

COMMENTARY

The DeLloyd Guth Visiting Lecture in Legal History: *Habeas Corpus*, Legal History, and Guantanamo Bay

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I. INTRODUCTION

It is an honor to be giving the second DeLloyd Guth Visiting Lecture in Legal History, and to follow the excellent inaugural lecture by Chief Justice McLachlin on “Louis Riel: Patriot Rebel.” I give special thanks to my long-time friend DeLloyd Guth. Among the many reasons why DeLloyd is so well-loved by his students and colleagues are his irrepressible intellectual curiosity and his unbounded, contagious enthusiasm for everything he teaches and studies.

About ten years ago, your own Justice Robert Sharpe wrote a review essay of a book entitled *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*.¹ Justice Sharpe discussed the view that seemed to be gaining momentum in England that *habeas corpus* should be absorbed into the doctrine of judicial review.² He quoted Lord Justice Simon Brown’s reassurance – “Bring *habeas corpus* into the evolving process of judicial review and I do not think the judges will fail you.”³

Justice Sharpe, however, said that this analysis...

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¹ Justice Robert J Sharpe, Book review of *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* by David J Clark & Gérard McCoy (2001) 1 OUC LJ 287.

² *Ibid* at 290-292.

³ *Ibid* at 292.

... reflects a preoccupation with procedural and remedial tidiness that is uncharacteristic of the English common law tradition. The rich historical hodge-podge of factors and influences shaping *habeas corpus* has . . . traditionally been used to ensure that important constitutional principles are followed and that the law is sufficiently supple and flexible to achieve justice in a wide variety of cases.⁴

He said, further, that “the writ remains an important residual constitutional remedy available to protect personal liberty when all else fails,” and “[u]nfortunately, all else does sometimes fail.”⁵

In the United States, the Suspension Clause of the United States Constitution states that “[t]he 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.”⁶ In 2001, the same year when Justice Sharpe wrote his review essay, the Supreme Court of the United States decided the case of *Immigration and Naturalization Service (“INS”) v St Cyr*.⁷ Justice Stevens in his majority opinion declared that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”⁸ This principle led the Supreme Court in two important decisions in 2004 and 2008 (*Rasul v Bush*⁹ and *Boumediene v Bush*¹⁰) – to explore whether prisoners held by the United States government at Guantanamo Bay have the right to a hearing in a United States federal court by filing a writ of *habeas corpus*. In both cases, by a bare majority of the justices, the Court said yes. Along the way, legal historians in the United States, England, and Australia played a background part by filing amicus briefs addressing the historical scope and geographic reach of the *habeas corpus* writ in England and America in the late eighteenth century. That is the story I will tell today.

There are actually three stories. One is the background part played by the amicus briefs of legal historians. The second is the Court’s disposition of two hard questions – whether *habeas* would run from a United States court to Guantanamo Bay in Cuba, and whether the writ could be

⁴ *Ibid.*

⁵ *Ibid.*

⁶ US Const art I, § 9, cl 2.

⁷ 533 US 289 (2001) [*St Cyr*]. Enrico St. Cyr was, at the time, a legal immigrant in the United States.

⁸ *Ibid* at 301, quoting *Felker v Turpin* 518 US 651 at 663-64 (1996).

⁹ 542 US 466 (2004) [*Rasul*].

¹⁰ 553 US 723 (2008) [*Boumediene*].

declared by Congress to be off limits to legal immigrants in the United States or to Guantanamo detainees. The third is whether, if the writ did run to Guantanamo (as the Court ultimately held), it would make much of a difference.

Let us start with the third question and then work backwards. Has the availability of the writ of *habeas corpus* to Guantanamo detainees made a difference?

As I will later explain, in *Boumediene*, the majority opinion by Justice Kennedy held that the *Detainee Treatment Act of 2005*¹¹ represented an unconstitutional suspension of the writ of *habeas corpus* because it did not provide detainees with the opportunity to present exculpatory evidence that had not been presented in earlier proceedings. He also did not require detainees to exhaust their remedies under the DTA due to the length of time detainees had been held at Guantanamo Bay. In a concurring opinion joined by Justices Ginsburg and Breyer, Justice Souter emphasized the long periods of detention, stating (in 2008):

After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.¹²

In the January 8, 2012 Sunday *New York Times*, an op-ed piece written by Lakhdar Boumediene and entitled "My Guantanamo Nightmare" was published.¹³ Mr. Boumediene noted the passage of the tenth year anniversary of the detention camp at Guantanamo Bay, stating that for seven of those ten years, "I was held there without explanation or charge." He stated also that during that time his daughters grew up without him, and they "were never allowed to visit or to speak to me by phone." Boumediene described his two-year hunger strike during which he was force-fed through a feeding tube. Finally, in 2008, Judge Richard Leon of the federal district court in Washington, on remand from the Supreme Court, ordered the government to free Boumediene along with four other men who had been arrested in Bosnia. Boumediene said that he would "never forget sitting with the four other men in a squalid room at

¹¹ § 1005(e)(2)(A), 119 Stat 2742 [the DTA].

¹² *Boumediene*, *supra* note 10 at 801.

¹³ *The New York Times* (8 January 2012) SR9.

Guantanamo, listening over a fuzzy speaker as Judge Leon read his decision in a Washington courtroom.” Judge Leon implored the government not to appeal his ruling, because “seven years of waiting for our legal system to give them an answer to a question so important is, in my judgment, more than plenty.” Boumediene was, at last, freed on May 15, 2009, and today he lives in Provence with his wife and children and a new baby boy, Yousef.

Presently, 171 prisoners remain in custody at Guantanamo Bay. According to the *Washington Post*, the Obama administration concluded in 2009 that 36 of these could be prosecuted.¹⁴ Meanwhile, since the *Boumediene* decision, the federal courts have been busy dealing with *habeas corpus* petitions from Guantanamo prisoners. According to the “Guantanamo Habeas Scorecard” maintained by the Center for Constitutional Rights, 57 habeas cases as of February 9, 2011 had been decided; habeas was granted in 37 of these, denied in 20.¹⁵

Most of the habeas hearings have been held in the federal courts in Washington, DC. Many of the decisions by the federal district court—both those granting and those denying the writ—were appealed to the DC Circuit Court of Appeals. Of the cases heard by the DC Circuit on the merits, the total number in which the prisoner prevailed is zero. This striking fact led Professor Stephen Vladeck of the American University Law School in Washington, and others, to accuse the DC Circuit “of actively subverting *Boumediene* by adopting holdings and reaching results that have both the intent and effect of vitiating the Supreme Court’s 2008 decision.”¹⁶ This is not the occasion to assess the critics’ claim, but a brief summary of basic principles either confirmed or established by the DC Circuit Court of Appeals can be given.

The fundamental standard of review under the 2001 statute, *Authorization for Use of Military Force (AUMF)*,¹⁷ is whether, by a preponderance of the evidence, the government has shown that a prisoner

¹⁴ Peter Finn, “Plea Agreement for Terror Suspect Sparks a Debate”, *Washington Post* (2 March 2012) A3.

¹⁵ “Guantanamo Habeas Scorecard” *Center for Constitutional Rights* (9 February 2011), online: <<http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf>>.

¹⁶ Stephen I Vladeck, “The DC Circuit after *Boumediene*” (2011) 41 *Seton Hall L Rev* 1451 at 1453.

¹⁷ Pub L No 107-40, 115 Stat 224.

was “part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹⁸ Hearsay evidence is always admissible, to be given probative weight according to whatever indicia of reliability are present in a given case.¹⁹ The government’s evidence, moreover, is entitled to a “presumption of regularity.”²⁰

In the “presumption of regularity” case, *Latif v Obama*, the sharply divided views among the judges on the DC Circuit are on vivid display. Dissenting Judge Tatel claimed that the court, by the majority opinion, had “moved the goalposts” by imposing the new presumption, especially as applied to the government’s report of the evidence against Latif—a report “produced in the fog of war by a clandestine method that we know almost nothing about.”²¹ The majority, in response, called Judge Tatel’s premises “false,” explaining that “the district court has operated under a case management order that specifically authorized reliance on evidentiary presumptions.”²² Judge Tatel in his dissent argued further that the majority compounded its improper use of the presumption of regularity by undertaking “a wholesale revision of the District Court’s fact finding.”²³ The majority, by contrast, said that the court was required to “view the evidence collectively rather than in isolation,”²⁴ and “A habeas court’s failure to do so is a legal error that we review *de novo*, separate and apart from the question of whether the resulting findings of fact are clearly erroneous in themselves.”²⁵

In what seems almost a sardonic conclusion, the DC Circuit Court in *Latif* remanded the case to the district court “[i]n light of the District Court’s expertise as a fact finder and judge of credibility,”²⁶ despite what the appellate court called the possible “waste of time and resources.” The

¹⁸ *Al Alwi v Obama* 653 F (3d) 11 at 15 (2011), citing *Al Alwi v Bush*, 593 F Supp 2d 24 at 27 (2008).

¹⁹ *Kandari v US* 462 Fed Appx 1 (2011), WL 6757005 (CADDC).

²⁰ *Latif v Obama*, 666 F (3d) 746 at 747 (2011).

²¹ *Ibid* at 772.

²² *Ibid* at 749 citing *In Re Guantanamo Bay Detainee Litig.*, 2008, U S Dist D LEXIS, 97095, at 104 (DDC 6 November 2008).

²³ *Ibid* at 771.

²⁴ *Ibid* at 759.

²⁵ *Ibid*.

²⁶ *Ibid* at 764.

majority also remarked on the amount of ink already spilled on the case, illustrating the fact that “*Boumediene*’s airy suppositions have caused great difficulty for the Executive and the courts.”²⁷ The author of the majority opinion, Judge Janice Rogers Brown, minced no words. In her view, “*Boumediene* fundamentally altered the calculus of war.”²⁸ In a concurring opinion, Judge Karen LeCraft Henderson scorned the dissent’s “high-pitched rhetoric,” and stated her view that “remand for further fact-finding will be a pointless exercise.”²⁹

Now let us regroup and consider briefly the history of “the Great Writ.” One legal historian who provided invaluable help to the drafters of the amicus briefs of legal historians in the *Rasul* and *Boumediene* cases was Paul Halliday of the University of Virginia History Department. Professor Halliday’s extraordinary archival research in England eventually culminated in the publication of a superb book, *Habeas Corpus: From England to Empire*, published in 2010 by the Belknap Press at Harvard.³⁰ In giving a bare bones sketch of the background of *habeas corpus*, I rely entirely on Professor Halliday’s recent book. I do so because the work is revisionist in the very best sense—it revises the history of *habeas corpus* on the basis of the methodical, tedious, exhausting examination of thousands of surviving original writs in the records of the Court of King’s Bench in London. Professor Halliday sampled writs from every fourth year from 1502 to 1798, covering over 2,750 prisoners. With hard-earned justification, he states in his introduction that if we “read Coke, Blackstone, and a handful of printed reports,” and we “claim to know what the law was in 1789 or some other moment” while “countless parchment court records and case reports surviving only in manuscript lie unread in the archives, then we have been derelict as historians.”³¹ Professor Halliday tells us that the little-studied “writs, rolls, and rulebooks” of the Court of King’s Bench “are indispensable for situating

²⁷ *Ibid* citing the dissenting opinions in *Boumediene* by Chief Justice Roberts and Justice Scalia.

²⁸ *Ibid*.

²⁹ *Ibid* at 765.

³⁰ Paul D Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 2010).

³¹ *Ibid* at 3.

habeas corpus in the worlds of law and living that constituted England the Empire.”

Professor Halliday sees the emergence of “the Great Writ,” as *habeas corpus* came to be called, as a development of the early seventeenth century in the influential hands of three King’s Bench Chief Justices—Sir John Popham, Sir Edward Fleming and Sir Edward Coke. Together, they transformed *habeas* from a disjointed pattern of assorted judicial writs used primarily to bring people before the court, into a writ that implemented the King’s prerogative to know why any of his subjects, throughout the King’s dominions, was under detention.

Yes, as we all know, one of the many provisions of the Magna Carta says that no free man is to be arrested or imprisoned “except by the lawful judgment of his peers or by the laws of the land,”³² and many attempts have been made to link *habeas corpus* to this somewhat vague guarantee. After all, as Professor Halliday states, “Magna Carta is as close to scripture as English law comes.”³³ But a linear narrative reaching back to 1215 is simply not sustainable by the historical sources, especially the documents that embodied the actual practices being followed. Those manuscripts survive, “especially the bundled writs and returns,” and they “have lain largely untouched since they were made.”³⁴ Professor Halliday estimates that in the years between 1500 and 1800, “more than 11,000 people used *habeas corpus*.”³⁵

These records tell a story that reshapes our understanding of the evolution and uses of *habeas corpus*, and for this we legal historians are in Professor Halliday’s debt. From his careful research, we must accept two fundamental conclusions: First, that from the early seventeenth century the writ was understood and used to implement the King’s prerogative to demand to know from jailors or persons holding others captive the basis for incarceration or detention. Second, by the middle of the eighteenth century, “the writ was being used to inspect those forms of detention that

³² Reproduced in JC Holt, *Magna Carta*, 2d, ed (Cambridge: Cambridge University Press, 1992) at 461.

³³ Paul D Halliday, *supra* note 30 at 15.

³⁴ *Ibid* at 28.

³⁵ *Ibid*.

involved no allegation of wrongdoing,”³⁶ or at least no alleged criminal wrongdoing.

Now to backtrack to the first and second of my three stories – the amicus briefs of legal historians and the Supreme Court decisions culminating in *Boumediene*. Before 2001, the idea of becoming counsel of record on an amicus brief of legal historians to be filed before the US Supreme Court had never occurred to me. Unexpectedly, I received a call from California from a man named Lucas Guttentag, whom I had never met and who was, I learned later, the Founding Director of the Immigrants’ Rights Project for the American Civil Liberties Union. Lucas had a proposition for me. He described a lawsuit that was pending in federal court that raised important questions about immigrants’ rights. Among other things, the case involved the extent to which immigrants’ rights had been cut off by the 1996 amendments to federal immigration statutes, and whether immigrants who were facing deportation would have access to the writ of *habeas corpus*. Guttentag stated there was a possibility that the case would reach the Supreme Court on a petition for *certiorari*. If this happened, he wanted to know whether I would be willing to put together an amicus brief of legal historians to lay out the historical scope of *habeas corpus* in the founding era, as practiced in England and America. I said that it was a novel proposition for me, but I would think about it and Lucas should call again in the event *cert* was granted.

Lucas, of course, did call again to say that *cert* had been granted. Meanwhile, I had canvassed opinions from legal history colleagues at Georgetown and elsewhere, and the consensus was that an amicus brief of legal historians was a bad idea. Fundamentally, colleagues were skeptical that legal historians could agree on the basic principles governing *habeas corpus* during the founding era. There was also uncertainty about what such a brief could accomplish, and even assuming that a unified view could be articulated, whether leading legal historians would be willing to sign such a brief.

With not a little anxiety, however, I decided to attempt the amicus brief, in partnership with Michael Wishnie, an Associate Professor of Clinical Law at NYU Law School. The first stage was to prepare a careful

³⁶ *Ibid* at 32.

draft of the proposed brief, introduced by a clear statement of the objective. For the objective, we wrote the following:

The professional interest of *amici curiae* legal historians is in ensuring that the Court is fully and accurately informed respecting the historical precedent, understandings and evidence on the scope and availability of the writ of *habeas corpus* that, under this Court's precedents, are properly considered in evaluating the issues raised under the Suspension Clause.

The draft was then developed to establish the following fundamental points:

1. That by the eighteenth century, *habeas corpus* was granted to review the legality of detention in a variety of civil contexts;
2. That habeas review encompassed questions of law including questions of statutory interpretation;
3. That at common law, the writ ran throughout the sovereign's territory and applied to all persons within, including aliens; and
4. That under American law in the colonies and early republic, *habeas corpus* was generally available to review the legality of civil confinement, without limitation as to the nature of the illegality asserted or citizenship.

In the end, we were gratified that twenty-one leading legal historians from English and American universities signed as *amici*.

The *St Cyr* case was a by-product of congressional efforts to tighten federal immigration statutes, as provided in two acts—the *Antiterrorism and Effective Death Penalty Act of 1996*³⁷ and the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*.³⁸ The Court's succinct description of the petitioners' plight was as follows:

Respondent, Enrico St.Cyr, is a citizen of Haiti who was admitted to the United States as a lawful permanent resident in 1986. Ten years later, on March 8, 1996, he pleaded guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law. That conviction made him deportable. Under pre-AEDPA law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective, and as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver.³⁹

³⁷ Pub L No 104-132, 110 Stat 1214.

³⁸ Pub L No 104-208, 110 Stat 3009-546.

³⁹ *St Cyr*, *supra* note 7 at 2275.

In his *habeas corpus* petition, St. Cyr claimed that the 1996 amendments should not apply to him because they should not have been considered retroactive. That argument did not need to be addressed by the amicus brief of legal historians, but section 401(e) of the AEDPA was relevant. That section was entitled “Elimination of Custody Review by *Habeas Corpus*.” As the majority opinion by Justice Stevens stated, this title would seem to support the INS position that *habeas corpus* was no longer available to the petitioner.⁴⁰ Was this an apparent suspension of *habeas corpus* for a class of people who would otherwise have had the benefit of the writ? The 1996 immigration amendments were obviously not driven by the need for public safety due to Rebellion or Invasion. Nevertheless, the suggestion of suspension in the title of section 401(e) was dispelled by the fact that the actual text of the section merely repealed a subsection of earlier statutes without reference to *habeas corpus*.

On the basic question of the availability of the writ to non-citizen immigrants in the United States who were in detention pending deportation, Justice Stevens declared, as noted earlier, that “[a]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”⁴¹ Justice Stevens explained that “[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been the strongest.”⁴² In support of this proposition, he stated that “[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of *habeas corpus* was available to nonenemy aliens as well as to citizens.”⁴³ As authority for the latter statement, Justice Stevens cited King’s Bench cases from the late eighteenth century, with a “see also” to the “Brief for Legal Historians as *Amici Curiae*.”⁴⁴ This, together with two additional citations by Justice Stephens,⁴⁵ satisfied us that the brief had accomplished, at least in some measure, its stated objective.

In dissent, Justice Scalia made the following claim:

⁴⁰ St Cyr, *supra* note 7 at 308.

⁴¹ *Ibid* at 301.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Ibid* at note 16.

⁴⁵ *Ibid* at notes 19 and 23.

An exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion; and on the rare occasions when they did, they simply confirmed what seems obvious from the paucity of such discussions—namely, that courts understood executive discretion as lying entirely beyond the judicial ken.⁴⁶

This, however, failed to recognize the distinction between eligibility for discretionary relief and the favorable exercise of that discretion. All *St. Cyr* sought “was an order compelling the Attorney General to give him a ... hearing, *not* an order to compel the Attorney General to exercise his discretion in *St. Cyr*’s favor.”⁴⁷

After the *St. Cyr* case, there was no reason to anticipate further chapters in the amicus adventure of legal historians, much less episodes arising out of Guantanamo Bay. Three years later, however, the case of *Rasul v. Bush*⁴⁸ came before the Court, and Mike Wishnie and I were again enlisted to fashion another amicus brief of legal historians, assisted this time by other academics and practitioners.⁴⁹ The fundamental question in the *Rasul* case was whether federal courts had jurisdiction to review *habeas corpus* petitions filed on behalf of persons detained by the United States at Guantanamo Bay.⁵⁰

Specifically, the question was whether the writ would reach leasehold territory located within the geographical boundaries of another sovereign nation (Cuba). The stated objective of the signers of the amicus brief was the same as that in *INS v. St. Cyr*, merely to ensure that...

... the Court is fully and accurately informed respecting the historical precedent, understandings and evidence regarding the history of English law and the scope and availability of the writ of *habeas corpus* that, under this Court’s precedents, are properly considered in evaluating the issues raised under the Suspension

⁴⁶ *Ibid* at 343.

⁴⁷ See J Oldham and MJ Wishnie, “The Historical Scope of *Habeas Corpus* and *INS v. St. Cyr*” (2002) 16 *Geo Immig LJ* 485, 501.

⁴⁸ *Supra* note 9.

⁴⁹ Among them, Daniel Hulsebosch, then on the faculty of St. Louis University Law School (now on the NYU Law School faculty) and Jonathan Hafetz, then an associate in the law firm representing the petitioners (now on the faculty at Seton Hall University Law School).

⁵⁰ *Supra* note 9 at 466.

Clause of the United States Constitution and the statutory codification of the writ.⁵¹

This time, twenty-four legal historians signed the brief. One of the newcomers was Professor Paul Halliday.

In preparing the amicus brief, we assembled precedents to demonstrate that *habeas corpus* in England in the late eighteenth century extended to territories well beyond the realm. One well known example involved the Quebec Act of 1774, showing that “*habeas corpus* was viewed as so fundamental that it should operate even in a conquered land in which other core elements of the ancient constitution—common law property tenures and a local assembly—were avoided.”⁵² The writ was even available “in territories held by merchant companies like the British East India Company pursuant to a grant of authority from the English Crown.”⁵³ The brief also discussed the power of the central English courts in London to issue the common law writ of *habeas corpus* to territories overseas, the ability of alleged “enemy aliens” to obtain review of their classification by the writ of *habeas corpus*, and the incorporation of the writ of *habeas corpus* into the Suspension Clause of the United States Constitution after independence.

In what quickly became a landmark decision, the Supreme Court in *Rasul* decided (five to four) that the writ of *habeas corpus* did extend to the prisoners at Guantanamo Bay. The majority opinion was again written by Justice Stevens. The Court of Appeals in *Rasul* had relied upon a 1950 decision by the Supreme Court, *Johnson v Eisentrager*,⁵⁴ construing that case to hold that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”⁵⁵ In the Supreme Court, however, the majority opinion concluded that the *Eisentrager* case was distinguishable, and among other reasons, supported its decision by observing that extending the writ to persons detained at Guantanamo was “consistent

⁵¹ Amicus Brief of Legal Historians, *Rasul v Bush* *supra* note 9 at 1 (Nos 03-334, 03-343) 2004 WL 96756.

⁵² *Ibid* at 12.

⁵³ *Ibid*.

⁵⁴ *Johnson v Eisentrager* 339 US 763 (1950).

⁵⁵ *Supra* note 9 at 473, citing 321 F (3d) 1134 at 1144 (Court of Appeals CA DC 2003).

with the historical reach of the writ of *habeas corpus*.⁵⁶ The Court quoted from an opinion by Lord Mansfield in 1759: “Even if a territory was ‘no part of the realm,’ there was ‘no doubt’ as to the court’s power to issue writs of *habeas corpus* if the territory was ‘under the subjection of the Crown.’”⁵⁷ This time, the Court did not cite expressly to the amicus brief of legal historians, but the brief nonetheless had its effect, since many of the cases cited in the brief were cited in turn by Justice Stevens. Again, Justice Scalia was vigorous in dissent, claiming:

All of the dominions in the cases the Court cites — and all of the territories Blackstone lists as dominions . . . are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.⁵⁸

The third and most recent amicus brief of legal historians was filed in the case of *Boumediene v Bush*, decided by the Supreme Court in June 2008.⁵⁹ This time, twenty-five legal historians signed on, and the same objective was stated as in previous amicus briefs. The legal landscape had changed since the *Rasul* case, as is evident in the first sentence in our brief, which read as follows:

This case raises the question of whether the *Military Commissions Act of 2006*,⁶⁰ in combination with the *Detainee Treatment Act of 2005*,⁶¹ constitutes an unconstitutional suspension of the writ of *habeas corpus* by limiting access to federal courts by persons detained by the United States at the United States Naval Base in Guantanamo Bay, Cuba.⁶²

The Supreme Court held (yet again by a five to four vote, but this time with the majority opinion written by Justice Kennedy) that the Guantanamo Bay petitioners did have the *habeas corpus* privilege, and that the procedures for review of the detainees’ status in the *Detainee Treatment Act of 2005* “are not an adequate and effective substitute for *habeas corpus*” and, “Therefore § 7 of the *Military Commissions Act of 2006* ... operates as

⁵⁶ *Ibid* at 481.

⁵⁷ *Ibid* at 482, citing *R v Cowle*, 2 Burr 834 at 854-55 (1759).

⁵⁸ *Ibid* at 503.

⁵⁹ *Boumediene*, *supra* note 10.

⁶⁰ Pub L No 109-366, 120 Stat 2600 [the MCA].

⁶¹ *Supra* note 11.

⁶² Amicus Brief of Legal Historians, *Boumediene*, *supra* note 10 (nos 06-1195,06-1196) 2007 WL 2441583 [*Boumediene* Amicus Brief].

an unconstitutional suspension of the writ.”⁶³ Section 7 of the MCA was an explicit attempt by Congress to overcome the effect of the *Rasul* case by providing, in its first paragraph, as follows:

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.⁶⁴

In the majority opinion, Justice Kennedy undertook to review in detail the historical evidence about the scope of the writ of *habeas corpus*. He noted that the parties had “examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past,” citing our brief and as well the *St Cyr* case.⁶⁵ After his careful review, Justice Kennedy found the historical evidence, presented by the parties and in our brief, to be informative but not dispositive.⁶⁶ The majority opinion nonetheless concluded:

[W]hen the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.⁶⁷

And against this finding, the *Detainee Treatment Act* was found deficient. The Court held:

[W]e see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.⁶⁸

Thus, “if a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have

⁶³ *Boumediene*, *supra* note 10 at 732.

⁶⁴ 28 USC § 2241.

⁶⁵ *Boumediene*, *supra* note 10 at 746.

⁶⁶ *Ibid* at 746-48. Justice Kennedy included in his historical review a recognition that, “By the mid 19th century, British courts could issue the writ to Canada, notwithstanding the fact that Canadian courts also had the power to do so.” See *ibid* at 750.

⁶⁷ *Ibid* at at 787.

⁶⁸ *Ibid* at 789.

the opportunity to present this evidence to a *habeas corpus* court.”⁶⁹ And finally, detainees are not to be required to exhaust their remedies under the DTA before proceeding with their *habeas corpus* actions, since that “would be to require additional months, if not years, of delay.”⁷⁰

Unsurprisingly, Justice Scalia filed a vigorous dissent, relying heavily on the *Eisentrager* case, and additionally claiming that “at English common law, the writ of *habeas corpus* did not extend beyond the sovereign territory of the Crown.”⁷¹ He emphasized the *Habeas Corpus* Act of 1679, claiming that this act codified the common-law writ,⁷² in his view, “all available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown.”⁷³ In our amicus brief, we pointed out that Justice Scalia, in his dissent in *Rasul*, made the mistake of equating the term “subject” with the modern term “citizen.” We also pointed out that the term “dominion,” understood in historical context, “is not a legal category of land-holding . . . but rather an expressive term implying the breadth of the Crown’s reach, applicable to any locale under the *de facto* control of the English Crown.”⁷⁴

For present purposes, further detail about the Court’s lengthy and complex opinion in *Boumediene* need not be given. An aspect of the background strategy in shaping the Amicus Brief of Legal Historians, however, is worth telling.

As I have already mentioned, Paul Halliday of the University of Virginia History faculty was a signer on the *Rasul* amicus brief. Three and a half years later, when the *Boumediene* brief was in preparation, Professor Halliday’s weary journey through centuries of *habeas corpus* writs in the English archives had ended, and he was on the verge of marketing his book manuscript. He also volunteered to help with the brief, sharing with us his ground-breaking research. At first, we thought that Professor Halliday would again sign the brief, but as our work progressed, we

⁶⁹ *Ibid* at 790.

⁷⁰ *Ibid* at 794.

⁷¹ *Ibid* at 844.

⁷² *Ibid* at 845.

⁷³ *Ibid* at 847 [emphasis in original].

⁷⁴ *Boumediene* Amicus Brief, *supra* note 61 at nn 4 and 13.

realized that we faced a pragmatic problem.⁷⁵ How effective would it be for us to be relying on and citing case after case from the English archives that were nowhere in print and that had been seen by only a single modern scholar? We could contrive to supply the Supreme Court with photocopies of the original writs, but could we really expect this to be effective? Would the Court be prepared to cite to such manuscript sources—sources that had come to the Court’s attention only by the preparation of an amicus brief? This seemed altogether unlikely.

In the end, with our encouragement, Professor Halliday proposed an alternative. He would enlist Professor Ted White, a well-established and respected constitutional historian on the University of Virginia’s law faculty, as a co-author, to write an article that would invoke the fundamental lessons of Professor Halliday’s archival research. Even so, we were aware that time was of the essence. There was no way to get such an article written and in print in time to be relied upon by the Court in preparing its opinion. There was nevertheless a long shot possibility, thanks to the arrival of the Internet age. There just might be time for Professors Halliday and White to get their article written and posted on the Social Science Research Network [SSRN]. To our knowledge, the Supreme Court had never before cited an article that was merely in draft, posted on SSRN, but there would surely be a first time, and perhaps this would be it. As, indeed, it was. In his summary review of the development of the writ of *habeas corpus*, Justice Kennedy wrote the following:

Thus the writ, while it would become part of the foundation of liberty for the King’s subjects, was in its earliest use a mechanism for securing compliance with the King’s laws. See Halliday & White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications...* (noting that ‘conceptually the writ arose from a theory of power rather than a power of liberty’).⁷⁶

In a recent article entitled “The New Habeas Revisionism,” Professor Stephen Vladeck of the American University Law School in Washington, DC writes that “what is perhaps most frustrating about *Boumediene* is how

⁷⁵ By “we,” I refer to the brief-writing team—this time headed by myself, Jonathan Hafetz (who had by then moved to the Brennan Center for Justice at NYU Law School), and three members of the National Litigation Project of the International Human Rights Clinic at Yale Law School (Michael Wishnie, having transferred to Yale from NYU; Hope Metcalf; and Allard Lowenstein).

⁷⁶ *Supra* note 59 at 740.

close the Court came to doing right by English history, only to miss the forest for a want of trees.”⁷⁷ By “a want of trees,” Professor Vladeck refers to the end point of Justice Kennedy’s historical analysis—that, “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.” Thus, “[w]e decline... to infer too much, one way or the other, from the lack of historical evidence on point.”⁷⁸

Professor Vladeck states that “[p]ut another way, the Court spent seven pages deciding that English legal history, on this critical constitutional question, was essentially useless.”⁷⁹ I would not characterize Justice Kennedy’s opinion that way. The Court’s willingness to look closely at the historical record was important, and equally important was the Court’s conclusion that the historical record was “informative but not dispositive.” The Court was left free to make its own determination about whether the *Detainee Treatment Act* and the *Military Commissions Act* effected a suspension of the writ of *habeas corpus*, which the Court proceeded to do. At the same time, the Court revisited the question of the territorial reach of the writ of *habeas corpus*, and despite discerning no compelling historical evidence, concluded that the government’s premise that *de jure* sovereignty was the touchstone for *habeas corpus* jurisdiction had scant support in the history of the common-law writ. The Court declared, as it had in *Rasul*, that “we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.”⁸⁰

II. EPILOGUE

Professor Vladeck attributes the DC Circuit’s consistent rejection of lower court opinions that were favorable to Guantanamo prisoners to the influence of four judges—Judges Janice Rogers Brown, Brett Kavanaugh, A.

⁷⁷ Stephen I Vladeck, “Book Review: The New Habeas Revisionism” (2011) 124 Harv L Rev 941.

⁷⁸ *Supra* note 59 at 752.

⁷⁹ *Supra* note 77 at 966.

⁸⁰ *Supra* note 59 at 755.

Raymond Randolph, and Laurence Silberman.⁸¹ How true this claim may be I cannot say, but, using the court's own approach, there may be enough in it to create a rebuttable presumption. Judge Brown's disgust with the majority opinion in *Boumediene* has been indicated. Professor Vladeck quotes other disrespectful comments by Judges Randolph and Silberman.⁸² Vladeck describes Judges Randolph and Silberman as "belittling the Supreme Court for what Randolph referred to as the 'mess' they made, and what Silberman describe as a 'charade' prompted by the court's defiant—if only theoretical—assertion of judicial supremacy" in *Boumediene*.⁸³ He also quotes statements by Judges Randolph and Silberman that even the preponderance of the evidence standard should be discarded as long as there is "some evidence" to support the government's position.⁸⁴

A final case illustration is the DC Circuit's recent decision in *Almerfed v Obama*,⁸⁵ in which the court reversed and remanded a careful opinion by District Judge Paul Friedman, who had concluded that the government's evidence against Almerfed was insufficient to demonstrate the requisite connection to al Qaida or the Taliban. In the majority opinion on review, Judge Silberman purported to apply the preponderance of the evidence standard. This claim, however, was undercut by his reliance on the plurality opinion of the Supreme Court in *Hamdi v Rumsfeld*, stating that "the government must put forth credible facts demonstrating that the petitioner meets the detention standard, which is then compared to a detainee's facts and explanation."⁸⁶ Judge Silberman held that the *Hamdi* approach "mirrors" the preponderance standard; therefore, "The government's evidence ... must meet at least a certain minimum threshold of persuasiveness."⁸⁷ Finally, the majority opinion concluded that "the District Court clearly erred" in regarding the statements of a key witness, Humoud al-Jadani, as unreliable—as merely "jailhouse gossip."⁸⁸ Judge

⁸¹ *Supra* note 16 at 1456.

⁸² *Ibid.*

⁸³ *Ibid* at 1455, citing *Esmail v Obama*, 2011 WL 1327701 at *3 (DC Cir April 8, 2011).

⁸⁴ *Ibid* at 16, 19.

⁸⁵ *Almerfed v Obama*, 654 F (3d) 1 (2011).

⁸⁶ *Ibid* at 6.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at 9.

Silberman justified this by observing that “[a]lthough this is a factual finding of the District Court, it was not a credibility determination based on witness testimony.”⁸⁹ Judge Kavanaugh joined Judge Silberman, and Judge Judith Rogers concurred only in the result.

In her concurring opinion, Judge Rogers pointed out that the preponderance of the evidence standard was based on evidence *in the record*. The obligation on review was for the Circuit Court to find clear error regardless of whether factual findings were based on live testimony or documentary evidence,⁹⁰ and Judge Rogers found nothing in the record evidence to justify disregarding the district court’s analysis of the al-Jadani statements. She also noted the fact that the government stated for the first time in its reply brief that “at the time of al-Jadani’s statements, Almaferdi was ‘the only person named Hussain[sic] from Aden at Guantanamo.’”⁹¹ She drily observed that even if this argument were properly before the court, “a website cited in the reply brief as support does not, as asserted, assist the government.”⁹²

Meanwhile, detention at Guantanamo continues. On September 19, 2011, the *National Law Journal* ran an article entitled, “Justice Denied at Guantanamo,” by Allison Lefrak, litigation director at Human Rights USA, a non-profit organization in Washington, DC. Ms. Lefrak described her representation of Guantanamo detainee Ravil Mingazof, who remains in Guantanamo Bay eight years after the night he was arrested at a house for refugees in Faisalabad, Pakistan. Ms. Lefrak noted that Mingazof “remains in Guantanamo more than three years after the US Supreme Court issued its opinion in *Boumediene v. Bush*,” eighteen months after a week-long trial at the US District Court for the District of Columbia before Judge Henry Kennedy, Jr., and more than a year...

... after Kennedy issued a comprehensive 42-page opinion methodically analyzing each piece of evidence presented by the government, and concluding that, after eight years of detention, the government had failed to prove by a preponderance

⁸⁹ *Ibid* at 7.

⁹⁰ *Ibid* at 9.

⁹¹ *Ibid* at 10 [emphasis in original].

⁹² *Ibid*. The district court emphasized the fact that the al-Jadani statements referred not to Almaferdi by his last name but rather only to “Hussain al-Adeni.” Judge Silberman disposed of this by explaining that “the phrase ‘al-Adeni’, in Arabic, means ‘from Aden’—which, of course, is Almaferdi’s home” – *ibid*. at *6.

of the evidence that Mingazof was “a part of or substantially supported” al-Queda [sic] or the Taliban.⁹³

Quite dispiritedly, Ms. Lefrak then told her client...

... that the government’s appeal to the US Court of Appeals for the DC Circuit is now stayed in light of the government’s motion to present the lower court with ‘new’ evidence—evidence the government purportedly only located recently, eight years after Ravil was arrested in Faisalabad.⁹⁴

In fairness, Ms. Lefrak acknowledged the argument that “this glacial speed with which the Guantanamo detainees’ cases move one step forward and two steps back in the courts is unfortunate yet necessary to ensure that a potential terrorist is not mistakenly released,” and that “there is much at stake in each of these cases.” She states that District Court judges “are doing what they are supposed to do, and they are doing it well,” but “the longer... detainees sit languishing in Guantanamo as their cases gradually make their way through the courts (only to face the near inevitable denial of the writ from the DC Circuit), the more credibility the US judicial system loses.”⁹⁵

III. CONCLUSION

Despite the obstacles thrown in the way by the DC Circuit Court of Appeals, the *habeas corpus* cases for the Guantanamo Bay prisoners have had meaningful effects. According to the Guantanamo Habeas Scorecard, as of February 9, 2011, 24 prisoners had been released after habeas was granted and the release of others was pending.⁹⁶ Military detention procedures even more cursory than those applied in the habeas proceedings were avoided.

The amicus briefs of legal historians played, we believe, a useful contributory part in the Supreme Court’s recognition in the *Rasul* and *Boumediene* cases of the extensive geographical reach and substantive scope of the writ of *habeas corpus* at the time of the founding of the republic in

⁹³ Allison M Lefrak, “Justice Denied at Guantánamo” *The National Law Journal*, (19 September 2011), online: <<http://www.law.com/jsp/nlj>>.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Supra* note 15.

cases of civil detention. The flexible capacity of the Great Writ to extend to detainees their day in court survives.

As a concluding postscript, I might mention a recent ironic turn of events. Much of the agitation about *habeas corpus* availability for Guantanamo prisoners was driven by “a widespread perception that military commissions are tilted strongly against defendants, often based on the assumption that military officers will come down more harshly than federal judges.”⁹⁷ This comment was by Professor Matthew Waxman of Columbia Law School, who added that, “the record to date tells a very different story.” According to Waxman, six military commissions were completed over the past decade, and of these, five “ended with relatively mild sentences.” Two detainees “have already gone home, and three more are scheduled to be repatriated in the next few years.” In a seventh case, the government last week reached a plea agreement with the prisoner, and more plea deals may be on the way. Federal courts, by contrast, “have been comparatively harsh on terrorism suspects.” According to the *Washington Post* article, “Under Obama, only one detainee has been brought into the civilian court system from Guantanamo,” and he was convicted, given a life sentence, and placed in the super max prison in Colorado, “the harshest facility in the US penal system.”

The fear of leaving detainees in the hands of the military, however, persists. The National Defense Authorization Act (NDAA) as originally proposed last fall would, according to an article in the *National Law Journal*, “almost certainly be read to allow . . . US citizens and legal immigrants” to be arrested in the United States and placed under mandatory military detention.⁹⁸ In December, however, according to an article only last week in the *Washington Post*, “a compromise was reached between Sens. Carl Levin (D-Mich.) and John McCain (R-Ariz.) requiring military custody for non-US citizens who are suspected members of al-Qaeda or its affiliates and who have planned or carried out an attack against the United States or its coalition partners—*unless the President waives*

⁹⁷ Peter Finn, “Plea Agreement for Terror Suspect Sparks a Debate”, *Washington Post* (2 March 2012) A3.

⁹⁸ Jonathan Hafetz, opinion, “Don’t Extend ‘War on Terrorism’”, *National Law Journal* (24 October 2011), 43. Jonathan Hafetz is one of the co-authors of the amicus brief of legal historians in the *Boumediene* case.

that provision.”⁹⁹ And on Tuesday, February 28, 2012, President Obama “issued the rules for the waivers, which are so broad that transfer of any suspect into military custody is now likely to be rare.”¹⁰⁰ According to one observer, “this is essentially a 3,450-word line-item veto, rendering the mandatory military detention provision mostly moot.”¹⁰¹ The article quotes a statement by Republican Senators McCain and Ayotte that the new rules “will require a hearing in the Senate Armed Services Committee.”

The Guantanamo Bay drama thus continues. But at least, writs of *habeas corpus* running to Guantanamo Bay will continue to be issued, and the Constitutional protection of the Great Writ against suspension remains intact.

⁹⁹ Sari Horwitz and Peter Finn, “Obama issues waivers for new detention rules”, *Washington Post* (29 February 2012) A10, online: <http://articles.washingtonpost.com/2012-02-28/world/35443115_1_qaeda-military-custody-new-waivers> [emphasis added].

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* The quote is attributed in the article to Tom Malinowski of Human Rights Watch.