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HABEAS CORPUS STANDING ALONE: A REPLY TO LEE B. KOVARSKY AND STEPHEN I. VLADECK

Brandon L. Garrett[†]

I. HABEAS CORPUS STANDING ALONE.....	36
II. AN APPLICATION TO EXTRADITION.....	38
III. WHEN IS REVIEW COLLATERAL?	39
IV. FACTUAL REVIEW.....	40
V. THE SHADOW OF THE SUSPENSION CLAUSE	41

The differences between habeas corpus and due process are important. The Due Process Clause, among other things, regulates the procedures that the government must use before it detains a person and holds the person in custody. But the Suspension Clause safeguards a more elemental habeas privilege. That is, under the Suspension Clause, the judge examines the bare question of whether a person is being held in custody legally. In *Habeas Corpus and Due Process*, I focus on the independent role of the habeas process.¹ The deep confusion between habeas corpus and due process arises from a critical area of overlap: the habeas judge may examine not only the bare lawfulness of the custody, but also whether officials complied with required procedures to detain the person, including due process requirements.

I am so grateful to Professors Lee B. Kovarsky and Stephen I. Vladeck for their insightful comments and responses to my Article.² I have long benefitted from Professor Vladeck's work, as is apparent throughout my Article.³ Professor Kovarsky and I share an even more direct interest in getting the distinctions between habeas process and other forms of process right: we are just now completing a federal habeas corpus casebook that we have co-authored.⁴ While responses

[†] Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law.

¹ See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47 (2012).

² See Lee B. Kovarsky, Response, 98 CORNELL L. REV. ONLINE 1 (2013); Stephen I. Vladeck, Response, 98 CORNELL L. REV. ONLINE 20 (2013).

³ I should also note here my great interest in Steve Vladeck's work on extradition and habeas corpus. Professor Vladeck notes that he co-authored an amicus brief on behalf of legal historians and habeas corpus experts and in support of certiorari in *Trinidad y Garcia v. Thomas*. Vladeck, *supra* note 2, at 1 n.†. For the brief itself, see Brief of Legal Historians and Habeas Corpus Experts as Amici Curiae in Support of Petitioner, *Trinidad y Garcia v. Thomas*, 2013 WL 57582 (2013) (No. 12-6615) (cert. denied). I agreed with and signed that amicus brief.

⁴ BRANDON L. GARRETT & LEE B. KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION (forthcoming 2013).

to my original Article by colleagues who do not share my sympathies and approach might have generated arguments with more friction and sharper points of disagreement, my common interests with Professors Kovarsky and Vladeck produced very interesting connections, which I explore further in the brief comments that follow.

I

HABEAS CORPUS STANDING ALONE

Habeas corpus and due process should be viewed apart and also as complements, as Professor Kovarsky rightly emphasizes.⁵ Due process cannot satisfy the demand that a habeas judge examine whether custody is legal. Nor can availability of habeas review reduce the obligation to comport with the Due Process Clause. In my Article, I emphasized how one of the surprises to many commentators of the *Boumediene v. Bush*⁶ decision was how the Court discussed the affirmative obligation of a judge to use habeas corpus to meaningfully review the custody of detainees, independent of any prior procedures used to review their custody.⁷ But habeas scholars may have been less surprised by these developments. Professor Vladeck, for example, had powerfully made many of these points in important prior works. Moreover, the Supreme Court has long noted the importance of habeas corpus ensuring a judicial forum to review executive detentions that have never previously been reviewed by a judge.

I made statements in my Article that the “Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process”⁸ and that “the Suspension Clause can ensure that habeas corpus begins where due process ends.”⁹ I intended these statements to emphasize the heightened importance of habeas corpus in such situations, rather than to suggest that that process is fungible. I hope that I equally forcefully emphasized that habeas process plays a “powerful, independent, and unappreciated role standing alone.”¹⁰ The power of habeas process is its elemental and constant demand that a judge examine whether a prisoner’s custody is legally authorized.

The *Boumediene* decision was clear that “the fundamental

⁵ Kovarsky, *supra* note 2, at 1–2.

⁶ 553 U.S. 723 (2008).

⁷ See Garrett, *supra* note 1, at 87 (“The [*Boumediene*] Court . . . articulated throughout that it relied on the Suspension Clause alone to secure habeas process independent of any prior process.”).

⁸ *Id.* at 124.

⁹ *Id.* at 47.

¹⁰ GARRETT & KOVARSKY, *supra* note 4, at 126.

procedural protections of habeas corpus” do not depend in any way on due process rights;¹¹ in fact the Court noted that even if administrative procedures used to screen enemy combatant detainees were assumed to “satisfy due process standards, it would not end our inquiry.”¹² Therefore, I view *Boumediene* as quite emphatic that the Suspension Clause entitled executive detainees to a judicial habeas process apart from any prior status determination.

That said, the Supreme Court has linked the two concepts of habeas corpus and due process in one unavoidable way and in one unfortunate way. Let’s start with the unfortunate one. I agree with Professor Kovarsky that it was particularly unfortunate that all nine Justices in *Boumediene* agreed that an “adequate” substitute for habeas corpus is possible.¹³ The *Boumediene* opinion need not have reached that question, and the Court in some places undermined the directness of its reasoning by digressing, perhaps because of Justices’ interest in making a more comprehensive statement of their habeas jurisprudence. However, the Court in *Boumediene* was right to emphasize that any substitute for habeas corpus should be rarely tolerated, and only then where the substitute is not merely “adequate,” but rather a near-identical form of judicial review. The Court could have made much clearer the fact that the situations in which it had approved such a “substitute” in the past were very limited situations, which were not designed to limit access to judicial review, and were not complete substitutes for habeas (e.g., each such statute contains a Savings Clause permitting some resort to habeas corpus¹⁴).

The unavoidable way that the *Boumediene* Court linked habeas corpus and due process was to address what it means for a judge to offer a detainee a “meaningful opportunity” to demonstrate unlawful confinement.¹⁵ The Court did not detail the process that the Suspension Clause required, although it did provide some direction to the lower courts. Perhaps the Court could have provided more specific directions to lower courts, or perhaps the Court should have intervened as the case law developed in the years since *Boumediene*.

The Court in *Boumediene* did suggest that, while not absolved of their independent obligation to examine the legality of custody,

¹¹ *Boumediene*, 553 U.S. at 798.

¹² *Id.* at 785.

¹³ See Kovarsky, *supra* note 2, at 7–8.

¹⁴ As I discuss in Part II.B.2 of my Article, the Court cited to *United States v. Hayman*, 342 U.S. 205 (1952) and *Swain v. Pressley*, 430 U.S. 372 (1977), both of which dealt with post-conviction statutes designed to replicate habeas corpus and which created safety-valve provisions designed to permit recourse to habeas filings. See Garrett, *supra* note 1, at 83–84. The relevant statutes from *Hayman* and *Swain* are published at 28 U.S.C. § 2255 (2006); D.C. CODE § 3-110(g) (2001).

¹⁵ *Boumediene*, 553 U.S. at 779.

federal judges may defer to administrative development of a factual record.¹⁶ But such deference may not be justified at all if the prior evaluators were not federal judges or if they followed shoddy procedures. Framing the deference to prior factfinding as a question of whether the prior process is an adequate “substitute” to habeas corpus is problematic, though the notion that federal judges may at times defer to the findings of others who have previously approved custody is not.

Since habeas corpus is a judicial power, it is only as strong as the reviewing judges. When federal judges are reluctant to exercise the writ, perhaps when faced with challenges to executive assertions of power over prisoners, there may be little that the Supreme Court can do except to exhort judges to take their roles seriously.

II

AN APPLICATION TO EXTRADITION

On the subject of judges reluctant to meaningfully examine the authorization for custody, Professor Vladeck’s response explores a troubling extradition case ruling in which, having concluded that administrative officials satisfied due process, the court ordered that no further inquiry into the legality of custody should follow.¹⁷ The Ninth Circuit in the *Trinidad y Garcia* case,¹⁸ as Professor Vladeck describes, was badly split in its en banc ruling regarding a claim by an extraditee that he would face torture upon removal. Statutes and regulations describe what the Secretary of State must do to comply with treaty obligations before extraditing a detainee who makes a torture claim. Specifically, the Secretary must make a determination of whether torture will “more likely than not” occur.¹⁹ The per curiam opinion held that “[t]he process due here is that prescribed by the statute and implementing regulation.”²⁰ That may be true for the Secretary. But how about for the federal judge: is the judge to defer completely to the Secretary, or must the judge inquire into whether there may be torture upon extradition? The per curiam opinion stated that if the Secretary provides a declaration of compliance with the statute and regulations, then “the court’s inquiry shall have reached its end and *Trinidad y Garcia*’s liberty interest shall be fully vindicated.”²¹

¹⁶ See *id.* at 782.

¹⁷ See Vladeck, *supra* note 2, at 22.

¹⁸ *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam).

¹⁹ 22 C.F.R. § 95.2(b) (2012).

²⁰ *Trinidad y Garcia*, 683 F.3d at 957.

²¹ *Id.* The Court added, “[t]o the extent that we have previously implied greater judicial review of the substance of the Secretary’s extradition decision other than

Some of the Ninth Circuit judges went further and argued that the process due was simply the statutory process, and therefore the judge would not inquire into the legality of the custody at all.²² Two concurring judges argued that “the scope of habeas review allows courts to examine whether the Secretary has complied with her non-discretionary obligations.”²³ Under that view, apparently the view of the plurality, the role of the federal judge is simply to ensure that the Secretary of State in fact complied with the procedural obligations.

That reasoning conflates due process with habeas corpus. Even assuming that the Secretary complied with the applicable procedures, the federal habeas judge has an independent obligation to assure that the custody is legal. The decision whether to approve the extradition may be deferential to factfinding conducted by the Secretary, and it may take into account that further judicial process is anticipated in the receiving country (although here the detainee alleges that he faced torture). However, the federal judge is not absolved of the obligation to make some determination of the legality of the custody. I therefore completely agree with Professor Vladeck that the real question is how much process provides the detainee with the “meaningful opportunity” that the Suspension Clause requires. I also agree that it is somewhat counterintuitive that sometimes habeas corpus entails more process than the Due Process Clause requires. That is the elemental power of habeas corpus.

III

WHEN IS REVIEW COLLATERAL?

How about the converse problem: whether the presence of habeas corpus as a form of review of custody can reduce the obligation to comport with due process? I did not focus on the interesting question that Professor Kovarsky develops,²⁴ and I agree with him that there is no good argument that more collateral process can somehow make up for an absence of prior process. The *Hamdi* plurality, as Professor Kovarsky describes well,²⁵ certainly muddies the waters by, in places, hinting at something along those lines. One of the welcome aspects of the *Boumediene* opinion was the added clarity on the differences between habeas process and prior process: the Court emphasized that whether the custody is legal is a separate habeas question, regardless of what procedures were used to establish custody. Indeed, in cases like *Boumediene* in which prisoners

compliance with her obligations under domestic law, e.g., *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1012 (9th Cir. 2000), we overrule that precedent.”

²² See *id.* at 984 (Tallman, J., dissenting).

²³ *Id.* at 961 (Thomas, J., concurring) (joined by Wardlaw, J.).

²⁴ See Kovarsky, *supra* note 2, at 10–14.

²⁵ See *id.* at 4–5.

challenge executive detention, habeas corpus is not even clearly “collateral,” since there has been no prior judgment or judicial ruling of any kind. Habeas may be the first judicial review. As Professor Kovarsky develops in a forthcoming article, habeas corpus is a power of Article III judges.²⁶ The *Boumediene* Court emphasized the importance of having an “Article III court in the exercise of its habeas corpus function” review the record supporting a detention.²⁷ While a judge might have reason to defer to a judgment of another judge, or even factfinding by an administrative agency, a judge has no obligation to defer to a mixed legal and factual conclusion reached by a non-judge.

IV

FACTUAL REVIEW

Before *Boumediene*, many thought that the focus of the Supreme Court’s Suspension Clause jurisprudence was the need for a federal judge to examine questions of law, particularly constitutional questions. The Court explained in *Boumediene* that habeas “entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”²⁸

Boumediene emphasized the need to examine questions of fact: is this person the type of person whose custody is authorized? Innocence claims bear a family resemblance to such claims regarding the factual legality of custody. I agree completely with Professor Kovarsky that claims of innocence assert a possible defect in prior process and that procedural due process is a logical grounding for the underlying claim. I have argued as much in other work focused on innocence claims.²⁹ However, as to the post-conviction habeas process that the judge carries out—the authority to inquire into newly discovered evidence, conduct hearings, and develop discovery—the Suspension Clause may support the authority of the judge to do that work. The reasoning of *Boumediene* also undermines the reasoning that the Court adopted when declining to recognize a Due Process or Eighth Amendment actual innocence claim: that habeas judges traditionally lacked the ability to examine factual questions. *Boumediene* and the rest of the executive detention jurisprudence emphasize that habeas at its core is centrally preoccupied with factual questions concerning whether a person’s

²⁶ See Lee B. Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. (forthcoming 2013).

²⁷ See *Boumediene v. Bush*, 553 U.S. 723, 790 (2008).

²⁸ *Id.* at 779 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

²⁹ See, e.g., Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008).

custody is authorized. Why, as a constitutional matter, the Court continues to view the question of the imprisonment of an innocent person as non-cognizable is hard to fathom.

One of the many important questions relating to the role of habeas judges as factfinders is before the Court this next Term: the Court is considering whether to recognize an equitable innocence-based exception to the statute of limitations governing federal post-conviction habeas.³⁰ That case raises the type of question that *Boumediene* and the Suspension Clause should influence: a question not concerned with the scope of an underlying due process or other constitutional claim, but rather with the equitable power of the federal judge to develop factual evidence related to innocence and excuse procedural defects in a case based on such factual evidence.

V

THE SHADOW OF THE SUSPENSION CLAUSE

The theme of the last part of my original Article is that the shadow of the Suspension Clause may have influenced seemingly unrelated statutes governing judicial review and habeas jurisprudence across different areas of habeas corpus.³¹ Perhaps there is some common ground in cases that range from extradition to immigration removal to national security detention to post-conviction challenges to criminal convictions. Habeas corpus has long been thought of as an internally specialized subject. Post-conviction lawyers have had little reason to engage with lawyers litigating Guantanamo cases or immigration removal challenges. The Suspension Clause, I argue, suggests a common structure for judicial review. Article III does so as well, but was not my focus. The Due Process Clause and other rights provisions also structure what can be litigated in a challenge to the legality of custody. The Suspension Clause structures the writ in a different way.

The bare Suspension Clause command that a federal judge ask whether a detainee's custody is authorized ensures a meaningful process apart from the standards and procedures regulating initial decisions to place individuals in custody. That core aspect of habeas corpus has had a powerful gravitational effect on a host of doctrines. In some key areas, legislators have tried to avoid Suspension Clause problems, and in others, judges have interpreted statutes governing judicial review to do the same. Even if the Court had avoided stating the stark principle clearly before *Boumediene*, and even though the Court did not develop many of the specific procedures to be followed when deciding *Boumediene*, the elemental force of the Suspension

³⁰ See *McQuiggin v. Perkins*, 133 S.Ct. 527 (2012) (cert. granted).

³¹ Garrett, *supra* note 1, at 111–21.

Clause will continue to ensure that detentions are reviewed. Habeas corpus, more than due process, will haunt future efforts to strip federal judges of their habeas power of inquiry.