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## RESPONSE

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### ACCESS TO COUNSEL, RES JUDICATA, AND THE FUTURE OF HABEAS AT GUANTANAMO

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

#### INTRODUCTION

As Professor Andrew Kent explains, the recent litigation over whether noncitizens detained at Guantanamo have a continuing right of access to counsel once their habeas petitions have been denied or dismissed is just the tip of the iceberg.<sup>1</sup> These cases raise a host of challenging questions about not only the rules governing the Guantanamo detainee litigation or the future of U.S. detention policy, but also the nature of the Constitution's Suspension Clause<sup>2</sup> more generally.<sup>3</sup> Professor Kent's analysis provides

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

<sup>2</sup> See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

<sup>3</sup> See generally Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) (summarizing the D.C. Circuit's jurisprudence in Guantanamo habeas cases following the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), which held that the Suspension Clause "has full effect" at Guantanamo).

useful insight on these complex issues, especially his recognition of the significance of Chief Judge Lamberth's September 2012 decision reaffirming that the government cannot interfere with Guantanamo detainees' access to counsel, even for those who have already had their day in court.<sup>4</sup>

But inasmuch as Professor Kent's essay suggests that the recent contretemps provoking Judge Lamberth's ruling present the larger question of whether "*Boumediene* rights expire,"<sup>5</sup> I argue in this Response that this is, in fact, not the real question implicated by the current Guantanamo litigation. As I explain in Part I, 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. And, whereas Congress and the Supreme Court have imposed some limits on the relitigation of substantive claims in post-conviction habeas cases, Part II suggests why, contra Professor Kent, *res judicata* categorically does not apply in the context of challenges to executive detention. Instead, the important questions going forward (to which I turn in Parts III and IV) will focus on the merits of potential successive habeas claims, including whether the government's detention authority might wane over time, and whether detainees' rights under domestic and international law will become more salient as time goes on.

## I. WHY *BOUMEDIENE* "RIGHTS" CANNOT "EXPIRE"

Professor Kent's essay begins with the proposition that in *Boumediene*, the Supreme Court recognized a new "right" to habeas corpus for at least some noncitizens detained outside the territorial United States.<sup>6</sup> In fact, Justice Kennedy's majority opinion was careful *not* to couch its holding in terms of individual rights.<sup>7</sup> Instead, the Court focused on the separation of powers, holding only that the Constitution's Suspension Clause "has full effect" at Guantanamo.<sup>8</sup> Thus, the federal courts must be open to hear

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<sup>4</sup> See *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 4039707, at \*18 (D.D.C. Sept. 6, 2012) (holding "that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel"); Kent, *supra* note 1, at 32-33 (discussing the Obama Administration's curious litigation position on the access-to-counsel issue).

<sup>5</sup> See Kent, *supra* note 1, at 21.

<sup>6</sup> See Kent, *supra* note 1, at 20-21.

<sup>7</sup> Virtually all of the *Boumediene* majority's references to "rights" are to the claims detainees might vindicate *through* their habeas petitions. See, e.g., 553 U.S. at 743, 745 (describing the Suspension Clause as an "instrument," "means," or "device" to protect "individual libert[ies]" and "the rights of the detained").

<sup>8</sup> *Id.* at 771.

the detainees' challenges to the lawfulness of their detention, whether via habeas corpus or an adequate alternative.<sup>9</sup> Quite pointedly, the *Boumediene* majority did not go on to hold that noncitizens detained at Guantanamo actually *have* any constitutional rights that might bear on the merits of their habeas petitions; it held only that the courts must be open to whatever legal challenges the detainees could raise.<sup>10</sup>

This distinction, which Professor Kent and I have debated before,<sup>11</sup> is hardly semantic. After all, the question raised in a habeas petition is not just whether the challenged detention violates the petitioner's rights; it is whether the detention is *lawful*—a question that turns as much on the government's underlying authority *to* detain as it does on any individual right *not* to be detained.<sup>12</sup> In the post-conviction habeas context more familiar to legal practitioners, a detainee typically uses habeas to collaterally challenge his underlying conviction or sentence. As such, the distinction between government authority and individual rights will often collapse, since the conviction and sentence are the sources of the government's ongoing detention authority. Thus, so long as neither the conviction nor the sentence is constitutionally infirm, post-conviction habeas relief will generally (albeit not always) be unavailable.<sup>13</sup> But in

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<sup>9</sup> For more on the separation-of-powers theme of Justice Kennedy's analysis, see Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2109 (2009).

<sup>10</sup> See, e.g., 553 U.S. at 795 ("Our decision today holds only that petitioners before us are entitled to seek the writ of [habeas corpus].").

<sup>11</sup> Compare, e.g., Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 103 (2011) (asserting that in *Boumediene*, the Supreme Court embraced "global constitutionalism" by extending the Constitution's substantive protections to non-citizens overseas), and Andrew Kent, *Habeas Corpus, Protection, and Extraterritorial Constitutional Rights: A Reply to Stephen Vladeck's "Insular Thinking About Habeas"*, 97 IOWA L. REV. BULL. 34, 35-36 (2012), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_97\\_Kent.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Kent.pdf) (same), with Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 18-19 (2012), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_97\\_Vladeck.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Vladeck.pdf) (arguing that Professor Kent's reading of *Boumediene* is belied by both the language of Justice Kennedy's opinion and its subsequent application in the lower courts).

<sup>12</sup> See generally Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1181 (arguing that "habeas relief can be based on individual-rights claims" but that these claims can also be based on the illegality of the detention itself).

<sup>13</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390, 400-02 (1993) (explaining that habeas claims challenge the constitutionality of a conviction, not its correctness, and that even when a conviction was arguably wrong, it cannot be overturned through habeas). But see *id.* at 437 (Blackmun, J., dissenting) (arguing that there should be no bar to the assertion of an actual innocence claim in a habeas petition because "it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent"); *Fay v. Noia*, 372 U.S. 391, 430-31 (1963) ("The jurisdictional prerequisite [in habeas cases] is not the judgment of a state court but detention

the executive-detention context, almost every case brought both before and after September 11 has involved a claim that the government lacked the authority to detain, not that the otherwise valid detention was in violation of the detainee's individual rights.<sup>14</sup> As these cases demonstrate, habeas can still be tremendously effective even for detainees who cannot specifically invoke any individual "rights."

This formulation matters because it helps to undercut the idea that the right to challenge continued physical detention ever "expires." Even if the initial detention is lawful, circumstances may change in a manner that materially affects the legality of the continuing detention; so long as an individual remains in custody, the Constitution protects his ability to challenge that custody in court. And although this result usually follows from the federal habeas statutes,<sup>15</sup> *Boumediene* necessarily compels the same conclusion, even in cases in which Congress has withdrawn the statutory jurisdiction of the federal courts (so long as the Suspension Clause applies).

## II. HABEAS CORPUS AND RES JUDICATA

The above discussion explains why Chief Judge Lamberth was correct to hold that the federal courts continue to retain jurisdiction over current and future habeas petitions filed by Guantanamo detainees.<sup>16</sup> The harder question, at least superficially, is whether the litigation of a detainee's initial habeas petition is in any way preclusive of his ability to bring a second or successive claim, and thus, whether jurisdiction in these cases is an empty formalism to preserve claims that are patently unavailing on their face.

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simpliciter. . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him.").

<sup>14</sup> *But see, e.g., Al Warafi v. Obama*, 409 F. App'x 360, 361 (D.C. Cir. 2011) (per curiam) (remanding a detainee's habeas petition for consideration of his claim that his detention is foreclosed by his rights as a medic under Article 24 of the First Geneva Convention).

<sup>15</sup> *See, e.g., 28 U.S.C. § 2241(c)(3)* (2006) (authorizing habeas relief for detainees who are "in custody in violation of the Constitution or laws or treaties of the United States").

<sup>16</sup> *See In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 4039707, at \*18 (D.D.C. Sept. 6, 2012) ("In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel.").

As Professor Kent rightly concedes, at common law, *res judicata* did not apply to habeas claims.<sup>17</sup> Writing for the Court in *Sanders v. United States*, Justice Brennan explained that

[i]t has been suggested that this principle derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. . . . The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.<sup>18</sup>

To that end, even after Congress invested the federal circuit courts with appellate jurisdiction in habeas cases in the Habeas Corpus Act of 1867,<sup>19</sup> the Court continued to hold that *res judicata* generally did not preclude relitigation on the merits in habeas petitions of claims that were litigated in the underlying criminal trial (or in a prior habeas petition).<sup>20</sup> Although the Justices *did* adopt judge-made constraints on relitigation deemed abusive, the basis for such an “abuse of the writ” doctrine was the petitioner’s misconduct and deliberate manipulation of the judicial system, *not* the preclusive nature of the original adjudication on the merits.<sup>21</sup> To that end, the Court in *Sanders* itself held that the then-extant version of 28 U.S.C. § 2244—which appeared to incorporate *res judicata* into the post-conviction context—did not actually do so.<sup>22</sup> Rather, the *Sanders* Court concluded that the statute “permitted,” but did “not compel[.]” district judges to refuse to entertain second or successive habeas petitions<sup>23</sup> so long as “the petition present[ed] no new ground not theretofore presented and determined, and the judge or court [wa]s satisfied that the ends of justice will not be served by such

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<sup>17</sup> See Kent, *supra* note 1, at 29 (citing Steve Vladeck, *Habeas, Res Judicata, and Why the New Guantanamo MOU is a Big Deal*, LAWFARE (July 17, 2012, 5:13 PM), <http://lawfareblog.com/2012/07/habeas-res-judicata-and-why-the-new-guantanamo-mou-is-a-big-deal>).

<sup>18</sup> 373 U.S. 1, 8 (1963) (internal citations omitted).

<sup>19</sup> Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2006)).

<sup>20</sup> See, e.g., *Salinger v. Loisel*, 265 U.S. 224, 230 (1924) (stating that the rule that *res judicata* does not bar relitigation through a writ of habeas corpus of previously resolved merits claims is “well established”).

<sup>21</sup> See, e.g., *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) (holding that the plaintiff abused the writ of habeas corpus by failing to present evidence at trial so he could present it in a later petition); see also *Ex parte Cuddy*, 40 F. 62, 65-66 (C.C.S.D. Cal. 1889) (“[W]hile the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second.”).

<sup>22</sup> *Sanders*, 373 U.S. at 11-12.

<sup>23</sup> *Id.* at 12.

inquiry.”<sup>24</sup> Pointedly, the *Sanders* Court construed § 2244 to *avoid* the “serious constitutional questions” that the statute would have raised had it been interpreted to otherwise codify *res judicata* and thereby “derogate from the traditional liberality of the writ.”<sup>25</sup>

To be sure, when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>26</sup> it came closer to incorporating *res judicata* into post-conviction habeas litigation by both requiring federal courts to defer to most state court legal rulings on the merits,<sup>27</sup> and imposing far tighter restrictions on the ability of those in custody pursuant to state court convictions to bring second or successive challenges to their conviction via habeas.<sup>28</sup> But neither of these measures expressly incorporated *res judicata* into the post-conviction context, and even still, the Supreme Court was careful to interpret these provisions to preserve at least *some* availability of continuing habeas relief in order to avoid constitutional questions.<sup>29</sup>

Nevertheless, Professor Kent suggests that the federal courts “would not seem to be foreclosed by the *Boumediene* decision or any strong policy arguments” from applying *res judicata* (or at least the abuse-of-the-writ doctrine) to Guantanamo detainees’ habeas claims.<sup>30</sup> In fact, the *Boumediene* Court was at pains to emphasize the fundamental differences between Congress’s power to circumscribe the scope of habeas review of state court convictions and its comparable power *vis-à-vis* federal executive detention. As Justice Kennedy put it,

<sup>24</sup> *Id.* at 11 n.5 (quoting 28 U.S.C. § 2244).

<sup>25</sup> *Id.* at 11-12.

<sup>26</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. code).

<sup>27</sup> See 28 U.S.C. § 2254(d)(1) (2006) (stating that the federal court should not grant a writ of habeas corpus with respect to any claim adjudicated on the merits in state court proceedings unless the decision by the state court “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”); see also *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (interpreting § 2254(d)(1) to authorize habeas relief only if the state court (1) “arrives at a conclusion opposite to that reached by this Court on a question of law;” (2) “decides a case differently than this Court has on a set of materially indistinguishable facts;” or (3) “identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case”).

<sup>28</sup> See 28 U.S.C. § 2244(b) (stating that a habeas petition raising an already-litigated issue “need not be entertained” by a federal court).

<sup>29</sup> See, e.g., *Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) (holding that the Court’s ability to entertain “original” habeas petitions pursuant to 28 U.S.C. § 2241(a) vitiated any constitutional question that AEDPA’s constraints on second or successive habeas petitions might otherwise have raised regarding the Court’s appellate jurisdiction).

<sup>30</sup> Kent, *supra* note 1, at 30.

[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.<sup>31</sup>

This contrast, between post-conviction habeas petitions and habeas petitions seeking review of executive detention, should be only that much *more* relevant with regard to the preclusive effect of the initial habeas proceeding. After all, detention in the post-conviction context is for a finite period, usually determined at the time of conviction, and the overwhelming majority of claims for post-conviction relief contest the underlying validity of the conviction (or sentence) itself. In that context, it is less likely that the resolution of the same claim will differ based upon when—or how often—it is relitigated. In contrast, in the context of executive and other noncriminal detention, the length of detention is *not* fixed ab initio, and the same source of detention authority may, in fact, apply differently as time goes on.

Consider in this regard the Supreme Court's jurisprudence concerning the constitutional limits on noncriminal detention, whether civil commitment,<sup>32</sup> pre-trial confinement,<sup>33</sup> or detention of noncitizens facing deportation.<sup>34</sup> In each of these contexts, the Court has held that due process requires *both* an individualized showing of current and future dangerousness<sup>35</sup>

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<sup>31</sup> *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

<sup>32</sup> *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 360-69 (1997) (examining the constitutionality of involuntary confinement for those who are "dangerous or mentally impaired").

<sup>33</sup> *See United States v. Salerno*, 481 U.S. 739, 755 (1987) (reviewing the constitutionality of pre-trial confinement for arrestees who "pose a threat to the safety of individuals or to the community which no condition of release can dispel").

<sup>34</sup> *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (discussing the constitutionality of pre-deportation confinement of noncitizens).

<sup>35</sup> *Id.* at 690-91 (explaining that the Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals" (citing *Hendricks*, 521 U.S. at 368; and *Salerno*, 481 U.S. at 747, 750-52)).

and a period of detention that is limited to a “reasonable” duration.<sup>36</sup> As such, one could easily imagine a scenario where the exact same claim—that a noncriminal detainee’s continuing incapacitation is unlawful—might have a *different* answer at different times.

This is all a long way of saying what should have already been clear before *Boumediene*: whatever limits Congress and the Court may have recognized on second or successive habeas petitions in the post-conviction context, it is much harder to justify those limits on either legal or policy grounds in the context of ongoing executive detention. Indeed, precluding those who have a nonfrivolous basis on which to relitigate a previously unsuccessful challenge to their ongoing, noncriminal detention raises the same “serious constitutional questions” to which Justice Brennan alluded in *Sanders*.<sup>37</sup>

### III. THE POTENTIAL MERITS OF SECOND OR SUCCESSIVE GUANTANAMO HABEAS PETITIONS

Of course, if the justification for allowing this kind of potentially opened relitigation is the idea that the merits of a detainee’s challenge to his continuing, noncriminal detention might change, then the real question raised by the Guantanamo cases going forward is whether noncitizens whose habeas petitions have already been dismissed or denied might *ever* be able to raise viable challenges to their continuing detention. What little the Supreme Court has said on the matter suggests that the answer will typically be no.

For example, in *Ludecke v. Watkins*, the Court held that the Alien Enemy Act of 1798—which authorizes the President to detain noncitizen adults present in the country who are “natives, citizens, denizens or subjects” of a country at war with the United States<sup>38</sup>—continued to authorize the detention of German nationals by the United States in 1948, more than three years after Germany’s unconditional surrender ended World War II in Europe.<sup>39</sup> Writing for a 5–4 majority, Justice Frankfurter explained that

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<sup>36</sup> In some circumstances, the Court has expressly quantified what a reasonable duration would be. See, e.g., *Zadvydas*, 533 U.S. at 701 (holding that, absent special circumstances, the Due Process Clause forbids the government from detaining a noncitizen for longer than six months while his or her deportation is pending without a significant likelihood that the noncitizen will be deported in the foreseeable future).

<sup>37</sup> *Sanders v. United States*, 373 U.S. 1, 12 (1963); see also *supra* text accompanying notes 22–25.

<sup>38</sup> An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. § 21 (2006)).

<sup>39</sup> *Ludecke v. Watkins*, 335 U.S. 160, 166–69, 171–73 (1948) (reasoning that a cease-fire does not allow the courts to declare that hostilities have terminated, and holding that the Alien Enemy Act validly delegated such a determination to the President).



the question of when a war was over was reserved for the political branches regardless of what was true on the ground.<sup>40</sup> Thus, the petitioners would not be entitled to habeas relief unless they were detained *after* the cessation of hostilities had been formally declared by the political branches.<sup>41</sup> *Ludecke* may therefore suggest that noncitizens who have had their day in court according to *Boumediene* will not have a viable challenge to their continuing detention until the political branches formally recognize a cessation of the hostilities initiated by Congress's September 2001 Authorization for the Use of Military Force (AUMF).<sup>42</sup> Especially in light of the AUMF's reaffirmation in the National Defense Authorization Act for Fiscal Year 2012 (NDAA),<sup>43</sup> it seems unlikely the political branches will declare an end to these hostilities anytime soon.<sup>44</sup>

At the same time, there is at least some language in the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld* hinting that this issue may not be so clearly settled.<sup>45</sup> There, the Court agreed with the petitioner—a U.S. citizen captured in Afghanistan—that the AUMF did not authorize “indefinite detention for the purpose of interrogation.”<sup>46</sup> Moreover, the Court interpreted the scope of the AUMF's “necessary and appropriate force” provision, from which it derived the government's detention authority, according to law-of-war principles.<sup>47</sup> Because American soldiers were still

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<sup>40</sup> See *id.* at 166 & n.10, 170.

<sup>41</sup> See *id.* at 168-69 & n. 13; see also *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347, 348 (1952) (per curiam) (holding that the Attorney General's power to remove the petitioner under the Alien Enemy Act expired when Congress officially ended the war with Germany).

<sup>42</sup> See Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) (authorizing the President “to use all necessary and appropriate force against” those who “planned, authorized, committed, or aided” the September 11 attacks).

<sup>43</sup> See Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (authorizing the detention of those responsible for September 11 as well as those who “substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners”).

<sup>44</sup> See Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 53 (2006) (discussing the possibility that the “war” on terrorism may never end” and the legal ramifications of such an enduring conflict). *But see* Charlie Savage, *Pentagon Counsel Speaks of Post-Qaeda Challenges*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/us/politics/pentagon-counsel-looks-ahead-to-post-qaeda-legal-challenges.html> (quoting a speech by Defense Department General Counsel Jeh Johnson in which he suggested that we may soon reach “a tipping point at which so many of the leaders and operatives of Al Qaeda and its affiliates have been killed or captured and the group is no longer able to attempt or launch a strategic attack against the United States, such that Al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed,” thereby raising difficult questions concerning the government's continuing detention authority).

<sup>45</sup> 542 U.S. 507 (2004).

<sup>46</sup> *Id.* at 521 (plurality opinion).

<sup>47</sup> See *id.*

involved in “[a]ctive combat operations against Taliban fighters,” those principles necessarily supported the conclusion that “necessary and appropriate force” included the power to detain those captured on the battlefield.<sup>48</sup> That said, Justice O’Connor, writing for the plurality, sounded an important note of caution. In her words, “If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.”<sup>49</sup>

In light of this discussion in *Hamdi*, one might argue that, if there comes a point when no ground troops are involved in “active combat operations” in Afghanistan (or elsewhere), then the detention authority provided by the AUMF *may* expire, even *without* a formal announcement to that effect by the political branches.<sup>50</sup> At the very least, this argument is far from frivolous.

#### IV. THE CONSTITUTIONAL SIGNIFICANCE OF THE DETAINEES’ RIGHT OF ACCESS TO COUNSEL

Another possibility is that, as it has with other forms of noncriminal detention, the courts will eventually hold that the Due Process Clause places limits on the type and length of detentions that are otherwise lawful. The D.C. Circuit has already held, after *Boumediene*, that the Due Process Clause does *not* apply at Guantanamo.<sup>51</sup> But a host of commentators

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<sup>48</sup> *See id.*

<sup>49</sup> *Id.*

<sup>50</sup> This argument is bolstered by the fact that the detention authority conferred by the AUMF (and the NDAA), unlike the Alien Enemy Act, is directly tethered to the laws of war, which authorize only the detention of enemy combatants until the cessation of an “armed conflict.” *See id.*; Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, LAWFARE (Dec. 31, 2011, 4:48 PM), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii> (“[T]he detention authority conferred by the AUMF, as ‘affirmed’ by the NDAA, must be understood with reference to the laws of war. Importantly, this construction should govern not only habeas cases going forward, but also the detention practices of future administrations.”); *see also* United States v. Hamdan, 696 F.3d 1238, 1248 n.8 (D.C. Cir. 2012) (underscoring the significance of statutes that “explicitly incorporate[] international norms into domestic U.S. law”).

<sup>51</sup> *See* Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) (holding that the Due Process Clause does not apply to noncitizens abroad), *vacated*, 130 S. Ct. 1235, 1235 (2010) (per curiam) (holding that new developments regarding offers to detainees to resettle in other countries required rehearing in the lower court), *reinstated on remand*, (*Kiyemba III*), 605 F.3d 1046, 1047 (D.C. Cir. 2010) (per curiam) (finding that the new developments did not affect the proper outcome of the case), *cert. denied*, 131 S. Ct. 1631 (2011).

(including me) have strongly criticized the D.C. Circuit's decision,<sup>52</sup> and a number of subsequent decisions in Guantanamo cases have implied that the Due Process Clause *could* apply.<sup>53</sup> Especially as military commissions begin issuing decisions on the merits,<sup>54</sup> it seems likely that the due process question will be revisited given the fundamentally different interests implicated in criminal, as opposed to civil, proceedings.<sup>55</sup> As such, it is more than possible that federal courts will recognize at least some constitutional protections for the Guantanamo detainees, whether under the Due Process Clause or other provisions.

This is where Chief Judge Lamberth's opinion settling the access-to-counsel dispute becomes so intriguing.<sup>56</sup> The government precipitated the decision by requiring at least some counsel, notably those whose detainee clients' habeas petitions had been dismissed or denied, to sign a new "Memorandum of Understanding" (MOU).<sup>57</sup> This document imposed far stricter limits on their ability to meet (and communicate) with their clients.<sup>58</sup> It also limited their ability to challenge the terms of the MOU, ostensibly on the ground that such contacts became less significant once the individual detainee

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<sup>52</sup> See, e.g., Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 972 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010)) (explaining the extent to which the court in *Kiyemba I* failed to appreciate the broad historical scope of a habeas court's equitable powers).

<sup>53</sup> See, e.g., *Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (holding that even if the petitioner had a constitutional right to due process and the district court violated it by relying on evidence outside of record, such error would be harmless); *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509, 518 n.4 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (assuming that Guantanamo detainees have the same constitutional rights with respect to their proposed transfer as did U.S. citizens in a previous case); cf. *United States v. Ali*, 71 M.J. 256, 278 (C.A.A.F. 2012) (Baker, C.J., concurring in part and concurring in the result) (explaining how *Boumediene* alters the analysis courts should use in determining the extraterritorial scope of constitutional rights and that "law overseas should not be applied in a formalistic manner, but in a practical and contextual manner").

<sup>54</sup> See, e.g., *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1323 (Ct. Mil. Comm'n Rev. 2011) (upholding a military commission's verdict that the defendant provided material support to terrorism and approving the sentence), *rev'd*, 696 F.3d at 1249-52 (reversing the conviction because "material support to terrorism" was not recognized as a violation of the international laws of war at the time of the defendant's relevant conduct).

<sup>55</sup> Cf. *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in the result) (arguing that the process that is due should vary as between criminal fines, criminal convictions resulting in prison terms, and capital cases).

<sup>56</sup> *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 4039707 (D.D.C. Sept. 6, 2012).

<sup>57</sup> See Benjamin Wittes, *A New Battle Over GTMO Attorney Access*, LAWFARE (July 11, 2012, 4:22 PM), <http://www.lawfareblog.com/2012/07/7995> (reporting on the government's insistence that lawyers for detainees sign a "highly-restrictive memorandum of understanding").

<sup>58</sup> *Id.*

had received his day in court.<sup>59</sup> The lawyers objected, arguing that the MOU interfered with their clients' right of access to counsel, and thus, with their right of access to the courts.<sup>60</sup> Chief Judge Lamberth agreed:

The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. . . . The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme.<sup>61</sup>

What is most revealing about this analysis is Chief Judge Lamberth's underexplained assumption that detainees' right of access to counsel follows from their right of access to the courts. Shortly after the Supreme Court's 2004 decision in *Rasul v. Bush* that federal courts had statutory jurisdiction to hear habeas petitions from Guantanamo detainees,<sup>62</sup> the D.C. district court recognized the detainees' right of access to counsel, but only under the federal habeas statute.<sup>63</sup> No court has revisited the question since Congress overruled *Rasul* and revoked most federal courts' statutory jurisdiction over Guantanamo in the Detainee Treatment Act of 2005<sup>64</sup> and the Military Commissions Act of 2006.<sup>65</sup> But, one may well argue that the right of access to counsel is simply part and parcel of the individual's right to a "meaningful" opportunity to challenge the legality of his detention, which is what the Supreme Court held

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<sup>59</sup> Memorandum of Understanding Governing Continued Contact Between Counsel/Translator and Detainee Following Termination of the Detainee's Habeas Case no. 8(f) (n.d.), available at <http://www.lawfareblog.com/wp-content/uploads/2012/07/Post-Habeas-MOU.pdf>.

<sup>60</sup> See Wittes, *supra* note 57.

<sup>61</sup> *In re Guantanamo Bay Detainee Continued Access to Counsel*, 2012 WL 4039707, at \*18.

<sup>62</sup> See 542 U.S. 466, 480 (2004).

<sup>63</sup> See *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (holding that 28 U.S.C. § 2254, when read together with 18 U.S.C. § 3006A(a)(2), "provides this Court with the discretionary authority to have counsel represent Petitioners in the habeas context").

<sup>64</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-44 (codified as amended at 28 U.S.C. § 2241(e) (2006)).

<sup>65</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241(e)).

the Suspension Clause to require in *Boumediene*.<sup>66</sup> So construed, access to counsel would be necessary to vindicate the *Boumediene* Court's understanding of the Suspension Clause and would therefore follow from the Court's holding that the Suspension Clause "has full effect" at Guantanamo.<sup>67</sup> If so, this would be an important development, albeit one limited to habeas cases.

In every other context, however, the Supreme Court has assessed a litigant's right of access to counsel according to traditional due process analysis,<sup>68</sup> presumably because such a right both transcends challenges to ongoing physical confinement and is more comfortably understood as an individual right than as a structural protection. Because the purpose of access to counsel is to allow litigants to avail themselves of subsequent legal process regardless of the nature of their underlying claim, it appears at once to be both procedural and individual. As Justice Stevens put it, "Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process."<sup>69</sup> And so, unless the right of access to counsel could be traced simultaneously (or independently) to *both* the Due Process Clause *and* the Suspension Clause,<sup>70</sup> the real significance of Chief Judge Lamberth's analysis may be the implicit but necessary conclusion that the detainees *do* have at least a modicum of due process rights. If such a conclusion is given fuller explication, it would introduce new grounds pursuant to which Guantanamo detainees—and others in similar situations—might seek to relitigate their underlying detention claims. Either way, Chief Judge Lamberth's opinion suggests that there is far more work to be done in fleshing out the full extent of the Constitution's applicability in the Guantanamo cases.

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<sup>66</sup> See *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("[T]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001))).

<sup>67</sup> *Id.* at 771. For a much fuller explication of this argument and of the otherwise underappreciated relationship between *Boumediene* and the Supreme Court's access-to-courts jurisprudence, see generally Vladeck, *supra* note 9.

<sup>68</sup> See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332-34 (1985) (summarizing cases in which the Court has recognized a litigant's right to—or right of access to—counsel).

<sup>69</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

<sup>70</sup> There is a complex relationship between the Due Process Clause and the Suspension Clause. See Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 776 (2012) (concluding that the Court's interpretation of the relationship between the two clauses will hinge on whether the Court applies *Boumediene*'s "impracticable and anomalous" test or instead uses the separation-of-powers approach); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1375-87 (2010) (examining the limits that the Due Process Clause imposes on the Suspension Clause).

It is tempting to think that none of this would matter if President Obama had fulfilled his pledge to close Guantanamo<sup>71</sup> or that the issues raised by Professor Kent's Essay are simply legacy problems confined to a small, unique, and eventually vanishing class of cases. But so long as the government continues to claim the power to subject certain terrorism suspects to long-term military detention under the laws of war, the question of whether (and to what extent) such detainees are entitled to continuing judicial review will matter, even if they are imprisoned at locations other than Guantanamo.<sup>72</sup> As I suggested above, Chief Judge Lamberth was clearly correct that, in cases in which the Suspension Clause "has full effect," the federal courts have continuing jurisdiction to supervise executive detentions. In this context, the Suspension Clause gives the federal courts the power to protect the detainees' right of access to counsel to facilitate the filing of *future* claims, even for those detainees seeking to relitigate prior challenges to the same detention. Whether or not such access will make any difference going forward depends entirely on whether the government's detention authority wanes—or whether the detainees' claims under domestic or international law ripen—over time.

It is to *these* queries, and not to the question of whether "*Boumediene* rights expire," that we should direct our focus.

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<sup>71</sup> See William Glaberson & Helene Cooper, *Obama's Plan to Close Prison at Guantánamo May Take Year*, N.Y. TIMES, Jan. 13, 2009, at A1.

<sup>72</sup> See, e.g., *Maqaleh v. Gates*, Nos. 06-1669, 08-1307 & 08-2143, 2012 WL 5077483, at \*12 (D.D.C. Oct. 19, 2012) (holding that noncitizens detained at Bagram Airfield in Afghanistan are not entitled to pursue habeas relief, even where the detainees were neither arrested in, nor citizens of, Afghanistan).