

BOUMEDIENE V. BUSH: A CATALYST FOR CHANGE[†]

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As one might expect, I disagree with some of my colleagues on myriad issues relating to national security, but what I would like to focus on this afternoon is the impact of the United States Supreme Court decision in *Boumediene v. Bush*.¹ Although I believe strongly in what Chief Justice Roberts has written in his dissent in the *Boumediene* case,² there may still be a silver lining in this decision that really highlights the need for change in the detention and adjudication policy for detainees in the war on al Qaeda.

First and foremost, we have to recognize that whether you define the current conflict as a war or as a law enforcement action completely decides how you are going to review, analyze, and discuss Supreme Court cases in the war on al Qaeda. How you look at it will decide how you are going to write about it, how you are going to think about it, and what policies will stem from it.

To a large degree, prior to *Boumediene*, the Court held that this was a war. In each of the three preceding cases relating to those detainees captured outside the U. S., there was some recognition, either tacit or overt, that the current conflict is a war.³ Unfortunately, in many regards, the worst part of the decision in *Boumediene* is that it really

[†] This Essay is adapted for publication from a panel discussion presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent Supreme Court decisions affecting national security, focusing on the 2008 decisions *Boumediene v. Bush* and *Munaf v. Geren*. Speakers included: Professor Jordan Paust, University of Houston Law Center; Commander Glenn M. Sulmasy, Associate Professor of Law, U.S. Coast Guard Academy; Elisa Massimino, CEO and Executive Director, Human Rights First; and Professor Harvey Rishikof, National War College. The panel was moderated by Dr. Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice.

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¹ 128 S. Ct. 2229 (2008).

² *Id.* at 2279–93 (Roberts, C.J., dissenting).

³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 599 n.31 (2006) (“[W]e do not question the Government’s position that the war commenced with the events of September 11, 2001.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“We conclude that detention of individuals . . . for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”); *Rasul v. Bush*, 542 U.S. 466, 499 (2004) (Scalia, J., dissenting) (entertaining detainee habeas petitions “force[s] courts to oversee one aspect of the Executive’s conduct of a foreign war”).

returns us back to the 9/10 mentality.⁴ It is the first time that we can ascertain a willingness (or an inference) from the Court in its 5-4 decision that it views this as a law enforcement action and no longer as a war.⁵ The Court does not specifically state it, but it is alluded to.⁶

If you accept this notion from *Boumediene* that the current conflict is a law enforcement action, it reaches a level of concern beyond simply what is being stated at Regent Law School today or even within the parameters of the specific holding in *Boumediene*. Politically, people will refer to the “9/10 mentality,” but the 9/11 Commission cautioned about this mentality after the attacks of September 11, 2001. Once the Commission had the opportunity to look back, in hindsight, they were able to warn against reverting back to that 9/10 mentality.⁷

This is a war being waged against radical Islam, international terrorism, and al Qaeda and its associates.⁸ It is critical to look at it from this perspective, and one of the major concerns I maintain is that we—the U. S. government and polity—are slipping back; the sleeping giant is going back to sleep not recognizing this is truly a war that we are engaged in.

⁴ A 9/10 mentality refers to the national mindset prior to the attacks of September 11, 2001. It is what left the government and its people totally unprepared for those attacks. A 9/10 mentality ignores the gravity of the threat posed by our enemies and ignores the institutional ineptitudes that allow such acts of terror to be successfully carried out against the United States. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *Preface to THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES*, at xv–xvi (2004), <http://govinfo.library.unt.edu/911/report/911Report.pdf> [hereinafter 9/11 COMMISSION REPORT].

⁵ *Boumediene*, 128 S. Ct. at 2239 (syllabus of the Court). The majority opinion was written by Justice Kennedy and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 2240. The dissenting justices were Chief Justice Roberts, Justices Scalia, Thomas, and Alito. *Id.* at 2279, 2293; see also *infra* note 6 and accompanying text.

⁶ *Boumediene*, 128 S. Ct. at 2248–49. The Court noted:

To the extent these authorities suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the enemy, a wartime practice well known to the Framers.

Id. Based on the Court's assertion, the judicial intervention on behalf of the prisoner in *Boumediene* exposes the Court's view of this case as being one of a law enforcement action because the Court acknowledged the validity of abstaining from matters involving prisoners of war during wartime conflicts. See also *id.* at 2260–61. The Court draws more than a mere trivial distinction “between Landsberg Prison, circa 1950, [in Germany] and the United States Naval Station at Guantanamo Bay.” *Id.* at 2260.

⁷ See 9/11 COMMISSION REPORT, *supra* note 4, at xv–xvi.

⁸ *Id.* at 363 (stating that our enemies are al Qaeda and a radical ideological Islamic movement).

The Supreme Court's 5-4 decision in *Boumediene* in late June of 2008 justifiably sent shock waves through the legal community. The majority opinion, authored by the ever-wandering Justice Kennedy, disregarded centuries of precedent, disregarded the military deference doctrine altogether, and intruded on what is clearly the province of the political branches. As a result of this holding, the detainees at Guantanamo Bay now formally have more rights than prisoners of war under the Geneva Conventions.⁹

To say the least, citizens, regardless of political affiliation, partisanship, or views on Guantanamo, should be concerned about the ramifications of this decision. I address this from three perspectives: historical precedent, military deference, and prisoners of war.

I. HISTORICAL PRECEDENT

From a precedential perspective, the *Boumediene* holding permits aliens held outside the United States to exercise constitutional rights within U.S. courts of law during a time of armed conflict.¹⁰ This has never been the policy of the United States regardless of what has been said, and the Court has never granted such rights to those detained outside of U.S. jurisdiction. Additionally, this is the first Supreme Court case since the attacks of September 11, 2001, that actually declares a constitutional violation contained within the military commissions process.¹¹ In previous cases, there were tweaks or setbacks, but no constitutional violations.

Although many people on both sides of the aisle believe that Guantanamo Bay and the military commissions might be flawed as a matter of policy—and some may say as a matter of law—I am one of those who believes the military commissions at Guantanamo Bay do not work efficiently. For full disclosure, I did initially, from 2001–2003, support the use of these unique tools of military justice in adjudicating the alleged crimes committed by the detainees captured in the war on al Qaeda. I also thought the military commissions would work because I thought they were going to be adjudicated. This was all happening in the summer of 2003 when they were supposed to begin the commissions.¹² But now we have to recognize that as a matter of policy, they are ineffective. We have to look at new and fresh ways to use the military commissions.

⁹ *Boumediene*, 128 S. Ct. at 2288–89 (Roberts, C.J., dissenting).

¹⁰ *Boumediene*, 128 S. Ct. at 2275.

¹¹ *Id.* at 2274 (holding Section 7 of the Military Commissions Act “effects an unconstitutional suspension of the writ” of habeas corpus).

¹² See 32 C.F.R. § 17 (2007). This statute took effect as of July 1, 2003, and it was promulgated for the purpose of establishing procedure and responsibilities for the conducting of trials by the military commissions. *Id.* § 17.1.

Boumediene will have a greater impact on the military commissions than simply finding them to be illegal. Justice Kennedy went to lengths to try to limit the decision to only those detained at Guantanamo Bay.¹³ It is clear, however, that some will analogize this decision to other military bases overseas—for example, the military base in Bagram, Afghanistan. There are 270 prisoners at Guantanamo Bay,¹⁴ and there are arguably 20,000 more detainees overseas.¹⁵ In fact, on September 17, 2008, I debated Steven Wax, author of *Kafka Comes to America*, who conceded what is already understood by most: any good defense counsel worth her weight will advocate strongly to increase these constitutional protections and the rights of the detainees.¹⁶ Many others will advocate to expand—or even drive a truck through—the holding in *Boumediene*.

The practical effect of flooding an already overburdened federal court system is no longer more than likely—it is happening right now. As is well known, the Department of Justice is busy trying to figure out ways to handle this flood of cases.¹⁷ In fact, they are detailing government attorneys from all over the Department of Justice to work on these habeas petitions.¹⁸ These alleged international terrorists, as of now, have access to federal district courthouses. There is strong potential that in the near future other constitutional rights of American citizens will begin to attach to the detainees as well.

Furthermore, there will be unprecedented legal challenges involving other constitutional provisions being provided to the detainees, who will argue that the Fourth and Fifth Amendments should apply to those searched or captured on the battlefield.¹⁹ This is not a stretch but a frightening, arguably unintended consequence of the *Boumediene* decision. For example, Salim Ahmed Hamdan's attorneys filed a motion

¹³ See *Boumediene*, 128 S. Ct. 2229.

¹⁴ Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, June 13, 2008, at A1 (noting the prison “now holds 270 detainees”).

¹⁵ Solomon Moore, *In Decrepit Court System, Prisoners Jam Iraq's Jails*, N.Y. TIMES, Feb. 14, 2008, at A16 (recognizing there are nearly 24,000 detainees being held in the American military prisons in Iraq).

¹⁶ Video: Rules of Engagement: A Debate in Celebration of Constitution Day, (Colgate University 2008), http://offices.colgate.edu/video_console/preview_player.asp?videoID=290.

¹⁷ James Vicini, *Judges Assigned to Decide Guantanamo Cases*, REUTERS, July 2, 2008, <http://www.reuters.com/article/topNews/idUSN0235993420080702> (reporting federal district judges in Washington, D.C., are being assigned to hear the nearly 250 cases that have already been filed involving 643 individuals who were held or are being held at Guantanamo Bay and that the court is expecting several dozen more cases to follow).

¹⁸ See, e.g., Respondents' Reply Memorandum in Support of Motion for Partial and Temporary Relief from the Court's July 11, 2008 Scheduling Order at 2, 5–6, *In re Guantanamo Bay Detainee Litigation*, No. 08-0422, 577 F. Supp. 2d 309 (D.D.C. Sept. 15, 2008).

¹⁹ U.S. CONST. amends. IV–V.

before the court for preliminary injunctive relief in hopes of delaying the military commission's process from going forward based on the holding in *Boumediene*.²⁰ They laid out a laundry list of constitutional rights that they believe should attach to Hamdan, even before the military commission's process, as a result of the decision in *Boumediene*.²¹ Although the motion for preliminary injunctive relief was not granted,²² it still is the beginning of a slippery slope that we might be going down.

II. MILITARY DEFERENCE

Boumediene has altogether removed the military from the habeas process of the detainees that they have captured. Few will doubt we are a nation at war, and the military is detaining and adjudicating those unlawful combatants accused of war crimes within the military commissions process. Under *Boumediene*, however, civilian federal judges are left to their own devices without proper opportunity for the military to formally review or determine the status of those they detain.²³ The civilian courts within the federal district court will make the decision of whether to issue a writ of habeas corpus.²⁴

Ordinarily, the United States Supreme Court has refrained from interfering with ongoing military operations and policy decisions. It has repeatedly refrained from intruding in this area where possible—for example, on issues such as homosexuals in the military²⁵ and women in combat.²⁶ In the past, the Court has been aware of its limitations. The justices have frequently questioned whether they are qualified to be making decisions such as the one made in *Boumediene*, as nine unelected folks in robes with life tenure who have no background or experience in military combat operations. The Court has acknowledged a lack of

²⁰ Hamdan v. Gates, 565 F. Supp. 2d 130, 133–34 (D.D.C. 2008).

²¹ *Id.* at 134 (“Hamdan argues that the Commission lacks power to proceed because the charges filed against him violate the Constitution’s *ex post facto*, define and punish, and bill of attainder clauses. He also asserts that the MCA violates the equal protection component of Fifth Amendment due process by subjecting only aliens to trial by military commission, and that the Commission’s potential allowance of certain kinds of hearsay evidence and evidence obtained through coercion will violate his Geneva Convention and due process rights.”).

²² *Id.* at 137.

²³ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

²⁴ *Id.*

²⁵ See *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (upholding the military’s policy of “don’t ask, don’t tell” towards homosexuals), *cert. denied*, 525 U.S. 1067 (1999).

²⁶ *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981) (“Congress[s] decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. . . . The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.”).

knowledge in these areas of military policymaking and has noted the need for deference to other more capable authorities.²⁷

In *Boumediene*, however, the Court inserted itself and removed the military altogether from the habeas process. In *Hamdan v. Rumsfeld*, Justice Stevens asserted the need for the commission process to be a mirror of the Uniform Code of Military Justice (“UCMJ”)—the laws that govern the armed forces—and that it should be applied to the detainees.²⁸ Strangely, as noted in the dissents, *Boumediene* completely disregards *Hamdan* and the UCMJ process for determining the lawfulness of detention.²⁹

Additionally, the Court has intruded into what the Founders clearly intended to be decisions left to the political branches.³⁰ With so much angst, as Professor Paust has discussed,³¹ over executive power in the past few years, one hopes reasonable minds will recognize this overreach by the Court. Clearly Congress and the President are better able to make these national policy decisions. In many ways, the Court is inserting itself not necessarily because of its concerns over executive power, but because of the ineffectiveness and inability of Congress to carry out its

²⁷ See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . .

Id.; see also *Boumediene*, 128 S. Ct. at 2276–77. “Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.” *Id.*

²⁸ 548 U.S. 557, 620 (2006) (noting “the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable”).

²⁹ *Boumediene*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting) (noting the Court has “unceremoniously brushed aside” *Hamdan* and has granted lawyers “a greater role than military and intelligence officials in shaping policy for alien enemy combatants”); *id.* at 2295–96 (Scalia, J., dissenting) (stating that the Court “elbows aside” the military and that it “[t]urns out they were just kidding” about what was stated in *Hamdan*).

³⁰ THE FEDERALIST NO. 41, at 253 (James Madison) (Clinton Rossiter ed., 2003).

³¹ See generally Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351 (2009). See also JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR (2007).

constitutional function to check the Executive. Now the Court is finding itself required to intervene in these areas, which was never intended by our Founding Fathers.³²

III. PRISONERS OF WAR

Ironically, the holding in *Boumediene* now affords greater protection to the alleged unlawful combatants than prisoners of war would have under the Geneva Conventions.³³ This absurdity should be shocking to American citizens. Prisoners of war are given the gold standard of treatment, but drafters and signatories to the Geneva Conventions never envisioned providing access to the domestic courts of the detaining country. The Guantanamo detainees, of course, are not even signatories to the tradition of the Geneva Conventions.³⁴

Now, however, nine unelected and life-tenured justices have determined that someone such as Khalid Sheikh Mohammed should be given access to our great courts of justice. If such a policy decision is to be made—and it could be made—it needs to be made by our elected representatives who have the voice of the people. The inaction of the political branches should not be a catalyst for the United States Supreme Court to intervene, particularly when such decisions impact a nation at war. Rather than argue back and forth on the merits or relative demerits of any given case, policymakers must quickly review the implications of the decision and find mutual ground on how best to proceed.

The political branches must seek a third way—not necessarily the federal courts or the military commissions, as I think most would agree they are not functioning efficiently—to balance the interests of both national security as well as the promotion of human rights. Perhaps we should seriously consider creating a specialized, hybrid court with civilian oversight. Such a court has most often been referred to as a national security court.³⁵

³² JEAN REITH SCHROEDEL, CONGRESS, THE PRESIDENT, AND POLICYMAKING: A HISTORICAL ANALYSIS 7 (1994) (defining the Founding Fathers' intent to have the Legislative Branch of government be superior based on a formalized constitutional ability to control executive power through enumerated positive and negative legislative powers); see also THE FEDERALIST NO. 41, *supra* note 30.

³³ *Boumediene*, 128 S. Ct. at 2288–89 (Roberts, C.J., dissenting).

³⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3425–31, 75 U.N.T.S. 135, 244–51; see also Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007) (determining that “members of al Qaeda, the Taliban, and associated forces” are not entitled to the protections afforded to prisoners of war by the Third Geneva Convention).

³⁵ See generally Glenn Sulmasy, *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>. See also GLENN SULMASY, THE NATIONAL SECURITY COURT

We have witnessed the relative failures of the military commissions in Guantanamo Bay, but I predict the holding in *Boumediene* will demonstrate the weaknesses of having the detainees simply tried or having some resort to our traditional federal courts. I would also predict that our traditional Article III courts will go the same way as the commissions have gone.³⁶ The reality is that we are fighting a war but it is a hybrid war. This hybrid war mixes law enforcement and warfare, and it mixes law enforcement with warfare at higher levels than ever before. This new war is being fought against hybrid warriors who are truly international criminals. As has been noted by General Ashcroft, they are not our traditional warriors in our generally accepted understanding of the term.³⁷ They come in civilian clothes and flout the Geneva Conventions.

We need to be pragmatic in our idealism to uphold the rule of law. If we are faced with a hybrid war against hybrid warriors, it logically follows that we should consider a hybrid court system. Perhaps the most compelling component of such a system would be to shift the oversight from the Department of Defense to the Department of Justice. Such a system would have civilian judges who are learned in the law of armed conflict, intelligence law, and international humanitarian law. These civilian judges, not military officers, would oversee cases regarding alleged international terrorists.

Such a federal terrorist court would be structured to better meet the policy concerns of many legal commentators both domestically and internationally. The court's purpose would be to facilitate the process by which we detain and adjudicate cases against unlawful belligerents in this war, not necessarily against terrorism, but against al Qaeda. *Boumediene*, for all its faults, might just be the catalyst necessary for such action to occur.

SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (forthcoming June 2009); Benjamin Wittes, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008); Amos N. Guiora, *Military Commissions and National Security Courts after Guantánamo*, 103 Nw. U. L. Rev. 199 (2008); Amos N. Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008), <http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf>; Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court*, in *OUTSOURCING AMERICAN LAW* (forthcoming) (on file with authors), available at <http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf>; Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 (proposing the creation of a bipartisan national security court), available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>; Stuart Taylor Jr., *Opening Argument: The Case for a National Security Court*, NAT'L J., Feb. 24, 2007, at 15.

³⁶ U.S. CONST. art. III.

³⁷ John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285, 287–88 (2009) (indicating that fighting terrorism creates new challenges because it is difficult to define the enemy).