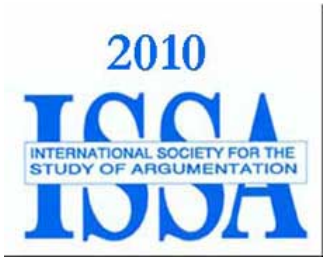
ISSA Proceedings 2010 – Strategic Maneuvering And Appellate Argumentation



Strategic maneuvering can account for the complexities of appellate argumentation in the U.S. This specialized type of reasoning is distinct from the activity type of adjudication identified in strategic maneuvering, a theory that explains the interplay between rhetorical and dialectical features of many types of argumentation. Van Eemeren and Houtlosser (2009) describe strategic maneuvering as a way of reconciling how arguers pursue "rhetorical aims of effectiveness" at the same time they retain "dialectical standards of reasonableness" (p. 5). My goal to extend strategic maneuvering theory and then apply it to the appellate argumentation in the majority and dissenting opinion in *Boumediene v. Bus*h (2008, 553 U.S. 723). To do so, the essay explains strategic maneuvering in appellate argumentation, describes the *Boumediene* case, emphasizes how rhetorical features permeate the dialectical processes of appellate argumentation, and gives examples of the argumentation of Justice Anthony Kennedy and Chief Justice John Roberts in this case.

1. Strategic maneuvering in appellate argumentation

Strategic maneuvering consists of explanations of how arguers reason in different activity types by selecting topical potential, framing arguments for particular audiences, and utilizing rhetorical tactics to influence these audiences. Van Eemeren and Houtlosser (2002, 2006, 2009) identify four different activity types–adjudication, mediation, negotiation and public debate. Then they distinguish each activity type according to stages of critical discussion: confrontation, opening, argumentation and conclusion. The type closest to appellate argumentation is adjudication, an activity in which a legal dispute takes place in a specific jurisdiction during the confrontation stage; arguers construct arguments according to the rules of a context in the opening stage; arguers interpret and offer concessions about facts and evidence in the argumentation stage; and a third party adjudicator settles the dispute in the concluding stage (pp. 7-10).

Appellate argumentation has some similarity with adjudication (van Eemeren & Houtlosser, 2009) because this type of argumentation includes a decision about a legal dispute from third party adjudicators. However, appellate argumentation differs significantly from adjudication because it emanates from and is reconstituted in multiple discourses, does not follow defined phases of critical discussion, and incorporates the reasoning of multiple arguers over time about the meaning of a disputed legal principle. For example, *Boumediene* evolved from other appeals of Guantanamo Bay (Gitmo) prisoners who claimed their legal rights had been violated when the U.S. military took them in custody following September 11, 2001. Many attorneys (petitioners) advocated for the detainees, and many other attorneys (respondents) represented the government in other jurisdictions before this case ended at the Supreme Court. The nine Supreme Court judges did not come to a consensus; they came to different conclusions written in multiple opinions, interpreted legal arguments written prior to the case from disparate viewpoints, and targeted their arguments to particular audiences. The overlapping and intersecting argumentation emanate from appeal attorneys and judges recycling and reusing arguments about Gitmo detainees they extracted from public and congressional debates, prior legal cases, statutes and executive orders, the U.S. Constitution, and precedents. What also differentiates appellate argumentation from adjudication is that arguers do not follow an established set of legal rules for presenting evidence and interpreting legal principles, nor do they apply the law as it is formulated by legislators (Feteris, 2008). The decision that results from appellate argumentation is not correct, but it is rhetorically persuasive for judges' target audiences. The adjudicators consist of multiple judges that are political appointees rather than a single adjudicator, and judges usually contest each other's legal interpretations within a single written opinion.

Judges' legal philosophy frequently foreshadows what their legal interpretations will be and predicts what evidence and arguments they will borrow and reuse from legal history and tradition, political forums, public debates, and relevant decisions from other legal jurisdictions. This process of borrowing and reusing of arguments is prominent in judges' strategic maneuvering enabling them to weave their arguments from multiple discourses into an opinion that reflects their choice of legal topics, adapt arguments to particular targeted audiences, rely upon specific types of reasoning, and create rhetorical framing and embellishing of arguments. In *Boumediene*, the judges' argumentation moves back and forth

between political justifications for the detention of prisoners at Gitmo based on threats of terror to the U.S., political motives for locating the detainees at Gitmo, the legal rights of citizens and foreigners incarcerated on Cuban land, and the legitimacy of legal processes available to detainees.

2. Boumediene v. Bush

The *Boumediene* decision illuminates the complexity of issues and the intricacies of strategic maneuvering in appellate argumentation. After suicide bombers attacked the United States on September 11, 2001, President George Bush declared a war on terror that he waged through a military offensive in Afghanistan and through the arrest and incarceration of hundreds of "enemy combatants" at Guantanamo Bay, Cuba. Eventually, Congress created new laws that identified the legal restrictions on Gitmo detainees' rights: they could be held and interrogated without legal counsel in the Detainee Treatment Act (DTA, 2005); incarcerated and interrogated without knowing what evidence the government had against them in the Combatant Status Review Tribunals Act (CSRT, 2005); and detained with only a cursory hearing before military personnel in the Military Commission Act (MCT, 2006). After national and international legal advocates eventually met with some Gitmo detainees and initiated challenges to their conditions of custody and interrogation, several challenges made their way to the Supreme Court resulting in the 2008 *Boumediene v. Bush* decision that focused on the rights of Gitmo prisoners to habeas corpus–to be brought before a judge and to hear evidence and charges against them. The *Boumediene* decision (553 U.S. 723) guaranteed habeas corpus rights to Gitmo detainees and declared sections of DTA, CSRT and MCT unconstitutional. Subsequent citations for *Boumediene* are by page number.

Lakhdar Boumediene, a Bosnian citizen captured while working in Algeria, was classified as terrorist sympathizer and designated as an "enemy combatant" before being incarcerated at Gitmo. No charges were filed against him in 2002 at the time of his incarceration nor did he receive legal assistance until 2006. The site of the Gitmo prison became an issue because it is located on a military base that is not formally part of the United States. In 1903, the United States and Cuba agreed on a lease that gave Cuba sovereignty over Guantanamo Bay but granted the U.S. complete jurisdiction and control of this area. Attorneys representing Boumediene claimed that Gitmo was under the control of the U.S. and therefore prisoners held there were entitled to the constitutional provisions of habeas

corpus; whereas the attorneys for the government concluded that Gitmo was Cuban territory and neither citizens nor foreigners incarcerated there had these rights. Another issue concerned whether or not the laws passed by Congress subsequent to incarceration were constitutional since they approved of severe military interrogation of Gitmo detainees even when these prisoners lacked knowledge about why they had been detained and what legal recourse they had.

Boumediene is a significant case because the majority opinion reinterpreted the principle of habeas corpus in relation to Gitmo detainees by designating jurisdictions to which this principle applies, made new law regarding prisoners of war, declared unconstitutional prior legislation, resulted in the release and repatriation of some Gitmo detainees, and provided guidelines for legitimate legal proceedings to be used with high threat Gitmo detainees. This 155-page decision consisted of Kennedy's detailed majority opinion and Roberts' dissenting opinion plus one concurring opinion written for each side.
The Supreme Court decided the case on June 12, 2008, in a 5-4 decision. Justice Kennedy wrote the opinion for the majority and Chief Justice Roberts wrote the dissent. The majority opinion in *Boumediene* concluded that prisoners at Gitmo had the right to the protection of habeas corpus under Article I, Section 9 of the U.S. Constitution and declared parts of the DTA and MCA as unconstitutional.

3.1. Dialectical processes
The appellate jurisdiction establishes broad procedural rules so that legal arguers from one side of a case contest the arguments of the other; it does not prescribe the content of argumentation, nor specify what constitutes effective appellate argumentation. Dialectical processes typically include a collaborative method in which logical reasoning and dialectical procedures guide how arguments are constructed within a discourse (van Eemeren & Houtlosser, 2002). In appellate argumentation, however, dialectic takes the form of back and forth adversarial arguments between attorneys who present written and oral arguments before a panel of judges that decide what the law means. In 50-page briefs, attorneys representing Boumediene and other similarly situated Gitmo prisoners petitioned the Supreme Court to hear their case on legal grounds, and attorneys representing respondents, the Bush administration, filed 50-page briefs refuting petitioners' legal claims and asserting new claims of their own. After the Court agreed to hear this case, the attorneys for both sides presented a condensed version of their briefed arguments and orally defended them by responding to

questions from several of the nine judges deciding the case. Following the completion of oral arguments, the judges gathered as a group to discuss the appeal attorneys' arguments, took a preliminary vote, rendered a split decision, and identified which judges would write the formal majority and dissenting opinions for the official Supreme Court record (Schuetz, 2007b). The appellate court norms for dialectical process also facilitated argumentation between attorneys representing adversarial positions in the civil court cases that preceded this Supreme Court opinion. Typically, the outcome of one segment of the dialectical process, the briefs of the appeal attorneys, leads to a preliminary decision among the judges following oral arguments, and culminates in judges writing a formal decision for the permanent record. Instead of producing one definitive consensus decision, appellate argumentation typically showcases the opposing views and the unresolved issues that remain between the majority and dissenting opinions in the published formal decision. In one sense, the majority opinion is the winner because this interpretation gains official standing as law; however, the minority judges also present reasons for their dissenting opinions (Schuetz, 2007b). Because the published decision acknowledges differences remaining among the judges deciding the case, these opposing views foster political and public debates about the disputed legal principle long after the decision appears in print.

Judges do not conform to a specific standard of reasonableness, such as reasonable doubt and preponderance of evidence, as they do in other types of U.S. adjudication. Instead judges often select evidence and make claims in line with their rhetorical goals, political allegiances and legal philosophy. Since the U.S. President appoints members of the Supreme Court based on partisan views and many judges serve for life, it is not surprising that judge's viewpoints permeate the content of appellate opinions as they did in *Boumediene* (Schuetz 2007a). Kennedy's arguments, for example, reflected his legal realist philosophy, and Roberts' reasoning mirrored his legal pragmatist philosophy. Legal realism, a liberal position, permits judges to deviate from the norms of judicial predecessors' decisions in order to consider the legal circumstances of new situations. Kennedy's opinion relied on historical arguments; he claimed habeas corpus should be granted to Gitmo prisoners to maintain the continuity of the common law legal tradition. In contrast, legal pragmatism assumes that the law making is an ongoing activity that serves the needs of the people and maintains the separation of powers between the executive, legislative and judicial structures of

government. Relying on pragmatism, Roberts justifies Bush-initiated statutes as necessary for fighting the war on terror. Specifically, he argues that the situational facts related to this war demand the incarceration of enemy combatants at Gitmo without benefit of habeas corpus rights. Neither judge follows a set of explicit rules about how to argue, such as deciding a case based on legislative intent, nor do they embrace an objective or an idealized judicial standard of what constitutes effective appellate argumentation.

3.2. Rhetorical processes

The strategic maneuvering in appellate argumentation integrates rhetorical goals with dialectical reasoning but does not equally balance the two. Following van Eemeren and Houtlosser's theory (2007), arguers can "neglect their persuasive interests for fear of being perceived as unreasonable" by an audience, or they may prefer one "critical ideal" over another (p. 61). Justices Kennedy and Roberts did not neglect their interests; they overtly stressed their persuasive goals, expressed their respective legal viewpoints about the Constitution, and identified which branch of government had responsibility for making law. In doing so, both judges used rhetoric to persuade their particular legal, political and public audiences about the reasonableness of their arguments (Tindale, 2009). Particular audiences refer to those groups of people for whom judges craft their opinions; these audiences share a common national legal heritage but hold disparate views about how judges should interpret the meaning of legal principles in a case.

Although the appellate courts require attorneys to address the judges deciding their case in both briefs and oral arguments, judges often write opinions for much broader audiences, including legislators, other members of the judiciary, political and military leaders and the public. Specifically, appeal attorneys for Boumediene initially met a legal obligation to persuade a majority of Supreme Court judges that government policies were unclear, sometimes contradictory and created injustices against Gitmo detainees. Government attorneys also met their obligation by defending legislation (DTA, CSRT, and MCA) and explaining that detainees' rights needed to be restricted to protect the United States against terrorism.

Winning the right to present a case to the Supreme Court results from attorneys for the disputing parties convincing a majority of appellate judges that their arguments are more compelling reasons than those presented by their adversaries. The standard of reasonableness in appellate argumentation is the

intersubjective agreement between judges and their particular audiences about the meaning of a legal principle in a given dispute, a standard of reasonableness similar to Stephen Toulmin's (2001) definition. Achieving intersubjective reasonableness depends on the extent to which attorneys' and judges' claims rely on relevant evidence, present cohesiveness and coherent reasons, explicate legal principles, and create compatibility between attorneys' and their clients' viewpoints and between judges' viewpoints and those of the particular audiences they address. Additionally, attorneys and judges pursue intersubjective reasonableness when they situate their interpretations of legal principles in relevant contexts, relate their reasons to provisions of the Constitution, and use evidence from precedents that reinforce their rhetorical goals.

3.2.1. Definitions

Judges' strategic use of definitions is a common rhetorical maneuver in appellate argumentation. Following Schiappa (2003), definitions are "rhetorical induced, linguistic propositions that are historically situated" (p. 3). Judges strategically use definitions to establish the reasonableness and force of their arguments, resulting in different definitions of key legal terms for the majority and dissenting opinion in a single case. In *Boumediene*, both Kennedy and Roberts used stipulative definitions, descriptions, and ruptures to frame and embellish their arguments. Stipulative definitions enable arguers to assert a particular definition and make it seem like an indisputable fact (Zarefsky, 1998). Appellate judges stipulate definitions to reinforce their preferred meaning of legal terms and reinforce a theme that advances their rhetorical goals.

(1) Both Kennedy and Roberts stipulate definitions of habeas corpus. Using a broad scope, Kennedy defines the right of habeas corpus as "any type of action relating to any aspect of detention, transfer, treatment, trial or conditions of confinement of an alien who . . . is or was detained . . . as an enemy combatant" (p. 759). He contrasts this definition with the one supplied by government attorneys that limits the scope and asserts that "non citizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus" (p. 760). Roberts' narrow definition of legal rights makes clear that habeas corpus is not at all appropriate for foreign enemy combatants housed in Cuba. And in fact the government should hold these prisoners as long as necessary to make sure they can never harm the U.S. again (p. 843). Roberts further stipulates that only the government has the

power to make law and limit the rights of detainees and the Supreme Court should not question that right (p. 851). The aforementioned stipulative definitions support the respective legal rhetorical goals and legal and political viewpoints of each judge.

Descriptions provide details about why judges support or reject legal principles relevant to a particular dispute. Zarefsky (1998) points out that descriptions "function strategically by redefining a phenomenon without acknowledging that a redefinition is taking place and a new point of view is being promoted" (p. 5). Appeal judges use detailed descriptions of disputed provisions of the law as a means of redefining the issues in ways that reinforce the judge's goals.(1) For example, Kennedy describes DTA's provision for a military hearing to be so restrictive that Gitmo prisoners lack any legal recourse at all (p. 789). Roberts' alterative description claims that the DTA gives all the rights that any enemy combatant should have because it enables them to hear "newly discovered or previously unavailable" evidence against them (p. 850). Kennedy claims any legitimate military hearings must create a review identifying the reasons for a prisoner's detention and must limit the power of the government to abridge those rights. For him, the CSRT process is defective because it prohibits detainees from hearing what charges have been made against them and why these charges have been made. He describes one provision of CSRT as flawed because "the [detainee] does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order detention" (p. 807).

(2) In siding with government attorneys, Roberts describes existing law as appropriate for all prisoners. He concludes, "Detainees not only have the opportunity to confront any witness before the tribunal but they may call witnesses of their own. . . . As to classified information, while detainees are not permitted access to it themselves," they can ask a "personal representative to summarize that evidence and they can appeal their case to a District of Columbia circuit court" (p. 844).

3.2.2. Framing appellate arguments

In addition to definitions, appellate judges frame their arguments by utilizing history and precedents associated with their own particular legal viewpoints. The claims appellate judges make, the evidence they select and emphasize, and the reasoning process they adopt advance their rhetorical goals. In *Boumediene*,

Kennedy locates habeas corpus in the common law legal tradition, invokes definitions from the Magna Carta, and relates both to the due process provisions of the U.S. Constitution. Roberts stresses the purpose of Bush administration laws regarding Gitmo detainees and then asserts these laws should remain in force to help the Bush administration fight the war on terror.

Audience-directed framing refers to argument moves (van Eemeren & Houtlosser, 2006, 2009), and framing refers to the slant or point of view that surfaces in the claims judges make, the evidence they emphasize, the values they evoke, and the legal viewpoints they stress. In appellate argumentation, judges writing for the majority pursue different legal goals with different audiences than those writing dissenting opinions. Judges' framing of arguments depends on several factors related to their legal philosophy including their role and legal reputation on the Court and political allegiances. Kennedy and Roberts constructed very different arguments about the rights of detainees. In doing so, they addressed particular audiences, not the universal audiences sharing common views about what constitutes justice that Chaim Perelman (1963, 1980) conceptualizes. Judges target audiences by framing their arguments from an explicit legal viewpoint that resonates with the beliefs and values held by particular audiences in
(1) Justice Kennedy's legal realism accounts for his framing of arguments for audiences that already agree with his premise that law should be relevant to contemporary circumstances and congruent with the common law legal legacy. This premise informs the following chain of reasoning:
(1) the tradition of due process in U.S. law affords legal rights to incarcerated citizens and to foreigners;
(2) a fundamental legal right for all detainees in U.S. custody is habeas corpus;
(3) Bush-initiated laws restricted the due process rights of Gitmo detainees;
(4) Boumediene and other similarly situated detainees should be released because these laws violate the principles of the Constitution; and
(5) provisions of DTA, CSRT, and MCT that violate the Constitution should be overturned. This configuration of claims informs Kennedy's audiences about his rhetorical goals, legal viewpoint, political values and the slant of his interpretations:
Kennedy makes clear that habeas corpus rights emanating from the common law tradition once provided a safeguard against the powers of monarchs and should continue as a safeguard against the restrictive provisions of Bush-initiated legislation that denies rights to detainees.

(1) Justice Roberts' legal pragmatism informs his approach to questions about which structure of government should make laws during wartime – the Supreme Court or the Congress. The framing of his arguments likely resonates with the views of his conservative legal and political audiences because he valorizes the laws initiated by Bush and passed by the conservative Republican Congress after September 11, 2001. Roberts' framing is predictable since Bush appointed him in 2006 with the expectation he would represent the conservative agenda of the government. As expected, Roberts aligns his arguments directly with those of government attorneys in this way:
claiming that Kennedy and the majority unfortunately have ignored the will of the American people, "who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges" (p. 853).

Roberts refers to one recent appellate case, *Hamdi v. Rumsfeld* (2004), claiming it provides sufficient guidelines for hearing the legal cases of Gitmo detainees. Roberts leaves out key features of the precedent when he notes that at the time Congress passed the DTA, it provided for a military hearing that met all of the due process provisions outlined in the *Hamdi* decision and required the government to provide an evidential basis for classifying detainees as enemy combatants. In contrast, Justice Kennedy emphasizes that drawing this conclusion from *Hamdi* is flawed and inapplicable to *Boumediene* because this decision applies only to the due process rights of American citizens detained at Gitmo, not to foreigners or to habeas corpus. Nonetheless, Roberts stresses that *Hamdi* is a correct decision for addressing detainee rights and no other decision is needed. This defense of Hamdi probably is the best precedent he can find that reinforces the theme of his narrative: foreign detainees pose a threat to the United States and this threat justifies restrictions to their legal rights.

4. Conclusion

This essay extends the strategic maneuvering theory of argumentation to account for the rhetorical features of appellate argumentation in common law legal systems. Although dialectical processes, such as advocacy and defense of interpretations of legal principles in appellate attorney briefs and oral arguments, aim to influence appellate judges to develop a consensus opinion, this outcome rarely occurs. Rather appellate judges create disparate judicial arguments with radically different interpretations of legal principles that reflect their individual goals with particular audiences. Judges writing for the majority create an

interpretation of what the national law is at the same time judges writing for the minority promote arguments that fuel dissent in public and political forums. While appellate decisions reflect a majority vote, they rarely create legal or public consensus.

In appellate argumentation, rhetorical processes are in the foreground and dialectical processes are in the background. The argumentation of the majority and dissenting judicial opinions reflect judges' rhetorical choices in the way they define, frame, embellish , and reason from precedent. My analysis of *Boumediene* shows that appellate argumentation is an activity type that differs from adjudication. It consists of multiple discourses; the phases of critical discussion are not defined; the reasoning is intersubjective; judges pursue rhetorical goals related to particular legal, political and public audiences; and the final published argument continues public debate about a legal principle rather than creates a consensus agreement.

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