

**BOUMEDIENE'S WAKE***Andrew Tutt\**

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.<sup>1</sup> In failing to elaborate on the substantive rights of aliens detained overseas,<sup>2</sup> in assigning exclusive jurisdiction over post-*Boumediene* habeas claims to a circuit court of appeals that doubted the wisdom of intervention,<sup>3</sup> and in fashioning a balancing test for federal court jurisdiction that only the prison at Guantánamo could meet,<sup>4</sup> *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.<sup>5</sup>

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

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

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.

3. *See id.* at 795-96 (assigning exclusive suspension-clause habeas jurisdiction to the D.C. Circuit Court of Appeals). The D.C. Circuit has reversed every district court decision granting habeas relief. *See* Jasmeet K. Ahuja & Andrew Tutt, *Evidentiary Rules Governing Guantánamo Habeas Petitions: Their Effects and Consequences*, 31 YALE L. & POL'Y REV. 185, 208 (2013). The D.C. Circuit Court of Appeals denied that U.S. federal courts possessed habeas corpus jurisdiction over Guantánamo Bay three times, and were thrice reversed by the Supreme Court: in *Rasul*, *Hamdan*, and *Boumediene* itself. *See Boumediene*, 553 U.S. 723; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004). For more about the D.C. Circuit Court of Appeals seeming hostility to *Boumediene*, see Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1455 (2011) (arguing some judges on the circuit read “the Supreme Court's work in this field for as little as it is worth –if not less”).

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.<sup>6</sup> The number of detainees at Guantánamo has gradually dwindled,<sup>7</sup> and no new prisoners are brought there anymore.<sup>8</sup> Meanwhile, in Bagram Air Force Base in Afghanistan, the United States detains several thousand people<sup>9</sup> (compared to the roughly 170 who remain detained in Guantánamo<sup>10</sup>). Detainees have been brought to the Bagram prison not just from Afghanistan, but from as far away as Iraq,<sup>11</sup> central Africa,<sup>12</sup> and Southeast Asia,<sup>13</sup> with scores captured in neighboring Pakistan.<sup>14</sup> Unlike those held at Guantánamo Bay, those held at Bagram never obtained access to the writ of habeas corpus under *Boumediene*.<sup>15</sup> And they never will. In March 2013, the United

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6. See, e.g., *Amanatullah v. Obama*, 10-CV-536 RCL, 2012 WL 5563955 (D.D.C. Nov. 15, 2012) (discussing allegations of purposeful evasion of *Boumediene* in the course of holding that purposefully evading *Boumediene* does not trigger *Boumediene*).

7. See *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, Dec. 11, 2012, <http://projects.nytimes.com/guantanamo>.

8. Ari Shapiro, *Departure Of Guantanamo Head Means Detention Center May Not Close Anytime Soon*, NPR, Jan. 29, 2013, <http://www.npr.org/2013/01/29/170588509/departure-of-guantanamo-head-means-detention-center-may-not-close-anytime-soon> (“No new prisoners have arrived in years . . .”).

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 Govt. 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, “[t]he detention center . . . is surrounded by U.S. checkpoints and is heavily staffed by U.S. guards”).

10. See *The Guantánamo Docket*, *supra* note 7; see also Josh Gerstein, *John Brennan: No New Prisoners to Guantanamo Bay*, POLITICO, Sept. 8, 2011, <http://www.politico.com/news/stories/0911/62990.html>.

11. Petition for the Writ of Habeas Corpus at 1-2, *Amanatullah v. Obama*, 10-CV-536 RCL, 2012 WL 5563955 (D.D.C. Nov. 15, 2012) (No. 10-CV-536), 2010 WL 1456158 (Iraq).

12. See Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, Jan. 7, 2008, A1.

13. Petition for the Writ of Habeas Corpus at 1, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 108-CV-01307), 2008 WL 7156039 (Thailand).

14. See Rana Tanveer, *LHC Irked with MFA's Lack of Progress on Repatriating Pakistanis in Afghan Jail*, EXPRESS TRIB., Feb. 22, 2013, <http://tribune.com.pk/story/511171/lhc-irked-with-mfas-lack-of-progress-on-repatriating-pakistanis-in-afghan-jail/>; Petition for the Writ of Habeas Corpus at 1-2, *Hamidullah v. Obama*, CIV.A. 10-758 JDB, 2012 WL 5077127 (D.D.C. Oct. 19, 2012) (No. 110-CV-00758).

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,<sup>16</sup> 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.<sup>17</sup> 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,<sup>18</sup> offering total protection from the reach of U.S. law.<sup>19</sup>

Failing to reach overseas is not the only dimension along which *Boumediene* has proven disappointing. Even at *Boumediene*’s core, in the Guantánamo Bay habeas cases from which *Boumediene* rose, it has failed to fulfill its promise. Those detainees, against whom the United States could not even stake out a plausible right to detain—

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rejected Bagram petitions seeking jurisdiction on the grounds that they possessed new jurisdictional evidence. See *Amanatullah v. Obama*, 10-CV-536 RCL, 2012 WL 5563955 (D.D.C. Nov. 15, 2012); *Al Maqaleh v. Gates* (“Al Maqaleh III”), CIV.A. 06-1669, 2012 WL 5077483 (D.D.C. Oct. 19, 2012); *Hamidullah v. Obama*, CIV.A. 10-758 JDB, 2012 WL 5077127 (D.D.C. Oct. 19, 2012); *Wahid v. Gates*, 876 F. Supp. 2d 15, 21-22 (D.D.C. 2012).

16. See, e.g., Memorandum of Understanding Between the Islamic Republic of Afghanistan and the United States of America on Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, U.S.-Afg., Mar. 9, 2012, available at <http://mfa.gov.af/en/news/7671>; Kate Clark, *The Other Guantanamo 2: the Afghan State begins Internment*, AFGHANISTAN ANALYSTS NETWORK (May 5, 2012), <http://aan-afghanistan.com/index.asp?id=2785>; see also HUMAN RIGHTS WATCH, DELIVERED INTO ENEMY HANDS: US-LED ABUSE AND RENDITION OF OPPONENTS TO GADDAFI’S LIBYA (2012), [http://www.hrw.org/sites/default/files/reports/libya0912webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf) (describing U.S. involvement in extraterritorial capture and rendition to Libya of opponents of the Gaddafi regime); Michael J. Ellis, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 245-46 (2011) (suggesting that “whenever possible, the United States . . . detain suspected terrorists in the state where they are captured, rather than at one central facility like Guantánamo Bay or the Parwan Detention Facility” and that “[d]etaining suspected terrorists in their home countries would also allow the government to avoid the question of whether habeas corpus rights extend to U.S. detention centers outside of American borders”).

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).

18. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 689-92 (2008) (implicitly holding that federal courts lack jurisdiction over aliens held by other sovereigns).

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.<sup>20</sup> But the D.C. Circuit Court of Appeals' evidentiary rules have effectively closed the door to all the others.<sup>21</sup> As Judge Silberman wrote, concurring in *Esmail v. Obama*, "I doubt any of my colleagues will vote to grant a petition if he or she believes that it is *somewhat likely* that the petitioner is an al Qaeda adherent or an active supporter."<sup>22</sup>

Five years on, the moral is that *Boumediene's* star fades, while U.S. detention practices remain much the same as they have been since 9/11.<sup>23</sup> This is the sense in which most of us talk about *Boumediene's* success or failure.

But more disturbing than *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 *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 *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,<sup>24</sup> military evasion,<sup>25</sup> and executive branch policies that simply trade detention for targeted killing.<sup>26</sup>

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20. See Scott Sayare, *After Guantánamo, Starting Anew, in Quiet Anger*, N.Y. TIMES, May 26, 2012, at A6.

21. See Ahuja & Tutt, *supra* note 3, at 189.

22. *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (emphasis added).

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-*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 *Boumediene's* "defiant—if only theoretical—assertion of judicial supremacy." *Id.*; see also Linda Greenhouse, *Gitmo Fatigue at the Supreme Court*, N.Y. TIMES OPINIONATOR (Apr. 6, 2011, 8:45 PM), <http://opinionator.blogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court>.

24. See Ann Riley, *Obama Signs Law Barring Transfer of Guantanamo Detainees to US for Trial*, JURIST (Jan. 9, 2011, 12:30 p.m.), <http://jurist.org/paperchase/2011/01/obama-signs-law-barring-transfer-of-guantanamo-detainees-to-us-for-trial.php>.

25. *Id.* ("The number of detainees at Guantanamo 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.")

26. See DANIEL KLAIDMAN, *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.<sup>27</sup> They call the United States' new approach to overseas non-citizen detention our "new normal."<sup>28</sup> 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.<sup>29</sup>

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OF THE OBAMA PRESIDENCY 117-43 (2012) ("By the time Obama accepted the Nobel Peace Prize in December 2009, he had authorized more drone strikes than George W. Bush had approved during his entire presidency."); Tom Junod, *The Lethal Presidency of Barack Obama*, ESQUIRE (July 9, 2012, 7:46 a.m.), <http://www.esquire.com/features/obama-lethal-presidency-0812> (highlighting the Obama administration's increasingly lethal counterterrorism strategies).

27. See, e.g., Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism* 4-13 MICH. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2138623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623); see Ritika Singh & Benjamin Wittes, *Two Parties, One Policy: Washington's New Consensus on Terrorism*, COMMONWEAL, Sept. 14, 2012, <http://commonwealmagazine.org/two-parties-one-policy>.

28. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 3-22 (2012).

29. Compare RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 1 (2006) ("Like any brittle thing, a Constitution that will not bend will break."), and Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295, 295 (2011) ("September 11, 2001 marked the beginning of a new age of American law. Combating terrorism became a matter of great public urgency and as part of that endeavor we adopted a number of policies that have compromised important constitutional principles."), and Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1801 (2004) ("The season for talk of leaving the Constitution behind . . . is upon us."), and David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004) ("The Palmer Raids and the Japanese internment are widely acknowledged as two of the most shameful moments in American history; the detention of thousands of Arabs and Muslims after September 11 deserves a place in that dubious pantheon."), and Bruce Ackerman, *This Is Not A War*, 113 YALE L.J. 1871, 1873 (2004) ("[A]ll of us find ourselves in a dark place far removed from the happy land of conventional legal analysis, where all our answers are clear and our reasoning compelling."), and Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 266 (2004) ("The Guantánamo policy began as an executive response to emergency . . ."), with Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 437-38 (2011) (arguing preventative detention reflects a broader shift in attitudes about risk and security, not a response to emergency), and Margulies, *supra* note 4, at 730 (arguing that American detention law reflects broader cultural undercurrents), and

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

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Gregory S. McNeal, *The Status Quo Bias and Counterterrorism Detention*, 101 J. CRIM. L. & CRIMINOLOGY 855 (2011) (arguing that those that object to American detention law are pursuing an agenda grounded more in politics than law). Scholars have begun to question whether greater protections for detainees are actually counterproductive. See, e.g., Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1395 (2008) (arguing that since capture is superior to killing, courts should not give the military and intelligence officials undue incentives to kill rather than capture); Matthew C. Waxman, *Guantanamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 263-64 (2009) (reiterating and expanding on this argument); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (arguing that the United States has adopted a compromise detention model that overcomes shortcomings in both the purely-civilian and purely-military detention models). Scholars also question whether too much attention has been paid to detention law at the expense of other important social and legal issues. See, e.g., Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 766, 769 (2011) (casting preventative detention as a symptom of a larger "punitive turn in American thought" worthy of greater attention and study); Judith Resnik, *Detention, the War on Terror, and the Federal Courts an Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 579, 584, 634-63 (2010) (explaining that since "neither the problems nor the law produced through 9/11 detention are exotic" we might profit from paying attention to the "more than two million persons . . . detained in the United States, and some 25,000 segregated in solitary confinement in 'supermax' facilities"), whether *Boumediene* itself wasn't somehow misguided and wrongheaded, see, e.g., Heather P. Scribner, *A Fundamental Misconception of Separation of Powers: Boumediene v. Bush*, 14 TEX. REV. L. & POL. 90, 92 (2009) ("[T]he Court violated basic separation-of-powers principles when it refused to stay its hand in the face of jurisdiction-stripping legislation."); Saxby Chambliss, *The Future of Detainees in the Global War on Terror: A U.S. Policy Perspective*, 43 U. RICH. L. REV. 821, 822 (2009) ("As a result of *Boumediene*, terrorists, detained by the United States for aiding Al-Qaeda and committing atrocities against our soldiers on the battlefield, may now enjoy many of the same constitutional privileges as our own citizens."); John Yoo, *The Supreme Court Goes to War*, WALL ST. J. (June 17, 2008), [http://online.wsj.com/article/SB121366596327979497.html?mod=opinion\\_main\\_commentaries](http://online.wsj.com/article/SB121366596327979497.html?mod=opinion_main_commentaries) ("[*Boumediene*] is judicial imperialism of the highest order"), and most pernicious of all, whether the courts haven't already struck the right balance between the protection of individual liberty and the needs of national security (an outcome obviating any need for further discourse), see, e.g., Benjamin Wittes, *How the Next 10 Years of Guantanamo Should Look*, WASH. POST, Jan. 13, 2012, at A19 (remarking that "Guantanamo has become rich with due process, and we should embrace this model for a wider array of long-term counterterrorism detentions"); Nathaniel H. Nesbitt, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244 (2010) (praising the work of the D.C. Circuit Court of Appeals in its post-*Boumediene* habeas hearings); Sophia Brill, *The National Security Court We Already Have*, 28 YALE L. & POLY REV. 525 (2010) (same).

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.<sup>30</sup>

*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*<sup>31</sup> 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.<sup>32</sup>

*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.

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30. 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.

31. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“These essential constitutional promises may not be eroded.”).

32. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).