

Notes

A Dissentious “Debate”: Shaping Habeas Procedures Post-*Boumediene**

I. Introduction

The United States’ formulation of detention policy for Guantanamo Bay enemy combatants has not exactly taken the path of least resistance. The rules governing military detentions at Guantanamo have emerged as the product of an expansive dialogue, vacillating and at times contentious, between the Executive, Legislative, and Judicial Branches. In *Boumediene v. Bush*,¹ the latest chapter in this ongoing discussion, the Supreme Court held by a vote of five to four that Guantanamo detainees possess a constitutional privilege of habeas corpus.²

But the widespread clamor over whether *Boumediene*’s brazen holding was the “correct” result has overshadowed a quieter but equally significant—and indeed, equally contentious—conversation that also was brought about by *Boumediene*: the Washington D.C. District Court’s endeavor to design appropriate procedures to govern the Guantanamo detainees’ habeas petitions. At first glance, the minutiae of habeas procedures may appear immaterial when compared to the more comprehensive constitutional issues confronted by the *Boumediene* Court. After all, the Court addressed the details of the proceedings only in passing: “We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings.”³

This Note demonstrates that to the contrary, the D.C. District Court’s post-*Boumediene* mandate to design procedures for the Guantanamo detainee habeas proceedings, as well as its adjudicatory role in the disposition of these proceedings, substantially impact the interbranch national-security dialogue. And so far, the rumblings at the district court level have been anything but uneventful.

First, I must place this dialogue within its proper context. Part II provides this frame of reference by contouring the key exchanges between the Judicial, Legislative, and Executive Branches since the commencement of the War on Terror, which cumulatively have shaped the United States’ noncitizen-detention policy to this point. By examining these decisions, and the reactions to these decisions, I find that *Boumediene* buttresses, rather than

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1. 128 S. Ct. 2229 (2008).

2. *Id.* at 2240.

3. *Id.* at 2276.

introduces, a trend of judicial involvement in the post-9/11 national-security-policy conversation.⁴ Part III presents a narrative of the D.C. District Court's development of habeas procedures from *Boumediene* to the present, focusing specifically on the two procedural issues on which the judges have been most divergent: the disclosure of exculpatory evidence and the regulation of discovery. An analysis of the judges' case management orders (CMOs), amended CMOs, and nondispositive orders illuminates the mini-dialogue that has accompanied the crafting of these procedures from the outset. Lastly, Part IV comments on the D.C. District Court's recent activity through a dialogic lens and posits that congressional involvement, particularly in the form of statutory habeas procedures, would ensure a more interbranch, systemically balanced construction of U.S. detention policy.

II. The Interbranch Guantanamo Detention Dialogue from *Rasul* to *Boumediene*

The current fractious national debate over U.S. detention policy at Guantanamo Bay stands in stark contrast to the unified support the government received for its military initiatives in the aftermath of 9/11. Less than a week after the Twin Towers collapsed, Congress enacted and the President signed the Authorization for Use of Military Force Against Terrorists (AUMF).⁵ This joint resolution granted the President broad authority to "use all necessary and appropriate force" against "nations, organizations, or persons" who were involved in the 9/11 attacks or who harbored those involved.⁶ The resolution passed overwhelmingly—by 98 to 0 in the Senate⁷ and 420 to 1 in the House.⁸ No legal objections hindered its passage, and public opinion expressed sweeping approval of the initiatives.⁹

4. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006) (holding that the jurisdiction-stripping provision of the Detainee Treatment Act does not apply to habeas petitions pending at the time the statute was enacted); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) ("[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that statutory habeas corpus "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention" at Guantanamo Bay).

5. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

6. *Id.* sec. 2(a). The full provision authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

7. 147 CONG. REC. 17,045 (2001).

8. *Id.* at 17,156.

9. See, e.g., Richard Morin & Claudia Deane, *Poll: Strong Backing for Bush, War; Few Americans See Easy End to Conflict*, WASH. POST, Mar. 11, 2002, at A1 (reporting that an ABC

Of course, the United States' counterterrorism operations resulted in the apprehension of suspected terrorists, and in early 2002 the first terrorism detainees were taken to Guantanamo Bay, Cuba.¹⁰ In response to litigation on behalf of the detainees, the Executive Branch took the position that captives it determined were "enemy combatants" could be detained indefinitely under its "plenary authority to detain pursuant to Article II of the Constitution."¹¹ As the Supreme Court weighed in on the issue of military detention for the first time post-9/11 in *Hamdi v. Rumsfeld*,¹² a plurality chose not to adopt the Executive's broad reasoning; instead, the plurality upheld detention on statutory grounds under the AUMF.¹³

But the Court was even less deferential to the Executive Branch when it came to opportunities for detainees to challenge the United States' grounds for detention. Weighing the Executive's concern for the prevention of future terrorist activities against Hamdi's interest in being free from unwarranted physical detention,¹⁴ four members of the Court held that Hamdi must be afforded a mechanism through which he received the "factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."¹⁵ Although the Court's decision did not make clear which detainees would qualify for these procedural safeguards,¹⁶ there was no question *Hamdi* put the onus on the Executive to ensure minimal safeguards exist for American citizens detained in the War on Terror.¹⁷ Furthermore, in *Rasul v. Bush*,¹⁸ an opinion handed down the same day as *Hamdi*, the Court held 6 to 3 that the federal courts had jurisdiction to consider *noncitizen*- as well as citizen-detainees' habeas corpus petitions.¹⁹ The Judicial Branch had made its voice

News/*Washington Post* poll found that nine out of ten Americans supported Bush's use of the military in Afghanistan).

10. See James Dao, *U.S. Is Taking War Captives to Cuba Base*, N.Y. TIMES, Jan. 11, 2002, at A1 (reporting that twenty Taliban and Al Qaeda operatives, the first of hundreds of such detainees, were being sent to Guantanamo Bay by the U.S. military).

11. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11, 516-17 (2004) (plurality opinion).

12. 542 U.S. 507 (2004).

13. *Id.* at 517 (plurality opinion). Interestingly, Justice Thomas, writing alone in his dissenting opinion, also justified the President's detention authority under AUMF and not under Article II. *Id.* at 587 (Thomas, J., dissenting).

14. *Id.* at 529-33 (plurality opinion).

15. *Id.* at 533.

16. While the plurality in *Hamdi* made clear throughout most of the opinion that its application was only for citizen-detainees, some key segments, including one addressing potential procedural concerns for enemy-combatant proceedings, are less clear. See *id.* at 533-34 (outlining potential elements of a general "enemy-combatant proceeding").

17. See *id.* (mandating that citizen-detainees be allowed an enemy-combatant proceeding and suggesting the various ways in which Guantanamo procedures would need to be altered to accommodate the "exigencies of the circumstances").

18. 542 U.S. 466 (2004).

19. *Id.* at 485.

heard in the decision of how the United States formulates military-detention policies post-9/11.

Whether or not noncitizens possessed the right to challenge their detention through military proceedings, the Executive Branch was mindful of the Court's directives. In July 2004, Deputy Secretary of Defense Paul Wolfowitz issued an order establishing military tribunals that would allow each foreign-national detainee to "contest designation as an enemy combatant."²⁰ These Combatant Status Review Tribunals (CSRTs), as initially designed, were not subject to an external judicial review process,²¹ and the procedural avenues available for the detainees to challenge their detention were limited. For instance, the detainee was denied access to counsel,²² the detainee could call witnesses but only if the witnesses were "reasonably available" (a determination left to the discretion of the tribunal),²³ hearsay evidence was admissible,²⁴ and there was a rebuttable presumption in favor of the Government's evidence.²⁵ But despite these procedural limitations, Wolfowitz's Order, issued in the wake of *Hamdi* and *Rasul*, signaled that the Executive Branch was not interested in defying the legal interpretations, or as cynics might say, policies, issued by its judicial counterpart.

Meanwhile, on a separate front, the Executive Branch sought a remedy for the Court's decision in *Rasul* that detainees, pursuant to federal statute, could file habeas petitions in U.S. courts. The Executive found, or at least thought it found, a solution on Capitol Hill. At the urging of the President,²⁶ Congress stepped in to pass the Detainee Treatment Act (DTA) in 2005, which, among other things, amended federal law by stripping federal courts of their jurisdiction to hear habeas petitions from Guantanamo detainees.²⁷ In the context of the interbranch dialogue, the passage of the DTA is noteworthy in that two branches (here, the two "political" branches) combined resources to negate the decision of the third.

20. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

21. See *id.* at 4 (providing no mechanism for federal judicial review and emphasizing that the Order was "intended solely to improve management within the Department of Defense").

22. See *id.* at 1–2 (appointing to the detainee a military officer as a "personal representative," rather than actual legal counsel).

23. *Id.* at 2–3.

24. *Id.* at 3.

25. *Id.*

26. See BENJAMIN WITTES, LAW AND THE LONG WAR 144 (2008) (describing Congress's national-security legislative efforts post-9/11 as "patchy and erratic" initiatives in response to Executive requests rather than independent endeavors).

27. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, secs. 1001–1006, 119 Stat. 2680, 2739–44 (codified at 10 U.S.C. § 801 note, 28 U.S.C. § 2241(e), and scattered sections of 42 U.S.C. § 2000dd) (amended 2006).

Congress did not empower the Executive with supreme authority over Guantanamo detention when it passed the DTA. In fact, the Act explicitly invokes the help of the Judiciary: Detainees, though precluded from applying for habeas relief in federal court, could appeal the CSRT's ruling on their status as enemy combatants to the D.C. Circuit.²⁸ As the majority in *Boumediene* later lamented, however, the DTA appeals process did not adequately provide for an independent judicial determination of whether the Government was justified in classifying the particular appellant as an enemy combatant.²⁹ Rather, the D.C. Circuit under the DTA was permitted only "to assess whether the CSRT complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful."³⁰

But before the Supreme Court confronted the legitimacy of the CSRT judicial review process, it faced an issue in *Hamdan v. Rumsfeld*³¹ that on the surface was far more facile: whether the DTA of 2005, specifically its jurisdiction-stripping provision, prohibited all Guantanamo habeas petitions (an interpretation that would have disposed of those petitions that were pending at the time the Act was passed) or only future petitions.³² In a 5 to 3 decision,³³ the Court allowed pending habeas cases to proceed.³⁴

Hamdan would not have presented such a key issue if several petitioners had not already filed habeas claims with the D.C. District Court. The post-*Rasul* habeas petitions had been consolidated into two separate proceedings in front of two different judges: Judge Leon and Judge Green.³⁵ Foreshadowing the diversity that would define the D.C. District Court's post-*Boumediene* habeas procedures, the judges' rulings were in opposition with respect to the petitioners' habeas rights.³⁶ While these D.C. District Court

28. *Id.* § 1005(e)(2).

29. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2265 (2008) (contrasting the DTA with other federal habeas statutes to demonstrate that the DTA did not allow the reviewing court "to inquire into the legality of the detention").

30. *Id.* (quoting DTA sec. 1005(e)(2)(C), 119 Stat. 2742).

31. 548 U.S. 557 (2006).

32. *Id.* at 574–77.

33. *See id.* at 635 (noting that Chief Justice Roberts took no part in the decision).

34. *Id.* at 584.

35. *Boumediene*, 128 S. Ct. at 2241. Judge Green was designated pursuant to the district court's Executive Session Resolution to coordinate and manage all the habeas proceedings, but Judge Leon, foreshadowing his post-*Boumediene* course of action, resolved to keep his habeas petitions for separate adjudication. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 451–52 & n.14 (D.D.C. 2005).

36. *Compare Khalid v. Bush*, 355 F. Supp. 2d 311, 317 (D.D.C. 2005) (Leon, J.) (asserting that the petitioners had not presented "at least one viable legal theory, accepting the facts as they plead them to be true, under which this Court could issue a writ of habeas corpus challenging the legality of their detention"), *with In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454 (Green, J.) (interpreting *Rasul* to indicate that Guantanamo detainees possess substantive constitutional rights in addition to the rights conferred by the federal habeas statute).

decisions were pending on appeal, Congress had enacted the DTA.³⁷ But since *Hamdan* held that the DTA's removal of habeas rights from detainees did not apply to habeas petitions pending at the time of enactment, the cases were set to proceed on appeal—unless Congress responded. Continuing the dialogic interbranch volley that had dictated Guantanamo detention policy since 2004, Congress did just that by passing the Military Commissions Act (MCA) in 2006.³⁸ Section 7 of the MCA aimed to essentially extinguish all habeas petitions, including those pending, from the purview of the federal courts.³⁹

The 2007 MCA set the stage for a dynamic shift in the military-detention dialogue. As predicted, the D.C. Circuit held that the habeas petitions before the court, which had appeared as a result of *Rasul* and survived the 2005 DTA as a result of *Hamdan*, now fell outside the jurisdiction of the federal courts pursuant to the MCA.⁴⁰ The circuit court also determined that Section 7 of the MCA did not invoke a constitutional analysis of the Suspension Clause because noncitizen detainees at Guantanamo were not entitled to the privilege of the writ of habeas corpus or the protections of the Suspension Clause.⁴¹ Thus, if Guantanamo detainees were to be equipped with habeas-petition opportunities, the directive would have to come from the Supreme Court.

If the Executive and Legislative Branches expected the Supreme Court to rubber stamp the denial of detainees' habeas rights through the MCA and the creation of the CSRT process, they were sorely disappointed on both counts. Five Justices coalesced in *Boumediene* to hold that noncitizen Guantanamo detainees *do* possess a constitutional privilege of habeas corpus.⁴² On the one hand, the Court agreed with the D.C. Circuit that if MCA Section 7 was presumed to be valid, Congress's intent to abolish the federal courts' jurisdiction over Guantanamo habeas petitions must be respected.⁴³ But by determining that noncitizen detainees at Guantanamo possess rights under the U.S. Constitution, the Court held Section 7 of the MCA unconstitutional.⁴⁴ The Court reasoned that Section 7 violated the

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

38. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at scattered sections of 10 U.S.C.).

39. *See id.* sec. 7(b) (stating that the habeas jurisdiction-stripping provision of the DTA “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”).

40. *Boumediene v. Bush*, 476 F.3d 981, 987–88 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

41. *Id.* at 988–91 (citing U.S. CONST. art. I, § 9, cl. 2).

42. *Boumediene v. Bush*, 128 S. Ct. 2229, 2239–40 (2008).

43. *Id.* at 2242–44.

44. *Id.* at 2274.

Suspension Clause because the CSRT process did not create an adequate alternative in place of the federal habeas corpus jurisdiction it removed.⁴⁵

Pursuant to the DTA, the CSRT review process had left out the federal district courts altogether.⁴⁶ The D.C. Circuit was given exclusive jurisdiction to review (1) whether the CSRT's enemy-combatant-status determination was consistent with the Department of Defense's standards and procedures,⁴⁷ and (2) whether the use of such standards and procedures properly conformed to the Constitution and laws of the United States.⁴⁸ A critical feature of any habeas proceeding, the Court proclaimed, is the ability of the detainee to rebut the factual basis for the Government's assertion that he is an enemy combatant.⁴⁹ Included in this right is a mechanism for the habeas court to admit and consider "relevant exculpatory evidence that was not introduced during the earlier proceeding."⁵⁰ The *Boumediene* Court's tone and its analysis of habeas principles are reminiscent of *Hamdi* and *Rasul*, demonstrating the Judiciary's relatively consistent contributions to the Guantanamo-detainee dialogue.⁵¹

The *Boumediene* majority provoked much public furor.⁵² Journalists and politicians either assailed the Court for ignoring precedent in a fit of judicial imperialism⁵³ and for making our country less safe,⁵⁴ or expressed support toward the Court for providing detainees with constitutional protections.⁵⁵ But when the Court's holding is appraised within the dialogic framework outlined above, we see that the overtures from both proponents and critics about *Boumediene*'s break from precedent are exaggerated.⁵⁶ Tracing the back-and-forth exchanges between the branches, from the enactment of the DTA after *Hamdi* and *Rasul* to the enactment of the MCA

45. Robert M. Chesney, *Boumediene v. Bush*, 128 S. Ct. 2229, *United States Supreme Court*, June 12, 2008, 102 AM. J. INT'L L. 848, 850 (2008).

46. DTA, Pub. L. No. 109-148, sec. 1005(e)(2)(A), 119 Stat. 2680, 2742 (codified at 10 U.S.C. § 801 note) (amended 2006).

47. *Id.* sec. 1005(e)(2)(C)(i), 119 stat. 2742.

48. *Id.* sec. 1005(e)(2)(C)(ii), 119 stat. 2742.

49. *Boumediene*, 128 S. Ct. at 2269-70.

50. *Id.* at 2270.

51. *See supra* notes 12-19 and accompanying text.

52. *See Chesney, supra* note 45, at 851 (reporting the range of reactions).

53. *E.g.*, John Yoo, Editorial, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23 (lambasting the Court for ignoring precedent, denying the President and Congress their constitutional powers, and for deciding an issue not yet before it).

54. *E.g.*, Fred Thompson, *Boumediene: A Supremely Problematic Court Decision*, REALCLEARPOLITICS, June 23, 2008, http://www.realclearpolitics.com/articles/2008/06/boumediene_a_supremely_problem.html (arguing that *Boumediene* incentivizes violations of the Geneva Convention).

55. *E.g.*, Editorial, *Justice 5, Brutality 4*, N.Y. TIMES, June 13, 2008, at A28 (applauding the Court's affirmation of detainees' habeas rights).

56. Other scholars have also taken note of this trend. *See, e.g.*, Chesney, *supra* note 45, at 851 (observing that contrary to the public opinion, *Boumediene* was not a "sharp departure" from the status quo).

after *Hamdan*, the *Boumediene* Court's opinion, though noteworthy as the latest edition in the detention-policy power struggle, was anything but capricious. Regardless of whether one believes that *Boumediene* was recalcitrant, all can agree that United States' military-detention policy in the War on Terror has formed not as a unilateral, preconceived plan but as a product of a multitude of interbranch decisions.⁵⁷

The implications of granting habeas rights to Guantanamo detainees may indeed be considerable and long-lasting from the perspective of constitutional scholars, but more pressing are the implications for the district judges who have been designated to oversee the habeas proceedings. As opposed to the system under the MCA, which wholly excluded the district court from the review process, *Boumediene* elevated the district courts to sit at the head of the table.⁵⁸ The D.C. District Court did not voluntarily position itself in the midst of the habeas commotion. Rather, its authority over the disposition of these petitions was essentially sealed by the Supreme Court's majority in *Boumediene*, who advocated for consolidating the habeas petitions within the D.C. District to "reduce administrative burdens on the Government" and to accommodate the Government's interest in "avoid[ing] the widespread dissemination of classified information."⁵⁹ But although the Supreme Court made clear that the D.C. District Court would be the venue of choice, its recommendations for how to arrange the proceedings were, to say the least, wanting.⁶⁰

III. The Dialogue at the Ground Level: The Shaping of the D.C. District Court's Habeas Procedures

A. (Limited) Guidance from Above

As it embarked on its new mission, the D.C. District Court was not entirely without assistance; it had a patchwork of Supreme Court suggestions

57. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 71–72, 83 (2008) (describing the development of the United States' policy on the detention of foreign nationals at Guantanamo Bay following the attacks on the World Trade Center and the Pentagon as primarily a mixture of legislative and executive decisions and claiming that in spite of the courts' efforts to "push back" against these decisions, ultimately their role has been limited); Chesney, *supra* note 45, at 848 ("*Boumediene* addressed the aftermath of a series of judicial decisions, legislative enactments, and policy developments relating to military detention at Guantánamo."); cf. Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877, 890 (2009) ("[T]he detention of terrorist combatants in the United States was based only on presidential orders or, as explained by the U.S. Supreme Court, on presidential orders supported by the vague authorization included in the AUMF.").

58. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) ("Our decision today holds only 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.").

59. *Id.* at 2276. The majority declared that the Government can move for change of venue for habeas petitions filed in district courts other than the D.C. District. *Id.*

60. See, e.g., *id.* ("We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings.").

it could use to point itself in the right direction. In fact, Judge Thomas Hogan, a prominent influence in the development of the habeas procedural framework, meticulously paired almost every procedural phase in his CMO with a statement from either a Supreme Court or D.C. Circuit ruling.⁶¹

It might seem odd that *Hamdi*, handed down four years before *Boumediene* and before the advent of the CSRT system, was the most useful precedent to guide the judges in shaping the habeas procedures. The *Hamdi* plurality pondered what a proceeding would look like for detainees challenging their enemy-combatant status.⁶² A central tenet of a detainee's proceeding is the right for the detainee to "receive notice of the factual basis for his classification."⁶³ Noting the difficulties inherent in balancing national-security concerns with individual liberties, the Court suggested various alterations to the normal criminal-defendant procedural protections: "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding,"⁶⁴ and "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."⁶⁵

By contrast, the *Boumediene* Court's guideposts were more general: "[i]f a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court";⁶⁶ "[t]he extent of the showing required of the Government in these cases is a matter to be determined";⁶⁷ and "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."⁶⁸

Additionally, the D.C. District was guided by earlier Supreme Court habeas precedents even though they were not directly applicable to the Guantanamo habeas procedures. For example, Judge Hogan's decision to allow Guantanamo petitioners to obtain limited discovery by request was made after considering *Bracy v. Gramley*,⁶⁹ which declares that habeas petitioners are not entitled to the type of discovery normally afforded civil

61. See, e.g., Case Management Order at 1, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (D.D.C. Nov. 6, 2008) (Hogan, J.) [hereinafter *Guantanamo Bay CMO*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-397 (designing the proceedings to "provide the petitioners . . . with prompt habeas corpus review" (citing *Boumediene*, 128 S. Ct. at 2275), while also "'proceed[ing] with the caution' necessary in [the] context" (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion) (first alteration in the original))).

62. *Hamdi*, 542 U.S. at 533–34.

63. *Id.* at 533.

64. *Id.* at 533–34.

65. *Id.* at 534.

66. *Boumediene*, 128 S. Ct. at 2273.

67. *Id.* at 2271.

68. *Id.* at 2269.

69. 520 U.S. 899 (1997).

litigants in federal court,⁷⁰ and *Harris v. Nelson*,⁷¹ which grants a habeas district court the power to require discovery “when essential to render a habeas corpus proceeding effective.”⁷² The district court has also carefully heeded the Supreme Court’s reminders to use caution when dealing with facts and intelligence that invoke national-security concerns.⁷³

B. Examining the D.C. District’s Divergent Habeas Procedures

By July 2008, the D.C. District faced the momentous task of adjudicating the hundreds of habeas petitions filed by Guantanamo detainees. The primary vehicle used to establish procedures for these cases is the Case Management Order.⁷⁴ With the Supreme Court’s edict that “[t]he detainees . . . are entitled to a prompt habeas corpus hearing”⁷⁵ still ringing in its ears, the court sprang into action by resolving to consolidate all current and future habeas cases in front of one person—Judge Hogan.⁷⁶ But it was immediately apparent that the fifteen district judges were not going to proceed as a singular unit. Judge Hogan acknowledged as much in his first order pertaining to the consolidated petitions: “Excluded from reassignment are all cases over which Judge Richard J. Leon currently presides”⁷⁷ On the same day, Leon issued an order cementing his decision to keep the eighteen habeas cases initially assigned to his docket.⁷⁸

Pursuant to the Executive Session Resolution, Judge Hogan was responsible for going through all the habeas cases and “identify[ing] and delineat[ing] both procedural and substantive issues . . . common to all or some of the[] cases and, to the extent possible, rul[ing] on procedural issues

70. *Guantanamo Bay CMO*, *supra* note 61, at 3 (citing *Bracy*, 520 U.S. at 904).

71. 394 U.S. 286 (1969).

72. *Guantanamo Bay CMO*, *supra* note 61, at 3 (citing *Harris*, 394 U.S. at 300 n.7).

73. The D.C. District Court has demonstrated a devout commitment to balancing national-security concerns with the interests of conducting legitimate and transparent proceedings. This is evidenced by the plethora of safety precautions the court has instituted to govern the prehearing and hearing phases of the proceedings and by its willingness to separate out the unclassified information from each case so that it can be made available to the citizenry. See Case Management Order at 2, *Boumediene v. Bush*, No. 04-1166 (D.D.C. Aug. 27, 2008) (Leon, J.) [hereinafter *Boumediene CMO*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1166-142; *Guantanamo Bay CMO*, *supra* note 61, at 3 (both requiring the Government to file both classified and unclassified factual returns).

74. See Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 1019–21 (2009) (detailing the common procedures for Guantanamo habeas cases created by Judge Hogan’s November 2008 Case Management Order and adopted by other members of the D.C. District Court).

75. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

76. Order at 1–2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. July 2, 2008) (Hogan, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-337.

77. *Id.* at 2 n.1.

78. Order at 1–2, *Khalid v. Bush*, No. 04-1142 (D.D.C. July 2, 2008) (Leon, J.) [hereinafter *Khalid Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1142-93.

that [were] common to the cases.”⁷⁹ Hogan explicitly stated that the cases would only be transferred for the purposes of “coordination and management” and that the transferring judges would still rule on the merits of each case to which they were originally assigned.⁸⁰

In November 2008, Judge Hogan released his CMO, which was significant in two major respects.⁸¹ First, several key procedures, both in the prehearing and hearing stages of the proceedings, differed from those set out by Judge Leon.⁸² Furthermore, Judge Hogan expressly stated that the judges, after getting back their original habeas cases, were free to alter the procedural framework “based on the particular facts and circumstances of their individual cases.”⁸³ By allowing this mechanism for alterations, Judge Hogan was in effect admitting the general CMO was merely a starting point or a suggestion the other judges could adopt or ignore. Though some judges received Judge Hogan’s CMO and implemented it almost wholesale,⁸⁴ other judges took the liberty of making relatively significant modifications.⁸⁵

But just two weeks after Judge Hogan released his original CMO, he decided to change it. Staying all the habeas petitions under his control, he contemplated the Government’s Motion for Clarification and Reconsideration⁸⁶ and released an amended CMO on December 16, 2008.⁸⁷ Again, judges were left with the option of following Judge Hogan’s CMO or making alterations.⁸⁸ Interestingly, at least one judge—Judge Bates—who

79. Order at 2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-4444 (D.D.C. July 3, 2008) (Hogan, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008mc04444-1.

80. *Id.*

81. See *Guantanamo Bay CMO*, *supra* note 61, at 2–4 (stipulating procedures for the disclosure of exculpatory evidence (requiring the disclosure of all “reasonably available” evidence) and discovery (allowing for a limited form of automatic discovery)).

82. See *infra* notes 93–97, 124–28 and accompanying text.

83. *Guantanamo Bay CMO*, *supra* note 61, at 2 n.1.

84. See, e.g., Order at 1, *Abdullah v. Bush*, No. 05-23 (D.D.C. Nov. 19, 2008) (Roberts, J.) [hereinafter *Abdullah Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0023-19 (confirming Judge Roberts’s decision to adopt Hogan’s CMO for all substantive purposes); Order at 1–2, *Hamlily v. Bush*, No. 05-0763 (D.D.C. Nov. 6, 2008) (Bates, J.) [hereinafter *Hamlily Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0763-90 (declaring Judge Bates’s decision to apply Hogan’s CMO subject to minor changes in the briefing schedule).

85. See, e.g., Case Management Order at 1, 3–7, *Al-Adahi v. Bush*, No. 05-280 (D.D.C. Nov. 13, 2008) (Kessler, J.) [hereinafter *Al-Adahi CMO*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0280-201 (adopting Hogan’s CMO “in large part” but providing additional or altered language for several key procedures, including the disclosure of exculpatory evidence, discovery, the presumption in favor of the Government’s evidence, and hearsay).

86. Order at 1–2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (D.D.C. Nov. 21, 2008) (Hogan, J.) [hereinafter *Guantanamo Bay Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2380-107.

87. Order at 2–3, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (D.D.C. Dec. 16, 2008) (Hogan, J.) [hereinafter *Guantanamo Bay Amended Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-420.

88. See *id.* at 1–2 (asserting that the November 6 order was amended only by the specific provisions enumerated in the December 16 order, which kept the opt-out mechanism in force).

chose to adopt all of Judge Hogan's original CMO drifted from Judge Hogan's amended CMO insofar as the language governing discovery procedures.⁸⁹

Before reaching the details of the CMOs, a cursory glance at the development of these habeas procedures shows, at the least, that this process is malleable. Judging by the proportion of judges who exercised their right to amend Judge Hogan's original CMO, Judge Leon and Judge Sullivan arguably took the more prudential course of action by immersing themselves in their cases from the beginning and crafting their own set of procedures. If the other judges were going to go through the same individualized process regardless, it stands to reason that delaying this process until Judge Hogan released his CMO only served to delay the petitioners' opportunity to present their cases in court.⁹⁰

In addition, by developing CMOs in a judge-by-judge fashion, rather than creating a uniform CMO, the D.C. District invites criticism of the legitimacy of the habeas proceedings. Detainees whose petitions are denied might have a better case on appeal under this fragmented system than if the procedures were all the same. The fact that the procedures are *not* the same only bolsters the argument that the ground-level, district court shaping of habeas procedures comprises a smaller but also contentious dialogue that meaningfully affects U.S. military-detention policy.

We turn now to the two habeas procedures that have varied the most among the D.C. District Court judges' CMOs: the disclosure of exculpatory evidence and discovery.

1. Exculpatory Evidence.—The *Boumediene* Court stressed the importance of allowing Guantanamo detainees the opportunity to present “relevant exculpatory evidence that was not introduced during the earlier proceeding.”⁹¹ And from the Court's perspective, the CSRT review process lacked this feature.⁹² The D.C. District Court has heeded *Boumediene's*

89. See Case Management Order at 2–3, *Hamlily v. Bush*, No. 05-0763 (D.D.C. Dec. 22, 2008) (Bates, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0763-116 (modifying Hogan's amended CMO by adding language in the discovery procedures to require the Government to turn over evidence indicating that the petitioner was interrogated with coercive tactics). Some judges have only recently altered the language and organization of their CMOs. See, e.g., Order at 1–5, *Al-Mithali v. Obama*, No. 05-cv-2186 (D.D.C. Jan. 14, 2010) (Huvelle, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2186-209 (amending her previous CMO to incorporate changes to discovery, exculpatory evidence, and other procedures).

90. The concern for unnecessarily delaying the habeas proceedings was realized as evidenced by the three habeas decisions (affecting seven detainees) Leon issued before the end of 2008. *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).

91. *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008).

92. *Id.* at 2272. Some scholars have observed that the D.C. Circuit in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *reh'g denied*, 503 F.3d 137, *reh'g en banc denied*, 514 F.3d 1291 (2008), *cert. granted, judgment vacated*, 128 S. Ct. 2960 (2008) (vacated for further consideration in light of *Boumediene*), expansively interpreted the MCA to bestow upon the circuit court a fact-finding

directive by making the disclosure of exculpatory evidence a central component in the habeas prehearing procedures. The judges have disagreed, however, about which standard for disclosure should apply.

Judge Leon's CMO was released over two months before that of any other judge. Aiming to move efficiently and effectively through the habeas cases assigned to his docket, Judge Leon abstained from the consolidation process and immediately began holding hearings to determine the parties' statuses.⁹³ Moreover, in contrast to his robed colleagues, he has not made any substantive changes to the procedures laid out in his first CMO.⁹⁴

Section I(E) of Judge Leon's CMO from August 27, 2008, requires the Government to disclose the following exculpatory evidence on an ongoing basis: "any evidence contained in the material reviewed in developing the return for the petitioner, and in preparation for the hearing for the petitioner, that tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention."⁹⁵

The corollary to this procedural safeguard in the normal criminal law framework is commonly referred to as the "*Brady* rule," which imposes a duty on the prosecution to disclose information to the criminal defendant that is "material either to guilt or to punishment."⁹⁶ Judge Leon's version of the exculpatory-evidence disclosure requirement is notable for its limitations on the scope of the Government's burden. The Government is required to turn over evidence it finds only while creating the factual return or while preparing for the habeas hearing *for the individual petitioner*.⁹⁷ So if the Government's attorneys, while working on a petitioner's return or hearing, find exculpatory evidence for a different petitioner, they are free to keep it to themselves.

Judge Hogan's original CMO, released on November 6, 2008, constructed an exculpatory-evidence procedure that was missing Judge

function. *E.g.*, Chesney, *supra* note 45, at 851–52 ("The D.C. Circuit in *Bismullah v. Gates* recently held, for example, that DTA review would not be limited to the record of information actually presented to the CSRT as the government had urged. Instead, the court would consider all information in the government's possession that in theory should have been assembled for the CSRT, regardless of whether it actually was collected previously.").

93. *E.g.*, *Khalid* Order, *supra* note 78, at 1–2 (scheduling a status conference to discuss common issues among eighteen habeas cases).

94. Compare Case Management Order at 1–4, *Al Shurfa v. Bush*, No. 05-0431 (D.D.C. Nov. 28, 2008) (Leon, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0431-77 (ordering the Government to provide the court with a brief stating, at a minimum, the factual and legal basis for the detention and containing provisions for the presentation and confidentiality of evidence at the habeas hearing), with *Boumediene* CMO, *supra* note 73, at 1–4 (requiring the government to, at a minimum, establish the factual and legal basis for the detention and containing provisions for the presentation and confidentiality of evidence at the habeas hearing).

95. *Boumediene* CMO, *supra* note 73, at 2.

96. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

97. *Boumediene* CMO, *supra* note 73, at 2.

Leon's explicit limitations. Under Judge Hogan's version, the Government is required to disclose "all reasonably available evidence in its possession."⁹⁸ Although one might argue that Judge Hogan's original version impliedly limits the Government's burden in the same manner as Judge Leon's (and evidently, the Government did argue this),⁹⁹ the more logical reading seems to require disclosure of evidence the Government discovers in *any* materials, whatever the subject matter. If interpreted this way, Judge Hogan's original CMO imposed a more significant burden on the Government's attorney. An additional requirement dictated by Judge Hogan's original CMO was that the Government must file a "notice certifying either that it has disclosed the exculpatory evidence or that it does not possess any exculpatory evidence."¹⁰⁰

Even though Judge Hogan's exculpatory-evidence disclosure requirements were more burdensome on the Government than Judge Leon's, some judges felt they still were inadequate. Judge Kessler issued her first CMO a week after Judge Hogan's.¹⁰¹ Judge Kessler announced she was implementing the generic CMO "in large part,"¹⁰² but her textual alterations suggested otherwise. For Judge Kessler, exculpatory evidence included all reasonably available evidence not only in the Government's possession, but also "that the Government can obtain through reasonable diligence."¹⁰³ The inclusion of the latter phrase creates an additional burden on the Government, but the extent of the burden is ambiguous.

Imagine a scenario where the Government is reviewing a CIA memo containing exculpatory evidence about a petitioner, say Petitioner A, while preparing for Petitioner A's habeas hearing. The Government would be required to disclose this information to Petitioner A no matter which of the three judges mentioned above was assigned the case—Judge Leon,¹⁰⁴ Judge Hogan,¹⁰⁵ or Judge Kessler.¹⁰⁶ Now, imagine the same scenario in which the

98. *Guantanamo Bay* CMO, *supra* note 61, at 2–3.

99. *See Guantanamo Bay* Amended Order, *supra* note 87, at 2 (making clear that the phrase "reasonably available evidence" is not constrained to mean evidence found solely while reviewing materials for the petitioner).

100. *Guantanamo Bay* CMO, *supra* note 61, at 3.

101. *Al-Adahi* CMO, *supra* note 85, at 1.

102. *Id.* at 1.

103. *Id.* at 3.

104. Because Judge Leon's version of the *Brady* rule would require the Government to disclose only the exculpatory evidence against the individual petitioner, Judge Leon would require the disclosure of exculpatory evidence found against Petitioner A during her habeas corpus proceeding. *See supra* notes 95–97 and accompanying text.

105. Judge Hogan would require this disclosure because Judge Hogan's version of the *Brady* rule would require the Government to disclose the same evidence as Judge Leon's understanding, and, in addition, any other exculpatory evidence in its possession that was reasonably available. *See supra* notes 98–100 and accompanying text.

106. Judge Kessler would require the Government's disclosure of all exculpatory evidence under Judge Hogan's version of the *Brady* rule and additionally require disclosure of other

attorneys are reviewing the CIA memo. This time, though, they are preparing for Petitioner *B*'s hearing. Under this scenario the attorneys are arguably only obligated to disclose the information to Petitioner *A* under the standards set out by Judge Hogan and Judge Kessler.¹⁰⁷ So where does Judge Kessler's "reasonable diligence" standard come into play? Imagine this time that the Government attorneys are preparing for Petitioner *A*'s hearing, but the CIA memo bears no mention of Petitioner *A*. But then, one of the attorneys gets a call from his supervisor informing him that British intelligence just came across exculpatory evidence regarding Petitioner *A*. The information would not be in the Government's "possession" (if the Government defines "possession" as "actual possession"), so if the Government attorneys were arguing in front of Judge Hogan or Judge Leon, disclosure would not be required.¹⁰⁸ But does asking the British officials for the information constitute "reasonable diligence?" One could make the case that Judge Kessler's standard requires that the information described in all three of the above scenarios be disclosed.

This argument is circumstantially supported by the additional language Judge Kessler inserted into her exculpatory-evidence procedure. Pursuant to her CMO, the Government must, by a particular date, file an additional notice, which "notif[ies] each Petitioner of the existence of any evidence within its actual knowledge but not within its possession or capable of being obtained through reasonable diligence."¹⁰⁹ Thus, if in the last scenario described above, even if the government attorneys were unable to convince the British officials to hand over the information, they still are obligated to tell the Petitioner of the *existence* of the information (not necessarily the details of the information).

Lastly, Judge Kessler explicitly includes within her definition of exculpatory evidence "any evidence of abusive treatment, torture, mental incapacity, or physical incapacity which could affect the credibility and/or reliability of evidence being offered."¹¹⁰ Taken altogether, Judge Kessler's exculpatory-evidence procedure, compared to Judge Hogan's, and especially compared to Judge Leon's, sets a much higher bar in terms of the time,

exculpatory evidence discoverable through reasonable diligence. *See supra* notes 101–03 and accompanying text.

107. *See supra* text accompanying notes 95–103. Because Judge Leon is the only judge of the three who understands the *Brady* rule as not requiring the Government to disclose exculpatory evidence found during the preparation for a hearing of another habeas petitioner, only Judge Leon would not require the Government in this hypothetical to disclose evidence that was exculpatory for Petitioner *A* if it was found during the Government's preparation for Petitioner *B*'s habeas hearing.

108. *See supra* text accompanying notes 95–100. Because Judge Leon's and Judge Hogan's versions of the *Brady* rule would require only the exculpatory evidence in the possession of the Government to be disclosed, evidence in the possession of the British government of which the U.S. Government was aware would not be in the possession of the U.S. Government and thus not subject to mandatory disclosure.

109. *Al-Adahi* CMO, *supra* note 85, at 1.

110. *Id.*

resources, and materials the Government is expected to contribute to the habeas proceedings.

Perhaps Judge Kessler was indirectly making the point that CMOs with greater specificity yield better results. If so, Judge Hogan was listening. Seven days after Judge Kessler's CMO, Judge Hogan stayed all habeas due dates and went to work revising his CMO.¹¹¹ In Judge Hogan's amended CMO, released on December 16, 2008, he clarified his original definition of "exculpatory evidence" but did not incorporate Judge Kessler's more stringent standard.¹¹² The revised language defines "reasonably available evidence" as "evidence contained in any information reviewed by attorneys preparing factual returns for all detainees; it is not limited to evidence discovered by the attorneys preparing the factual return for the petitioner."¹¹³ By including this language Judge Hogan officially distinguished his procedure from Judge Leon's¹¹⁴ and precluded the Government from arguing that as a practical matter both standards were the same.

Just days after Judge Hogan's revised CMO was released, Judge Huvelle released her first CMO, which both expanded and narrowed Hogan's new exculpatory-evidence standard. Huvelle expanded the standard by requiring the disclosure of reasonably available evidence not just in the Government's possession but also "within its actual knowledge."¹¹⁵ This standard almost certainly imposes a more substantial burden on the Government than the "reasonable diligence" standard devised by Judge Kessler.¹¹⁶ Recall the situation above where the Government's attorneys are aware of exculpatory information possessed by British officials. Judge Huvelle's version of the standard makes any discussion about the viability of obtaining the information from the British officials irrelevant: if the Government attorneys know about it, then the petitioner has a right to know as well.

Like Judge Kessler, Judge Huvelle more specifically defines "reasonably available evidence" but provides even more detail:

[A]ny evidence or information that undercuts the reliability and/or credibility of the government's evidence (*i.e.*, such as evidence that

111. See *Guantanamo Bay Order*, *supra* note 86, at 1–2 (staying all due dates for habeas cases under his control pending resolution of the Motion for Clarification and Reconsideration of the CMO from November 6, 2008).

112. *Guantanamo Bay Amended Order*, *supra* note 87, at 2.

113. *Id.*

114. See *supra* text accompanying note 95.

115. Order at 2, *Abdessalam v. Bush*, No. 06-cv-1761 (D.D.C. Dec. 19, 2008) (Huvelle, J.) [hereinafter *Abdessalam Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008mc0442-1365.

116. Compare *id.* (requiring the Government to disclose "all reasonably available evidence in its possession or any evidence within its actual knowledge that tends to materially undermine the evidence that the government intends to rely on"), with *Al-Adahi CMO*, *supra* note 85, at 1 (requiring disclosure of all evidence in the Government's possession that is reasonably available and all evidence "that the Government can obtain through reasonable diligence").

casts doubt on a speaker's credibility, evidence that undermines the reliability of a witness's identification of the petitioner, or evidence that indicates a statement is unreliable because it is the product of abuse, torture, or mental or physical incapacity).¹¹⁷

Judge Huvelle's—like Judge Kessler's—concern for evidence tainted by possible coercion or torture is clearly indicated in her disclosure requirement.

Despite the broad nature of Judge Huvelle's original exculpatory-evidence procedure, it narrows, perhaps inadvertently, Judge Hogan's amended standard in one small but crucial way. Judge Huvelle left unclear whether the reasonably available evidence standard applied to information the Government came across for *all detainees*, or only the particular detainee.¹¹⁸ Judge Huvelle's standard at first allowed the Government to make its own interpretation of the scope of application.¹¹⁹ This debate has been made moot, however, by Judge Huvelle's order of January 9, 2009, which officially expanded the definition to include evidence the Government is reviewing for all other detainees.¹²⁰

Looking at the CMOs chronologically, from Judge Leon's August 2008 CMO to Judge Huvelle's December 2008 CMO, the exculpatory-evidence standards have gradually become more burdensome for the Government. This is problematic for those who ascribe to the view that similarly situated petitioners should be subject to the same procedural standards.¹²¹ This trend may be partially attributed to the system the district court devised for establishing the CMOs in the first place. Judges like Kessler and Huvelle were able to wait and see what Judge Hogan produced, and then, if dissatisfied (which they apparently were), they could craft their own standard. It is this consecutiveness that lends the procedure-formulating process to the dialogic framework. The judges' CMOs and amended CMOs constitute an intrabranched conversation regarding which standard for exculpatory evidence is most appropriate.

2. *Discovery*.—As the U.S. Supreme Court has observed, discovery in ordinary habeas proceedings is not a privilege petitioners enjoy “as a matter

117. *Abdessalam Order*, *supra* note 115, at 2.

118. *See id.* (“The government shall disclose . . . all reasonably available evidence in its possession or any evidence within its actual knowledge that tends to materially undermine the evidence that the government intends to rely on in its case-in-chief.”).

119. *See id.* (omitting direction as to whether or not the Government must provide evidence relating to all detainees or only the specific detainee).

120. Order at 1, *Al-Mithali v. Bush*, No. 05-cv-2186 (D.D.C. Jan. 9, 2009) (Huvelle, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2186-138.

121. *See Teague v. Lane*, 489 U.S. 288, 290 (1989) (“A new rule will not be announced in a given case unless it would be applied retroactively to the defendant in that case and to all others similarly situated. This . . . avoids the inequity resulting from an uneven application of new rules to similarly situated defendants.”).

of course.”¹²² Instead, the determination of whether a petitioner is entitled to invoke discovery for good cause shown is left to the discretion of the court.¹²³ Though all the judges on the D.C. district bench agree that Guantanamo petitioners should be allowed an opportunity for discovery in some circumstances, they are sharply divided over the type of discovery the petitioners should be offered.

Continuing the relatively conservative approach he displayed with his exculpatory-evidence procedures, Judge Leon provides Guantanamo petitioners limited discovery opportunities “for good cause shown” and refrains from placing excessive compliance burdens on the Government.¹²⁴ In order to obtain discovery at all, however, a petitioner must first submit to the court, in writing, the specific reasons for the request.¹²⁵ Furthermore, petitioners’ requests must comply with the following rules:

Any request for discovery must: (1) be narrowly tailored; (2) specify why the request is likely to produce evidence both relevant and material to the petitioner’s case; (3) specify the nature of the request . . . ; and (4) explain why the burden on the Government to produce such evidence is neither unfairly disruptive nor unduly burdensome to the Government.¹²⁶

Despite the plethora of CMOs that have been released since Judge Leon’s *Boumediene* CMO, many of which pose alternatives to Leon’s limited conception of habeas discovery, Judge Leon has stood by his original decision and has not made any substantive changes.¹²⁷

A comparison of the discovery procedures from Judge Leon’s and Judge Hogan’s CMOs reveals that the judges possess divergent views on the discovery privileges to which the petitioners are entitled. In Section I(E)(1) of Judge Hogan’s original CMO, the Government is *required* to disclose the following information to the petitioner upon a request from the petitioner:

(1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.¹²⁸

122. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). The D.C. District Court has referenced this observation to support its discovery requirements. *Guantanamo Bay CMO*, *supra* note 61, at 3.

123. *Bracy*, 520 U.S. at 904.

124. *See Boumediene CMO*, *supra* note 73, at 2 (allowing petitioners discovery only after they have submitted detailed requests showing why the information will benefit their case).

125. *Id.*

126. *Id.*

127. *See supra* note 94.

128. *See Guantanamo Bay CMO*, *supra* note 61, at 3 (stipulating that the government “shall disclose” the listed types of information to the petitioner).

As distinguished from the exculpatory-evidence procedures, these discovery measures concern information, whether exculpatory or not, the court has determined should be available for all petitioners.

In light of Supreme Court precedent acknowledging that judges have the capacity to deny habeas petitioners all types of discovery,¹²⁹ it is in some ways remarkable that Judge Hogan (and other judges)¹³⁰ promulgated procedures that incorporate a form of “automatic” discovery. Or maybe automatic discovery is not just appropriate but necessary if the petitioners are to have, as Justice O’Connor stated in *Hamdi*, a “fair opportunity to rebut the Government’s factual assertions.”¹³¹ Evidence may be lacking if the petitioners were captured on a battlefield in a foreign country, and petitioners may have limited access to witnesses and evidence. Consequently, the most probable explanation behind Judge Hogan’s decision to incorporate an automatic discovery requirement is that the unmistakable burden it places on the Government is outweighed by the interest of conducting a fair proceeding according to *Boumediene*’s instructions.¹³²

Under Judge Hogan’s original CMO, however, petitioners are allowed discovery opportunities that even stretch beyond those provided automatically. In Section I.E.2, he stipulates that the judge, “for good cause,” may “permit the petitioner to obtain limited discovery” beyond that described in the automatic-discovery provision.¹³³ Qualifying for this additional discovery is dependent on the discretion of the judge, and like Judge Leon’s blanket discovery procedure, a petitioner seeking this discovery must submit a discovery request that complies with various specifications.¹³⁴ These specifications largely resemble those from Judge Leon’s CMO, with a few minor changes. Instead of requiring the petitioner to explain why the requested information is likely to produce evidence “both relevant and material to the petitioner’s case,”¹³⁵ Judge Hogan requires an explanation of why the information is likely to produce evidence “that demonstrates that the petitioner’s detention is unlawful.”¹³⁶ It is difficult to say which standard is tougher on the petitioner—demonstrating unlawful detention seems to require evidence that is both relevant and material—but it nevertheless reveals Judge Hogan’s affirmative decision to change Judge Leon’s wording.

129. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

130. See *infra* notes 140–41 and accompanying text.

131. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

132. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (“The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty. . . . The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”).

133. *Guantanamo Bay CMO*, *supra* note 61, at 3.

134. *Id.* at 3–4.

135. *Boumediene CMO*, *supra* note 73, at 2.

136. *Guantanamo Bay CMO*, *supra* note 61, at 3.

It could be argued Judge Hogan's difference in language is inconsequential and that any change in meaning is inadvertent. But this assertion can be refuted for two reasons. First, by structuring his discovery procedures into a two-tiered, more pro-petitioner approach, Judge Hogan signaled he has thought about and discarded Judge Leon's discovery framework, meaning it is not a stretch to presume that any modification he made to Judge Leon's language is there because he intended it to be there. The second reason is the subtle manner in which his changes shift the tone of the procedure. Viewed in isolation, Judge Hogan's wording may not attract much attention. But take, for instance, his fourth rule governing a petitioner's request for additional discovery: "Discovery requests shall . . . (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government."¹³⁷ Rule number four's direct counterpart in Judge Leon's CMO requires that the request "explain why the burden on the Government to produce such evidence is neither unfairly disruptive nor unduly burdensome to the Government."¹³⁸ Judge Leon emphasizes "burden," making it the subject of the sentence; Judge Hogan replaces "burden" with "the requested discovery" and emphasizes the phrase "will enable the petitioner."¹³⁹ This quiet exchange between the judges is subtle, but significant.

Judge Bates adopted Judge Hogan's discovery language into his CMO on the same day Judge Hogan's original CMO was released,¹⁴⁰ and Judge Roberts followed suit thirteen days later.¹⁴¹ Finding fewer disagreements with the generic discovery rules than with the exculpatory-evidence procedure, Judge Kessler implemented Judge Hogan's rules, adding only the phrase "whether coercive or not" in the automatic-discovery provision requiring the Government to disclose information about the circumstances surrounding any statements the petitioner made or adopted that relate to anything in his factual return.¹⁴²

In his revised CMO on December 16, 2008, Judge Hogan kept most discovery provisions the same, but in a marked effort to reduce the

137. *Id.*

138. *Boumediene* CMO, *supra* note 73, at 2.

139. *Guantanamo Bay* CMO, *supra* note 61, at 3; *Boumediene* CMO, *supra* note 73, at 2.

140. *Hamlily* Order, *supra* note 84, at 2.

141. *Abdullah* Order, *supra* note 84, at 1. Roberts did slightly modify the Section I.E.2 by using the explicit phrase "additional discovery." *Id.*

142. See *Al-Adahi* CMO, *supra* note 85, at 1, 3-7 ("If requested by a Petitioner, the Government shall disclose to him: (1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the Petitioner that relate to the information contained in the factual return; and (3) information about the circumstances—whether coercive or not—in which such statements of that Petitioner were made or adopted.").

Government's automatic-discovery burden,¹⁴³ he reworded the first two requirements. The first was changed from "any documents or objects in its possession that are referenced in the factual return"¹⁴⁴ to "any documents and objects in the government's possession that the government relies on to justify detention."¹⁴⁵ Similarly, the second category of items was scaled back to require disclosure of "all statements . . . made . . . by the petitioner that the government relies on to justify detention."¹⁴⁶ After reviewing the Government's contention that the initial phrase was too burdensome, Judge Hogan decided to scale back the language of his CMO—and by consequence, other judges' CMOs—to place less of an obligation on the Government.¹⁴⁷

After Judge Hogan's revised CMO was released, Judge Bates reconsidered his earlier wholesale adoption of Judge Hogan's discovery procedure. In addition to the previous requirement that the Government disclose "information about the circumstances" under which a petitioner made statements, under Judge Bates's revised discovery procedure, the Government must also disclose information that includes "but [is] not limited to any evidence of coercive techniques used during any interrogation or any inducements or promises [that] were made."¹⁴⁸ Judge Huvelle, staying true to form, paid more attention to the details, evidenced by her automatic-discovery disclosure requirements for statements the Government planned to use in its case-in-chief:

[T]he Government . . . shall disclose (1) the identity of the speaker; (2) the content of the statement; (3) the person(s) to whom the statement was made; (4) the date and time the statement was made or adopted; and (5) circumstances under which such statement was made or adopted (including the location where the statement was made).¹⁴⁹

The discovery procedures issued by the D.C. District Court have mimicked the trend of the exculpatory-evidence procedures in that they have grown increasingly more demanding in terms of the information they expect the Government to produce. For reasons stated above, this increasing

143. See Order at 2, *Zaid v. Obama*, No. 05-1646 (D.D.C. Feb. 9, 2009) (Bates, J.) [hereinafter *Zaid Order*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1646-146 ("To be sure, [Hogan's] amended order reduced [the Government's] automatic discovery burden under section I.E.1(2)—but not as much as respondents claim.").

144. *Guantanamo Bay CMO*, *supra* note 61, at 3.

145. *Guantanamo Bay Amended Order*, *supra* note 87, at 2; see also *supra* text accompanying note 128 (quoting the requirements from the initial CMO).

146. *Guantanamo Bay Amended Order*, *supra* note 87, at 2; see also *supra* text accompanying note 128 (quoting the requirements from the initial CMO).

147. See *Zaid Order*, *supra* note 143, at 2 (acknowledging the slightly scaled-back disclosure requirements in Judge Hogan's revised CMO).

148. Case Management Order at 2, *Zaid v. Bush*, No. 05-1646 (D.D.C. Dec. 22, 2008) (Bates, J.) [hereinafter *Zaid CMO*], available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1646-96.

149. *Abdessalam Order*, *supra* note 115, at 2.

demand may be a natural consequence of the system to which the judges initially subscribed.¹⁵⁰ This variance, though, carries potentially damaging systemic consequences.

IV. The Judges Are Talking, But Should They Be Leading the Conversation?

Contrasting Leon's steady, conservative CMO with Huvelle's evolving, pro-petitioner CMO demonstrates the amount of discretion available to district judges. The malleable nature of district court jurisprudence, especially when precedent is lacking or vague, may be criticized for its tendency to create uncertainty.¹⁵¹ The D.C. District Court, however, has not stepped outside the bounds of its authority. After all, the *Boumediene* Court offered only broad generalizations for what it envisioned the habeas procedures would look like.¹⁵² But discretionary determinations are arguably more susceptible to the influence of personal predilections.¹⁵³ And systemically, we might be especially concerned about such a high level of discretion when important national-security issues are at stake.

One must keep in mind, though, that the Judiciary's leadership role in crafting habeas procedures is not without limit; it could be checked quite easily by congressional action. Since *Boumediene*, Congress has conspicuously abstained. And the more variant the Judiciary's procedural experimentation, the more noticeable the Legislature's absence from this process. Shifting the habeas-procedure dialogue from an intrabranch to an interbranch discussion—with Congress at the head of the table—would ensure an institutionally balanced and uniform formulation of the procedures governing Guantanamo detainees' legal efforts.¹⁵⁴

One could argue that the current intrabranch dialogue—fickle as it may be—is an appropriate approach to the shaping of habeas procedures. This may be true for three reasons. First, the judges are skilled in procedural matters. As overseers of the pretrial and trial process for all types of

150. See *supra* subpart III(A).

151. See, e.g., Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 328 (2007) (opining that appellate court standards, as opposed to rules, “offer little guidance as to expected behavior, thus generating some costs associated with uncertainty”).

152. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (declaring that habeas courts must have the “means to correct errors”); *id.* (asserting that the district court must have the authority to admit and consider “relevant exculpatory evidence that was not introduced during the earlier proceeding”); *id.* at 2275 (cautioning that the Judiciary should have sensible rules for staying habeas proceedings for domestic exigencies).

153. See Jacobi & Tiller, *supra* note 151, at 328 (“[I]ncreased discretion . . . makes standards more easily susceptible to value judgments and fact shading by lower courts and thus also may produce policy errors when the lower court has policy preferences different from the higher court.”).

154. See Cynthia J. Bowling & Margaret R. Ferguson, *Divided Government, Interest Representation, and Policy Differences: Competing Explanations of Gridlock in the Fifty States*, 63 J. POL. 182, 183 (2001) (noting that overcoming interbranch rivalry can theoretically create a more cooperative and effective government).

litigants, the D.C. judges possess unique knowledge of the discovery rules and the rules of evidence, not to mention the federal rules of civil and criminal procedure.¹⁵⁵ In some ways their experience in this area seems to make them the natural choice to be the creators of the habeas procedures, especially since two of the biggest procedures at issue post-*Boumediene* are the disclosure of exculpatory evidence and the rules governing discovery.

A second reason the D.C. District Court's procedure-shaping authority might actually help advance the broader dialogue lies in the very manner in which the procedures have unfolded. The judge-by-judge process, a process the court has ensured contains maximum transparency, has revealed a diverse set of procedural options. The fact that the judges have diverged, and in some instances diverged considerably, at least shows the judges are shaping these procedures with their eyes open. These procedures were crafted neither simultaneously nor independently. A review of the CMOs issued by the D.C. District Court in the last nine months shows us that most judges' procedures were crafted only after scrutinizing the initial procedures set out in Hogan's general CMO of November 2008.¹⁵⁶ In essence, the judges are communicating their military-detention policy preferences for the Guantanamo habeas proceedings through their original and revised CMOs.

Last, the D.C. judges are not talking entirely amongst themselves. In some respects, the mini-dialogue at the ground level has been a mutual conversation between the Judiciary and the Executive. Each proceeding has commenced with an invitation by the court for each party to submit briefs arguing for the appropriate standards and rules to govern the process.¹⁵⁷ Only those in chambers know whether and to what extent the judges incorporated these views into their CMOs, but the opportunity for external input is present. Government attorneys, as respondents, have served as the Executive's voice on the procedure-developing process. But this voice inevitably plays a subordinate role and can quickly be muffled by the court, a

155. See *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 60 (1969) (statement of L. Ray Patterson, Professor of Law) (asserting that the Judiciary is especially qualified in making rules of procedure, principally because they are constantly monitoring how well rules of procedure are working).

156. The judges were free to make these adjustments, as Judge Hogan himself noted in his original CMO. *Guantanamo Bay CMO*, *supra* note 61, at 2 n.1.

157. See, e.g., Order at 2–4, *Batarfi v. Bush*, Civ. No. 05-0409 (D.D.C. July 31, 2008) (Sullivan, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0409-92 (asking the parties to address various procedural issues, including evidentiary standards, burdens of proof, and the overall structure of the habeas proceeding); Briefing and Scheduling Order at 3–4, *Boumediene v. Bush*, No. 04-1166 (D.D.C. July 30, 2008) (Leon, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0573-65 (obligating the parties to file briefs addressing relevant standards of proof, discovery, evidentiary concerns, and other procedural matters); Scheduling Order at 3, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. July 11, 2008) (Hogan, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-348 (requiring the parties to file briefs concerning the scope of discovery, evidentiary standards, burdens of proof, and other procedural matters).

point emphatically reinforced by several judges openly chastising, and even forcibly withdrawing, government attorneys who have not complied with the court's CMO.¹⁵⁸

These potential benefits, when weighed against alternatives, do not ultimately justify a judicially dominated procedure-shaping system. Although the Judiciary's authoritative role in legal proceedings is an important one, and should not be unnecessarily hampered, it is problematic that since *Boumediene*, the most poignant government voice regarding the structure of the Guantanamo habeas proceedings has come from the federal district bench and not from our nation's law-making authority. To be clear, it's not as if the Judiciary has spoken *more loudly* vis-à-vis Congress on detention procedures and policy; it's that Congress has been virtually silent.¹⁵⁹ Perhaps, one could say, this arrangement passes muster at least in the sense it has happened before: the Judiciary has not shied away from intervening in Guantanamo issues (e.g., *Hamdi*, *Rasul*, and *Hamdan*), and Congress's initiatives in the aftermath of these opinions were arguably more a result of deference to the Executive than independent will.

But *Boumediene*'s call for the D.C. District Court to take the reins of the habeas petitions constitutes a qualitatively different type of judicial intervention. In addition to merely having jurisdiction over habeas proceedings, the district court has the task of generating the procedural standards that govern these proceedings. The judges in this context are functioning not just in their normal capacity as fact finders but also as policy makers. The significance of this type of decision-making process lies not only in the fact that the judges are applying facts to procedures they have themselves generated; which set of procedural standards a given petitioner is afforded depends on the judge to whom the petitioner is assigned. Moreover, as we have seen, the available array of procedures is quite heterogeneous.

Putting Congress in charge of this dialogue would not necessarily provide a more workable system for Guantanamo habeas petitioners. The institutional deficiencies of the Legislature indeed create concerns of their own. But congressional leadership in the form of targeted legislation would help create a more systemically balanced process. A balanced option like this is becoming increasingly attractive as the tragic attacks of 9/11 become

158. See, e.g., Order Denying Respondents' Motion for Reconsideration at 12, *Al Odah v. U.S.*, No. 02-828 (D.D.C. Apr. 6, 2009) (Kollar-Kotelly, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-529 (ordering an attorney to withdraw from the case for repeatedly evading the court's orders); Order to Show Cause at 1-3, *Batarfi v. Bush*, No. 05-0409 (D.D.C. Mar. 13, 2009) (Sullivan, J.), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0409-170 (expressing Judge Sullivan's frustration with the Government's noncompliance with the court's exculpatory-evidence procedures and ordering the Government to explain why it should not be held in contempt).

159. WITTES, *supra* note 26, at 144.

more distant and the complex legal dilemmas surrounding anti-terrorism efforts become more prominent.¹⁶⁰

First, congressionally created habeas procedures would instill uniformity while still allowing judges flexibility in adjudicating specific petitioners' claims. As it stands, some detainees may have a greater chance of gaining a favorable judgment on the merits if the judge's exculpatory-evidence procedures require more exertion on the part of the Government. Petitioners might prefer Judge Huvelle or Judge Kessler—rather than Judge Bates¹⁶¹—to adjudicate their petitions, since Huvelle's¹⁶² and Kessler's¹⁶³ discovery and exculpatory-evidence disclosure standards are, at least on the surface, relatively more favorable to petitioners. But perhaps the differences are merely formal, not substantive, and the Government's response to habeas petitions is already uniform.¹⁶⁴ Even assuming this is true, having formally varied standards within the D.C. District Court is still problematic. Such a system breeds uncertainty and skepticism. It personifies a court in disagreement about the way in which suspected terrorists are treated in our legal system, a disagreement in need of resolution.

Second, because of the practical reality of the congressional lawmaking process, a shift from judge-made to statutory habeas procedures would give the Executive an opportunity to play a more influential role in the process. The Government's interest in shielding certain information in the interests of national security is a legitimate concern that must be a critical factor in the design of concrete habeas procedures.¹⁶⁵ Although the D.C. District Court judges have certainly been cognizant of this concern,¹⁶⁶ the reality is that the Executive can insert itself into the process in a much more meaningful way as a collaborator with Congress than merely as a respondent in a habeas proceeding.

Last, congressionally created habeas procedures would serve as a catalyst for the development of a more stable and consistent legal framework

160. See *id.* at 146 (“[I]t is, in fact, a system that we’re building. Its parts are interconnected and affect one another. Legislators cannot ignore the often perverse incentive structures legal rules create between and among these parts.”).

161. See *supra* notes 140, 148 and accompanying text.

162. See *supra* notes 115–17, 142 and accompanying text.

163. See *supra* notes 102–03, 142 and accompanying text.

164. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (describing the constitutional, functional, and practical arguments the government typically sets forth in detention proceedings).

165. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2296 (2008) (Scalia, J., dissenting) (“Henceforth, as today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”). But see Falkoff, *supra* note 74, at 1021 (“The mere fact that all evidence in cases of this nature necessarily touches on issues of national security should not be an adequate justification [for keeping the evidence from the petitioners].”).

166. See, e.g., *Zaid CMO*, *supra* note 148, at 3 (requiring that petitioner’s counsel be cleared to access classified information before requiring that the Government release such information to the lawyer).

for the United States' broader antiterrorism efforts. Back-and-forth jabs between the Supreme Court, Congress, and the President, the type of dialogue we have witnessed since 2004, has its advantages but is not conducive to establishing durable long-term policies. And if the United States wants to take a step toward solidifying some of the legal areas currently draped in ambiguity, the development of clear habeas procedures for Guantanamo detainees would be a feasible start to such an undertaking.

The district court's adjudicatory process, if this were to happen, would not be torn asunder. In fact, statutory procedures would enable the district court to dispose of habeas cases more efficiently, reducing the amount of resources judges expend on crafting and tweaking their CMO procedures. Certainty could also come in the form of an appellate decision, but while this would help clarify the current heterogeneous guidelines, the systemic benefits described above would not come to fruition and the Judiciary-dominated system would still be in place. Congressional leadership on this issue, or at least a system in which Congress and the Judiciary work in tandem,¹⁶⁷ offers a more balanced system for adjudicating habeas claims.

V. Conclusion

In the post-9/11 setting, the Judiciary is no stranger to the military-detention policy dialogue. The Supreme Court has stated that its involvement in this conversation strengthens, not weakens, the United States' ability to counteract terrorism because it ensures that our actions are within the bounds of the law.¹⁶⁸ In the past five years Americans have watched the three branches jockey for position for the final word on the scope of the Executive's authority for detaining terrorist suspects: *Hamdi* and *Rasul*;¹⁶⁹ the creation of the CSRT process;¹⁷⁰ the passage of the DTA;¹⁷¹ *Hamdan*'s response to the DTA;¹⁷² Congress's response to *Hamdan* via the MCA;¹⁷³ and now, *Boumediene*.¹⁷⁴

The *Boumediene* Court proclaimed that in the United States, liberty and security are reconciled "within the framework of the law," and that "[t]he Framers decided that habeas corpus, a right of first importance, must be a

167. The process by which Congress promulgates these statutory habeas procedures could resemble the current system for other federal rules, such as the Federal Rules of Civil Procedure. This sort of arrangement comprises judicial committees that construct rules and then make recommendations to Congress. Administrative Office of the U.S. Courts, Federal Rulemaking: The Rulemaking Process, <http://www.uscourts.gov/rules/newrules3.html>.

168. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

169. See *supra* text accompanying notes 12–19.

170. See *supra* text accompanying notes 20–25.

171. See *supra* text accompanying notes 26–30.

172. See *supra* text accompanying notes 31–37.

173. See *supra* text accompanying notes 38–41.

174. See *supra* text accompanying notes 42–50.

part of that framework, a part of that law.”¹⁷⁵ We can be less certain of the framers’ thoughts on whether the district court is the governmental entity best suited to develop the parameters of this framework. Nevertheless, following *Boumediene*, the D.C. District Court has relentlessly assumed this responsibility, and in doing so has demonstrated that the ground-level communication inside the district court can meaningfully impact the broader interbranch dialogue. It is time now for this dialogue to include the Legislative Branch. The Judiciary has made it clear that Guantanamo Bay detainees have a right to the benefits of U.S. law through habeas corpus; Congress must now help determine how that law is developed.

—*Colin C. Pogge*

175. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).