



# Department of Justice

FOR IMMEDIATE RELEASE

OPA

MONDAY , JULY 21, 2008

(202) 514-2007

[WWW.USDOJ.GOV](http://WWW.USDOJ.GOV)

TDD (202) 514-1888

**REMARKS PREPARED FOR DELIVERY BY ATTORNEY GENERAL  
MICHAEL B. MUKASEY AT THE AMERICAN ENTERPRISE INSTITUTE FOR  
PUBLIC POLICY RESEARCH**

WASHINGTON, D.C.

***Highlights:***

- “Today, I would like to discuss one particular institutional challenge that we still face—the continued detention of enemy combatants after the Supreme Court’s recent decision in *Boumediene v. Bush*. In that decision, the Court ruled that the 275 or so enemy combatants detained at Guantanamo Bay have a constitutional right to challenge their detention in federal court through petitions for habeas corpus. The Supreme Court said explicitly, however, that it was not deciding questions relating to how those habeas corpus proceedings must be conducted.”
- “The responsibility of moving forward rests with the Legislative and Executive Branches as much as it does with the judiciary. This reality follows from the *Boumediene* decision itself: Although the Supreme Court settled the constitutional question of whether the Guantanamo detainees have the right to habeas corpus, the Court stopped well short of detailing how the habeas corpus proceedings must be conducted. In other words, the Supreme Court left many significant questions open, and it is well within the historic role and competence of Congress and the Executive Branch to attempt to resolve them.”
- “Unless Congress acts, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending. With so many cases, there is a serious risk of inconsistent rulings and

considerable uncertainty. . . . [W]ithout guidance from the Congress, different judges even on the same court will disagree about how the difficult questions left open by *Boumediene* should be answered. Such disagreement will, in turn, lead to a long period of protracted litigation—with the possibility of different procedures being used in different cases—until, perhaps, the Supreme Court intervenes yet again.”

- “But uncertainty is not the only, or even the main, reason these issues should not be left to the courts alone to resolve. There is also the question of which branches of government are best suited to resolve them. . . . Congress and the Executive Branch are affirmatively charged by our Constitution with protecting national security, are expert in such matters, and are in the best position to weigh the difficult policy choices that are posed by these issues. Judges play an important role in deciding whether a chosen policy is consistent with our laws and the Constitution, but it is our elected leaders who have the responsibility for making policy choices in the first instance.”
  - “So today, I am urging Congress to act – to resolve the difficult questions left open by the Supreme Court. I am urging Congress to pass legislation to ensure that the proceedings mandated by the Supreme Court are conducted in a responsible and prompt way and, as the Court itself urged, in a practical way. I believe that there are several principles that should guide such legislation.”
    - “First, and most important, Congress should make clear that a federal court may not order the Government to bring enemy combatants into the United States. There are more than 200 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; many already have demonstrated their ability and their desire to kill Americans.”
    - “Second, it is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence, and what that intelligence is. We simply cannot afford to reveal to terrorists all that we know about them and how we acquired that information.”
    - “Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Twenty individuals have already been charged, and many more may be charged in the upcoming months. Last Thursday, we received a favorable decision from a federal court rejecting the effort of a detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings.”

- “Fourth, any legislation should acknowledge again and explicitly that the Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans—soldiers and civilians alike.”
- “Fifth, Congress should establish sensible procedures for habeas challenges going forward. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees’ rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court’s explicit invitation to make these proceedings, in a word repeated often in the *Boumediene* decision, practical....”
- “Sixth and finally, because of the significant resource constraints on the Government’s ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. ”

\* \* \*

Thank you for that introduction. AEI’s scholars and fellows have contributed valuable scholarship on many of the central public policy issues of our time, and it is therefore a great privilege to be with you.

When I was nominated as Attorney General, I believed that I had been chosen in part because I knew something about terrorism. When I was a federal judge in the Southern District of New York, I presided over several significant terrorism matters, and after I left the bench I gave speeches and even wrote a bit on issues relating to the War on Terror. When I became Attorney General, however, it didn’t take me long to discover how much I had not known—both about the nature and extent of the threat, and about the varied and extensive resources, human and technological, that the Department of Justice and the Executive Branch as a whole—civilian and military—have deployed to confront that threat.

One of my most solemn obligations, especially as we look ahead to the first post-2001 transition, is to try, along with others in our government, to make sure that our efforts in this conflict are put on a sound institutional footing so that the next Attorney General and the new Administration have in place what they need to continue to assure the nation's safety.

One success in that category occurred just two weeks ago, when the President signed into law the most significant reform of our surveillance statutes in a generation—bipartisan legislation that will give our intelligence professionals critical long-term authorities to monitor foreign intelligence targets located overseas. This modernization of the Foreign Intelligence Surveillance Act showed how the political branches can work together to put our national security laws on a more solid foundation.

Today, I would like to discuss one particular institutional challenge that we still face—the continued detention of enemy combatants after the Supreme Court's recent decision in *Boumediene v. Bush*. In that decision, the Court ruled that the 270 or so enemy combatants detained at Guantanamo Bay have a constitutional right to challenge their detention in federal court through petitions for habeas corpus. The Supreme Court said explicitly, however, that it was not deciding questions relating to how those habeas corpus proceedings must be conducted. It is those questions – the questions that *Boumediene* left unanswered, and how I believe the political branches should answer them – that I would like to discuss today.

At the outset, it is worth stressing that the *Boumediene* decision is about the *process* afforded to those we detain in our conflict with al Qaeda, the Taliban, and associated groups, not about whether we can detain them at all. The United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to return to the battlefield—as indeed some have after their release from Guantanamo. We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. In addition, this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer.

Although our right to detain enemy combatants in this armed conflict is clear, determining what, if any, rights those detainees should be granted to challenge their detention has been more complicated. This is not surprising, because the laws of war governing detention of enemy combatants were designed with traditional armed conflicts in mind. However, the President emphasized shortly after the attacks on September 11, 2001, the War on Terror is a different sort of war.

We are confronted not with a hostile foreign state whose fighters wear uniforms and abide by the laws of war themselves, but rather with a dispersed group of non-state terrorists who wear no uniforms and abide by neither laws nor the norms of civilization. And although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we'll know it's over. It is, after all, rather hard to imagine Al Qaeda and its allies laying down their arms and signing articles of

surrender on the deck of an American warship. But those differences do not make it any less important, or any less fair, for us to detain those who take up arms against us.

Over the past seven years, the three branches of our government have been engaged in a dialogue—and, to put it candidly, at times a sharp debate—over the appropriate legal process for detaining combatants in this new kind of conflict. In the first few years after the September 11th attacks, for example, the Executive Branch took the view, consistent with the traditional laws of war, that we could detain enemy combatants for the duration of hostilities without judicial review of those detentions, as we had done in World War II and earlier conflicts. In 2004, the Supreme Court agreed that enemy combatants could be detained based on military evaluations for the duration of the hostilities. At the same time, the Court recognized a role for the courts in reviewing the government's basis for detaining those enemy combatants.

Following these developments, Congress and the Administration tried to apply the Court's guidance in working out how judicial review might fit within a traditional framework of military detention. The answer, provided in the Detainee Treatment Act in 2005, and reaffirmed by the Military Commissions Act a year later, was to establish a new system of judicial review of decisions by the Department of Defense as to the status of detainees at Guantanamo. One central feature of this system was that Guantanamo detainees could not file lawsuits in the United States seeking the statutory remedy of habeas corpus, but could seek review in the federal court of appeals in Washington, D.C., of the determinations of the military tribunals.

Taken together, these laws gave more procedural protections than the United States—or any other country, for that matter—had ever before given to wartime captives, whether those captives were lawful soldiers in foreign armies, or unlawful combatants who target civilians and hide in civilian populations.

The Supreme Court considered these procedures in *Boumediene v. Bush*, and decided by a 5 to 4 vote that they were not adequate to fulfill the constitutional guarantees of habeas corpus. It is important to note that the Court did *not* invalidate the separate system of military commission trials established to prosecute some detainees for war crimes, including people alleged to have been directly responsible for the September 11 attacks. The war crimes trials were not reviewed by the Supreme Court in *Boumediene* and are proceeding; indeed, the first trial begins today at Guantanamo. *Boumediene* held only that detainees at Guantanamo Bay have a constitutional right to challenge their detention through petitions for habeas corpus, and that the Detainee Treatment Act procedures did not provide an adequate substitute for habeas corpus review.

Before I go any further, let me take a brief detour to explain what habeas corpus is. Although many of you here today are probably familiar with – some of you even expert in – the concept of habeas corpus, that concept is generally not the small change of daily discourse among non-lawyers in our country. In its basic terms, a habeas corpus action is a lawsuit brought by someone in custody who asks to be released on the ground that his detention is unlawful. As a federal judge, I routinely saw the most common example of

habeas corpus actions – a defendant who has been convicted in state court filing an action in federal court and arguing that his conviction and detention violate the U.S. Constitution.

For at least a century, habeas corpus has usually applied to imprisonment in regular criminal cases and detention by immigration authorities. Congress and the courts have developed an extensive body of law in both statutes and cases to guide habeas proceedings in those settings. Before the Supreme Court's decision in *Boumediene*, however, no alien enemy combatant detained outside the United States had ever before received a right to habeas corpus. The majority opinion itself acknowledged as much. Nonetheless, the Court concluded that the unique nature of this conflict, and the unique features of our naval base at Guantanamo Bay, Cuba, particularly the control we exercise over that base, were enough to extend the writ to cover the aliens who are detained there as enemy combatants.

We have previously expressed, and I think unsurprisingly, disappointment with the *Boumediene* decision. That disappointment came about because, in our judgment, the political branches had established, in response to prior Supreme Court guidance, reasonable—indeed, historic—procedural protections for detainees. The Supreme Court, however, has spoken on this issue, and our task now is to move forward consistent with the principles set forth in the Court's decision.

The responsibility of moving forward rests with the Legislative and Executive Branches as much as it does with the judiciary. This reality follows from the *Boumediene* decision itself: Although the Supreme Court settled the constitutional question of whether the Guantanamo detainees have the right to habeas corpus, the Court stopped well short of detailing how the habeas corpus proceedings must be conducted. In other words, the Supreme Court left many significant questions open, and it is well within the historic role and competence of Congress and the Executive Branch to attempt to resolve them.

The Court also recognized that habeas proceedings for the detainees at Guantanamo Bay could raise serious national security issues, and that these issues could require that we adjust the rules that would ordinarily apply in habeas proceedings brought by defendants in domestic criminal custody. Indeed, the Supreme Court went out of its way to emphasize that “practical considerations and exigent circumstances” must help define the substance and the reach of these habeas corpus proceedings. The Court recognized, and with good reason, that certain accommodations must be made “to reduce the burden habeas corpus proceedings will place on the military” and to “protect sources and methods of intelligence gathering.”

With the Supreme Court's explicit recognition of such practical concerns in mind, let's consider some of the difficult questions that *Boumediene* leaves unresolved, and the policy choices that must be made in order to answer them.

First, will a federal court be able to order that enemy combatants detained at Guantanamo Bay be released into the United States? The Supreme Court stated that a federal trial

court must be able to order at least the conditional release of a detainee who successfully challenges his detention. But what does it mean to order the release of a foreign national captured abroad and detained at a secure United States military base in Cuba? Will the courts be able to order the government to bring detainees into the United States and release them here, rather than transferring them to another nation? What happens if a detainee's home country will not take him back, or if we cannot transfer the detainee to that country because it will not provide the required humanitarian guarantees that the detainee will not be subject to abuse when he gets home?

Second, how will the courts handle classified information in these unprecedented court proceedings? A lot of the information supporting the detention of enemy combatants held at Guantanamo Bay is drawn from highly classified and sensitive intelligence. Some of it was obtained by exposing American military and intelligence personnel to extraordinary dangers. And we know from bitter experience that terrorists adjust their tactics in response to what they learn about our intelligence-gathering methods. For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies. We need to devise rules for the habeas corpus cases that will provide for the necessary protection of national security information.

And third, what are the procedural rules that will govern these court proceedings? Does *Boumediene* require that each detainee receive a full-dress trial, with live testimony by the detainee here in Washington? Will a detainee be able to subpoena a soldier to return from combat duty in Afghanistan or Iraq to testify? Should one detainee be allowed to call other detainees as witnesses? Or compel the United States to reveal its intelligence sources in order to establish the admissibility of critical evidence?

One could say, I suppose, that these questions should be left to the courts, to resolve through litigation. But I do not think that is the most prudent course. Unless Congress acts, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending. With so many cases, there is a serious risk of inconsistent rulings and considerable uncertainty. The federal court in the District of Columbia is already working on some of these issues, and I believe that court should be commended for the preliminary steps it has taken thus far to provide for the fair, efficient, and prompt adjudication of these cases.

But it hardly takes a pessimist to expect that, without guidance from the Congress, different judges even on the same court will disagree about how the difficult questions left open by *Boumediene* should be answered. Such disagreement will, in turn, lead to a long period of protracted litigation—with the possibility of different procedures being used in different cases—until, perhaps, the Supreme Court intervenes yet again.

But uncertainty is not the only, or even the main, reason these issues should not be left to the courts alone to resolve. There is also the question of which branches of government are best suited to resolve them. I am a former federal judge; I appreciate fully the institutional strengths of our courts, and the critical role the federal judiciary plays in our

system of government. But I am also acutely aware of the judiciary's limitations. Judges decide particular cases, and they are limited to the evidence and the legal arguments presented in those cases. They have no independent way, or indeed authority, to find facts on their own, and they are generally limited by the parties' presentations of background information and expert testimony.

By contrast, Congress and the Executive Branch are affirmatively charged by our Constitution with protecting national security, are expert in such matters, and are in the best position to weigh the difficult policy choices that are posed by these issues. Judges play an important role in deciding whether a chosen policy is consistent with our laws and the Constitution, but it is our elected leaders who have the responsibility for making policy choices in the first instance.

So today, I am urging Congress to act – to resolve the difficult questions left open by the Supreme Court. I am urging Congress to pass legislation to ensure that the proceedings mandated by the Supreme Court are conducted in a responsible and prompt way and, as the Court itself urged, in a practical way. I believe that there are several principles that should guide such legislation.

First, and most important, Congress should make clear that a federal court may not order the Government to bring enemy combatants into the United States. There are more than 200 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; many already have demonstrated their ability and their desire to kill Americans. As a federal judge, I presided over a prominent terrorism-related trial, and the expense and effort required to provide security before, during, and after the trial were staggering. Simply bringing a detainee into the United States for the limited purpose of participating in his habeas proceeding would require extraordinary efforts to maintain the security of the site. To the extent detainees need to participate personally, technology should enable them to do so by video link from Guantanamo Bay, which is both remote and safe.

Far more critically, although the Constitution may require generally that a habeas court have the authority to order release, no court should be able to order that an alien captured and detained abroad during wartime be admitted and released *into the United States*.

Second, it is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence, and what that intelligence is. In the terrorism case I mentioned a minute ago, the government was required by law to turn over to the defense a list of unindicted co-conspirators – a list that included Osama bin Laden. This was in 1995, long before most Americans had ever heard of Osama bin Laden. As we learned later, that list found its way into bin Laden's hands in Khartoum, tipping him off to the fact that the United States Government was aware not only of him but also of the identity of many of his co-conspirators. We simply cannot afford to reveal to terrorists all that we know about them and how we acquired that information. We need to protect our national security secrets, and we can do so in a way that is fair to both the Government and detainees alike.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Twenty individuals have already been charged, and many more may be charged in the upcoming months. Last Thursday, we received a favorable decision from a federal court rejecting the effort of a detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants. Congress can and should reaffirm that habeas review for those combatants must await the outcome of their trials. The victims of the September 11th terrorist attacks should not have to wait any longer to see those who stand accused face trial.

Fourth, any legislation should acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans—soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures for habeas challenges going forward. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings, in a word repeated often in the *Boumediene* decision, practical—that is, proceedings adapted to the real world we live in, not the ideal world we wish we lived in.

Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers fighting the War on Terror, for example, should not be required to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be enough.

And military personnel should not be required to risk their lives to create the sort of arrest reports and chain-of-custody reports that are used, under very different circumstances, by ordinary law enforcement officers in the United States. Battlefields are not an environment where such reports can be generated without substantial risk to American lives. As one editorialist put it, this is not CSI Kandahar. Federal courts have never treated habeas corpus as demanding full-dress trials, even in ordinary criminal cases, and

it would be particularly unwise to do so here given the grave national security concerns I have discussed.

Sixth and finally, because of the significant resource constraints on the Government's ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. One unintended consequence of the Supreme Court's decision in *Boumediene* is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act, and it should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of United States custody.

Here I must make explicit, and perhaps risk reiterating, a point I would hope was obvious from the discussion so far. We are talking here about habeas corpus proceedings, not about criminal trials of the sort that some but not all of the detainees at Guantanamo Bay may face. Some people have argued that we should either charge the detainees we are holding at Guantanamo with crimes, or release them. We can and we have charged some detainees with war crimes. These proceedings are exceptionally important, and I referred to them earlier.

But to suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers. The Department of Defense and the Department of State have worked together to release those whom we believe can be transferred to a third country, consistent with the safety of our citizens and our military personnel abroad, and with our humanitarian commitments; of the 775 people who have been detained at Guantanamo, only about one-third remain. The fact that we have not charged all of those remaining at Guantanamo with crimes should not be regarded as a fair criticism of our detention policies; rather, it reflects the fundamental reality that these individuals were captured in an armed conflict, not in a police raid.

These are the central principles that should govern Congress's effort to legislate in this area. I think they are principles that should have bipartisan support, because they would provide unprecedented access for enemy combatants to challenge their detention in federal courts, while at the same time protecting the security of our citizens. Seven years ago, when we were attacked on September 11, 2001, our Nation's response to that challenge was swift, decisive, and bipartisan. Congress authorized the use of military force against Al Qaeda and others responsible for the attacks, demonstrating agreement that the Nation—not by its own choice, but by the choice of a totally ruthless enemy—was at war. The President then swiftly deployed United States troops, and the fight continues to this day.

I hope that the political branches can work together in the same way to address the process owed to terrorists and other combatants whom we have detained as part of this conflict. There is a pressing need for such legislation, as these cases are proceeding now. As I have explained, I believe that these questions are ones on which the judgment of the political branches can help the courts to adjudicate these cases fairly, uniformly, accurately, and efficiently, while ensuring that we have firm institutions in place that will allow our Nation to continue to prosecute this war with success.

Thank you very much, and I'll be happy to take your questions.

# # #

DO NOT REPLY TO THIS MESSAGE. IF YOU HAVE QUESTIONS, PLEASE USE THE CONTACTS IN THE MESSAGE OR CALL THE OFFICE OF PUBLIC AFFAIRS AT 202-514-2007.