REVENGE OF ARTICLE III

We've talked about this in threads, but I just wanted to pull out all the bits of Anthony Kennedy's opinion that really address separation of powers and rule of law, in addition the question of Gitmo and Habeas more directly. Kennedy bases much of his argument on separation of powers on the reminder that since Marbury v. Madison, it has been the Court's duty—and not that of Congress or the President—to determine what the law is.

> Our basic charter cannot be contracted away like this [claiming the US had no sovereignty over Gitmo because we ceded it to Cuba then leased it back]. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Murphy v. Ramsey, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. **The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."** Marbury v. Madison, 1 Cranch 137, 177 (1803).

Within that context, he describes habeas corpus as a mechanism which has been historically designed to check the power of the political

branches.

> These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

As such, only the Court can determine the proper boundaries of habeas corpus, not Congress or the President.

Kennedy's opinion raises the role of the President in this opinion on several occasions, notably when it points out that these men have been detained solely through executive order.

> They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history.
>
> [snip]
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> **Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing**. A criminal conviction in the usual course occurs after a judicial hearing before **a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence**. These dynamics **are not inherent in executive detention orders or executive review procedures**. In this context the need for habeas corpus is more urgent. [my emphasis]

Kennedy suggests that the procedures the Bush Administration put into place might be designed

with interests other than independent review in mind. Golly. You think he's thinking of the way the Show Trials are being timed with the presidential election in mind?

To anticipate and undercut the cries of "Article II Article II!!!" Kennedy argues (not all that convincingly) that their judicial review of Bush's power to imprison people indefinitely makes him stronger.

> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Somehow, I don't think David Addington was convinced by this argument.

Tough.

Kennedy's opinion was slightly less direct in its criticism of Congressional overreach. He starts by pointing out how unusual it is for Congress to attempt to curtail habeas corpus.

> Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ

> and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims.

And then describes the ways—the several ways—in which Congress has passed unconstitutional laws. First, he describes what would be required for any legal substitution of something else for habeas corpus.

> We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. St. Cyr, 533 U. S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See Ex parte Bollman, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"); R. Hurd, Treatise on the Right of Personal Liberty, and On the Writ of Habeas Corpus and the Practice Connected with It: With a View of the Law of Extradition of Fugitives 222 (2d ed. 1876) ("It cannot be denied where 'a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered,' for the writ then becomes a 'writ of right, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty' "). But see Chessman v. Teets, 354 U. S. 156, 165–166 (1957) (remanding in a

> habeas case for retrial within a "reasonable time"). These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

And then gives a list of other ways the DTA is constitutionally "infirm."

> The DTA might be read, furthermore, to allow the petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA §7 to remain intact.
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> The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, DTA §1005(e)(2)(B)(i), 119 Stat. 2742; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the

> "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful.

The argument I find most interesting—because it applies to other abuses of executive power, like the Administration's warrantless wiretap program—is the Court's insistence that judicial review must constitute more than simply a review of whether 1) the standards and procedures developed by an executive agency are lawful and 2) whether those standards were followed. As Kennedy points out, Congress has narrowly circumscribed the role of the courts to reviewing the execution of a plan implemented by the executive branch.

> Congress has granted that court jurisdiction to consider
>
> > "(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." §1005(e)(2)(C), 119 Stat. 2742.

Under DTA, the courts only have the authority to affirm what the executive branch does; they don't have the authority to make judgments concerning the legality of the detention itself.

> The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but 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.

And that is the core of the problem for Kennedy—that the DTA does not permit the courts to intervene except pursuant to certain actions by the Secretary of Defense, which does not constitute adequate judicial review. The courts must have the ability to judge the evidence presented in CSRT proceedings itself.

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.

Now, as I pointed out, this argument is significant beyond the Boumediene decision. That's because Congress is **as we speak** debating implementing a similar circumscribed review process for wiretapping Americans.

The idea behind the Protect America Act and—to a large degree—the FISA amendment, after all, is that the Attorney General writes a set of procedures surrounding a given wire-tapping method. The FISC gets to review those procedures to see if they're legal. And it gets to review individual cases of wiretaps to see if they followed procedures.

But the FISC never gets to review the actual wiretap evidence to see if the programs themselves were legal, to see if the evidence underlying the decision to wiretap a bunch of

Americans was sufficiently credible to justify the program.

So you can take the complaint the court made about DTA…

> The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but 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.

… Rewrite it to apply to FISA…

> The FISC has jurisdiction not to inquire into the legality of the wiretap program generally, but only to assess whether the government complied with the "standards and procedures specified by the Attorney General" and whether those standards are lawful.

And you'd have a direct parallel in which Congress was proposing a law which took legal review out of the hands of Article III Courts and put it instead into the hands of the executive.

Now, I realize that the Court's ruling applies only to detention and only explicitly to Gitmo. But the court has laid out an argument—that Article III cannot be legislated into a review function of the executive branch—that has much wider applications. Having just glanced at Roberts' dissent and seen the prominence of his defense of such a role for the courts, I imagine the Administration has seen this argument too.

And I expect David Addington is even less happy about that argument than he is by the Court's half-hearted nod to the power of the Commander in Chief.