

KEEPING BOUMEDIENE OFF
THE BATTLEFIELD: EXAMINING
POTENTIAL IMPLICATIONS OF
THE BOUMEDIENE V. BUSH
DECISION TO THE CONDUCT
OF UNITED STATES MILITARY
OPERATIONS

BY

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Disclaimer

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ABSTRACT

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KEEPING BOUMEDIENE OFF THE BATTLEFIELD: EXAMING POTENTIAL IMPLICATIONS OF THE BOUMEDIENE V. BUSH DECISION TO THE CONDUCT OF UNITED STATES MILITARY OPERATIONS

I. Boumediene and the Historical Precedent.

The United States Supreme Court, by its June 2008 holding in Boumediene v. Bush,¹ has granted the right of *habeas corpus* to the petitioning enemy detainees held by the Department of Defense at Guantanamo Bay, Cuba. This landmark ruling granted rights to enemy fighters heretofore foreclosed and leaves open the potential for further extension of rights under United States laws to enemy fighters detained overseas. In particular, the Court's decision has implications in two general areas: (1) the application of the *habeas* right to foreign fighters detained in locations other than Guantanamo Bay; and (2) the application of other constitutional and statutory rights to persons stopped or detained by U.S. military forces. By including restrictive language in its holding, the Court attempted to limit application of the Boumediene decision to Guantanamo Bay, but the Court stopped short of explicitly restricting application to the Cuban base. As such, leaders within the Department of Defense may be forced to consider Boumediene in planning and waging future military operations. Organizational change, including change to policy, structure, and tactics, may be required. And troops on the ground may be forced to operate within the confines of Boumediene, figuratively carrying the heavy 70 page majority opinion in their assault pack while conducting combat operations.

The United States military has a long historical legal precedent and framework regarding the capture and detention by the United States military of foreign enemies engaged in hostilities against the United States. We have a history of engaging in overseas wars, capturing prisoners overseas, and holding them in overseas and domestic camps controlled by U.S. forces. Generally, these detainees have been entitled to the panoply of legal protections afforded by international law, primarily the Geneva Conventions. Historically, these prisoners and detained

persons² have not had the legal right to petition United States courts for redress under United States law when the detainees are located outside of the United States. Specifically, the right of a foreigner detained overseas by the U.S. military to petition a U.S. court for release pursuant to the United States Constitution--that is, the right of *habeas corpus*--has not previously existed in our nation's history. The Supreme Court in Boumediene v. Bush changed the legal landscape in this area.

In determining that Guantanamo detainees have the *habeas* right, the Court appeared to attempt to limit its holding to the unique circumstances of Guantanamo Bay. In its holding, the Court fashioned a new test to determine whether a foreign fighter detained overseas may rely on the *habeas* right³ and rejected a *de jure* sovereignty analysis. Simply detaining enemy fighters on foreign territory is no longer sufficient to prevent application of the *habeas* right. Instead, the Court held that a petitioning foreign enemy detainee held overseas enjoys the right of *habeas corpus* if the United States, though not possessing legal sovereignty over the area, maintains functional control over the prisoner. In order to determine whether the United States maintains functional control, the Court rejected the traditional black-and-white analysis of legal sovereignty and adopted a more objective test. Under the new test, a court reviews the "objective factors and practical concerns" associated with the detention to determine whether the United States exercises functional control over the detained enemy fighter.

In the case of Guantanamo Bay, the Court focused on the unique circumstances of the United States base on Cuban territory. The United States enjoys an unprecedented amount of autonomy at Guantanamo Bay under the terms of an indefinite lease with the Cuban government. The Court considered important the fact that the United States exercised relative autonomy at the base. Using words like "absolute," "indefinite," and "total military and civil control," the Court reasoned, in essence, that the United States possessed *de facto* sovereignty⁴ over the territory.

The Court considered “objective factors and practical concerns” in conducting its functional analysis and in determining that the United States maintained “functional control” over the detainees.⁵

Chief Justice Roberts and Justice Scalia, in their dissenting opinions, criticized the majority of the Court for overstepping its bounds in granting these new rights. Each pointed out possible problems or repercussions from the decision.

Justice Scalia devoted focused attention to what he termed the “disastrous consequences” of the majority opinion. He cautioned that the holding “will almost certainly cause more Americans to be killed” and concluded that “[t]he Nation will live to regret what the Court has done today.” He highlighted that over the years, of the detainees DoD has released from Guantanamo, there is evidence that approximately 30 have returned to the battlefield to fight again against the United States. He argues that the success of the returnees “illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection.”⁶ Essentially Justice Scalia argues that the military, rather than the courts, is in the best position to determine friend or foe. If DoD released terrorists inadvertently, under procedures the Court determined to be inadequate to protect the detainees, then the heightened review, as mandated now by the Court, would doubtless result in the release back to the battlefield of even more terrorists who feign false imprisonment as innocent bystanders.

Justice Scalia, and Chief Justice Roberts in his dissent, likewise expressed concerns about providing detainees access to U.S. military witnesses, who may be otherwise unavailable, at war in a combat zone. They also resisted releasing classified information to detainee counsel, which information might be used against the U.S. forces in the field or to the advantage of the terrorist enemy. Noting that DoD relied on previous Court decisions, namely Eisentrager,⁷ in moving

detainees all the way from Afghanistan to Cuba, Justice Scalia chastised the majority of the Court for essentially changing the rules in the middle of the war. Concluding his discussion of the consequences of the majority decision, he warned that “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subjects entails.”

The Boumediene dissenters raise an issue that has slithered into today’s modern battlefield and one that must be confronted by national security policy makers: Lawfare. Lawfare is the concept that the current enemy, or any enemy for that matter, will use our laws and general compliance with the Rule of Law against us. The term was coined in 2001 by then-Colonel, now Major General, Charles J. Dunlap, Jr., U.S. Air Force, in an article questioning whether lawfare undercuts the effectiveness of the military.⁸ The Boumediene dissenters would likely argue that it indeed does. More significantly, Boumediene could be described as a form of fratricide—self-imposed, self-perpetuating form of lawfare.

Will the concerns of the dissenters be realized? Is the majority opinion an attempt by the Court to structure a remedy applicable only to Guantanamo Bay, in order perhaps to make a political statement or rectify a perceived particularized wrong? Regardless of the answers, the fact remains that this decision provides a precedential framework for analysis. The Court must be taken at its word, and in its holding, the Court fashioned a new test for determining whether a foreign fighter detained overseas may rely on the *habeas* right. Our task is to apply it. And, applying Boumediene, a subsequent court could conceivably determine that the United States exercises functional control over a United States prisoner of war holding or detention camp located in a foreign area, particularly where United States and/or coalition forces may be the occupiers (traditional Occupied Territory under the laws of war). For some of the practical reasons and obstacles contained herein, Boumediene should not be extended.

Under Boumediene, did prisoners held at Abu Ghraib during the height of the United States occupation of Iraq possess *habeas* rights?⁹ Does *habeas* attach currently to the prisoners held in overseas locations, such as Bagram Air Base in Afghanistan?¹⁰ Notwithstanding current restrictions on the military uses, what if the U.S. chose to establish a Guantanamo Bay-like location in Antarctica, or in space. Or what about in the middle of an ocean on a ship or man-made island? The questions are fair ones, and some are already being asked by commentators.

To many who have followed the Court's decision in this area, the holding is no surprise. Boumediene reinforced a position the Court began to signal a few years earlier. In 2004, in Rasul v. Bush,¹¹ the Court found that the statutory *habeas corpus* provisions contained at 22 U.S. Code § 2241,¹² applied to the Guantanamo detainees. And, in the 2006 decision of Hamdan v. Rumsfeld,¹³ the Court applied Geneva Convention protections to the Guantanamo detainees. Will this trend by the Court of providing rights to detained foreign fighters continue? Referring to Boumediene, former Attorney General Mukasey expressed concern that the trend could continue when he warned that our wartime efforts in Afghanistan could become an evidentiary nightmare and turn into "CSI Kandahar."¹⁴ In this context, what measures could the Department of Defense undertake?

II. Boumediene in the Pentagon.

The scope of the problem set DoD may face is a bit daunting. What could happen--and in the case of the Guantanamo detainees, is happening--is that foreign detainees held by United States forces in locations deemed to be the functional equivalent of United States territory would be entitled not just to Geneva protections, for prisoners of war, or Detainee Treatment Act protections, in the case of enemy combatants at Guantanamo Bay not declared prisoners of war. They would also be entitled to a *habeas* review by a federal district court. If the functional

analysis test of Boumediene is extended, or interpreted by DoD to extend, to physical locations other than Guantanamo, then foreign fighters would be afforded additional protections under the United States Constitution and U.S. laws—protections normally afforded to United States citizens or other persons in the United States.¹⁵

These new rights could include a right to counsel, a right to remain silent and Miranda warnings, heightened due process, and countless other rights and privileges normally associated with U.S. citizenship or presence in the U.S. Imagine a military commander needing articulable suspicion to stop, or probable cause to detain, or worse, some higher level of proof to attack an enemy!¹⁶ The implications are mind-boggling to a military professional. Our professional military force would essentially be converted into a *de facto* law enforcement organization, or, have as its adjunct, an actual or *de facto* law enforcement organization. Such extension would totally change the face of combat. Perhaps some of these examples are far-fetched; the question at issue though is how far toward this end will the courts go? They should go no further than Boumediene. But, if courts continues the trend and extend this holding, how would the Department of Defense meet these new requirements?

Programmatically and institutionally, extension would require a re-evaluation of DoD's policies, regulations, training and organization. Currently, all military personnel are trained to the Geneva standard under the Department of Defense Law of War Program.¹⁷ This program ensures that servicemembers are trained in and abide by the international legal norms of warfare. Would DoD implement a similar program to ensure compliance with domestic laws during combat operations, including detention operations? And, if so, should it be separate from the Law of War Program or integrated into it?

A progressive extension of Boumediene may require servicemembers in combat to abide by constitutional provisions normally applicable to law enforcement personnel domestically.

Such an extension would require a massive training and education program to implement department wide. This training may include instruction on the court-directed domestic laws that might now be applicable to taking that next hill, essentially a shifting body of Criminal Law for the Battlefield. In implementing this new standard, DoD and the military departments might be required to create training packages for new entrants at the basic training installations; annual refresher training; formalized procedures for integration into major military training exercises and actual military operations; reporting procedures for violations; and benchmarks for methods of effectiveness. The International Committee of the Red Cross might choose to monitor U.S. forces not only for compliance with international law but also for compliance with our applicable domestic laws. DoD would be interested in the ICRC's new focus area and would need to implement procedures to address these new areas of international scrutiny.

As DoD attempts to operationalize Boumediene, it must consider the new concept of how to prove up a federal case while concomitantly conducting military operations. Justice Scalia, in his dissent, noted that the Boumediene holding "sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner."¹⁸ Practically speaking, this concern is happening now in the District of Columbia federal court as the *habeas* cases of the Guantanamo detainees progress. The Supreme Court, however, is not establishing the rules under which those cases proceed, as Justice Scalia suggests. The task has fallen on the District Court judges themselves, in particular, Senior Judge Thomas F. Hogan, who is in charge of establishing general rules for the administration and management of most of these cases.¹⁹

And these rules and procedures are indeed vitally important, not only for the process but also for DoD and Soldiers on the ground whose actions may be dictated by these rules. Courts will create, and lawyers argue endlessly about, such important matters as the definition of

“enemy combatant,” the standard of proof for this yet-to-be defined term, the admissibility of evidence, the scope and breadth of exclusionary rules, presumptions afforded to government evidence, whether the presence of the detainee is required, access to government witnesses, the extent of government disclosures of evidence (Brady-like evidence), and a host of other procedural and substantive issues. Essentially, every issue that may arise in a federal criminal case will have to be addressed, interpreted, decided, and applied to the current and future unique enemy prisoner *habeas* actions. This is a daunting task.

Enter CSI Kandahar. Extending Boumediene would require detailed procedures in the collection, preservation, and maintenance of “evidence.” Normally, the military treats information regarding enemy captives simply as battlefield information or intelligence. Military personnel process this information, important to the conduct of military operations, through intelligence channels. Intelligence analysts and commanders use it to determine enemy strength, weaknesses, vulnerabilities, location, and other information about the enemy important to the commander on the ground. Treating captured enemy information as evidence in a federal case would require an entirely new process and procedure, perhaps a new intelligence collection and processing procedure. More likely, because of the significant risk to intelligence sources and methods, DoD and the intelligence agencies would choose to establish an entirely separate but parallel system to process and sanitize battlefield intelligence information for transmittal to federal court.

DoD may be forced to address these federal evidence requirements. Standards may have to be established, beginning with procedures for what constitutes the equivalent of probable cause to detain, and including procedures for the seizure and collection of evidence; chain of custody; evidence storage and maintenance; evidence authentication; and witness availability,

just to name a few.²⁰ This may require procedures to formalize investigations, including a requirement to establish a pseudo-criminal case file for every detained enemy,

Certainly servicemembers do not have the training to make and prove up a federal case. Servicemembers on the ground now are familiar with basic evidence collection requirements, and great strides have been taken in Iraq and Afghanistan to formalize information collection resulting from raids.²¹ Site exploitation teams and specially trained personnel have assisted in gathering and maintaining site intelligence information, which may later be used as evidence, normally in an Iraqi court. But this is only the tip of the iceberg. Imagine if every raid or other military operation required a police-like crime scene analysis, with the collection of evidence to be used in a federal court. Soldiers simply cannot conduct such an undertaking, nor should they be required to.

Military law enforcement personnel are a limited asset on the battlefield, busy conducting criminal investigations into allegations of misconduct by military personnel, contract fraud investigations, and investigations into the death of servicemembers. DoD would be hard-pressed to meet this new investigative and evidentiary requirement. DoD may be forced to adjust its force structure and increase (phenomenally) the capacity of the services' law enforcement investigative agencies, a precarious undertaking for a military already stretched thin if end strength is not increased. Or, perhaps DoD would create a new *habeas* investigative agency, uniformed and/or civilian, to accompany forces on the battlefield. One solution is to use another federal law enforcement agency, such as the Federal Bureau of Investigation, to augment military forces, similar to the way that the U.S. Coast Guard augments U.S. Navy operations on law enforcement actions at sea.²²

In addition to programmatic and organizational challenges, DoD may be forced to consider Boumediene in the planning and execution of military strategy in particular theaters of

operation or on specified operations. It is highly probable to expect that DoD would take necessary steps, perhaps in consult with the Department of State, to ensure that functional control does not attach as war plans are drafted and executed. DoD may desire, for example, to be invited into a theater of operation, as opposed to conducting a forced entry; to have time-specific “stationing” agreements in place with the legitimate or proxy authority, trumpeting the sovereign authority of the host nation (or at a minimum a similar unilateral proclamation from the host nation); to have a United Nations Security Council Resolution, or similar pronouncement from an international organization, containing language disavowing United States functional control; or to avoid declaring, or taking cumulative actions amounting to, United States functional control.

Consider detention operations themselves and the prisoner of war/corrections conundrum that would ensue. A new paradigm for battlefield detention, temporary holding, and transfer to permanent internment facilities may be necessary. Detaining enemy fighters may become a risky endeavor, from the perspective of ensuring compliance with new yet uncertain legal norms or seeking to mitigate litigation risk. DoD would need to formalize specific guidance, perhaps a framework of Standing Rules of Detention Operations. Military corrections facilities and guards exist, but not in the scope or breadth that would be required with an extension of Boumediene. More practically, will military guards be required to provide these detainees with television, a law library, and other privileges determined by our courts to be constitutional rights of prisoners in U.S. prisons?

Clearly, facilities and leases similar to Guantanamo Bay would be avoided. Cautiously, however, DoD may be inclined to establish detention agreements with a host nation. For an Army of Occupation, where the risk of a functional control determination is greater, the United States may desire, through Congressional action, treaty or other international agreement, or

simple Memoranda of Understanding, effectively to cede functional control of detention facilities to the occupied nation, a third nation, or an international body. In some scenarios, it may not be operationally wise or safe to transition our prisoners in a war zone to a third party, particularly one with less capability to operate and defend the facility. And, for the same reason the United States may seek this agreement, however, third parties may avoid such an agreement, or risk the concomitant waves of detainee counsel seeking to meet with clients and *habeas* actions flooding their domestic courts. Our coalition partners certainly are not interested in conducting much less managing battlefield detentions of enemy fighters.

“Take no prisoners” is unacceptable from a national, organizational, or individual perspective. Unfortunately, some commentators and pundits who have decried Boumediene have either prognosticated that a take-no-prisoners policy will ensue or have boldly promoted such a policy. A policy of taking no prisoners, either express or implied, can never be an option for a civilized nation or its citizens, including its servicemembers. More so, DoD must be proactive in affirmatively setting in place procedures to guard against organizational or individualized temptation to take what may seem operationally as the expedient route in order to avoid court-imposed requirements placed on detaining foreign fighters overseas. This is a simple Rule of Law issue that must be emphasized from the top down, including establishing procedures, training, and an evaluation mechanism.

DoD is not the only entity affected. An extension of Boumediene would require a substantial investment of other federal resources not previously required for a war effort. Federal courts and the Department of Justice will likewise bear a huge load under such an extension. Both the federal courts, specifically the United States District Court for the District of Columbia, and the Department of Justice have already taken exhaustive measures post-Boumediene to handle the relatively few cases, in likely comparison, currently coming out of

Guantanamo. The 250 or so *habeas* cases from Guantanamo detainees pale in comparison to the potential tens of thousands that could be filed by war prisoners if Boumediene is extended.²³

Without major changes to meet such a likelihood, judicial resources would be overwhelmed.

Further, the impact of this decision on separation of powers and an independent Executive Branch is uncertain, and beyond the scope of this discussion.

In summary, from a department-wide perspective, DoD is in the untenable position of having to conduct a war, and plan for future engagements, in an uncertain legal landscape. Whether DoD personnel have or will have functional control over detained enemy personnel is not a question easily answered but one that must be addressed and guidance issued so that troops on the ground can operate effectively and in compliance with the law.

III. Boumediene in Bagram and on the Battlefield.

Boumediene, and an extension of Boumediene, impacts U.S. detention operations not only at Guantanamo but also Bagram and other current or future detention operations. As a preliminary matter, the natural question in light of Boumediene is how necessary or beneficial is Guantanamo? If DoD established Guantanamo initially as a more convenient foreign detention location—more convenient for U.S.-based intelligence and interrogation personnel—then, in light of Boumediene, it is no longer “foreign.” The purported freedom from domestic legal requirements initially presumed at Guantanamo no longer exists. As the current Administration seeks to close Guantanamo,²⁴ whether due to legal, political, or policy reasons or in whole or part due to Boumediene, it is clear that at least one of the benefits of housing detainees at Guantanamo no longer exists after Boumediene.

Could Boumediene impact current detention activities in Bagram? If Boumediene reaches to Bagram, then the warning issued by the Supreme Court in the precedential Eisentrager

decision, that the Court found it difficult to imagine a more “effective fettering” of a military commander,²⁵ would be realized. Interrogations may not proceed without court approval, or worse, without counsel for the detainee being present. Detainees may not be moved without court approval. Conditions of confinement might be reviewable by a court. Military prison guards may be liable to their enemy captives in constitutional tort. The implications again are vast.

In addition to detention operations in a theater of war, Boumediene may directly impact actual day-to-day combat operations. Justice Scalia warned that Boumediene could “cause more Americans to be killed.” Practically speaking, he was referring to the likely inadvertent, or intentional, release by a court of terrorists to return to fight again against Americans. In addition to his concerns, it is not improbable to imagine battlefield impact, and risk to servicemembers, for other reasons.

As a preliminary matter, the issue arises of when do *habeas* rights attach. *Habeas* would attach on the battlefield only if the U.S. exercises functional control over a combatant, that is, exercises the functional equivalent of legal sovereignty over the enemy detained. In a country like Afghanistan, or even Iraq today, there is no question that functioning governments active in inter- and intra-state affairs are operating, and the nations maintains their sovereignty. But, does, or would, the U.S. operate in a pocket or umbrella of sovereignty in either nation, for purposes of Boumediene? Liberal stationing agreements, UNSCRs, or other documents authorizing or defining the scope and breadth of authority of U.S. forces in a country could be read to grant Boumediene-like autonomy. During the heightened occupation of Iraq, and the initial invasion of Afghanistan, a stronger argument could have been made that *habeas* in fact attached to in-country detentions. And, in a certain area of occupation, such as post-war Germany, or immediately following invasive hostilities, the case is again much closer.

If a U.S. Soldier on the ground operates in a pocket of sovereignty, then *habeas* rights may attach to any enemy he seizes or captures on the battlefield. Those rights would remain during temporary detention, transfer, and long-term detention. In this hopefully unlikely but possible application, U.S. combat troops would have to be trained in the latest version of *habeas* law for the battlefield. They would need to know not only the operational requirements and details of the military operation, for example, seizing terrain or raiding a compound, but also the legal niceties associated with seizing an enemy who has constitutional rights and seizing and securing the evidence that might prove the case and keep that enemy in detention and off of the future battlefield. These new requirements would at the very least be a distraction to an undertaking where focus and attention to detail is vital and distractions can be dangerous and deadly.

Troops on patrol would essentially be carrying in their assault packs the full panoply of rights and privileges afforded under the U.S. Constitution and laws. Every enemy encountered would be entitled to rummage through the pack to choose the U.S. domestic law, the legal weapon,²⁶ to use against the Soldier. The military operation would essentially be converted into a pseudo-law enforcement search and seizure operation. U.S. combat troops would be no different than a police officer on patrol in any town or city in the United States. The U.S. military would cease to exist as we know it and become no more than a deployable police force.

As indicated above, evidence experts and/or law enforcement experts may be integrated into the operation, individuals who likely are not familiar with military operations or who have not trained with the unit. Potential for confusion, hesitation, mistaken identify, and uncertainty is great, each of which is a recipe for fratricide, an enemy advantage, or worse, mission failure and defeat.

Intelligence operations will be most vulnerable. If court-directed discovery occurs, a unit's intelligence files would become the equivalent of a law enforcement investigative file. Information deemed relevant to the defense, information that at the very least the U.S. expended significant resources to obtain and at worst lives were lost obtaining, would become discoverable in some form. Valuable intelligence sources and methods, perhaps irreplaceable, would be lost. Sources would dry up or perhaps be revealed and killed.

Consider the sad and dangerous contradiction. Military planners and intelligence officers study and analyze the enemy, compiling tens of thousands of pieces of information into a precise operations plan, targeted specifically at important enemy leaders or facilities. Troops receive the order, conduct mission-specific training, and prepare to execute. Approvals are obtained from appropriate higher level commanders. A joint and multi-national combined arms operation ensues to attain the military objective sought. Conventional troops, special operations forces, combat aircraft, artillery support, and overhead assets all converge on the target in an incredibly dangerous and complex culmination of modern military power. Lives are lost, friendly, enemy, and civilian, and prisoners taken. Specialized teams exploit the site, sweeping through the complex, retrieving enemy information, valuable to future operations and saving American lives. Then, the contradiction. All the information relevant to a federal court case--information gained in the intelligence process, the planning, execution, and exploitation, all of the information deemed relevant by a federal court in the U.S.--is transmitted back to the U.S., to a federal court, to counsel, and perhaps, right back to the enemy captives, the very same captives against whom so much time, effort, resources, and lives were spent capturing. What a sad and dangerous contradiction. Soldiers risking their lives to regurgitate back to their enemy the fruits of their sweat, toil, and blood. Boumediene must stop at Guantanamo Bay.

IV. Conclusion.

In the penultimate paragraph of his dissent in Boumediene, Supreme Court Chief Justice John Roberts asked the important question “who has won?” The apparent answer to that question is that no one wins. Not the detainees, as Chief Justice Roberts writes, for they are left “with only the prospect of further litigation to determine the content of their new *habeas* right.” And, not the U.S Congress, he writes, as its role in legislating “has been unceremoniously brushed aside,” and not the “Great Writ,” (the Writ of *Habeas Corpus*), as it has been relegated to application at some “jurisdictionally quirky outpost” (Guantanamo Bay). Forebodingly, Chief Justice Roberts concludes who has not won:

[A]nd not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.²⁷

In a Boumediene environment, military personnel would know that essentially every prisoner is a federal case. The federal court would in a real sense be there on the battlefield too, dictating the conduct of military operations. Plans, procedures, and military tactics would undoubtedly change if Boumediene were applied to the battlefield. In an environment where the U.S. exercised functional control, the Boumediene protections, and perhaps even more domestic legal protections, would apply to detained personnel. In the traditional battlefield environment, however, where the U.S. does not exercise functional control, it would be business as usual for our military forces. DoD, or a court, would conduct the functional analysis, and Soldiers would

know, in theory, during planning stages and during execution of a mission whether *habeas* rights lie with the enemy they may detain. In the worst-case scenario, the military planners would make the wrong decision on whether functional sovereignty lies with the U.S. The result is, essentially, Guantanamo all over again, a painful and untenable situation not only for the military but also for the Executive Branch and the court system which may have to hear the cases.

Soldiers know the business of seizing and holding terrain, and it is difficult enough to fight a war against an enemy that ascribes to and follows Geneva. Fighting against an enemy that laughs at Geneva, beheading prisoners and killing civilians, as does our current terrorist foe, is even more daunting. Extending Boumediene to the battlefield makes a difficult military situation only worse. On a spectrum of negative repercussions, extending Boumediene to the battlefield is the practical equivalent of placing a pile of rocks into a Soldier's already full rucksack; tauntingly and spitefully laughing in the face of servicemembers who have risked their lives on dangerous missions and friends, family and a Nation whose loved ones were lost on those missions; and presenting the enemy on a legal silver platter former captives to return to the fight or valuable intelligence information only to be used by the enemy to kill more Americans. The impact and effect would be felt from the highest levels of the Department of Defense, to theater commanders, to commanders on the ground, to the Soldier in the field executing a mission, to a regretting Nation. Boumediene should not and cannot be extended.

Endnotes:

¹ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

² Whether termed “enemy combatant,” “detained person,” “prisoners of war,” or other title, foreign fighters captured in defense of the nation possess some measure of rights under the law and are entitled to the appropriate degree of protection and security. Since *Boumediene*, an argument can be made that the new functional analysis test created by the Court, and discussed herein, applies equally to “enemy combatants” as to traditional prisoners of war who are entitled to the protections of Geneva. For a comprehensive pre-*Boumediene* discussion that labels and status do matter, see Geoffrey S. Corn, “Enemy Combatants and Access to *Habeas Corpus*: Questioning the Validity of the Prisoner of War Analogy,” 5 *Santa Clara Journal of International Law* 2 (2007). Further, this paper will not address application of *Boumediene* to other locations where the U.S. might arguably exercise functional control, such as overseas embassies and consulates and alleged intelligence “black sites.”

³ As discussed *infra*, the Court indicated its tendency to extend rights to the Guantanamo detainees when it decided the case of *Rasul v. Bush* in 2004. In *Rasul*, the Court, in a precedential decision, granted the petitioning detainees (foreign fighters detained at Guantanamo) statutory *habeas* rights under 28 U.S. Code § 2241. Such rights had never previously been granted to foreign enemies detained overseas by the United States. Attempting to statutorily overrule *Rasul*, Congress passed the Detainee Treatment Act of 2005, granting a *habeas*-like procedure to the Guantanamo detainees. Likewise, in 2006, the Court decided *Hamdan v. Rumsfeld* and struck down the military commissions process established for the prosecution of certain Guantanamo Bay detainees. In response, Congress passed the Military Commissions Act of 2006, establishing new military commissions procedures intended to meet the Court’s concerns. Evidenced by these two cases and the commensurate congressional reaction, Congress may again legislate, responsive to *Boumediene*. This paper does not address a congressional fix to *Boumediene* but focuses on possible consequences and implications should Congress not act. Congress is interested, though. See *e.g.*, Congressional Research Service Report for Congress, “*Boumediene v. Bush*: Guantanamo Detainees’ Right to *Habeas Corpus*,” 8 Sep 2008, at 11 (noting that “*Boumediene* did not necessarily bar all legislation” in response to the ruling). For a discussion of some of the measures Congress could take to alleviate the impact of *Boumediene*, see Daniel J. Dell’Orto, “Opening Statement of Daniel J. Dell’Orto, Acting General Counsel, Department of Defense, to the House Armed Services Committee on July 31, 2008,” available at http://armedservices.house.gov/pdfs/FC073108/DellOrto_Testimony073108.pdf. Mr. Dell’Orto testified during House proceedings assessing the impact of *Boumediene* on the detention operations at Guantanamo Bay.

⁴ For a detailed discussion of *Boumediene* and the concept of *de facto* sovereignty, see Anthony J. Colangelo, “‘De Facto Sovereignty’: *Boumediene* and Beyond,” *George Washington Law Review*, Forthcoming; SMU Dedman School of Law Legal Studies Research Paper No. 00-29 (September 29, 2008), found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275413 (opining that the *de facto* sovereignty the Court found at Guantanamo likely exists nowhere else in the world).

⁵ For another analysis of *Boumediene*, see *Harvard Law Review*, “Leading Cases, Suspension Clause: Extraterritorial Reach of the Writ of *Habeas Corpus*: *Boumediene v. Bush*,” Volume 122, at pages 395-405 (2008).

⁶ *Boumediene*, 128 S.Ct. at 2 (J. Scalia dissent).

⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that *habeas* did not attach for alien war criminals detained by United States forces in Germany).

⁸ Charles J. Dunlap, Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” Prepared for the Humanitarian Challenges in Military Interventions Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University (November 29, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

⁹ The U.S. Supreme Court, on the same day *Boumediene* was decided, ruled that U.S. citizens detained in Abu Ghraib have *habeas* rights. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

¹⁰ This is not a theoretical question. Currently, four detainees, foreign fighters detained at the Bagram Theater Internment Facility, have brought suit in U.S. federal court seeking *habeas* relief. The U.S. government argues in these cases that *Boumediene* does not reach to Bagram. See http://www.nytimes.com/2009/02/22/washington/22bagram.html?_r=2&scp=2&sq=bagram&st=cse. Decisions in these cases are pending.

¹¹ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹² 28 U.S. Code § 2241(a) (2008).

¹³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

¹⁴ Michael B. Mukasey, “Remarks by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research,” 21 July 2008; transcript reprinted at <http://www.usdoj.gov/opa/pr/2008/July/08-opa-633.html>.

¹⁵ For a detailed discussion of this issue, see Gerald Neuman, “The Extraterritorial Constitution after *Boumediene v. Bush*,” forthcoming Harvard Public Law Working Paper No. 08-39, found at the searchable Social Science Research Network, www.ssrn.com. See also, Neal A. Katyal, “Testimony Before the House Armed Services Committee on July 30, 2008,” available at http://armedservices.house.gov/pdfs/FC073008/Katyal_Testimony073008.pdf (opining that the Constitution applies to Guantanamo, not just the *habeas* provision).

¹⁶ Practically speaking, commanders conduct a per se probable cause analysis when, under the Laws of Armed Conflict, they evaluate a target, including evaluating whether it is a lawful military target and whether there is a lawful military purpose to attack. This process and resulting decision, however, while somewhat formalized, is not designed nor intended to be introduced as evidence in a federal court.

¹⁷ Department of Defense Dir. No. 2311.01E, DoD Law of War Program, May 9, 2006. This directive implements measures to ensure DoD compliance with the laws of war as detailed in international agreements, primarily the Geneva Conventions.

¹⁸ *Boumediene*, 128 S.Ct. at 2 (J. Scalia dissent).

¹⁹ Press Release, United States District Court for the District of Columbia, “DC Chief Judge Meets with Judges to Discuss District Court Procedures for Guantanamo Cases,” July 2, 2008, found at <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-PressRelease070208.pdf>. Judge Hogan issued a Preliminary Consolidated Management Order on November 16, 2008, and a Consolidated Management Order on December 16, 2008, which detail common procedures for most of the *habeas* cases. In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442, Preliminary Case Management Order of Judge Hogan, November 6, 2008, revised on December 16, 2008 (Judge Thomas F. Hogan, U.S. District Court for the District of Columbia), copies of which may be found at scotusblog.com;

<http://www.scotusblog.com/wp/wp-content/uploads/2008/11/hogan-case-mng-order-11-6-08.pdf>; and <http://www.scotusblog.com/wp/?s=hogan+order>.

²⁰ These concerns are not unfounded. In arguing evidence procedures and standards before Judge Leon in the U.S District Court in the District of Columbia, detainee counsel argued, among other things, that the standard of proof to determine whether a detainee is in fact an enemy combatant should be the criminal conviction standard of beyond a reasonable doubt. Judge Leon ordered the lesser standard of proof by a preponderance of the evidence. See posting by Lyle Denniston, “An Easier Standard for Review,” posted August 27, 2008 and available at <http://www.scotusblog.com/wp/an-easier-standard-for-detention>. Moreover, the U.S. District Court for the District of South Carolina addressed this issue of standard of proof in the case of Hamdi v. Rumsfeld. Hamdi, a U.S. citizen, was captured as an enemy combatant in Afghanistan, transferred to Guantanamo, and moved to the Naval brig in Charleston, South Carolina after it was determined that he was a U.S. citizen. He sought *habeas* review. The district court determined that he was entitled to *habeas* review but that he was entitled to have the government prove his status by a “heightened standard” of proof. The U.S Supreme Court reversed this latter holding. Hamdi v. Rumsfeld, 542 U.S. 507, 531-32 (2004). One commentator described this heightened standard initially imposed by the district court as indeed the beyond a reasonable doubt standard. See Terry Gill and Elies van Sliedregdt, “Guantanamo Bay: A Reflection on Legal Rights and Status of ‘Unlawful Enemy Combatants,’” 1 *Utrecht Law Review* 28, at 42 (2005), available at <http://www.utrechtlawreview.org/publish/articles/000003/article.pdf>.

²¹ See, e.g., Captain Robin Worch, “Iraqi Soldiers Learn Evidence Gathering,” 13 August 2008, available at <http://www.supportourtroops.org/iraq/iraqi-soldiers-learn-evidence-gathering.html> (describing efforts by U.S. troops to train the new Iraqi Army on evidence collection procedures to assist in criminal prosecutions).

²² 10 U.S. Code § 379 (2004) (requiring U.S. Coast Guard personnel to be assigned to Navy vessels in order to conduct law enforcement, including drug interdiction, operations). See also, The Judge Advocate General’s Legal Center and School, U.S. Army, Center for Law and Military Operations, *Operational Law Handbook* (2008), at 214 (describing that the Coast Guard Law Enforcement Detachment actually assumes constructive command of the vessel during the conduct of the law enforcement operation).

²³ For an example of the impact on one agency, DoD, see Dell’Orto, *supra* note 3. Mr. Dell’Orto indicates that the future implications of Boumediene, should it be extended, would have a “crippling” effect on DoD. The tremendous strain of these few 250 cases also will affect, and has affected, numerous other agencies. Just for the District of Columbia cases, the court itself, DoD, law enforcement, intelligence agencies, and other agencies were required to devote substantial assets, standing up Guantanamo teams to assist in processing information for the court and parties.

²⁴ Executive Order, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” January 22, 2009.

²⁵ Eisentrager, at 779. The exact quote is

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result

of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

²⁶ The Court in Eisentrager called this “placing the litigation weapon unrestricted in the enemy’s hands.” *Id.*

²⁷ Boumediene, 128 S. Ct. at 27-28 (C.J. Roberts dissent).

