
ESSAY

DO *BOUMEDIENE* RIGHTS EXPIRE?

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INTRODUCTION

In recent weeks, a dispute has developed between the Obama Administration and lawyers representing detainees housed at the U.S. facility in Guantanamo Bay, Cuba. In court filings, the government suggested that, once a habeas corpus case has terminated adversely to a detainee, the detainee's lawyers may no longer access classified information or meet with their clients on the same terms that were allowed during the proceedings.¹ Though the district court summarily rejected the government's position,² this seemingly minor dispute is just the tip of the iceberg. As Guantanamo detainees' first round of habeas cases come to an end, and as the U.S. military deployment in Afghanistan reaches its denouement, the courts will have to address the much bigger issue of whether *Boumediene v. Bush*³ granted rights to Guantanamo detainees that have now expired.

In *Boumediene*, the Supreme Court held that Guantanamo detainees had a constitutional right to habeas corpus review to determine whether they were properly held as enemy combatants, even though the detainees were noncitizens imprisoned outside the sovereign territory of the United

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¹ See Benjamin Wittes, *On Continued Counsel Access at Gitmo and the Government's Filing*, LAWFARE (July 27, 2012, 8:06 AM), <http://www.lawfareblog.com/2012/07/on-continued-counsel-access-at-gitmo-and-the-governments-filing/>.

² See *In re Guantanamo Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 4039707, at *8 (D.D.C. Sept. 6, 2012) (rejecting the government's attempt to modify detainees' counsel access to classified information and meetings with their clients).

³ 553 U.S. 723 (2008).

States.⁴ In the Court's view, the non-habeas review processes provided for alleged enemy combatants were insufficient to justify the prolonged detention of people who claimed to be innocent civilians.⁵ But now, several years later, many detainees have had their day in court and have lost their habeas cases; the federal courts have found them to be enemy fighters⁶ who may be detained for the duration of the United States' armed conflict with al Qaeda and affiliated groups.⁷ Though the Obama Administration seems content to avoid the issue for now,⁸ future presidential administrations seem likely to ask whether persons found to be enemy fighters by Article III courts continue to have a constitutional right under *Boumediene* to access the federal courts for additional legal claims, including habeas. If the detainees' *Boumediene* rights have expired, they would presumably have no right to counsel either, hence the significance of the current dispute about counsel access.

⁴ *Id.* at 798. The Court stated that "at least three factors [were] 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 took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766. Relying partially on the finding that Guantanamo was "[i]n every practical sense . . . not abroad," *id.* at 769, the Court held that the Suspension Clause had full effect at Guantanamo, and the executive and judicial processes substituted for habeas were inadequate, *id.* at 792.

⁵ *Id.* at 794-95.

⁶ The Bush Administration used the now-familiar term "enemy combatants" to describe al Qaeda and Taliban fighters, but the Obama Administration has dropped the term. As a shorthand reference that describes both the detainees who fall within the war on terror detention authorization described in *infra* note 7 and enemy soldiers in prior traditional conflicts such as World War II, I have chosen the intentionally generic term "enemy fighters."

⁷ Under post-*Boumediene* law elaborated by the D.C. Circuit, the government may detain a person under Congress's post-9/11 Authorization for the Use of Military Force (AUMF) if the detainee admits, or the government shows by a preponderance of the evidence, that the detainee is, among other things, "part of al Qaeda or the Taliban," *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011), or that he "purposefully and materially support[ed]" al Qaeda or Taliban forces "in hostilities against U.S. Coalition partners," *id.* at 402 n.2 (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010)). See also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (authorizing detention "pending disposition under the law of war" of any person who "planned, authorized, committed, or aided" the 9/11 attacks or "was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners").

⁸ The Administration recently told a district court judge in a dispute about access to counsel that "[t]he Government does not contend, for example, that the right to habeas review recognized in *Boumediene v. Bush*, 553 U.S. 723 (2008), is extinguished once a detainee's initial habeas petition is dismissed, or even denied. Detainees retain the right, in appropriate circumstances, to file successive petitions." Respondent's Combined Opposition to Motions by Detainees Al-Mudafari, Al-Mithali, Ghanem, Al-Baidany, Esmail, and Uthman for Continued Counsel Access Pursuant to the Protective Order at 2, *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 3542496 (D.D.C. Aug. 16, 2012), 2012 WL 3193560.

There is no easy answer to the question whether confirmed enemy fighters have any right to continued court access once they have exercised their *Boumediene* rights and lost. This Essay first highlights and frames the question about the possible expiration of *Boumediene* rights, then sketches how a court could answer that question. The Essay then demonstrates that the possible expiration of *Boumediene* rights to court access raises questions about the subject matter jurisdiction of the federal courts (as well as civil capacity to sue, individual constitutional rights, and separation of powers). Thus, the courts have a duty to raise the issue *sua sponte*, and the President lacks legal authority to waive the argument. Finally, the Essay suggests policy reasons why the executive branch might be wise to avoid an argument about whether *Boumediene* rights have expired.

I. THE DETAINEES AND THEIR LITIGATION

As part of the post-9/11 “war on terror,” President Bush chose to detain noncitizens accused of membership in al Qaeda or the Taliban at a military facility at Guantanamo Bay, Cuba, on territory leased by the United States since 1903. The United States does not consider Guantanamo to be its sovereign territory.⁹ Habeas corpus petitions were soon filed on behalf of some detainees—a move the government resisted. In 2004, the Supreme Court held that the existing habeas corpus statute required that Guantanamo detainees be given the chance to file habeas petitions.¹⁰ As these lawsuits multiplied, Congress responded by stripping the jurisdiction of the federal courts to consider habeas corpus claims by alleged enemy combatants.¹¹ The detainees challenged the new statute as an unconstitutional suspension of habeas.¹² The Bush Administration argued that the detainees could not access U.S. courts and had no constitutional rights because they were (1) aliens held outside the sovereign territory of the United States, and (2) enemy combatants in the custody of the U.S. military during wartime.¹³

⁹ See Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 105-06 & n.13 (2011) (describing the history and nature of the United States' lease with Cuba for the Guantanamo base).

¹⁰ See *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (“[Section] 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”).

¹¹ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006) (forbidding U.S. courts from hearing habeas petitions “on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”).

¹² *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

¹³ See Brief for Respondents George W. Bush et al. at 9-10, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196), 2007 WL 2972541, at *9-10.

Though these two justifications share a conceptual link, they played out very differently in the Guantanamo litigation.

For much of American history, it was understood that not every person in the world could claim the protections of U.S. laws and courts.¹⁴ The availability of rights under the Constitution and other domestic laws, along with access to courts to protect those rights, depended on being within the protection of the laws. Protection by the United States went hand-in-hand with allegiance to it, and allegiance turned on both citizenship and territorial location. Citizens of the United States were presumptively within the protection of the courts and laws because they owed allegiance to their country, but noncitizens were a different matter.

Noncitizens were within that protection only when they owed temporary allegiance to the United States. While present in the United States with the express or tacit permission of the government, aliens owed this temporary allegiance and they received the protection of the courts, domestic laws, and the Constitution. When abroad, an alien owed no allegiance to the United States, and U.S. domestic laws and courts offered no protection to the alien.¹⁵ Until 2008, the Supreme Court consistently held that noncitizens outside the United States could not claim protection under the Constitution.¹⁶ Hence, the Bush Administration's argument in

¹⁴ The following two paragraphs of main text are based on Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, *passim* (2009); Kent, *supra* note 9, at 123-32; Andrew 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, *passim* (2007); and Andrew Kent, *The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. (forthcoming 2013) [hereinafter Kent, *Court's Fateful Turn*]. The conclusions of these articles, as summarized in the main text following this footnote, are not universally shared. For arguments that, in seventeenth- and eighteenth-century England, enemy fighters and nonresident enemy aliens could seek habeas corpus, see PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008), and Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing HALLIDAY, *supra*). For arguments that this was or would have been allowed under U.S. law as well, see Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008) [hereinafter Vladeck, *Suspension Clause*], and Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1 (2004).

¹⁵ Another reason why the Constitution was not thought to protect aliens abroad was the fairly widespread nineteenth century view that all domestic law (including the Constitution) was strictly territorial, that is, had no force or effect abroad. See Kent, *supra* note 9, at 123-26, 124 n.96. Some believed this concept of territoriality prevented even U.S. citizens from claiming extraterritorial constitutional rights. *Id.* at 125.

¹⁶ The Court in *Boumediene* claimed that an important series of early twentieth century Supreme Court decisions called the *Insular Cases* supported its view that the Suspension Clause, and perhaps other individual rights provisions in the Constitution, has extraterritorial effect on behalf of noncitizens. See *Boumediene*, 553 U.S. at 756-60. But my previous work has shown that this proposition is simply not true and is not even an arguably plausible reading of those

the Guantanamo litigation about citizenship and territorial location was rooted in long-standing precedent and legal understandings. Though some have suggested that the Suspension Clause is a structural separation-of-powers protection that was available to noncitizens abroad even during the era when they were understood to lack any individual constitutional rights,¹⁷ the cases decided before *Boumediene* took a contrary view of the Clause—a view which was consistent with the Bush Administration’s first argument.¹⁸

Moreover, prior to *Boumediene*, there was an important exception to the general rule that noncitizens present in the United States were within the protection of the laws and courts. Until World War II, courts and commentators consistently held that enemy fighters could not access U.S. courts or claim rights under U.S. law during wartime.¹⁹ Fighting war against the United States was fundamentally inconsistent with allegiance to it and hence no protection was granted, even when the combatants were located in the United States. Therefore, the Bush Administration’s second argument that enemy fighter status barred court access for Guantanamo detainees also derived from traditional jurisprudence.

decisions. See *Kent*, *supra* note 9, at 110-15. In fact, at the time of the *Insular Cases*, the Court, Congress, the executive branch, and leading commentators all agreed that the Constitution did not protect noncitizens outside the sovereign territory of the United States. See *id.* at 120-21, 123-32, 134-36, 144, 146-49.

¹⁷ See, e.g., Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 19 (2012) (“[T]he backstop to Justice Kennedy’s analysis in *Boumediene* was the view that the Suspension Clause is a structural separation-of-powers provision, and that its scope therefore must be understood wholly apart from individual rights such as due process.”); Vladeck, *Suspension Clause*, *supra* note 14, at 302-04 (arguing that it is incorrect for the Court to conclude that the Suspension Clause does not apply to Guantanamo detainees simply because they are noncitizens outside U.S. territorial jurisdiction).

¹⁸ The Supreme Court rejected application of the Suspension Clause to noncitizens abroad in *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950). Earlier Supreme Court decisions are consistent with *Eisentrager*’s holding on this point. See 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, 37-40 (2012) (discussing early twentieth-century cases that suggest the Supreme Court *did not* believe the Constitution required Article III habeas jurisdiction over challenges to executive detention arising in new overseas U.S. possessions, and, a fortiori, that detentions in foreign territory would not implicate the Suspension Clause either). One case sometimes said to support extraterritorial application of the Suspension Clause to noncitizens, *In re Yamashita*, 327 U.S. 1 (1946), arose in the Philippines and was decided when the Philippines was actually still American territory (independence came in July 1946, after the Supreme Court’s decision). In addition, the Supreme Court’s power to review Yamashita’s habeas petition by certiorari came from a statute expressly granting such power, 28 U.S.C. § 349 (1940), and the Philippine courts had power given by positive law to issue writs of habeas corpus. Because both habeas corpus in the local courts and appellate review in an Article III court were provided by statute, the Suspension Clause was not implicated.

¹⁹ See Kent, *Court’s Fateful Turn*, *supra* note 14.

Despite this exception's historical heritage and its invocation by the Bush Administration, the second argument did not figure prominently in the Guantanamo litigation. The crux of the dispute between the U.S. government and the Guantanamo detainees was whether the detainees were in fact enemy fighters or innocent civilians. The detainees argued that a federal court using habeas corpus, rather than executive branch agents, must make this crucial status determination.

Even the Bush Administration seemed to recognize that this would have been a winning argument, had Guantanamo been located in the United States.²⁰ And so the hard-fought litigation challenging Congress's withdrawal of habeas jurisdiction for Guantanamo detainees focused primarily on territorial location: did the fact that these noncitizens were located in territory that was technically not under the full sovereignty of the United States mean they had no right to access the courts and claim constitutional rights, or was Guantanamo Bay tantamount to U.S. territory where the Constitution required the military to provide court access and other rights to aliens?

In *Boumediene*, the Court sided with the detainees. It held that the Suspension Clause of the Constitution "has full effect at Guantanamo Bay,"²¹ and that the status review procedures provided by statute and executive order were not constitutionally adequate substitutes for the habeas corpus rights guaranteed by the Constitution.²² Crucial to this decision was the Court's view that "the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over [Guantanamo.]"²³ After *Boumediene*, Guantanamo detainees litigated dozens of habeas cases in the federal courts.

In a report published in early 2010, President Obama's Guantanamo Review Task Force declared that of the 240 detainees subject to review, 126 had been approved for transfer, but only 44 had been transferred to countries outside the United States.²⁴ In addition, 44 detainees were deemed eligible for prosecution in federal or military court, 48 were declared too dangerous to transfer but not "feasible for prosecution," and 30 detainees from Yemen were designated for "'conditional' detention" due to

²⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("All [parties] agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.").

²¹ *Boumediene*, 553 U.S. at 771.

²² *Id.* at 789.

²³ *Id.* at 755.

²⁴ See GUANTANAMO REVIEW TASK FORCE, FINAL REPORT ii (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

instability in Yemen at the time.²⁵ As of early fall 2012, there were still 168 detainees at Guantanamo.²⁶ Many of those not cleared for release have litigated habeas cases, and to date, federal courts have adjudicated the cases of about 60 detainees.²⁷ It is difficult to neatly tally “wins” and “losses” for the detainees and the government in the habeas cases, but doing so is not necessary here in any case. It suffices for this Essay to say that the federal courts have determined that dozens of detainees are al Qaeda or Taliban enemy combatants, a group I will call the “judicially-confirmed enemy fighters.”²⁸

Before turning to the question of whether *Boumediene* rights have expired for judicially-confirmed enemy fighters, it will be useful to clarify what kinds of claims these detainees might want to bring in the future. A number of detainees have already brought suits for money damages challenging various aspects of their treatment in custody, but Congress withdrew the federal courts’ jurisdiction over these suits in 2006,²⁹ and the D.C. Circuit has upheld the constitutionality of Congress’s act.³⁰ That holding seems likely to be affirmed if it reaches the Supreme Court;³¹ thus, damages suits are not an option.

²⁵ *Id.*

²⁶ See *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 12-398, 2012 WL 4039707, at *1 (D.D.C. Sept. 6, 2012).

²⁷ See Clive Stafford Smith, *Guantánamo Bay: Statistics*, REPRIEVE (July 28, 2012), <http://www.repriev.org.uk/publiceducation/guantanamostats/>.

²⁸ There are two other classes of detainees totaling only a small number of individuals, that are legally equivalent to “judicially-confirmed enemy fighters.” First, some detainees never filed, or filed then dropped, habeas cases. They have conceded by implicit waiver of their right to habeas that the executive branch’s classification of them as enemy fighters is correct. Second, a few detainees are held pursuant to a judgment of a military commission that they committed one or more war crimes. Such judgments require a threshold finding that the detainees were enemy fighters. See 10 U.S.C. §§ 948a(7), 948b(a) (Supp. III 2010) (replacing a similar provision, section 3(a)(1) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, and establishing procedures for trying “unprivileged enemy belligerents”). Convicted defendants have a right to appellate review by the D.C. Circuit and may petition the Supreme Court for certiorari. See 10 U.S.C. § 950(g) (Supp. III 2010). As a result, an Article III court will have found detainees held pursuant to a final judgment of a military commission to be enemy fighters, just like detainees who litigated but lost their habeas cases.

²⁹ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241(e)(2) (Supp. II 2009)).

³⁰ See *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012).

³¹ So-called *Bivens* suits for money damages are highly disfavored by the courts today, especially when they are brought by noncitizens challenging national security policies. See Benjamin Wittes, *Andrew Kent on Al-Aulaqi and Bivens*, LAWFARE (Aug. 3, 2012, 7:44 AM), <http://www.lawfareblog.com/2012/08/andrew-kent-on-al-aulaqui-and-bivens/>. Even when *Bivens* suits go forward, qualified immunity prevents many litigants from recovering. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). As a result, it is hard to imagine a winning argument that Congress had violated detainees’ constitutional rights by precluding damages suits—suits that would likely be blocked because of qualified immunity and limitations on *Bivens*. This is especially true because the detainees are noncitizens outside the United States and, to date, the only constitutional right

The most important type of claim that judicially-confirmed enemy fighters at Guantanamo will want to bring is a second round of habeas challenges to either the factual or legal basis of their detentions. When facts change—for instance, if newly discovered information showed that a detainee was not in fact an enemy fighter—the detainees and their counsel will want to return to court. Once the United States withdraws from its combat mission in Afghanistan, Taliban detainees at Guantanamo will most likely claim that the factual predicate for their detention has ended.³² Given the United States' success in eliminating al Qaeda fighters, including many top leaders, detainees held because of their al Qaeda associations might in the future claim that America's war with the group has effectively terminated, ending the justification for detaining them.³³ Detainees may also invoke the Court's language in *Hamdi* that suggested that, even if the conflict with al Qaeda, the Taliban, and affiliates does not in fact end, "[i]f the practical circumstances" of that conflict "are entirely unlike those of the conflicts that informed the development of the law of war," the "understanding" that detention is authorized for the duration of the conflict may over time "unravel."³⁴ Even without viable legal claims, lawyers for detainees will still desire to represent their clients in other ways, for instance by pressing for better conditions of confinement or for detainees' release or repatriation.

that the Supreme Court has clearly confirmed they have is the Suspension Clause protection announced in *Boumediene*. See *Boumediene*, 553 U.S. at 771 (holding that Congress must "act in accordance with the requirements of the Suspension Clause" if it intends to suspend habeas corpus for Guantanamo detainees). It should be noted though that *Boumediene* and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), are probably best read as implicitly granting Due Process Clause rights and a right to raise separation-of-powers claims to detainees at Guantanamo. See Kent, *Court's Fateful Turn*, *supra* note 14. For an argument that the Supreme Court could decide the question raised in *Al-Zahrani*, see *supra* note 30, in favor of the plaintiff, see Steve Vladeck, *The Subtle New (Constitutional) Holding in Al-Zahrani*, LAWFARE (Feb. 21, 2012, 2:47 PM), <http://www.lawfareblog.com/2012/02/the-subtle-new-constitutional-holding-in-al-zahrani/>.

³² See generally *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (approving detention of an alleged Taliban fighter "for the duration of the particular conflict" under law-of-war principles implicitly adopted by the AUMF). For a rich discussion of how changes in the conflict with al Qaeda and the Taliban, including the removal of most U.S. troops from Afghanistan, are likely to affect future detention litigation and other legal issues, see Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623.

³³ See, e.g., Peter Bergen, *Time to Declare Victory: al Qaeda Is Defeated*, CNN SEC. CLEARANCE (June 27, 2012, 12:01 AM), <http://security.blogs.cnn.com/2012/06/27/time-to-declare-victory-al-qaeda-is-defeated-opinion/> (quoting the Secretary of Defense and President Obama predicting that a strategic defeat of al Qaeda is within reach).

³⁴ *Hamdi*, 542 U.S. at 521 (plurality opinion).

II. HAVE *BOUMEDIENE* RIGHTS EXPIRED FOR JUDICIALLY-CONFIRMED ENEMY FIGHTERS?

A. *The Law Before Boumediene*

Do the rights announced in *Boumediene* expire once an Article III court determines that a detainee is an enemy fighter? There is no easy answer to this important question.

Prior to *Boumediene*, three Supreme Court cases—all arising from World War II—addressed whether enemy fighters could access U.S. courts and claim rights under domestic law during wartime. The first, *Ex parte Quirin*, involved German military agents who snuck into the United States on a sabotage mission during the war, and who, once captured, filed petitions for habeas corpus.³⁵ All but one were German nationals; the other claimed to be a U.S. citizen.³⁶ The government argued that neither nonresident enemy aliens nor enemy fighters had ever had the right to access U.S. courts or to claim domestic legal rights during wartime.³⁷ The Court rejected this argument and allowed the saboteurs to access the courts via habeas.³⁸ However, the Court did not explain why it overturned longstanding rules to permit this court access.³⁹ Later interpreters have understood *Quirin* to mean that any person present in U.S. territory has a right to habeas corpus.⁴⁰

The second case, *In re Yamashita*,⁴¹ arose in the Philippines, at the time a U.S. territory. A Japanese army general was charged with war crimes, and he filed a writ of habeas corpus in order to challenge his military commission trial.⁴² Over the Executive's objections, but citing *Quirin*, the Court held that the general could access U.S. courts via habeas.⁴³ The third case arose a few years later. In *Johnson v. Eisentrager*,⁴⁴ the Court confronted habeas corpus petitions brought by German military agents convicted of war crimes by a U.S. military tribunal in China and subsequently detained in U.S.-occupied Germany.⁴⁵ Pointing to their status as nonresident enemy aliens and enemy fighters, and their location outside the United States, the

³⁵ 317 U.S. 1, 19-22 (1942).

³⁶ *Id.* at 20.

³⁷ *Id.* at 24-25.

³⁸ *Id.* at 25.

³⁹ See Kent, *Court's Fateful Turn*, *supra* note 14.

⁴⁰ See *id.*

⁴¹ 327 U.S. 1 (1946).

⁴² *Id.* at 5-6.

⁴³ See *id.* at 9.

⁴⁴ 339 U.S. 763 (1950).

⁴⁵ *Id.* at 766.

Court in *Eisentrager* held that these agents had no right to access U.S. courts and claim rights under U.S. law.⁴⁶

These three cases were the most recent precedents concerning enemy fighters when the Guantanamo detainees began to file their habeas petitions.

On one reading of the cases, the question about continuing court access for judicially-confirmed enemy fighters at Guantanamo looks straightforward. Just like the claimants in *Eisentrager*, the judicially-confirmed enemy fighters at Guantanamo are (1) noncitizens (2) held outside the United States who (3) either admitted, or were found by an Article III court to be, enemy fighters. If *Eisentrager* was the most recent Court precedent, it would be easy to say, based both on *Eisentrager*'s authority as well as on the negative implications of the *Quirin* and *Yamashita* rule regarding location within the United States, that the judicially-confirmed enemy fighters at Guantanamo no longer have any constitutional right to access the courts. But *Boumediene* has intervened. Though the Court there read *Eisentrager* in a thoroughly unconvincing manner—as turning not only upon enemy status, citizenship, and territorial location, but also on a host of practical equities⁴⁷—it is now the law of the land.

B. Beyond Boumediene

Boumediene did not expressly address whether the rights it announced would expire upon judicial confirmation of enemy fighter status. There is language in the opinion suggesting divergent interpretations. The Court's holding was that the Suspension Clause "has full effect at Guantanamo Bay,"⁴⁸ and it seems to treat common law habeas as a baseline or floor for the detainee's court-access rights.⁴⁹ As Professor Steve Vladeck has pointed out, "in the executive detention context, it has long been recognized that habeas at common law recognizes *no* bar to filing second or successive petitions, including *res judicata*."⁵⁰ Therefore, the argument would go, the *Boumediene* court-access rights of the detainees would never expire.

But *Boumediene* is more complicated than this reading allows, both as to claims that might fall under a *res judicata* bar and to truly new claims. It is

⁴⁶ *Id.* at 784-85.

⁴⁷ See *Boumediene v. Bush*, 553 U.S. 723, 762-64, 766 (2008).

⁴⁸ *Id.* at 771.

⁴⁹ *Id.* at 779-80 (describing the attributes of a constitutionally adequate habeas proceeding, and noting that the exact requirements of such a proceeding depend on the circumstances).

⁵⁰ Steve Vladeck, *Habeas, Res Judicata, and Why the New Guantanamo MOU Is a Big Deal*, LAWFARE (July 17, 2012, 5:13 PM), <http://www.lawfareblog.com/2012/07/habeas-res-judicata-and-why-the-new-guantanamo-mou-is-a-big-deal/>; see also *McCleskey v. Zant*, 499 U.S. 467, 479 (1991) ("At common law, *res judicata* did not attach to a court's denial of habeas relief.").

true that the eighteenth-century common law tradition upon which the *Boumediene* Court relied contains no bar to filing successive habeas petitions, including *res judicata*. But that common law rule prevailed when there was no appellate review of habeas denials; a new petition was the only way to secure higher court review.⁵¹ Once appellate review became available, U.S. courts and then Congress shaped the doctrine of “abuse-of-the-writ” by essentially importing *res judicata* principles into the habeas context.⁵² Applying this change to the common law in the Guantanamo litigation—where appellate review for the determination of enemy fighter status was available—would not seem to be foreclosed by the *Boumediene* decision or any strong policy arguments.⁵³ Therefore, *res judicata* principles could be used to bar successive habeas petitions that raised issues already decided or which could have been raised earlier.

And what about successive habeas petitions raising truly new factual or legal claims?⁵⁴ *Boumediene* was premised on the recognition that the detainees were requesting something exceptional. As the 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.”⁵⁵ Whether their exceptional claim to constitutional protection would be accepted depended, the Court held, on balancing a variety of factors such as citizenship, enemy status, territorial location, the military and diplomatic situation in the territory of detention and other practical equities.⁵⁶ Notably, many of these factors are clearly likely to change over time—meaning that the Court’s test contemplates that the propriety of recognizing exceptional habeas rights for noncitizens abroad could change over time. One significant factor in *Boumediene*’s test for whether noncitizens outside the United States have habeas rights was the “status of the detainee and the adequacy of the process

⁵¹ See *McCleskey*, 499 U.S. at 479.

⁵² *Id.* at 479-89 (explaining how the right to appellate review undermined the rationale for allowing “endless successive petitions”).

⁵³ The *Boumediene* Court recognized that the Suspension Clause does not mandate full-blown common law habeas; it confirmed the long-standing rule that alternate procedures are constitutionally permissible if they are an “adequate substitute” for regular habeas. 553 U.S. at 771. As the Court noted, it has previously sustained a statutory ban on abusive second or successive habeas petitions in the context of state prisoners seeking post-conviction habeas relief in federal court. See *id.* at 774 (discussing *Felker v. Turpin*, 518 U.S. 651, 662-664 (1996)). As the Court has said repeatedly in the post-conviction habeas context, there is little value in allowing either repeated bites at the apple or piecemeal litigation of claims which could have been brought earlier.

⁵⁴ For predictions about what types of claims will be made in the future, see *supra* notes 32-34 and accompanying text.

⁵⁵ *Boumediene*, 553 U.S. at 770.

⁵⁶ *Id.* at 798; see also *supra* note 4.

through which that status determination was made.”⁵⁷ When they went to the Supreme Court in 2007 seeking habeas rights, the detainees were not enemy aliens because they were from nations at peace with the United States.⁵⁸ And crucially, they claimed to be innocent civilians.⁵⁹ The executive branch had determined that they were enemy fighters, but only through a military administrative process recently supplemented by limited judicial review,⁶⁰ all of which the Supreme Court found deficient in numerous respects.⁶¹

Things are different now, and applying *Boumediene*'s test to these detainees' changed circumstances arguably yields a different result today. The judicially-confirmed enemy fighters have had their day in court. Those who filed habeas petitions had their claims adjudicated before independent, highly competent Article III judges sitting in the District of Columbia. They were assisted by counsel. Their counsel, in turn, received access to large amounts of information from the government, thereby allowing them to contest the government's allegations. And they lost—judges found that the government proved that they were enemy fighters who could be detained for the duration of hostilities. So today, their “status” is no longer that of innocent civilian but of confirmed enemy fighter. And the “process through which that status determination was made”⁶² was a fulsome, judicial process conducted in federal court, not a deficient military administrative process. Based on this aspect of *Boumediene*, one could argue that the changed status of these detainees via judicial process means that the judicially-confirmed enemy fighters at Guantanamo no longer enjoy the constitutional rights to habeas corpus announced in *Boumediene*.

But this argument for the expiration of *Boumediene* rights can and will be challenged. If lower courts or the Supreme Court review whether *Boumediene* rights have expired, they might well decide that there is a great need for continuing judicial review of executive detention practices because the war on terror is a novel conflict of uncertain duration with an ever-present possibility of overreaching or mistakes in detention decisions. The *Boumediene* Court stressed that in order to protect individual liberty, the separation of powers generally requires independent judicial review of executive detentions.⁶³ A court might hold that this structural need for

⁵⁷ *Boumediene*, 553 U.S. at 766.

⁵⁸ *Id.* at 734.

⁵⁹ *Id.* at 766.

⁶⁰ *Id.* at 734.

⁶¹ *Id.* at 792.

⁶² *Id.* at 766.

⁶³ For a description of Justice Kennedy's reliance on the idea that separation of powers demanded the federal courts' jurisdiction *see infra* note 89 and accompanying text.

judicial review persists even after judicial confirmation of enemy fighter status. Or, a court might double-down on the view that Guantanamo is quasi-U.S. territory and invoke the rule derived from *Quirin* and *Yamashita* that admitted even enemy fighters of a *hostile* nation's military have a right to habeas if they are located within the United States.

The decision in *Boumediene* does not conclusively explain how the Supreme Court would rule on whether *Boumediene* rights have expired for judicially-confirmed enemy fighters. My suspicion is that the current Court would be exceedingly reluctant to relinquish the habeas jurisdiction over Guantanamo which it so dramatically claimed in *Boumediene*, *Hamdan*,⁶⁴ and *Rasul*.⁶⁵ However, both *Boumediene* and *Rasul* were 5–4 decisions,⁶⁶ and so future changes to the Court's membership could of course shift the balance. In recent years, Congress has enacted three important statutes concerning judicial review of detentions at Guantanamo;⁶⁷ thus, if Congress chooses to address this issue again, future legislation could also affect *Boumediene*'s continuing legacy.

III. MAY THE GOVERNMENT WAIVE THE ARGUMENT THAT *BOUMEDIENE* RIGHTS HAVE EXPIRED?

The Obama Administration recently informed a district court coordinating Guantanamo habeas litigation that it will not argue that *Boumediene* rights to court access have expired for judicially-confirmed enemy fighters.⁶⁸ However, the Executive's concession should not be the end of the matter. In general, access to courts for enemy fighters and noncitizens located abroad may be a nonwaivable jurisdictional requirement that federal courts have an obligation to examine *sua sponte*. Unfortunately, the Supreme Court has been inconsistent and unclear in its description of the court-access inquiry, and have characterized it variously as an issue of standing, civil capacity to sue, subject matter jurisdiction, separation of powers, and individual constitutional rights.⁶⁹ Whether a party may waive

⁶⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁶⁵ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁶⁶ *Hamdan* would almost certainly have been 5–4 also, had Chief Justice Roberts not recused himself because he was part of the D.C. Circuit panel whose decision was being reviewed. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Due to the recusal, the detainee prevailed in the Supreme Court 5–3.

⁶⁷ Relevant provisions of the Military Commissions Act of 2006 and the National Defense Authorization Act for Fiscal Year 2012 are noted in notes 7, 11, 29 and accompanying text, *supra*. The third provision is section 1005(e) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2741-42 (codified at 42 U.S.C. §§ 2000dd-2000dd-1 (2006)).

⁶⁸ See *supra* note 8.

⁶⁹ See *infra* Section III.A.

an argument, and whether courts must *sua sponte* raise an issue vary depending on which of these characterizations is correct. Despite this uncertainty about general principles, court access under *Boumediene* is, in the specific context of Guantanamo, an issue of a federal court's subject matter jurisdiction that almost certainly cannot be waived and must be raised *sua sponte* by the courts.

A. *Just What Kind of Right Is the Right to Court Access?*

In a number of nineteenth century cases, the Court described wartime court access for civilian enemy aliens as a question of "standing."⁷⁰ The *Eisentrager* Court also used the language of "standing" to describe its inquiry into court access for enemy fighters who were also nonresident enemy aliens.⁷¹ If court access is indeed an aspect of standing, it might be a non-waivable requirement that federal courts must raise *sua sponte*, just like Article III and prudential standing under current doctrine.⁷²

But it seems a stretch to equate court access with standing. The "critical question" in modern standing doctrine is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction."⁷³ A detainee undoubtedly has a direct and personal stake in litigation about the lawfulness of his detention.

In other cases, the Court has described court access for civilian alien enemies as a question of civil capacity to sue.⁷⁴ If that is the correct description of the court-access issue, the strict rules imposed by the standing doctrine do not apply—a litigant may waive objections to the adversary's

⁷⁰ See, e.g., *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.").

⁷¹ See *Johnson v. Eisentrager*, 339 U.S. 763, 776 ("The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied."); *id.* at 777 (explaining that in order to find the German agents had "standing to demand access to our courts" the Court would have to depart from all precedent and historical practice).

⁷² See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (noting that Article III standing must be evaluated *sua sponte* by the courts); *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (stating that the court is obliged to independently examine whether prudential standing requirements are met).

⁷³ *Horne v. Flores*, 557 U.S. 433, 445 (2009) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

⁷⁴ See, e.g., *Ex parte Kawato*, 317 U.S. 69, 74 (1942) (stating, in a case involving court access of a civilian, resident enemy alien, that "[a] lawful residence implies protection, and a capacity to sue and be sued" (internal citation and quotation marks omitted)); *Conrad v. Waples*, 96 U.S. 279, 289-90 (1877) ("During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended."). Premodern references to "standing," see *supra* note 70 and accompanying text, are probably best read as referring to civil capacity to sue.

lack of capacity⁷⁵ and courts may, but are not required to, raise it sua sponte.⁷⁶ In some older American and English cases about civilian alien enemies, it appears that judges allowed litigants to waive the argument about court access.⁷⁷ And at common law, the sovereign could choose to grant protection, including the right to sue, to nonresident alien enemies, who would otherwise be barred from the courts, based on policy considerations.⁷⁸

Court access for enemy fighters involves issues of constitutional dimension, implicating war powers, separation of powers, and individual rights, whereas today, an individual's civil capacity to sue is a question of state law.⁷⁹ But this does not mean that court access does not concern civil capacity. Prior to the 2006 jurisdiction-stripping legislation at issue in *Boumediene*, statutes providing habeas and general federal question jurisdiction did not contain exceptions based on alien or enemy status. In the older cases, the bar on court access for nonresident enemy aliens and enemy fighters was said to arise from the common law and law of nations (today's customary international law); these limitations created implied exceptions to both jurisdictional statutes and to constitutional provisions which otherwise would have allowed court access, such as the Suspension Clause or the Due Process Clause.⁸⁰ The law of nations and the common law applicable to cases about enemy court access were understood to be forms of general law or state law, but not federal law.⁸¹ Thus the fact that personal capacity to sue is a question of state law does not mean it is an inaccurate description of the court-access inquiry.

⁷⁵ See, e.g., *Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345-46 (7th Cir. 1991) (stating that a party must raise lack of capacity to sue or the defense will be waived).

⁷⁶ See, e.g., *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003) (explaining that no federal rule of procedure nor any case precedent impose an obligation upon the court to inquire sua sponte into a pro se plaintiff's mental competence).

⁷⁷ See, e.g., *Levine v. Taylor*, 12 Mass. (1 Tyng) 8, 9 (1815); *Hoppen v. Leppett*, (1737) 95 Eng. Rep. 305, 305-06 (K.B.).

⁷⁸ See, e.g., *Crawford v. William Penn*, 6 F. Cas. 778, 779 (C.C.D.N.J. 1815) (No. 3372). See generally 1 WILLIAM BLACKSTONE, COMMENTARIES *372 (“[A]lien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.”).

⁷⁹ See FED. R. CIV. P. 17(b)(1).

⁸⁰ See *Kent, Court's Fateful Turn*, *supra* note 14.

⁸¹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 820-25 (1997) (describing how prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), most considered the law of nations to be general law or state law).

B. *Clues in Boumediene*

There is language in leading Supreme Court cases suggesting that court access might not be a question of civil capacity, but might instead concern subject matter jurisdiction, another requirement courts must raise *sua sponte* and that litigants may not waive.⁸² Subject matter jurisdiction refers to “the courts’ statutory or constitutional *power* to adjudicate the case.”⁸³ In its brief reference to the court-access dispute, the *Quirin* Court discussed whether the Court had authority to hear the case, perhaps indicating that the Justices were thinking in terms of subject matter jurisdiction.⁸⁴ The *Eisentrager* Court repeatedly described the issue of court access as one of jurisdiction⁸⁵ and the court’s power to hear the case.⁸⁶ Justice Kennedy—who has been the crucial swing vote in the war on terror court-access cases and who wrote the majority opinion in *Boumediene*—discussed *Eisentrager* at length in his concurrence in *Rasul*.⁸⁷ There, he framed *Eisentrager* as raising a jurisdictional question and holding that “there was no jurisdiction for the courts to hear the prisoner’s claims” because “there is a realm of political authority over military affairs where the judicial power may not enter.”⁸⁸ In *Boumediene*, however, Justice Kennedy dialed back the references to jurisdiction. His majority opinion repeatedly framed the issues presented as concerning separation of powers⁸⁹ and individual constitutional rights under the Suspension Clause,⁹⁰ while only occasionally referring to jurisdiction

⁸² See *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (“Characteristically, a court’s subject-matter jurisdiction cannot be expanded to account for the parties’ litigation conduct.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93 (1998) (explaining that courts have an obligation to inquire into subject matter jurisdiction *sua sponte*).

⁸³ *Steel Co.*, 523 U.S. at 89; *accord* *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010).

⁸⁴ See *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

⁸⁵ See *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950) (“The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas.”); *id.* at 780 (distinguishing other cases allowing access to the courts because “[n]one of these heads of jurisdiction can be invoked by these prisoners”).

⁸⁶ *Id.* at 771 (“[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”); *id.* at 790 (“[I]n the present application we find no basis for invoking federal judicial power”); *id.* at 767 (describing the lower court’s decision it reversed as holding that “although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States”); see also *id.* at 796 (Black, J., dissenting) (viewing the holding as going to “power” of Court to act).

⁸⁷ *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring) (“[T]he correct course is to follow the framework of *Eisentrager*.”).

⁸⁸ *Id.* at 486-87.

⁸⁹ See *Boumediene v. Bush*, 553 U.S. 723, 742-43, 746, 755, 764-65, 772, 797 (2008).

⁹⁰ See, e.g., *id.* at 744 (“[T]he [Suspension] Clause . . . guarantees an affirmative right to judicial inquiry into the causes of detention.”); *id.* at 770 (“It is true that before today the Court

and the federal courts' power to hear the case.⁹¹ Because *Boumediene* involved a jurisdiction-stripping statute and the Court clearly viewed the Suspension Clause as supplying the removed subject matter jurisdiction (or voiding Congress's attempt to remove the preexisting statutory subject matter jurisdiction), the *Boumediene* majority's reticence about discussing the issue in jurisdictional terms is odd. In contrast to the majority opinion, Justice Scalia's dissent (joined by the Chief Justice and Justices Alito and Thomas), and a concurring opinion of Justice Souter (joined by Justices Ginsburg and Breyer), framed the issue as primarily one of subject matter jurisdiction.⁹²

As noted, the *Boumediene* Court repeatedly relied upon the constitutional separation of powers. In prior centuries, courts have considered court access for enemy fighters to raise separation-of-powers issues.⁹³ Separation-of-powers violations are not waivable and cannot be cured by the consent of the affected branch of government.⁹⁴ It has not been clearly decided, but it is likely that federal courts may raise separation-of-powers defects *sua sponte*.

In sum, there is a decided lack of clarity in prior Supreme Court cases about what the court-access question involves—standing, civil capacity to sue, subject matter jurisdiction, individual constitutional rights, separation of powers, some combination of these, or something else entirely. The best answer seems to be that court access via habeas for enemy fighters or aliens outside the United States is a mixed question of individual constitutional rights under the Suspension and Due Process Clauses, capacity to sue, separation of powers, *and* subject matter jurisdiction. But this lack of clarity about general principles is not especially significant in the specific context

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.”).

⁹¹ See, e.g., *id.* at 745 (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”); *id.* at 793 (“In light of our conclusion that there is no jurisdictional bar to the District Court’s entertaining petitioners’ claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.”).

⁹² See *id.* at 834, 843 (Scalia, J., dissenting) (“And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners’ claims.”); *id.* at 799 (Souter, J., concurring) (writing that “there must be constitutionally based jurisdiction or none at all,” and finding that the constitution mandated the result reached by the majority).

⁹³ See *Johnson v. Eisentragher*, 339 U.S. 763, 797 (1950); *Moxon v. Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (No. 9895); *Lockington’s Case* (Pa. 1814) (opinion of Brackenridge, J.), in *REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA, IN THE COURT OF NISI PRIUS AT PHILADELPHIA, AND ALSO IN THE SUPREME COURT* 283, 296 (Frederick C. Brightly ed., Phila., James Kay Jr. & Bro. Pub. 1851).

⁹⁴ See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850-51 (1986) (stating that consent cannot cure harm to the “structural principle[s]” of the Constitution).

of the Guantanamo saga, because Congress's jurisdiction-stripping statute and *Boumediene's* rejection of it have made clear that court access for these detainees does in fact go to subject matter jurisdiction. And that means that the Executive cannot waive the issue. It also means the courts must raise the issue *sua sponte* and decide the question of continued court access for judicially-confirmed enemy fighters.

IV. SHOULD THE GOVERNMENT PRESS THE ARGUMENT THAT *BOUMEDIENE* RIGHTS HAVE EXPIRED?

Notwithstanding that federal courts have an independent duty to raise this jurisdictional issue *sua sponte*, there are weighty policy reasons supporting the Obama Administration's decision to refrain from seeking to bar additional litigation by judicially-confirmed fighters held at Guantanamo. For one thing, consider the types of claims that such detainees might bring. Under a 2006 statute, Guantanamo detainees cannot bring damages actions, which leaves primarily successive habeas petitions. Habeas litigation imposes significant costs on the government. It requires the time and attention of executive officials and judges, money, disclosure of sensitive intelligence information through discovery or court filings, and the sacrifice of actions beneficial to national security not taken because of fear of litigation implications. The litigation also creates a focal point for condemnation of U.S. policies by domestic and international critics. But these costs should not be too onerous going forward because most were incurred during the first round of habeas litigation and cannot be undone. The additional costs of future litigation should not be too great given the relatively small and declining number of detainees at Guantanamo. Thus if a detainee previously confirmed by the courts to be an enemy fighter comes forward with new information casting doubt on his enemy status, it is hard to see why the government has a strong interest in barring that claim. If the conflicts with the Taliban and al Qaeda peter out and the Executive continues to hold detainees, the detainees will have a legitimate legal gripe because law-of-war detention should end when the conflict does. If the government believes that good policy reasons and sound legal bases remain to hold detainees, it should probably welcome the error-correction and legitimating functions that continued judicial review would provide.⁹⁵

This raises another consideration: the domestic and international public perceptions of the legitimacy of U.S. policies. It is widely agreed that

⁹⁵ See generally JACK GOLDSMITH, *POWER AND CONSTRAINT* 188-201 (2012) (arguing that counter-terrorism policies have gained significant legitimacy as a result of judicial review and other means of accountability).

Guantanamo harmed relations with many allies and angered some important domestic constituencies. It is hard to see why the President would find it advantageous to restart the controversy about Guantanamo being a “legal black hole,”⁹⁶ especially since the costs of future litigation for judicially-confirmed fighters will likely be much lower than the costs already borne.

* * *

For these or similar reasons, Obama Administration policymakers are unwilling, for now at least, to press the argument against the continuation of *Boumediene* rights. A future administration might well weigh the equities differently. Whenever and in whatever precise form the issue arises, it is a near certainty that courts in the future will need to decide whether *Boumediene* rights to court access have expired or at least diminished for judicially-confirmed enemy fighters at Guantanamo. The Supreme Court may need to weigh in yet again. There are aspects of *Boumediene* and prior precedents which support the notion that judicially-confirmed enemy fighters lack any additional right to access the courts, but other aspects of *Boumediene*, as well as some policy considerations, point the other way. The legal battles about Guantanamo, which have already lasted a decade, are likely far from over.

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⁹⁶ Detainees’ lawyers are already arguing (perhaps a bit hyperbolically) that the Administration’s move to place some restrictions on counsel access for judicially-confirmed enemy fighters who have no pending litigation has helped recreate “the status quo” circa 2002–2004 “when Guantanamo was iconic for denying human beings legal rights or access to the outside world.” Baher Azmy, *Obama Turns Back the Clock on Guantanamo*, WASH. POST (Aug. 16, 2012), at A19, available at http://www.washingtonpost.com/opinions/obama-turns-back-the-clock-on-guantanamo/2012/08/16/e97f10c2-e62c-11e1-936a-b801fabab19_story.html.