



NATIONAL SECURITY LAW REPORT

Editor's Note:

In this issue we present a dialogue between **Richard Klingler** (*Sidley Austin LLP*) and **Stephen I. Vladeck** (*American University*) regarding the Supreme Court's OT 2007 national security jurisprudence. **Michael A. Newton** (*Vanderbilt University*) provides his commentary on *Munaf* while **Julian Davis Mortenson** (*Fordham University*) comments about the implications of *Boumediene*. We also highlight the recipient of the *Morris I. Leibman Award*, **Professor Howard S. Levie** and announce the **2008 National Security Law Student Writing Competition**.

The Court, the Culture Wars, and Real Wars

Richard Klingler

When addressing military and foreign affairs, the Supreme Court often refers to the Executive Branch and Congress as the “political departments” or the “political branches.” It did so this Term in *Boumediene v. Bush*, *Munaf v. Geren*, and *Medellin v. Texas*. The Court always uses those phrases to contrast those branches with the judiciary, at times even without irony.

These cases concern the Court's role in military and foreign policy. In *Munaf* and *Medellin*, the Court adhered to a longstanding judicial tradition of distinguishing sharply between domestic legal matters within the Court's purview and military and diplomatic matters where it defers to the Executive and Congress – especially when both act in tandem. Both decisions extended this valuable tradition in important respects.

In *Boumediene*, a sharply divided Court abandoned this tradition of deference. The majority acknowledged that legal text and precedent provided little basis for overturning the combined and repeated determinations of Congress and the President in the course of military conflict. It did, however, overturn those determinations related to detainees and did so based on the asserted *value* of judicial intervention in military activities. This led even

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Reflecting on *Boumediene*: The Substance of Habeas and the Futility of Exhaustion

Stephen I. Vladeck

History will likely forget how, in April 2007, the Supreme Court denied certiorari in *Boumediene v. Bush*, only to change course three months later and set the case for argument during the October 2007 Term. That would be a pity, because for as comprehensive as Justice Kennedy's 70-page opinion for the *Boumediene* majority is, and as canonical as it will likely become, the real crux of the Court's decision might just as easily be discerned from the far shorter and far more poignant opinion of Justice Breyer, dissenting from the initial denial of review.

To briefly refresh our recollection, rewind to April 2007, when Justices Stevens and Kennedy filed a joint opinion accompanying the denial of certiorari, in which they argued that “traditional rules governing our decision of constitutional questions, and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus, make it appropriate to deny these petitions at this time.” Justice Breyer — joined by Justices Souter and Ginsburg —dissented, arguing that it would be futile to require the petitioners to exhaust their available remedy, i.e., an appeal to the D.C. Circuit pursuant to the Detainee Treatment Act of 2005 (DTA) to challenge the determinations by

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the Chief Justice to conclude that “this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.” Here, the “political branches” especially included the Court.

Munaf, Medellin and the Deferential Tradition of Separated Powers

In *Munaf*, the Court restated the basic principles of this tradition of deference as it considered barring U.S. military forces in Iraq from transferring U.S. citizens from their custody to Iraqi officials who sought to prosecute them for violating Iraqi law. The Court unanimously held that “prudential concerns” prevented it from interfering with the Executive Branch’s operations even though the Court had habeas jurisdiction over the matter. “[T]hose issues arise in the context of ongoing military operations,” and the “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Slip op.* 11 (internal quotations omitted throughout). Issuing the order would also raise “concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.” *Id.* 22. Instead, the Constitution “requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” *Id.* 22-23. As for claims that judicial intervention was required to prevent the Iraqi government from torturing the U.S. citizens, “it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.” *Id.* 23.

The Court in *Medellin* implemented this tradition in a wholesale fashion and produced one of the most significant decisions of recent Terms. At issue was whether, as a result of treaties entered by the United States, a decision of the International Court of Justice had the force of domestic law

and thus pre-empted inconsistent provisions of state law – either directly or through a Presidential memorandum. The Court held that it did not. It reasoned that these and other non-self-executing treaties are not part of domestic law – not for enforcement in U.S. courts, not for pre-emption, and not for Article II’s requirement that the President “take care that the laws be faithfully executed.” Such treaties include the U.N. Charter and many of the humanitarian law treaties that underpin litigation against counter-terrorism and related U.S. policies.

Excluding such treaties from domestic law rested squarely on the tradition of deference. Relying on cases dating to 1829, the Court defined its role by reference to Congress’ and the President’s determinations. Courts could address treaty terms where Congress and the President clearly indicated that domestic law encompassed a treaty, but “[t]he point of a non-self-executing treaty is that it addresses itself to the political, not the judicial department” *Slip op.* 20. Such “international obligations” between sovereign states were “the proper subject of political and diplomatic negotiations,” *Id.* 24, and judicial action risked impairing “the ability of the political branches to determine whether and how to comply with [them].” *Id.* 15. In this sense, such international “law” obligations

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are a species of politics conducted between nations. Deference rested on “the principle that the conduct of the foreign relations of our Government is committed to the Executive and Legislative – the political – Departments.” *Id.*

***Boumediene* and the Politics of Military Operations**

In *Boumediene*, a bare majority of the Court sharply departed from this tradition. It struck down, as contrary to the Constitution’s Suspension Clause, a provision of the Military Commissions Act (“MCA”) that limited federal judicial review of the military’s determinations that certain foreign nationals should be detained in Guantanamo because they threatened U.S. forces and citizens in an ongoing military conflict. The majority held that habeas courts’ review of the military’s determinations, in addition to the narrower review that Congress provided via a federal Court of Appeals, was needed to “safeguard liberty” through the “separation of powers.”

The majority’s opinion candidly acknowledged its scant legal underpinnings. Canvassing the history of the habeas writ until 1789, the majority found no case where an English or colonial court “granted habeas relief to an enemy alien detained abroad,” *Slip op.* 21-22, or in circumstances that supported extending jurisdiction to Guantanamo. *Id.* 16. Nor did it find that any later cases lent direct support, beyond suggesting that a flexible test may determine the writ’s scope.

The Court had, however, already addressed just this issue of non-citizens held by the military beyond the nation’s territory. In *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950), the Court denied habeas relief to alien detainees held in post-War, occupied Germany because the detainees “at no relevant time were within the territory over which the United States is sovereign” and had been and remained “beyond the territorial jurisdiction of any court of the United States.” The *Boumediene* majority’s half-hearted effort to distinguish the case is, charitably, not one of the Court’s finer moments.

Nor were the majority’s reasons offered to support its holding any more principled or sensible. The majority made up a new, open-ended test with “at least” three factors that inform whether habeas jurisdiction applies. *Slip op.* 36-37. For one factor, the petitioners’ “citizenship and status,” the majority lost the lodestone of habeas law, U.S. personhood. The majority acknowledged that the detainees are foreign citizens but, newly focusing on the detainees’ “status,” second-guessed the military’s determination that the habeas petitioners were enemy combatants who threaten U.S. servicemen. Similarly, for a factor addressing “practical obstacles,” the majority simply found not “credible” the Government’s claims that “the military mission at Guantanamo would be compromised.” *Id.* 39. A habeas court’s erroneous release of a detainee who may go on to kill U.S. soldiers, civilians, and allies – as detainees erroneously released by the military have done – might credibly be thought contrary to the central “military mission” at issue.

The broader principles the majority invoked won press plaudits but made little sense even on their own terms. The majority repeatedly claimed that judicial oversight of military determinations fulfilled the “separation of powers” required to protect our “liberty.” “Separation of powers,” as the term suggests, means separate roles for distinct branches, and has for two hundred years separated judicial inquiry from military and foreign affairs. *Munaf* and *Medellin*, of course, reflect just that tradition. But without argument and without addressing those cases and many prior cases to like effect, the majority invoked the phrase to increase judicial control over those matters. In addition, how *our liberty is protected* might have puzzled the Framers, as it puzzles us today. The detainees are all *foreign* nationals who the U.S. military found to have furthered armed combat or acts of terrorism designed to kill American soldiers, citizens, and allies during a conflict that is reasonably termed war. While the *Boumediene* majority may not have made the Constitution a “suicide pact,” it overindulged the impulse to “love thine enemy.”

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Finally, the majority rejected the balance of interests that Congress struck to ensure that military detainees receive extensive procedural protections – far beyond those provided in any other significant military conflict. Even if habeas jurisdiction properly extends to Guantanamo, the Suspension Clause permits Congress to bar habeas petitions if it provides a reasonable substitute. Here, the majority barely faulted Congress' solution of military tribunals followed by federal court review. It found that an appropriate judicial construction would cure all the alleged flaws except one -- the ability to introduce newly discovered evidence on appeal. As the Chief Justice's dissent outlined, the MCA's operation might reveal even this fault to be illusory.

In this respect, *Boumediene* reflects a complete breakdown in the usual dialogue between the branches. When the Court first overturned the Executive's claim that statutory habeas did not extend to Guantanamo, Congress promptly reversed that decision. Overlooking that statutory bar, the Court then overturned the President's military commissions – because Congress had not endorsed them and with the invitation for the President and Congress to address the issue together. They did so through the MCA, overruling or modifying nearly every aspect of the Court's decision. In *Boumediene*, the Court insisted on the final word – finding the MCA's tribunal process inadequate and striking its treatment of habeas suits.

Boumediene thus joins a long line of cases where the Court insists that it finally determine, on uncertain legal grounds, a repeatedly contested political or policy issue. To abortion rights, public prayer, gay rights, pornography, climate change, and the death penalty, add detainee policy. All are causes celebres in certain quarters, all have generated waves of largely fruitless litigation, all have deeply ambiguous and often unintended policy consequences, and all undermine the Court's claim to being a non-political body. *Boumediene* takes sides in the culture wars in a setting where war is

hardly a metaphor.

Practical Implications

Boumediene is doubtlessly a symbolic victory for the opponents of the Bush Administration's policies who seek to conduct counter-counter-terrorism via lawsuit. In faculty lounges and NGO offices, however, the decision will be a lesser *Roe v. Wade*: celebrated for its result but, *sotto voce*, faulted for its reasoning. Detainees receive yet another forum to challenge their confinement and, if charged with war crimes, to press their defense, and their lawyers can do so with the leverage provided by seeking and using highly classified information and the opportunity to challenge basic military policies. Of the 200 or so affected detainees the military assesses as threats to Americans, some may be released by court order or by a subsequent Administration that relaxes the military's current test – some perhaps released justifiably, others not. Of that latter group, some may do little harm to U.S. soldiers and citizens. Others, not.

The decision will otherwise affect military operations. It creates incentives to detain subsequently captured enemy combatants further from U.S. territory than Guantanamo, to leave the task to other countries, to kill rather than capture terrorists, or to leave known or suspected terrorists at large or subject only to the vagaries and limited reach of the criminal justice system. The first three outcomes hardly benefit detainees. The last hardly benefits Americans.

The decision's implications may be broader. At best, the decision is confined to detainee policy at Guantanamo, an aberration springing from the peculiar politics of a particular social set and a perception – perhaps misperception – of limited threat to the nation. At worst, the decision could be taken seriously, as abandoning true separation of powers and the tradition of judicial deference to Congress and the Executive in matters military and diplomatic. That approach could conceivably extend to operations in Afghanistan and Iraq and to detention and other war powers more broadly. But, the tradition of deference is valuable: the

branches' respective competences are so different and the stakes are so high, that the judiciary should at least aspire to be distinct from the "political branches."

Richard Klingler served as Legal Adviser and General Counsel on the NSC staff, 2006-2007.

Vladeck

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Combatant Status Review Tribunals (CSRTs) that they were, in fact, "enemy combatants":

The lower court expressly indicated that no constitutional rights (not merely the right to habeas) extend to the Guantanamo detainees. Therefore, it is irrelevant, to petitioners, that the DTA provides for review in the D.C. Circuit of any constitutional infirmities in the proceedings under that Act; the lower court has already rendered that provision a nullity.

Nor will further percolation of the question presented offer elucidation as to either the threshold question whether petitioners have a right to habeas, or the question whether the DTA provides a constitutionally adequate substitute. It is unreasonable to suggest that the D.C. Circuit in future proceedings under the DTA will provide review that affords petitioners the rights that the Circuit has already concluded they do not have. Ordinarily, habeas petitioners need not exhaust a remedy that is inadequate to vindicate the asserted right.

At the time, Breyer's dissent helped provide a window into the internal atmospherics within the Court. In retrospect, though, it also helped frame what, at least to me, was always the critical issue in *Boumediene*. After all, whether the Court's 2004 decision in *Rasul v. Bush* established the unique nature of Guantánamo as a matter of law, or whether it merely alluded thereto in dicta, Justice Kennedy's position was abundantly clear, and

it seemed inevitable that the Court would reject the D.C. Circuit's conclusion that the Suspension Clause simply does not "apply" to Guantánamo.

Instead, the real question would be the one side-stepped by the D.C. Circuit, and initially punted upon by the Supreme Court — whether the DTA provided petitioners with an adequate alternative to the writ of habeas corpus.

II.

Fast forward, then, to the Court's decision on the merits, in which the majority held that the detainees had a constitutional right to the writ of habeas corpus, that the DTA did not provide an adequate alternative to habeas corpus, and that the Military Commissions Act of 2006 (MCA), which otherwise took away the jurisdiction of the federal courts to entertain habeas petitions from non-citizens detained as "enemy combatants," was therefore unconstitutional in so providing. Justice Kennedy's opinion provoked two dissents — a hyperbolic, rhetoric-laden effort from Justice Scalia, and a more nuanced, legal critique from Chief Justice Roberts. It is on the latter opinion that I'd like to focus.

The Chief Justice's central objections are simple enough to summarize. First, the majority's holding that the remedy provided by the DTA is inadequate was simply premature. Until and unless the petitioners' DTA appeals are resolved by the D.C. Circuit, it would simply be impossible, according to Roberts, to judge whether or not such review would constitute an adequate substitute for the writ of habeas corpus:

Mandating that the petitioners exhaust their statutory remedies "is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile." So too here, it is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect the detainees' rights.

Second, the Chief Justice argued, even reaching

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the merits, the review provided for by the DTA is an adequate alternative to habeas corpus. Relying on the plurality's decision in *Hamdi v. Rumsfeld*, Roberts's opinion explains how the process provided for by the CSRTs (and the subsequent appeal to the D.C. Circuit) more than satisfies the *Hamdi* standard. And if *Hamdi* identified the appropriate process due to citizens held as "enemy combatants," it would follow, a fortiori, that non-citizens so detained are entitled to nothing more.

Of course, the Chief Justice's dissent fudges one critical point about *Hamdi*. In that case, the plurality reached the question of the appropriate process due only after deciding that Congress had authorized the detention of U.S. citizen "enemy combatants" captured in a zone of active combat. In other words, *Hamdi* first resolved the threshold question in all habeas petitions — the government's authority to detain. Roberts's dissent, in focusing primarily on whether the DTA provides adequate process, thus skirts over the heart of the matter, i.e., whether the DTA provides the detainees with a chance to challenge the President's authority to detain them, notwithstanding the procedural sufficiency of the CSRTs vel non. After all, the question in a habeas petition is whether the detention is legal, not whether the process leading to the petitioner's detention has been adequate. Insufficient process might help state a claim for unlawful detention, but the converse simply does not follow.

To be fair, the Chief Justice also read the DTA as authorizing the petitioners to contest the legal basis of their detention in the D.C. Circuit, noting that "[d]etainees receive additional process before the D.C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions." Indeed, the government appeared to concede that the D.C. Circuit would have "the ability to dispute the Government's right to detain alleged combatants in the first place, and to dispute the Government's definition of 'enemy combatant.'"

But this reading is, charitably, disingenuous. The plain language of the DTA, as Justice Kennedy rightly countered, provides the D.C. Circuit with no such authority. Instead, it authorizes the D.C.

Circuit only to review whether the CSRT comported with "the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals," and, "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." One is hard-pressed to see in this statute how a detainee could argue to the D.C. Circuit that there was no authority for his detention without arguing that his CSRT violated due process.

Moreover, as Kennedy argued, reading such power into the statute would be interpreting the statute in a manner that Congress could not possibly have intended:

[S]hould the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction.

. . . . To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation.

My own view is that this is a compelling rejoinder. But even if the Chief Justice's reading of the statute is plausible, it necessarily assumes that the D.C. Circuit would take a more expansive view of the detainees' rights than the majority of the Supreme Court was itself willing to take in *Boumediene*. As Justice Kennedy was at pains to emphasize, the conclusion that the detainees have a constitutional right to petition for writs of habeas corpus hardly compels the conclusion that they have any substantive rights to enforce in those petitions. To the contrary, that question will be left for the D.C.

Circuit on remand, and every time that court has reached that question previously, its answer has been emphatic — and negative.

We end up, then, back with Justice Breyer. In explaining why the Court should not wait for the DTA review in order to pass upon the detainees' right to habeas corpus, Breyer similarly harped upon the D.C. Circuit's decisions in earlier iterations of the same litigation, concluding that "[i]t is unreasonable to suggest that the D.C. Circuit in future proceedings under the DTA will provide review that affords petitioners the rights that the Circuit has already concluded they do not have." One might respond that *Boumediene* itself calls those earlier D.C. Circuit decisions into question, and that it is now clear, even to the D.C. Circuit, that the Guantánamo detainees have at least some constitutional rights.

But at the end of the day, that's largely beside the point. For the question is not whether the detainees have due process rights, Eighth Amendment rights, and the privilege of other constitutional protections. The question is whether, as part of their right to petition for a writ of habeas corpus, they have a right to raise any colorable challenge to the legality of their detention. The least convincing part of the Chief Justice's dissent is his atextual reading of the DTA to answer that question in the affirmative. The most convincing part of the majority opinion is its purposive reading of the DTA to answer that question in the negative. Breyer was right from

the get-go; on this essential question, at least, exhaustion would be futile, no matter how much evidence the detainee was allowed to present to the D.C. Circuit on appeal.

At one point, Chief Justice Roberts castigated the *Boumediene* majority for "shift[ing] responsibility for [such] sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary." But such criticism rings more than a little hollow when one considers that his solution would have been for the Court to rewrite the DTA by judicial fiat. At the heart of *Boumediene*, like *Rasul* and *Hamdan* before it, is statutory interpretation. The only difference is that this time, as Justice Breyer foretold and as Justice Kennedy concluded, Congress did not leave the Court with any way out.

Stephen I. Vladeck, is a law professor at American University Washington College of Law. He co-authored amicus briefs on behalf of a group of law professors in support of the petitioners in Boumediene, and on behalf of a different group in support of the detainees in Munaf.

Klingler Replies

Professor Vladeck's thoughtful analysis of *Boumediene* prudently declines to defend the majority's reasoning and instead focuses on two procedural

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Klingler Replies

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issues raised in the Chief Justice's dissent. Those issues highlight further flaws in the majority's opinion and underscore how far the majority chose to overreach to address the politically current issues surrounding the case.

Established judicial processes would ordinarily have barred the Court from addressing the sufficiency of the DTA process (and the constitutionality of the MCA's bar on habeas suits) once the Court concluded that habeas jurisdiction extends to Guantanamo. The court below had not even addressed the former issue. The *Boumediene* majority conceded this "would in the ordinary course," absent "exceptional circumstances," require "remand to the Court of Appeals to consider the question in the first instance." *Slip op.* 43. Here, the only "exceptional circumstance" is the exceptional interest that certain factions show in the policy issues at hand.

In addition, the majority very unusually addressed the sufficiency of the DTA's protections for the detainees even as lower courts were assessing those protections. Professor Vladeck is certain that waiting for the lower courts' conclusion would have been futile because the D.C. Circuit's answer was pre-ordained. But, now we'll never know, and certainty is misplaced because the D.C. Circuit has already read the DTA's protections surprisingly widely and may reshape the military tribunals role as well.

Separately, in faulting the DTA's procedural protections, the *Boumediene* majority ignored the Court's prior decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdi* upheld the Executive's authority to detain even U.S. citizens as enemy combatants and indicated the very limited procedural protections that would suffice to meet a habeas challenge. Those protections could be discharged in large part "by an appropriately authorized ... military tribunal," *id.* at 538, with the exigencies of war permitting the government, for example, to receive a presumption in favor of its evidence and to rely on

hearsay evidence. *Id.* at 533-34. The Chief Justice has far the better argument that, under *Hamdi* and other precedents, the DTA processes should be judged by the protections afforded by the military tribunals as well as by the D.C. Circuit – and those together readily suffice. He's correct that the DTA was predicated on *Hamdi* and provided more rights for alien combatants than *Hamdi* indicated was required for U.S. citizens. Not enough, though, for the *Boumediene* majority.

But *Hamdi* was then and *Boumediene* is now. Judges' confidence in their assessments of military and foreign affairs increases as September 11 fades from memory and terrorist attacks remain confined to Europe, to disrupted domestic plots, and to attacks on our soldiers far afield in unpopular wars. For a significant portion of the bench, exigency now requires that their fine judgment displace that of generals and diplomats, and Presidents and Senators, rather than requires them to stay their hand. It requires that result even when the normal processes and sources of law would preclude decision or yield less politically celebrated results. And, it does so when the liberty of no American is at stake.

Political scientists might trace the Court's posture instead to the increasing tolerance for the "rule of lawyers" over war matters as the belief spreads that we have evolved beyond real wars with real consequences, to the declining sense of sovereignty that makes more attractive a multinational view on matters military, and to how certain holdings make more congenial the international conferences and bar functions where judicial intervention is now in fashion. But political science would be unnecessary if the Court were less political, and instead upheld the legal tradition of deference to coordinate branches on military and foreign affairs.

Vladeck Replies

An increasingly prevalent conservative critique of Supreme Court decisions enforcing individual rights at the expense of the political branches is that such decisions are inconsistent with the separation of powers. One needn't look too closely at Richard Klingler's critique of the Court's recent decision in *Boumediene* to find a similar theme. As Klingler warns, "the decision could be taken seriously, as abandoning true separation of powers and the tradition of judicial deference to Congress and the Executive in matters military and diplomatic."

Such an argument has always struck me as a not-so-subtle attempt to re-conceptualize why we even have separated powers in the first place. In *Myers v. United States*, Justice Brandeis explained that "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

In other words, the separation of powers is means to an end — the protection of liberty from autocratic rule — and not an end unto itself. Instead, if the argument is really as simple as that the courts should not interfere with the political branches when those branches act in concert, very little would protect us from the tyranny of the majority of which our Founding Fathers so rightly feared.

I also take serious issue with the suggestion that *Boumediene* is another battleground — and another victory for the "left" — in the "culture wars." Wherever one comes down on the Court's jurisprudence concerning substantive due process and the right to privacy, to compare that body of law to the law concerning the writ of habeas corpus is to compare apples to oranges. As the Court pointed out in *McNabb v. United States*, "[t]he history of liberty has largely been the history of observance of procedural safeguards," and habeas corpus is

one of our most important procedural protections. Moreover, the *Boumediene* majority assiduously avoided reaching any of the difficult questions concerning the substantive rights of the detainees, leaving those questions for another day, and allowing for the possibility that those questions could be answered through the procedures established by Congress. Thus, one may disagree with the majority's analysis of why the Suspension Clause protects the Guantánamo detainees (although, as I've written elsewhere, such a disagreement cannot begin and end merely with the assertion that *Johnson v. Eisentrager* was rightly decided), but it simply belittles the structural importance of habeas corpus, and its commitment to constitutional text in the form of the Suspension Clause, to compare *Boumediene* to the likes of *Griswold* and *Roe*.

Finally, with respect to "the tradition of judicial deference to Congress and the Executive in matters military and diplomatic," it was this very sort of unquestioning deference to the political branches during wartime that led to Justice Black's majority opinion in *Korematsu*, which upheld the military's power to detain U.S. citizens in internment camps largely because "Congress, reposing its confidence in this time of war in our military leaders . . . determined that they should have the power to do just this." I would've thought that we've learned our lesson — that the constitutionality of measures that restrict one's liberty, even (if not especially) during wartime, cannot simply turn on whether the political branches have assented thereto.

Related Resources

A panel of experts discussed the *Boumediene* and *Munaf* rulings and their long term impact at a June 17th Standing Committee program held in cooperation with the Reserve Officers Association. The podcast is available at: www.abanet.org/natsecurity/

"*Due Process and Terrorism: A Post Workshop Report*" features legal experts discussing the appropriate process due to individuals detained as suspected terrorists. The full report is available at: www.abanet.org/natsecurity.

COMMENTARY:
Munaf, Bigger Than Boumediene?

Michael A. Newton

On the same day that a deeply divided Supreme Court extended habeas corpus rights to foreign detainees held at Guantanamo Bay, Cuba, a unanimous court issued a potentially more far reaching decision in *Munaf et. al. v. Geren et. al.* In *Munaf*, the Court reiterated that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command. One petitioner was an American-Jordanian citizen who aided the late leader of al-Qaeda in Iraq, Abu Musab al Zarqawi. Captured insurgents told American military interrogators that his fluent English allowed him to lure foreigners to his home where they were abducted. The second petitioner, *Munaf*, is a citizen of both Iraq and the United States. He was tried by the Central Criminal Court of Iraq and convicted for participating in the kidnapping of several Romanian journalists with whom he had travelled to Iraq to serve as translator and guide. Though *Munaf*'s conviction was overturned by the Iraqi Court of Cassation, he remained in American custody pending retrial in the CCCI. Both sought injunctive relief to prevent their transfer to Iraqi authorities.

The habeas statute, 28 U. S. C. §2241(c)(1), applies to persons held "in custody under or by color of the authority of the United States." The Court rejected the Solicitor General's argument that the federal courts lack jurisdiction over the detainees' habeas petitions in such circumstances because the Multinational Forces Iraq (MNF-I) constitutes a multinational force operating under the legal authority of the U.N. Security Council umbrella. Instead, the court focused on the disjunctive "or" in §2241(c)(1), which makes clear that actual Government custody suffices for jurisdiction, even if that custody could be viewed as "under . . . color of" another authority, such as the MNF-I. The Solicitor General conceded during arguments that American forces deployed

as part of MNF-I operate under the exclusive authority of U.S. command channels, and the court distinguished the World War II era precedent in which Japanese prisoners held under General McArthur's command were denied habeas jurisdiction. The lower courts in both cases erred in failing to grant habeas jurisdiction and to decide the cases based on the merits of the underlying petitions.

Acknowledging that the courts are generally reluctant to intrude upon the authority of the Executive in military and national security affairs, the Court nevertheless decided to reach the merits of the claims because the habeas petitions "implicate sensitive foreign policy issues in the context of military operations." While the Court upheld habeas federal jurisdiction over the American citizens, it nonetheless rejected their claims that they enjoyed enforceable rights not to be transferred to Iraqi custody under the Due Process Clause, concluding that the district courts could not issue the injunctions sought. Habeas corpus is an equitable principle that is "at its core a remedy for unlawful executive detention." On these facts, the petitioners voluntarily travelled to Iraq where they each committed serious crimes of terrorism within the jurisdictional authority of the Central Criminal Court of Iraq. The traditional remedy for a habeas violation is release, but the Court noted that "the last thing the petitioners want is simple release." In effect, the petitioners sought a federal order that would protect them from Iraqi judicial authority, but allow them to flee the jurisdiction so as to escape that territorial authority. As Chief Justice Roberts concluded, "Habeas corpus does not require the United States to shelter such fugitives from the criminal justice of the sovereign with authority to prosecute them."

Munaf is an important case because of its harmonization of the sovereign authority of the Iraqi government with the scope of constitutional protections enjoyed by American citizens outside the territorial jurisdiction of the United States. Setting aside speculative arguments that the pe-

tioners could be subjected to torture or other inhumane treatment at the hands of foreign officials, the federal officials may transfer American citizens to another sovereign state with territorial jurisdiction; “there is hardly an exception to that rule when the crime at issue is not embezzlement but unlawful insurgency directed against an ally during ongoing hostilities directed involving our troops.” In fact, the opinion explicitly acknowledges that American citizens who commit crimes after traveling abroad remain within the territorial jurisdiction of the foreign state “whether or not the pertinent process comes with all the rights guaranteed by our Constitution.” Negotiations continue at the time of this writing on a bilateral Status of Forces agreement for U.S. citizens operating in Iraq. *Munaf* vindicates the scope of Iraqi criminal authority “unless they have relinquished their jurisdiction to do so.” *Munaf* will likely be the central case at issue in the future if any sovereign state attempts to transfer an American citizen to the International Criminal Court on the basis of its own treaty authority.

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COMMENTARY:

***Boumediene*: The Path Forward**

Julian Davis Mortenson

In *Boumediene v. Bush*, the Supreme Court held that alleged enemy combatants detained in Guantanamo Bay have a constitutional right to bring habeas petitions in federal court. In the wake of the decision, two practical questions stand out: what exactly did detainees win, and how exactly can Congress respond? On the second question, I have elsewhere suggested that *Boumediene* leaves the door open for Congress to create a comprehensive preventive detention regime, so long as it secures a meaningful opportunity to challenge executive detention in individual cases. (See www.opiniojuris.org, June 13 & June 17, 2008). My aim here is to focus instead on the first question: contrary to the concerns expressed

in Chief Justice Roberts’ dissenting opinion, I believe the way forward for current detainees is reasonably clear.

Habeas Claims

The *Boumediene* decision’s principal result is, of course, that Guantanamo detainees may pursue their habeas cases in district court as though the jurisdiction-stripping provisions of the Military Commissions Act had never been passed. Habeas corpus is an ancient procedure with a simple core function: testing the legal authority of jailers to detain their prisoners. As district courts follow their 28 U.S.C. § 2243 obligation to “dispose of the[se] matter[s] as law and justice require” with a fact-specific inquiry adapted to the particular circumstances of each case, three types of claims are likely to predominate.

Legal Authorization: Many detainees will surely challenge the government’s definition of the categories of individuals who are legally detainable as enemy combatants. The *Hamdi* plurality found that the Authorization for Use of Military Force (AUMF) authorized the detention of anyone in Afghanistan who was “part of or supporting forces hostile to the United States” and actually “engaged in an armed conflict against the United States.” Less than two weeks later, an order issued by Deputy Secretary of Defense Paul Wolfowitz purported to eliminate any requirement that a detainee have engaged in armed conflict, premising detention instead on mere “support[for] Taliban or al Qaeda forces.” Which standard, or related variants, controls? And how do they apply: does the detention authority cover people accused of providing money or lodging to al Qaeda operatives? Does it reach membership *simpliciter* in radical organizations that themselves have ties to known members of al Qaeda?

Answering these questions will require sorting through a complicated and overlapping set of legal issues. How do the laws of war define direct participation in armed conflict? Does the AUMF or any other statutory provision alter that definition, or confer agency-style authority on the

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Executive to further clarify the scope of enemy combatancy? What additional power exists under the President's inherent authority as Commander in Chief? By resolving these issues in the ordinary fashion of Article III courts—that is, on a case-by-case basis—the habeas courts can incrementally delineate the permissible scope of detention.

Factual Basis: Many detainees will rely on the independent fact-finding role of traditional habeas courts to challenge the Executive's factual allegations. They may not deny that the U.S. military can properly detain, for example, a Taliban commander or an al Qaeda triggerman in the midst of a combat operation. Rather, these detainees would focus on whether they are *in fact* accurately described by the Executive, or are actually the victims of mistaken identity, a festering clan feud, or a crooked informant. It is in this context that classified material will take on the greatest salience, with courts likely drawing on the Classified Information Procedures Act, the evolving state secrets privilege, and whatever hints they can glean from *Boumediene*'s dicta to navigate the difficulties posed by sensitive material. It is also here that Congress likely has the greatest opportunity to weigh in on “innovation in the field of habeas corpus.” *Boumediene v. Bush*, Slip Op. at 67.

Due Process: Detainees may also argue that the Due Process Clause prohibits executive detention in their cases. Some may contend that, outside the context of interstate warfare, the government must either try suspected terrorists in criminal court or release them. *Cf. al Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (prohibiting extended detention of resident alien in United States without criminal trial) (en banc rehearing granted and decision pending). Other detainees will argue that, even if the Constitution permits preventive detention as such, the Executive has violated the Due Process Clause by failing to

implement adequate safeguards at the front end of that detention. These petitioners may well seek immediate release, following Justice Scalia's *Hamdi* dissent in arguing that “it is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided.”

DTA Claims

To some observers' surprise, the Supreme Court emphasized in *Boumediene* that “both the DTA and the CSRT process remain intact.” The role actually reserved for DTA review is at first something of a puzzle, since the Court seems not to anticipate requiring future detainees to exhaust the DTA's review procedures before seeking habeas review. *See* Slip Op. at 66-67. So it appears that the DTA will live on as a source of rights parallel, rather than antecedent, to habeas review. The question then becomes: what detainee would ever use a process that is now deemed constitutionally inadequate?

Despite the DTA's failings as compared to habeas review—and bearing in mind potential res judicata complications—some detainees may actually find DTA review attractive. Two types of cases seem most significant. First, quick dispositive motions on the CSRT record may be the fastest way for some petitioners to secure relief, especially since DTA review authorizes detainees to proceed directly in the D.C. Circuit. This is particularly well suited for detainees who claim that the government's allegations, even if true, cannot support their continued detention. *See, e.g., Parhat v. Gates*, No. 06-1397 (D.C. Cir. June 20, 2008) (invalidating CSRT designation of petitioner as enemy combatant).

A second set of petitioners may be more interested in the discovery available on DTA review. The D.C. Circuit held in *Bismullah v. Gates* that DTA petitioners are entitled to all “reasonably available” information in the government's possession “bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.” While the Supreme Court vacated and remanded *Bismullah* for reconsid-

eration in light of *Boumediene*, the *Bismullah* ruling rested on straightforward statutory construction that should technically be unaffected by *Boumediene*'s reinstatement of habeas corpus. So there is some reason to expect the court of appeals' DTA precedent to survive *Boumediene*. If so, the scope of mandatory discovery on DTA review may be attractive to certain detainees with strong innocence claims.

There may thus be good cause for some detainees to seek the peculiar advantages of DTA review. If the court of appeals follows the Supreme Court's lead and leaves that option open, there is reason to believe that at least some will do so.

Conclusion

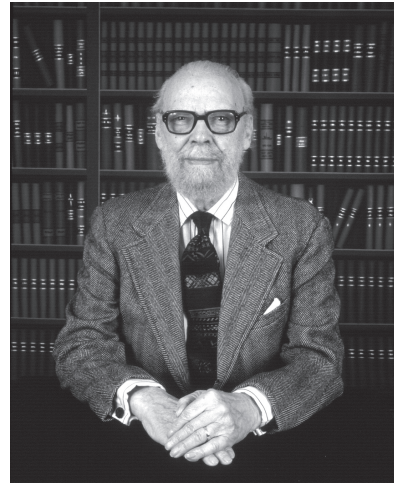
Chief Justice Roberts' *Boumediene* dissent suggests that the majority has cut the lower courts adrift in a trackless sea of uncertainty. As outlined above, this view is, at best, significantly exaggerated. The basic outlines of detainees' substantive legal claims have already become fairly clear. And even without congressional intervention, detainee litigation is now moving forward—on a path which is both sufficiently grounded in centuries of habeas practice and sufficiently flexible given the courts' equitable powers to fashion meaningful process—to begin testing the government's long-insulated claims about the men held in Guantanamo Bay.

Julian Davis Mortenson is Visiting Assistant Professor at Fordham Law School, where he teaches national security law and international law. Until January 2008 he was a member of the Wilmer-Hale team that is representing the Boumediene petitioners in federal court.

Morris I. Leibman Award Presented to Professor Howard S. Levie

The ABA Standing Committee on Law and National Security was proud to award the Morris I. Leibman award in law and national security to Professor Howard S. Levie for his distinguished

contributions to the field of national security law.



Leibman Award recipient
Professor Howard S. Levie

Photograph courtesy of U.S. Naval War College

The Leibman award was established by the Standing Committee on Law and National Security in honor of Morris Leibman, a distinguished lawyer, co-founder of the Standing Committee, and recipient of the Presidential Medal of Freedom. The Award recognizes Mr. Leibman's lifelong dedication to the rule of law, leadership in the field of law and national security affairs, and continuing support for those engaged in this field. Recipients must demonstrate a sustained commitment to, and have had an exceptional impact on, the field of national security; whether through government service, legal scholarship, or otherwise.

Nominated by Professor John Norton Moore, Director of the University of Virginia's Center for National Security Law and Counselor to the Standing Committee, Professor Levie was presented with the Leibman award by Captain Ralph Thomas of the U.S. Naval War College at a celebration attended by friends and family celebrating his 100th birthday on December 19th, 2007 in Portsmouth, Rhode Island, where Professor Levie now lives. Captain Thomas read the following citation on behalf of the Standing Committee:

Professor Howard Levie's career as a soldier and a scholar has spanned more than six decades and has been marked by distinction throughout. Dur-

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Leibman Award

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ing those often arduous and always productive years, Howard was a consistent and often hardy champion of the rule of law in armed conflict. He earned the admiration and respect of statesmen, military commanders and international law practitioners worldwide. His contribution to the development and articulation of the Law of War, both in uniform and academic robe, has been enormous.

Howard Levie's military career spanned 21 years and included service in World War II and the Korean Conflict. His abiding interest in the Law of War, war crimes and protection of prisoners of war stemmed from his participation in the Tokyo War Crimes Trials while a member of General MacArthur's staff and from his assignment to the United Nations Command Armistice Delegation. As a principal architect of the Korean Armistice Agreement, Howard learned first hand the need to strengthen the protections of prisoners of war and other noncombatants during conflict. Two years later, he became the first Chief of the Judge Advocate General of the Army's International Affairs Division.

Howard Levie's contribution to the formulation of the Law of War and to the protection of victims of armed conflict in the ensuing years of his military service was monumental. Following retirement from the United States Army in 1963, Howard began his distinguished academic career on the faculty of Saint Louis University Law School where his passionate advocacy of the rule of law during armed conflict echoed in the halls of civilian academe and, during a sabbatical year as the Charles H. Stockton Professor of International Law, in the military classrooms of the United States Naval War College. However, Professor Levie's 21 years of military service and 14 years of law school teaching proved to be merely a prologue in his illustrious career.

Upon retiring from Saint Louis University, Howard returned to Newport, Rhode Island and

renewed his association with the Naval War College where he taught pro bono within the International Law and Ocean Affairs program as an Adjunct Professor of International Law until withdrawing from the program in 1997 at the age of 89. Howard's most prolific and influential writing on the Law of War occurred during these "retired" years in Newport. He wrote books and articles on the Law of War, war crimes and the treatment and protection of prisoners of war and other victims of armed conflict that have become bedrock to which practitioners and scholars return. Principal among these works are *Prisoners of War in Armed Conflict*, *The Code of International Armed Conflict (2 Vols.)* and *Terrorism in War: The Law of War Crimes*, each considered a classic in the field.

The impact of this enormous body of work on the thinking of domestic and international policy makers, military commanders and scholars cannot be overstated. Importantly, Howard Levie's wisdom, compassion and dedication to his country and to his profession translates into enhanced respect for, and adherence to the rule of law in armed conflict by individual soldiers, sailors, airmen, marines and coast guardsmen. It is a special honor for the American Bar Association Standing Committee on Law and National Security to award Howard Levie the Morris I. Leibman Award in Law and National Security.

2008 ABA Annual Meeting – New York City Committee Programs Saturday, August 9, 2008

8:30 a.m. – 10:00 a.m. “Local Police Fighting International Terrorism”

(Gibson Suite, 2nd floor, Hilton New York)

* Complimentary CLE Credit

10:30 a.m. – 12:30 p.m. “Privacy and National Security in a Networked World: Is It Time to Reconsider Privacy Rights in Third Party Records?”

(Sheraton New York, New York Ballroom East, 3rd Floor) *Complimentary CLE Credit

For more information visit,
www.abanet.org/natsecurity

American Bar Association Standing Committee on Law and National Security Announces the 2008 National Security Law Student Writing Competition

Overview: The Standing Committee on Law and National Security, founded in 1962 by then-ABA President and later Supreme Court Justice Lewis J. Powell, conducts studies, sponsors programs and conferences, and administers working groups on law and national security-related issues.

In furtherance of its mission the Standing Committee is proud to announce a new and innovative writing competition for law students to provide their unique perspective and insight to one of the most important questions our country faces, how to craft a legal response to the problems presented by terrorism and other emerging national security threats.

Topic: *New Perspectives for a New Threat*: student analysis of a timely issue at the intersection of law and national security.

Eligibility: The competition is open to all students attending an ABA accredited law school at the time their entry is submitted. Only original and previously unpublished papers are eligible. Papers prepared for law school credit are eligible provided they are original work. Jointly authored papers are not eligible. Entrants can have a faculty member or practicing lawyer review and critique their work, but the submission must be the student's own work product. The name of the reviewing professor or lawyer must be noted on the entry. Committee members, staff, and selection committee members shall not participate in the contest or review process. Only one essay may be submitted per entrant.

Format: Essays shall be between 4,000-6,000 words, including title, citations, and any footnotes. The text of the essay must be double-spaced, with twelve-point font and one-inch margins. Entries should reflect the style of the ABA Standing Committee on Law and National Security's *National Security Law Report* articles rather than law review style. Entrants are encouraged to review past copies of the News available at <http://www.abanet.org/natsecurity/> - prior to drafting their submissions. Citations must be embedded in text or in footnote form, as opposed to endnotes. Cites must conform with The Bluebook: Uniform System of Citation.

Entry Procedure: Each submission must include a SEPARATE COVER PAGE with the entrant's name, law school, year of study, mailing and email address, and phone number. The contestant's name and other identifying markings, such as school name, MAY NOT appear on any copy of the submitted essay.

Deadline: Submissions must be postmarked no later than **September 15, 2008** and mailed to: American Bar Association, Standing Committee on Law and National Security, 740 15th Street NW, Washington, DC 20005; or sent via email to hmcMahon@staff.abanet.org. Winner will be notified by October 15, 2008.

By submitting an entry in this contest, the entrant grants the ABA and the ABA Standing Committee on Law and National Security permission to edit and publish the entry in the Committee's National Security Law Report. Please direct any questions about the contest to the Committee Staff Director at hmcMahon@staff.abanet.org.

Judging: The winning entry will contain an original analysis of a national security law issue that is substantively accurate and persuasive, supported by citations, and clearly written. The entries will be judged anonymously by members of the ABA Standing Committee on Law and National Security.

Prize: The winning essay will be published in *The National Security Law Report*. The winner will also receive free registration to the 18th Annual Review of the Field of National Security Law Conference held in Washington, DC, on November 6 and 7, 2008, as well as reimbursement, up to \$500, for travel, housing, and per diem to attend the conference.

In Case You Missed It ...

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at robert.chesney@wfu.edu.

“In Case You Missed It...,” featuring selected posts from Professor Chesney’s listserv, is a recurring feature of The National Security Law Report.

- *Azmy v. U.S. Dep’t of Defense* (S.D.N.Y. June 22, 2008) Judge Rakoff granted, for the most part, the government’s motion for summary judgment in connection with FOIA litigation brought by Professor Baher Azmy (Seton Hall) seeking information about the CSRT and ARB proceedings relating to his client Murat Kurnaz. The government resisted disclosure under FOIA exemptions 1, 2, 5 and 7. Judge Rakoff by and large agreed that these properly were invoked, with the exception of a few items that he concluded might already have been disclosed elsewhere.
- *United States v. Benkahla* (4th Cir. June 23, 2008) The Fourth Circuit (in an opinion by Judge Wilkinson, joined by Judges Motz and Duncan) rejected a series of arguments raised by Sabri Benkahla. Benkahla was associated with the “Virginia Jihad/Virginia Paintball” investigation. He was tried and acquitted of providing services to the Taliban in violation of IEEPA and using a firearm in furtherance of a crime of violence, based on allegations that he attended an LET training camp in Afghanistan (and fired weapons there). After his acquittal, he was subpoenaed to testify before grand juries on at least two occasions, and in those settings and elsewhere he denied having ever attended any jihadist training camp. He was then indicted and convicted on obstruction/false statement charges. In that sense the case represents charging strategies not unlike the issues currently associated with the al-Arian situation (where attorneys for al-Arian have been trying to avoid having their client testify before grand juries, anticipating this sort of result). Bekhahla raised three sets of issues: whether Double Jeopardy applied in this context; whether it was error to admit certain testimony relating to the jihad movement; and whether it was error to apply the terrorism enhancement at sentencing.
- *Parhat v. Gates* (D. C. Circuit June 23, 2008) The D.C. Circuit, exercising the DTA review authority recently deemed an inadequate habeas substitute by the Supreme Court in *Boumediene*, overturned a CSRT determination of enemy combatant status relating to a Chinese Uighur detainee. The precise grounds for the decision were not clear as The Report went to publication as the court is preparing a redacted version of its complete opinion.
- Office of the Director of National Intelligence, Office of General Counsel – “Intelligence Community Legal Reference Book” (2007) An extremely handy desk reference with excerpts from key statutes and guidelines. http://www.dni.gov/reports/IC_Legal_Reference_Book.pdf
- *Khadr v. U.S.* (D.C. Cir. June 20, 2008) The D.C. Circuit, in an opinion by Chief Judge Sentelle, has dismissed a petition by Omar Khadr asking the Court to address certain procedural issues relating to Khadr’s war crime trial before a military commission at GTMO. The opinion relies on language in the Military Commissions Act providing that the D.C. Circuit’s jurisdiction in this context comes into play only after a final judgment by the commission that has been approved by the Convening Authority and after all other MCA appeal options are complete.