

12-18-2009

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Brandon C. Pond

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Recommended Citation

Brandon C. Pond, *Boumediene v. Bush: Habeas Corpus, Exhaustion, and the Special Circumstances Exception*, 2009 BYU L. Rev. 1907 (2009).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2009/iss6/14>

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Boumediene v. Bush: Habeas Corpus, Exhaustion, and the Special Circumstances Exception

I. INTRODUCTION

On November 20, 2008, six native Algerian detainees at Guantanamo anxiously listened over a phone line for District Judge Richard Leon's ruling from the bench on their writ of habeas corpus petitions.¹ After numerous legal proceedings and close to seven years of detention, five of the men learned that because the Government failed to sufficiently justify their detention, the court would grant their petitions and order their release.²

Judge Leon's decision followed six days of closed-door hearings, where testimony and evidence was offered to prove by a preponderance of the evidence that these men were in fact enemy combatants.³ According to the Government, the petitioners "planned to travel to Afghanistan in late 2001 and take up arms against U.S. and allied forces."⁴ Despite the Government's submission of 53 pages of narrative and approximately 650 more of exhibits, Judge Leon found the Government relied exclusively on information from a classified document given by an unnamed source to support its allegations against the petitioners.⁵ In addition, the court found that the Government failed to provide sufficient evidence to effectively evaluate the credibility of the unnamed

1. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 18, 2008, at A1.

2. See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197–98 (D.D.C. 2008). The names of the five men whose petitions were granted are Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar. *Id.* at 193, 198.

3. *Id.* at 195–96. In deciding whether the petitioners had a right to habeas corpus, the Supreme Court delegated the task of defining enemy combatant to the habeas court. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008) ("The extent of the showing required of the Government in these cases is a matter to be determined."). After a four day hearing, the Court defined an enemy combatant as "an individual who was 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 includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Boumediene*, 579 F. Supp. 2d at 196 (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008)).

4. *Boumediene*, 579 F. Supp. 2d at 196.

5. *Id.* at 195–97.

source.⁶ While Judge Leon found that the information relied upon by the unnamed source “was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it.”⁷ The court explained further that “[t]o allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this Court’s obligation . . . to protect petitioners from the risk of erroneous detention.”⁸

Judge Leon’s decision came only five months after the Supreme Court’s decision, in *Boumediene v. Bush*, to grant Guantanamo detainees the ability to challenge their detention by applying for a writ of habeas corpus in federal court.⁹ The fact that such a hearing was ever held underlies a significant aspect of the Supreme Court’s decision. Following the Court’s decision in *Boumediene*, the detainees were allowed to forego the review procedures already available to them by the Combatant Status Review Tribunals (CSRTs) and the Detainee Treatment Act (DTA)—a legislatively created habeas substitute that none of the detainees even attempted to use—and proceed immediately to federal district court.¹⁰

At first glance, the *Boumediene* decision appears to stand as a marked departure from the exhaustion doctrine of habeas corpus. Developed mostly in the state criminal context, the exhaustion doctrine requires state prisoners to exhaust all state judicial remedies before they proceed with their habeas petition in federal court.¹¹ Thus, while petitioners may seek to challenge the constitutionality of their detention at any time, such applications will likely be rejected unless the petitioner has exhausted the remedies available in state court.¹²

6. *Id.* at 197.

7. *Id.*

8. *Id.*

9. 128 S. Ct. 2229, 2275–76 (2008).

10. *Id.* at 2275.

11. See *Harbison v. Bell*, 129 S. Ct. 1481, 1488 (2009) (“[Habeas petitioners] must exhaust their claims in state court before seeking federal habeas relief.”); Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1200–01 (1995).

12. See 28 U.S.C. § 2254(b) (2006) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State”); Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983).

Despite its roots in the state criminal context, over the years the Supreme Court has extended the doctrine to other circumstances. For example, in *Gusik v. Schilder*,¹³ the Supreme Court recognized the doctrine's application to courts-martial cases.¹⁴ In extending the exhaustion doctrine to this new context, the Court remarked, "The policy underlying [exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts."¹⁵

Among the policies underlying exhaustion are two fundamental principles: comity and judicial efficiency.¹⁶ Comity, a principle which traces its genesis to interactions among the courts of foreign nations, requires "the recognition that the courts of coordinate systems can and must exercise forbearance in cases in which both are interested, lest they interfere with each other, create confusion and distrust, and sacrifice the utility that comes with cooperation."¹⁷ Thus, by requiring federal courts to defer adjudication until the appropriate state court has rendered a decision, the exhaustion doctrine promotes inter-system respect and predictability.¹⁸ In a similar vein, judicial efficiency encourages state courts to fully determine and accurately document legal findings involving the petitioner's claims.¹⁹ Furthermore, judicial efficiency "fosters an orderly process for habeas appeals by . . . allowing prisoners to make only one transition between the two forums."²⁰ Perhaps most important, in requiring the petitioner to fully adjudicate his or her claims in a state proceeding, the petitioner has an opportunity to refine his or her habeas petition or even abandon the petition altogether.²¹

The Supreme Court's recent decision in *Boumediene v. Bush*²² to allow the petitioners to proceed directly with their habeas petitions in federal court while other judicial remedies remained unexplored sparked a rather curt dissent from Chief Justice Roberts.²³ Roberts

13. 340 U.S. 128 (1950).

14. *Id.*

15. *Id.* at 131–32.

16. Anderson, *supra* note 11, at 1202.

17. Yackle, *supra* note 12, at 394.

18. See Anderson, *supra* note 11, at 1202.

19. *Id.* at 1204.

20. *Id.*

21. *Id.*

22. 128 S. Ct. 2229 (2008).

23. *Id.* at 2279 (Roberts, C.J., dissenting).

found it remarkable that “this Court [did] not require petitioners to exhaust their remedies under the statute; [nor] wait to see whether those remedies [would] prove sufficient to protect petitioners’ rights.”²⁴ Roberts asserted that it was “grossly premature”²⁵ for the Court to allow the petitioners to avoid exhaustion “without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim.”²⁶

Despite Chief Justice Robert’s pointed criticism, the Court appears to do little to justify its apparent departure from the exhaustion doctrine. Instead, the only justifications given by the Court are that exhaustion would “require additional months, if not years”²⁷ of litigation and that the Guantanamo detainee petitions arise under “‘exceptional’ circumstances.”²⁸ Notwithstanding the Court’s apparent lackluster justifications for avoiding exhaustion, in comparing the Guantanamo detainee petitions with the principles extracted from the state habeas petitions, interesting distinctions arise. In light of this comparison, the Court’s decision not to require exhaustion appears to stand on solid precedential footing and strengthens the Court’s conclusion that the Guantanamo detainee circumstances are in fact exceptional. This Note will discuss these distinctions and comparisons in an attempt to better understand the Court’s decision not to require exhaustion and to explain why the unique circumstances of the Guantanamo detainee petitions justify such a decision.

This Note proceeds by first discussing the history of the exhaustion doctrine in both the state court system and the military court context. Part III will turn to a discussion of the Court’s decision in *Boumediene v. Bush*, commencing with a discussion of the judicial and political events leading up to the decision and concluding with a detailed analysis of the Court’s decision. Part IV will compare the principles underlying the *Boumediene* decision with those of the state and military courts and discuss how the *Boumediene* context truly is exceptional and how the Court’s decision to not require exhaustion is consistent with habeas

24. *Id.* at 2280.

25. *Id.*

26. *Id.* at 2280–81.

27. *Id.* at 2275 (majority opinion).

28. *Id.* at 2263 (citing *Cooper Indus., Inc. v. Avial Servs., Inc.*, 543 U.S. 157, 169 (2004); *Duigan v. United States*, 274 U.S. 195, 200 (1927)).

1907

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precedent. Part V gives a brief conclusion to the analysis and arguments presented in this Note.

II. THE EXHAUSTION DOCTRINE

In its simplest terms, the exhaustion doctrine in federal habeas corpus “postpones federal review until petitioners have exhausted state judicial remedies still available for the treatment of their federal claims at the time they wish to apply for federal relief.”²⁹ While some judicial opinions appear to define and utilize the doctrine as a quasi-judicial barrier to federal courts,³⁰ the doctrine actually concerns whether the timing of the petition, in light of the surrounding circumstances, is appropriate.³¹ Thus, while federal courts always have proper jurisdiction to entertain a habeas petition, under most circumstances federal courts will dismiss the petition if the petitioner has yet to exhaust all judicial remedies of the other court system.

A. Early Beginnings

One of the earliest pronouncements by the Supreme Court regarding the exhaustion doctrine in federal habeas proceedings is found in *Ex parte Royall*.³² The petitioner in *Royall* had been indicted by a grand jury for violating a Virginia statute that required sellers of bond coupons to have a state-issued license and pay significant taxes.³³ The petitioner sought a writ of habeas corpus from the federal circuit court, alleging that the statute was “repugnant to section ten of article one of the Constitution of the United States.”³⁴ The circuit court denied the writ, stating the court “was without jurisdiction to discharge the prisoner from

29. Yackle, *supra* note 12, at 393.

30. The use of the exhaustion doctrine as a jurisdictional barrier stems from language found in the Supreme Court decision *Rose v. Lundy* where the majority required “total exhaustion” of all state claims before a petitioner’s writ be heard in federal courts. 455 U.S. 509, 522 (1982). Based on this language, it can be argued that a habeas petition is not ripe (i.e., the court is without jurisdiction) until all state claims have been adjudicated in state courts. See Yackle, *supra* note 12, at 424–31.

31. Yackle, *supra* note 12, at 412 (“[T]he exhaustion doctrine was not a device for cutting off the federal forum to state prisoners, but was only a rule of timing.”).

32. 117 U.S. 241 (1886).

33. *Id.* at 242.

34. *Id.* at 243.

prosecution.”³⁵ Although the Supreme Court affirmed the denial of the writ, the Court disagreed with the circuit court’s assessment of its own jurisdiction. The Supreme Court found that the circuit court did in fact have the ability to release the prisoner, as the Congressional grant of habeas review was broad enough to encompass such claims.³⁶ Notwithstanding this ability, the Court found that simply because the circuit court could release the prisoner, it “[was] not bound in every case to exercise such a power immediately upon application”³⁷ The circuit court’s broad authority to hear habeas petitions includes the “discretion as to the time and mode in which it will exert the powers conferred upon it.”³⁸

The Court went on to detail what factors the circuit court should consider when determining whether to grant a petitioner’s application for the writ:

[D]iscretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.³⁹

In effect, the *Royall* standard instructs the lower court to exercise its ability to hear the habeas petition only after a thorough evaluation of whether entertaining such a petition would unnecessarily impinge on the duties and responsibilities of the state tribunal. If hearing the petition would infringe on the province of the state court, the *Royall* court encourages the federal court to deny the petition in the interest of comity.

Ironically, the most enduring legacy of the *Royall* decision actually stems from a misconstruction of the Court’s holding. In an attempt to articulate a comprehensive standard for evaluating habeas petitions, the Court held:

[W]here a person is in custody, under process from a State court . . . and it is claimed that he is restrained . . . in violation of

35. *Id.* at 245.

36. *Id.* at 247.

37. *Id.* at 251.

38. *Id.*

39. *Id.*

the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him upon habeas corpus, in advance of his trial . . . that discretion, however, to be subordinated to any special circumstances requiring immediate action.⁴⁰

The Court further explained that even after the prisoner has been convicted in the state court, the federal court still has discretion as to whether it will proceed with the writ of habeas corpus, or require the prisoner to appeal to the highest court of the state.⁴¹ Thus, the standard announced in *Royall* was effectually a matter of timing, not a hard and fast rule requiring exhaustion. Notwithstanding the emphasis on judicial discretion, the Court's opinion was quickly construed to mean that exhaustion was the "general rule" unless special circumstances required immediate action.⁴² In effect, subsequent opinions inverted the *Royall* standard and created the modern-day exhaustion doctrine.⁴³

While courts consistently treated the exhaustion doctrine as a general rule following the *Royall* decision, widespread use of the special circumstances exception persisted.⁴⁴ In an effort to clarify the contours of the exception, the Court readdressed the issue in *Ex parte Hawk*.⁴⁵ The *Hawk* Court reaffirmed the general principle that a petitioner from state court must exhaust all of his state remedies before a habeas petition to the federal courts will be entertained.⁴⁶ The Court further clarified that "only in rare cases where exceptional circumstances of peculiar urgency are shown to exist" should the federal courts intervene while avenues for state adjudication still remain to be used.⁴⁷ Although the Court resisted the opportunity to clarify what exactly would constitute an exceptional circumstance, the Court did hint that a federal court should likely intervene immediately when the petitioner would

40. *Id.* at 252–53.

41. *Id.* at 253.

42. *See* *Boske v. Comingore*, 177 U.S. 459, 466 (1900) ("Hence, the general rule that the courts of the United States should not interfere by *habeas corpus* with the custody by state authorities . . . until after final action by the state courts . . ."); Yackle, *supra* note 12, at 404–08.

43. *See* Yackle, *supra* note 12, at 404–05.

44. *Id.* at 404–08.

45. 321 U.S. 114 (1944).

46. *Id.* at 117.

47. *Id.*

otherwise be remediless.⁴⁸

B. Codification and a Return to First Principles

Four years following the *Hawk* decision, Congress codified the exhaustion doctrine in 28 U.S.C. § 2254. Although the expressed intent of Congress was to simply codify the common law doctrine,⁴⁹ the statute appears to have attempted to define the “special circumstances” where exhaustion may not be required. The statute first incorporates the general principle of exhaustion: “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State.”⁵⁰ Notwithstanding this general prohibition on collateral habeas review, the statute codifies two general exceptions: if “there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant” the federal courts need not require exhaustion.⁵¹ Thus, instead of relying on the vague notion of special circumstances, the statute attempts to limit avoidance of exhaustion to circumstances where the state tribunal’s remedy is ineffective to protect the rights of the habeas petitioner.

A mere two years after codification of the exhaustion doctrine, the Supreme Court retreated somewhat from its previous pronouncements of the exhaustion doctrine. In *Frisbie v. Collins*,⁵² the petitioner, acting as his own lawyer, brought a habeas action in the appropriate United States District Court arguing that he was tried and convicted under circumstances that violated “the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act.”⁵³ Although there was some question as to whether the petitioner still had a viable state remedy, the court ultimately decided that was not relevant.⁵⁴ The Court reasoned that while

48. *Id.* at 118.

49. *See* *Rose v. Lundy*, 455 U.S. 509, 516 n.8 (1982) (noting that Congress, in codifying the exhaustion doctrine, sought only to declare “existing law as affirmed by the Supreme Court”) (quoting H.R. REP. NO. 80-308, at A180 (1947)).

50. 28 U.S.C. § 2254(b)(1)(A) (2006).

51. *Id.* at (b)(1)(B)(i)–(ii).

52. 342 U.S. 519 (1952).

53. *Id.* at 520.

54. *Id.*

“[t]here is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is ‘available State corrective process[,]’ . . . this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances.”⁵⁵ Highlighting the ultimate discretion granted to the district courts, the Court stated that “[w]hether such circumstances exist calls for a factual appraisal by the court in each special situation.”⁵⁶ Perhaps most surprising, the Court refused to further delineate when such special circumstances would exist: “It would serve no useful purpose to review those special circumstances in detail. They are peculiar to this case, may never come up again, and a discussion of them could not give precision to the ‘special circumstances’ rule.”⁵⁷

Underlying the Court’s decision in *Frisbie* are what appear to be remnants of the initial principles first announced in *Royall*. The *Frisbie* Court appears to retreat a bit from the strict statutory language and to once again advocate a flexible, fact-intensive evaluation of whether the habeas court should immediately intervene. Thus, while the district court certainly expressed the strong presumption towards exhaustion of state remedies, the *Frisbie* Court suggested that the district court should still appraise the factual context of the habeas application before requiring exhaustion.

C. Other Contexts: Military Courts

The Supreme Court’s preference for exhaustion holds true for writ applications in other contexts as well. In *Gusik v. Schilder*,⁵⁸ the Supreme Court faced a petition for a writ of habeas corpus on behalf of a petitioner held pursuant to a court-martial conviction.⁵⁹ While the District Court granted the writ on evidence of procedural failures in the court-martial proceeding, the Court of Appeals reversed. The Court of Appeals held that “there was an administrative remedy which petitioner had not exhausted” and consequently dismissed the petition.⁶⁰ In considering whether federal courts should require

55. *Id.* at 520–21 (quoting 28 U.S.C. § 2254 (1950)).

56. *Id.* at 521.

57. *Id.* at 522.

58. 340 U.S. 128 (1950).

59. *Id.* at 129.

60. *Id.* at 130. The administrative remedy still available to the petitioner was to request a new trial from the Judge Advocate General. *See id.* at 130–31.

exhaustion of administrative remedies before entertaining a habeas petition from a military-court convict, the court informed its decision by analogizing from the principles employed in state habeas petitions to federal courts.⁶¹

The Supreme Court recognized that in the state criminal context, “[i]f the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere.”⁶² In comparing the policies underlying this rule to the case at hand, the Court found several crucial similarities. First, the Court recognized that should the petitioner resort to the now available administrative remedy, “interference by the federal court may be wholly needless”⁶³ and a waste of precious judicial resources. Second, the Court noted that should the administrative remedy prove adequate, “any friction between the federal court and the military or state tribunal is saved.”⁶⁴ Thus, the Court recognized that in the interest of comity and judicial efficiency, exhaustion should be required.⁶⁵

The Court noted that denying the application until a future date “is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.”⁶⁶ Based on this principle, the Court did not affirm the Court of Appeals’ dismissal, but rather reversed and remanded the case to the Court of Appeals to hold the case pending until the administrative remedy was fully pursued.⁶⁷ Should the administrative remedy prove adequate, the petitioner could then be dismissed.⁶⁸ Should the opposite occur, the petitioner is saved the time and expense of refiling his habeas petition.⁶⁹

D. Summary of the Exhaustion Doctrine

Although the federal courts have authority to grant an application of the Great Writ, the Supreme Court has routinely

61. *Id.* at 131.

62. *Id.*

63. *Id.* at 132.

64. *Id.*

65. *See id.* at 133–34.

66. *Id.* at 132.

67. *Id.* at 133–34.

68. *Id.*

69. *Id.* at 134.

avored full exhaustion of state remedies before federal courts intervene with habeas proceedings. As the *Gusik* case illustrates, this principle holds true in other contexts as well. The exhaustion doctrine strongly suggests federal courts deny habeas applications out of respect for the other tribunal's authority and to guard against useless exercise of federal judicial resources.

III. *BOUMEDIENE V. BUSH*

Despite the Supreme Court's strong preference towards exhaustion, the Court in *Boumediene v. Bush*⁷⁰ allowed the petitioners to proceed directly to federal court without exhausting the legislatively enacted remedy. Perhaps most surprising is the fact that the special circumstances exception was used not in protection of American citizens, but rather in favor of detainees accused of engaging in unlawful hostilities against the United States. To best understand the Supreme Court's decision, a detailed analysis of the specific factual circumstances of the case in light of the surrounding judicial and legislative happenings is necessary.

A. Background and Context

In response to the terrorist attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force which grants the President power "to use all necessary and appropriate force" against all who either participated in any way in those attacks or gave refuge to those who participated.⁷¹ Under this authority, the Department of Defense ordered several "enemy combatants" to be transferred to Guantanamo Bay for detention.⁷² In *Hamdi v. Rumsfeld*,⁷³ a plurality of the Court recognized that the ability to detain individuals engaged in armed conflict against the United States 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."⁷⁴ Notwithstanding this explicit sanction of detention, the Court held that the "citizen-detainee

70. 128 S. Ct. 2229 (2008).

71. *Id.* at 2240 (quoting Authorization for Use of Military Force, Pub. L. No. 107-243, § 2(a), 115 Stat. 224 (2002)).

72. *Id.*

73. 542 U.S. 507 (2004).

74. *Id.* at 518 (O'Connor, J., plurality opinion).

seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁷⁵ The Court suggested that this could be done "by an appropriately authorized and properly constituted military tribunal."⁷⁶

In direct response to the *Hamdi* decision, the United States established the Combatant Status Review Tribunals (CSRTs).⁷⁷ The CSRTs provide the detainee, both U.S. citizen and non-citizen alike, an opportunity to receive notice of the basis for his classification as an enemy combatant and to challenge the Government's determination.⁷⁸

The petitioners in *Boumediene* were apprehended on battlefields ranging from Afghanistan to Bosnia and thereafter transferred to Guantanamo. Unlike some of the petitioners in other detainee cases,⁷⁹ all of the petitioners were foreign nationals and "none is a citizen of a nation now at war with the United States."⁸⁰ All of the petitioners denied any affiliation with either al Qaeda which "carried out the September 11 attacks or the Taliban regime that provided sanctuary for al Qaeda."⁸¹ Each of the petitioners received a separate CSRT proceeding and was deemed an enemy combatant.⁸² Each petitioner filed a writ of habeas corpus in the United States District Court for the District of Columbia.⁸³

Following dismissal in the District Court for want of jurisdiction and affirmation by the Court of Appeals, the Supreme Court granted

75. *Id.* at 533.

76. *Id.* at 538.

77. Joseph Blocher, Comment, *Combatant Status Review Tribunals: Answer to the Wrong Questions*, 116 YALE L.J. 667, 670 (2006).

78. Brief for the Respondents at 49–50, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2972541.

79. One of the first detainee habeas corpus cases of the War on Terror involved petitioner Jose Padilla, who was an American citizen captured in the Chicago O'Hare Airport and detained in North Carolina. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Petitioner Yaser Esam Hamdi, who was captured in Afghanistan and detained initially at Guantanamo Bay and later in South Carolina, held both Saudi and United States citizenship. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Tung Yin, *Enemies of the State: Rational Classification in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 903, 909–10, 935 (2007).

80. *Boumediene*, 128 S. Ct. at 2241.

81. *Id.*

82. *Id.*

83. *Id.*

certiorari for the habeas applications.⁸⁴ The Supreme Court reversed, “holding that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo.”⁸⁵ On remand, the petitioners’ cases were consolidated and heard in two proceedings with opposite results.⁸⁶ Judge Richard J. Leon dismissed the petitioners’ application, holding the petitioners had no rights that were protectable by habeas corpus, while Judge Joyce Hens Green found that the detainees had vindicable rights under the Due Process Clause of the Fifth Amendment.⁸⁷

While appeals were pending, and likely acting in response to the Supreme Court’s decision in *Rasul*, Congress passed the Detainee Treatment Act (DTA), which granted exclusive jurisdiction to review CSRT decisions to the Court of Appeals for the District of Columbia and provided 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 Department of Defense at Guantanamo Bay, Cuba.”⁸⁸ In *Hamdan v. Rumsfeld*,⁸⁹ however, the Supreme Court held that the DTA did not apply retroactively to cases pending before its enactment, which included the petitioners in *Boumediene*.⁹⁰ This decision prompted Congress to pass the Military Commissions Act (MCA), which, among other things, amended 28 U.S.C. § 2241(e) to reflect the jurisdiction-stripping language of the DTA⁹¹ and established the effective date of

84. *Id.*

85. *Id.* (citing *Rasul v. Bush*, 542 U.S. 466, 473 (2004)).

86. *Id.*

87. *Id.*

88. *Id.* (omission in original) (quoting 28 U.S.C. § 2241 (2006)).

89. 548 U.S. 557 (2006).

90. *Boumediene*, 128 S. Ct. at 2241.

91. As amended by the MCA, 28 U.S.C. § 2241(e) (2006) now reads:

(1) 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.

(2) Except as provided [in the DTA (i.e. granting CSRT appellate jurisdiction exclusively to the D.C. Federal Court of Appeals)], no court, justice, or judge, shall have jurisdiction to hear or consider 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 an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

these changes as September 11, 2001.⁹² Thus, working in tandem, these provisions stripped all courts of any ability to entertain a writ application from a Guantanamo detainee and leave the CSRT and DTA review as the only available recourse for petitioners seeking to challenge their detention as enemy combatants.

Following the passage of the MCA, the Court of Appeals concluded that the court was without jurisdiction to hear the petitioners' habeas corpus applications and dismissed the case.⁹³ The Supreme Court granted certiorari.⁹⁴

B. The Opinion of the Court

In *Boumediene v. Bush*, the Court first recognized that the MCA unquestionably denies habeas jurisdiction to all federal courts. Thus, "if the statute is valid, petitioners' cases must be dismissed."⁹⁵ To determine whether the statute was valid, the Court first considered whether enemy combatants detained outside of the United States were entitled to the writ of habeas corpus.⁹⁶

The Court first determined that the petitioners' status as enemy combatants was not, in and of itself, a bar to habeas corpus relief.⁹⁷ Turning to the question of detainment outside of the United States, the Court found no ready equivalent to Guantanamo Bay in the common law record.⁹⁸ The Government adamantly asserted that the United States does not claim sovereignty over Guantanamo, and therefore the Suspension Clause had no application.⁹⁹ While the Court agreed that the United States did not, and has never, claimed ultimate jurisdiction over Guantanamo, technical sovereignty did

92. Section 7(b) of the MCA provides:

The amendment made by [the MCA to 28 U.S.C. § 2241(e)] 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 the 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.

Military Commissions Act, § 7(b), 120 Stat. 2600, 2635 (2006).

93. *Boumediene*, 128 S. Ct at 2242.

94. *Id.*

95. *Id.*

96. *Id.* at 2244.

97. *Id.* at 2248.

98. *Id.* at 2249–51.

99. *Id.* at 2252.

“not end the analysis.”¹⁰⁰ The Court found that two principles are embodied in the concept of sovereignty: the exercise of dominion or control, and legal sovereignty, “meaning a claim of right.”¹⁰¹

In reviewing the common law, the Court found that extraterritorial application of the Constitution did not turn solely on whether the Government asserted legal sovereignty over a given area, but rather “questions of extraterritoriality turn on objective factors and practical concerns”¹⁰² As a practical matter, the Court found it unconvincing that the Government, by abstaining from asserting any sort of legal claim of right, could then operate without constitutional constraints.¹⁰³ Furthermore, because the assertion of legal sovereignty is a power reserved for the political branches, the Court recognized real danger in allowing the scope of the writ to “be subject to manipulation by those whose power it is designed to restrain.”¹⁰⁴ If the Court were to grant the petitioners’ writs, the Court found “no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners’ claims, and no law other than the laws of the United States applies at the naval station.”¹⁰⁵

Having evaluated the practical concerns, the Court turned its attention to objective factors derived from common law.¹⁰⁶

100. *Id.*

101. *Id.*

102. *Id.* at 2258. In other words, the Court is arguing that habeas corpus jurisprudence has traditionally followed the common law approach. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2033 (2007). In Fallon and Meltzer’s article, they argue that judges operate within two models of judicial action: the “Agency Model” and the “Common Law Model.” *Id.* Judges operating within the Agency Model “regard themselves as the agents of those who enacted, or ratified, pertinent statutory or constitutional provisions; they should assume that those provisions were framed to be as determinate as possible; and they should minimize judicial creativity.” *Id.* The Common Law Model views judges as “having a creative, discretionary function in adapting constitutional and statutory language—which is frequently vague, and even more frequently reflects imperfect foresight—to novel circumstances.” *Id.* Thus, under the Common Law Model, while judges are still agents of the law, the judges view themselves as holding “bounded authority to interpret legal mandates in light of considerations of fairness, policy, and prudence.” *Id.* The article goes on to argue that federal habeas corpus jurisprudence has historically been dominated by the Common Law Model. *Id.*

103. *Boumediene*, 128 S. Ct. at 2258–59.

104. *Id.* at 2259.

105. *Id.* at 2251.

106. The court derived these factors from an analysis of *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, the Court dismissed the habeas corpus petitions of two German nationals confined by the United States Army in Germany. *Id.* In dismissing the petitions, the

The Court noted three factors relevant in determining the extraterritorial reach of the Suspension Clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”¹⁰⁷ In applying these factors to the case at hand, the Court first found that the status of the detainees and the process by which their status was determined fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”¹⁰⁸ Second, the Court found that the nature of the site of detention merited application of the writ.¹⁰⁹ Lastly, the Court noted that the Government presented no persuasive argument that the mission of Guantanamo “would be compromised if habeas

Court found persuasive that each petitioner:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Id. at 777.

107. *Boumediene*, 128 S. Ct. at 2259.

108. *Id.* at 2260. The Court notes that in *Eisentrager*, the detainees did not contest their status as enemy aliens and had been convicted of war crimes after a full military court hearing. *Id.* at 2259. By contrast, in *Boumediene*, the detainees adamantly contest their status as enemy combatants and have never been convicted of any war crimes. *Id.* The Court further found significant procedural differences between the two cases. In *Eisentrager*, the “petitioners were charged by a bill of particulars that made detailed factual allegations against them.” *Id.* at 2260. Furthermore, the petitioners were “entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.” *Id.* By contrast, the CSRT hearings afforded the *Boumediene* petitioners were “far more limited.” *Id.* While the petitioners were “assigned a ‘Personal Representative’ to assist [them] during CSRT proceedings, the Secretary of the Navy’s memorandum makes clear that person is not the detainee’s lawyer or even his ‘advocate.’” *Id.* Furthermore, the Government’s evidence carries a “presumption of validity” and the detainees were only afforded the opportunity to present “reasonably available” evidence. *Id.*

109. *Id.* 2260–61. While the Court notes that both the detainees of Guantanamo and the *Eisentrager* prisoners were detained outside the territorial jurisdiction of the United States, the Court points out important distinctions between Landsberg Prison and Guantanamo Bay. *Id.* at 2260. Landsberg Prison was under the jurisdiction of the Allied Forces. *Id.* Thus, the United States was answerable to its allies for its actions at the prison. *Id.* Further, the United States did not intend to occupy the territory indefinitely nor seek to displace German institutions. *Id.* At Guantanamo, the United States by express agreement with Cuba exercises “complete jurisdiction and control” over Guantanamo “and may continue to exercise such control permanently if so chooses.” *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (internal quotation marks omitted).

corpus courts had jurisdiction to hear the detainees' claims."¹¹⁰

Combining both the practical concerns and the Court's conclusions as to the relevant three factors, the Court held that "Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."¹¹¹ As neither the MCA nor the AUMF purported to formally suspend the writ of habeas corpus, the question then became whether the DTA review in the Court of Appeals constituted an adequate substitute to traditional habeas proceedings.¹¹²

At the outset of this determination, the Court noted the unique characteristics of the DTA. While most of the substitute habeas statutes were actually attempts to streamline habeas review, the DTA was admittedly an attempt to limit its contours.¹¹³ The Court noted that traditional grants of habeas review give courts broad authority to "determine the issues and make findings of fact and conclusions of law,"¹¹⁴ to determine whether the court had jurisdiction to hear the case, and to determine whether the sentence "imposed was not authorized by law or otherwise open to collateral attack."¹¹⁵ In contrast, the DTA limits the Court of Appeals to only "assess whether the CSRT complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful."¹¹⁶ Thus, the intent of the DTA appears not to be a system coextensive with traditional habeas review, but rather to create a much more limited proceeding.¹¹⁷

As the DTA is limited to simply reviewing the determination made by the CSRT, the Court first examined whether procedural

110. *Boumediene*, 128 S. Ct. at 2261.

111. *Id.* at 2262.

112. *Id.*

113. *Id.* at 2263–66. The Court cites a revealing statement by Senator Lindsey Graham, who stated that the DTA "extinguish[es] these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court" and, further, that it "create[s] in their place a very limited judicial review of certain military administrative decisions." *Id.* (alterations in original) (internal quotation marks omitted) (quoting 151 CONG. REC. S14263 (daily ed. Dec. 21, 2005)).

114. *Id.* at 2265 (quoting 28 U.S.C. § 2255(b) (2006)).

115. *Id.* (quoting 28 U.S.C. § 2255(b)).

116. *Id.* (quoting Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2742).

117. *Id.* at 2266.

defects in the lower proceeding would restrict or negatively impact the adequacy of the review process.¹¹⁸ In examining the CSRT, the Court noted that even if all parties are genuinely interested in achieving a just outcome, serious risk of error still remains.¹¹⁹ First, the detainee has limited ability to locate and present exculpatory evidence.¹²⁰ The detainee does not have assistance of counsel and may only present evidence if reasonably available.¹²¹ Second, hearsay evidence is admissible if “relevant and helpful.”¹²² Thus, while the detainee has the right to confront witnesses who testify against him, the “opportunity to question witnesses is likely to be more theoretical than real.”¹²³

In light of these serious risks of error, the Court analyzed whether the DTA review provides a means to remedy these errors.¹²⁴ The Court found that it is likely the DTA would allow the petitioners to assert any claim they seek to advance, “including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely.”¹²⁵ Notwithstanding this ability, the Court had serious reservations about whether “the DTA permits the Court of Appeals to make requisite findings of fact.”¹²⁶ As aforementioned, the DTA review is limited to whether the CSRT procedures were properly followed and whether those procedures were lawful.¹²⁷ With this severe limitation, the Court found no way to interpret the statute as to provide an opportunity for the petitioners to offer exculpatory evidence not part of the record from the earlier proceeding.¹²⁸ Though the Court admitted that the DTA court may order production of any and all evidence in the possession of the Government that is relevant to the petitioner’s enemy combatant determination, “regardless of whether this evidence was put before the CSRT,” the Court found no opportunity to offer

118. *See id.* at 2268–69 (“[T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings . . .”).

119. *Id.* at 2269–70.

120. *Id.* at 2269.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2270.

125. *Id.* at 2271.

126. *Id.* at 2272.

127. *Id.*

128. *Id.*

evidence discovered after the CSRT proceedings.¹²⁹ This restriction implied to the Court that the DTA failed to afford a new opportunity to challenge the petitioner's detention.¹³⁰

Taking the procedural defects of the CSRT and the limited review provided by the DTA in total, the Court found the process "an inadequate substitute for habeas corpus."¹³¹ Thus, as MCA § 7 strips all courts of habeas corpus jurisdiction yet fails to provide for an adequate substitute, the Court held the Act unconstitutional as an unauthorized suspension of the writ of habeas corpus.¹³²

The Court noted that its typical practice would be to decline to address whether the DTA provided an adequate substitute for habeas corpus until after the petitioner had exhausted that avenue.¹³³ Despite this standard practice of exhaustion, the Court found that the "gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."¹³⁴ In light of these exceptional circumstances, the Court held that "the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court."¹³⁵

C. Chief Justice Roberts' Dissent

Chief Justice Roberts, joined by Justices Scalia,¹³⁶ Thomas, and Alito, dissented. Roberts argued that the Court should have dismissed the petition and required the petitioners to first pursue their remedies under the MCA and DTA.¹³⁷ Roberts asserted that habeas corpus is primarily "a procedural right, a mechanism for contesting the legality of executive detention."¹³⁸ Thus, regardless of whether the procedure is called "'habeas' or something else," if there

129. *Id.*

130. *Id.* at 2272–73.

131. *Id.* at 2274.

132. *Id.*

133. *Id.* at 2262–63.

134. *Id.* at 2263.

135. *Id.* at 2275.

136. Justice Scalia also entered a separate dissenting opinion. His dissent, which is outside the scope of this Note, focuses on the historical contours of the writ of habeas corpus. *See id.* at 2293 (Scalia, J., dissenting).

137. *See id.* at 2279 (Roberts, C.J., dissenting).

138. *Id.*

is a procedural avenue which protects a petitioner's rights, the Constitution is satisfied.¹³⁹

Roberts noted that no petitioner had attempted to utilize the review process outlined by the DTA.¹⁴⁰ Finding it "remarkabl[e]" that the Court did not require petitioners to exhaust the process under the DTA, he labeled the Court's actions "grossly premature."¹⁴¹ Had the Court required exhaustion, it could have reserved the question of constitutionality until first waiting to see whether the DTA vindicated "whatever rights petitioners may claim."¹⁴² While requiring the petitioners to exhaust their remedies under the DTA may involve additional delay, Roberts reminded the Court that mandating exhaustion of statutory remedies in no way suspends the writ of habeas corpus, but merely defers usage of the writ until other proceedings are indeed shown to be inadequate.¹⁴³

Roberts further chided the Court for departing from what the majority itself deemed "the ordinary course" of the Court.¹⁴⁴ He noted that while the Court justifies its departure "in light of the 'gravity' of the constitutional issues presented and the prospect of additional delay," such circumstances are precisely when the Court should cling to its ordinary course of business.¹⁴⁵ As he so aptly put, "[a] principle applied only when unimportant is not much of a principle at all"¹⁴⁶

IV. EXHAUSTION IN THE DETAINEE CONTEXT

Chief Justice Roberts' dissent highlights some interesting aspects and glaring deficiencies in the Court's opinion. Although the Court notes that unique separation-of-powers issues and substantial passage of time since the detainees' initial capture make the Guantanamo detainee cases so exceptional as to not require exhaustion, the Court devotes very little of its lengthy opinion to discussing these issues. Notwithstanding the Court's failure to fully address these key issues, the question remains whether the Court was incorrect in not

139. *Id.*

140. *Id.* at 2280.

141. *Id.*

142. *Id.* at 2280–81.

143. *Id.* at 2281.

144. *Id.* at 2282.

145. *Id.*

146. *Id.*

requiring exhaustion of the congressionally provided review process. In answering this question, a comparison of the policies underlying exhaustion with the specific circumstances of *Boumediene* is instructive. In light of these comparisons and distinctions, the Court's decision not to require exhaustion becomes much more compelling than simply a desire to avoid any unnecessary delay.

A. Comity

The traditional justification for requiring complete exhaustion of state remedies before a habeas petitioner can proceed to federal court is comity.¹⁴⁷ As first enunciated by the Court in *Ex parte Royall*, comity instructs us that when two overlapping court systems have a sincere interest in overseeing a particular claim, the courts should restrain from interfering with one another's jurisdiction to the greatest extent possible.¹⁴⁸ In the traditional habeas petition context, the federal court is encouraged to avoid interfering with the state court proceedings until all remedies available in the state system have been fully exhausted by the petitioner so that no unnecessary conflict arises between the two forums.¹⁴⁹ The commitment to comity has become so ingrained in American jurisprudence that the Supreme Court has even required "total exhaustion" of petitions that contain "both unexhausted and exhausted claims."¹⁵⁰

In the Respondent's brief, the Government argues that should the Court find that the detainees have habeas corpus rights under the Suspension Clause, the Court should require the petitioners to exhaust their DTA remedies.¹⁵¹ After setting forth the general rule of exhaustion, the Government asserts that "[t]he comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war."¹⁵² In effect, the Government uses comity to advance the point that the Court should defer to the wisdom of the political branches on matters concerning the conduct

147. Yackle, *supra* note 12, at 393–94.

148. *See Ex parte Royall*, 117 U.S. 241, 251 (1886).

149. *Id.*

150. *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

151. Brief for the Respondents at 41, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2972541.

152. *Id.* at 42.

of an ongoing war. According to the Government, the principle of comity demands that the judicial branch respect the province of the political branches on all matters concerning warfare.

In reviewing the fundamental principles of comity, however, the Government's argument that comity demands exhaustion where branches of the same government are in dispute appears to be misplaced. Comity, at least in the exhaustion context, has traditionally encompassed only disputes between competing jurisdictions, not competing branches of government.¹⁵³ Thus, in the United States, where both state and federal governments are sovereign in their own sphere, comity encourages federal courts to defer to the sovereignty of state courts unless special circumstances demand otherwise. By exercising such forbearance, federal courts are able to avoid "creat[ing] confusion and distrust, and sacrific[ing] the utility that comes with cooperation."¹⁵⁴

Boumediene involves a rather distinctive power struggle. Instead of two sovereign court systems vying for jurisdictional prowess, *Boumediene* presents a unique separation-of-powers dilemma between the Executive and Judicial Branches. On the one hand, the Executive Branch is asserting its traditional war-time powers as justification for detention of alleged terrorists.¹⁵⁵ On the other hand, the Judicial Branch is upholding its traditional power to guard against unlawful detention by the Executive Branch.¹⁵⁶ This power struggle is complicated by the fact that the Executive Branch, with express legislative approval, is attempting to redefine the contours of the writ of habeas corpus—the very judicial instrument designed to guard against unlawful executive detention.¹⁵⁷ Although Roberts suggests that the opinion disregards the collective wisdom of both Congress and the President,¹⁵⁸ matters concerning the writ of habeas corpus are exactly the circumstances where the judiciary should intervene.

Other constitutional principles aside, comity does not require that federal courts defer to legislatively created alternatives, but instead requires federal courts to respect the province of other

153. See Yackle, *supra* note 12, at 393–94.

154. *Id.* at 394.

155. See *Boumediene*, 128 S. Ct. at 2240.

156. See *id.* at 2277.

157. See *id.* at 2259.

158. See *id.* at 2280 (Roberts, C.J., dissenting).

judicial tribunals. As the *Boumediene* case is actually a separation-of-powers issue rather than an issue of federalism, the justification of comity appears to be inapplicable to the *Boumediene* circumstances.

B. Judicial Efficiency

The other consideration for requiring complete exhaustion of state remedies before a habeas petitioner can proceed to federal court is judicial efficiency.¹⁵⁹ As noted in *Gusik*, the exhaustion doctrine seeks to prevent early intervention by the federal courts because such intervention may become utterly unnecessary once an alternative remedy is fully pursued.¹⁶⁰ This sentiment was echoed by Roberts, who chided the Court for failing to dismiss the case and for interfering with the DTA review process when remand may have made such actions “entirely unnecessary.”¹⁶¹ Thus, judicial efficiency prescribes that if alternative remedies exist that potentially may fully adjudicate the petitioners’ claims, federal courts should refrain from intervening in an attempt to conserve federal judicial resources.¹⁶²

In evaluating whether dismissal of the *Boumediene* petitions would have been more judicially efficient, the principles announced in *Gusik* are helpful. In comparing the two cases, powerful similarities arise that cannot be overlooked. First, both cases arise out of the distinctive arena of executive action. The *Gusik* petition involves a collateral attack of a military decision,¹⁶³ while in *Boumediene* the decision at issue involves a military determination.¹⁶⁴ Second, both cases involve statutory alternative remedies, which were authorized by both Congress and the Executive while the appeals were pending.¹⁶⁵

Notwithstanding these similarities, serious distinctions remain. In *Gusik*, even after exhaustion of the alternative remedy, the petitioner would still then have full access to the writ of habeas corpus.¹⁶⁶ In fact, while the Supreme Court agreed with the Court of Appeals’ conclusion that exhaustion should be required, the Court reversed

159. Anderson, *supra* note 11, at 1204.

160. *Gusik v. Schilder*, 340 U.S. 128, 131–32 (1950).

161. *Boumediene*, 128 S. Ct. at 2281 (Roberts, C.J., dissenting).

162. *See* Anderson, *supra* note 11, at 1204.

163. *Gusik*, 340 U.S. at 129.

164. *Boumediene*, 128 S. Ct. at 2240.

165. *Id.* at 2241; *Gusik*, 340 U.S. at 130.

166. *See Gusik*, 340 U.S. at 132–133.

the appellate court's dismissal so that the petition could be held pending while the alternative remedy was pursued.¹⁶⁷ Thus, even after the alternative remedy was exhausted, the petitioner in *Gusik* clearly retained full access to habeas relief. In *Boumediene*, by contrast, given that the MCA purportedly stripped all federal courts from all detainee habeas proceedings, the unexhausted remedy was the only available remedy.¹⁶⁸

In light of this comparison, Roberts' assertion that requiring exhaustion in this instance is "merely a deferment" rather than a suspension of the writ¹⁶⁹ loses a bit of its muster. While resort to the alternative remedy in *Gusik* may have been a simple deferment of habeas relief until a later date, resort to the DTA was a substitute proceeding designed to entirely supplant habeas review. Thus, the argument that interference by the Court may later prove to be an utter waste of federal judicial resources becomes rather suspect, as later interference by the Court may not have even been available.

C. *Special Circumstances Exception*

Although the exhaustion doctrine has become so enshrined in state habeas proceedings as to become axiomatic, courts continue to recognize that in "special circumstances" the exhaustion doctrine may be avoided.¹⁷⁰ While the use of this exception is incredibly rare and not very well defined, two codified exceptions exist: when "there is an absence of available State corrective process," or when "circumstances exist that render such process ineffective to protect the rights of the applicant."¹⁷¹ Applying this exception to the case at hand, if the DTA review process inadequately protects the rights of the detainees, the Court is not required to mandate exhaustion of the administrative remedy.

Before the adequacy of the DTA review is assessed, a brief discussion as to why the Court even engaged in an analysis of the DTA is necessary. Perhaps one of the most troubling aspects of the *Boumediene* decision is the fact that none of the petitioners had actually attempted to utilize the DTA remedy before the Court razed

167. *Id.* at 133.

168. *Boumediene*, 128 S. Ct. at 2266.

169. *Id.* at 2281 (Roberts, C.J., dissenting).

170. *See Ex Parte Royall*, 117 U.S. 241, 253 (1886).

171. 28 U.S.C. § 2254(b)(1) (2006).

the entire system.¹⁷² Thus, in the mind of some critics, the Court invalidated a system that may have been entirely sound.¹⁷³ But in comparing the *Boumediene* decision to other habeas cases where exhaustion was actually required, an intriguing distinction arises between an alternative remedy and a substitute remedy. In all of the exhaustion cases discussed in this Note, the unexhausted remedy was simply an alternative to habeas relief. Thus, even after the petitioner had resorted to the alternative remedy, habeas relief remained a viable option. Had the DTA review simply been an alternative remedy to habeas review, the Court's opinion truly would have been an unfounded departure from a longstanding doctrine. Yet, the legislative history and the explicit language of the MCA and the DTA make it quite clear that the DTA review process was indeed intended to be a circumscribed substitute for habeas relief.¹⁷⁴ Thus, the question before the Court becomes much more immediate and much more pressing. Had the Court required exhaustion of the substitute remedy, the *Boumediene* petitioners may have lost their right to habeas corpus altogether.¹⁷⁵ Because of the grave implications at stake, the Court found it appropriate to engage in immediate appraisal of the adequacy of the DTA review.

Returning to an analysis of the DTA, a strong case can be made that the DTA review is ineffective to protect the rights of the Guantanamo petitioners. As the scope of DTA review is limited to a review of the CSRT, an analysis of both the DTA and CSRT is necessary to determine the adequacy of the DTA process.¹⁷⁶ In evaluating the CSRT, perhaps the most glaring weakness is the fact that the proceedings are "closed and accusatorial."¹⁷⁷ The CSRT provides detainees with only a "personal representative" who serves neither as counsel nor advocate for the petitioner, and the Government's evidence is given a rebuttable presumption of validity.¹⁷⁸ Furthermore, the Government is allowed to admit hearsay evidence as long as it is "relevant and helpful."¹⁷⁹ Far from the

172. See *Boumediene*, 128 S. Ct. at 2281 (Roberts, C.J., dissenting).

173. *Id.*

174. *Id.* at 2266 (majority opinion).

175. *Id.*

176. See *id.* at 2268–70.

177. See *id.* at 2270 (citation omitted).

178. *Id.* at 2260.

179. *Id.* at 2269 (citation omitted).

adversarial proceedings entitled to judicial deference, the CSRT appears to heavily favor the Government.

Notwithstanding this structural bias in favor of the Government, the DTA review is limited to an evaluation of whether the Government fully complied with the CSRT procedures and the legality of those procedures.¹⁸⁰ To be sure, an alternative remedy that limits the scope of review is appropriate when the petitioner already had a full opportunity to develop his claims.¹⁸¹ But when the lower proceeding begins with a presumption against the accused, the need for full review becomes more compelling.¹⁸² In this light, the fact that the DTA provides no opportunity for the petitioner to advance new evidence discovered since his CSRT becomes detrimental to the adequacy of the DTA review.¹⁸³

It should be noted that the detainee can request a new CSRT from the Deputy Secretary of Defense.¹⁸⁴ This decision, however, is final and unreviewable.¹⁸⁵ This opportunity to request a new proceeding is effectively the same remedy that the petitioner in *Gusik* was required to exhaust.¹⁸⁶ Interestingly, the determination for the new trial in *Gusik* was to be made by the Judge Advocate General, and all determinations by the Judge were to be “final and conclusive” and “binding upon all departments, courts, agencies, and officers of the United States.”¹⁸⁷ While the petitioner argued that this language appeared to foreclose later habeas review, the Court found that had Congress “intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable.”¹⁸⁸ Thus, the Court found that the new remedy in no way sought to foreclose later habeas review in federal court.

By contrast, in *Boumediene* Congress explicitly intended to deprive the civil courts of their habeas corpus jurisdiction.¹⁸⁹

180. *Id.* at 2274.

181. *Id.* at 2273.

182. *Id.*

183. *Id.* at 2272.

184. *Id.* at 2273.

185. *Id.* at 2273–74.

186. *See Gusik v. Schilder*, 340 U.S. 128, 130–31 (1950).

187. *Id.* at 132.

188. *Id.* at 132–33.

189. *Boumediene*, 128 S. Ct. at 2265–66.

As aforementioned, the explicit language and legislative history of the MCA and the DTA make it clear that Congress intended to foreclose any later resort to habeas review.¹⁹⁰ Thus, the finality of the Deputy Secretary of Defense's decision becomes much more important than in *Gusik*.

Totaling the restrictive nature of the CSRT, the circumscribed DTA review, the unreviewable decision whether to convene a new CSRT, and the express intent to foreclose any resort to habeas review, the DTA process appears grossly inadequate to protect the rights of the petitioners. In light of these considerations, the Court appears to be justified in deeming these circumstances "exceptional" and foregoing any requirement of exhaustion.

V. CONCLUSION

While exhaustion is typically required of habeas petitioners who have yet to pursue an alternative remedy available in another forum, the *Boumediene* case highlights when that principle can be eschewed. In comparing the policies favoring exhaustion with the circumstances surrounding *Boumediene*, one can see that none of the justifications adequately apply to the Guantanamo detainees. While the Court fell short of adequately explaining why exhaustion is inappropriate, it appears to have nonetheless decided the issue correctly. By not requiring exhaustion, the Court upheld the fundamental principles underlying the writ of habeas corpus and sent a strong signal to both the Executive and Legislative Branches that if they attempt to provide a substitute for habeas protections, the substitute must provide substantially similar protections to those afforded in a traditional habeas proceeding.

*Brandon C. Pond**

190. *Id.*

* B.A., University of Utah; J.D. candidate 2010, J. Reuben Clark Law School, Brigham Young University.

