POWERS, DISTINCTIONS, AND THE STATE IN THE TWENTY-FIRST CENTURY: THE NEW PARADIGM OF FORCE IN DUE PROCESS[†]

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The *Boumediene v. Bush* case raises issues of constitutional powers, distinctions, and the state in the twenty-first century.[1] The case is a reflection of the new paradigm of how force is projected in this new era and how we understand the concept of due process. The case, when placed in a strategic framework, argues for the creation of a national security court. Over the last eight years, we have been involved in a constitutional dialogue among the three branches of government. *Boumediene* is the latest volley in this dialogue and highlights the role the Supreme Court plays and why the concept of due process is critical to winning the battle of ideas in the struggle against violent extremism.

In an ABA publication that I was involved in, we grouped individuals who have been captured or seized in the war on terror into six categories: "(1) U.S. citizens captured and held on the battlefield"; "(2) U.S. citizens captured on the battlefield and held elsewhere"; "(3) U.S. citizens seized and held elsewhere"; "(4) Non-U.S. citizens captured and held on the battlefield"; "(5) Non-U.S. citizens captured on the battlefield and held elsewhere"; and "(6) Non-U.S. citizens seized and held elsewhere."[2] *Boumediene* falls into the final category.[3]

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

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[1] 128 S. Ct. 2229 (2008).

[2] AM. BAR ASS'N STANDING COMM. ON LAW & NAT'L SEC. ET AL., DUE PROCESS AND TERRORISM: A POST-WORKSHOP REPORT 7 (2007), *available at* http://www.mccormicktribune.org/publications/dueprocess.pdf.

[3] *Boumediene*, 128 S. Ct. at 2241, 2244.

Lakhdar Boumediene was an Algerian living in Bosnia at the time he was captured.[4] He was arrested on suspicion that he was involved in a plot to bomb the United States embassy in Sarajevo.[5] The Supreme Court of the Federation of Bosnia and Herzegovina—a court that the United States helped establish—released him because they could not find any evidence to justify his arrest.[6] Despite the fact that the Bosnian court released him, the United States seized him and brought him to Guantanamo.[7] This is the genesis of the case.

This case is interesting because of the status of Lakhdar Boumediene. Boumediene is a non-U.S. citizen, seized in a non-battlefield environment placed under U.S. authority.[8] As noted by the Court in *Boumediene*, this fact pattern raises significant due process questions that must involve the court.[9] I have no problem defending the role of the Supreme Court in *Boumediene*. I believe the controversy surrounding the legitimacy of the Court's involvement in this case stems from the principles of *Marbury v. Madison*.[10] Some people believe that this is an Article II arena in which the courts should not be involved. Others, including the majority of the Court, believe that cases that involve detainees who have a tenuous relation to the classic "battlefield" require judicial review for due process.[11]

The Court's assertion of jurisdiction is a response to previous administrations' aggressive interpretation of power under Article II. *Boumediene* follows the logic of the Court in *Rasul v. Bush*.[12] In *Rasul*, the Bush Administration claimed that the district court did not have jurisdiction because the territory was not U.S. property.[13] The Court rejected this assertion and said that its power did reach to Guantanamo.[14] In this context, the United States passed the Authorization for the Use of Military Force, declaring war on "nations, organizations, [and] persons."[15] This declaration of war on "people" has generated concerns.

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[4] Andy Worthington, *Profiles: Odah and Boumediene*, BBC NEWS, Dec. 4, 2007, http://news.bbc.co.uk/1/hi/world/americas/7120713.stm.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Boumediene*, 128 S. Ct. at 2241, 2244.

[9] *See id.* at 2244.

[10] 5 U.S. (1 Cranch) 137 (1803).

[11] *Boumediene*, 128 S. Ct. at 2275.

[12] 542 U.S. 466 (2004).

[13] *See id.* at 475.

[14] *Id.* at 485.

[15] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

If you check the FBI top ten list, you will see that Osama bin Laden is still on it.[16] I have taught, and been involved with, many of the JAG officers on both defending the individuals in Guantanamo and prosecuting them. I always ask, "Who is the person who is supposed to 'Mirandize' Osama bin Laden as we would in the classic criminal paradigm when the FBI would be involved in an arrest?" Are you supposed to arrest Osama bin Laden? Or do you have the right to kill him under the law of armed conflict? Under the law of armed conflict, you have the right to kill him because he is involved in an armed conflict and has violated the rules of armed conflict by targeting civilians along with other violations.[17] But as a civilian or unlawful combatant, what due process is he owed? If we do capture him, and decide to try him, is he a criminal or a prisoner of war? How did we get to this level of confusion? The first reason for the confusion is caused by the fact that we have changed the notion of what we understand as sovereignty. Sovereignty is under attack in the new world order in a way that has completely challenged the principles of the Treaty of Westphalia in 1648.[18] The first issue is: how do we understand force and projection of force? We went into Iraq without the cover of a U.N. resolution—we went in articulating an international law defense under Article 51 of the U.N. Charter on self-defense or anticipatory self-defense.[19] We never expected to be an occupying power. But we did become one, and as a result, we created categories of detainees; first from Afghanistan and then from Iraq. The problem becomes, what do you do with them? The reason the military can kill without resulting in an indictment is because it, like law enforcement, is working for the sovereign as an agent of the state. When we fight people in other nation states, they too are working on behalf of their sovereign, which is why they can kill us lawfully as they follow the law of armed conflict. And that is why we can kill them lawfully up to the moment we capture them.

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[16] Fed. Bureau of Investigation, Most Wanted Terrorists: Usama Bin Laden, http://www.fbi.gov/wanted/terrorists/terbinladen.htm (last visited Apr. 10, 2009).

[17] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001). Osama bin Laden issued repeated declarations of war; praising the Riyadh and Dhahram attacks on U.S. forces in Saudi Arabia, he said the attacks marked "the beginning of *war* between Muslims and the United States." Anti-Defamation League, *Osama bin Laden*, http://www.adl.org/terrorism_america/bin_l.asp (last visited Apr. 10, 2009).

[18] Yale Law School, The Avalon Project, Treaty of Westphalia (Oct. 24, 1648), http://avalon.law.yale.edu/17th_century/westphal.asp. "The Treaty of Westphalia of 1648 brought to a not quite conclusive end the previous thirty years of warfare which had torn central Europe apart, largely destroying in the process its prosperity, infrastructure[,] and vast swathes of its population." 2 MARK LEVENE, GENOCIDE IN THE AGE OF THE NATION-STATE: THE RISE OF THE WEST AND THE COMING OF GENOCIDE 143 (2005).

[19] U.N. Charter art. 51.

As soon as we capture them, however, the Geneva Conventions concerning capture kick in and we can no longer kill them.[20] If we do kill them, it then becomes a violation of the law of armed conflict. And what do we have to do? You can ask their name, rank, serial number, and age.[21] Prisoners of War ("POW") do not "get lawyered up," as we would say in criminal law. Why? Because they are representatives of a state—they are doing the same thing our soldiers do. What makes this complicated is that in this new form of "hybrid warfare," when you exert force into another geographical area, you are also generating new types of detainees. In addition to the six categories of detainees above, there is also a theoretical category of individuals in Iraq who do not like the idea of Americans being there. During the initial invasion, individuals had a legitimate right to take up arms against Americans under the law of armed conflict theory of "levee en masse." These individuals would be categorically different than al Qaeda.

So the question becomes, what is the due process owed to an individual not on the battlefield who is "captured" under a theory of threat? That is the debate in *Boumediene*. A majority of the Court is saying that we are not going to let a detainee's status or location dictate the obligations and duties that some people believe are critical for understanding the great writ of habeas corpus.[22] That is revolutionary. Why? A quick way of understanding the cases is to read the dissents first. If you read the dissents first, you immediately get to the problem of what the case is. Look at the opening lines of Justice Roberts's dissent:

> Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. . . . The Court rejects them today out of hand, [Congress's actions], without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation.[23]

Then look at Justice Scalia's opening line.

> Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of ongoing war. . . . The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.[24]

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[20] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[21] *Id.* art. 17.

[22] *Boumediene*, 128 S. Ct. at 2262.

[23] *Id.* at 2279 (Roberts, C.J., dissenting).

[24] *Id.* at 2293–94 (Scalia, J., dissenting).

What does the majority say? This gets back to former Attorney General Ashcroft's argument that we have a new paradigm of peril, a new paradigm of prevention, and a new paradigm of protection.[25] Regardless of how you break on these cases, do you agree or disagree on the nature of the conflict? Justice Kennedy says in his argument,

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the largest wars in American history. . . . The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.[26]

That is the real core. What is the nature of the conflict? Why do we have these people? If you believe that this is a clear POW issue, we all know what we are supposed to do. If it is a pure criminal issue, we all also know what we are supposed to do. When one thinks of due process, eighteen characteristics should come to mind: presumption of innocence,[27] the right to remain silent,[28] freedom from unreasonable searches and seizures,[29] assistance of effective counsel,[30] the right to indictment and presentment,[31] the right to a written statement of charges,[32] the right to be present at trial,[33] prohibition against ex post facto laws,[34] protection against double jeopardy,[35] the right to a speedy and public trial,[36] burdens and standards of proof that are clear,[37] privileges against self-incrimination,[38] the right to examine or have

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[25] *See generally* John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285 (2009).

[26] *Boumediene*, 128 S. Ct. at 2262.

[27] *E.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) (explaining that the presumption of innocence "lies at the foundation of the administration of our criminal law").

[28] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (establishing the right to remain silent as a procedural safeguard to protect citizens during custodial interrogations).

[29] U.S. CONST. amend. IV.

[30] *Id.* amend. VI; *see also Miranda*, 384 U.S. at 472.

[31] U.S. CONST. amend. V.

[32] *See id.* amend. VI.

[33] *See id.*

[34] *Id.* art. 9, § 3.

[35] *Id.* amend. V.

[36] *Id.* amend. VI.

[37] *Id.* amend. XIV, § 1.

[38] *Id.* amend. V.

examined adverse witnesses,[39] the right to compulsory process to obtain witnesses,[40] the right to trial by impartial judge,[41] the right to trial by impartial jury,[42] the right to appeal to an independent reviewing authority,[43] and protection against excessive penalties.[44]

When we say due process, under the Constitution, that is more or less what we are talking about in the criminal context. What did the Court say should be the sort of due process given to this new category of detainees? *Hamdi v. Rumsfeld* suggests that it be a very light, in-between due process.[45] It is not the due process given a prisoner of war, and it is not the due process in the criminal context. As stipulated by Justice O'Connor, it is "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[46] For the dissenters in *Boumediene*, the Detainee Treatment Act meets these standards.[47] Then why does the majority disagree? I think the disagreement harkens back to the fact that we are in a battle of ideas. In the sense of sovereignty, we have made it clear that inside the international community, some believe that there is a duty to protect. This duty to protect, a Canadian concept, has become the new rule for how you should be able to violate sovereignty.

Who is in favor of genocide? If I said to you, genocide is going on right now in a number of countries, do you think we should have a duty to intervene? That is the modern debate for the modern world. When do you have the right to intervene, and once you intervene, under what authority, and what do you do with the individuals that you capture?

As former Attorney General Ashcroft said, the other problem we have is this notion of miniaturization of the threat of terrorism.[48] He pointed out that the real issue about terrorism is threefold: it is

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[39] *Id.* amend. VI.

[40] *Id.*

[41] *See id.* amend. XIV, § 1; Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.").

[42] U.S. CONST. amend. VI.

[43] *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 105–06, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[44] U.S. CONST. amend. VIII.

[45] 542 U.S. 507, 533, 538 (2004) (plurality opinion); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[46] *Id.* at 533.

[47] 128 S. Ct. 2229, 2287 (2008) (Roberts, C.J., Scalia, Thomas, & Alito, J.J., dissenting).

[48] Ashcroft, *supra* note 25, at 286.

transcendent; it is transnational; and it uses soft targets.[49] If you are terrified of this threat, you then say we need information to stop it. If we need information to stop it, we get into the issue of rendition and what a coerced interrogation is.

There are always three responses to this notion of due process and coerced interrogations. First, it does not work because people will always tell you what you want to hear. But I could probably bring in some Israelis who would have a different perspective on that issue. Second, there is a political reason why I oppose coerced interrogations. I do not want to do them because the political traditions of the United States do not tolerate such actions and we will be lowering the political bar of international behavior. The response to that is our enemies are committing torture. All of the enemies we have fought historically post-World War II have not followed the Geneva Conventions—the Koreans did not; the Vietnamese did not. So that is not the relevant issue. Therefore, the third issue becomes a moral issue. Regardless of the effectiveness of coerced interrogations or torture, and regardless of their political effect, we should not use them because they are morally wrong. Who should make that decision to break the law? Should it be the Executive Branch? The Executive Branch says it will make that decision, maybe in violation of the law, and if you disagree with its decision, impeach the President. Or if you disagree with a covert action, and if it ever is known, then again, the remedy is impeaching the President. This is the dilemma for the Executive Branch.

The other approach is that we should let Congress make the decision. Congress made it very clear in the Detainee Treatment Act ("DTA"), if you wear the cloth of the state you cannot use coerced interrogations or torture.[50] But if you notice under the DTA, nonmilitary forces are left out. The CIA for example, is not mentioned—the statute is silent on the issue, and that has been the problem.

So what has happened? The Supreme Court has intervened—and it has said no. Under our notions of due process, the Court is asserting itself because that is what freedom is all about. Is the Court asserting the belief that the Executive and Legislative Branches have not performed their duty? There may be times when the Executive and Legislative Branches agree on a course of action, and the Court contends it is unconstitutional. The Executive Branch wanted to restrict the writ of habeas corpus, for example, Congress agreed to restrict the writ of

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[49] *See generally id.*

[50] Detainee Treatment Act of 2005, Pub L. No. 109-148, div. A, tit. X, §§ 1002–1003, 119 Stat. 2739, 2739–44 (codified as amended at 10 U.S.C. § 801 note (2006) and 42 U.S.C. § 2000dd (Supp. V 2006)).

habeas corpus, and the Court in *Boumediene* disagreed.[51] In a *Steel Seizure* moment, the Executive was working at its highest level of authority with the assent of Congress,[52] and the Court slapped its action down as being unconstitutional. That was the Court's right, and that has been the role of the Court since *Marbury v. Madison*.[53]

In a rare occurrence, Justice Scalia admitted he was wrong because he could not remember the legal history, stating, "My dissent in *Rasul v. Bush* mistakenly included Scotland among the places to which the writ could run."[54] The issue of using a legal history from the eighteenth century to determine our twenty-first century problems is in itself a problem that the courts should no longer be involved in. We need a more strategic approach to resolve these problems. The battle of ideas about the best institutional solution should be a debate for Congress and the Executive. *Boumediene* argues for a new approach—a new understanding of the way to have due process. That is why I agree that there should be an Article III national security court to create a new understanding of the paradigm of projecting force because due process is a strategic and constitutional choice.

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[51] 128 S. Ct. at 2240.

[52] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

[53] 5 U.S. (1 Cranch) 137 (1803).

[54] *Boumediene*, 128 S. Ct. at 2304 n.5 (Scalia, J., dissenting) (citation omitted).