

## THE DECLINE OF JUDICIAL DEFERENCE ON NATIONAL SECURITY

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From a historical standpoint, September 11, 2001, was probably the most significant event that occurred during my lifetime—not only the experience itself but also the responsibilities that flowed from that experience. In many ways, it is difficult to talk about these issues academically if you do not put them in the context of the responsibility that you have when you are a public official—certainly at the federal level but also at the state and local level—for protecting the people in your jurisdiction or your country. The oath that everybody takes dedicates us to protecting the country, and that is something everybody feels keenly at the time of an attack. Those of you that have had that experience will know that when you talk to people who have lost loved ones in a terrorist attack, there is a certain responsibility to account for why it happened and to give the assurance that it will not happen again. So, that is the context in which I approach these issues—with a very vivid recollection.

I recognize there are matters about which people will disagree, and of course, hindsight is a fabulous analytic tool. Everybody knows in retrospect what they would have done. The companion of hindsight is the inability to prove the negative. You can never show what would have been the case if you had not done something; so, you are always arguing in a position of defending that which you decided to do without having the ability to compare your decisions to what might have otherwise happened under a different course of action. It is humbling to think about this when you discuss issues like the legal architecture of the war on terror. Judge Gibbons said in his argument that we should not have law-free zones in the war against terror,<sup>1</sup> and I would argue that we do not have a law-free zone. I say that in a couple of ways. First, there is, of course, a lot of

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1. See John J. Gibbons, *Does 9/11 Justify A War On The Judicial Branch?*, 63 RUTGERS L. REV. 1101, 1114 (2011).

law that surrounds the activities of the military and our civilian authorities, whether operating here or overseas. This is not just the law of what people's rights are but also the law of command authority, the law of jurisdiction, the law of competing authorities, and the law that allows you to do some things in certain countries and does not allow you to do things in other countries. Far from being a law-free zone, I would say that it is actually a law-saturated zone. It surprised me to learn when I was in the government that as important as the battlefield commander was to the operational activities overseas, in many ways, the lawyer for the battlefield commander was almost as important. I was not in the military, but I remember when I was a kid and watched World War II movies, they never had lawyers in the movies. In *Saving Private Ryan* there was not some guy saying a soldier can do this or a soldier cannot do that.<sup>2</sup> But, life has changed, and I think that is important.

So, it is not a law-free zone, and it should not be a law-free zone. But there is a somewhat different question that I do want to talk a little bit about today, and that is whether it should be a court-free zone. Or, to be a little more specific, what is the appropriate role of the courts in supervising what goes on in warfare and in the issues we have dealt with in the War Against Terror? If you look back to the days of World War II and even through the Vietnam War, the courts traditionally were very, very deferential to the executive branch in terms of what they were prepared to do and into what they intervened when it came to the war powers and national security issues. I know that you have people that are much more scholarly than I am who talked to you earlier today about some of the historic cases like *Ex parte Quirin*;<sup>3</sup> *Eisentrager*;<sup>4</sup> the cases involving the military government in Hawaii during the Second World War;<sup>5</sup> and *Yamashita*, which was a habeas corpus case arising out of the War Crime Trials involving the Japanese military leadership.<sup>6</sup> All of these cases exemplify the very, very strong deference courts had previously paid to the executive branch, particularly in a time of war when it came to fighting.

The late Chief Justice Rehnquist wrote a book about this in which his basic point was not that the courts went quite so far as the old Latin saying that "in time of war, the law falls silent," but that the court was very, very deferential with respect to military

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2. *SAVING PRIVATE RYAN* (Paramount Pictures 1998).

3. 317 U.S. 1 (1942).

4. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

5. *See, e.g., Ex parte Duncan*, 153 F.2d 943 (9th Cir. 1946); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

6. *In re Yamashita*, 327 U.S. 1 (1946).

operations.<sup>7</sup> This draws support not only from the traditional deference in foreign affairs but also from the recognition that judges and lawyers are not necessarily adapted to weigh the practical exigencies of what happens on the battlefield. And remember, many of the judges and justices who served on the Supreme Court during times of conflict had some experiences with war. For example, Oliver Wendell Holmes, who had battlefield experience during the Civil War,<sup>8</sup> wrote the opinion in the *Moyer* case, which upheld the ability of the government to detain people during a time of civil strife.<sup>9</sup> Robert Jackson, who was the attorney general under Roosevelt, wrote the neutrality decision, which really pushed the envelope in terms of the President's ability to conduct the Lend-Lease program.<sup>10</sup> And in his service on the Supreme Court, Jackson brought a keen sense of reality and deference to the executive branch.

The courts' deference to military operations continued into the Vietnam era. I do not know how many of you remember, but there was a series of cases that were brought in the 1960s in district courts to try to enjoin things like the bombing in Cambodia and various military activities during the Vietnam War.<sup>11</sup> They were uniformly rejected as being nonjusticiable under the political question doctrine, and, in fact, are not even really taught in law school because they were mostly dismissed out of hand.<sup>12</sup> The message that came out loud and clear was the unwillingness to interfere with the kind of core battlefield management functions that the executive branch undertakes.<sup>13</sup>

Even if you look at *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>14</sup> which everybody thinks of as the foundational discussion of executive power—the reversal of President Truman's seizure of the steel mills related to economic activity—the President was trying to regulate the mills because the price of steel affected the ability to supply the war machine.<sup>15</sup> It did not involve direct battlefield behavior or things

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7. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 202 (1998).

8. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 37, 48, 66 (1989) (noting that Holmes was in the Twentieth Massachusetts Regiment and was wounded three times in battle).

9. See *Moyer v. Peabody*, 212 U.S. 78, 84-86 (1909).

10. *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484 (1940).

11. *E.g.*, *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972).

12. See, *e.g.*, *Holtzman*, 484 F.2d at 1308; *Meyers*, 339 F. Supp. at 1391.

13. See *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

14. 343 U.S. 579, 585-89 (1952).

15. *Id.* at 582-84.

that were ancillary.<sup>16</sup> And *Youngstown* itself, the famous concurring opinion written by Justice Jackson, which was subsequently the foundation of *Dames*,<sup>17</sup> talks about the fact that the President does have a core executive power.<sup>18</sup> It is obviously smaller than the domain of Congress and the President working together, but there is a residual amount of power that the President does have.

When 9/11 happened, the legal architecture in place was not adapted for a massive attack by a non-state actor on the continental United States. We had not had that experience before. And the kinds of tools you might have to legally deal with those issues were not fashioned. So the tools were built, more or less, on the hop. There was a lot of improvisation. But eventually, and not surprisingly, it came into the courts. I want to talk a little bit about two cases because I think these two cases are a really dramatic change in the way the Court looks at the issue of deference to the executive branch. In fact, I consider it to be, in many ways, the most dramatic change in the history of the United States in terms of the way the Supreme Court deals with the Executive.

If you look at *Hamdi v. Rumsfeld*, which is the case where the American citizen captured overseas was brought into the United States, the issue was whether he could be detained without going through the criminal process.<sup>19</sup> The Supreme Court upheld the power to detain.<sup>20</sup> The Court held, as a matter of due process, that there be some very basic, foundational process that is due; but the Court was quite deferential to the Executive and to the need to deal with time exigencies.<sup>21</sup> In fact, one of the interesting things about *Hamdi*, which is very strikingly unlike the subsequent decision in *Boumediene*, is they talk a little bit about whether it makes a difference that Hamdi is in the United States as opposed to somewhere else.<sup>22</sup> They basically say that Hamdi's presence in the United States should not give him more rights as an American citizen because all that is going to happen is that the executive branch will simply stop bringing people into the United States.<sup>23</sup> They could keep them in Guantánamo, or they could keep them in

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16. *Id.*

17. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

18. *Youngstown*, 343 U.S. at 634-55 (Jackson, J., concurring).

19. 542 U.S. 507, 510, 516 (2004).

20. *Id.* at 517-25.

21. *See id.* at 517-19 (explaining that the executive branch maintains ample authority during wartime to detain enemy combatants).

22. *Compare id.* at 524 (recognizing that Hamdi's location should not be relevant to what constitutional rights apply), *with* *Boumediene v. Bush*, 553 U.S. 723, 768-72 (2008) (finding that Boumediene's presence at Guantánamo Bay is a factor in determining if the Suspension Clause applies).

23. *Hamdi*, 542 U.S. at 524.

Afghanistan. And that is a bit of a throwaway line, but it is kind of a prescient throwaway line because it contrasts what the world looks like after *Boumediene*, when in fact it turns out that bringing people into Guantánamo is a fateful legal move.<sup>24</sup> Needless to say, that creates a huge incentive to keep detainees in Afghanistan and to simply keep the problem away.<sup>25</sup> In my mind, a decision that turns a lot on the location of something tends to be a fragile decision because it is hard to see what the meaningful distinction is.

So let us turn to *Boumediene v. Bush*, which I think is a striking decision. Let me start by explaining in terms of what happened. There were efforts, of course, to bring habeas challenges on behalf of people in Guantánamo Bay much earlier than *Boumediene*. The first round came in *Rasul v. Bush*, where the Court held that as a statutory matter the habeas statute extended to Guantánamo Bay.<sup>26</sup> So then in 2005, Congress passed the Detainee Treatment Act and stripped habeas jurisdiction over Guantánamo detainees from the courts.<sup>27</sup> Now, what happened is the Supreme Court read the statute as not applying to pending cases that were present in the courts at the time but only to future cases.<sup>28</sup> So Congress went back at it again with the Military Commissions Act in 2006, and there, they were explicit that the Military Commissions Act stripped federal court jurisdiction of the cases that were then pending.<sup>29</sup> Now I want to pause for a minute and talk about how extraordinary that is because it is rare to get Congress to weigh in on these kinds of process issues. It is hard to get Congress to do anything these days and particularly in an area that is rather remote from the day-to-day experience of its constituents, where there does not tend to be a lot of congressional interest. Here, Congress not only once, but twice, weighed in and said that it does not want to have these kinds of issues in habeas. So, if we go back to the old paradigm involving Justice Jackson's opinion in *Youngstown Sheet & Tube*, we are now at the very apex of federal power.<sup>30</sup> Twice, Congress and the President agreed that there is not going to be judicial review, and so the Court weighs in now to determine: Is there a constitutional right to habeas review so clear that it requires you to overturn the jurisdictional provision in the

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24. *Boumediene*, 553 U.S. at 768-69 (explaining why bringing an enemy combatants into Guantánamo is a key component of the Court's due process analysis).

25. *See Hamdi*, 542 U.S. at 524.

26. 542 U.S. 466, 480 (2004).

27. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (codified as amended at 42 U.S.C. §§ 2000dd-2000dd-1 (2006)).

28. *Hamdan v. Rumsfeld* 548 U.S. 557, 576-77 (2006).

29. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 28 U.S.C. § 2241 (2006)).

30. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

statute?

Looking back at history—whether back in the days of Frankfurter and even before—people look at prudential judicial decision-making when it comes to overturning an act of Congress. There are a whole series of prudential rules that go back to Alexander Bickel, which talk about how hesitant courts ought to be to wade into the political thicket.<sup>31</sup> These rules include: do not do it if it is avoidable; do not do it if you can delay doing it and because it is not perfectly ripe; and do not do it if you are not 100 percent certain and have compelling, overwhelming support for the proposition that a law is unconstitutional. And I submit that *Boumediene* absolutely violates each and every one of these prudential canons.

The historical discussion about habeas corpus in *Boumediene* is critical because it was important for the Court to show, as a constitutional matter, that it was enforcing habeas as it was more or less at the time it was put in the Constitution, rather than the statutory elaborations on it, which Congress could simply repeal.

The Court goes through, very painstakingly, all of the examples of old English law: India, Scotland, and Hanover.<sup>32</sup> And the Court ultimately finds that there are no certain conclusions; the evidence is not dispositive; the historical record is insufficient.<sup>33</sup> In other words, when you are done reading this historical discussion in *Boumediene*, where you are left is: we do not know, the evidence is inconclusive. Now, if you go back to the old Frankfurter-Bickel model, that should be game over.<sup>34</sup> A constitutional tie goes to Congress and the Executive. This is the highest presumption that exists in terms of supporting the constitutionality of an enactment. The historical record, however, is inconclusive.

Then, we look at the jurisdictional questions of ripeness. This case comes up while the petitioners are in the middle of the process of getting their review. They have fully exhausted neither their administrative review nor the first review of the court of appeals that

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31. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 128 (1962) (“Those who do recognize [a need for judicial restraint] have the choice of either limiting the occasions of the Court’s interventions, so that the times will be relatively few when the Court injects itself decisively into the political process, or of restricting the category of principles that the Court may evolve and enforce . . .”).

32. *Boumediene v. Bush*, 553 U.S. 723, 748-52 (2008).

33. See *id.* at 746, 748, 752 (surveying historical sources from founding-era authorities to determine whether “foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security” have a right to seek protection under habeas corpus).

34. BICKEL, *supra* note 31, at 40 (agreeing with Justice Frankfurter that under the rule of clear mistake, courts should limit their interventions because they “are not representative bodies. They are not designed to be a good reflex of a democratic society” (quoting *Dennis v. United States*, 341 U.S. 494, 517, 525 (1951))).

they are going to get under the existing statute.

Again, there are hundreds of cases where courts and the Supreme Court say that they are not even going to take the case, or they will not grant *certiorari* because of all the things that could happen that would moot the case: maybe the petitioner is going to win at the administrative level; maybe the petitioner is going to win at the court of appeals level; or maybe in the middle of the hearing the petitioner is going to have an epiphany, and he is going to admit to everything. There are all kinds of things that can allow you to avoid declaring an act of Congress, that has been passed twice, unconstitutional; and you should use them. But here the Court says it has been too long. Now some of these people have been in custody for six years. Even if some of these cases go away, there are going to be other cases. We are going to settle the issue now. So, these prudential canons of staying or delaying are totally disregarded.

What is striking about the opinion—and I have to give deference obviously to Chief Justice Roberts’ dissent because he spends a lot of time on this—is that there is a lot of discussion about the process.<sup>35</sup> We have the right to vindicate, or rather, they have a right to get their rights vindicated. But there is no discussion of what the rights are. In other words, the Court says there is a vessel here. In this vessel, the petitioners can pour their complaint; it is going to be considered by the Court, but there is no discussion of what the Court is going to decide.

Remember, the essence of the habeas issue is: Do you have the right to detain somebody? When dealing with an American citizen like Hamdi, we have a set of rules about due process for American citizens that are pretty well-settled. So, you have a target to shoot at if you are a judge, and if you cannot satisfy these standards under the traditional model, you have to let somebody out.

But here, we are dealing with people who are not Americans; they were not apprehended on American soil. It is true that they are in Guantánamo, and there is a lot of discussion about how to distinguish Guantánamo from the Philippines. But remember, in *Hamdi*, we were told that it is an immaterial point because if all we are doing is resolving Guantánamo, then why take the case?<sup>36</sup> We are never going to see anybody brought into Guantánamo because they are going to be back at Bagram, Afghanistan, or someplace else, and this question would never be resolved.<sup>37</sup> In many ways, it is the core and most interesting, fundamental question of the whole litigation:

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35. See *Boumediene*, 553 U.S. at 803-05 (Roberts, C.J., dissenting).

36. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (discussing how determining detainees’ constitutional rights based on their location creates a “perverse incentive” to hold them abroad).

37. See *id.*

What is the right of the enemy combatant? Someone who is not an American, who is on the field of battle overseas, what rights do they have with respect to being detained anywhere in the world? Do they have any constitutional rights? The tradition is that non-Americans overseas do not have constitutional rights. If you are going to change that, at a minimum, you expect to have a very lengthy discussion about that topic, but you do not really find it in the opinion. So you are left with the feeling that there is a process that has been created, but the substance to go through the process has not been identified.<sup>38</sup>

In many ways, from the standpoint of deference to the Executive, this is the most striking element because if you are going to intrude into the area of battlefield operations—I will explain in a minute where that becomes a critical part of this—you have to have a clear idea of what it is you are vindicating. If it is just—it is not enough of a basis to hold someone—you have to be able to answer the question: Not enough under what standard? And just to put things in context again, in a war, we do not just detain, we kill people. In World War II, we carpet bombed Dresden. That was not collateral damage; that was the absolute intent of the war fighter—to break the back of the Germans and to force them to surrender. In Japan, we dropped nuclear bombs. So it has to raise the question: If foreigners have rights not to be detained, do they have rights not to be killed? That kind of undercuts the whole notion of warfighting. And again, at a minimum, we would like to have some discussion on this, but we do not really see it.

The last outcome which I think is surprising about *Boumediene* is the discussion of the practical concerns. Again and again what the Court does as it reviews the historical records, which are inclusive, is it comes back and says that it looks like the earlier courts were animated by practical considerations.<sup>39</sup> So you would expect there to be a really intense practical discussion of what the impact of granting habeas in these cases has on military operations.

Here is the kind of practical discussion you get. In *Eisentrager*, in which the court said there is no habeas right for German prisoners being held in American military prisons in Germany in 1950, the Court mentions in passing that it was concerned about interfering with military operations.<sup>40</sup> Now remember, this is 1950. The war has

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38. See *Boumediene*, 553 U.S. at 797-98 (holding alien detainees at Guantánamo have the right to challenge detention but failing to address application to aliens on foreign soil).

39. *Id.* at 762 (commenting the *Eisentrager* Court “stressed the practical difficulties of ordering the production of prisoners [during post-World War II occupation]”).

40. See *Johnson v. Eisentrager*, 339 U.S. 763, 796-97 (1950) (Black, J., dissenting) (commenting the separation of powers doctrine constrains judicial involvement with military tribunals to only determining whether the tribunal was created correctly and



been over for five years. We have had the Marshall Plan, and yet, five years later, the Supreme Court is still worried about interfering with military operations. What does the *Boumediene* Court say? They say that it is distinguishable because in *Eisentrager* the Court had a real concern about the occupation; there were Nazi sympathizers; and there was guerrilla warfare. So understandably, there were practical considerations there. That is not present here because we do not have that issue in Guantánamo.<sup>41</sup>

Again, let me step back. In 1950, I would seriously doubt, five years after the end of the war, that we were spending a lot of time worrying about Nazi insurgents. But I will tell you that in Guantánamo, not only do they have force protection issues with respect to prisoners, but also they have to worry about the impact of what goes on in terms of how they handle prisoners with respect to active combat operations that are literally going on in two theaters of war overseas. So to argue that the military challenges in 1950 were greater than the military challenges in 2007 is frankly counterfactual. And it suggests to me a real problem with the whole practical analysis.

So, where has this left us? It has left us in a puzzling situation. In a decision called *Al-Bihani* in the D.C. Circuit in 2010, Judge Janice Rogers Brown talked about the consequences—practical consequences—of having habeas review in Guantánamo as it affects the battlefield.<sup>42</sup> And what she said is that the process at the tail end is now impacting the front end because when you conduct combat operations, you now have to worry about collecting evidence.<sup>43</sup>

A somewhat darker analysis has been put forward by Ben Wittes who has recently written a book called *Detention and Denial*, where he argues that the courts have now created an incentive system to kill rather than capture.<sup>44</sup> And much of the law of war over the years was designed to move away from the “give no quarter” theory, where you killed everybody at the battlefield, into the theory of you would rather capture than kill. And his point, and you can agree or disagree with it, is that you have now actually loaded it the other way; you have pushed it in the direction of kill rather than capture.<sup>45</sup>

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whether the tribunal had proper jurisdiction).

41. See *Boumediene*, 553 U.S. at 769-70 (2008) (distinguishing the sprawling, heavily populated military zone in *Eisentrager*’s post-war Germany to the “isolated and heavily fortified military base” at issue in *Boumediene*).

42. *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010).

43. See *id.* (“From the moment a shot is fired, to battlefield capture, up to a detainee’s day in court, military operations would be compromised as the government strove to satisfy the evidentiary standards in anticipation of habeas litigation.”).

44. BENJAMIN WITTES, *DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO* 23-25 (2011).

45. See *id.* at 24 (“[T]hese days a kill is, in legal terms, a far cleaner outcome than

We have complete uncertainty now in the standards to be applied in the individual cases. If you read Ben Wittes's book *Detention and Denial*, he will details about ten or twelve district court cases where literally on the same facts you get different answers.<sup>46</sup> And it is not that the district judges are not doing their best, but they have no guidance. There is no standard, and no one has offered them a standard.

We now have litigation about Bagram Air Force Base in Afghanistan.<sup>47</sup> It was absolutely predictable when *Boumediene* was decided that the next case would be against Bagram Airbase. I do not know how it is going to come out at the end. I think it is still in the district court, but I will tell you, the logic—now they may have stopped the logic of Guantánamo—the logic of *Boumediene* certainly raises questions about Bagram. How do you wind up having habeas in Bagram? And then what is going to happen when you are in a forward firebase? Are you going to have habeas cases there? No one knows, but the big problem is that the battlefield commanders do not know either; that is a serious operational problem.

In many ways, it is absolutely a great example of what the Court in *Eisentrager* predicted.<sup>48</sup> When you go down this path, you are going to actually have real operational problems with warfighting. But of course, we are not in 1950 now; we are actually in active operations.

Finally, and I find this really to be the most interesting contemporary question posed by this series of issues, the press reports—and I cannot verify this, I am not confirming it, but I am assuming it to be true—the press reports that President Obama has authorized the killing of Anwar al-Aulaki, the American citizen in Yemen who is, in my mind for quite good reason, believed to be a major recruiter and operation leader for al-Qaeda.<sup>49</sup> I want to be clear: I am perfectly okay with that, and I think it is exactly the right decision, so I do not want to be misunderstood. But I will say that if you read the decision and logic of *Boumediene* that is a very puzzling situation for al-Aulaki. Because if you need court permission to detain somebody, and if you need court permission to wiretap somebody, how can you kill that person without court permission?

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a capture.”).

46. See *id.* at 73-93.

47. *Al-Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding the court lacked jurisdiction to determine whether enemy combatants at Bagram Airfield were entitled to habeas relief).

48. See *Johnson v. Eisentrager*, 339 U.S. 763, 796 (1950) (Black, J., dissenting) (warning “actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations”).

49. Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A12.

But that is what warfighting is. You cannot fight a war without that. There is current litigation on this issue where people are purporting to represent al-Aulaki's family.<sup>50</sup> It has been tossed out, but we are just at the early stages. And frankly, I think we are going to see more of this.<sup>51</sup> I have been reading that there are debates taking place about this. They are holding a moot court, I believe, on this issue.

A lot of interesting comments can be made about where we find ourselves, where the current administration finds itself if you believe the al-Aulaki allegations to be true. But to me, what it suggests is that when you abruptly change the attitude of deference—and I think you must look at *Boumediene* as an abrupt change—the consequences become unpredictable and very serious. And there is a reason that judges and courts in the past forswore from doing that. We may be seeing some of this play out. How it ends is difficult to predict.

Before I take a few minutes of questions, let me conclude by making sure I do not cast blame only on the Court, because it is not the Court's fault. This is something where everybody was complicit in putting us in this situation—all three branches of government. The fact is, I was here about seven or eight years ago in 2003, at Rutgers, not here in this particular building but across the street where they have a campus, and I gave a talk. I had just left as head of the criminal division, and I said we have kind of put a lot of things together in a jerry-built way. We need to have a sustainable legal architecture that is going to make this a framework that we are comfortable with over a long period of time. Congress has to get involved—the executive branch has to go to Congress. It is seven years later, and we have not done it. So that, to me, is a failure of both branches. For the executive branch, the failure to push Congress on this has been a mistake. It has led to, for example, a lot of delay in setting up the administrative process for dealing with these detainees. Frankly, I think that was a strategic error that more or less baited the Court into doing what the Court did. I come from the old school of believing that whatever you think the right answer is, you do not want to test the limit of what you think it is if you can avoid it. You want to go into court with the strongest possible

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50. See, e.g., Scott Shane, *Rights Groups Sue U.S. On Effort to Kill Cleric*, N.Y. TIMES, Aug. 31, 2010, at A6 (reporting that the ACLU and the Center for Constitutional Rights filed a lawsuit challenging the Obama administration's decision to authorize the killing of Anwar al-Aulaki on behalf of Aulaki's father, Nasser al-Aulaki).

51. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.C. Cir. 2010) ("Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.").

position, and you want to be the most modest and incremental in asking for power because that is how you maximize your chance to win. I do not think the executive branch was wise in pushing the envelope on this. That included also delaying the process for years. There was a lot of internal back and forth on that. It is unfortunate that the delaying impulse won. I think that some of the processes put in place in the first couple of rounds were overly scanty—it was more parsimonious than it should have been and than it needed to be. And this comes to the point: do not tempt fate. So the executive branch, by delaying and being parsimonious with how it handled these cases, essentially begged the Court—not literally but functionally—to get involved and to step into this. And that is historically, of course, what courts do.

Congress has never stepped up to the plate on this—other than the jurisdiction stripping in the Detainee Treatment Act and the Military Commissions Act.<sup>52</sup> Even there, in terms of looking at what habeas might be and writing the kind of complex procedures you would need to really build the process for detaining people, Congress still has not stepped up to do that. There are people like Senator Lindsey Graham of South Carolina who are constantly out there saying that both parties should work together to identify a solution, but I have not seen the action taken yet. So, in a way, I have to say in defense of the decision in *Boumediene*, at some point when the Court sees that neither branch is addressing the problem, where there is a serious issue of balancing security and liberty, and where we are uncomfortable about the idea of just locking people up indefinitely without having some confidence that we can review it, the courts are going to step in. And that leads to the old adage that hard cases make bad law.

The best result, in my mind, would be for the executive branch and Congress to sit down and put together, like they did with the Debt Commission now, a plan that talks about how we deal with detaining people when we are not going to put them in a criminal case or in a military commission. What is the process of review? What should the procedural rights be? What should the standard be? And what is the ultimate target that the judge has to find? I would hope that if we got that kind of comprehensive and robust statute that the courts would back off and would give the deference that has traditionally been good both for the executive and for the courts when dealing with these kinds of sensitive national security issues.

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52. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (stripping habeas jurisdiction from courts concerning Guantánamo detainees); Military Commissions Act of 2006, 28 U.S.C. § 2241 (2006) (stripping habeas jurisdiction from courts concerning Guantánamo detainees for all pending and future cases). *But see infra* notes 28-30 and accompanying text.

So with that, I am happy to take about five minutes of questions.

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**Questioner 1:** I have a very different read on *Boumediene*. I do not accept the parade of horrors. I think there is a fairly clear line drawn in the appellate case in *Al-Maqaleh* where the question was habeas at an air base.<sup>53</sup> The court said if you are actually bringing someone there to evade court review, then that would be an unacceptable thing to do.<sup>54</sup> But people who are there not to evade, just because they happen to be picked up in a war zone, of course we are not going to interfere and give them reason. But I want to take—

**Chertoff:** Let me stop you because that to me is actually—and I like John Bates; he's a friend of mine, so I am not going personal here—that to me is totally emblematic of what is going on here. First of all, practically, what does it mean, “we brought them from someplace else?” And we are going to start to say, “the nearest place from where you caught this guy was not Bagram, it was somewhere else; you should have taken him somewhere else.” You begin to get into motivations. But beyond that, look at what is the judge's focus. It is not—is there substantively some right that is being violated—it is are they trying to avoid my being in charge? I must tell you that I think one of the things that comes across in *Boumediene*, and is picked up here, is that it is a lot about the Court vindicating its own authority and not a lot about the rights of the people, if they even have rights.

**Questioner 1:** That is where I wanted to go. I think it is actually the completely wrong reason. But here is where I want to suggest that the wrong turn was taken. It is *Eisentrager*, but if you read the *Eisentrager* opinion, the dissent was on the winning side. Black, in *Eisentrager*, said the real question is not where these guys were picked up but where they are being held. The real question is: is there someone who is giving them the legal—a court that is checking to make sure that their legal rights are vindicated?<sup>55</sup> And the argument that these people in Germany do not need to have a court supervising what is being done to them because they are in Germany is bogus. The Germans did not have a government that was supervising them; we were in charge of them. We should have had a court supervising them.<sup>56</sup>

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53. See *Al-Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

54. See *id.* at 98.

55. See *Johnson v. Eisentrager*, 339 U.S. 763, 797-98 (1950) (Black, J., dissenting) (highlighting that the United States controls “that part of Germany” and the petitioners were convicted by U.S. military tribunals and laws). In fact, Justice Black goes on to state that the illegality of the petitioners' sentences is irrelevant because the petitioners cannot expect only relief from the German government or courts: “Only our own courts can inquire into the legality of their imprisonment.” *Id.*

56. See *id.* at 795 (questioning the Court's reliance not on the petitioners' status as

**Chertoff:** And then the question is: what are the rights? I mean, if there are rights under international law and the law of war, then it is not clear that federal courts have jurisdiction to vindicate those rights for individuals. There are conventions, and they are getting enforced in different ways. And you have got to answer the question of where those rights are. And the problem becomes this: if you have a due process right to liberty as a foreign combatant, how come I can kill you without getting permission first?

**Questioner 1:** There is an easy answer to that. The easy answer is anything that would interfere with the fundamental war process cannot be traditionally litigated first. But something that can be traditionally litigated afterwards, like someone has been detained and moved outside of an active combat zone, cannot be killed.

**Chertoff:** I do not want to get into a debate. I conclude by saying what Judge Brown said in *Bihani*, which I can tell you from a practical standpoint I know to be true: if you are going to be litigating on the back end, it is going to affect your warfighting on the front end.<sup>57</sup> It is going to be a fundamentally different operational situation because you are going to have to collect evidence; the whole process by which you handle things is going to be different. That is why they are going to have a lot of trouble, for example, in trying some of these cases in civilian court. But let us not monopolize with a debate. Other questions?

**Questioner 2:** Is there strategic significance to a facility like Guantánamo, and if so, what are the consequences of that location?

**Chertoff:** The question was, was there a strategic significance to being in Guantánamo? I think the answer is that they were looking for a place that was not in the United States, that can be readily protected, not likely to be the subject of an attack, and relatively convenient; and Bagram was always a force protection issue. They could have picked Diego Garcia or someplace like that, but that is a British possession. So, I do not think there is anything intrinsic to it. I think it is probably shot—no pun intended—as a location for

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“alien enemy belligerents” but rather where the petitioners are imprisoned: “Does a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him?”). Justice Black concludes that the Court’s decision “that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas . . . [is a] broad and dangerous principle.” *Id.*

57. See *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown J., concurring) (expressing that cases pertaining to habeas standards “present hard questions and hard choices, ones best faced directly”). Judge Brown points out that judicial review is “an indirect and necessarily backward looking process,” which may not be sufficient “in this new war.” *Id.* She highlights that in establishing “the law in response to the challenge of the current war . . . the President, Congress, and the courts [have a duty] to realize that . . . the rule of law and the nation’s safety will benefit from an honest assessment of the new challenges we face that will produce an appropriately calibrated response.” *Id.*

detainees. Although I should mention in passing that when we have illegal migration from Haiti, people are sent back to Guantánamo, and they are staged there until they are sent back home again. But I think it was a practical thing. I do not think it was anything intrinsic.

**Questioner 3:** You spent a lot of time talking about the cost of legality on the battlefield, but I wonder if you have any concerns about what the definition of what the battlefield will encompass within?

**Chertoff:** That is a great question, and I do not want to suggest there are not some really hard questions. When you take the battlefield out of what is going on in Afghanistan, and you take it to—let us say New York—that is much different. I know there are some people who believe they are the same thing. I do not really think that is right. I think for practical reasons we are not going to drop a bomb on somebody in New York as we would do on someone in Afghanistan. Now, it is not because there is not a war in New York and there is a war in Afghanistan, but it is because when we are dealing with operations in the United States, for a whole lot of obvious reasons, we are much, much more careful about what we allow the Executive to do. Also, it is because we worry a lot about its ability to overreach, and you start to punish your enemies where you wind up seeing some of what we see on television now.

So I think this is where there is useful discussion. First, there is an array of places you can encounter somebody: Afghanistan, Italy, New York, and maybe Somalia, and depending on where those are, we do have to have different restraints. And we need to talk about those as practical issues—why there are reasons to have different constraints, including the fact that we worry a lot more about the impact on civil liberties for things that are going on in the United States or involving American citizens. Now that will offend some people whose attitude will be: everybody in the world should be treated alike. And we should not treat Americans as having more rights than other people in a combat situation. I can only say that historically the United States has never taken that position legally, going back to the days of John Adams and the Alien Act, which is still on the books.<sup>58</sup> But also, I come back to the point about the oath. Whatever your personal feelings are about your own world, when you take the oath of office, it is the oath to the American people, and so an office holder in the United States is bound to consider, with special solicitude, the rights of American citizens and things in the

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58. An Act Respecting Alien Enemies, 50 U.S.C. §§ 21-24 (2006) (“Whenever there is a declared war between the United States and any foreign nation or government . . . all natives, citizens, denizens, or subjects of the hostile nation . . . shall be liable to be apprehended, restrained, secured and removed as alien enemies.”).

United States.

**Questioner 4:** [Paraphrased based on audible sections and Chertoff's answer.] Thank you for coming and doing this. You sort of laid out the problem: we have a tension between the civil system and military system. Where do you stand on assimilating these models? First, what do you think of the tension between these two models for dealing with enemy combatants? Second, the big question is preventative detention: should we use it and with what model?

**Chertoff:** First let me say that I agree. I think a lot of the tension we have experienced has been with these two different models. I have said publicly before—and I mentioned writing a chapter in my book on this—I think the problem is the models do not apply anymore; security is now a spectrum. Globalization, and the leverage technology gives non-state actors, means you cannot treat it just as a crime anymore when you are dealing with a global enterprise. So I think in many ways we need to build a different architecture that blends a spectrum of tools, and then along the lines of what I said earlier, we need to decide which tools to use in certain circumstances. What I would do here in Newark is not what I would do in Congo. So I think that is where we have to go, and that is where Congress needs to get involved.

On the issue of civilian courts versus military courts, let me tell you what we did in the Bush administration. The general presumption—and it was a presumption; it was not an ironclad rule—was that if you were not an American and you were caught overseas, you would not be in front of a U.S. court, at least not if you were operational. But if you were caught in the United States, the presumption was that you would go to a U.S. court, unless there were some pretty strong reason not to. And there were only a couple of people caught in the United States during the Bush administration who were held in military custody, and they eventually resolved their cases in civilian courts. I am an all-of-the-above type of guy. I do not believe that as a matter of principle you should say everything must go into the military or everything must go into the civilian court system. I think you need to evaluate the facts and circumstances. But I think the rule of thumb that I have outlined is pretty good. I worry in the United States when we are dealing with American citizens or people in America that the heightened concern about a political leader misusing military courts to punish enemies means that I am much more inclined to go to a civilian court for people apprehended here. I can reverse that presumption if the facts warrant it, but that is my inclination. I am frankly not concerned about that in Afghanistan—that we are going to be oppressing the Afghan people politically. Therefore, I think the traditional model of the military is great.

On the issue of preventative detention—and Ben Wittes's book,



which I highly recommend, talks a lot about this<sup>59</sup>—we do this already in a lot of ways. What we will need to do ultimately is construct a system, if we are going to detain people, that affords them some regular measure of review, a reasonably fair process, and something that can be periodically checked but that does not necessarily get tangled up in some of the very specific requirements of the criminal case—many of which are historical and do not blend very well with the battlefield. And the thing you have to worry about is this: if you push the ordinary criminal justice system to accommodate these somewhat outlying cases, you are going to wind up actually hurting the entire criminal justice system. You may not be happy with that result in your garden-variety criminal justice case. Sometimes this idea of a national security court, which would review these cases, is really appealing, but again, it is a debatable matter.

Thank you for your patience and good to see you.

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59. WITTES, *supra* note 44, at 33-58.