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RESPONSE

UNDERSTANDING THE EXCEPTIONAL AND DYNAMIC NATURE OF *BOUMEDIENE* RIGHTS TO COURT ACCESS

ANDREW KENT[†]

In response to Stephen I. Vladeck, Response, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78 (2012), <http://www.pennumbra.com/responses/12-2012/Vladeck.pdf>.

I appreciate Professor Steve Vladeck's engagement with my Essay¹ about the future of habeas litigation for Guantanamo detainees. My Essay questions the Obama Administration's recent statement that *Boumediene v. Bush*² granted a constitutional right to habeas corpus that continues in perpetuity, allowing detainees to continue filing successive habeas petitions for as long as they are detained.³ I argue that the question of continuing access to the courts for Guantanamo detainees who have lost their habeas cases is significantly more complicated than the Obama Administration conveyed.

My argument has two parts. First, I propose that the court-access rights granted by *Boumediene* could be held to have expired once a federal habeas court found a detainee to be an enemy fighter (a "judicially-confirmed

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¹ Andrew Kent, Essay, *Do Boumediene Rights Expire?*, 161 U. PA. L. REV. PENNUMBRA 20 (2012), <http://www.pennumbra.com/essays/10-2012/Kent.pdf>.

² 553 U.S. 723, 732-33 (2008) (holding that "[aliens held at Guantanamo] do have the habeas corpus privilege" and that the procedures provided by the Detainee Treatment Act of 2005 do not provide an adequate substitute).

³ See Kent, *supra* note 1, at 20-21 (discussing the Justice Department's recent announcement that it would not contest such petitions).

enemy fighter”).⁴ In other words, *Boumediene* might be read to give the detainees only one bite at the habeas apple. Second, I contend that federal courts have a duty to inquire sua sponte whether *Boumediene*-based rights to court access still exists for judicially-confirmed enemy fighters because, in addition to involving individual rights and other considerations, court access under *Boumediene* implicates the federal courts’ subject matter jurisdiction.⁵ As a result, the executive branch may not waive this potential jurisdictional deficiency, and therefore, the Obama Administration’s concession is inoperative.⁶ I conclude, however, that there are some arguments supporting continued court access for judicially-confirmed enemy fighters at Guantanamo, including important policy considerations.⁷

Like the Department of Justice in its recent filing, Professor Vladeck contends that if *Boumediene* was rightly decided, habeas corpus rights must continue in perpetuity for all Guantanamo detainees, including judicially-confirmed enemy fighters.⁸ However, given the law prior to *Boumediene* and the precise holdings of the *Boumediene* Court, I think Professor Vladeck’s theory misses several key issues. In particular, the rights the *Boumediene* Court granted were both *exceptional*—that is, an exception from previous law and practice, which had denied such rights—and *dynamic*—meaning that the result of *Boumediene*’s test for whether to grant a given detainee these rights is changeable over time as the circumstances evaluated by the test change.

Historically, the right to access U.S. courts and to claim protection under U.S. law, including the Constitution, was limited by citizenship, territorial location, and enemy status.⁹ Enemy aliens (citizens or subjects of a nation at war with the United States), were barred from accessing U.S. courts during wartime unless they were resident in America and had refrained from taking hostile actions against the United States.¹⁰ And all aliens who were outside the United States lacked any rights under the U.S. Constitution.¹¹ Even if present in the United States (say, as prisoners of

⁴ See *id.* at 31.

⁵ See *id.* at 32-33.

⁶ See *id.* at 37.

⁷ See *id.* at 37-38.

⁸ See Stephen I. Vladeck, Response, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78, 79-81 (2012), <http://www.pennumbra.com/responses/11-2012/Vladeck.pdf>.

⁹ See Andrew Kent, *The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. (forthcoming 2013) (manuscript at 26-27, 67) (on file with author) [hereinafter Kent, *Fateful Turn*].

¹⁰ *Id.*

¹¹ See *id.* (manuscript at 67); see also Andrew Kent, *Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 123-32 & 124 n.96 (2011); Andrew

war), enemy *fighters* lacked any right to access U.S. courts and any individual rights under the Constitution.¹² As Justice Kennedy, the author of *Boumediene*, once put it, “[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.”¹³ There were always sharp limits to the scope of our constitutional community, and for noncitizens, access to U.S. courts and to U.S. constitutional rights historically depended on being a civilian (not an enemy fighter) who was present in the United States.

These rules came under challenge starting about the middle of the twentieth century.¹⁴ And *Boumediene* was a watershed moment. As the *Boumediene* Court noted, “before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.”¹⁵ The *Boumediene* Court did not reject the relevance of citizenship, territorial location, or enemy status in determining rights to court access or to individual constitutional rights. But the Court did reject the old, categorical, bright-line rules based on these factors. In its place, the Court substituted a multi-factor, nonexclusive test to determine whether a noncitizen outside the United States had a constitutional right to access U.S. courts via habeas corpus:

[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention

Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1853-60 (2010); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 492-93 & 505 (2007) [hereinafter Kent, *Global Constitution*].

¹² See Kent, *Fateful Turn*, *supra* note 9 (manuscript at 27-28).

¹³ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring).

¹⁴ See, e.g., *Eisentrager v. Forrester*, 174 F.2d 961, 963-65 & 963 n.9 (D.C. Cir. 1949) (holding that the Fifth Amendment Due Process and Habeas Suspension Clauses protect “any person,” anywhere in the world, including admitted agents of the German government convicted of war crimes by a U.S. military commission in China and detained in U.S.-occupied Germany), *rev’d sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (holding that the German petitioners lacked constitutional rights, including the right to access U.S. courts).

Some scholars contend that *Reid v. Covert*, 354 U.S. 1 (1957), established that noncitizens abroad have judicially enforceable constitutional rights, see, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 305-06 (2d ed. 1996), but as I have previously pointed out, this greatly over-reads a decision which expressly confined its discussion to the rights of U.S. citizens, see Kent, *Global Constitution*, *supra* note 11, at 474-75.

¹⁵ *Boumediene v. Bush*, 553 U.S. 723, 770 (2008).

took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.¹⁶

When the detainees went to the Supreme Court in 2007 requesting a constitutional right to habeas corpus, they claimed to be innocent civilians who had been designated enemy fighters only through a flawed, administrative review procedure.¹⁷ Thus, as framed by the Court's test, the detainees' claim was that, even though they were noncitizens outside the sovereign territory of the United States, the "status" and "process" factors favored granting them a constitutional right to habeas.¹⁸ The *Boumediene* Court agreed, holding that they had a constitutional right to have a federal habeas court evaluate their status using adequate procedures.¹⁹ My Essay's contention is that, after federal habeas courts found the detainees to be enemy fighters—after they had their day in court and lost—*Boumediene* may no longer provide them with any continuing right to court access because the "status" and "process" factors now cut against them instead of in their favor.²⁰ They are now noncitizens outside the United States and judicially-confirmed enemy fighters who cannot point to much in the way of special factors supporting their continued entitlement to court access.²¹

Professor Vladeck disagrees with this for several reasons. He claims that *Boumediene* is not a case about individual rights at all, but rather one that announced a structural, separation of powers-based rule.²² He also contends that "if *Boumediene* was rightly decided, it must necessarily follow that the federal courts have jurisdiction not only to entertain habeas petitions, but also to protect that jurisdiction by policing the ability of detainees to file *future* petitions."²³ In other words, Professor Vladeck appears to read *Boumediene* as announcing an unalterable, impersonal, structural requirement that, so long as the Executive holds detainees at Guantanamo Bay, those detainees have an inextinguishable right to petition federal courts for a writ of habeas corpus.²⁴

¹⁶ *Id.* at 766.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 766-67.

²⁰ Kent, *supra* note 1, at 31.

²¹ The detainees can still argue that the place of their detention is far from any theater of combat and, while not sovereign U.S. territory, is under the uncontested jurisdiction and control of the United States. See *Boumediene*, 553 U.S. at 755, 768 & 770 (emphasizing these points).

²² Vladeck, *supra* note 8, at 79-80.

²³ *Id.* at 79.

²⁴ *Id.* at 81.

There are several aspects of Professor Vladeck's analysis with which I disagree. First, the ability of a given person to access U.S. civilian courts is a question of a particular individual's rights, and U.S. courts have always treated it as such.²⁵ More than once in *Boumediene*, the Court referred to detainees' ability to access U.S. courts via habeas corpus as a "right" or a "privilege."²⁶ Once properly in court, individuals can typically raise all sorts of claims. Thus, Professor Vladeck is correct that in habeas cases, detainees may simply claim that the government lacks legal authority to detain instead of raising a claim that an individual constitutional right, like Due Process or Equal Protection, has been violated.²⁷ But it is not faithful to either *Boumediene* or a great deal of earlier precedent to suggest, as Professor Vladeck appears to, that courts do not evaluate a given individual's right to court access but look only at nonindividuated questions of constitutional structure.²⁸

Indeed, it is hard to understand *Boumediene*'s test for "determining the reach of the Suspension Clause"²⁹ as doing anything other than looking at the specific legal status and factual circumstances of a given detainee and deciding if that particular person has a constitutional right to habeas corpus. As quoted above, the individual factors *Boumediene* highlights include citizenship, territorial location, enemy status, the process through which that individual status determination was made, and the like.³⁰ The Court

²⁵ Though earlier courts used different language than they would today, U.S. courts have consistently said, in both habeas and nonhabeas cases, that the inquiry turned on the particular individual's entitlement to court access. See *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950) (noting that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection"); *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 421 (1864) ("Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist."); *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 402 (1863) (applying "those principles of the common law, which suspend an alien enemy's right of action during war"); *Dorsey v. Kyle*, 30 Md. 512, 519 (1869) (explaining that "[a]s a general rule, an alien enemy is not allowed to maintain suit in the Courts of the country with which he is, at the time, in hostility").

²⁶ *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (referring to constitutionally protected habeas corpus as "a right of first importance"); see also *id.* at 739 ("[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."); *id.* at 743 (equating the "privilege" of habeas corpus protected by the Suspension Clause with a constitutional "right"); *id.* at 768 (considering habeas corpus to be a "right[]" protected by the Suspension Clause); *id.* at 770 ("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.").

²⁷ See Vladeck, *supra* note 8, at 80-81.

²⁸ See *id.*

²⁹ See, e.g., *Boumediene*, 553 U.S. at 766.

³⁰ See *supra* text accompanying note 16.

considered its decision to be a determination of individual constitutional rights,³¹ and there is no reason to challenge this assessment.³²

Second, I disagree with Professor Vladeck's views that this *Boumediene* test for court access is static and that the right of court access conferred by *Boumediene* is ongoing and irrevocable.³³ This is not, in my opinion, the best reading of the decision.

As noted, the right conferred by *Boumediene* is exceptional. The Guantanamo detainees were noncitizens outside the United States who, under pre-*Boumediene* law, lacked individual constitutional rights, including the right to habeas.³⁴ Applying the multi-factor test, the *Boumediene* Court carved out an exception based on the specific facts of the Guantanamo detainees' situation in 2008. If the facts justifying the exception change, the exception might no longer be available to detainees.

And the multi-factor test outlined in *Boumediene* is dynamic, meaning that changing circumstances will lead to different results under the test. Even for a person who remains in the same geographic spot on the globe, every one of the *Boumediene* factors can change over time.

- "Citizenship": Individuals can gain or lose citizenship based on both the government's actions and their own.

- "[T]he nature of the sites where apprehension and then detention took place": Even if the detainee stays in the same place, the nature of the place can change around him. Leased territory, such as Guantanamo, can be fully incorporated into the sovereign territory of the nation holding the lease, or the lease can be terminated and the territory can revert to the full control and sovereignty of its original owner. Within a war zone, territory can be gained or lost by contending armies—what was the frontlines can become the rear and vice versa.

Further, over the course of a long war, many other legal and practical changes can take place. For example, starting in late 2001 with the U.S. invasion of Afghanistan, the United States was a hostile military occupier of an enemy state. Once a friendly Afghan government was installed, the U.S. presence had the consent of the host state and since then has operated as a co-belligerent assisting the Afghan government in its civil war against

³¹ See *supra* note 26 and accompanying text.

³² To be sure, the Court seemed to understand in *Boumediene* that it was determining in bulk that all detainees had a right to access the courts via habeas. But that was because all detainees were identically situated in relevant respects: noncitizens, but not enemy aliens, detained at Guantanamo, and determined by the same administrative procedures to be enemy combatants.

³³ See Vladeck, *supra* note 8, at 81 & 85.

³⁴ See *supra* notes 10-12 and accompanying text.

al Qaeda and the Taliban.³⁵ By 2014, only a small U.S. civil and military presence will remain.³⁶ For the thousands of enemy fighters detained by the United States in Afghanistan, “the nature of the site” where they were apprehended and have been detained has been changing drastically over the years.

• “[P]ractical obstacles inherent in resolving the prisoner’s entitlement to the writ”: The *Boumediene* Court’s analysis suggests that this factor overlaps somewhat with the inquiry about the “nature” of the sites of apprehension and detention, and involves looking at the military situation on the ground where the detainee is held, the potential cost and intrusiveness of judicial review into the war-fighting mission, relations between the United States and the foreign host government, and similar practicalities.³⁷

Therefore, as these factors change, the exceptional right to habeas corpus for a noncitizen detained outside the United States could also change. And because the other *Boumediene* factors are dynamic in this sense, it should not be a surprise that the one factor I primarily focus on in my Essay is also dynamic. Returning to the first of the factors in *Boumediene*’s test:

• “[S]tatus of the detainee and the adequacy of the process through which that status determination was made”: “Status” in the Guantanamo context is a shorthand way of referring to questions about either the detainee’s relationship to enemy military organizations or other individual conduct which would make the person detainable. Status can presumably change based on the detainee’s renouncing or adopting different affiliations with enemy military organizations. Status can also change by means of the government’s status-determining processes. This is the key change that has occurred since *Boumediene* was decided and the primary reason why I suggest that the *Boumediene* rights of those detainees that have undergone such status determination might have expired. Now that federal habeas courts have found the detainees to be enemy fighters, their “status” and “the process through which that status determination was made” have changed dramatically.³⁸

Applying the very test that *Boumediene* established to detainees’ changed circumstances today suggests that the constitutional right to court access

³⁵ See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 216 (2011) (noting that the United States and Afghanistan are co-belligerents in an armed conflict against al Qaeda and the Taliban).

³⁶ Michael R. Gordon, *Time Slipping, U.S. Ponders Afghan Role After 2014*, N.Y. TIMES (Nov. 25, 2012), <http://www.nytimes.com/2012/11/26/world/asia/us-planning-a-force-to-stay-in-afghanistan.html?pagewanted=all> (discussing the plans to reduce the American and allied military force in Afghanistan following the handover to Afghan security in 2014).

³⁷ *Boumediene v. Bush*, 553 U.S. 723, 769-70 (2008).

³⁸ See Kent, *supra* note 1, at 31.

announced in *Boumediene* may well have expired for judicially-confirmed enemy fighters. The citizenship factors have always cut against these detainees, as does their apprehension and detention outside the sovereign territory of the United States. Now both the status and process factors also work against them because they have been confirmed enemy fighters by the federal courts' habeas processes.

I do not want to appear to overstate my points. My Essay identifies possible counter-arguments to my legal analysis, and Professor Vladeck's response raises others. Further, I close my Essay noting various policy reasons that might support continued court access for judicially-confirmed enemy fighters at Guantanamo.³⁹ Still, federal courts cannot avoid confronting the question of whether *Boumediene* rights have expired for judicially-confirmed enemy fighters because such expiration would strip the courts of subject matter jurisdiction. And there are solid reasons to think that the answer to that question should be yes, *Boumediene* rights *do* expire. Our Constitution and courts might properly be solicitous of individuals claiming to be innocent civilians wrongly detained by the U.S. military through flawed procedures. It is harder—not impossible, but harder—to see why that solicitude should continue when the individuals have been determined by independent, Article III judges to be members of terrorist groups engaged in an armed conflict with the United States.

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³⁹ See *id.* at 37-38.