

Imprisonment without Trial

Owen Fiss

The Constitution is a broad charter of governance. It establishes the national institutions of government and places limits on their exercise of power. For the most part, the Constitution speaks in broad generalities and over the last several hundred years, many principles have been developed to give specific content to these generalities.

Some of these principles, like the one requiring separation of powers, are inferred from the general structure of the Constitution. Others, like antidiscrimination or its alternative, the antissubordination principle, are rooted in some specific provision such as the Equal Protection Clause, and are meant to give further content to those provisions. Both types of principles are supposed to guide government officials in the discharge of their duties and if need be, are to be enforced against these officials by the judiciary. These principles are as much a part of the Constitution as the words on the parchment, though they present themselves to us as an interpretation of those words and can be criticized and, if need be, reformulated in ways that, short of an amendment, the words on the parchment cannot.

One such principle – I refer to it as the principle of freedom – has been violated by the Bush administration and now by the Obama administration in their fight against terrorism. This principle denies the government the power to imprison anyone without charging that individual with a specific crime and swiftly bringing him to trial. This principle is implicit in the provision of the Constitution that limits the power of Congress to suspend the writ of habeas corpus – the means by which the legality of imprisonment can be tested. More importantly, it should be seen as a gloss on the Fifth Amendment of

the Bill of Rights, which denies government the power to deny anyone of “life, liberty, or property without due process of law.”

At its core, the principle of freedom denies the government the power to deprive an individual of his liberty without charging the individual with a specific crime and producing evidence of guilt in open court. It also requires the government to give the accused an opportunity to cross-examine the witnesses who testified against him and to present his own witnesses.

Many of the procedural protections required by the principle of freedom have instrumental value: they are the best means available for arriving at the truth of the matter. They also reflect elemental notions of fairness and are thus one source of the government’s legitimacy. They put the government to the burden of proving its charges in open court and give the accused, who is also protected by a presumption of innocence and the right to trial by jury, a reasonable opportunity to defend himself. The underlying assumption is that a government willing to abide by these limitations is likely to win the respect and admiration of its citizens.

Like many constitutional principles, the principle of freedom has a limited number of exceptions. War is one. The Constitution fully recognizes the authority of the United States to engage in war, and the principle of freedom has been adjusted to accommodate the felt necessities of combat. In the throes of war, the government is allowed to capture enemy soldiers and imprison them without the necessity of a trial for the duration of hostilities. Both Bush and Obama have, in effect, made claim to this exception to the principle of freedom and insisted upon the authority to imprison for

prolonged, indefinite periods of time anyone that they determine has fought for the Taliban or Al Qaeda.

The Taliban and the Third Geneva Convention

The continued detention of persons accused of fighting for the Taliban presents a special set of problems arising from the Third Geneva Convention of 1949. This treaty operates within this sphere of authority allowed by the Constitution and thus should be seen as a secondary constraint on the authority of the government to imprison without trial. Under the Third Geneva Convention, enemy combatants can be held for the duration of a war and are to be repatriated at the conclusion of the hostilities. The convention also (implicitly) provides that enemy combatants cannot be prosecuted simply for fighting, although they can be prosecuted for war crimes. The United States is a signatory of the treaty and is constrained by it whenever the belligerent is also a signatory.

In the fall of 2001, shortly after the terrorist attacks on September 11, the United States launched a war against Afghanistan. At that time, the Taliban, essentially a political organization of religious fanatics, controlled the government of Afghanistan and used its power to support and harbor Al Qaeda. The United States invaded Afghanistan when the government refused to turn over Osama Bin Laden. The Taliban fighters then taken into custody were protected by the Third Geneva Convention simply by virtue of the fact that both the United States and Afghanistan are signatories to the treaty. The fact that the United States had earlier refused diplomatic recognition to the Afghanistan government when it was controlled by the Taliban did not preclude the applicability of the Convention.

At an early stage in this war, President Bush declared that all who fought for the Taliban were “unlawful enemy combatants.” By that he meant that members of the Taliban were not entitled to any of the protections of the Third Geneva Convention. So denied the protection of the treaty, the Taliban fighters could, according to Bush, be prosecuted for fighting or, alternatively, held for prolonged indefinite periods of time, even for life. Moreover, under this doctrine there was no obligation to repatriate them at the conclusion of the war. President Bush did not in any way recognize the principle of freedom as a limitation of his power.

In late 2001, a young American citizen – John Walker Lindh, who admittedly had fought for the Taliban, but denied any connection whatsoever to Al Qaeda – was captured by the United States forces in Afghanistan. Soon thereafter he was prosecuted in federal District Court in Virginia for being part of a conspiracy to kill American soldiers. This prosecution contravened the Third Geneva Convention, since Lindh was being prosecuted simply for fighting, but the District Court denied Lindh’s motion to dismiss and in so doing, lent support to the doctrine propounded by the Bush administration that treated all Taliban fighters as unlawful enemy combatants. After Lindh’s motion to dismiss was denied, Lindh pleaded guilty to one of the charges and was sentenced to 20 years imprisonment in a maximum security facility in Arizona. The plea agreement provided that if, for any reason, the sentence were to be set aside, Lindh would once again be classified as an unlawful enemy combatant and thus could be imprisoned without trial for an indefinite period of time, presumably even for life.

The Third Geneva Convention sets forth four conditions that must be satisfied in order for an irregular militia to be brought within its protection. The fighters

must (1) wear uniforms or some designation; (2) carry their arms openly; (3) be subject to a command structure; and (4) not commit war crimes. The District Court took liberty with the text of the Convention when it used these criteria to determine whether the Afghanistan army, not some irregular militia, was entitled to its protection of the treaty. By its very terms, the Convention applies to “Members of the armed forces of a Party to a conflict.” The District Court can also be faulted for the way it applied some of these criteria. For example, in determining whether the fighters had committed war crimes, the District Court looked to practices that had been used by the Taliban to bring it to power rather than the way it fought the war against the United States. To compound the problem, the District Court rested its judgment on books (one of which happened to be published before 2001), not evidence on the record.

Obama has been careful to avoid using the nomenclature of unlawful enemy combatants but with regard to the Taliban, he appears to be pursuing the same policy as Bush. On May 21, 2009, President Obama announced his strategy for dealing with the prisoners still being held at Guantánamo and, by way of example, listed among those to be held indefinitely without trial a prisoner who “had commanded Taliban troops in battle.” He said that this prisoner was being held for his “past crimes,” but never specified what those crimes were. If the Taliban prisoners being held at Guantánamo had violated the laws of war, for example, by killing civilians, then they should be tried for that crime. However, if their only crime was fighting against American soldiers, as was true of John Walker Lindh and arguably the unnamed individual who had commanded Taliban troops in battle, then under the terms of the Geneva Convention, they should be

turned over to the Afghanistan government, which would then have the responsibility of deciding their fate.

The obligation of repatriation stems from the fact that we are no longer at war with Afghanistan. That war ended by at least 2004, when the Taliban were routed, a new Constitution was adopted for the country, elections held, and a new government installed. In fact, a second round of national elections was held in August of 2009. The United States and a limited number of NATO forces are still operating in Afghanistan, but they are now doing so at the behest of the Afghanistan government, to help with the reconstruction of the nation, to suppress the resurgence of the Taliban, and to pursue Osama Bin Laden and Al Qaeda.

The current Taliban insurgency may tempt Obama's lawyers to recharacterize the military operation in Afghanistan that began in the fall of 2001 as a war against the Taliban, not Afghanistan. Such a recharacterization would be unfortunate. It would postpone indefinitely the obligation of repatriation, suspending it until all insurgencies are suppressed, and thus run counter to the humanitarian purposes underlying the Geneva Convention. In any event, such a recharacterization would be of no avail to the Taliban prisoners subject to the Obama policy, for they did not participate in the insurgency but rather have been imprisoned, for almost a decade, at Guantánamo. They are accused of fighting against United State forces when we invaded the country in the fall of 2001 and according to Obama are being held for their "past crimes."

Al Qaeda and the Principle of Freedom

Al Qaeda cannot possibly claim the protection of the Third Geneva Convention. All of its fighters are unlawful or perhaps more properly, unprivileged, enemy

combatants. This, recall, was the same classification President Bush (and by implication, President Obama) applied to the Taliban. But while Bush's justification for placing the Taliban outside the reach of the Convention rested on a strained interpretation of a provision of the treaty regarding irregular militias, there is a much more straightforward argument for reaching the same conclusion with to Al Qaeda. For the most part, the treaty only constrains the United States when a belligerent is a signatory of the Convention and Al Qaeda is not a signatory, nor could it be. It is a far flung international terrorist organization that operates in secret and does not (yet) lay claim to any national territory. The Convention provides that a signatory may be bound by it in its relationship to a non-signatory, but only if the non-signatory acts in accordance with its requirements—a condition Al Qaeda most assuredly does not satisfy.

Even though Executive action towards Al Qaeda is not constrained by the treaty (and perhaps customary humanitarian law), it does nevertheless remain subject to the Constitution and in particular to the principle of freedom—unless, of course, this action fits with the exception allowed for war. The Bush administration took the position that Al Qaeda was responsible for the 9/11 attacks and for that reason launched a war against Al Qaeda. Since taking office, Obama has been meticulous in avoiding the use of Bush's mantra of the "War on Terror," but he has repeatedly declared, "We are at war with Al Qaeda."

Although the fight against Al Qaeda may be characterized as a war, thereby allowing the United States to target or capture Al Qaeda fighters, it is no ordinary war and the exceptions to the principle of freedom must be adjusted accordingly. In its fight against Al Qaeda, the Bush administration was prepared to treat the entire world as a

battlefield and insisted that the prerogatives of the United States as a belligerent allowed it to seize and maybe even target members of Al Qaeda anywhere they might be found – at O’Hare Airport, the streets of Milan, driving on a road in Yemen, or at a university in Peoria, Illinois. Yet the recognition of such a power would disrupt or endanger the character of civilized life as we know it and would defeat the very values underlying the principle of freedom.

To guard against such a danger, it became necessary to calibrate the concept of the battlefield and to distinguish between active theaters of armed conflict (so called hot battlefields) and other locations where suspected terrorists might be found. Suspects not residing within a theater of war can of course be apprehended outside but only through the ordinary processes of the law, not the kind of action typically undertaken by the military on a battlefield. Such suspects cannot be targeted nor can they be seized or kidnapped by military forces and bundled off to some secret or military detention facility.

Analogous restrictions must be placed on the authority the United States to imprison individuals accused of having Al Qaeda links, even when they were captured on the battlefield and allegedly engaged in armed conflict. In this case, the restrictions must be temporal in nature and reflect the almost unending character of the war against Al Qaeda. Much of our military action is aimed at capturing or killing Osama Bin Laden, but even if that action is successful, it will not bring an end to the war. Al Qaeda has terrorist units throughout the world. Most are capable of acting without Bin Laden. Accordingly, just as it is unthinkable to treat every place on earth where Al Qaeda fighters might be as a battlefield, it would be unthinkable to allow the government to hold Al Qaeda suspects until the war between the United States and Al Qaeda is at an end – a

time that we cannot readily foresee. To allow persons accused of being Al Qaeda soldiers to be imprisoned for the duration of hostilities would constitute such an enormous expansion of the exception to the principle of freedom as to undermine the principle and threaten the values it serves.

The principle of freedom does not prohibit the United States from capturing and holding Al Qaeda suspects for a brief period. Such a detention policy could be justified in terms of the necessities of military conflict. What the principle does prohibit, however, is imprisonment for sustained or prolonged periods without placing them on trial, for such a policy is not required by the exigencies of warfare. The Bush administration was, of course, allowed some leeway when it began its war against Al Qaeda and captured persons it believed were members of Al Qaeda, but it soon became clear that the administration was prepared to incarcerate the suspects far from an active theatre of armed conflict and to do so for a prolonged period of time, maybe forever, without ever placing them on trial. Some of these prisoners were held in naval briggs in South Carolina and Virginia. For the most part, however, they were imprisoned (for reasons that still remain unclear) at Guantánamo Naval Station in Cuba.

The prison in Guantánamo was opened in January 2002 and over the next seven years close to 800 prisoners were incarcerated there at one time or another. Some of these prisoners were accused of fighting for the Taliban, but most were accused of Al Qaeda links. During this period, some were transferred to other prisons and others were released due to either diplomatic pressure or to decisions by military tribunals established by the Department of Defense in July 2004 (as part of the strategy of depriving the Guantánamo prisoners of access to federal courts to advance their claim of freedom through the writ of

habeas corpus). In January 2009, when Obama took office, Guantánamo had 240 prisoners, some of whom had been incarcerated there for as long as seven years.

Upon taking office, President Obama signed an Executive Order requiring that the prison at Guantánamo be closed in one year's time, but it remained unclear what might happen to the prisoners still confined there. Accordingly, on May 21, 2009 he announced a triparte policy – free those who had succeeded in their petitions for habeas corpus, place others on trial either before military commissions or civilian courts, and continue the imprisonment without trial for the group that remained. Months later, the White House announced that there were 50 prisoners in this third category, and that arrangements had been made to transfer them to a prison in Thomsen, Illinois. Admittedly, it will sometimes be difficult to know when a detention might be brief enough to be justified by the necessities of war and thus allowed by the exception to the principle of freedom, but not in this instance.

To Obama's credit, he, unlike Bush and his defenders, appears to be using the power to imprison without trial only reluctantly. When he announced the policy in May 2009, Obama called the prospect of prolong, indefinite incarceration "one of the toughest issues we will face." Yet rather than honor the principle of freedom, Obama continued Bush's policy and declared that some of the Guantánamo prisoners "cannot be prosecuted". He did not explain why trials were not an option. Certainly it cannot be the case that American law is incapable of dealing with Al Qaeda agents or terrorism in general. Bush tried and convicted a number of Al Qaeda terrorists during his tenure, and Obama is poised to do the same, including the alleged mastermind of the 911 attack, Khalid Sheikh Mohammed.

Many have speculated that Obama's refusal to try some of the prisoners stemmed from a concern that the evidence against them was the product of torture, and thus tainted. This kind of evidence has long been inadmissible in federal courts under what is known as the "exclusionary rule," which prohibits the use of evidence that has been acquired in violation of the Constitution or some federal statute. But if this was Obama's reason, he effectively bifurcated the exclusionary rule, creating a regime in which evidence secured through torture cannot be used at trial, but can be used as the basis for incarcerating a suspect, even for the rest of his life.

Such a bifurcated exclusionary rule would create all the wrong incentives. Government interrogators will know that a confession secured through torture may serve as the basis for prolonged incarceration, despite the fact that upon taking office, Obama issued an order banning torture. This rule would also compound the wrong suffered by the Guantánamo prisoners who were tortured and now being held indefinitely without trial: first they were subject to excruciating pain, and now the fruits of that abuse will keep them in prison with no end in sight. The Constitution should not allow any deprivation of liberty to be based on evidence procured through torture, regardless of whether deprivation is the result of a trial or a presidential decision.

Alternatively, the concern animating Obama's and before him Bush's unwillingness to go to trial, may not have been the use of tainted evidence, but rather the disclosure of secret evidence in the course of the prosecution. An example of such evidence might be the identity of undercover agents. The government is, of course, entitled to a measure of secrecy, but that should not and in fact never has justified imprisonment without a trial. In a good number of criminal prosecutions touching on

national security, defendants have sought information that the government deemed top secret. Courts have been more than capable of accommodating these concerns, typically by examining the evidence in private without the accused or his lawyer and evaluating its relevance to the case. If the judge determines that the evidence is important, the government can make it available to the accused, offer a substitute, or drop the case. The remedy has never been to suspend the trial and incarcerate the prisoner indefinitely.

Nor can the policy of imprisonment without trial be justified on the ground of preventing some extraordinary harm, such as the detonation of a radioactive bomb. One Al Qaeda operative – Jose Padilla – who had been taken into custody in 2002 at O’Hare Airport in Chicago as he alighted from a flight that originated in Pakistan, was accused of such a crime. He was “accused” not in the formal sense of the term, but rather in press releases of the Department of Justice. After seven years imprisonment, the government brought finally brought him to trial—but for an entirely different crime. No other Al Qaeda prisoner, not even those at Guantánamo, has been accused of such an extraordinary crime. Even if one were, the burden would remain on the government to prosecute that individual for that crime, even if that carries a risk of acquittal.

In defending his decision to place Khalid Sheikh Mohammed on trial before a civilian court in New York City, Obama’s Attorney General, Eric Holder, sought to minimize the risk of an acquittal and in so doing produced an even more barbarous offense to the principle of freedom. In testifying before a Senate committee, Holder said that even if Mohammed were acquitted at trial, he could be imprisoned indefinitely, even for life, as an enemy combatant. Such a policy would make the trial pointless and defeat the very values the principle of freedom seeks to further. Imprisonment after acquittal

would be far worse than imprisonment without trial. The exceptions to the principle of freedom must be narrowly cabined to protect the values furthered by the principle and in any event, cannot be adjusted on a case-by-case basis to reflect the President's assessment of the gravity of the threat posed if the prisoner is acquitted, or much less allow the President to imprison the accused after he has been acquitted.

Many have criticized President Bush's conduct of his "War on Terror" as an exercise of excessive unilateralism. They have faulted him for acting on his own without seeking the involvement or concurrence of the other branches of government. Fully aware of this line of criticism, President Obama declared in his May 21 address, "in our constitutional system prolonged detention should not be the decision of any one man." He also promised in that address to develop a system that involved "judicial and congressional oversight" of his decision to incarcerate someone as an enemy combatant. However, Obama has since abandoned this endeavor and on September 24, 2009 announced that he would not turn to Congress for establishing the promised oversight system. He appeared unwilling to reckon with the political forces in Congress that have fought his decision to close Guantánamo – maybe like the imprisonment without trial policy itself, he made a judgment of expediency rather than principle.

Others who have defended imprisonment without trial, like David Cole, have proposed an oversight system administered not by Congress but by the judiciary. Such an oversight system would avoid the unilateralism of Bush and perhaps even satisfied the principle of the Constitution requiring separation of powers. It would not, however, satisfied the requirements of the principle of freedom, which is a wholly independent principle and requires not simply oversight by the judiciary, but a trial. The procedures

governing a trial seek to protect the innocent by casting the burden of proof on the government and controlling the discovery and admission of evidence. These procedures can be replicated in an oversight system, but as a practical matter they are likely to be watered down. Otherwise there would be no point to the exercise – avoiding a trial. Moreover, the allocation of power entailed in an oversight system is necessarily – as a theoretical matter – quite different than that in a trial. For one thing, the jury would be supplanted and, in a case tried without a jury, the responsibility of the judiciary would be diluted. In a trial the task of the court is to decide not, as it would under a system of oversight, whether the government has good reason to believe that the suspect has committed a crime, but rather whether in fact the accused is guilty of the crime charged. In a trial the responsibility to determine guilt and thus to deprive an individual of his liberty is not shared with the government, but rests entirely on the shoulders of the judiciary, as indeed due process of law requires.

The Scope of Obama's Policy

In analyzing the policy of imprisonment without trial, I have treated Obama's stance as a continuation of Bush's. There are, however, two differences between the position of Bush and Obama arising from the circumstances under which Obama announced his policy, though it remains to be seen whether these differences are of any significance.

One difference consists of the number of persons affected by the policy. Obama announced his policy in the context of deciding the fate of some of the prisoners being held at Guantánamo. We have been told that there are fifty persons in this group. There are also indications that he will apply this policy to some of the approximately 600

prisons being at Bagram Air Force Base in Afghanistan. Bush had established a prison on the base and then proceeded to use it as a facility to detain Al Qaeda suspects captured throughout the world, not just in Afghanistan. In January 2009, shortly after the inauguration, Obama's lawyers announced in federal court in Washington that they were prepared to continue and defend Bush's policy regarding the Bagram prisoners. Thus, some portion of the Bagram prisoners should be added to the ones at Guantanamo in estimating the scope of the policy. Nevertheless, we should acknowledge that the number of persons to whom it applies is limited and does not have the open-ended quality of Bush's declaration that all Al Qaeda and Taliban fighters would be treated as unlawful enemy combatants, regardless of where they are captured or incarcerated.

The essentially vestigial quality of Obama's policy is underscored by his treatment of the Nigerian citizen, Umar Farouk Abdulmutallab, accused of trying to detonate a bomb on a KLM flight as it was about to land in Detroit on Christmas day 2009. Abdulmutallab was accused of being an operative of Al Qaeda, and trained by the organization in Yemen, but he was immediately brought within the ambit of the criminal process, not treated as an enemy combatant.

This strikes me as a good turn of events, but there is still reason to object to Obama's policy. The offense to the principle of freedom and the rule of law does not turn on the number of persons affected. Moreover, President Obama's policy, even if embraced reluctantly and confined to a limited number of those imprisoned by previous administration, will define what is allowed to the government in the years ahead. It will lend a measure of legitimacy to Bush's action and will have the inevitable effect of normalizing what should be seen as an offense to the Constitution.

Another circumstance limiting the scope of Obama's policy is the fact that all the prisoners at Guantanamo and of course Bagram are foreign nationals; in contrast, President Bush was prepared to treat all Al Qaeda and Taliban fighters including American citizens as unlawful enemy combatants who could be imprisoned indefinitely without trial. This was evident in the case of John Walker Lindh as well as that of Jose Padilla. It was also evident in the case of Ali Saleh Kahlah Al-Marri, a citizen of Qatar who had lawfully been admitted to the United States for educational purposes. Al-Marri was taken into custody while enrolled as a student at Butler University in Peoria, Illinois and on the basis of alleged Al Qaeda links was held as an unlawful enemy combatant in a naval brig in South Carolina for six years. Much like the case of Jose Padilla, the government changed its strategy while a petition for certiorari was pending before the Court, and for the obvious purpose of mooting Supreme Court review of its detention policy, charged Al-Marri with a specific crime, to which he eventually pleaded guilty.

The imprisonment of any American citizen brings into play the Nondetention Act of 1971, which provides that no American citizen can be detained without authorization of Congress. This statute was enacted as a belated repudiation of the program instituted during World War II to relocate from the West Coast all persons (including American citizens) of Japanese ancestry. The statute might be seen as a watered down version of the principle of freedom – watered down because it only requires a grant of authority from Congress, not a trial, and seeks to protect the authority of Congress rather than personal liberty.

The force of the statute was further reduced in 2004 in the case of an American citizen (Yasser Hamdi) who had been captured in Afghanistan and accused of fighting for

the Taliban (he denied that charge, and insisted that he was in the country engaged in relief work.) In an opinion by Justice Sandra Day O'Connor, four Justices ruled that the statutory authorization required by the 1971 Act could be found in the statute passed immediately after 9/11 that authorized the use of force to respond to that terrorist attack and that functioned as the declaration of war against Afghanistan. As an alternative ground of decision, O'Connor and her colleagues also ruled that the 1971 Act did not protect American citizens who had been captured in an active theater of war.

In truth, the primary protection for the personal liberty of American citizens is the principle of freedom, not the Nondetention Act, and this constitutional principle is not confined to the protection of American citizens. It applies to citizens and non-citizens alike. The primary textual source of the principle is the Due Process Clause, which by its very term protects the liberty of "any person" and should be seen as limiting the authority of United States officials wherever they act and against whomever they act. The Due Process Clause and perhaps the Bill of Rights in general should not be read as a testamentary document distributing property or benefits (individual rights) to privileged classes of persons (American citizens), but rather as promulgating general norms defining the authority of American officials. Foreign nationals may not be part of the political community – "We the People" – that endows the constitution with democratic legitimacy, but the members of that political community may define the standards of conduct that they expect of their officials wherever these officers act and against whomever they act. Accordingly, even if Obama's policy of imprisonment without trial were confined – and only time will tell whether it is – to persons who are not American citizens or those not lawfully admitted to the United States, much like the foreign nationals still incarcerated

in Guantánamo or Bagram, it would violate the Constitution and be as much a breach as the rule of law as Bush's.

Unfortunately, the law regarding the applicability of the Bill of Rights to non-citizens is not as clear it should be, especially in the post-Warren Court era. In 1990, Chief Justice Rehnquist wrote an opinion in the well known case of *United States v. Verdugo-Uquidez* limiting the reach of the Bill of Rights. He wrote in the context of yet another war – the War on Drugs – and declared that the Fourth Amendment and its protection against unreasonable searches and seizures did not in any way constrain United States officials implicated in the search of the Mexican residence of a Mexican citizen (who had been forcibly taken to the United States to stand trial). Rehnquist denominated his opinion “the opinion of the Court,” yet there is reason to doubt that characterization. The fifth vote that he needed came from Anthony Kennedy, then a relatively new appointee, who said that he joined the Chief Justice's opinion, but actually espoused a much more universal conception of the Constitution and Bill of Rights. According to Kennedy, although the Fourth Amendment did not apply abroad in the same way as it applied to residences in the United States, it still imposed an obligation on American officials wherever they acted—they must always act in a way that comported with the tenets of fundamental fairness. In the end, Kennedy deemed the search reasonable under the circumstances and on the basis of that assessment refused, as did Rehnquist, to suppress the results of the search.

Kennedy advanced this same universalistic view of the Constitution in 2004 in the very first case before the Court that involved Guantánamo prisoners. The issue in that case – *Rasul vs. Bush* – was whether federal habeas corpus was available to the

Guantánamo prisoners. Justice Stevens, writing for majority, strained to avoid any constitutional pronouncements and treated this issue as purely one of statutory interpretation. He ruled that by the very terms of the federal statute, the writ was available to the prisoners. Justice Kennedy once again wrote a separate opinion in which he advanced his more flexible but nonetheless global understanding of the reach of the Constitution. He was mindful of the need of the judiciary to accommodate the exigencies of a military conflict, but saw that need to have been greatly attenuated in the case of the Guantánamo prisoners so removed in time and geography from an active theatre of armed conflict. As he then wrote, almost six years ago: “Perhaps, when detainees are taking from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies, becomes weaker.”

In the Detainee Treatment Act of 2005, Congress responded to Justice Stevens’s opinion in *Rasul* – after all it was the opinion of the Court – and amended the applicable federal statute to deny the Guantánamo prisoners access to federal habeas corpus. In a 2006 decision involving the use of military commissions to try some of the Guantánamo prisoners, the Supreme Court held that the bar on habeas of the 2005 Act was not applicable to cases that had been pending at the time of enactment. This “shortcoming” of the 2005 Act was soon remedied in the Military Commissions Act of 2006. In the 2008 case *Boumediene vs. Bush*, the Supreme Court held unconstitutional the bar on the writ of habeas corpus for the Guantánamo prisoners that had been renewed and extended by the 2006 Act.

Not surprisingly, the Boumediene opinion was written by Justice Kennedy and reflected the views expressed in his concurrences in *Rasul* and before that in *Verdugo-Uquidez*. He ruled that the 2006 Act constituted an unconstitutional suspension of the writ of habeas corpus. In so ruling, he implied that the Guantánamo prisoners possessed some substantive constitutional rights, for, as the lower court reasoned, without such rights there would be no point in having the habeas writ available. While Kennedy did not specify what those rights might be, they presumably include fundamental rights, such as the right to personal liberty. The principle of freedom gives specific content to that right and has long represented – at least until Bush launched his War on Terror and Obama continued it in his own way – one of the nation’s greatest and proudest achievements.