

Dear GOP: Get Serious

The Boumediene ruling should not be a political football for presidential campaigns.

BY JACK QUINN AND
JEFF CONNAUGHTON

The Supreme Court's decision in *Boumediene v. Bush* triggered yet another illustration of how the adversarial system in law and political campaigns differs dramatically.

In the legal setting, respected lawyers addressed the weighty constitutional issues before the justices. But in the campaign setting, we saw more of the post-9/11 tactics where President George W. Bush, the Republican Party, and now the McCain campaign continue to debate national security law by painting Democrats as “weak on terror,” “naïve,” and “delusional.”

Indeed, immediately after 9/11, in the 2004 presidential campaign, and to a lesser but still potent degree today, anyone who stands up against the abysmal performance of Bush's top governmental lawyers risks the label of “no confidence that he'll pursue a determined, difficult course” against terrorism, as former New York City Mayor Rudy Giuliani put it at the 2004 Republican convention.

Or perhaps it will be that they are “more concerned about the rights of terrorists ... than the rights the American people have to safety and security,” as Giuliani said this month.

Somehow, we suspect that at oral argument in *Boumediene*, the Supreme Court heard a higher level of discourse.

FINDING TRUTH

Lawyers are trained to believe in the virtues of an adversarial system, where the advocates argue the facts and law and an impartial judge or jury tries to determine the truth of the case.

It is natural that in political settings and campaigns especially, advocates for each political party or candidate would employ messages and narratives that highlight differences and contrast points of view, and the American people must

gather enough information to make fair judgments about what they believe to be true and whom they support.

But too often since 9/11, Republican leaders have appealed to fear and distorted national security legal issues to score political points. This approach is particularly offensive and counter-productive when the political fight involves core principles of American constitutional practice and when—in the wake of *Boumediene*—the need exists for Congress and the executive to work together to treat detainees fairly while not compromising America's defense.

One might have hoped that Sen. John McCain (R-Ariz.)—a former prisoner of war himself who has shown commendable leadership in standing up to Bush on torture—would be different. But he has succumbed to temptation, because *Boumediene*—itself decided by a majority conservative Court of mostly Republican appointees, including the opinion's author, Justice Anthony Kennedy—fits right into the Republican playbook (Rudy and all). The Republicans predictably will use *Boumediene* to try to paint Sen. Barack Obama (D-Ill.) falsely as weak on terrorism.

COMPETING NARRATIVES

Even as a lawyer trying to be objective, one's reaction to *Boumediene* might depend on the lens one uses to view it.

Through one lens, these are alien combatants captured on a foreign battlefield, held in Cuba, and no court (debatable) has ever before so extended the habeas privilege. Some justices and lawyers could fairly conclude that these detainees should not enjoy a constitutionally based habeas privilege, nor too much process under any statutory approach, certainly not anything compared to that given U.S. citizens in a criminal trial.

Through a different lens, the U.S. government intentionally created a long-term facility in Guantánamo to detain people indefinitely, in an endless war, with little or no recourse, some of them snatched in places nowhere near a battlefield. And, as a McClatchy newspaper series has argued convincingly, some are clearly being held erroneously.

Even military officials have protested the abject inadequacy of the process for the detainees under the Military Commissions Act of 2006. As Justice David Souter stated in his concurrence, when one considers that the political branches have failed in six years to make available to hundreds of detainees any meaningful opportunity to prove error, that *Rasul v. Bush* four years ago held that statutory habeas jurisdiction (which subsequent legislation eliminated) extended to detainees at Guantánamo, and that a majority in well-considered dicta stated that such coverage was consistent with the historical reach of the writ, the issue begins to look quite different to many objective lawyers.

POLITICAL BATTLES

Now overlay the political narrative that each campaign applies to the case. Obama and Democratic leaders are supporting the *Boumediene* decision, saying it would ensure that the United States can protect itself and bring terrorists to justice while also protecting America's core values by avoiding a dangerously flawed legal approach.

Obama has argued that holding detainees endlessly without recourse has “destroyed our credibility when it comes to rule of law all around the world and given a huge boost to terrorist recruitment in countries that say, ‘Look, this is how the United States treats Muslims.’” He and other Democrats want to close Guantánamo because the American tradition rejects legal black holes.

Randy Scheunemann, a McCain adviser, described Obama as having the “perfect manifestation of a Sept. 10 mind-set,” saying he “does not understand the nature of the enemy as we face it.” In a statement released by the McCain campaign, Giuliani said, “Throughout this campaign, I have been very concerned that the Democrats want to take a step back to the failed policies that treated terrorism solely as a law enforcement matter rather than a clear and present danger. Barack Obama appears to believe that terrorists should be treated like criminals—a belief that underscores his fundamental lack of judgment regarding our national security.”

What is particularly unfair about this rhetoric is that McCain has favored closing Guantánamo and bringing these foreign detainees to federal prisons on U.S. soil. This would mean that under existing statutes, these same detainees—regardless of *Boumediene*—would receive habeas

rights. As Sen. Joe Biden (D-Del.) said last week: “When it comes to Guantánamo detainees, Senator McCain has been all over the map.”

As Obama likes to say, this should be a “teachable moment.” He and McCain (at least in the past) agree that detainees should have the basic right to challenge their imprisonment. After *Boumediene*, the questions are what factors should make up that basic right and who should craft them. Should district courts decide? Or, if Justice Antonin Scalia and others are right that the political branches best understand what national security requires, should Congress craft a habeas substitute, something that would circumscribe habeas review because of national security interests yet still could survive Supreme Court scrutiny after *Boumediene*? Rather than debate the ruling, each candidate should propose a reasonable way forward.

UNIFYING GROUND

If Obama's campaign for president stands for anything, it is that Americans should look for unifying ground to find solutions to problems. And as former government lawyers who have defended executive power by a past administration against Republican congressional attacks, we have long believed that lawyers in both parties should strive to find as much common ground as possible in crafting a bipartisan consensus on executive power, separation of powers, and national security law. Working together in a responsible, reasonable, bipartisan fashion on war and security is in our nation's highest traditions.

McCain's decision to make the Constitution a campaign wedge issue after *Boumediene* has made that ideal more difficult to achieve.

It is long past time that we turn away from the toxic politicization of difficult issues on liberty and security. Lawyers should be leading the way, both in setting an example and in opposing the transformation of a serious Supreme Court opinion, with important points on both sides, into a political football.

Jack Quinn served as counsel to President Bill Clinton from 1995 to 1997, and Jeff Connaughton served as a White House lawyer from 1994 to 1995. They now are co-chairman and vice chairman, respectively, of Quinn Gillespie & Associates, a strategic consulting company in Washington, D.C.