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## Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations

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# Keeping *Boumediene* off the Battlefield: Examining Potential Implications of the *Boumediene v. Bush* Decision to the Conduct of United States Military Operations

Colonel Fred K. Ford\*

## I. *Boumediene* and the Historical Precedent

The Supreme Court of the United States, by its June 2008 holding in *Boumediene v. Bush*,<sup>1</sup> granted the right of habeas corpus to the enemy detainees held by the Department of Defense (“DoD”) at Guantanamo Bay, Cuba. This landmark ruling granted rights to enemy fighters heretofore foreclosed and left open the potential for further extension of rights under the laws of the United States 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

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1. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262, 2274 (2008) (holding that the Suspension Clause of the U.S. Constitution applies to Guantanamo Bay and that congressional attempts to create habeas-like procedures were insufficient). The Suspension Clause states that the habeas writ “shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

Bay; and (2) the application of other constitutional and statutory rights to persons stopped or detained by U.S. military forces during military operations. While the Court attempted, through the use of restrictive language, to limit application of the *Boumediene* decision to Guantanamo Bay, it stopped short of explicitly doing so. As a result, leaders within the DoD may be forced to consider *Boumediene* in planning and waging future military operations. Organizational change, including adjustments to policy, structure, and tactics, may be required. Additionally, troops on the ground may be forced to operate within the confines of *Boumediene*, figuratively loading their already full combat assault packs with the heavy rocks of constitutional procedures and protections normally reserved for domestic police operations.

The U.S. military adheres to a historical legal precedent and framework regarding the capture and detention of foreign enemies engaged in hostilities against the United States.<sup>2</sup> Our country has a history of engaging in overseas wars, capturing prisoners, 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, however, these prisoners and detained persons<sup>3</sup> have not had the right to petition U.S. courts for release when they are located outside the country's borders. That is, they have not enjoyed the right of habeas corpus. *Boumediene*

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2. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Rasul v. Bush*, 542 U.S. 466 (2004).

3. Whether termed "enemy combatant," "detained person," "prisoner 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 an 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 as much to "enemy combatants" as it does to traditional prisoners of war who are entitled to the protections of Geneva. For a comprehensive pre-*Boumediene* discussion asserting 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 J. INT'L L. 2 (2007). Further, this Essay will not address application of *Boumediene* to other locations where the United States might arguably exercise functional control, such as overseas embassies, and consulates, and alleged intelligence "black sites."

changed the legal landscape in this area.

In determining that Guantanamo detainees have the right of habeas corpus, the Court appeared to attempt to limit application of this new precedent 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 right<sup>4</sup> and rejected a *de jure* sovereignty analysis.<sup>5</sup> 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

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4. As discussed *infra*, the Court indicated its tendency to extend rights to the Guantanamo detainees when it decided the case of *Rasul v. Bush*, 542 U.S. 466 (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.C. § 2241 (2006). *Rasul*, 542 U.S. at 483. The United States had never previously granted such rights to foreign enemies detained overseas. Attempting to statutorily overrule *Rasul*, Congress passed the Detainee Treatment Act of 2005, granting Guantanamo detainees the right to a habeas-like procedure. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680. Similarly, in 2006, the Court struck down the military commissions process established for the prosecution of certain Guantanamo Bay detainees. *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). In response, Congress passed the Military Commissions Act of 2006, establishing new military commissions procedures intended to meet the Court's concerns. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. These two cases and the commensurate congressional reaction suggest that Congress may yet again legislate in response to *Boumediene*. This Essay does not address a congressional fix to *Boumediene* but instead focuses on possible implications of Congressional inaction. In any event, Congress has already shown an interest in the *Boumediene* decision. See, e.g., MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., BOUMEDIENE V. BUSH: GUANTANAMO DETAINEES' RIGHT TO HABEAS CORPUS 11 (2008), available at <http://fas.org/sgp/crs/natsec/RL34536.pdf> (noting that "*Boumediene* did not necessarily bar all legislation" responsive to the ruling). For a discussion of some measures Congress could take to alleviate *Boumediene's* impact, see *Implications of the Supreme Court's Boumediene v. Bush Decision for Detainees at Guantanamo Bay: Before the H. Armed Services Comm.*, 110th Cong. (2008) (opening statement of Daniel J. Dell'Orto, Acting General Counsel, Department of Defense), available at [http://armedservices.house.gov/pdfs/FC073108/DellOrto\\_Testimony073108.pdf](http://armedservices.house.gov/pdfs/FC073108/DellOrto_Testimony073108.pdf).

5. *Boumediene*, 128 S. Ct. at 2253.

prisoner.<sup>6</sup> 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 nuanced test.<sup>7</sup> 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.<sup>8</sup>

In the case of Guantanamo Bay, the Court pointed out that an indefinite lease with the Cuban government affords the United States an unprecedented amount of autonomy.<sup>9</sup> Using the phrase “total military and civil control,”<sup>10</sup> the Court reasoned, in essence, that the United States possessed *de facto* sovereignty over the territory.<sup>11</sup> 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.<sup>12</sup>

Chief Justice Roberts and Justice Scalia, in their dissenting opinions, criticized the majority for overstepping its bounds in granting these new rights.<sup>13</sup> Each pointed out possible problems with or repercussions from the decision.<sup>14</sup>

Justice Scalia devoted attention to what he termed the “disastrous consequences” of the majority opinion.<sup>15</sup> He cautioned that the holding “will almost certainly cause more

6. *Id.* at 2262.

7. *Id.* at 2258.

8. *Id.*

9. *Id.* at 2251-52. See also Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418, Art. III.

10. *Boumediene*, 128 S. Ct. at 2248.

11. *Id.* at 2253. For a detailed discussion of *Boumediene* and the concept of *de facto* sovereignty, see Anthony J. Colangelo, “*De Facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 627-32, 662-69 (2009) (opining that the *de facto* sovereignty the Court found at Guantanamo likely exists nowhere else in the world).

12. *Boumediene*, 128 S. Ct. at 2258. For another analysis of *Boumediene*, see Comment, *Extraterritorial Reach of Writ of Habeas Corpus*, 122 HARV. L. REV. 395 (2008).

13. *Boumediene*, 128 S. Ct. at 2279-93 (Roberts, C.J., dissenting); *id.* at 2293-2307 (Scalia, J., dissenting).

14. See, e.g., *id.* at 2279 (Roberts, C.J., dissenting); *id.* at 2295 (Scalia, J., dissenting).

15. *Id.* at 2294 (Scalia, J., dissenting).

Americans to be killed”<sup>16</sup> and concluded that “[t]he Nation will live to regret what the Court has done today.”<sup>17</sup> Justice Scalia pointed to evidence showing that, of the detainees that the DoD has released from Guantanamo, approximately 30 have returned to the battlefield.<sup>18</sup> He argued that this data “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.”<sup>19</sup> Essentially, Justice Scalia argued that the military, rather than the courts, is in the best position to determine friend or foe.<sup>20</sup> If the DoD in fact released terrorists inadvertently, under procedures the Court determined were inadequate to protect the detainees, then the heightened review, as now mandated 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 expressed additional concerns about providing detainees access to U.S. military witnesses, who may be otherwise unavailable, at war in a combat zone.<sup>21</sup> They also resisted releasing classified information to detainee counsel, which could be used against U.S. forces or to the advantage of the terrorist enemy.<sup>22</sup> Noting that the DoD relied on previous Court decisions, namely *Eisentrager*,<sup>23</sup> in moving detainees all the way from Afghanistan to Cuba, Justice Scalia chastised the majority for essentially changing the rules in the middle of the war.<sup>24</sup> Concluding his discussion of the decision’s consequences, he warned that “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the

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16. *Id.* (Scalia, J., dissenting).

17. *Id.* at 2307 (Scalia, J., dissenting).

18. *Id.* at 2294-95 (Scalia, J., dissenting).

19. *Id.* at 2295 (Scalia, J., dissenting).

20. *Id.* at 2295-96 (Scalia, J., dissenting).

21. *Id.* at 2295 (Scalia, J., dissenting).

22. *Id.* at 2288 (Roberts, C.J., dissenting).

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

24. *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).

national security concerns that the subjects entails.”<sup>25</sup>

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., of the U.S. Air Force, in an article questioning whether lawfare undercuts the effectiveness of the military.<sup>26</sup> The *Boumediene* dissenters would likely argue that it does. More significantly, *Boumediene* could be described as a form of fratricide—self-imposed, self-perpetuating 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, perhaps in order to make a political statement or rectify a perceived particularized wrong? Regardless of the answers, the fact remains that the decision provides a precedential framework for analysis. The Court must be taken at its word. In its holding, the Court fashioned a new test for determining whether a foreign fighter detained overseas may rely on the habeas right.<sup>27</sup> In applying this test, a subsequent court could conceivably determine that the United States exercises functional control over a U.S. prisoner of war holding or detention camp located in a foreign area, particularly where the area is a traditional Occupied Territory under the laws of war—where U.S. and/or coalition forces are the occupiers. For some of the practical reasons and obstacles described herein, *Boumediene* should not be extended.

Under *Boumediene*, did prisoners held at Abu Ghraib

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25. *Id.* (Scalia, J., dissenting).

26. Col. Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (unpublished working paper), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>. For a recent analysis of the rise of lawfare as a legal concept, see Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 JOINT FORCE Q. 34 (2009).

27. *Boumediene*, 128 S. Ct. at 2258.

during the height of the United States' occupation of Iraq possess habeas rights?<sup>28</sup> Does habeas attach to the prisoners currently held in overseas locations, such as Bagram Air Base in Afghanistan?<sup>29</sup> Notwithstanding current restrictions on the use of certain areas for military purposes, what if the United States chose to establish a Guantanamo Bay-like location in Antarctica, or in space? Or in the middle of an ocean, on a ship, or on a man-made island? The questions are fair ones, and some are already being asked by commentators.

To many who have followed the Court's decisions 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*, the Court found that the statutory habeas corpus provisions contained in the U.S. Code<sup>30</sup> applied to the Guantanamo detainees.<sup>31</sup> And, in deciding *Hamdan v. Rumsfeld* in 2006, the Court applied Geneva Convention protections to the Guantanamo detainees.<sup>32</sup> Will this trend by the Court of providing rights to detained foreign fighters continue? Referring to *Boumediene*, former Attorney General Michael 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*.<sup>33</sup> With this in mind, what measures could

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28. On the same day *Boumediene* was decided, the Supreme Court ruled that U.S. citizens detained in Iraq have habeas rights. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

29. This is not a theoretical question. Judge John Bates of the U.S. District Court for the District of Columbia held that *Boumediene* applied to three non-Afghani foreign fighters detained by coalition forces at the Theater Internment Facility in Bagram, Afghanistan. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009). The United States is appealing the decision. See Motion for Certification of this Court's April 2, 2009 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and for a Stay of Proceedings Pending Appeal, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06 Civ. 1669), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/04/us-bagram-appeal-filing-4-10-09.pdf>.

30. 28 U.S.C. § 2241(a) (2006).

31. *Rasul v. Bush*, 542 U.S. 466, 481-84 (2004).

32. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-33 (2006).

33. Michael B. Mukasey, Attorney General, U.S. Dep't of Justice, Remarks at the Meeting of the American Enterprise Institute for Public Policy Research (July 21, 2008), available at

the DoD undertake?

## II. *Boumediene* in the Pentagon

The scope of the problem the DoD may face is a bit daunting. What could happen—and, in the case of the Guantanamo detainees, what *is* happening—is that foreign detainees held by U.S. forces in locations deemed to be the functional equivalent of United States territory could be entitled not just to Geneva protections (for prisoners of war) or Detainee Treatment Act<sup>34</sup> protections (in the case of enemy combatants at Guantanamo Bay not declared prisoners of war), but also to habeas review by a federal district court. If the functional analysis test of *Boumediene* is extended, or is interpreted by the DoD to extend to physical locations other than Guantanamo, then foreign fighters will be afforded additional protections under the U.S. Constitution and U.S. laws—protections normally reserved for U.S. citizens or other persons in the country.<sup>35</sup>

These new rights could include a right to counsel, *Miranda* warnings, heightened due process, and countless other rights and privileges normally associated with citizenship or presence in the United States. Imagine a military commander needing probable cause to detain—or worse, some higher level of proof to attack—an enemy!<sup>36</sup> The implications are mind-boggling to

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<http://www.usdoj.gov/opa/pr/2008/July/08-opa-633.html>.

34. Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (2005).

35. For a detailed discussion of this issue, see Gerald Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009). See also *Implications of the Supreme Court's Boumediene v. Bush Decision for Detainees at Guantanamo Bay: Before the H. Armed Services Comm.*, 110th Cong. (2008) (testimony of Neal A. Katyal, Professor, Georgetown University Law Center) (opining that the entire Constitution applies to Guantanamo, not just the habeas provision), available at [http://armedservices.house.gov/pdfs/FC073008/Katyal\\_Testimony073008.pdf](http://armedservices.house.gov/pdfs/FC073008/Katyal_Testimony073008.pdf).

36. Practically speaking, commanders conduct a per se probable cause analysis when, under the Laws of Armed Conflict, they evaluate a target, including whether it is a lawful military target and whether there is a lawful military purpose to attack. This process and the resulting decision, while quite formalized, are neither designed nor intended to be introduced as evidence in a federal court.

a military professional. Our military force would essentially be converted into a *de facto* law enforcement organization or would have such an organization as its adjunct. Such extension would completely change the face of combat.<sup>37</sup> Perhaps some of these examples are far-fetched; the issue, though, is how far toward this end will the courts go? They should go no further than *Boumediene*. If, however, courts continue the trend and extend this holding, how would the DoD meet these new requirements?

Programmatically and institutionally, extension would require a re-evaluation of the DoD's policies, regulations, training, and organization. Currently, all military personnel are trained to the Geneva standard under the DoD Law of War Program.<sup>38</sup> This program ensures that service members are trained in and abide by the international legal norms of warfare. Would the 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 service members in combat to abide by constitutional provisions normally applicable to domestic law enforcement personnel. Such an extension would require a massive training and education program to be implemented department-wide. This training might include instruction on the court-directed domestic laws that might now be applicable, essentially a shifting body of criminal law for the battlefield. In

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37. A fundamental question regarding the use of military force in counterterrorism operations is which law applies. Specifically, do traditional law enforcement rules apply, or do the laws of warfare apply? This question is discussed in detail in Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661 (2007) (arguing that neither a law enforcement nor a military framework applies but, rather, a unique counterterrorism paradigm).

38. U.S. Dep't of Defense, Dir. No. 2311.01E, DoD Law of War Program (May 9, 2006), available at [http://www.fas.org/irp/doddir/dod/d2311\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2311_01e.pdf). This directive implements measures to ensure DoD compliance with the laws of war as detailed in international agreements, primarily the Geneva Conventions.

implementing this new standard, both the DoD and the military might be required to implement several new procedures, including: training packages for new entrants at basic training installations, annual refresher training, formalized procedures for integration into major military training exercises and actual military operations, a reporting procedure for violations, and benchmarks for methods of effectiveness. The International Committee of the Red Cross (“ICRC”) might choose to monitor U.S. forces not only for compliance with international law but also for compliance with our applicable domestic laws. The 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 the DoD attempts to operationalize *Boumediene*, it must consider the new concept of how to support 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.”<sup>39</sup> Practically speaking, this is already happening in the U.S. District Court for the District of Columbia as the Guantanamo detainees’ habeas cases progress.<sup>40</sup> The Supreme Court is not, as Justice Scalia noted, establishing the rules under which these cases will proceed. That task has fallen on the district court judges, specifically Senior Judge Thomas F. Hogan, who has been charged with establishing general rules for the administration and management of most of these cases.<sup>41</sup>

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39. *Boumediene v. Bush*, 128 S. Ct. 2229, 2307 (Scalia, J., dissenting).

40. Judge Thomas F. Hogan issued a Preliminary Consolidated Management Order on November 6, 2008 and a Consolidated Management Order on December 17, 2008, which detail common procedures for most of the habeas cases. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2008 U.S. Dist. LEXIS 97095 (D.D.C. Nov. 6, 2008); *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2008 WL 5275914 (D.D.C. Dec. 17, 2008).

41. 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) [hereinafter DC District Court Press Release], available at <http://www.dcd.uscourts.gov/public->

These rules and procedures will be vitally important not only for the process, but also for the DoD and combat soldiers whose actions they will dictate. 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 exculpatory evidence pursuant to *Brady v. Maryland*,<sup>42</sup> and a host of other procedural and substantive issues. 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. These procedures create daunting tasks.

Enter *CSI: Kandahar*. Extending the *Boumediene* holding would require detailed procedures for the collection, preservation, and maintenance of “evidence.” Normally, the military treats information regarding enemy captives 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 the information to determine enemy strengths, weaknesses, vulnerabilities, and locations important to the commander on the ground. Treating captured enemy information as evidence in a federal case would require an entirely new method of collecting and processing intelligence. More likely, the 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 courts because of the significant risk to intelligence sources and methods.

The DoD may be forced to address these federal evidence requirements. Standards may have to be established, beginning with procedures to determine what constitutes the

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docs/system/files/Guantanamo-PressRelease070208.pdf; *In re Guantanamo Bay Detainee Litig.*, 2008 U.S. Dist. LEXIS 97095; *In re Guantanamo Bay Detainee Litig.*, 2008 WL 5275914.

42. 373 U.S. 83 (1963).

equivalent of probable cause to detain, and including procedures for, *inter alia*, the seizure and collection of evidence, chain of custody, evidence storage and maintenance, evidence authentication, and witness availability.<sup>43</sup> This may, in turn, require procedures to formalize investigations, including a requirement of a pseudo-criminal case file for every detained enemy.

Certainly, service members do not have the training to make and prove a federal case. Service members on the ground are now familiar with basic evidence collection requirements, and great strides have been taken in Iraq and Afghanistan to formalize information collection resulting from raids.<sup>44</sup> 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 or Afghani court. But imagine if every military operation required a police-like crime scene analysis, with the

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43. These concerns are not unfounded. In arguing evidence procedures and standards before Judge Richard Leon in the U.S. District Court for 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. *Boumediene v. Bush*, No. 04-1166 (D.D.C. Aug. 27, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/leon-case-manage-order-8-27-08.pdf>. 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. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (2004) (plurality). The district court determined that he was entitled to habeas review and that he was entitled to have the government prove his status by a heightened standard of proof. *Id.* at 511-16. The U.S. Supreme Court reversed the latter part of this holding. *Id.* at 531-33. One commentator described this heightened standard initially imposed by the district court as, indeed, the beyond a reasonable doubt standard. Terry Gill & Elies van Sliedregdt, *Guantanamo Bay: A Reflection on Legal Rights and Status of 'Unlawful Enemy Combatants'*, 1 *UTRECHT L. REV.* 28, 42 (2005).

44. See, e.g., Capt. Robin Worch, *IA Learns Evidence Gathering From Cavalry Troops*, *TASK FORCE MOUNTAIN*, Aug. 12, 2007, <http://www.taskforce-mountain.com/stories/5-stories/316-20080813-p3-1> (describing efforts by U.S. troops to train the new Iraqi Army on evidence collection procedures to assist in criminal prosecutions).

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, busily investigating alleged misconduct by military personnel, contract fraud, and the deaths of service members. The DoD would be hard pressed to meet new stringent investigative and evidentiary requirements. The DoD may have to adjust its force structure and dramatically increase the capacity of the services' law enforcement investigative agencies, a precarious undertaking for a military already stretched thin. Or, perhaps the 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 ("F.B.I."), to augment military forces, similar to the manner in which the U.S. Coast Guard augments U.S. Navy operations during law enforcement actions at sea.<sup>45</sup>

In addition to programmatic and organizational challenges, the DoD may be forced to consider *Boumediene* in the planning and execution of military strategy in particular theaters or on specified operations. The DoD would likely take necessary steps, perhaps in consultation with the Department of State, to ensure that functional control does not attach as war plans are drafted and executed. The 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 ("UNSCR") or similar pronouncement from an international organization, containing language disavowing United States

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45. See 10 U.S.C. § 379 (2006) (requiring U.S. Coast Guard personnel to be assigned to Navy vessels in order to conduct law enforcement—including drug interdiction—operations). See also CTR. FOR LAW & MILITARY OPERATIONS, DOMESTIC OPERATIONAL LAW HANDBOOK 206 (2009) (noting that the Coast Guard Law Enforcement Detachment unit actually assumes constructive command of the vessel during the conduct of the law enforcement operation).

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 in seeking to mitigate litigation risk. The DoD would need to formalize specific guidelines, perhaps a set of Standing Rules of Detention Operations. Military corrections facilities and guards currently exist, but not in the scope or breadth that would be required with an extension of the *Boumediene* holding. More practically, will military guards be required to provide these detainees with televisions, a law library, and other privileges determined by our courts to be constitutional rights of inmates in U.S. prisons?

Clearly, facilities and leases similar to Guantanamo Bay would be avoided. The DoD may, however, be cautiously 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—whether through Congressional action, treaty or international agreement, or simple memoranda of understanding—to effectively 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 transfer prisoners in a war zone to a third party, particularly one less capable of operating and defending the facility. And, for the same reason the United States may pursue this agreement, third parties may seek to avoid it, or else risk a political backlash or a wave of detainee counsel seeking to meet with clients and file countless habeas actions on their behalf. Our coalition partners certainly are not interested in conducting—much less managing—battlefield detentions of enemy fighters.

Further, the “take-no-prisoners” mantra is unacceptable, whether viewed from a national, organizational, or individual perspective. Unfortunately, some commentators and pundits

who have decried *Boumediene* have either endorsed a take-no-prisoners policy or at least predicted that one will eventually come into being. A policy of taking no prisoners, either express or implied, can never be an option for a civilized nation or its citizens and service members. The DoD must emphasize that such an approach, whether created intentionally or through benign neglect, is unacceptable. To achieve this goal, the DoD will need to establish procedures, a training program, and an evaluation mechanism to avoid a “take-no-prisoners” organizational tone from taking hold.

The 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 bear a huge load under such an extension. Both the federal court system—specifically the U.S. District Court for the District of Columbia—and the Department of Justice have already taken exhaustive post-*Boumediene* measures to handle the relatively few cases currently coming out of Guantanamo Bay.<sup>46</sup> The 250 or so habeas cases from Guantanamo Bay detainees pale in comparison to the potential tens of thousands that could be filed by prisoners if *Boumediene* is extended.<sup>47</sup> Without major changes to meet such a scenario, judicial resources would be overwhelmed. Further, the impact of this decision on the separation of powers and an independent executive branch is uncertain, and beyond the scope of this discussion.

In summary, from a department-wide perspective, the DoD is in the untenable position of having to conduct a war and plan for future engagements in an uncertain legal landscape.

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46. See, e.g., Mukasey, Remarks at the Meeting of the American Enterprise Institute for Public Policy Research, *supra* note 33; DC District Court Press Release, *supra* note 41.

47. For an example of the impact on one agency, the DoD, see Dell’Orto, *supra* note 4. Mr. Dell’Orto indicates that the future implications of *Boumediene*, should it be extended, would have a “crippling” effect on the DoD. *Id.* at 7. The tremendous strain of these 250 cases will also affect, and indeed has already affected, numerous other agencies. For the District of Columbia cases alone, the Court, the 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.

Whether any DoD personnel have or will have functional control over detained enemy personnel is not a question easily answered but one that must be formally addressed, 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 the potential extension of its holding, impacts U.S. detention operations not only at Guantanamo Bay but also at Bagram and other current or future detention facilities. As a preliminary matter, the natural question in light of *Boumediene* is how necessary or beneficial is Guantanamo Bay? If the DoD initially established Guantanamo Bay for its foreign location—more convenient for U.S.-based intelligence and interrogation personnel—then, in light of *Boumediene*, the base 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<sup>48</sup>—whether due to legal, political, or policy reasons—it is clear that *Boumediene* has done away with at least one benefit of housing detainees at Guantanamo.

Could *Boumediene* impact current detention activities in Bagram? If *Boumediene* reaches that facility, the *Eisentrager* Court’s worst fears would be realized.<sup>49</sup> Military interrogations

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48. See Memorandum on Directing Certain Actions With Respect to Acquisition and Use of Thomson Correctional Center To Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base, 75 Fed. Reg. 1015 (Dec. 15, 2009). See also Charlie Savage, *Delay Expected on Illinois Plan for Detainees*, N.Y. TIMES, Dec. 23, 2009, at A1 (reporting that officials believe Guantanamo Bay will be closed by 2011 at the earliest).

49. See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). The Court stated that:

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

might require court approval, or worse, the presence of a detainee's counsel. Moving a detainee may likewise require approval from the court. 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."<sup>50</sup> Practically speaking, he was referring to a situation where a court releases a terrorist who returns to fight against Americans. Additionally, battlefield impact and risk to service members for other reasons is not improbable.

As a preliminary matter, the issue arises in determining when habeas rights attach. Habeas would attach on the battlefield only if the United States exercises functional control over a combatant—that is, if it exercises the functional equivalent of legal sovereignty over the detainee. In a country like Afghanistan, or even Iraq, there is no question that functioning governments active in inter- and intra-state affairs are operating, and the nations maintain their sovereignty. But does (or would) the United States 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 for 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

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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.

*Id.*

50. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

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 operates in a pocket of sovereignty, 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) situation, 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 capturing an enemy who has constitutional rights and seizing the evidence that might be necessary to keep that enemy in detention and off of future battlefields. At the very least, these new requirements would be a distraction to an undertaking where focus and attention to detail are vital, a distraction that could be deadly.

Essentially, troops on patrol would be carrying the full panoply of rights and privileges afforded under the U.S. Constitution in their assault packs. Every enemy encountered would be entitled to rummage through the pack to choose the U.S. domestic law—the legal weapon<sup>51</sup>—to use against the soldier. In effect, the military operation would be converted into a pseudo-law enforcement search and seizure operation. U.S. combat troops would be no different than police officers on patrol in any town or city in the United States. The military would cease to exist as we know it and would become nothing more than a deployable F.B.I.

As indicated above, evidence experts and/or law enforcement experts may be integrated into the operation. These individuals are likely not familiar with military operations and have not trained with the unit to which they would be assigned. The potential for confusion, hesitation, mistaken identity, and uncertainty is great. Each creates a recipe for fratricide, enemy advantage, or worse—mission failure and defeat.

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51. The Court in *Eisentrager* called this “placing the litigation weapon in unrestrained enemy hands.” *Eisentrager*, 339 U.S. at 779.

Intelligence operations will be the 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, including information that the United States expended significant resources, and potentially lives, to obtain, would become discoverable in some form. Valuable intelligence sources and methods, some 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 an enemy, compiling tens of thousands of pieces of information into a precise operations plan, targeted at important leaders or facilities. Troops receive an order, conduct mission-specific training, and prepare to execute. Approvals are obtained from appropriate 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 a dangerous and complex culmination of modern military power. Enemy, friendly, and civilian lives are lost, and prisoners are taken. Specialized teams exploit the site and sweep through the complex, retrieving valuable enemy information that will assist in future operations and save American lives. Now the contradiction is revealed. All the information relevant to a federal court case—information gained in the planning, execution, and exploitation of the mission—is transmitted back to a U.S. court, to counsel, and, perhaps, back to the same enemy captives who required so much time, effort, resources, and lives to capture. This truly is a sad and dangerous contradiction. Soldiers will have risked their lives to regurgitate the fruits of their sweat, toil, and blood back to the enemy. This example illustrates why *Boumediene* must stop at Guantanamo Bay.

## IV. Conclusion

Strikingly, in the penultimate paragraph of his dissent in *Boumediene*, Chief Justice Roberts asked “who has won?”<sup>52</sup> The apparent answer is that no one wins. Not the detainees, as Chief Justice Roberts wrote, for they are left “with only the prospect of further litigation to determine the content of their new habeas right.”<sup>53</sup> Not the U.S. Congress, as its role in legislating “has been unceremoniously brushed aside,”<sup>54</sup> and not the “Great Writ,” (the Writ of Habeas Corpus), as it has been relegated to application at some “jurisdictionally quirky outpost” known as Guantanamo Bay.<sup>55</sup> Forebodingly, Chief Justice Roberts concludes that two other more important entities have also not won:

[And] [n]ot 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.<sup>56</sup>

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. If *Boumediene* were applied to the battlefield, plans, procedures, and military tactics would undoubtedly change. In an environment where the United States exercises functional control, the *Boumediene* protections, and perhaps even more domestic legal protections, would apply to detained personnel. But in the traditional battlefield environment, where the United States does not

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52. *Boumediene*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

53. *Id.* (Roberts, C.J., dissenting).

54. *Id.* (Roberts, C.J., dissenting).

55. *Id.* (Roberts, C.J., dissenting).

56. *Id.* (Roberts, C.J., dissenting).

exercise functional control, it would be business as usual for our military forces. The DoD (or a court) would conduct the functional analysis, and soldiers would know, in theory, during the planning stages and 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 United States. 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 that 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 the Geneva Conventions. Fighting against terrorists who openly disregard the Conventions, behead prisoners and kill civilians is even more daunting. Extending *Boumediene* to the battlefield makes a difficult military situation even worse. On a spectrum of negative repercussions, extending *Boumediene* 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 service members who have risked their lives on dangerous missions, not to mention the friends, family, and a Nation whose loved ones were lost on those missions; and giving the enemy, on a legal silver platter, former captives to return to the fight or valuable intelligence information with which to kill more Americans. The impact and effect would be felt from the highest levels of the DoD, to theater commanders, to commanders on the ground, to soldiers in the field executing a mission, and to a regretful Nation. *Boumediene* should not and cannot be extended.