**BOUMEDIENE’S WAKE**

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The soul uneasy and confin’d from home,
Rests and expatiates in a life to come.
Alexander Pope, *An Essay on Man* (1734)

*Boumediene* was doomed the day it was decided.¹ In failing to elaborate on the substantive rights of aliens detained overseas,² in assigning exclusive jurisdiction over post-*Boumediene* habeas claims to a circuit court of appeals that doubted the wisdom of intervention,³ and in fashioning a balancing test for federal court jurisdiction that only the prison at Guantánamo could meet,⁴ *Boumediene* laid the blueprint for its own elusion. Justice Scalia crisply summarized the strategy: henceforth, to slip through *Boumediene*’s grasp, the military would be well advised to keep prisoners in Afghanistan, transfer them to other foreign military bases, and turn them over to allies for detention.⁵

In the years since *Boumediene*, the U.S. government has shown

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2. *Id.* at 808 (Roberts, C.J., dissenting). Chief Justice Roberts reiterated this point almost word for word three times in his dissent. *See id.* at 802, 808, 813.


4. *See Boumediene*, 553 U.S. at 766 (making the latter two of the test’s three factors turn, essentially, on whether the prison is near the United States).

5. *Id.* at 828 (Scalia, J., dissenting).
itself capable of following these simple directions. The number of detainees at Guantánamo has gradually dwindled, and no new prisoners are brought there anymore. Meanwhile, in Bagram Air Force Base in Afghanistan, the United States detains several thousand people (compared to the roughly 170 who remain detained in Guantánamo). Detainees have been brought to the Bagram prison not just from Afghanistan, but from as far away as Iraq, central Africa, and Southeast Asia, with scores captured in neighboring Pakistan. Unlike those held at Guantánamo Bay, those held at Bagram never obtained access to the writ of habeas corpus under Boumediene. And they never will. In March 2013, the United

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9. Azam Ahmed & Habib Zahori, Afghanistan Frees Detainees in Show of Sovereignty Before Karzai Visits U.S., N.Y. Times, Jan. 4, 2013, at A6 (noting that 3,000 are held at Bagram). The United States “functionally” detains those at Bagram because it is engaged in a long and contentious process of transferring control over its Afghan prisons to the Afghan government. See id. (the United States argues it should have “veto power” over anyone released); see also Afghan Gouv. Says it Will Take Full Control of Bagram Prison, TEHRAN TIMES, Mar. 4, 2013, http://www.tehrantimes.com/component/content/article/106139 (noting that, though the Afghans were set to have complete control of the prison by March 9, 2013, “the detention center . . . is surrounded by U.S. checkpoints and is heavily staffed by U.S. guards”).


15. In 2010, the D.C. Circuit Court of Appeals held that the suspension clause does not extend to alien detainees held at Bagram. Al Maqaleh v. Gates (“Maqaleh II”), 605 F.3d 84, 99 (D.C. Cir. 2010). In four subsequent cases, courts in the D.C. Circuit have
States finished a multi-year process of transferring “control” of those detained in Afghanistan to the Afghan government, a strategy similar to the one it pursued to great effect in Iraq. Those captured by the Multinational Force in Iraq were turned over to “Iraqi Authorities” for continued detention. The Supreme Court has held that the decision to transfer detainees to the custody of another sovereign is a political question, not a judicial one, meaning the strategy can be pursued without limitation, offering total protection from the reach of U.S. law.


17. See also ASSOC.OF THE BAR OF THE CITY OF NEW YORK & CNTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” (2004).


19. And though it must theoretically comport with international and federal laws, such as the Alien Tort Statute and the Torture Victims Protection Act, the D.C. Circuit has already held that the United States cannot be sued by an alien for failing to abide by the terms of any of these laws. See Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011) (denying relief under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Alien Tort Statute); Munaf, 553 U.S. at 700 (decisions to transfer to authorities of another sovereign are political judgments beyond judicial ken). Since prisoners in such foreign-controlled prisons cannot obtain release anyway, the United States has little to fear.
such as Lakhdar Boumediene—found justice.\textsuperscript{20} But the D.C. Circuit Court of Appeals’ evidentiary rules have effectively closed the door to all the others.\textsuperscript{21} As Judge Silberman wrote, concurring in \textit{Esmail v. Obama}, “I doubt any of my colleagues will vote to grant a petition if he or she believes that it is \textit{somewhat likely} that the petitioner is an al Qaeda adherent or an active supporter.”\textsuperscript{22}

Five years on, the moral is that \textit{Boumediene}’s star fades, while U.S. detention practices remain much the same as they have been since 9/11.\textsuperscript{23} This is the sense in which most of us talk about \textit{Boumediene}’s success or failure.

But more disturbing than \textit{Boumediene}’s failure to change the United States’ specific detention practices was its failure to change the way we talk about detention. After all, that \textit{Boumediene} would fail as an explicit mechanism for vindicating the rights of those detained was foreordained. There was no way that the United States’ detention policy could actually be regulated through the ancient and procedurally burdensome habeas remedy. The ease with which the military (and the legislative and executive branches of government more broadly) can circumvent and even deny \textit{Boumediene} was obvious to the Court the day it was decided. Courts, especially Supreme Courts, know they cannot effectuate their judgments in the face of massive congressional resistance,\textsuperscript{24} military evasion,\textsuperscript{25} and executive branch policies that simply trade detention for targeted killing.\textsuperscript{26}

\textsuperscript{21} See Ahuja & Tutt, supra note 3, at 189.
\textsuperscript{22} \textit{Esmail v. Obama}, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (emphasis added).
\textsuperscript{23} The pace of merits decisions in habeas cases in the D.C. Circuit has slowed to a standstill, while the Supreme Court has rejected every outstanding petition for certiorari from the D.C. Circuit Court of Appeals’ post-\textit{Boumediene} habeas denials, in the face of increasingly brazen calls from the D.C. Circuit Court of Appeals for the Supreme Court to grant certiorari and thereby substantiate \textit{Boumediene}’s “defiant—if only theoretical—assertion of judicial supremacy.” \textit{Id.}; see also Linda Greenhouse, \textit{Gitmo Fatigue at the Supreme Court}, N.Y. TIMES OPINIONATOR (Apr. 6, 2011, 8:45 PM), http://opinionatorblogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court.
\textsuperscript{25} \textit{Id.} (“The number of detainees at Guantánamo has been significantly reduced as the administration continues to transfer detainees to a growing list of countries including Germany, Italy, Spain, Maldives, Georgia, Albania, Latvia, Switzerland, Slovakia, Somaliland, Palau, Belgium, Afghanistan and Bermuda.”).
\textsuperscript{26} See \textit{Daniel Klaidman}, \textit{Kill or Capture: The War on Terror and the Soul}
What makes Boumediene’s fall a tragedy is the way scholars and lawyers have begun to accept that because Boumediene failed as a mechanism, it must have been wrong. They trumpet “cross-party” and “cross-branch consensus,” “institutional settlement” and “legal stabilization . . . most pronounced” with respect to military detention policy.27 They call the United States’ new approach to overseas non-citizen detention our “new normal.”28 The conversation has transformed, in other words, from a debate about the appropriateness of compromising our ideals temporarily in response to an extraordinary crisis, to a conversation framed as one between a sensible political majority and an isolated, partisan moral and intellectual minority that persistently refuses to accept the workability, legitimacy, and necessity of United States’ new approach to a fundamentally different world.29
This change is profoundly troubling. While 9/11 and the national security response it triggered is not the first time an episode has fundamentally upset the established legal order, it may be the first time that the legal profession, and the nation more broadly, has

acted as if it need never come to an end. America’s post-9/11 detention practices resulted in the imprisonment of many innocent people and broke decisively with then-prevailing constitutional and international legal norms. And they continue to do so.\footnote{See, e.g., Goldsmith, supra note 28 (describing the “new normal,” in which President Obama has largely left intact President Bush’s counterterrorism policies); Chesney, supra note 27.}

_Boumediene_ sought to remedy this problem, but not by granting a few prisoners in Guantánamo access to an old procedural mechanism that barely works even when it works well. _Boumediene_ sought to remedy this problem by signaling the rejection of the idea that we are willing to accept forever—even for a decade—that many innocent people will be taken from their families and their homes without even the promise of a minimally adequate procedure to ensure we do not have the wrong guy. Read in this light, _Boumediene_ was as right as any case has ever been. Perhaps not for what it did, for there was little it could do, but for what it said. What _Boumediene_ tried to say was that there must always be a process, no matter how inefficient or ineffective. There must always be a way to demand that our government engage a neutral decision-maker to serve as an honest broker between the accuser and the accused. This was a holding implicit in _Hamdi v. Rumsfeld_\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (“These essential constitutional promises may not be eroded.”).} and made explicit in _Boumediene_ when the Court held that every prisoner must have “a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law”—no matter who he is, or where he is held.\footnote{Boumediene v. Bush, 553 U.S. 723, 779 (2008).}

_Boumediene_ never could have survived as a detention framework. But, the efforts to cast _Boumediene_’s impracticability as a moral and pragmatic failure because it has failed to vindicate the rights of detainees—the argument in essence that because detainees cannot vindicate their rights they must have no rights—is deeply misguided. The Supreme Court’s decision in _Boumediene_ was correct even if it was impossible for the courts to implement and even if, five years on, we imprison too many for too little.

Because, for all its flaws, in deciding _Boumediene_ the Supreme Court reaffirmed the centrality of equal protection, the right to freedom from arbitrary detention and the requirement of process before the application of force. And as detention disappears, and the fight over _Boumediene_’s legacy begins, we would be well served to remember that _Boumediene_ was always, could only ever be, a symbol, not a savior.