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Military Jurisdiction, the Right Not to be Tried, and the Suspension Clause After *Boumediene*

by Stephen I. Vladeck*

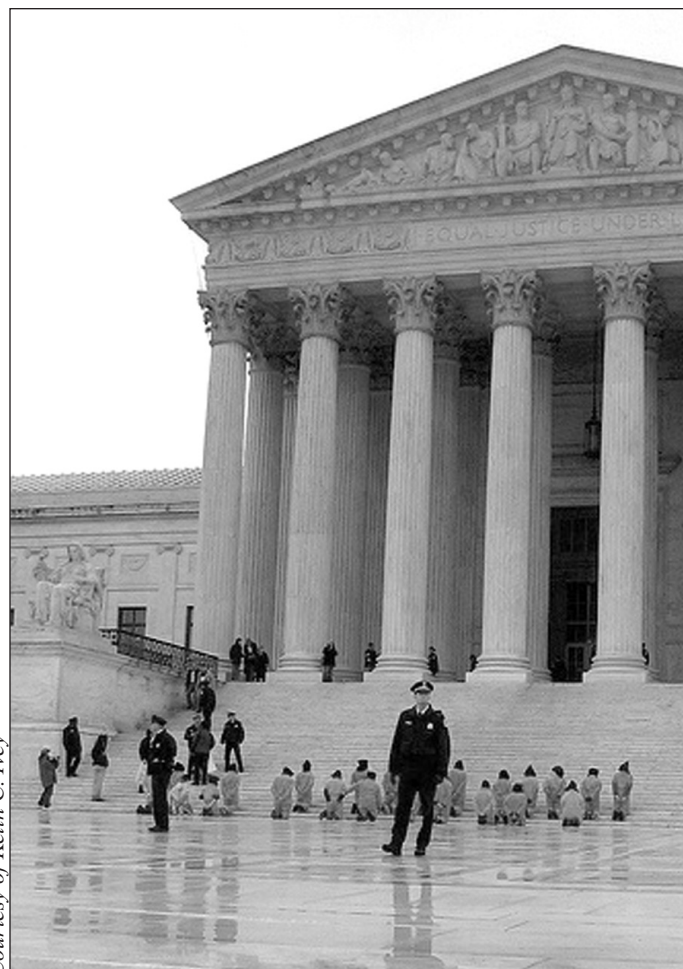
I. INTRODUCTION

IN ITS LANDMARK DECISION HOLDING THAT NON-CITIZENS DETAINED AS “ENEMY COMBATANTS” AT GUANTÁNAMO BAY HAVE A CONSTITUTIONAL RIGHT TO PETITION THE FEDERAL COURTS FOR A WRIT OF HABEAS CORPUS CHALLENGING THEIR DETENTION, the Supreme Court in *Boumediene v. Bush*¹ expressly invalidated parts of section 7 of the Military Commissions Act of 2006 (MCA),² the plain text of which would otherwise have precluded such suits.³ In particular, the Court held that Congress had failed to provide an adequate alternative to habeas corpus, and that, as a result, the MCA violates the Constitution’s Suspension Clause, which protects the right of those who fall within its scope to challenge the legality of their detention unless there has been a formal “suspension” of the writ — an extraordinary measure that can only occur “in Cases of Rebellion or Invasion [when] the public Safety may require it.”⁴

Unsurprisingly, a number of questions have arisen in *Boumediene*’s aftermath concerning just how broadly the Court’s reasoning sweeps. In particular, there has been substantial wrangling in recent months over what remains of section 7 — and whether the MCA still precludes the Guantánamo detainees from bringing any lawsuit potentially *outside* the scope of the Constitution’s Suspension Clause, including challenges to the conditions of their confinement.⁵

Whereas virtually all of the post-*Boumediene* focus has thus been on detainees challenging aspects of their *detention*, a separate but no less important question has arisen in the context of the military commissions created by the MCA, on which Congress conferred both personal and subject-matter jurisdiction far broader than any U.S. military commission has previously exercised — and perhaps broader than the Constitution and the laws of war allow.⁶ Thus, several commission defendants have argued that they fall outside the personal jurisdiction that the commissions may lawfully exercise, and that Congress also lacked the power to confer subject-matter jurisdiction over the offenses with which they have been charged. At least some of these “jurisdictional” challenges go to whether the defendants can be tried by military commissions *at all* — and, if they have a right not to be tried by commissions acting without jurisdiction, whether that right can be vindicated *before* the potentially unlawful trial occurs.

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Courtesy of Keith C. Ivey

“Shut Down Guantánamo” Protest before the U.S. Supreme Court.

The language of the MCA, though, purports to bar *any* collateral attack — including habeas petitions — challenging the jurisdiction of the military tribunals. In particular, 10 U.S.C. § 950j(b) (part of section 3 of the MCA), provides that:

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.⁷

This essay takes up the question of the relationship between § 950j(b) and the Court’s decision in *Boumediene*. As the dis-

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cussion that follows explains, because a collateral challenge to military jurisdiction is tantamount to a challenge to “pure” executive detention, such lawsuits fall within the “core” of the Suspension Clause. In other words, the Suspension Clause necessarily protects a right not to be tried by a military commission acting without jurisdiction. And because, per *Boumediene*, the Suspension Clause “applies” to the Guantánamo detainees,⁸ the only remaining question under the analysis the Court used in *Boumediene* is whether the MCA provides an adequate alternative remedy to vindicate a commission defendant’s right not to be tried. As the U.S. Court of Appeals for the D.C. Circuit has already held, though, the MCA provides commission defendants with *no* interlocutory remedy, even where the challenge is to the commission’s jurisdiction.⁹ Thus, § 950j(b) precludes commission defendants from vindicating a right not to be tried until after the trial has occurred, and must therefore be unconstitutional as so applied. Although this essay thus focuses on a largely doctrinal argument, such analysis is simply means to an end — to highlight the importance of collateral review in civilian courts, especially where there are such serious questions as to whether the defendant is subject to military jurisdiction in the first place.

Part II begins with the argument that the Suspension Clause protects an *ex ante* right to collaterally attack the jurisdiction of a military court — a right not to be tried — by comparing such “jurisdictional” challenges to other contexts where the Supreme Court has recognized an analogous right. Part III turns to the MCA, and details how it precludes such collateral challenges — and thereby fails to provide a commission defendant with a meaningful opportunity to vindicate his right not to be tried. Finally, Part IV concludes by criticizing the one district court decision that has considered § 950j(b) to date — Judge Robertson’s denial of a request for a preliminary injunction in *Hamdan v. Gates*.¹⁰ Although *Hamdan* did not formally resolve the constitutionality of § 950j(b), Judge Robertson’s decision to abstain in favor of post-conviction proceedings frustrates the very right that *Hamdan* sought to vindicate, a right that the Suspension Clause necessarily protects.

II. MILITARY TRIBUNALS AND THE RIGHT NOT TO BE TRIED

Over its history, the Supreme Court has issued a number of decisions reflecting a tacit recognition by the Court that collateral challenges to military jurisdiction are not just properly brought through habeas petitions, but may well lie at the heart of the right that the Constitution’s Suspension Clause protects — a right to be free from unlawful executive detention. Thus, the question whether the Constitution protects a right not to be tried by a military commission acting without jurisdiction may have already been answered, albeit implicitly.

First, to the precedents: As Justice Scalia has admonished,

One must be careful . . . not to play word games with the concept of a “right not to be tried.” In one sense, any legal rule can be said to give rise to a “right not to be tried” if failure to observe it requires the trial court to dismiss the indictment or terminate the trial. . . . A right not to be tried . . . rests upon an explicit statutory or constitutional guarantee that trial will not occur . . .¹¹

Thus, the paradigmatic example of a right not to be tried is that conferred by the Double Jeopardy Clause of the U.S. Constitution’s Fifth Amendment, which provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹² It is not the conviction that violates the constitutional prohibition; it is the trial itself.¹³

To be sure, the Supreme Court has never identified a parallel constitutional provision that guarantees that “trial will not occur” in the context of a military tribunal acting without jurisdiction. Nevertheless, precedents dating back to the Founding recognize the ability — indeed, the *responsibility* — of the Article III courts to entertain collateral challenges to military jurisdiction,¹⁴ along with the parallel notion that the Constitution limits both the personal and subject-matter jurisdiction of military commissions.¹⁵

Most notably, in a series of cases decided during the 1950s, the Court repeatedly reached the merits of challenges to military

jurisdiction brought by U.S. citizens stationed (or related to someone stationed) overseas, even though there was a substantial question as to whether the federal courts had statutory jurisdiction to entertain such lawsuits.¹⁶ Justice Scalia himself would later describe these decisions as recognizing that “constitutional doubt [over the availability of habeas corpus] . . . might indeed exist with regard to a citizen abroad — justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.”¹⁷ It wasn’t just that habeas corpus was available as of right to contest their *detention*; the writ was available as of right to test their amenability to military jurisdiction.

More than just recognizing that the Constitution might protect such a right, these cases also suggested that, for such a right to be meaningful, it had to be redressable *ex ante*. As the younger Justice Harlan would explain in *Noyd v. Bond*,¹⁸ the Court in these cases had not only entertained collateral attacks on the jurisdiction of the military courts, but had allowed such challenges to proceed *without* requiring that petitioners exhaust their remedies within the military court system. In his words, “it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all.”¹⁹

Moreover, such a reading of the Suspension Clause — as protecting a right to challenge military jurisdiction — makes practical sense; as part of the executive branch, military courts acting without jurisdiction implicate the same concerns as *extra-judicial* executive detention — *i.e.*, the executive is seeking to detain someone without the traditional safeguards attendant to judicial review by courts acting within their jurisdiction.

Thus, it is no surprise that, in another World War II-era decision rejecting on the merits a collateral attack on a military commission, the Supreme Court took pains to emphasize that Congress had not suspended habeas corpus, and that the Court thereby had the responsibility to inquire into the jurisdiction of the commission that tried and convicted the petitioner (and ultimately sentenced him to death). As Chief Justice Vinson wrote, “[Congress] has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”²⁰

III. COLLATERAL REVIEW UNDER THE MCA

In light of the above analysis, it should not take much convincing to show that the MCA fails adequately to provide for collateral challenges to military jurisdiction. First, § 950j(b), quoted above, provides that “no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter,” except as provided by the MCA.²¹ Moreover, the provision expressly includes habeas petitions within its scope, thus defeating any argument that Congress was insufficiently clear in manifesting its intent to preclude habeas review, in particular.²²

Second, a defendant’s right to a statutory appeal under the MCA only allows him to challenge the “final” decision of the military commission. Such a narrow reading of the defendant’s right to appeal was confirmed by the D.C. Circuit in *Khadr v. United States*,²³ perhaps the paradigm case for *allowing* an inter-

locutory appeal. In *Khadr*, the trial court had concluded that it *lacked* personal jurisdiction over the defendant, on the ground that his “Combatant Status Review Tribunal” (CSRT) had determined only that he was an “enemy combatant,” not an “*unlawful* enemy combatant” as required by the jurisdiction-conferring provision of the MCA.²⁴ The government took an interlocutory appeal to the “Court of Military Commission Review”²⁵ (as provided by the MCA), which reversed the trial court. Khadr then sought to appeal *that* decision to the D.C. Circuit, only to have the Court of Appeals conclude that there was no authority in the MCA for a defendant to appeal *any* decision until and unless his conviction is confirmed by the convening authority. If no interlocutory appeal was available to a defendant in Khadr’s position, it is hard to imagine a case where such relief *would* be available.

Third, even if one viewed the right protected by the Suspension Clause more narrowly — as going to an ability to collaterally challenge military jurisdiction *at some point*, as opposed to *ex ante*, there are reasons even to doubt the efficacy of the MCA’s provisions concerning a *post*-conviction appeal. For starters, new 10 U.S.C. § 950g(c) appears intended to limit the scope of the D.C. Circuit’s review to whether the “final decision” is consistent with the standards and procedures specified by the MCA, and whether those standards and procedures are themselves consistent with the Constitution and laws of the United States. As Justice Kennedy wrote of similar language in *Boumediene*, “If Congress had envisioned [such] review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.”²⁶

Indeed, missing from the scope of the D.C. Circuit’s appellate review are claims that the commission lacked jurisdiction over either the defendant or the subject-matter; that the commission’s standards and procedures violated the defendant’s *treaty*-based rights (including procedural rights conferred by the Geneva Conventions); and other challenges to collateral orders by the trial court not necessarily included with its “final decision.” And even if it is substantively adequate, the post-conviction appellate review for which the MCA provides is only triggered once the “convening authority” approves the “final decision” of the military commission, even though the statute nowhere specifies a timeframe within which such action must be taken.²⁷

The upshot of the above analysis, then, is that the MCA does not provide an adequate substitute to habeas corpus in two respects: First, it provides no opportunity — let alone an inadequate opportunity — for commission defendants meaningfully to vindicate their right not to be tried before the trial itself takes place. Second, it appears to provide an inadequate opportunity for the defendant to vindicate both those claims and other challenges to the proceedings after the fact. The MCA does not channel the defendant’s claims into a post-conviction appeal, as the government has argued;²⁸ rather, it channels those claims into the very military process whose legitimacy is challenged, and provides no meaningful opportunity for independent review by the Article III courts. To suggest that it nevertheless provides an adequate substitute to habeas corpus is to turn the concept of adequate alternative remedies on its head.

In all, there can be little question that the MCA plainly bars military commission defendants from collaterally challenging their amenability to military jurisdiction. The only possible challenge for which the MCA provides is one subsequent to the

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defendant's trial and conviction. And at that point, such review — even if it encompasses all potential claims — comes too late; the bell cannot be un-rung.

IV. *HAMDAN* AND THE MCA'S LARGER IMPLICATIONS

All of these arguments were advanced to Judge Robertson in the *Hamdan* proceedings, where Hamdan's counsel sought to have his trial by military commission stayed until he had a meaningful opportunity collaterally to contest the commission's jurisdiction.²⁹ And yet, rather than reach the merits of Hamdan's argument — that the Suspension Clause protected his right to collaterally attack the jurisdiction of the military commission — Judge Robertson deferred. As he wrote,

The absence of a full-scale habeas hearing as to Hamdan's classification as an unlawful enemy combatant does not, by itself, raise a substantial question about the Commission's jurisdiction to proceed. Moreover, under the D.C. Circuit's recent decision in *Khadr*, all of Hamdan's jurisdictional arguments can be addressed, if necessary, following final judgment in accordance with § 950g. Where both Congress and the President have expressly decided when Article III review is to occur, the courts should be wary of disturbing their judgment.³⁰

Of course, Judge Robertson's discussion misses the point, for it neglects the extent to which Hamdan claimed a right not to be tried — a claim that, as noted above, cannot be fully redressed “following final judgment.” Odder still, it was the same jurist in 2004 who found that precise argument compelling, ruling in Hamdan's initial habeas petition that abstention was *inappropriate* on almost the same facts.³¹ As the D.C. Circuit noted in Hamdan's case in 2005, “setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction.”³² The only difference is the intervention of Congress in the form of the MCA, but it should go without saying that Congress has no

more power to intrude upon a defendant's constitutional right not to be tried than the President does, acting unilaterally. It may be that Hamdan was ultimately bound to lose on the merits of his collateral challenge — that his commission was acting with jurisdiction — but that conclusion cannot follow simply from the *existence* of the MCA.

* * *

The above discussion is rather technical, and may even strike the reader as bordering on legal semantics. Where the Guantánamo detainees are concerned, even a successful challenge to the jurisdiction of the military commission doesn't do much to the status quo — on the government's view, the defendant is still subject to detention (albeit without trial) as an “enemy combatant.” And the “right not to be tried” tends not to arise that often, or in a large enough number of cases so as to excite more than academic commentary.

But there are also distinct and palpable injuries suffered by defendants who are subjected to the process of courts acting without jurisdiction, for they have to mount a defense (and perhaps even consider plea offers) in a regime the legitimacy of which they contest — and which may well be struck down on a post-conviction appeal. In mounting a defense, the defendant may have to produce evidence or provide statements that could be used against him in later proceedings. It is for these reasons that no court before *Hamdan* had ever precluded a defendant with a substantial challenge to the jurisdiction of a military tribunal from collaterally attacking that jurisdiction before trial, and why *Boumediene*'s extension of the Suspension Clause to Guantánamo compels the result that 10 U.S.C. § 950j(b) is unconstitutional to the extent that it prevents such a claim. After all, while it is troubling enough for Congress to create a system of military tribunals with personal and subject-matter jurisdiction that runs so closely to — if not beyond — constitutional limits, it is simply indefensible for Congress to simultaneously preclude the Article III courts from enforcing those limits if and when they are transgressed.

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ENDNOTES: Military Jurisdiction, the Right Not to be Tried, and the Suspension Clause After *Boumediene*

¹ 128 S. Ct. 2229 (2008).

² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, and 28 U.S.C.).

³ Indeed, the D.C. Circuit had expressly so held. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229.

⁴ U.S. CONST. art. I, § 9, cl. 2.

⁵ *See, e.g., In re Guantanamo Bay Detainee Litig.*, No. 08-mc-0442, 2008 WL 4294304 (D.D.C. Sept. 22, 2008) (assuming without deciding that the MCA is constitutional to the extent that it precludes challenges to the conditions of confinement).

⁶ For an overview of the potential jurisdictional infirmities, see Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172 (2008).

⁷ 10 U.S.C. § 950j(b).

⁸ *See* 128 S. Ct. at 2252 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

⁹ *See Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008).

¹⁰ 565 F. Supp. 2d 130 (D.D.C. 2008).

¹¹ *Midland Asphalt Co. v. United States*, 489 U.S. 794, 801 (1989) (citations omitted).

¹² U.S. CONST. amend. V.

¹³ *See, e.g., Abney v. United States*, 431 U.S. 651, 659–60 (1977).

¹⁴ For just a smattering of exemplar cases, see *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957) (plurality); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Reed*, 100 U.S. 13 (1879); *Ex parte Yenger*, 75 U.S. (8 Wall.) 85 (1869); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). *Cf. Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (action in replevin); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (action in trespass); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806) (same).

¹⁵ *See Vladeck, supra* note 6.

¹⁶ Justice Frankfurter emphasized precisely this point in his opinion respecting the denial of rehearing in *Burns v. Wilson*, 346 U.S. 844 (1953) (opinion of Frankfurter, J.).

¹⁷ *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting); *see also Ex parte Hayes*, 414 U.S. 1327, 1328–29 (1973) (Douglas, Circuit Justice).

¹⁸ 395 U.S. 683 (1969).

¹⁹ *See id.* at 696 n.8; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 585 n.16 (2006) (“[W]e do not [abstain] when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant.”).

²⁰ *In re Yamashita*, 327 U.S. 1, 9 (1946).

²¹ 10 U.S.C. § 950j(b).

²² *Cf. INS v. St. Cyr*, 533 U.S. 289 (2001).

²³ *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008).

²⁴ *See* 10 U.S.C. § 948c; *see also id.* § 948a(1)(A) (defining “unlawful enemy combatant”).

²⁵ *See United States v. Khadr*, No. 07-001 (Ct. Mil. Comm’n Rev. Sept. 24, 2007), <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>.

²⁶ 128 S. Ct. at 2265; *see also id.* at 2266 (noting Congress’s intent to make review of military commission convictions narrower than that which would be available under the federal habeas statute).

²⁷ *See, e.g.,* 10 U.S.C. § 950c(a) (“[I]n each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the Court of Military Commission Review.”).

²⁸ *See, e.g., Hamdan v. Gates*, 565 F. Supp. 2d 130, 134 n.4 (D.D.C. 2008).

²⁹ *See Hamdan*, 565 F. Supp. 2d 130.

³⁰ *Id.* at 137 (citation omitted).

³¹ *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

³² *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005).