Fordham International Law Journal

Volume 33, *Issue* 3 2009 *Article* 5

From Baghdad to Bagram: The Length & Strength of the Suspension Clause After Boumediene

Justin D. D'Aloia*

*

Copyright ©2009 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj

From Baghdad to Bagram: The Length & Strength of the Suspension Clause After Boumediene

Justin D. D'Aloia

Abstract

This is a predictive Note that will examine the doctrine relating to war-time detention and endeavor to decipher who currently maintains a right to challenge executive detention in the wake of Boumediene. This Note therefore does not centrally discuss the authority of the United States to detain wartime prisoners, what procedure is due to detainees, the wisdom of the Boumediene approach to constitutional domain, or any other related issues. Instead, this Note will attempt to define the outer contours of the Suspension Clause by looking through the Boumediene prism to determine who may presently invoke the protections of the Suspension Clause and in what contexts outside of Guantánamo Bay those protections apply. This Note proceeds in three parts. Part I provides a background on habeas corpus, the heart of the protection preserved in the Suspension Clause, and its semblance in the extraterritorial arena. Part II outlines the history leading up to Boumediene and the law surrounding this decision. Part III will then critically analyze Boumediene and its progeny against the Court's prior precedent in order to develop a framework for analyzing the Suspension Clause. Part III finally uses these concepts in several hypothetical scenarios in order to better illustrate the length and strength of the Suspension Clause, as it stands today.

NOTES

FROM BAGHDAD TO BAGRAM: THE LENGTH & STRENGTH OF THE SUSPENSION CLAUSE AFTER *BOUMEDIENE*

Justin D. D'Aloia[*]

INTRODUCTION

Hafizullah Shahbaz Khiel is an Afghan father of seven.[1] After serving five years away from his family as a prisoner in the detention camp run by the U.S. Navy at Guantánamo Bay, Cuba, Khiel was released to Afghan authorities.[2] He was soon cleared of all charges and finally reunited with his family in Afghanistan in December 2007.[3] But less than a year later, U.S. forces raided Khiel's home and he was once again taken into custody.[4] Since then, he has been held at a U.S.-operated Afghan internment camp with nearly 600 others, notwithstanding documents from Afghan authorities proclaiming his innocence.[5]

The U.S. Constitution sets out the basic structure for a democratic form of government. Yet it provides little, if any, guidance as to whether, or under what circumstances, any of its

* Editor-in-Chief, *Fordham International Law Journal*; J.D. Candidate, 2010, Fordham University School of Law; B.S., 2006, Rutgers University. The author wishes to thank Liz Shura and Jared Limbach for their thoughtful comments and guidance throughout the drafting process. Special thanks are also due to my parents, Susan and David, Kristen D'Aloia, and Mary Katherine Houston for their continuous support and encouragement.

1. *See* Kathy Gannon, *Guantanamo Prisoner Freed, Arrested Again*, MSNBC, Feb. 7, 2009, http://www.msnbc.msn.com/id/29071536 ("Hafizullah was a village elder and a father of seven . . . .").

2. *Id.* (stating that "[t]he first time Hafizullah was seized, in 2002, he spent five years at Guantanamo" and that "[u]pon Hafizullah's release in 2007, the Afghan government held him for three months and then cleared him of all charges").

3. *Id.* ("[T]he Afghan government cleared him of all charges in December 2007").

4. *Id.* (indicating that "Hafizullah and 13 others were arrested" in a September raid but that "[t]he others were later released").

5. *Id.* ("Afghan officials have signed documents attesting to his innocence, but he is still in custody at Bagram Air Base, along with about 600 other prisoners.").

provisions have force beyond the sovereign territory of the United States. Throughout important episodes of American history, the U.S. judiciary has been called upon to answer discrete questions concerning the Constitution's "extraterritorial" application.[6] Nevertheless, the law in this area remains unsettled and no clear rubric exists for answering questions of this nature.[7] Notwithstanding the common adage that the Constitution applies *in toto* within the territory of the United States,[8] the more accurate approximation is that its application is circumstantial, both domestically and abroad.[9]

In June 2008, the Supreme Court extended a right to alien prisoners held by the U.S. military at Guantánamo Bay, Cuba, to challenge the legality of their detentions under the Suspension Clause of the U.S. Constitution in the landmark case of *Boumediene v. Bush*.[10] The case offers a significant contribution to U.S. constitutionalism by indicating that aliens located beyond the strict borders of the United States can receive constitutional

6. *See* José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1660–62 (2009) (identifying "continental expansion, colonial administration, and conventional war" and, more recently, "initiatives undertaken to combat international terrorism" as periods that produced questions concerning the reach of the Constitution beyond the borders of the United States). *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (outlining the evolution of extraterritorial constitutional jurisprudence within context of U.S. history); Gerald L. Neuman, *Who's Constitution?*, 100 YALE L.J. 909 (1991) (same).

7. *See* Cabranes, *supra* note 6, at 1660 ("Despite nearly two centuries of decisions on this issue, the law remains unsettled, and no framework for analyzing these claims is clearly defined, much less well established."); Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 467–72 (2007) (recognizing the debate circling the Constitution's coverage); Neuman, *supra* note 6, at 944 (summarizing that the current state of the Constitution's scope is the result of "a mosaic of inconsistent rules and rationales rather than a true synthesis").

8. *See, e.g.*, Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 808 n.40 (2005) (collecting authority indicating that Constitution does not always apply within the United States); *see also* Cleveland, *supra* note 6, at 17–18 (observing that express text of several constitutional clauses limit their application domestically to only "states" or "citizens").

9. *See, e.g.*, Cabranes, *supra* note 6, at 1664 (summarizing the juridical approach to the extraterritorial application of the Constitution as "context-specific, tailored to the needs of the case, and sensitive to the practical limitations of enforcing a particular rule"); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 977 (2009) (providing examples where constitutional protections sometimes do not inhere domestically).

10. 128 S. Ct. 2229 (2008).

protection. Nevertheless, there remains wide speculation as to who else, such as Khiel, may be entitled to this right because of the Court's limited holding.[11]

This is a predictive Note that will examine the doctrine relating to war-time detention and endeavor to decipher who currently maintains a right to challenge executive detention in the wake of *Boumediene*. This Note therefore does not centrally discuss the authority of the United States to detain wartime prisoners, what procedure is due to detainees, the wisdom of the *Boumediene* approach to constitutional domain, or any other related issues. Instead, this Note will attempt to define the outer contours of the Suspension Clause by looking through the *Boumediene* prism to determine who may presently invoke the protections of the Suspension Clause and in what contexts outside of Guantánamo Bay those protections apply.

This Note proceeds in three parts. Part I provides a background on habeas corpus, the heart of the protection preserved in the Suspension Clause, and its semblance in the extraterritorial arena. Part II outlines the history leading up to *Boumediene* and the law surrounding this decision. Part III will then critically analyze *Boumediene* and its progeny against the Court's prior precedent in order to develop a framework for analyzing the Suspension Clause. Part III finally uses these concepts in several hypothetical scenarios in order to better illustrate the length and strength of the Suspension Clause, as it stands today.

I. *HABEAS CORPUS: DOMESTIC ORIGINS AND INTERNATIONAL IMPLICATIONS*

The Suspension Clause of the U.S. Constitution[12] has enjoyed a relatively unremarkable inspection since it was ratified

11. *E.g.*, Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14 (quoting Professor David Cole of Georgetown University Law Center as stating "Kennedy's decision in *Boumediene* leaves open the question as to what other places the [right extended in *Boumediene*] extends"); *see also* Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 279 (2009) ("As for detention in other locations . . . several passages [in *Boumediene*] foreshadow the possibility that functionalism may often lead to the denial of habeas rights.").

12. *See infra* note 29 and accompanying text (reproducing the text of the Suspension Clause).

into permanency as part of the original Constitution in 1788.[13] But several recent acts of Congress[14] have propelled this historically dormant constitutional provision back into the spotlight[15] and, more broadly, caused the U.S. Supreme Court to reevaluate its jurisprudence relating to the general reach of the Constitution outside of the sovereign territory of the United States. In order to fully appreciate these innovations, a brief overview of the law relating to habeas corpus and the extraterritorial scope of the Constitution is necessary. Part I.A begins by exploring the basics of U.S. law relating to the writ of habeas corpus. Part I.B will then outline the handful of cases to address the extraterritorial reach of the Constitution. Finally, Part I.C will take up the issue of standing that arises when habeas corpus is invoked extraterritorially, beyond U.S. borders.

---

13. The dearth of case law on the Suspension Clause is the result of several factors. First, the writ of habeas corpus, which the Suspension Clause safeguards, was enacted into positive law by the first Congress, leaving little need for persons seeking habeas relief to fall back on the text of the Constitution. *See infra* note 33 and accompanying text (outlining the historic evolution of the statutory grant of habeas corpus). Second, the protections of habeas corpus were formally suspended only on rare occasion and for limited periods of time, providing the U.S. Supreme Court with few opportunities to analyze the Clause even in that context. *See* An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes § 5, ch. 1369, 32 Stat. 691, 692 (1902) (used as authority to suspend the writ in a territory during an insurrection in 1905); Hawaiian Organic Act § 67, ch. 339, 31 Stat. 141, 153 (1900) (used as authority to suspend the writ in Hawaii after the 1941 attack on Pearl Harbor); An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes § 4, ch. 22, 17 Stat. 13, 14–15 (1871) (authorizing President Grant to suspend the writ to quell the Ku Klux Klan rising in the southern United States); An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases § 1, ch. 81, 12 Stat. 755, 755 (1863) (authorizing President Lincoln to suspend the writ during the Civil War). For an intriguing presentation on what is achieved by a valid suspension, see Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) (arguing that suspension acts as a temporary displacement of core due process rights).

14. *See infra* notes 214–19 and accompanying text (discussing the impact of recent acts passed by Congress in connection with the "war on terror").

15. The only recent case before the Supreme Court to take up a meaningful consideration of the Suspension Clause prior to *Boumediene* was *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001). *But see* Felker v. Turpin, 518 U.S. 651, 664 (1996) (concluding that an act barring Supreme Court review an appellate body's denial of leave to file a second habeas petition did not amount to a constitutional suspension of the writ); Swain v. Pressley, 430 U.S. 372 (1977) (rejecting the argument that the alternative collateral review procedure for state prisoners in the District of Columbia did not work a constitutional suspension). The significance of *St. Cyr* with regard to the Suspension Clause is discussed *infra* at note 33.

A. *Foundations of Habeas Corpus in U.S. Law*

Historical authorities depict the writ of habeas corpus as a "bulwark" of individual liberty.[16] To Thomas Jefferson its protections represented one of the "essential principles of our government."[17] This legal instrument has even gained the status of the "Great Writ" among U.S. jurists.[18] Yet, the phrase "habeas corpus" translates rather plainly from Latin as "that you have the body."[19] So how do the elegant descriptions and bland definition reconcile?

A writ is a written court order that requires an authority to carry out a specific directive.[20] A writ of habeas corpus, more specifically, commands a custodian to produce the body of a prisoner before the court at a specific time and place so that the court may inquire into the basis of their detention.[21] The

16. *In re* Kaine, 55 U.S. (14 How.) 103, 147 (1852) (Nelson, J., dissenting) ("The writ has always been justly regarded as the stable bulwark of civil liberty."); THE FEDERALIST NO. 83, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that habeas corpus is a "bulwark" against arbitrary punishment). Blackstone was first to describe the common-law writ as a "stable bulwark of our liberties." WILLIAM BLACKSTONE, 1 COMMENTARIES *137.

17. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* 3 THE WRITINGS OF THOMAS JEFFERSON 317, 321–22 (Albert E. Bergh ed., 1905).

18. *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95–96 (1807) (first U.S. case identifying habeas corpus as the "great writ"). This language was likely borrowed from Blackstone, who described habeas corpus as the "great and efficacious writ." BLACKSTONE, *supra* note 16, at 3 COMMENTARIES *131. Paul Halliday and Edward White identify, however, that the earliest use of the term is found in GILES JACOB, A NEW LAW-DICTIONARY 348 (London, 1729). *See* Paul D. Halliday & Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 580 n.10 (2008).

19. BLACK'S LAW DICTIONARY 728 (8th ed. 2004); BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1400 (8th ed. 1914) [hereinafter BOUVIER'S LAW DICTIONARY].

20. *See* BLACK'S LAW DICTIONARY, *supra* note 19, at 1640; BOUVIER'S LAW DICTIONARY, *supra* note 19, at 3496.

21. *See* BLACK'S LAW DICTIONARY , *supra* note 19, at 728 (defining habeas corpus as "[a] writ employed to bring a person before a court . . . to ensure that the party's imprisonment or detention is not illegal"); BOUVIER'S LAW DICTIONARY, *supra* note 19, at 1400 (defining habeas corpus as "[a] writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place . . . to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf."); *see also, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830) ("This is a petition for a writ of habeas corpus to bring the body of Tobias Watkins before this court, for the purpose of inquiring into the legality of his confinement in gaol [sic]."). The phrase "writ of habeas corpus" as it is used in this Note and throughout U.S. law refers to the common law writ of *habeas corpus ad subjiciendum et recipiendum*. *See Ex parte* Bollman, 8 U.S. at 95 ("It has been truly said, that [habeas

traditional function of a habeas corpus action is to secure release from an illegal detention.[22] An application for a writ of habeas corpus is in essence an attack on the legality of someone's custody over another person.[23] Thus, the court does not pass on a prisoner's guilt or innocence, but rather examines whether the prisoner's liberty was restrained in a manner consistent with the law.[24] In order to make this determination, the writ demands that the prisoner's jailer provide a sound legal basis for the confinement.[25] If a court is satisfied that a person's liberty was

---

corpus] is a generic term, and includes every species of that writ. To this it may be added, that when used singly—when we say *the writ of habeas corpus*, without addition, we most generally mean the great writ which is now applied for; and in that sense it is used in the constitution."); BOUVIER'S LAW DICTIONARY, *supra* note 19, at 1400 ("This writ was in like manner designated as *habeas corpus ad subjiciendum et recipiendum*; but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated that generic term . . . The Writ of Habeas Corpus."). At common law, the writ of habeas corpus took on several other forms that acted on the body of a prisoner including *ad deliberandum*, *ad prosequendum*, *ad respondendum*, *ad satisfaciendum*, and *ad testificandum*. *See* BLACKSTONE, *supra* note 16, at 3 COMMENTARIES *129-30 (defining each of the habeas corpus varieties); *see also Ex parte* Bollman, 8 U.S. at 97–98 (considering the use of each of the lesser-known habeas corpus writs in relation to U.S. law).

22. *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 5 (2d ed. 1989) (conveying that the writ tests "the legality of [the] cause" of a prisoner's confinement); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting) ("The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal."); Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody.").

23. *See Rodriguez*, 411 U.S. at 484 ("[T]he very essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . . ."); Rose v. Mitchell, 443 U.S. 545, 586 (1979) (Powell, J., concurring) ("[T]he very purpose of the Great Writ is to provide some means by which the legality of an individual's incarceration may be tested." (citations omitted)).

24. *See* Fay v. Noia, 372 U.S. 391, 401 (1963) ("[I]n a civilized society, government must always be accountable [and] if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."), *abrogated by* Coleman v. Thompson, 501 U.S. 722, 745 (1991) ("Our cases after *Fay* that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules."); *In re* Yamashita, 327 U.S. 1, 8 (1946) ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the [military] commission to try the petitioner . . . .").

25. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2247 (2008) ("The [writ of habeas corpus] protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." (citing Wales v. Whitney, 114 U.S. 564, 574–75 (1885))).

deprived in a manner contrary to the law, the writ will issue and direct their release.[26]

The writ of habeas corpus finds its roots deep in common law tradition.[27] Early colonists brought its protections to the United States as a self-evident aspect of their civil heritage in the formative years of the Nation.[28] After achieving independence

26. *See* Lindh v. Murphy, 521 U.S. 320, 342 (1997) (Rehnquist, C.J., dissenting) ("[H]abeas is a challenge to unlawful custody, and when the writ issues it prevents further illegal custody." (citing *Rodriguez*, 411 U.S. at 489)); *Wales*, 114 U.S. at 571 ("[The] purpose [of the writ] is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful, it must then discharge the prisoner."); *cf.* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 311 (1946) ("If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient." (citing United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924))); Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) ("We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ.").

27. *See* Rasul v. Bush, 542 U.S. 466, 473 (2004) ("Habeas corpus . . . throw[s] its root deep into the genius of our common law.'" (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting) (in turn quoting Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.) (appeal taken from Eng.)))). In 1215, Magna Carta established that "[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta art. 39 (1215), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 17 (Richard L. Perry & John C. Cooper eds., 1959). The final version of Magna Carta, confirmed by Henry III when he assumed control of the throne in 1225, which differs slightly from the charter established in 1215, can be found in THE BIRTHRIGHT OF BRITONS: OR THE BRITISH CONSTITUTION, WITH A SKETCH OF ITS HISTORY, AND INCIDENTAL REMARKS 23–29 (London, L. Waylon 1792). In short, habeas corpus is believed to derive from this vernacular. *See, e.g.*, 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND *52–53 (reflecting on the origins of the writ); WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS INCLUDING JURISDICTION, FALSE IMPRISONMENT, WRIT OF ERROR, EXTRADITION, MANDAMUS, CERTIORARI, JUDGMENTS ETC. WITH PRACTICE AND FORMS 3 (The Lawbook Exchange, Ltd. 2002) (1886) (grounding earliest arguments for habeas corpus in Magna Carta); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 85–89 (The Lawbook Exchange, Ltd. 2003) (1858) (same). A discussion on the common-law evolution of the writ is beyond the scope of this Note because *Boumediene* incorporates the history of the writ into its analytic framework. *See infra* note 225 (concluding that common-law history was not dispositive as to the writ's geographic reach). However, for an illuminating presentation of the Anglo-American history of the writ of habeas corpus see generally Halliday & White, *supra* note 18 (presenting a thorough examination of habeas corpus in English history through a review of rare common-law texts).

28. *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) ("[The writ] was brought to America by the colonists, and claimed as among the immemorial rights descended to

from British rule, the writ received prominent endorsement in the original text of the U.S. Constitution. Specifically, the Suspension Clause of the Constitution reads: "The Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[29] Fully aware of the writ's fundamental place in preventing arbitrary and oppressive governmental power, the Framers specifically sanctioned the writ in order to ensure its vitality in the new republic.[30] Individually, habeas corpus is a mode of procedure.[31]

---

them from their ancestors."); WILLIAM WAIT, 5 THE PRACTICE AT LAW, IN EQUITY, AND IN SPECIAL PROCEEDINGS, IN ALL THE COURTS OF RECORD IN THE STATE OF NEW YORK 502 (Albany, W. Gould 1875) (quoting colonists as regarding the writ as the "dearest birthright of Britons."); *see also* CHURCH, *supra* note 27, at 35–40 (illustrating that the writ was in use in the early colonies of Massachusetts, South Carolina, New Jersey, and Virginia prior to the Revolution); A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 20–26 (1903) (specifying that early colonists employed the common-law privilege of habeas corpus until Queen Anne extended the Habeas Corpus Act to the colonies in 1710).

29. U.S. CONST. art. I, § 9, cl. 2. The caution used to narrowly circumscribe the grounds for the suspension of the writ provides further evidence of how highly the Framers regarded its protections. *See Boumediene*, 128 S. Ct. at 2246 ("That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension . . . ." (citing Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987))); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007) ("[T]he Suspension Clause [itself] signals the historic importance of habeas corpus . . . ."). This ancient protection has achieved a similar status in U.S. jurisprudence. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence."); Harris v. Nelson, 394 U.S. 286, 291 (1969) (contending that the writ of habeas corpus is "jealously guarded" by the courts); *Ex parte* Yerger, 75 U.S. at 95 ("The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.").

30. *See Boumediene*, 128 S. Ct. at 2244 ("[T]he common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system."); Kelly v. Robinson, 479 U.S. 36, 48 n.9 (1986) ("[E]xplicit reference in the Constitution . . . testifies to the importance of the writ of habeas corpus."). Blackstone described habeas corpus as "the most celebrated writ in the English law." BLACKSTONE, *supra* note 16, at 3 COMMENTARIES *129. The writ was central to the preservation of common-law liberties. *See id.* at 1 COMMENTARIES *135 ("Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whoever he or his officers thought proper . . . there would soon be an end of all other rights and immunities."); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV 59, 64 (2006) (noting that "the development of the writ in England was closely linked with the need to make effective the guarantees of the Magna Carta, especially that of due process of law" (citing ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY

But, more generally, by holding all branches of government accountable for their actions, the writ has the salutary effect of securing personal liberty for all and establishing the rule of law.[32]

This protection is currently codified in section 2241 of the judicial code.[33] That section provides that federal courts may

---

88 (1960))). Consistent with these beliefs, Alexander Hamilton denounced arbitrary imprisonment as "the favorite and most formidable instrument[] of tyranny." THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *See supra* note 22 (characterizing habeas corpus as a tool to secure release from illegal detention).

32. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2246 (appreciating habeas corpus as strengthening the separation-of-powers design); Fay v. Noia, 372 U.S. 391, 401–02 (1963) ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty."); United States v. Lee, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. [The writ] is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866) (perceiving habeas corpus as "guarding the foundations of civil liberty against the abuses of unlimited power").

33. *See* 28 U.S.C. § 2241 (2006). The writ of habeas corpus was originally enacted into federal law by the first Congress in 1789 as a consequence of the newly ratified Constitution. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (describing the first Congress as enacting the Judiciary Act under the "immediate influence" of the "injunction" imposed by the Suspension Clause). Several amendments to the habeas statute were precipitated by significant sociopolitical events, but section 2241 is the direct successor to the original grant conferred in 1789. *See St. Cyr*, 533 U.S. at 305 ("Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789 . . . ."); Sumner v. Mata, 449 U.S. 539, 547 n.2 (1981) ("The present codification [in § 2241 *et seq.*] of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal courts' . . . ." (quoting *Rodriguez*, 411 U.S. at 485)); *see also* Fay v. Noia, 372 U.S. 391, 401 n.9 (1963) (conveying that "[a]ll significant statutory changes in the federal writ have been prompted by grave political crises" and listing amendments). Prior to *Boumediene*, it at least remained analytically possible to conclude that the Suspension Clause did not embody an inviolate right to habeas corpus and instead stood as a congressional directive because it is framed in prohibitory language and located in article I of the Constitution. *Compare* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953) (implied in the Constitution), *with* Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 344 (1952) (requires congressional authorization), *and* RICHARD H. FALLON, JR. ET AL., HART AND WESCHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1287 n.3 (5th ed. 2003) (collecting literature arguing that the exclusive source of habeas corpus is statutory). In 2001, the Court avoided the delicate question of whether the Suspension Clause contains a parallel right to habeas corpus by invoking the canon of constitutional avoidance and concluding that the petitioner's statutory ability to seek habeas relief was not repealed. *See St. Cyr*, 533 U.S. 289, 314–15 (2001).

issue a writ of habeas corpus "within their respective jurisdictions"[34] so long as the prisoner seeking the writ falls within one of five enumerated categories.[35] For purposes of section 2241, a court acts "within" its jurisdiction when the custodian of the person seeking release may be reached by that court's process.[36] It bears mention, however, that Congress is free to alter or expand its statutory habeas corpus scheme to the extent that it does not transgress the Constitution.[37]

The writ has evolved since colonial times to cover a wide

---

34. § 2241(a). For a discussion on the history and meaning of the jurisdictional limitation in the federal habeas statute, see *Rumsfeld v. Padilla*, 542 U.S. 426, 442–43 (2004) (noting that the jurisdictional clause was added by Congress to avoid the possibility of judges issuing the writ from afar).

35. *See* § 2241(c). Specifically, the writ will not extend to a prisoner under § 2241(c) unless:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or [a directive] of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any [authority] claimed under the [directive] of a foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify for trial.

Id.

36. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973) ("[T]he language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue the writ 'within its jurisdiction' . . . even if the prisoner himself is confined outside the court's territorial jurisdiction."); *cf. Ex parte* Endo, 323 U.S. 283, 307 (1944) (explaining that jurisdiction still rests "if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit [began]" because the jurisdiction of the of the District Court under section 2241 "may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction for the District Court").

37. *See* Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("Within constitutional constraints," judgments about the scope of the habeas corpus statute are "normally for Congress to make."); Walker v. Johnston, 312 U.S. 275, 285 (1941) ("[There is] no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus." (quoting Frank v. Mangum, 237 U.S. 309, 331 (1915)); *cf. Boumediene*, 128 S. Ct. at 2276 ("[Prior case law] stand[s] for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus."); Rasul v. Bush, 542 U.S. 466, 474 (2004) ("As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries.'" (quoting Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977))); Felker v. Turpin, 518 U.S. 651, 663 (1996) (detailing expansion of statutory habeas relief from time of first Congress to present).

range of restraints on liberty,[38] but is historically intended to serve as a vehicle to review the propriety of executive detention.[39] Therefore the writ, at its core, ensures that executive detentions are carried out in accordance with law.[40]

B. *The Fringe of the Constitution: Beyond U.S. Borders*

A natural point of departure for analyzing the extraterritorial scope of the Suspension Clause is the Supreme Court's methodology for determining the general reach of the overall Constitution. But there is no settled approach to extricate from the Court's case law.[41] This section will provide a brief narrative on the historic evolution of this topic.

At the time the Constitution was drafted, the Framers contemplated that the United States would acquire new lands.[42]

---

38. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 485 (1973) (explaining that "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law" and listing numerous examples); Peyton v. Rowe, 391 U.S. 54, 58 (1968) (observing that the writ of habeas corpus "is a procedural device for subjecting executive, judicial, or private restrains on liberty" and collecting cases).

39. *See* Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." (citing *Developments in the Law-Federal Habeas Corpus: Extra Judicial Detentions*, 83 HARV. L. REV. 1208, 1238 (1970))); *Pressley*, 430 U.S. at 386 (Powell, J., concurring) (observing that the "Great Writ was [traditionally] a remedy against executive detention" (citing P. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1513–14 (2d ed. 1973))); Brown v. Allen, 344 U.S. 443, 533 (1948) (Jackson, J., concurring) (contending that "[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"). An English court recounted its historic uses similarly: "[The writ] has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.) (appeal taken from Eng.).

40. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) ("At all other times [other than during suspension], it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." (citing *St. Cyr*, 533 U.S. at 301)); United States v. Lee, 106 U.S. 196, 260 (1882) ("[T]he writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive . . . ." (citing *Ex parte* Milligan, 71 U.S. at 2)).

41. *See supra* note 7 (recognizing that no clear rubric exists for determining the extraterritorial application of the Constitution).

42. *See, e.g.*, U.S. Const. art. IV, § 3, cls. 1–2 (granting Congress the power to annex new states and promulgate rules for U.S. territories); *see also* Am. Ins. Co. v. 356 Bales of Cotton (*Canter*), 26 U.S. (1 Pet.) 511, 542 (1828) (proclaiming that under the authority

Yet, with few exceptions, there was little need to explore the outer limits of the Constitution's geographic coverage during this era because Congress usually "extended" the Constitution by statute to newly acquired territories during the era of westward expansion.[43]

One such exception arose in 1891. In the case of *In re Ross*[44] a U.S. sailor[45] was tried and convicted by a U.S. consular tribunal for murdering a fellow crewman in a Japanese harbor.[46] As to his

---

of the Constitution the United States possesses the inherent power to "acquir[e] territory, either by conquest or by treaty").

43. For an exhaustive list of these statutes relating to the Louisiana Purchase through the annexation of Hawaii, see Burnett, *supra* note 8, at 825 n.127 and accompanying text. This is not to say that constitutional questions never arose in the outer territories during this period. *See, e.g.*, *Canter*, 26 U.S. at 542 (passing on the constitutional question by relying on treaty provisions); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850) (providing Seventh Amendment protection to the Iowa territory without clearly identifying the Constitution or statute as the source); Benner v. Porter, 50 U.S. (9 How.) 235, 242 (1850) (article III does not serve as Florida's "organic law"); United States v. Dawson, 56 U.S. (15 How.) 467, 488 (1853) (holding section 2 of article III controls venue for offenses committed outside of State jurisdiction); Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856) (applying the Fifth Amendment to territories to provide slaveholders with property rights); Reynolds v. United States, 98 U.S. 145, 154 (1878) (applying the Constitution of its own force to the Utah Territory); Callan v. Wilson, 127 U.S. 540, 550 (1888) (same for District of Columbia); *Ex parte* Nielsen, 131 U.S. 176, 183 (1888) (implicitly recognizing Double Jeopardy rights of a Utah resident); Kennon v. Gilmer, 131 U.S. 22, 28 (1889) (relying on statute for protection in Montana); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 40 (1890) (questioning the applicability of the Constitution and relying instead on statute); McAllister v. United States, 141 U.S. 174, 184–85 (1891) (observing the ambiguity as to the application of article III to U.S. territory); American Publ'g Co. v. Fisher, 166 U.S. 464, 466–68 (1897) (extending the jury trial right to Utah without identifying the source of protection); Springville v. Thomas, 166 U.S. 707, 709 (1897) (identifying the Constitution as applying of its own force to the Utah territory); Thompson v. Utah, 170 U.S. 343, 346 (1898) (resolving that jury trial rights applied of their own force to territories, generally). But the case-to-case inconsistencies between the justices left open the question of whether the entire Constitution applied of its own force within U.S. territories. Burnett, *supra* note 9, at 985 (noting that "a number of the nineteenth century cases on the application of the Constitution to the territories were ambiguous"); Cleveland, *supra* note 6, at 207 (noting tension between these decisions).

44. Ross v. McIntyre (*In re* Ross), 140 U.S. 453 (1891).

45. John Ross was technically a British citizen, but, consistent with maritime custom, attained the fictitious benefit of U.S. citizenship as a result of his membership on the boat. *See id.* at 472 ("By such enlistment [on an American ship] he became an American seaman . . . and as such entitled to the protection and benefits of all the laws passed by congress on behalf of American seamen, and subject to all their obligations and liabilities.").

46. *See id.* at 456–57 (outlining the events of the murder and trial).

trial, the Supreme Court flatly concluded that the Constitution has no operation outside of the legal border of the United States.[47] This bright-line interpretation was a display of what many now refer to as a strict territorial view of constitutional domain.[48] More importantly, by couching its language in terms of the claimant's relative place,[49] rather than the claimant's class of membership or cause for asserting constitutional coverage, the Court solidified a geographic view of the Constitution's province that would predominate in case law for years to come.[50]

The issue garnered significant attention at the turn of the century as a result of U.S. imperial ambitions to expand overseas.[51] Considerable dispute surrounded the acquisition of Hawaii and other islands ceded to the United States in the Spanish-American war.[52] In a series of opinions generically known as the *Insular Cases*,[53] the Court resolved the lingering

47. *See id.* at 464 ("The constitution can have no operation in another country.").

48. *See* Burnett, *supra* note 9, at 997 (portraying *Ross* Court as espousing a model of "strict territoriality"); Neuman, *supra* note 6, at 918 n.39 (same); *see also* Cleveland, *supra* note 6, at 23 (explaining territoriality as deriving from principle that "a sovereign's jurisdiction to legally regulate conduct was coterminous with its territory").

49. *See In re* Ross, 140 U.S. at 464 ("[The Fifth and Sixth Amendments] apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." (citing Cook v. United States, 138 U.S. 157, 181 (1891))).

50. *See* Neuman, *supra* note 6, at 918 ("Strict territoriality prevailed as dogma for most of American constitutional history, until its overthrow in [the mid-twentieth century]."); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2521 (2005) (equating the "demise" of strict territoriality with developments in the mid-twentieth century). *But see* Kent, *supra* note 7, at 492–96 (2007) (acknowledging that legal thought prior to the mid-twentieth century was predominantly "territorial" but arguing that the United States did acknowledge rights of citizens abroad during this era).

51. *See* Cleveland, *supra* note 6, at 208 ("The acquisition provoked extensive academic and political debate over the legal status of the territories, the scope of congressional authority over them, and the extent of constitutional protections . . . ."); Neuman, *supra* note 6, at 958–59 (describing period as age of "imperialist competition with other great powers").

52. *See* Neuman, *supra* note 6, at 959 (noting political controversy surrounding constitutional status of new territorial acquisitions).

53. "Insular Cases" is an imperfect term that is used to collectively refer to the series of cases relating to the governance of newly acquired, non-contiguous territories at the turn of the century. *E.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3 n.1 (1985). The list of cases includes De Lima v. Bidwell, 182 U.S. 1 (1901), Goetze v. United States, 182 U.S. 221 (1901), Armstrong v. United States, 182 U.S. 243 (1901), Downes v. Bidwell, 182 U.S. 244 (1901), Huus v. N.Y. & P.R. S.S. Co., 182 U.S. 392 (1901), Dooley v. United States, 182 U.S. 222 (*Dooley I*) (1901), Dooley v. United States, 183 U.S. 151 (1901) (*Dooley II*),

issue of the Constitution's independent force in the territorial possessions of the United States.[54] Justice White's theory of "territorial incorporation" emerged through these cases as the new paradigm.[55] Under this model, lands ordained by Congress as territories gained status as part of the "United States" and thus fell under the full umbrella of the Constitution, but "unincorporated" possessions, which ultimately retain their institutions and traditions, only received fundamental liberties.[56] Many cite the *Insular Cases* for the ready proposition that the Constitution applies "in full" within the United States, but only provides "fundamental" coverage to unincorporated territories.[57] However, the distinction is a bit more subtle: the creation of a new legal hierarchy of territories was based on the difference in

---

Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901), Hawaii v. Mankichi, 190 U.S. 197 (1903), Gonzales v. Williams, 192 U.S. 1 (1904), Kepner v. United States, 195 U.S. 100 (1904), Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904), Rasmussen v. United States, 197 U.S. 516 (1905), Trono v. United States, 199 U.S. 521 (1905), Grafton v. United States, 206 U.S. 333 (1907), Kent v. Porto Rico, 207 U.S. 113 (1907), Kopel v. Bingham, 211 U.S. 468 (1909), Dowdell v. United States, 221 U.S. 325 (1911), Ochoa v. Hernandez, 230 U.S. 139 (1913), Ocampo v. United States, 234 U.S. 91 (1914), and finally Balzac v. Porto Rico, 258 U.S. 298 (1922).

54. Of the entire group, only a handful of the *Insular Cases* actually reached constitutional issues. *See Balzac*, 258 U.S. at 312–13 (right to jury trial); *Ocampo*, 234 U.S. at 98 (same); *Dowdell*, 221 U.S. at 329–32 (same); *Rassmussen*, 197 U.S. at 528 (same); *Dorr*, 195 U.S. at 148–49 (same); *Mankichi*, 190 U.S. at 217–18 (same); *Dooley II*, 183 U.S. at 157 (Export Clause); *Downes*, 182 U.S. at 287 (Uniformity Clause).

55. *See* TORRUELLA, *supra* note 53, at 62–84 (identifying Justice White's theory of "territorial incorporation" as model to gain majority opinion in cases); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926) (same).

56. *See Downes*, 182 U.S. at 291–93 (White, J., concurring) (first case articulating White's theory that distinguishes between incorporated and unincorporated territories).

57. *See, e.g.*, José Julián Alvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 319 n.38 (1990) (describing *Insular Cases* as standing for authority that Constitution applies in full within incorporated territories, but only fundamental protections run to unincorporated territories); Daniel E. Hall, *Curfews, Culture and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 79–80 (2001) (same); Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 343 (2005) (same); John M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449 (1992) (same). These authorities were originally compiled by Christina Duffy Burnett in Burnett, *supra* note 9, at 1020 n.171, and Burnett, *supra* note 8, at 808 n.40.

objective ties to the United States.[58] This doctrine again advanced a constitutional synthesis that fell along geographic lines, but it also inched away from strict territoriality by sustaining the Constitution's presence in lands not technically within the strict legal borders of the United States due to the objective circumstances of those places.[59]

The Court revisited the reach of the Constitution in 1956. In relatively brief opinions, the Court relied on the precedent of *Ross* and the *Insular* opinions to dispose of a set of companion cases brought by citizens convicted abroad for the murder of their military spouses by courts-martial without a jury trial.[60] But the following term the Court took the rare step of granting a petition for rehearing[61] and reversed itself.[62] Justice Black, writing for a plurality, started with a sweeping passage:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States . . . can only act in accordance with all the limitations imposed by the Constitution [and if] the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of

58. *See Downes*, 182 U.S. at 293 (basing applicability of constitutional protection on "an inquiry into the situation of the territory and its relations to the United States"); *see also* Burnett, *supra* note 9, at 983–94 (contending that "the difference between [incorporated and unincorporated] territories with respect to the application of constitutional provisions has never been as great as courts and commentators have argued.").

59. *See* Burnett, *supra* note 9, at 993–99 (arguing that *Boumediene* was correct to observe that the *Insular Cases* are best understood as extending, rather than retracting, constitutional protections); Neuman, *supra* note 6, at 918 n.39 (postulating that a form of "global due process" can be seen in the *Insular Cases* with regard to unincorporated territories). Though shying away from a strict view of territoriality, this model still found citizenship irrelevant. *See* Cleveland, *supra* note 6, at 237 (remarking that citizenship proved "irrelevant" in the *Insular Cases*); Neuman, *supra* note 6, at 981 (perceiving that "not even the *Insular Cases* relied on a distinction between the rights of American citizens and the rights of subject peoples in the territories").

60. *See* Kinsella v. Krueger, 351 U.S. 470, 475 (1956) (denying article III jury trial right and Sixth Amendment protection to citizens convicted abroad by courts-martial); Reid v. Covert, 351 U.S. 487 (1956) (disposing case on basis of *Kinsella*).

61. *See* Reid v. Covert, 352 U.S. 901 (1956) (granting petition for rehearing).

62. *See* Reid v. Covert, 354 U.S. 1, 5 (1957) (plurality opinion) ("[A]fter further . . . consideration, we conclude that the previous decisions cannot be permitted to stand."). Justice Harlan, the only member to flip from the original majority, curiously cited time constraints as his reason for granting the rehearing. *See id.* at 65 (claiming that a serious consideration of the questions presented "was [not] possible in the short interval between the argument and decision of the cases in the closing days of last Term.").

> the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept.[63]

Black treaded directly through *Ross* and the *Insular Cases*. He found *Ross* "erroneous"[64] and sharply criticized the *Insular Cases* for discriminating between which essential liberties to extend to a population over which the United States exercises plenary control.[65] By making full constitutional coverage coextensive with government action, Black favored an *absolute* extraterritorial design of the Constitution—at least to the extent that citizens were implicated.[66] Although the concurring opinions of Justices Frankfurter and Harlan reached the same result, they would have remained true to the spirit of the *Insular Cases* and only afforded citizens located abroad an abridged set of core rights.[67] Specifically, Justice Harlan proposed that constitutional protections should apply abroad in all instances when not

---

63. *Id.* at 5–6 (internal citations omitted). *Ex parte Quirin* bears mention because in that case a citizen combatant was *not* entitled to protections of the Fifth and Sixth Amendments even though he was convicted and held *within* the United States. 317 U.S. 1, 44 (1942). But he was denied these protections not due to his citizenship or status, but rather because the constitutional rights he claimed depended on the crime(s) charged and his offenses did not give rise to their protections. *See id.*

64. *Reid*, 354 U.S. at 12.

65. *See id.* at 9 ("[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments."). Black manifested his dissatisfaction with the *Insular Cases* by declaring that "neither the cases nor their reasoning should be given any further expansion." *Id.* at 14.

66. *See id.* ("If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.").

67. *See id.* at 53 (Frankfurter, J., concurring) (advocating the "'fundamental right' test" as the proper basis for resolving the case); *id.* at 65 (Harlan, J., concurring) ("I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."). Those who sided with Justice Black must have perceived the unsavory consequence of taking the position of the concurring justices in the case at hand because the jury trial right in issue was already rejected in a series of *Insular* decisions as not carrying "fundamental" status. *See supra* note 54 (listing the subset of *Insular Cases* that reached constitutional issues). Gerald Neuman, in his seminal 1990 work, *supra* note 6, at 970, notes that Justice Black's position eventually garnered a majority three years later in a series of companion cases involving similar issues. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960).

"impracticable and anomalous" to do so.[68] Notwithstanding the lack of consensus amongst the plurality, one noteworthy observation is the Court's shift away from a tradition steeped in geography towards one that favors the citizen's individual rights.[69]

After over thirty years, the Court, in 1990, put limits on the potential of *Reid*. Again as a plurality, the Court determined in *United States v. Verdugo-Urquidez*[70] that the Fourth Amendment did not prohibit a warrantless search by federal agents of an alien's home in Mexico after he was arrested and extradited to the United States.[71] Chief Justice Rehnquist, invoking a characteristic social contract theory of the Constitution, reasoned that "the people" referenced in the Fourth Amendment was a term of art that was intentionally narrower than "person" and did not encompass Verdugo-Urquidez.[72] Verdugo-Urquidez was involuntarily in the United States for only several days at the time of the search and lacked the "substantial connections" that vest other resident aliens with constitutional privileges.[73] The Chief Justice also dismissed *Reid* as limited strictly to citizens.[74] Justice Kennedy concurred, but instead endorsed Harlan's earlier "impracticable and anomalous" test in order to make a case-by-case determination based on the totality of circumstances.[75] Many describe Kennedy's approach as a "global due process" view of the Constitution that favors global application as balanced against countervailing administrative exigencies.[76] The contrast

68. *Reid*, 345 U.S. at 74.

69. *See* Neuman, *supra* note 6, at 968 ("*Reid v. Covert* thus represents a modern realignment of the municipal law approach, taking into fuller account the exercise of prescriptive jurisdiction over American citizens worldwide under the nationality principle."); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 31 (1985) ("*Reid* and its progeny abandoned the territorial view of the compact, affirming that individual rights must be respected wherever federal officials act.").

70. 494 U.S. 259 (1990).

71. *See id.* at 274–75 (rejecting the contention that the Fourth Amendment protects an alien from government search abroad).

72. *Id.* at 265–66.

73. *Id.* at 271–72.

74. *See id.* at 270 ("Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.").

75. *Id.* at 277–78 (Kennedy, J., concurring).

76. Gerald Neuman was the first to coin this term and ascribe it to Kennedy's concurrence in *Verdugo-Urquidez*. *See* Neuman, *supra* note 6, at 920 (associating global due process with Kennedy). This characterization has gained significant recognition in

between Rehnquist and Kennedy is of great practical import—both would agree that the Constitution is not omnipresent, but Kennedy's approach suggests that, at least in some circumstances, aliens abroad can find solace in the protections found in Constitution.[77]

As the foregoing illustrates, there is a constant exchange in the Court that precludes a settled line of precedent from emerging from its extraterritorial jurisprudence. The resulting impact is an uncertain normative and legal framework for conclusively determining the geographic range of the Constitution.

C. *Habeas Corpus at the Fringe: An Issue of Standing*

The judicial power of the federal courts is limited by article III of the Constitution to the resolution of "Cases" and "Controversies."[78] This fundamental precept ensures the judiciary's proper role in the tripartite system of government envisioned in the Constitution.[79] The requirement stems from a belief that the judiciary should not use its remedial powers in a case not properly before the courts.[80]

---

recent years. *See* Burnett, *supra* note 9, at 1030–31 (referencing Neuman's model of "global due process"); A. Hays Butler, *The Supreme Court's Decision in Boumediene v. Bush: The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction*, 6 RUTGERS J. L. & PUB. POL'Y 149, 173 (2008) (same); Kent, *supra* note 7, at 470 (citing *Verdugo-Urquidez* as a prototypical example of "global due process"); Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 661 (2007) (mentioning the concept of "global due process").

77. *See* Kent, *supra* note 7, at 477 n.83 (indicating Kennedy left the issue of whether aliens outside the United States can invoke Constitution open); Neuman, *supra* note 6, at 975–76 (postulating that the history of "political and jurisprudential assumptions . . . demonstrates that the distance between Rehnquist's opinion and Kennedy's concurrence is wider than a superficial reading might suggest").

78. U.S. CONST. art. III, § 2.

79. *See* DiamlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("[T]he case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution." (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) (stating that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies").

80. *Cuno*, 547 U.S. at 341 ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); Fed. Elections Comm'n v. Akins, 524 U.S. 11, 20 (1998) (conveying that case or controversy requirement "assures[s] that courts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries.'"

Every party that invokes the courts' powers must have some personal interest at the outset of litigation in order to display that they have "standing" in the dispute.[81] To satisfy this aspect of the case or controversy requirement, a plaintiff must, in the familiar words of the Court, "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[82] Standing in no way rests on the merits of a claim; but, in a circular way, the personal injury asserted can often turn on the legal source of the alleged harm.[83] Stated differently, the alleged injury must result from the invasion of a legally protected interest,[84] and where there is no legal right to that interest, statutory or otherwise, a claimed invasion of that protection results in no legal injury.[85]

In a habeas corpus action, there are two parties attendant to the writ: the prisoner seeking relief and the custodian to whom

(quoting Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (second alteration in original)).

81. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (indicating that litigants must have a "'personal interest that must exist at the commencement of the litigation'" to satisfy standing (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973))); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

82. Allen v. Wright, 468 U.S. 737, 751 (1984).

83. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (internal citations omitted)); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring))); Hardin v. Ky. Utils. Co., 390 U.S. 1, 6 (1968))).

84. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 227 (2003) ("[T]o satisfy our standing requirements, a plaintiff's alleged injury must be an invasion of a concrete and particularized legally protected interest." (citing *Lujan*, 504 U.S. at 560)); *Raines*, 521 U.S. at 819 ("We have also stressed that the alleged injury must be legally and judicially cognizable."); *cf. Warth*, 422 U.S. at 500 ("[T]he standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.").

85. *See, e.g.*, *McConnell*, 540 U.S. at 227 (dismissing claim for lack of standing based on interest that is not a "legally recognizable right"); United States v. Hays, 515 U.S. 737, 752 (1995) (Stevens, J., concurring) ("Because these appellees have not alleged any legally cognizable injury . . . they lack standing.").

the writ is directed.[86] Under current law, a federal court acts within its jurisdiction when the custodian may be reached by the court's process.[87] However, the prisoner seeking relief must first have standing in order to invoke the court's equitable power.[88] In the vast majority of habeas applications, this is not usually an issue because it is widely recognized that the writ of habeas corpus is available to all persons within the territorial jurisdiction of the United States.[89] As a result, the Court has entertained a variety of habeas petitions from enemy alien and enemy citizen combatants detained within the sovereign territory of the United States and its possessions.[90]

But for prisoners held abroad, the immediate question becomes whether they are entitled to the protections of the writ and thus have standing to challenge their detention.[91] Courts addressing the rare situation have often framed the issue in terms

86. *See supra* notes 21, 25, 36 and accompanying text (recognizing the prisoner who seeks relief and his or her jailer as the two individuals involved in a habeas corpus proceeding).

87. *See supra* note 36 and accompanying text (requiring the jailer's presence in the jurisdiction of the district court to issue a writ of habeas corpus).

88. *See supra* notes 78–85 and accompanying text (describing the "standing" aspect of the article III "case or controversy" requirement).

89. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) ("[A]bsent suspension, the writ of habeas corpus remains available to *every individual detained within the United States*." (citing U.S. CONST. art. I, § 9, cl. 2) (emphasis added)); *cf.* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is [presumed] to apply only within the territorial jurisdiction of the United States."). Quite importantly, this construction does not discriminate between aliens and citizens. *See, e.g.*, Heikkila v. Barber, 345 U.S. 229, 234–35 (1953) (implying that an alien may challenge deportation proceeding by habeas corpus under the Constitution); Clark v. Martinez, 543 U.S. 371, 400 (2005) (noting the historic use of statutory habeas corpus by noncitizens (citing United States v. Jung Ah Lung, 124 U.S. 621 (1888); *In re* Kaine, 55 U.S. (14 How.) 103 (1852))).

90. *See, e.g.*, *Hamdi*, 542 U.S. 507 (entertaining application by enemy citizen captured abroad and held on U.S. mainland); *Heikkila*, 345 U.S. 229 (alien subject to deportation due to alleged membership in Communist Party); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (same); United States *ex rel.* Eicenlaub v. Shaughnessy, 338 U.S. 521 (alien subject to deportation for violation of Espionage Act); Ludecke v. Watkins, 335 U.S. 160 (1948) (enemy alien detained in United States and subject to removal order); *In re* Yamashita, 327 U.S. 1 (1946) (enemy alien tried and detained in U.S. insular possession); *Ex parte* Quirin, 317 U.S. 1 (1942) (enemy aliens and enemy citizen imprisoned on U.S. mainland); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (enemy citizen held by Union state during the Civil War).

91. *See supra* note 85 (discerning that standing rests on protected legal interests).

of jurisdiction.[92] Jurisdiction, however, is an imprecise term with diverse meaning.[93] At bottom, the threshold issue in these cases is more appropriately one of whether the prisoner seeking relief has standing—i.e. that they hold a legally protected interest in habeas review—to challenge their detention.[94] This is the primary focus of the hypothetical cases presented in Part III.C.

II. *THE CONTEXT FOR CONSTITUTIONAL EVOLUTION*

Boumediene broke historic ground in June 2008 by undertaking a thorough review of the Suspension Clause and extending its protections to a group of prisoners detained outside of the United States.[95] The case, however, did not arise by mere happenstance. It was one of many challenges initiated by prisoners detained in the aftermath of the terrorist attacks of September 11, 2001.[96] This Part will set out the events that forced the Court to focus on the Suspension Clause for the first time in

92. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 470 (2004) ("These two cases present the narrow but important question whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad."); 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-a-vis military authorities in dealing with enemy aliens overseas."); Hirota v. MacArthur, 338 U.S. 197, 199 (1949) (Douglas, J., concurring) ("There is an important question of jurisdiction that lies at the threshold of these cases.").

93. *See, e.g.*, BLACK'S LAW DICTIONARY, *supra* note 19, at 867–71 (listing numerous meanings). As observed by the U.S. District Court for the District of Columbia in *Al Maqaleh v. Gates*, "jurisdiction" is a nebulous term that carries with it over fifty recognized definitions. 604 F. Supp. 2d 205, 222–23 (2009).

94. *See, e.g.*, Boumediene v. Bush, 128 S. Ct.. 2229, 2262 (2008) ("Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. . . . Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention."); *Rasul*, 542 U.S. at 475 ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detentions of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"); *cf. Eisentrager*, 339 U.S. at 777 ("The foregoing demonstrates how much further we must go if we are to invest these enemy aliens . . . with standing to demand access to our courts.").

95. *See infa* notes 242–51.

96. For a sampling of important federal cases initiated by these prisoners, see Torture'sNotUs.net, Court Cases, http://www.torturesnotus.net/pb/wp_162218b9/wp_162218b9.html (last visited Apr. 3, 2010) (listing various cases at different stages of litigation in federal courts). The U.S. District Court for the District of Columbia also maintains a website that provides regular updates on all pending cases related to Guantánamo detentions. *See* U.S. Dist. Ct. for the D.C., Guantanamo Bay Case Information, http://www.dcd.uscourts.gov/public-docs/gitmo (last visited Apr. 3, 2010) (supplying docket updates on all pending cases).

recent history. First, Part II.A provides a brief summary of the U.S. commitment to embark on a "war on terror," and the nature of the military campaigns waged as part of that resolve. Part II.B explains the character of the detentions carried out by U.S. forces during this war. Part II.C rounds out the discussion with an overview of the legal challenges to these detentions that set the stage for a modern revival of the Suspension Clause.

A. *September 11th and the "War on Terror"*

On September 11, 2001, commercial airplanes were used to attack the World Trade Center in New York City and the Pentagon defense complex in Arlington, Virginia ("September 11th" or "9/11"), causing the single largest loss of life on U.S. soil due to a hostile attack.[97] President Bush soon informed Congress and the public that the Al Qaeda terrorist network was behind the attacks and described a new approach that the United States would take against those responsible as a "war on terror."[98]

Congress swiftly reacted with a joint resolution known as the Authorization for Use of Military Force ("AUMF") that granted the President the power to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11th attacks] or harbored such organizations."[99]

---

97. *See* 9/11 COMM'N, 9/11 COMMISSION REPORT: NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES 311 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf. The report estimates that a total of 2973 persons lost their life as an immediate result of the attacks. *Id.*

98. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) [hereinafter 9/11 Joint Session Speech] (reproducing text of speech). Al Qaeda eventually conceded involvement, *see Full Transcript of Bin Laden's Speech*, AL-JAZEERA, Nov. 2, 2004, http://web.archive.org/web/20070613014620/http://english.aljazeera.net/English/archive/archive?ArchiveId=7403 (providing translation of original video aired on the Arab media network *Al-Jazeera*), after initially equivocating. *see Bin Laden Says He Wasn't Behind Attacks*, CNN, Sept. 17, 2001, http://archives.cnn.com/2001/US/09/16/inv.binladen.denial/ (quoting Bin Laden as stating "I would like to assure the world that I did not plan the recent attacks, which seems to have been planned by people for personal reasons."); Tom Bowman et al., *Taliban Face Ultimatum Warnings: Give Up Bin Laden or Feel the 'Full Wrath' of U.S.*, BALT. SUN, Sept. 17, 2001, at 1A (reporting that bin Laden issued a statement denying responsibility for attacks).

99. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (codified in note at 50 U.S.C. § 1541 (2006)).

Vested with this broad authority, the President issued an expansive military directive on November 13, 2001 that authorized the indefinite detainment of individuals suspected of terrorism without formal charges[100] and the option to try them by military commission.[101]

As is described at length elsewhere,[102] the United States initiated attacks in Afghanistan and later in Iraq in order to achieve its ambition of obstructing terrorism. While both missions were successful in ousting the incumbent government from control,[103] U.S. forces have since remained in each country in order to fulfill a handful of responsibilities.

During the nascent stages of the military campaign in Afghanistan in 2001, the United Nations ("U.N.") Security Council authorized the creation of a temporary international security assistance force ("ISAF") comprised of several dozen countries to patrol Kabul and the surrounding locale.[104] At the request of the U.N. and the Afghan government, the North Atlantic Treaty Organization ("NATO") assumed responsibility over the ISAF and expanded operations to the whole of the country.[105] In late 2002, the United States and the Afghan

100. *See* Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 2(a)(1), 37 WEEKLY COMP. PRES. DOC. 1665, 1666 (Nov. 13, 2001) (subjecting to the order any person who "is or was a member of . . . al Qaida" or "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism" that are adverse to the United States).

101. *See id.* § 4(a) ("Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission . . . .").

102. *See generally* AMERICA'S WAR ON TERROR (Tom Lansford et al. eds., 2d ed. 2009) (collecting essays on the causes and implications of the war on terror); RICHARD A. CLARKE, AGAINST ALL ENEMIES (2004) (providing a detailed account on the motivations to launch attacks in Afghanistan and Iraq); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008) (same).

103. *See generally* TOMMY FRANKS, AMERICAN SOLDIER (2004) (providing a first-hand account of the military campaigns in Afghanistan and Iraq); DAVID E. THALER ET AL., FUTURE U.S. SECURITY RELATIONSHIP WITH IRAQ AND AFGHANISTAN (2008) (outlining the U.S. objectives in Afghanistan and Iraq).

104. *See* S.C. Res. 1386, U.N. Doc. S/RES/1386 (2001) (authorizing the creation of a security force).

105. *See* Press Release, N. Atlantic Treaty Org. [NATO], NATO to Assume Command of the International Security Assistance Force (ISAF) in Kabul on Monday, 11 August 2003 (Aug. 8, 2003) *available at* http://www.nato.int/docu/pr/2003/p03-091e.htm (announcing change in control); *see also* S.C. Res. 1510, U.N. Doc. S/RES/1510 (2003) (expanding mandate from Kabul to the entire country). Under the command of the North Atlantic Treaty Organization, forty-two nations voluntarily

government formalized a status of forces agreement ("SOFA-A") through an exchange of diplomatic notes that governs the presence of U.S. forces in Afghanistan.[106] In part due to the agreement's broad language, U.S. forces are endowed with considerable authority to act as they need and the instrument cedes criminal jurisdiction over U.S. personnel to the United States.[107] Most recently, U.S. President Barack Obama authorized a 17,000-soldier troop surge in Afghanistan in order to realize the goal of uprooting Al-Qaeda.[108]

As for Iraq, the United States led a multinational force

---

contribute troops and each province in Afghanistan falls under the care of a participating nation. *See* NATO, ISAF Contributing Nations, http://www.nato.int/isaf/structure/nations/index.html (last visited Apr. 3, 2010) (listing participating nations); NATO, *Provincial Reconstruction Teams (PRTs*), http://www.nato.int/isaf/topics/prt/index.html (last visited Apr. 3, 2010) (outlining regional breakdown). For a map depicting the breakdown of forces, see NATO, *Map of Afghanistan Showing the Regional Commands (ISAF RCs) and the Provincial Reconstruction Teams (ISAF PRTs)* (Apr. 3, 2009), http://www.nato.int/isaf/docu/epub/maps/graphics/afganistan_prt_rc.pdf (last visited Apr. 3, 2010).

106. *See* Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., May 23, 2003, Temp. State Dep't No. 03-67, 2003 WL 21754316 [hereinafter U.S.-Afg. SOFA]. For a copy of the original documents, see Declaration of Colonel Charles A. Tennison Ex. 2 (attached as Ex. 1 to Respondent's Motion to Dismiss First Amended Petition for Writ of Habeas Corpus), Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. Sept. 15, 2009) (No. 06-CV-01669), *available at* http://sites.google.com/a/ijnetwork.org/bagram-public-library/Home/maqaleh/18.1Exhibits.pdf [hereinafter Tennison Decl.] (attaching as an exhibit a copy of original diplomatic notes). Despite attempts to arrange a new compact, the SOFA-A still remains in effect. *See* Joint Declaration of the United States-Afghanistan Strategic Partnership, U.S.-Afg., 41 WEEKLY COMP. PRES. DOC. 863, 864 (May 23, 2005) (committing to "develop appropriate arrangements and agreements" to spell out terms of U.S. authority in Afghanistan); Karen DeYoung, *Only a Two-Page 'Note' Governs U.S. Military in Afghanistan*, WASH. POST, Aug. 28, 2008, at A07 (reporting that the diplomatic note still controls U.S. presence, notwithstanding the May 2005 Joint Declaration).

107. U.S.-Afg. SOFA, *supra* note 106, ¶¶ 5, 7 (granting to the United States the right to "exercise criminal jurisdiction over United States personnel" and to "import into, export out of, and use in the Republic of Afghanistan any personal property, equipment, supplies, materials, technology, training or services required to implement this agreement.").

108. *See* Statement on United States Troop Levels in Afghanistanm 2009 DAILY COMP. PRES. DOC. 89 (Feb. 17, 2009) (announcing a troop surge in Afghanistan); *see also* Helene Cooper, *Putting Stamp on Afghan War, Obama Will Send 17,000 Troops*, Feb. 18, 2009, N.Y. TIMES, at A1 (specifying that President Obama authorized a deployment of 17,000 troops to Afghanistan).

("MNF-I") under the authority of a sweeping mandate.[109] The Security Council periodically renewed the mandate of the MNF-I at the request of the Iraqi government in order to quell surges in violence.[110] Before this grant expired, the Iraqi and U.S. governments formalized a status of forces agreement ("SOFA-I") permitting U.S. forces, as separate from other MNF-I coalition members, to remain in Iraq through the end of 2011.[111] The SOFA-I requests U.S. "assistance" in "maintain[ing] security and stability in Iraq."[112] At first blush, this language may appear to parallel the authority granted to the MNF-I by the U.N. Security Council.[113] But the SOFA-I makes all U.S. military actions subject to the supervision of a joint oversight committee.[114] This partnership reflects the desire for Iraqi authorities to assume full control over security detail as the United States gradually withdraws forces.[115] As part of this strategy, U.S. President Barack

109. *See* S.C. Res. 1511, ¶ 13, U.N. Doc. S/RES/1511 (2003) (authorizing "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" for the lifetime of the interim governing body known as the Coalition Provisional Authority); *cf.* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO J. INT'L L. 195, 202 (2005) (qualifying the United States and United Kingdom as "occupying powers" during this period).

110. *See* S.C. Res. 1546, ¶ 1, U.N. Doc. S/RES/1546 (June 8, 2004) (extending mandate of Iraq multinational force ("MNF-I") in order to promote "restoration of stability" in light of June 5, 2004 request from Iraqi authorities); S.C. Res. 1723, ¶ 1, U.N. Doc. S/RES/1723 (Nov. 28, 2006) (extending mandate through end of 2007); S.C. Res. 1790, ¶ 1, U.N. Doc. S/RES/1790 (Dec. 18, 2007) (extending mandate through end of 2008).

111. *See* Agreement Between the United States of American and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence In Iraq, U.S.-Iraq, art. 24, Nov. 17, 2008, Temp. State Dep't No. 09-6 [hereinafter U.S.-Iraq SOFA], *available at* https://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (formalizing a timetable for U.S. withdrawl).

112. *Id.* art. 4.

113. *Compare id.* (requesting U.S. forces "for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq"), *with* S.C. Res. 1511, *supra* note 109 (authorizing a multinational force "to take all necessary measures to contribute to the maintenance of security and stability in Iraq").

114. U.S.-Iraq SOFA, *supra* note 111, art. 4 ("All military operations that are carried out pursuant to this Agreement . . . shall be fully coordinated with Iraqi authorities [under the supervision of] a Joint Military Operations Coordination Committee (JMOCC) to be established pursuant to this agreement.").

115. *Id.* art. 24 ("Recognizing the performance and increasing capacity of the Iraqi Security Forces [and] the assumption of full responsibility by those Forces . . . [The United States agrees to withdraw forces by December 31, 2011]."); Larisa Epatko, *Detention Centers in Iraq Move from 'Chaos' to Reform*, NEWS HOUR, June 20, 2008, http://www.pbs.org/newshour/indepth_coverage/middle_east/iraq/jan-june08/

Obama announced an expedited withdrawal of U.S. forces after assuming office in January 2009, but made no mention of any changes as to their on-ground responsibilities.[116]

B. *Detention Abroad and at Home*

As an initial matter, it is worth noting that the war waged against terrorism was not confined to the Afghan and Iraqi borders. Detainees have alleged capture off the battlefield in locations as diverse as Bosnia and Herzegovina,[117] Djibouti,[118] Dubai,[119] Egypt,[120] Gambia,[121] Italy,[122] Jordan,[123] Macedonia,[124] Pakistan,[125] Thailand,[126] Sweden,[127] the United Arab Emirates,[128] and even the United States.[129] Ultimately, though, the vast majority of individuals detained in this war ended up in one of several notable long-term holding facilities and the United States operates a number of other sites that could potentially be used for similar purposes. This section will review the detention practices engaged in by the United States as part of its war on

---

detainees_06-20.html (summarizing Iraqi official as stating "the goal is to put Iraqis in charge and develop a way for the Iraqi legal system to handle the thousands of people already in detention").

116. *See* Responsibly Ending the War in Iraq, 2009 DAILY COMP. PRES. DOC. 109 (Feb. 27, 2009) ("Today, I can announce that . . . the United States will pursue a new strategy to end the war in Iraq through a transition to full Iraqi responsibility. . . . [L]et me say this as plainly as I can: by August 31, 2010, our combat mission in Iraq will end.").

117. Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008).

118. Int'l Comm. of the Red Cross [ICRC], *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* 5 (Feb. 2007), http://www.nybooks.com/icrc-report.pdf [hereinafter ICRC RENDITION REPORT] (prisoner Guleed).

119. *Id.* (prisoner Nashiri).

120. Rasul v. Bush, 542 U.S. 466, 472 n.4 (2004).

121. *Boumediene*, 128 S.Ct. at 2241.

122. European Parliament Resoution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, 2007 O.J. C 287 E/309, at 316 [hereinafter European Parliament Rendition Report].

123. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1131 (N.D. Cal. 2008).

124. El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–33 (E.D. Va. 2006).

125. *E.g.*, *Mohamed*, 539 F. Supp. 2d at 1130.

126. *E.g.*, Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) (petitioner al Bakri).

127. U.N. Comm. Against Torture, *Communication No. 233/2003* (Agiza v. Sweden), ¶ 1.1, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005).

128. *Al Maqaleh*, 604 F. Supp. 2d at 209 (petitioner Wazir).

129. *E.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

terror.

1. Detention Abroad

At the inception of the Afghan offensive in late 2001, the U.S. military preferred that Afghan militiamen hold valuable prisoners detained in the conflict.[130] As U.S. presence grew, the Department of Defense ("DOD") announced that they sought to take custody of prisoners in order to gather intelligence.[131] As for the separate mission in Iraq, U.S. forces performed several functions for the Iraqi government under the broad U.N. mandate of the MNF-I.[132] One of their functions was to detain individuals posing a threat to Iraqi security.[133] In addition to persons posing a security risk to Iraq, the MNF-I also agreed to take custody of individuals standing trial on domestic charges for the Iraqi government because a large portion of the country's security infrastructure was impaired as a result of the U.S. invasion.[134]

---

130. *See* Press Release, U.S. Dep't of Defense, Rumsfeld: Taliban, Al Qaeda Dangerous Like Wounded Animals (Dec. 11, 2001), *available at* http://www.defense.gov/news/newsarticle.aspx?id=44377 ("Till [sic] now, American commanders had preferred to allow opposition groups to handle all prisoners, saying America didn't have enough of a presence in the region to effectively handle prisoners.").

131. *See id.* ("American forces in Afghanistan w[ill] soon start taking prisoners . . . . American forces can gather valuable intelligence information from 'detainees.'")

132. *See supra* notes 109–10 and accompanying text (vesting MNF-I with authority to provide security in Iraq).

133. *See supra* notes 109–10 and accompanying text (permitting detention as an aspect of providing security in Iraq).

134. *See* Munaf v. Geren, 128 S. Ct. 2207, 2213 (2008) ("Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq's prison facilities have been destroyed, the MNF-I agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings."); *U.S. Military May Abandon Abu Ghraib*, USA TODAY, Mar. 8, 2005, http://www.usatoday.com/news/world/iraq/2005-03-08-abu-ghraib_x.htm (paraphrasing a U.S. commander as stating, "prisoners [detained by U.S. forces] were divided into two groups—'security detainees' under American control, and common Iraqi criminals under the control of the Iraqi judicial system."); ANTONIO TAGUBA, U.S. DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 10 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf [hereinafter TAGUBA REPORT] ("[D]ue to a lack of adequate Iraqi facilities, Iraqi criminals (generally Iraqi-on-Iraqi crimes) are detained with security internees (generally Iraqi-on-Coalition offenses) . . . in the same facilities.").

a. Guantánamo Bay Naval Station

The first long-term holding facility used by the United States to detain individuals captured on the battlefield was, rather unusually, located far off the battlefield at a site known as Guantánamo Bay. Guantánamo Bay is a naturally fortified inlet on the southeastern edge of Cuba.[135]

By way of historic background, U.S. forces overtook the area around Guantánamo Bay during the Spanish-American War and established military barracks as a base of operations.[136] The United States assumed control over the whole of Cuba following the end of the war in 1898.[137] Although the United States eventually ceded control back to Cuba, they retained a small portion of the island as their own. A rider appended to a U.S. army appropriations bill and likewise annexed to the newly ratified Cuban constitution, popularly known as the Platt Amendment, outlined the terms of U.S. withdrawal from the country.[138] Among the conditions was a demand that Cuba agree to lease or sell territory on the island to the United States for purposes of coaling and a naval station.[139] In 1903, the first President of Cuba granted a lease agreement to the United States

135. *See* 5 ENCYCLOPÆDIA BRITANNICA 532 (2002).

136. *See* MARION EMERSON MURPHY, THE HISTORY OF GUANTANAMO BAY ch. 2 (1953) (outlining the Cuba invasion); *With the Fleet Off Santiago; A $200,000 Bombardment—Cubans Capture a Spanish Camp—Famine Menaces the Enemy*, N.Y. TIMES, June 14, 1898, at A1 (reporting that "the fine harbor [at Guantánamo Bay] will make a good American base").

137. *See* Treaty of Peace, U.S.-Spain, art. I, Dec. 10, 1898, 30 Stat. 1754 ("Spain relinquishes all claim of sovereignty over and title to Cuba."); *see also* KENNETH E. HENDRICKSON, THE SPANISH-AMERICAN WAR 77 (2003) (suggesting political interests as the reason for U.S. post-war occupation of Cuba); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT 309 (2003) (observing that the United States assumed military control of Cuba after defeating Spain).

138. *See* Act of Mar. 12, 1901, ch. 803, 31 Stat. 895, 897–98 (1901); *The United States, Cuba, and the Platt Amendment, 1901*, U.S. DEP'T OF STATE, http://www.state.gov/r/pa/ho/time/ip/86557.htm (last visited Apr. 3, 2010) (detailing the history of the Platt Amendment).

139. *See* Act of Mar. 12, 1901 § 7 ("[T]he government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations . . . to be agreed upon with the President of the United States."). The language employed in the Platt Amendment superseded a prior U.S. commitment, made at the outset of the Spanish-American war, to "disclaim[] any . . . intention to exercise sovereignty, jurisdiction, or control over [Cuba]" and furthermore "leave the government and control of [Cuba] to its people" following the defeat of Spain. Act of April 20, 1898, ch. 24, art. 4, 30 Stat. 738, 739 (1898) (joint resolution of Congress popularly known as the "Teller Amendment").

over an area comprising about forty-five square miles of land and water around Guantánamo Bay.[140] Notably, the lease stipulated that the United States would exercise "*complete jurisdiction and control*" over the area while Cuba would retain "ultimate sovereignty."[141] In 1934, the two parties entered into a treaty containing a proviso that the lease would remain in effect "[s]o long as the United States of America shall not abandon the said naval station," or both parties agree to abandon the lease.[142]

On December 21, 2001, the United States announced that it would use the naval station at Guantánamo Bay to hold suspects recently detained by the military in Afghanistan.[143] The Bush administration sought a location to house detainees where it could exercise a high level of control with minimal oversight or restraint and turned to the base at Guantánamo Bay for its unique location and legal status.[144] The President was advised by

140. *See* MURPHY, *supra* note 136, ch. 3 (describing in detail the geography of land acquired under lease); *History of Guantanamo*, CUBA TODAY, http://www.cubatoday.com/guantanamo-bay/history/ (last visited Apr. 3, 2010) (recognizing the first Cuban President Tomás Estrada Palma as the individual to offer the lease). For the full text of the lease, see Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, February 23, 1903, T.S. No. 418 [hereinafter 1903 Cuba Lease] (reproducing the text of the agreement).

141. 1903 Cuba Lease, *supra* note 140, art. 3 (emphasis added); *see also* MURPHY, *supra* note 136, ch. 3 (interpreting the jurisdiction and control provisions as interrupting Cuban sovereignty).

142. *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, Art. 3, 48 Stat. 1682. The 1934 treaty effectively abrogated the Platt Amendment, which defined Cuban-American relations up through that time, but most of its language was substantially incorporated into the text of the agreement. *See id.* pmbl. (incorporating an excerpt of the Platt Amendment into the body of the agreement).

143. *See* News Briefing, Donald Rumsfeld, U.S. Sec'y of Defense (Dec. 27, 2001), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2696 (conceeding that U.S. government is "making preparations to hold detainees" at Guantánamo Bay); Katharine Q. Seelye, *A Nation Challenged: The Detention Camp; U.S. to Hold Taliban Detainees in 'the Least Worst Place,'* N.Y. TIMES, Dec. 28, 2001 at B6 (reporting that U.S. Secretary of Defense Donald Rumsfeld announced that Guantánamo Bay would be used to detain Taliban and Al Qaeda fighters).

144. *See* KAREN J. GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 5–6 (2009) (providing that officials sought a location that would not be hampered by diplomatic negotiations, intergovernmental oversight, or U.S. law); JANE MAYER, supra note 102, at 147 (indicating that Guantánamo Bay was selected for its "unique legal status" of being "under U.S. control but not under U.S. law"). The administration initially considered a diverse host of other locations as potential sites for detention, but discarded them for various practical or political reasons. *See* GREENBERG, *supra*, at 4–5 (citing America Samoa, Diego Garcia, Germany, Guam, the Marshall Islands, Pakistan,

attorneys within the U.S. Department of Justice ("DOJ") that Guantánamo Bay fell beyond the reach of U.S. courts and that the Geneva Conventions were inapplicable to anyone detained at the base.[145] On the advice of the DOJ, the Bush administration began labeling individuals captured as part of the U.S. war on terror as "illegal enemy combatants,"[146] in an effort to sidestep

---

Poland, Tinian, and Wake Island as other areas considered by administration); *see also* Esther Schrader, *POWs Will Go to Base in Cuba; Military: Rumsfeld Calls Guantanamo Bay 'Least Worst Place' for Taliban and Al Qaeda Fighters*, L.A. TIMES, Dec. 28, 2001, at A1 ("Other, more remote sites mentioned have included Guam and Wake Island in the Pacific."); Seelye, *supra* note 143 ("Officials said the other options had included Guam . . . and ships at sea . . . .").

145. *See* Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, & John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes, II, General Counsel, U.S. Dep't of Defense, Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay Cuba 1 (Dec. 28, 2001) ("We conclude that the great weight of legal authority indicates that a federal court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay]."); Draft Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, & Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes, II, General Counsel, U.S. Dep't of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) ("We conclude that [the Geneva Conventions] do not protect members of the al Qaeda organization . . . . We further conclude that these treaties do not apply to the Taliban militia."). These, along with other U.S. Department of Justice memoranda from the same time period, are collected in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–79 (Karen J. Greenberg & Joshua l. Dratel eds., 2005). The third Geneva Convention is one in a series of international treaties that provides various minimal protections for "prisoners of war." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. U.S. case law embraces the international and customary understanding that "lawful combatants" receive "prisoner of war" status, whereas those unlawfully engaged in hostilities are separately subject to trial under domestic law. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 31 (1942) (proclaiming that "[b]y universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants"); Official Statement, ICRC, The Relevance of IHL in the Context of Terrorism (July 21, 2005), http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 ("Unlawful combatants do not qualify for prisoner of war status. . . . This protection is not the same as that afforded to lawful combatants. To the contrary, [such persons] may be prosecuted under domestic law for directly participating in hostilities.").

146. The status "illegal enemy combatant" is a mix of several terms of art. The laws of war differentiate between "combatants," as members of a nation's militia, and "citizens," as all other persons. *See* Third Geneva Convention, *supra* note 145, arts. 2, 4, 5, (defining the legal status of "prisoner of war"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (defining the legal status of "protected persons" not taking part in hostilities). Civilian, therefore, is a legal class of persons not subject to military seizure. Al-Marri v. Wright, 487 F.3d 160, 178 n.8 (4th Cir. 2007) (indicating that civilians are not subject to military seizure under international humanitarian law). Likewise,

these requirements.[147] The practical effect of concurrently precluding U.S. jurisdiction and international humanitarian law from Guantánamo Bay was the creation of a law-free zone that many labeled as a "legal black hole."[148] As a result, the administration quickly garnered sharp criticism from international non-profit organizations,[149] professional

"combatant" does not imply wrongdoing but is simply a category of persons with different rights than "citizens." Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004) (characterizing "combatant" status as a "legal category"). Although the term "enemy combatant" is the source of recent controversy, the Court has historically used it with regularity to refer to a combatant with adversarial allegiances. *Hamdi*, 542 U.S. at 522 n.1; Madsen v. Kinsella, 343 U.S. 341, 355 (1952); In re Yamashita 327 U.S. 1, 7 (1946); *Ex Parte* Quirin, 317 U.S. at 31. Consistent with these principles, an enemy combatant who commits hostile acts beyond the bounds prescribed by the laws of war is subject to military tribunal as an unlawful, or illegal, combatant. *Quirin*, 317 U.S. at 35 ("[O]ur Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."); *see also Hamdi*, 542 U.S. 507, 518 (2004) (recognizing that the trial of "unlawful combatants" is widely accepted).

147. *See* Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 107 ("Soon after September 11th, [Justice Department lawyers] began advising President Bush that he did not have to comply with the Geneva Conventions in handling detainees in the war on terror. The lawyers classified these detainees not as civilians or prisoners of war—two categories of individuals protected by the Conventions—but as 'illegal enemy combatants.'"); *see also* Adam Roberts, *The Laws of War*, *in* ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 186, 202–06 (Audrey Kurth Cronin & James M. Ludes eds., 2004) (identifying origins and initial use of an indeterminate status with fewer protections than "prisoner of war" following September 11th attacks).

148. *See, e.g.*, Raustiala, *supra* note 50, at 2547 (utilizing the term "black hole" with reference to Guantánamo); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1133 (2009) (same). Johan Steyn, a prominent English jurist, is generally credited as the first to coin this term during a November 23, 2003, speech that is reproduced in *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004) ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay . . . ."). The term, as used in reference to the detention camp at Guantánamo Bay, however, first originated in an earlier English Court of Appeals case. R *ex rel.* Abbasi v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA (Civ) 1598, [22], (2002) 126 I.L.R. 686, 697 (paraphrasing counsel as arguing that his client sits in a "legal black hole").

149. *See, e.g.*, Richard Wilson, *Detainees at Guantanamo Bay: The Inter-American Human Rights Commission Responds to a "Legal Black Hole"*, 10 HUM. RIGHTS BRIEF 2 (2003) (denouncing the ongoing detention practices at Guantánamo); Amnesty Int'l, *USA: AI Calls on the USA to End Legal Limbo of Guantánamo Prisoners*, AI Index No. AMR 51/009/2002 (Jan. 15, 2002) (calling on the United States to end "legal limbo" of detainees); Press Release, ICRC, ICRC President Urges Progress on Detention-Related

associations,[150] and scholars[151] worldwide.

b. Afghanistan

The first facilities used for detaining prisoners captured in the Afghan offensive were, quite practically, makeshift sites located near the battlefront in Afghanistan.[152] A camp at Bagram airfield evolved to become the sole U.S.-managed detention site in Afghanistan.[153]

The United States took possession of the abandoned Bagram airfield after removing the Taliban from control during the 2001 invasion.[154] Without an aviation need for the space, the

---

Issues (Jan. 16, 2004), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5v9te8?opendocument (lamenting that detention conditions are subpar).

150. *See, e.g.*, Press Release, Int'l Bar Ass'n, Guantanamo Bay Detainees are Entitled to Challenge Their Detention in Court, IBA Human Rights Institute Briefs US Supreme Court (Jan. 25, 2004), *available at* http://www.ibanet.org/article/detail.aspx?articleuid=dbb08456-daF6-42e4-b6d5-204141e6457a (criticizing military for holding detainees outside legal framework); *see also* Jonathan D. Glater, *A.B.A. Urges Wider Rights in Cases Tried by Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18 (lobbying for access to lawyers).

151. *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the military tribunal erected to try Guantánamo detainees is unconstitutional); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (contending that the military commission at Guantánamo undermines the separation-of-powers design).

152. *See* Linda Kozaryn, *U.S. to Question Detainees*, AM. FORCES PRESS SERVICE, Dec. 18, 2001, *available at* http://www.defense.gov//news/newsarticle.aspx?id=44340 (reporting that the initial detainees were en route to facilities at Kandahar Airport and aboard the U.S.S. Peleliu); News Briefing, U.S. Gen. Richard B. Myers (Jan. 7, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1082 ("There are 302 being held at Kandahar, 38 at Bagram, 16 at Mazar-e Sharif [sic], and eight on the [U.S.S.] Bataan."); News Briefing, Donald Rumsfeld, U.S. Sec'y of Defense (Jan. 16, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2197 (recounting that "[t]he preliminary interrogations took place in the locations where the detainees had previously been in custody, essentially Kandahar and Bagram, but also some other places").

153. *See* News Briefing, U.S. Gen. Tommy Franks (Oct. 29, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3800 ("I think at one point we had perhaps two—one in Kandahar, one up in the vicinity of Kabul at Bagram air base. Now we use one that is up in the vicinity of Bagram."); *see also* Eric Schmitt & Tim Golden, *U.S. Set to Build Big New Prison in Afghanistan*, N.Y. TIMES, May 17, 2008, at A1 (confirming that "[a]fter [Bagram] was set up in early 2002, it became the primary site for screening prisoners captured in the fighting.").

154. *See* Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1 (detailing U.S. occupation of base in December 2001); Eliza Griswold, *The Other Guantanamo: Black Hole*, NEW REPUBLIC, May 2, 2007, at 9 ("In late 2001, as it trounced the Taliban, the United States took possession of the base and outfitted [the base] to detain captured combatants.").

military converted a vacant hangar into a makeshift detention facility now known as Bagram Theater Internment Facility ("Bagram").[155] The United States eventually legitimized its use of the space in an indefinite lease agreement with the Afghan government on September 28, 2006.[156] By its terms, U.S. forces are provided with exclusive use of the base.[157] Although the lease is theoretically indefinite, the United States has signaled that it intends to occupy Bagram only as long as necessary to complete its military mission and assist Afghanistan in attaining full sovereignty.[158]

The military initially used Bagram as a clearinghouse to screen out from the pool of worldwide prisoners those who merited transfer to Guantánamo Bay.[159] However, after a

155. *See* Tim Golden, Topics, Bagram Detention Center (Afghanistan), N.Y. TIMES, Apr. 2, 2009, http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html (describing location of detention center and name of facility); *see also* Press Release, U.S. Dep't of Defense, 101st Division Soldiers to Relieve 15th MEU in Afghanistan (Dec. 31, 2001) *available at* http://www.defense.gov/news/newsarticle.aspx?id=44313 (first official statement acknowledging seven detainees at Bagram air base).

156. *See* Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan Represented by His Excellency General Abdul Rahim Wardak Minister of Defense of the Office of the Ministry of Defense and the United States of America, U.S.-Afg., ¶ 4, U.S.-Afg., Sept. 28, 2006 [hereinafter Bagram Lease] ("[T]his Agreement . . . shall continue until the United States or its successors determine that the Premises are no longer required for its use."). For the full text of this lease, see Declaration of Colonel Rose M. Miller Ex. 1, (attached as Ex. A to Respondent's Response to Order to Show Cause and Motion to Dismiss or Lack of Jurisdiction), Ruzatullah v. Gates, No. 06-CV-01707 (D.D.C. Nov. 20, 2006), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2006cv01707/122762/5/2.pdf [hereinafter Miller Decl.].

157. *See* Bagram Lease, *supra* note 156, ¶ 9 (granting the United States "exclusive, peaceable, undisturbed and uninterrupted possession" of the airbase).

158. *See* Joint Declaration of the United States-Afghanistan Strategic Partnership, *supra* note 106 (embracing a partnership that envisions Afghan assumption of full control as resources increase); Remarks by the President on a New Strategy for Afghanistan and Pakistan, 2009 DAILY COMP. PRES. DOC. 196, at 4 (Mar. 27, 2009) ("[W]e will shift the emphasis of our mission to training and increasing the size of Afghan security forces, so that they can eventually take the lead in securing their country [and] bring our own troops home.").

159. *See* News Briefing, Donald Rumsfeld, U.S. Sec'y of Defense (Jan. 27, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2348 ("[W]hat they've done at Bagram and Kandahar is to sort through these people . . . and make judgments as to who they believe to be ones that might prove to be particularly useful from an information standpoint and sent a group of them [to Guantánamo]."); *see also* Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1 (explaining that in early days of Bagram "[m]ilitary and

Supreme Court ruling adverse to the Guantánamo detention practice,[160] this process ceased and Bagram became the preferred destination for indefinite detention.[161] Because of this reshuffling, the prison's population increased six fold by 2009 to a level of somewhere between 550 and 630.[162] A vast majority of these detainees came from the Afghan battlefield, but a small segment of prisoners were relocated to Bagram from remote areas of the world.[163]

---

intelligence personnel there sifted through captured Afghan rebels and suspected terrorists seized in Afghanistan, Pakistan and elsewhere, sending the most valuable and dangerous to Guantánamo for extensive interrogation, and generally releasing the rest."); Griswold, *supra* note 154 ("The detention facility was [initially] designed as a short-term collection point, where American interrogators sorted erroneous and low-level captures from those of higher intelligence value."); Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantánamo Detainees in Afghanistan* 8 (2008), *available at* http://www.humanrightsfirst.info/pdf/usls-080409-arbitrary-justice-report.pdf ("Following the U.S. invasion of Afghanistan, many detainees initially were held in Bagram and then transferred to Guantánamo.").

160. *See* discussion *infra* notes 209–12 (extending statutory habeas corpus relief to prisoners detained at Guantánamo).

161. *See* Golden, *supra* note 159 (ascribing the influx of detainees to the "Bush administration decision to shut off the flow of detainees into Guantánamo after the Supreme Court ruled that those prisoners had some basic due-process rights"); Daphne Eviatar, *Bagram's Black Hole: Guantanamo Bay Was Bad Enough—Bagram Is Worse*, AM. LAW., Fall 2008 Supp., at 78 (providing that the "unintended consequence" of successful lawsuits prompted the U.S. military to "stop[] sending captured suspects to Guantánamo"); *see also* JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 176 (2007) (identifying "a cabinet-level meeting [on] September 14, 2004" as time at which the decision was made). The official change of title from Bagram Collection Point to Bagram Theater Internment Facility is indicative of this shift. *Compare* News Briefing, Lt. Gen. David Barno (June 17, 2004), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3345 ("Bagram Collection Point"), *with Battle in Afhanistan Leaves One U.S. Servicemember, One Enemy Dead*, AM. FORCES PRESS SERVICE, Dec. 15, 2005, http://www.defense.gov/news/newsarticle.aspx?id=18526 ("Bagram Theater Internment Facility").

162. *Compare* Golden, *supra* note 155 (estimating 630 as the prison's population as of November 2009), *with US Detention Related to the Fight Against Terrorism—The Role of the ICRC*, INT'L COMM. RED CROSS (Apr. 3, 2009) (estimating 550 as the population in mid-2009).

163. *See* Golden, *supra* note 155 (observing that "all but about 30 [of the 630 Bagram detainees] are Afghans" but some are "brought there from as far away as central Africa and Southeast Asia"); *ACLU on Obama, Bagram and Secrecy* (Salon Radio broadcast Feb. 24, 2009), *available at* http://www.salon.com/opinion/greenwald/radio/2009/02/24/aclu/index1.html (quoting an American Civil Liberties Union lawyer as stating that "there are two different groups [of detainees]. There are individuals who were seized in Afghanistan . . . and the second group, broadly is individuals who . . . were not seized in Afghanistan at all. [This latter group] are the exact same people that were brought to Guantanamo in 2004.").

Consistent with its position on Guantánamo, the U.S. government has asserted that article III courts lack jurisdiction over prisoners at Bagram[164] and that the prisoners are likewise ineligible for "prisoner of war" status under the Geneva Conventions.[165] As a result, several commentators refer to Bagram as yet another "black hole."[166] The Obama administration recently endorsed this policy, arguing that prisoners at Bagram have no right to challenge their detention in U.S. courts.[167]

Because Bagram was not designed to accommodate a large volume of prisoners and U.S. commitment in the region is long-term, there was speculation that the DOD intended to construct a larger detention camp in Afghanistan.[168] As part of a broader effort to increase transparency on detainee operations, government officials unveiled a new prison on the edge of Bagram airfield in late 2009 that will be used in place of the

164. Notably, this belief is based not on the fact that Bagram is located outside of the United States, but rather because it is located in an active theater of war. *See, e.g.*, Pauline Jelinek, *Afghan Detainees Get More Rights Prisoners May Now Challenge Detentions*, PITTSBURG POST-GAZETTE, Sept. 14, 2009, at A4 ("[T]he U.S. military argues that Bagram detainees should be treated differently because they are being held in an active theater of war."); Wilber, *supra* note 11 (contending that prisoners lack rights because they are detained "in the zone of war").

165. *See* News Briefing, Donald Rumsfeld, U.S. Sec'y of Defense (Jan. 30, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2418 (explaining reasons for denying prisoner of war statuts); *see also* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005, at A1 (paraphrasing a U.S. Sergeant stationed at Bagram as believing that the Geneva Conventions did not apply to detainees); Tom Lasseter, *Abuse Plagued Afghan Camps Too; Guantanamo: Beyond the Law*, SEATTLE TIMES, June 16, 2008, at A3 (summarizing the U.S. policy to "withhold Geneva Conventions protections" from Bagram detainees).

166. *See e.g.*, Eviatar, *supra* note 161; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. TIMES, April 13, 2008, at A8; Griswold, *supra* note 154.

167. *See* Government's Response to This Court's Order of January 22, 2009 at 2, Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) (No. 06-CV-01669) ("Having considered the matter, the Government adheres to its previously articulated position."); *see also* Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 21, 2009, at A6 (reporting that the Obama administration endorsed the Bush policy that "military detainees in Afghanistan have no legal right to challenge their imprisonment"); Stephen Foley, *Obama Denies Terror Suspects Right to Trial*, INDEP. (London), Feb. 22, 2009, at 38 (same).

168. *See* Eric Schmitt & Tim Golden, *supra* note 153 (outlining plans for a new facility); Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, A1 (pinpointing volume as an issue).

facility located in the airport hangar.[169] Recent reports put the number of detainees held in the new complex at somewhere between 800 and 1100.[170] The new facility is also expected to serve as the default location for indefinite detention, although the practice of relocating prisoners captured elsewhere to Bagram has ceased since President Obama took office in January 2009.[171] Regardless of the number or location of these facilities, the foregoing illustrates that the United States, under the auspice of NATO, asserts substantial authority through the AUMF and consent of the Afghan government to indefinitely detain individuals in Afghanistan.[172]

c. Iraq

Eight hundred miles away, the United States was also involved in restructuring the public institutions of Iraq. Part of this transformation involved the internment of both civilians and security detainees.[173] As in Afghanistan, the military used a number of sites near the battlefield to screen initial detainees,[174] but all long-term prisoners were generally transferred to one of three theater-level internment sites at Camp Bucca, Camp

169. *See* Alan Cullison, *U.S. Set to Open New Afghan Prison—Pentagon Pledges Improved Transparency and Plans Open Hearings in a Move to 'Increase Credibility,'* WALL ST. J., Nov. 16, 2009, at A10; Alissa J. Rubin, *U.S. Readies New Facility for Afghanistan Detainees*, N.Y. TIMES, Nov. 16, 2009, at A8.

170. *Compare* David S. Cloud & Julian E. Barnes, *U.S. May Expand Use of Its Afghan Prison*, L.A. TIMES, Mar. 21, 2010, at A1 (reporting that there are about 800 detainees in the new prison), *and* Alissa J. Rubin, *As U.S. Frees Detainees, Afghans Ask Why They Were Held*, N.Y. TIMES, Mar. 20, 2010, at A4 (estimating the current population at about 800), *with* ICRC, *Afghanistan: Homemade Bombs and Improvised Mines Kill and Maim Civilians in South* (Apr. 14, 2010), http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/afghanistan-update-140410 (indicating that there are roughly 1,100 detainees receiving humanitarian assistance).

171. *See* Cloud & Barnes, *supra* note 170.

172. *See* Authorization for Use of Military Force, *supra* note 99, § 2(a) (authorizing the President to use "all necessary and appropriate force against those nations, organizations"); Joint Declaration of the United States-Afghanistan Strategic Partnership, *supra* note 106, at 864 ("It is understood that in order to achieve the objectives contained herein, . . . U.S. and Coalition forces are to continue to have the freedom of action required to conduct appropriate military operations based on consultations pre-arranged procedures.").

173. *See supra* notes 133–34 (establishing that U.S. forces in Iraq carried out detentions in several capacities).

174. *See* News Briefing, Maj. Gen. Geoffrey Miller, (May 4, 2004), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2963 (recognizing existence of "14 or 15 tactical facilities" where detainees receive a "first assessment").

Cropper, or a pre-existing prison located in the city of Abu Ghraib.[175]

In October 2002, an estimated 13,000 prisoners deserted the Abu Ghraib jail after President Saddam Hussein announced an unprecedented general amnesty.[176] The United States took possession of the vacant prison after assuming control of Iraq and quickly converted the preexisting compound into an internment facility.[177] Long-term, large-scale detention facilities were also erected at several military bases, most notably Camp Bucca in the south and Camp Cropper at Baghdad International Airport.[178] In response to backlash over widely publicized reports of detainee abuse, the U.S. military announced that all detainees held at Abu Ghraib would be transferred to other camps and control of the prison relinquished to Iraqi authorities.[179] At their peak, these U.S. facilities collectively held some 26,000

175. *See id.* (clarifying that Abu Ghraib, Camp Bucca, and Camp Cropper are the "three main theater-level facilities" where all detainees end up after initial assessments).

176. *See* EA Torriero, *Hussein Frees Prisoner; Tens of Thousands Let Go in What U.S. Calls a Ploy*, CHI. TRIB., Oct. 21, 2002, at A1 (reporting on the prisoner release); *Iraq 'Empties Its Jails,'* BBC NEWS, Oct. 20, 2002, http://news.bbc.co.uk/2/hi/middle_east/2343843.stm (describing the release as "an unprecedented general amnesty"); *see also* GlobalSecurity.org, Abu Ghurayb Prison, http://www.globalsecurity.org/intell/world/iraq/abu-ghurayb-prison.htm (last visited Apr. 3, 2010) (estimating that 13,000 were released from Abu Ghraib).

177. *See* Martin Asser, *Abu Ghraib: Dark Stain on Iraq's Past*, BBC NEWS, May 25, 2004, http://news.bbc.co.uk/2/hi/americas/3747005.stm (providing a first hand account of the April 2003 take-over of the prison and indicating that it "has been re-designated as the Baghdad Central Detention Center, now holding up to 5,000 Iraqis detained by US forces for a variety of offences"); Suzanne Goldenberg, *End of Infamous Prison: Abu Ghraib, Symbol of America's Shame, to Close Within Three Months*, GUARDIAN (London), Mar. 10, 2006, at 3 (reporting that U.S. troops set up at Abu Ghraib in April 2003 to "hold the overflow of detainees").

178. *See* David Enders, *Camp Bucca: Iraq's Guantánamo Bay*, NATION, Oct. 27, 2008, http://www.thenation.com/doc/20081027/enders (quoting a retired U.S. colonel as describing the use of Camp Bucca as a holding center for the "massive population of . . . detainees that have no intelligence value" and Camp Cropper as a "center for interrogations."); Robert F. Worth, *U.S. to Abandon Abu Ahraib and Move Prisoners to a New Center*, N.Y. TIMES, Mar. 10, 2006, at A10 (listing Camp Cropper, Camp Bucca, and Fort Suse as operating detainee prisons in Iraq); *see also* TAGUBA REPORT, *supra* note 134, at 7 (acknowledging the use of Abu Ghraib prison, Camp Ashraf, Camp Bucca, and the "high-value" internment center at Camp Cropper as U.S. detention facilities in a confidential report).

179. *See* Goldenberg, *supra* note 177 (reporting that the prison would be closed and prisoners transferred to other U.S. facilities); Worth, *supra* note 178 (supplementing that the prison will be handed over to the Iraqi government after all prisoners are transferred).

detainees.[180]

A U.S. military unit under U.S. chain of command known as task force 134 administers all detention operations in Iraq.[181] The SOFA-I, however, significantly alters their detention practice by requiring all detainees in U.S. custody to be released or turned over to Iraqi authorities.[182] The agreement further proscribes the active detention of Iraqi citizens without official sanction from Iraq.[183] In continuing the gradual transition to full control, detainee operations at Camp Bucca ended on September 17, 2009.[184] According to the MNF-I, there still are roughly 6000 detainees remaining in U.S. camps as of March 2010.[185]

d. Extraordinary Rendition and Black Sites

The U.S. government also utilized several other facilities located off the battlefield to hold detainees captured in the war on terror. In early 2005, the media began to reveal several covert tactics employed by the U.S. government in their effort to gain

---

180. *See* Enders, *supra* note 178 (estimating that "[t]he total number of those officially in US custody in Iraq has fluctuated between a low of 7,200 and more than 26,000 since 2005"); Solomon Moore, *In Decrepit Court System, Prisoners ja Iraq's Jails*, N.Y. TIMES, Feb. 14, 2008, at A16 (projecting total number at about 26,000).

181. *See* Task Foce 134, *Camp Bucca Changes Hands*, U.S. NAVY, Jan. 11, 2008, http://www.news.navy.mil/search/display.asp?story_id=34256 (self-describing Task Force 134 as the U.S. military group that "manages detainee operations for all of Iraq"); *Coalition Begins Releasing Detainees Under New Security Agreement*, MULTI-NATIONAL FORCE—IRAQ, Feb. 3, 2009, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25249&itemid=128 (identifying task force 134 as "the organization that handles detainee affairs for MNF-I.").

182. *See* U.S.-Iraq SOFA, *supra* note 111, art. 22 ("The United States Forces shall . . . turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner . . . .").

183. *See id.* ("No detention or arrest shall be carried out by the United States Forces . . . except through an Iraqi decision issued in accordance with Iraqi law . . . .").

184. *See Camp Bucca Detention Center Closes in Iraq*, MULTI-NATIONAL FORCE—IRAQ, Sept. 18, 2009, http://www.usf-iraq.com/news/headlines/camp-bucca-detention-center-closes-in-iraq (proclaiming that the detention practice at Camp Bucca ended on September 17, 2009, in accordance with the U.S.-Iraq strategic agreement); Martin Chulov, *Prison Break-Up: Camp Bucca to Shut*, GUARDIAN (London), Sept. 16, 2009, at 15 ("The largest of America's two prisons in Iraq, Camp Bucca, will close by the weekend . . . .").

185. *See* Maria Mengrone, *US Forces Begin Transfer of Detainees to GoI*, MULTI-NATIONAL FORCE—IRAQ, Mar. 17, 2010, http://www.usf-iraq.com/news/headlines/us-forces-begin-transfer-of-detainees-to-goi (declaring that there are approximately 6000 prisoners left in the U.S.-controlled detainee population).

intelligence in the war on terror. First, it was reported that the U.S. Central Intelligence Agency ("CIA") transferred suspected terrorists under a clandestine process of rendition to the temporary custody of countries with questionable records of human rights practices—such as Egypt, Jordan, Morocco, and Syria—for purposes of interrogation.[186] Unlike extradition or "ordinary" rendition, there is no connection between the person rendered and the country to which they are sent; hence the term for this process: "extraordinary rendition."[187]

In addition, a number of high-value suspects were also held in a global network of secret CIA holding facilities, known as "black sites" due to the secrecy of the stations.[188] In one of several executive orders issued on January 22, 2009, President Obama expressly ordered that all CIA detention facilities be decommissioned.[189] However, a fleeting clause in the same order ostensibly left open the continued use of extraordinary rendition

186. One of the first journalists to propel extraordinary rendition into the public spotlight was Jane Mayer in her highly publicized article *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, *supra* note 147, at 106–07 (revealing the use of extraordinary rendition in the war on terror). *See generally* European Parliament Rendition Report, *supra* note 122, 2007 O.J. C 387 E/309 (noting the operation of rendition systems within Europe).

187. *See* Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT'L L. & COM. REG. 657, 662 ("The difference to ordinary rendition and to deportation or extradition is essentially that, in the case of extraordinary rendition, there is no link between the person 'rendered' and the country to which he is sent."); James R. Silkenat & Peter M. Norman, *Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition*, 30 FORDHAM INT'L L.J. 535, 535 (2007) ("Extraordinary rendition . . . differs from ordinary forms of rendition, since the latter refers broadly to any circumstance where a government takes or transfers custody of a person by means of procedures outside those of extradition treaties.").

188. *See* Mayer, *supra* note 147, at 107 ("Rendition is just one element of of the [Bush] Administration's New Paradigm. The C.I.A. itself is holding dozens of 'high value' terrorist suspects outside of the territorial jurisdiction of the U.S. . . . ."); *see also* U.S. President George W. Bush, Remarks on the War on Terror, 42 WEEKLY COMP. OF PRES. DOCS. 1569, 1570 (Sept. 6, 2006) (disclosing to the public the existence of a secret detention program run by the Central Intelligence Agency ("CIA")); ICRC RENDITION REPORT, *supra* note 118 (providing detailed account of CIA detention program in the case of fourteen prisoners later transferred to Guantánamo Bay); Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46 (describing black sites as "secret prisons outside the United States.").

189. *See* Exec. Order No. 13,491, § 4(a), 74 Fed. Reg. 4,893 (Jan. 22, 2009) ("The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future."); *see also* Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, at A1 ("The CIA's secret prisons are being shuttered.").

as a political option.[190]

2. Detention at Home

The U.S. naval base in Charleston, South Carolina, is home to a 288-person consolidated military prison—or "brig,"[191] in Navy parlance—that serves the Army, Navy, and Air Force.[192] In addition to its traditional purpose as a confinement center for military personnel, this brig also served as an indefinite detention facility for a discrete population of enemy combatants who either held U.S. citizenship[193] or were apprehended within the territorial United States.[194] Ali Saleh Kahlah al-Marri was the last remaining enemy combatant held without charges in the United States following the resolution of cases involving the other detainees in this category.[195] Al-Marri has since been released

190. *See* Exec. Order No. 13,491, *supra* note 189, § 2(g) ("The terms 'detention facilities' and 'detention facility' in [the section relating to closing CIA detention sites] do not refer to facilities used only to hold people on a short-term, transitory basis."); Miller, *supra* note 189 (citing the clause and stating that "the CIA still has authority to carry out what are known as renditions, secret abductions and transfers of prisoners to countries that cooperate with the United States").

191. The purpose of a "brig," as defined by the U.S. Navy, is to provide a secure confinement facility for persons pending or serving sentences under the Uniform Code of Military Justice or courts-martial. *See, e.g.*, U.S. NAVY, TEMPLATE BRIG INSTRUCTIONS § 101(a)-(b) (n.d.), *available at* http://www.npc.navy.mil/NR/rdonlyres/4e4c623c-3d18-4a27-9a35-1f6feae4bf01/0/sampleafloatbriginst.doc.

192. *See* U.S. Navy, Navy Corrections History, http://www.npc.navy.mil/NR/rdonlyres/8860EA92-5DAA-4C27-B9E1-7423C7186474/0/navycorrectionshistory.doc (last visited Apr. 3, 2010) (advising that the Charleston brig serves all military branches and carries a 288-person capacity); *see also* Sophia Yan, *If Not Gitmo, Then Where Should Detainees Be Held?*, TIME, Jan. 24, 2009, http://www.time.com/time/nation/articles/0,8599,1873669,00.html (describing the Charleston brig as "[a] medium-security prison, [that] can hold up to 288 inmates").

193. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004) (plurality opinion) (transferred to Charleston naval brig upon learning of U.S. citizenship).

194. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004) (arrested at O'Hare airport); Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (arrested at home in Illinois), *vacated as moot on other grounds*, 129 S. Ct. 1545 (2009).

195. *See* Memorandum from Barack Obama, U.S. President, to The Attorney General et al., Review of the Detention of Ali Saleh Kahlah, 2009 DAILY COMP. OF PRES. DOC. 11 (Jan. 22, 2009) ("Al-Marri is the only individual the Department of Defense is currently holding as an enemy combatant within the United States."); *see also* Jane Mayer, *The Hard Cases: Will Obama Institute a New Kind of Preventive Detention for Terrorist Suspects?*, NEW YORKER, Feb. 23, 2009, at 38 ("The last 'enemy combatant' being detained in America is incarcerated at the U.S. Naval Consolidated Brig in Charleston, South Carolina . . . .").

into the civilian court system,[196] and there are now no remaining prisoners held on U.S. soil as enemy combatants.[197]

3. Other Facilities Available for Combatant Detention

On the campaign trail, Barack Obama pledged to shut down the detention facility at Guantánamo Bay.[198] Anticipating the news, media outlets began to speculate that a U.S. military base or federal prison would replace the Cuban camp.[199]

The U.S. military maintains its own corrections system under which each branch of the Armed Forces operates a number of detention centers at varying levels of security to accommodate different terms of confinement.[200] The only maximum-security detention barracks is located in Fort Leaventhal, Kansas, and is intended to serve members from all branches of the military subject to long-term sentences.[201] Apart from these mainland

196. *See infra* note 206 and accompanying text.

197. *See Around the Nation*, WASH. POST, Mar. 24, 2009, at A2 (noting that Al-Marri was "the only 'enemy combatant' held on U.S. soil"); Mayer, *supra* note 195 (observing that Al-Marri is the last enemy combatant in the United States); *see also* Government Motion to Dismiss Or, In the Alternative, To Vacate the Judgment Below and Remand with Directions to Dismiss the Case as Moot at 14, Al-Marri v. Spagone, No. 08-368 (2009) (warning that "upon [Al-Marri's] release and transfer, there will be no remaining individuals detained as enemy combatants on American soil.").

198. *See, e.g.*, Suzanne Goldenberg, *Closing Down Detention Centre 'Not so Easy,'* GUARDIAN (London), Nov. 11, 2008, at 18 ("Obama has repeatedly promised to shut down Guantánamo . . . ."); Eugene Robinson, *After the Torture Era*, WASH. POST, Nov. 18, 2008, at A27 (quoting then-Senator Obama as declaring "I have said repeatedly that I intend to close Guantanamo, and I will follow through on that").

199. *See, e.g.*, Solomon Moore, *Pentagon Studies Bases as Alternative to Guantánamo; G.O.P. Lawmakers Object*, N.Y. TIMES, Jan. 17, 2009, at A10 (reporting that Pentagon officials were considering "several military bases in the United States" or "federal prisons" that could be used to replace Guantánamo Bay); Yan, *supra* note 192 (speculating on six possible alternative mainland locations for detaining Guantánamo inmates).

200. *See* David K. Haasenritter, *The Military Correctional System: An Overview*, CORRECTIONS TODAY, Dec. 2003, at 58, *available at* http://www.aca.org/publications/ctarchivespdf/dec03/hassenrittter.pdf [hereinafter Haasenritter, *Military Corrections Overview*] (describing the structure of the military corrections system); Timothy E. Purcell & William E. Peck, *U.S. Navy Corrections: Purpose and Policy*, CORRECTIONS TODAY, at 35, Dec. 2008, *available at* http://www.aca.org/fileupload/177/ahaidar/Purcell_Peck.pdf (same); *see also* David K. Haasenritter, *Military Corrections and ACA Evolve Together*, CORRECTIONS TODAY, Dec. 2008, at 8, *available at* http://www.aca.org/fileupload/177/ahaidar/1_1_1_Commentary.pdf ("Today, the military correction system consists of . . . 64 correctional facilities throughout the world.").

201. *See* Haasenritter, *Military Corrections Overview*, *supra* note 200 at 59 ("Fort Leavenworth is the only facility in the third and highest tier of the military correctional

penal facilities, the military also operates a number of short-term sites overseas in a number of different locations.[202] The Navy additionally carries a group of brigs aboard twenty-one of its active vessels, although their uses are limited.[203] Unlike their civilian counterparts, these military detention facilities are historically under-occupied.[204] Most importantly, any military facility run by the United States, either home or abroad, will usually be within its indefinite and full operational control.[205]

---

system and is the only Department of Defense maximum-security confinement facility. For the most part . . . inmates with sentences longer than seven years are confined [there]."); U.S. Disciplinary Barracks Homepage, http://usacac.army.mil/cac2/usdb/ (last visited Apr. 3, 2010) ("[Our] mission is to incarcerate U.S. military prisoners sentenced to long terms of confinement.").

202. *See* Haasenritter, *Military Corrections Overview*, *supra* note 200 at 59 (listing Germany, Japan, and Korea as temporary facilities); Ashore Western Region, U.S. Navy, http://www.npc.navy.mil/CommandSupport/CorrectionsandPrograms/Brigs/Ashore/AshoreWesternRegion.htm (last visited Apr. 3, 2010) (providing the contact information of a U.S. correctional facility in Japan); *see also* Detention Facilities, U.S. Navy, http://www.npc.navy.mil/CommandSupport/CorrectionsandPrograms/Detention+Facilities.htm (last visited Apr. 3, 2010) (indicating the existence of U.S. detention facilities in Diego Garcia, Guam, Iceland, and Italy).

203. *See* Purcell & Peck, *supra* note 200, at 35 (noting that there are twenty-one such brigs, but that they "generally . . . function similarly to small jails supporting individuals in pretrial confinement, post-trial inmates with short sentences (less than 30 days) or inmates awaiting transfer to a longer-term facility."); *see also* U.S. Navy, Afloat Western Region, http://www.npc.navy.mil/commandsupport/correctionsandprograms/brigs/afloat/afloat+western+region.htm (last visited Apr. 3, 2010) (acknowledging a variety of afloat brigs on the western coast); U.S. Navy, Afloat Eastern Region, http://www.npc.navy.mil/commandsupport/correctionsandprograms/brigs/afloat/afloat+eastern+region.htm (last visited Apr. 3, 2010) (acknowledging a variety of afloat brigs on the eastern coast).

204. *See* Haasenritter, *Military Corrections Overview*, *supra* note 200 at 58 ("The total population in military facilities at year-end 2002 was 2,377, comprising 57 percent of its design capacity and 73 percent of its operational capacity."). Bureau of Justice statistics compiled at the end of 2005 confirm that these figures remained static. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2005, 11 (Nov. 2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf ("There were 2,322 prisoners under military jurisdiction at yearend 2005. . . . The operational capacity of the 58 military confinement facilities was 3,286 [or about] 71% of their operational capacity."). In fact, the latest figures show that the number of military prisoners decreased to 1,944 by the end of 2008. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008 at 8 tbl. 9 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

205. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 225 (D.D.C. 2009) (observing that "long-term leases . . . are not uncommon" for leases on military bases located abroad); *id.* at 222 (quoting a government stipulation that "near-total operational control" will be "true of any military facility that the United States runs anywhere in the world." (quoting Transcript of January 7, 2009 Hearing at 39, *Al Maqaleh*, 604 F. Supp. 2d 205 (Civ. No. 1:06-CV-01669))).

C. *Legal Challenges*

The detention practices at Guantánamo went largely unchallenged for nearly a year and a half. In fact, the Supreme Court proclaimed in 2004 that the President's power to detain individuals fighting U.S. forces abroad in the course of a conflict "is so fundamental and accepted an incident to war as to be an exercise of 'necessary and appropriate force,'" within the meaning of the AUMF.[206] This war power comprises the right to detain citizen enemy combatants to the same extent as it pertains to alien enemy combatants.[207] In either case, the obvious concern is that a conflict and therefore detention could easily drag out over the course of a prisoner's entire lifetime, given the unprecedented realities of the ongoing war on terror.[208]

The first major impediment to the post-9/11 detention practice manifested in the landmark, albeit concise, decision of *Rasul v. Bush*.[209] The Court held that alien detainees secured at Guantánamo were entitled to invoke the federal habeas corpus

206. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion). The Court agreed in 2008 to hear a case challenging the President's power to indefinitely detain an individual *lawfully in the United States* on suspicion of engaging in terrorism. *See* Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008), *available at* http://www.supremecourtus.gov/orders/courtorders/120508zr.pdf (order granting writ of certiorari to the United States Court of Appeals for the Fourth Circuit). The case, however, was dismissed as moot after the government changed its position, opting instead to transfer the detainee to a civilian jail for indictment on traditional criminal charges. *See* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009), *available at* http://www.supremecourtus.gov/orders/courtorders/030609zr.pdf (order granting the application of transfer and dismissing the case as moot). Notably, the order of the Supreme Court vacates a decision of the U.S. Court of Appeals for the Fourth Circuit that upheld the President's ability to detain suspected terrorists that are lawfully in the United States without trial—the only precedent on the matter. *See generally* Al-Marri v. Pucciarelli, 543 F.3d 213 (4th Cir. 2008) (en banc), *vacated as moot*, *Al-Marri*, 129 S. Ct. 1545.

207. *See Hamdi*, 542 U.S. at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant. . . . [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.").

208. *See id.* at 520 ("[T]he national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable. As the Government concedes, 'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire' . . . [and] detention could last for [a lifetime]."). The Court cautioned, however, that although the current case did not yet warrant such a drastic departure, "[i]f 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." *Id.* at 521.

209. 542 U.S. 466 (2004).

statute.[210] Under the peculiar terms of the Guantánamo lease agreement the United States exercised exclusive jurisdiction over the naval station, and the statute required nothing more for a court to entertain a habeas petition.[211] Moreover, the protections of the habeas statute ran to *alien* petitioners because the statutory language was not strictly confined to U.S. citizens.[212]

Viewing these holdings as an invitation rather than a restriction, the Pentagon ordered the creation of Combatant Status Review Tribunals ("CSRT") on July 7, 2004, in order to formally review the "enemy combatant" status of each detainee, as defined by the DOD.[213] Congress supplemented this action with the enactment of the Detainee Treatment Act of 2005.[214] The Act covers a variety of matters related to detainees, but in relevant part amended section 2241 of the U.S. Judicial Code to strip article III courts of jurisdiction to hear habeas petitions from alien detainees held at Guantánamo.[215] The Court held, soon after, in *Hamdan v. Rumsfeld*[216] that, "[o]rdinary principles of statutory construction" rendered this amendment inapplicable

210. *See id.* at 481 ("Aliens held at the base . . . are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241.").

211. *See id.* at 480 ("By the express terms of its agreement with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay," and the habeas statute requires no more); *see also supra* note 35 (providing the precise language of the habeas statute).

212. *See id.* at 481 ("Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the state to vary depending on the detainee's citizenship.").

213. *See* Memorandum from Paul Wolfowitz, U.S. Deputy Sec'y of Defense, to the Sec'y of the U.S. Navy § d (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf ("[A] Tribunal shall be convened to review the detainee's status as an enemy combatant."). The order defines "enemy combatant" as "an individual who was part of or supporting the Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." *Id.* § a. This definition was amended by the Military Commissions Act of 2006 to be "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents . . . ." 10 U.S.C. § 948a (2006).

214. Pub. L. 109-148, 119 Stat. 2739 (2005) (amending 28 U.S.C. § 2241).

215. *See id.* § 1005(e), 119 Stat. at 2741–42. The Detainee Treatment Act of 2005 appended the federal habeas statute (28 U.S.C. § 2241) with the following language at section 2241(e): "no court, justice, or judge shall have jurisdiction to hear . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained [at] Guantanamo Bay, Cuba." *Id.*

216. 548 U.S. 557 (2006).

to cases that were pending at the time of its enactment.[217] In order to void this legal gap, Congress passed the Military Commissions Act of 2006 ("MCA"),[218] which expressly extended these provisions to pending cases and broadened its scope to cover *all aliens* detained by the United States.[219]

1. *Boumediene*

In June 2008, the Supreme Court directly addressed these maneuvers in *Boumediene v. Bush*.[220] Petitioners in this consolidated appeal were alien detainees held at Guantánamo who, notwithstanding the jurisdiction-stripping provisions of the MCA, challenged their CSRT designation as enemy combatants by asserting a common law right to habeas corpus.[221] The Court held that alien prisoners maintained a right to pursue a writ of habeas corpus in U.S. courts in order to challenge the legality of their detention because the Suspension Clause of the U.S. Constitution "has full effect at Guantanamo Bay."[222] In order to reach this conclusion, the Court isolated several factors relevant to defining the extraterritorial reach of the Suspension Clause:

(1) the citizenship and status of the detainee and the

---

217. *Id.* at 575–78. At the time of the ruling, there were over 100 cases pending at the district court level and nearly 450 detainees held at the camp. *See* Tim Golden, *After Ruling, Uncertainty Hovers at Cuba Prison*, N.Y. TIMES, June 30, 2006, at A1 (citing "more than 100 district court cases" as being unaffected by ruling); Transcript of Teleconference with Senior Officials Regarding the Supreme Court's Ruling in the Hamdan Case, U.S. Dep't of Justice (June 30, 2006), *available at* http://www.justice.gov/opa/pr/2006/June/06_opa_411.html (quoting a senior Department of Justice member as stating that "there are hundreds of [pending] cases" as of that date).

218. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

219. *See id.* § 7(a)–(b), 120 Stat. at 2635–36. The Military Commissions Act of 2006 ("MCA") specifically amends section 2241(e) to read:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or 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.

Id. The Act conspicuously makes no mention of U.S. citizens and, by its very terms, only applies to "*alien[s]* detained by the United States." *Id.* (emphasis added).

220. 128 S. Ct. 2229 (2008).

221. *Id.* at 2241 (describing characteristics of petitioners); Brief for Petitioners at 9–10, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No.06-1195), 2007 WL 2441590 (advancing argument that petitioners hold a common-law right to habeas corpus).

222. *Id.* at 2262 (citing U.S. CONST. art. I, § 9, cl. 2).

> 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.[223]

These components were selected only after a careful survey of the historical record. At the outset, Justice Kennedy, writing for the majority, stated the well-recognized principle that the Framers intended the writ to hold a central role in the tripartite system of government as a check on each political branch.[224] He found founding-era English authority, however, to be inconclusive as to the reach of this ancient protection.[225]

U.S. case law, on the other hand, provided greater guidance. The Court pointed to the *Insular Cases* as the first to address the general extra-sovereign reach of the U.S. Constitution.[226] Rather than interpreting the *Insular* decisions as placing a limit on the reach of the Constitution, Kennedy emphasized that they stood for the proposition that fundamental rights *apply* in distant and dissimilar lands.[227] Citing heavily to Justice Harlan and

---

223. *Id.* at 2259.

224. *See id.* at 2246 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.").

225. *See id.* at 2248. It was plain that the writ was not denied to prisoners at common law merely due to their status as an alien or enemy alien. *See id.* (citing Khera v. Sec'y of State for the Home Dept., [1984] A.C. 74, 111 (H.L.) (appeal taken from Eng.); Case of Three Spanish Sailors, (1779) 96 Eng. Rep. 775 (C.P.); R. v. Knowles *ex parte* Somersett, (1772) 20 How. St. Tr. 1, 80, 82 (K.B.); King v. Schiever, (1759) 97 Eng. Rep. 551 (K.B.); Du Castro's Case, (1697) 92 Eng. Rep. 816 (K.B.)). English common-law courts regularly exercised habeas jurisdiction over claims put forward by aliens imprisoned *within* the territorial realm of the Crown. *See* Rasul v. Bush, 542 U.S. 446, 481 (2002) (collecting common-law cases). Early U.S. courts followed this practice as well. *Id.* (citing Wilson v. Izard, 30 F. Cas. 131 (No. 17,810) (C.C. Mass. 1813); *Ex parte* D'Olivera, 7 F. Cas. 853 (No. 3, 967) (C.C. Mass. 1813); United States v. Villato, 2 Dall. 370 (C.C. Pa. 1797)). But the precise geographic reach of the writ beyond the Crown's sovereign territory remained unclear, given the unique circumstances of the limited case law, *Boumediene*, 128 S. Ct. at 2249 ("Guantanamo Bay . . . and the exempt jurisdictions discussed in the English authorities are not similarly situated" and "[t]he Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo."), and "prudential concerns" present at the time of those cases. *Id.* at 2250.

226. *See Boumediene*, 128 S. Ct. at 2253–54 ("Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontinguous Territories . . . .").

227. *See id.* at 2253–54 ("[These cases] held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.").

Frankfurter's concurring opinions in *Reid*, the Court went on to confirm that the "'specific circumstances of each particular case' are relevant in determining the geographic scope of the Constitution."[228] The prisoner's U.S. citizenship in that case was clearly important.[229] But "practical considerations," among them the place of the confinement and courts-martial, also received attention.[230]

Justice Kennedy pronounced that the Court's precedent underscored a "functional approach" toward determining the Constitution's reach.[231] Under this functional framework, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[232] Consistent with this principal, the Court observed that *de jure* sovereignty in the strict legal sense was not outcome-determinative for purposes of the writ of habeas corpus.[233] Indeed, such an arrangement would raise troubling separation-of-powers concerns because the political branches would be authorized *sub silentio* to act without legal check by surrendering formal sovereignty while retaining plenary control of an area (such as in the Guantánamo lease)—a result which the Suspension Clause was conceived to prevent.[234] To the contrary, courts should "inquire into the objective degree of control [a] Nation asserts over foreign territory."[235]

Prior to the Guantánamo line of cases, the Court's only other occasion to analyze the extraterritorial contours of the

228. *Id.* at 2255 (quoting Reid v. Covert, 354 U.S. 1, 14 (1957)). The *Boumediene* Court also discussed the precedential value of Ross v. McIntyre (*In re* Ross), 140 U.S. 453 (1891). 128 S. Ct. at 2256. Kennedy reconciled this case with *Reid* by explaining that it was decided correctly because it, too, turned on "practical considerations." *Id.*

229. *See id.* ("That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States.").

230. *See id.* (intimating that the prisoner's citizenship and place of confinement "were relevant to each member of the *Reid* majority" and "decisive" for the concurring justices).

231. *See id.* at 2258 (indicating that the *Insular Cases* and, later, *Reid* mark a "functional approach to questions of extraterritoriality").

232. *Id.*

233. *See id.* at 2252. ("[T]hat *de jure* sovereignty is the touchstone of habeas corpus jurisdiction . . . is unfounded [and] inconsistent with our precedents.").

234. *See id.* 2258–59 (admonishing that "[o]ur basic charter cannot be contracted away like this" and observing that "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers").

235. *Id.* at 2252.

habeas corpus writ was in *Johnson v. Eisentrager*[236] at the end of the Second World War. The case involved alien saboteurs that were repatriated to a U.S.-run prison in occupied Germany ("Landsberg") after being tried for war crimes in China and petitioned for habeas corpus on both constitutional and statutory grounds.[237] The *Eisentrager* Court succinctly concluded that "[n]othing in the text of the Constitution extends such a right, nor does anything in our statutes."[238] The prisoners lacked standing to claim entitlement to the writ due to several common objective features concerning citizenship and location.[239] However, *Boumediene* observed that practical concerns also played a significant role in the case.[240] Kennedy appreciated that at the time of the decision the United States was responsible for overseeing reconstruction efforts in an area covering 57,000 square miles and containing residual militants.[241]

Drawing on this rich history, the *Boumediene* Court constructed the three-prong list that guided their analysis.[242]

---

236. 339 U.S. 763 (1950).

237. *See id.* 765–66 (describing the procedural posture and nationality for each petitioner); *see also* Brief for Respondent at 9, 27, *Eisentrager*, 339 U.S. 763 (No. 306) (advancing arguments under "28 U.S.C. § 2241" and "Article I, Section 9").

238. *Eisentrager*, 339 U.S. at 768.

239. Those factors included that each petitioner:

> (a) [was] an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held as a prisoner of war; (d) was tried by a Military Commission sitting outside of the United States; (e) for offenses against laws of war committed outside of the United States; (f) and is at all times imprisoned outside of the United States.

Id. at 777.

240. *Boumediene*, 128 S. Ct. at 2257 (remarking that "[p]ractical considerations [also] weighed heavily"). Justice Jackson, writing for the Court in *Eisentrager*, drew particular attention to the difficulty in administering habeas petitioners from overseas:

> A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. . . . To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.

339 U.S. at 778–79.

241. *Boumediene*, 128 S. Ct. at at 2261 ("[T]he United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition . . . American forces stationed in Germany faced potential security threats from a defeated enemy." (citations omitted)).

242. *See supra* note 223 and accompanying text (laying out the three-factor test for determining the extraterritorial reach of the Suspension Clause).

Because *Eisentrager* previously denied access to the writ under ostensibly similar circumstances, the Court went through pains to distinguish the case. As to the first factor, the Court observed that the alien petitioners deny their status as enemy combatants,[243] and additionally did not receive the same procedural protections as was provided by the military tribunals in *Eisentrager*.[244] As to the second factor, the precise nature of the German prison was "critically differen[t]"[245] because the United States shared what authority it retained at Landsberg with the combined Allied Forces, and instead maintains plenary control over the Guantánamo naval base.[246] The Court even squared *Eisentrager* with the *Insular Cases* in light of the temporal occupation of the Allied Forces at Landsberg.[247] As for the third factor, military operations at Guantánamo would remain virtually unaffected by accommodating the petitioners,[248] and U.S. intervention would not usurp the authority of Cuban courts because the unique terms of the Guantánamo lease precluded them from asserting jurisdiction over the base.[249] Kennedy cautioned, however, that practical concerns are unique to each case and the result might well come out differently under other circumstances.[250] On the

243. *See Boumediene*, 128 S. Ct. at 2259 ("[P]etitioners in *Eisentrager* did not contest . . . that they were 'enemy aliens.'").

244. *See id.* at 2260 (describing the procedures of the Combatant Status Review Tribunals ("CSRT") as "far more limited" and "fall[ing] well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review").

245. *Id.* at 2260.

246. *See* 1903 Cuba Lease, *supra* note 141 and accompanying text (vesting the United States with full control); *Boumediene*, 128 S. Ct. at 2252 ("Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite."); *see also id.* at 2253 ("[T]he United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty . . . .").

247. *See id.* at 2260–61 ("The Court's holding in *Eisentrager* was thus consistent with the Insular Cases . . . .").

248. *See id.* at 2261 ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. . . . The situation in *Eisentrager* was far different . . . ."). In short, Guantánamo simply did not present any exigencies similar to those in *Eisentrager*. *See id.* at 2262 ("Under the facts presented here . . . there are few practical barriers to the running of the writ.").

249. *See id.* at 2251 ("No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the [Guantanamo Bay] naval station.").

250. *See id.* ("[T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the [naval] base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ

basis of these factors, the majority concluded that the Suspension Clause extends to aliens detained at Guantánamo and that the MCA therefore effects an unconstitutional suspension of that right.[251]

The Court tackled the difficult question presented by espousing a malleable "functional approach" toward the extraterritorial application of the Suspension Clause.[252] At the very least, the Court eschewed a strict "territorial definition" of constitutional domain for purposes of the Suspension Clause.[253] Reading the holding at its broadest, some some assert that *Boumediene* extends the protections of the Suspension Clause to *anyone in U.S. custody*.[254] Others in the academic community view the Court's shift as a signal that the functional model will become the new paradigm for determining the geographic coverage of

---

would be 'impracticable or anomalous' would have more weight." (quoting Reid v. Covert 354 U.S. 1, 74 (1957) (Harlan, J., concurring))).

251. *See id.* ("Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay [and] Congress must act in accordance with the requirements of the Suspension Clause."). Consequently, the Court concluded that "MCA § 7 thus effects an unconstitutional suspension of the writ." *Id.* at 2274. The Court keenly acknowledged the novelty of extending constitutional rights to noncitizens in delivering its holding. *Id.* at 2262 ("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.").

252. *See supra* notes 226–33 (extracting a "functional approach" from prior precedent to the Constitution's application beyond U.S. territory).

253. Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 594 (2009) ("In *Boumediene*, the Supreme Court appeared to reject a narrowly territorial definition of constitutional domain."); *see also* Burnett, *supra* note 9, at 976 ("[T]he *Boumediene* Court got it right when it rejected the proposition that the Constitution stops where de jure sovereignty ends (a.k.a. 'strict territoriality') . . . ."). Burnett makes the provocative argument that the functional test in fact strengthens the importance of strict territoriality in the extraterritorial application of the Constitution by sharply contrasting foreign and domestic circumstances in the assessment of practical considerations. *See* Burnett, *supra* note 9, at 977 ("[The functional approach] assumes a sharp distinction between 'foreign' and 'domestic' territory for purposes of determining whether a given element of the Constitution applies in a liminal or extraterritorial situation, and in that way strengthens the basic premise of strict territoriality even as the same test purports to follow from a rejection of strict territoriality.").

254. *See* Kevin Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 113 (2008) ("[S]weeping jurisdiction . . . to review the legal sufficiency of persons detained by the government outside U.S. territory [w]as indicated by *Boumedeine*."); Neuman, *supra* note 11, at 286 ("For Kennedy, it appears from *Boumediene* and *Verdugo-Urquidez* that persons in U.S. custody are [entitled to protection], at least for the purposes of the Suspension Clause.").

the Constitution, generally.[255] In this sense, the case might raise more questions than it answers.

More generally, a common theme to the Guantánamo line of cases is the judiciary's willingness to temper the other braches of government from operating without scrutiny. Despite longstanding doctrine advocating deference in matters of foreign affairs,[256] particularly in times of war,[257] these concerns gave way to the writ's central purpose—what *Boumediene* described as "maintain[ing] the 'delicate balance of government.'"[258] In no

255. *See, e.g.*, Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 493 (2008) ("Kennedy and the majority adopt a 'functional approach' to the question of the extraterritorial application of the Constitution."); Neuman, *supra* note 11, at 261 ("*Boumediene* confirms and illustrates the current Supreme Court's 'functional approach' to the extraterritorial application of constitutional rights."); Zick, *supra* note 253, at 595 ("If *Boumediene*'s functional approach is any indication, we shall likely continue to see the Constitution's domain decided in an ad hoc, case-by-case fashion."); *see also* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2145–49 (2009) (arguing that the separation-of-powers approach in *Boumediene* should apply more broadly to all denial of access cases). It bears note that there is another camp that questions the exact extent of constitutional coverage flowing from *Boumediene*. *See* Robert M. Chesney, *International Decision,* Boumediene v. Bush, 102 AM. J. INT'L L. 848, 853 (2008) ("Ultimately, the logic of *Boumediene*—particularly its emphasis on the absence of security threats in Cuba—cuts against [extending the holding to Iraq or Afghanistan]."); Anthony J. Colangelo, *Brief Remarks on the Supreme Court's Role After 9/11: Continuing the Legal Conversation in the War on Terror*, 62 SMU L. REV. 17, 20 (2009) ("In *Boumediene*, the Court . . . did not say that habeas extends to all persons in U.S. custody around the globe."); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists*, 84 NOTRE DAME L. REV. 1975, 1981 (2009) (contending that the entire Guantánamo line of cases will eventually be seen as "abberational and not a harbinger of a Brave New World"); *cf.* Burnett, *supra* note 9 (suggesting that the functional model conflates the distinct inquiries of whether the constitution should apply and abroad and how the right should be enforced, if it applies).

256. *See, e.g.*, Regan v. Wald, 468 U.S. 222, 243 (1984) (in executive actions) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (in congressional actions); *see also* Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (wartime decisions of government generally).

257. *See, e.g.*, Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the deference afforded to "the Executive in military and national security affairs" and collecting cases).

258. Boumediene v. Bush, 128 S. Ct. 2229, 2235 (2008) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2006) (plurality opinion)). Indeed, the *Hamdi* plurality took this very position. 542 U.S. at 535–36 ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts . . . this approach serves only to *condense* power into a single branch of government."). One of the key functions of the judiciary in the tripartite structure is to ensure that the Executive operates within its wartime bounds. *Boumediene*, 128 S. Ct. at 2277 ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the

small part due to these cases, roughly 550 detainees have been released from Guantánamo, reducing the total number of inmates from about 779 at its peak to a current level of 183.[259] Making good on campaign promises, U.S. President Barack Obama issued an executive order on January 22, 2009, directing that the Guantánamo detention site close at latest by January 22, 2010.[260] As of the date of this Note, this has yet to occur.

2. Beyond Guantánamo: Recent Developments

Although the U.S. missions in Guantánamo and Iraq are winding up, the broader war on terror continues.[261] The renewed pledge to defeat terrorism, taken together with a troop surge in Afghanistan,[262] appears indicative of an overall U.S. plan to continue the practice of detaining suspected terrorists in the war on terror.[263] The prior subsection focused solely on Guantánamo

---

authority of the Executive to imprison a person."); *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866) ("[The Framers] knew [that] the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen."). Kennedy used this separation-of-powers principle to validate the Court's action: "[T]he exercise of [Presidential] powers is vindicated, not eroded, when confirmed by the Judical Branch." *Boumediene*, 128 S. Ct. at 2277.

259. *See The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo (last visited Apr. 3, 2010).

260. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); *see also Closure of Guantanamo Detention Facilities*, The White House, Jan. 22, 2009, http://www.whitehouse.gov/the_press_office/closure_of_guantanamo_detention_facilities/ (ordering the closure of Guantánamo within one year).

261. *See* Christina Bellantoni, *Obama Zeros In On Afghanistan*: *Pledges More Troops, Funds and Diplomacy*, WASH. TIMES, Mar. 28, 2009, at A1 ("President Obama . . . will send more troops to Afghanistan, more money to Pakistan and push for renewed diplomatic attention to the region to combat terrorism."); Press Release, White House, What's New in the Strategy for Afghanistan and Pakistan (March 27, 2009), *available at* http://www.whitehouse.gov/the_press_office/Whats-New-in-the-Strategy-for-Afghanistan-and-Pakistan/ (stating as the Obama administration's mission to "disrupt, dismantle, and defeat al Qaeda and its safe havens").

262. *See supra* note 108 (discussing the authorization of the troop surge in Afghanistan).

263. *See* Eric Schmitt, *Two Prisons, Similar Issues for President*, N.Y. TIMES, Jan. 27, 2009, at A1 (quoting a U.S. official as stating that no changes will be made in Afghanistan); Mark Thompson, *Another Gitmo Grows in Afghanistan*, TIME, Jan. 5, 2009, http://www.time.com/time/nation/article/0,8599,1869519,00.html ("[E]ven if Guantánamo closes, the controversial U.S. practice of jailing suspected al-Qaeda militants and other terrorists indefinitely won't end, because such detentions continue

Bay, but the case law is nonetheless illustrative of the Court's overall sensibility toward detention challenges mounted by wartime prisoners. This subsection will explore case law that arises from contexts other than Guantánamo but still provides guidance on the overseas use of habeas corpus.

a. In the Supreme Court

On the same day as the *Boumediene* decision, the Court issued another—often overlooked—opinion bearing on the availability of habeas corpus to overseas prisoners. In *Munaf v. Geren*[264] a unanimous Court ruled that "American citizens held overseas by American forces operating subject to an American chain of command" may seek statutory habeas relief, even though the forces holding them act as part of a multinational coalition.[265] The consolidated appeal was levied by two U.S. citizens captured in Iraq by the MNF-I for engaging in suspicious activities.[266] The MNF-I held the two citizens at Camp Cropper for the benefit of the Iraqi government during their criminal proceedings in Iraqi court, under its role as outlined by U.N. mandate.[267] The government relied heavily on *Hirota v.*

---

on an even greater scale . . . at Bagram."); *USA: President Obama's Executive Orders on Detentions and Interrogations*, AMNESTY INT'L, AI Index No. AMR 51/015/2009 (Jan. 30, 2009) ("The executive order appears to leave open the possibility of transferring Guantánamo detainees to other US detention facilities outside of the USA, [such as] Bagram air base in Afghanistan . . . ."). In fact, recent press releases by the Department of Defense confirm that detentions are still taking place in Afghanistan under the Obama presidency. *See* Press Release, U.S. Dep't of Defense, Forces Clash with Enemy Fighters in Afghanistan (Sept. 6, 2009), *available at* http://www.defense.gov/news/newsarticle.aspx?id=54701 ("U.S. and Afghan forces killed an undetermined number of enemy fighters and detained 13 suspected militants in three operations in Afghanistan early today . . . .").

264. 553 U.S. 674 (2008).

265. *Id.* at 2213. The U.S. prisoners sought relief under section 2241 because the MCA only precluded its use by alien prisoners. *See supra* note 219 and accompanying text (discussing 28 U.S.C. § 2241(e) and its availability to U.S. citizens).

266. *See Munaf*, 128 S. Ct. at 2213 ("These consolidated cases concern the availability of habeas corpus relief arising from the MNF-I's detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there.").

267. *See id.* at 2214 ("At all times since his capture, Omar has remained in the custody of the United States military operating as part of the MNF-I[,]" even though "the Department of Justice informed Omar that the MNF-I had decided to refer him to [Iraqi courts] for criminal proceedings."); *id.* at 2215 (indicating Munaf stayed in custody of the MNF-I pending outcome of criminal proceedings in Iraqi Court). As

MacArthur,[268] which summarily denied Japanese citizens, held in Japan by a post-World War II multinational coalition, leave to file petitions for writs of habeas corpus.[269] The Court quickly distinguished *Hirota* from the facts at hand because the tribunal from which the *Hirota* petitioners appealed was subject to a "broken" chain of U.S. command and therefore autonomous of U.S. influence.[270] Furthermore, petitioners in *Hirota* were aliens.[271] Jurisdiction under section 2241 lay for the *Munaf* petitioners in the fact that the MNF-I, including the unit in charge of detainee operations, was "[a]s a practical matter," under complete U.S. control.[272] As was the case in *Rasul*, the habeas statute requires no more.[273] The Court made clear that its jurisdictional holding was limited to U.S. citizens seeking relief under the statutory habeas scheme and not under the Suspension Clause.[274]

Turning to the merits, the Court was ultimately unable to

---

noted earlier, *supra* notes 133–34, the U.S.-led MNF-I held detained persons in Iraq both posing a security threat and standing trial on domestic charges.

268. 338 U.S. 197 (1948) (per curium).

269. *Id.* at 198 ("[T]he courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners . . . .").

270. *See Munaf*, 128 S. Ct. at 2217–18 ("General MacArthur, as pertinent, was not subject to United States authority. . . . Here, in contrast, the Government acknowledges that our military commanders do answer to the President."). The war tribunal that sentenced the *Hirota* petitioners was set up by a U.S. commander, but he only acted on behalf of the occupying Allied Forces. *Hirota*, 338 U.S. at 197.

271. *See Munaf*, 128 S.Ct. at 2218 ("Even if the Government is correct that the international authority at issue in *Hirota* is no different from the international authority at issue here, . . . [t]hese cases concern American citizens while *Hirota* did not . . . .").

272. *Munaf*, 128 S. Ct. at 2216 ("'[A]s a practical matter,' the Government concedes, it is the 'the President and the Pentagon, the Secretary of Defense, and the American commanders that control . . . what American soldiers do,' including the soldiers holding Munaf and Omar." (citing Transcript of Oral Argument at 15, *Munaf*, 128. S. Ct. 2207 (No. 06-1666), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1666.pdf).

273. *See id.* at 2216–17 ("We think these concessions the end of the jurisdictional inquiry . . . . The disjunctive 'or' in § 2241(c)(1) makes clear that actual custody by the United States suffices for jurisdiction, even if that custody could be viewed as 'under . . . color of' another authority, such as the MNF-I."). The Court took notice that a prisoner is "in custody" for purposes of section 2241 "when the United States official charged with his detention has 'the power to produce' him." *Id.* at 2217 (quoting Wales v. Whitney, 114 U.S. 564, 574 (1885)).

274. *See id.* at 2216 n.2 ("These cases concern only American citizens and only the statutory reach of the writ. Nothing herein addresses jurisdiction with respect to alien petitioners or with respect to the constitutional scope of the writ.").

grant any form of relief to the prisoners. The petitioners sought the unconventional remedy of a preliminary injunction enjoining their transfer to Iraqi custody following their trial in domestic courts.[275] Prudential concerns of comity and international civility precluded the Court, in its equitable capacity, from granting relief out of respect for the "sovereign['s] undoubted authority" to prosecute the prisoners.[276] In addition, MNF-I was holding the prisoners at the behest of the Iraqi government,[277] and in the midst of ongoing hostilities.[278] The forbearance exhibited by the Court was based on the same policy underlying the general rule of U.S. courts from refusing to engage in collateral review of foreign judicial rulings.[279]

b. Lower Courts

Long before the Supreme Court delivered its decision in *Boumediene*, the detentions taking place in Afghanistan received a

275. *See id.* at 2221 ("The typical remedy [afforded by habeas corpus] is, of course, release. But here the last thing petitioners want is simple release; . . . what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." (citing Preiser v. Rodriguez, 411 U.S. 475 (1973))).

276. *Id.* at 2223. To arrive at this conclusion, the Court first noted that "'[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.'" *Id.* at 2221–22 (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)). The result stood notwithstanding that the citizens might be subject to procedures that fall short of U.S. constitutional standards. *See id.* at 2222 ("[The right of a sovereign to prosecute offenses committed within its borders] is true with respect to American citizens . . . whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution.").

277. *See id.* at 2223–24 (observing that "Omar and Munaf are being held by United States Armed Forces at the behest of the Iraqi Government[,]" and "MNF-I detention is an integral part of the Iraqi system of criminal justice [through] functioning, in essence, as its jailor.").

278. *See id.* at 2224 ("There is of course even more at issue here: . . . the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as 'an active theater of combat.'" (quoting Brief for the Federal Parties at 16, *Munaf*, 128. S. Ct. 2207 (No. 06-1666), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_FederalParties.pdf).

279. *See id.* at 2224 ("To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions." (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 417–18 (1964))).

modest amount of attention in the shadow of Guantánamo.[280] Reports surfaced in 2006 that indicated that the channels in place to review a prisoner's detention were substandard.[281] Later that year, several habeas actions were initiated in rapid succession in the U.S. District Court for the District of Columbia on behalf of a number of different Bagram detainees.[282] Affidavits sworn by military personnel stationed at Bagram that were filed in these cases confirmed the use of a five-member Enemy Combatant Review Board ("ECRB") that sporadically inspects each prisoner's status in *ex parte* panels on the basis of "all reasonably available and relevant information."[283] The government was

280. *See* Eviatar, *supra* note 161 (explaining that to date "the Bagram detainees have failed to garner the same level of public attention and outrage [as Guantánamo]—or the stampede of offers for pro bono representation from major commercial law firms.").

281. *See* Golden, *supra* note 159 (first to report identifying that Bagram detainees "have no access to lawyers, no right to hear the allegations against them and [receive] only rudimentary reviews of their status as 'enemy combatants' . . . ."); *see also* Amnesty Int'l, *Afghanistan 'Success' Ebbing Away*, WIRE, March 2006, at 4, AI Index No. NWS 21/002/2006 (claiming that detainees are "held without charge, trial or access to legal representation" after interviewing several prisoners).

282. *See* Petition for Writ of Habeas Corpus, Ruzatullah v. Rumsfeld, No. 06-CV-01707 (D.D.C. Oct. 2, 2006), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2006cv01707/122762/1/0.pdf (petition on behalf of prisoner only known as "Ruzatullah" and his cousin); Petition for Writ of Habeas Corpus, Wazir v. Rumsfeld, No. 06-CV-01697 (D.D.C. Sept. 29, 2006) (petition on behalf of four prisoners detained at Bagram); Petition for a Writ of Habeas Corpus, Mohammed v. Rumsfeld, No. 06-CV-01680 (D.D.C. Sept. 29, 2006), *available at* http://www.scotusblog.com/movabletype/archives/Bagram%20petition.pdf (draft amalgamated petition on behalf of twenty-five detainees); Petition for Writ of Habeas Corpus, Al Maqaleh v. Rumsfeld, No. 06-CV-01669 (D.D.C. Sept. 28, 2006), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2006cv01669/122669/1/0.pdf (petition on behalf of sole Bagram prisoner).

283. The first time this information was disclosed on the public record was in a November 2006 declaration by Colonel Rose M. Miller in the *Ruzatullah* case. *See* Miller Decl., *supra* note 156, ¶¶ 10–12 (summarizing the general Enemy Combatant Review Board ("ECRB") procedure). Declarations subsequently submitted in connection with the other cases by the commander who replaced Colonel Miller corroborate the same review procedure. *See, e.g.*, Declaration of Colonel James W. Gray ¶¶ 10–12 (attached as Ex. B to Respondents' Response to Order to Show Cause and Motion to Dismiss for Lack of Jurisdiction), Mohammed v. Rumsfeld, No. 06-CV-01680 (D.D.C. Dec. 22, 2006), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2006cv01680/122640/4/2.pdf (utilizing the same text as included in Rose Declaration); Declaration of James W. Gray ¶¶ 11–13 (attached as Ex. 1 in Respondents' Motion to Dismiss for Lack of Jurisdiction), *Al Maqaleh*, 604 F. Supp. 2d 205 (D.D.C. Mar. 5, 2007) (No. 06-CV-01669), *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2006cv01669/122669/7/1.pdf (same). For further discussion on the review procedure used by the ECRBs, see Eviatar, *supra* note

afforded an opportunity to change its position after the 2009 election, but instead chose to rely on its previous filings.[284]

A decision recently issued in one of these cases marked the first and only major application of *Boumediene*'s functional model in a context other than Guantánamo. The district court in *Al Maqaleh v. Gates*[285] ruled that the protections of the Suspension Clause extend to a limited group of alien prisoners who were transferred to the Bagram internment facility from elsewhere and therefore the jurisdiction-stripping provisions of the MCA worked an unconstitutional suspension of the writ as applied to them.[286]

Al Maqaleh is important in several respects. First, the

---

161 (criticizing that ECRB procedures as "even more circumscribed" than the CSRTs offered at Guantánamo). *See also* Eric Lewis, *Custody Dispute: Why Is the U.S. Stashing Detainees at Policharki Prison in Afghanistan?*, SLATE, Aug. 16, 2007, http://www.slate.com/id/2172334/ (chastising ECRB process, as "not made through any evidentiary hearing, but rather by the commanding officer at Bagram, who has discretion whether to gather evidence, hear witnesses, or allow the detainee to present his story").

284. *See, e.g.*, Government's Response to this Court's Order of January 22, 2009 at 2, Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06-CV-01669), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/02/us-reply-re-bagram-2-20-09.pdf ("Having considered the matter, the Government adheres to its previously articulated position.").

285. 604 F. Supp. 2d 205 (D.D.C. 2009).

286. *See id.* at 235 ("MCA § 7(a), the statute stripping habeas jurisdiction, is unconstitutional as to three of the four petitioners. Under *Boumediene*, Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time . . . without adequate process may invoke the protections of the Suspension Clause."). On June 1, 2009 the same judge who issued the ruling granted the government's motion for an interlocutory appeal and stayed the case pending appeal. *See* Del Quentin Wilber, *Nation Digest: Bagram Detainees*, WASH. POST, at A16 (reporting that court granted motion); Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com (June 2, 2009, 4:25pm) (same); *see also* Al Maqaleh v. Gates, No. 06-1669 (D.D.C. June 1, 2009), http://www.docstoc.com/docs/6764307/al-maqaleh-v-gates (reproducing a copy of the order). As of the date of this Note, the only action taken in the appeal was a brief that was filed by the government on September 14, 2009. *See* Amnesty Int'l, *USA: Government Opposes Habeas Corpus Review for Any Bagram Detainees; Reveals 'Enhanced' Administrative Review Procedures*, AI Index No. AMR 51/100/2009, Sept. 16, 2009 [hereinafter *Amnesty Government Appellate Brief Review*], *available at* http://www.amnesty.org/en/library/asset/AMR51/100/2009/en/825cb177-59b8-4db6-a2b2-ac6874310ce3/amr511002009en.html (writing extensively on substance of government filing); Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com (Sept. 15, 2009, 11:40am) (reporting on filing); *see also* Brief for Respondents-Appellants, Al Maqaleh v. Gates, No. 09-5265 (D.C. Cir. Sept. 14, 2009), http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf (reproducing the filing).

decision interprets *Boumediene* as holding section 7(a) of the MCA unconstitutional only as applied to Guantánamo detainees, rather than facially invalidating that provision.[287] The result of this distinction is that section 7(a) of the MCA remains intact as against all aliens detained elsewhere and continues to foreclose their use of statutory habeas corpus.[288] Secondly, the case marks a significant expansion of *Boumediene* by extending the reach of the Suspension Clause to a select group of aliens detained both in a theater of war and at a location where the United States does not exercise de facto sovereignty.[289]

The district court's opinion also provides a helpful distillation of *Boumediene*'s functional model. The court subdivided the three *Boumediene* factors into six for purposes of analysis.[290] As for their citizenship, detention status, and sites of

---

287. *See Al Maqaleh*, 604 F. Supp. 2d at 213 ("Fairly read, *Boumediene* was an as applied rejection of MCA § 7."). While *Boumediene* at times was framed in general terms, the Court specifically focused on the unique character of Guantánamo and even noted that it might reach a different conclusion if the prisoners were held somewhere else. *See id.* ("The Supreme Court [in *Boumediene*] examined the history of the U.S. presence at Guantanamo, the degree of U.S. control at Guantanamo, and the practical obstacles of extending habeas rights to Guantanamo. The Supreme Court did not examine those very fact-specific factors with regard to any other place the United States presently operates or confines detainees." (citations omitted)). Moreover, any broader reading would conflict with the Supreme Court's longstanding admonition for courts to favor "'partial, rather than facial, invalidation.'" *Id.* at 213–14 (quoting Ayotte v. Planned Parenthood, 546 U.S. 320, 328–29 (2006) (in turn quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985))).

288. *See id.* at 214 ("Because the Court interprets *Boumediene* as a rejection of MCA § 7 as it applies to Guantanamo specifically, rather than a broader facial rejection, MCA § 7 (and, therefore, § 2241(e)(1)) continues to deprive this Court of statutory jurisdiction over habeas petitions filed by Bagram detainees.").

289. *See supra* note 246 and accompanying text (explaining that the long-term lease with Cuba provides the United States with "*de facto* sovereignty" over base). Notably, Kennedy remarked that the result in *Boumediene* might be different if the petitioners were detained "in an active theater of war." *See supra* note 250.

290. *See Al Maqaleh*, 604 F. Supp. 2d 205, 215 (D.D.C. 2009) ("For the sake of analysis, these three factors can be subdivided further into six."). Specifically, the court dissected the *Boumediene* factors as follows: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ." *Id.* The court also noted that "the length of a petitioner's detention without adequate review" implicitly motivated the *Boumediene* majority because of their care to caution that the Executive was entitled to a reasonable amount of time to determine a detainee's status before it would be practical for a court to consider their habeas petition. *Id.* at 216. Even so, this implicit concern was inapposite to the Bagram petitioners because they, like the *Boumediene* detainees, were

apprehension, the Bagram petitioners were considered to be "situated no differently than the detainees in *Boumediene*."[291] Consequently, the outcome of the case turned on the remaining three considerations: detention site, adequacy of process, and prudential concerns.[292]

Regarding the site of detention, the court took the position that *Boumediene*'s lengthy comparison of Guantánamo and Landsberg prison highlighted the need to examine the objective "degree and duration of U.S. 'control.'"[293] The court started by highlighting the several respects in which general U.S. presence differs at Bagram from Guantánamo: it was authorized by the sovereign Afghan government by means of the SOFA-A,[294] the jurisdiction granted to the United States is not exclusive,[295] a handful of non-U.S. personnel work out of the base,[296] and U.S.

---

held for over six years, which was already seen in *Boumediene* as exceeding that threshold. *See id.* ("The *Boumediene* petitioners—like petitioners here—had been held for six years or more. Hence, whatever 'reasonable period of time' the Executive was entitled to had long since passed." (quoting Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008))).

291. *Id.* at 217–18. More precisely, each petitioner is an alien that was apprehended outside of the United States, brought into Afghanistan, and later determined to be an enemy combatant. *Id.* at 218. As was the case with Guantánamo detainees held in Cuba, "[s]uch rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely." *Id.* at 220. The court aptly noted, however, that prisoners captured on the Afghan battlefield are qualitatively different. *Id.* ("Bagram detainees captured in Afghanistan are qualitatively different than Bagram detainees who . . . were captured elsewhere.").

292. *See id.* at 221 ("[F]or these three factors, petitioners are not much different than the petitioners in *Boumediene*. . . . The primary comparison of these cases and *Boumediene*, then, rests on an analysis of the remaining three factors.").

293. *See id.* at 221–22; *see also id.* at 221 ("The touchstone of the site of detention factor is the 'objective degree of control' the United States has over Bagram." (quoting Boumedeiene v. Bush, 128 S. Ct. 2229, 2252 (2008))).

294. *See id.* at 222 ("A SOFA governs the terms of the U.S. presence in Afghanistan, and the very existence of a SOFA is a 'manifestation of the full sovereignty of the state on whose territory it applies.'" (quoting Respondent's Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at 13–15, *Al Maqaleh*, 604 F. Supp. 2d 205 (D.D.C. Sept. 15, 2009) (06-CV-01669))).

295. *See id.* at 222–23 (appreciating that the United States maintains a lesser degree of jurisdiction at Bagram because the SOFA only provides criminal jurisdiction over U.S. personnel).

296. *See id.* ("[I]n addition to the U.S. allies who operate out of the base, a sizable population of Afghan workers and contractors is there." (citing Tennison Decl., *supra* note 106, ¶¶ 7–8)).

forces operate with the support of NATO allies.[297] But, to the court, these differences did not significantly undercut the near absolute day-to-day U.S. control at Bagram. First, the lack of complete jurisdiction within the overall country did not significantly curtail the absolute control of the air base enjoyed by U.S. forces under the Bagram lease.[298] Moreover, allied forces also engaged in the country do not supervise or even share control of the detention facility at Bagram with the United States.[299] Thus, the *degree* of practical U.S. control at Bagram is "slightly less complete than at Guantanamo" but still vastly greater than Landsberg.[300] Temporally, the Bagram lease is indefinite.[301] The court distinguished the use of Bagram from Guantánamo, however, on the basis that the U.S. long-term objective in the region is not permanent.[302] And prior U.S. occupation of Bagram is nowhere near as extensive as it was at Guantánamo.[303] In short, U.S. ambitions at Bagram drew a closer temporal parallel to Landsberg than Guantánamo, but the United States still exercises exercised a high quantum of control at Bagram on balance.[304]

A detailed analysis of the ECRB process was not warranted in

---

297. *See id.* at 224 ("To be sure, the United States is supported by allies in Afghanistan.").

298. *See id.* at 223 (reasoning that "[t]he existence of a SOFA . . . does not affect the actual control the United States exercises at the Bagram detention facility, which is practically absolute" and "[p]erhaps the difference in jurisdiction precludes the United States from operating at Bagram [without] scrutiny of the host country [but] the lack of complete 'jurisdiction' does not appreciably undermine the conclusion that the United States exercises a very high 'objective degree of control'"); *see also* Bagram Lease, *supra* note 156 (granting "exclusive . . . and uninterrupted possession" of the airbase).

299. *See Al Maqaleh*, 604 F. Supp. 2d at 224 ("[I]t is the United States, not U.S. allies, that detains people at the Bagram Theater Internment Facility and that operates (and hence fully controls) that prison facility and its occupants, which was not the case at Landsberg." (citing Hirota v. MacArthur, 338 U.S. 197, 198 (1948))).

300. *Id.*

301. *See id.* at 225 (noting the limited duration of the Bagram lease).

302. *See id.* at 224–25 ("At Bagram, the United States has declared that it only intends to stay until the current military operations are concluded and Afghan sovereignty is fully restored." (citing Joint Declaration of the United States-Afghanistan Strategic Partnership, *supra* note 106).

303. *See id.* at 224 (analogizing that the short-lived U.S. presence at Bagram is a "far cry" from the century-long occupation at Guantánamo).

304. *See id.* at 225–26 ("Whereas the site of detention factor in *Boumediene* plainly supported application of the Suspension Clause, [the duration factor] does not favor petitioners to quite the same extent here. Nonetheless, it is still fair to say that the United States has a high objective degree of control at Bagram.").

the eyes of the court because it was enough to merely "recognize that the [ECRB] process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo."[305]

The court finally turned to practical concerns, pinpointing the impact on daily military operations and maintenance of comity as those identified in *Boumediene*.[306] Bagram, much like Landsberg, is under the constant threat of attack by rebel forces given its close proximity to the frontlines.[307] Though diverting resources in this type of forum may at first appear to thwart the military mission,[308] technological advances alleviate the stress caused by managing the habeas petitions[309] and only a limited segment of the Bagram population would benefit from a narrow ruling.[310] In terms of diplomacy, the court warned of tension that could result from reviewing petitions by *Afghan* detainees on account of the U.S. policy to eventually transfer these prisoners to Afghan authorities.[311] All other prisoners, on the other hand, remain in exclusive U.S. custody and therefore present no source

305. *See id.* at 227 ("Respondents concede, as they must, that the process used for status determinations at Bagram is less comprehensive than the CSRT process used for the Guantanamo detainees." (quoting Transcript of Jan. 7, 2009 Hearing at 53, *Al Maqaleh*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06-CV-01669))).

306. *See id.* ("The Supreme Court . . . focus[ed] on the impact that habeas review would have on the military mission and on whether litigating habeas cases would cause friction with the host government.").

307. *See id.* at 228 ("Bagram resembles Landsberg more than Guantanamo, since it, like Landsberg, is under constant threat by suicide bombers and other violent elements." (citing *Bomber Strikes Outside Main US Base in Afghanistan*, VOICE OF AMERICA, Mar. 4, 2009, http://www.voanews.com/english/2009-03-04-voa30.cfm).

308. *See id.* (acknowledging that "the practical difficulties of providing habeas review are enhanced in an active war zone").

309. *See id.* (explaining that real-time video is a viable substitute for in-court appearance and is currently in use for most habeas appeals by Guantánamo prisoners).

310. *See id.* at 230 ("Only a limited subset of detainees—non-Afghans captured beyond Afghan borders—will be affected by this ruling . . . .").

311. *See id.* ("[O]nly Wazir is an Afghan citizen, and hence only he is subject to such transfer [to Afghan prison]."); *see also* Tennison Decl., *supra* note 106, ¶ 16 and accompanying text. Quite problematically, a U.S. court adjudicating their habeas petition may reach a different result than an Afghan tribunal or potentially usurp the prerogative of the Afghan government by granting release. *See Al Maqaleh*, 604 F. Supp. 2d at 230 (pointing out that "[i]t is by no measure unlikely that a federal court . . . would arrive at a different result than an Afghan court applying an entirely different process and legal standards" and that "unilateral release of Bagram detainees [into Afghanistan] could easily upset the delicate diplomatic balance the United States has struck with the host government.").

of friction as against Afghanistan.[312]

Each of the four petitioners in the case was captured outside of Afghanistan, but only one held Afghan citizenship.[313] Thus, the only real difference dividing the detainees in *Boumediene* and the non-Afghan petitioners is that Bagram operates with a high, but not plenary, level of U.S. control and each is afforded an even less adequate review process.[314] In essence, the three alien detainees were more closely aligned with the prisoners at Guantánamo, who were provided constitutional protection, than with those at Landsberg, who were not. The Afghan petitioner was situated differently, though, because his citizenship posed an obstacle to habeas review.[315] Based on this balancing, the court held that non-Afghan detainees, captured outside Afghanistan, can invoke the Suspension Clause to challenge their detention.[316] The court lastly acknowledged *Boumediene*'s admonition that a different outcome might result "if the detention facility were located in an active theater of war."[317] However, detainees transferred to Bagram from elsewhere are only in the theater by strategic U.S. choice,[318] which implicates an executive practice unrestrained by authority.[319]

Seizing on language found in the district court's opinion, government officials in September 2009 signaled that they were crafting a new review system that provided detainees at Bagram

312. *See Al Maqaleh*, 604 F. Supp. 2d 205, 230 ("[Non-Afghan petitioners] are not subject to transfer to Afghan custody, so the United States is 'answerable to no other sovereign' for their detention . . . .").

313. *See id.* at 209 (indicating that each petitioner alleged capture outside of Afghanistan and listing respective citizenship).

314. *See id.* at 232 ("It is worth repeating that the Bagram detainees in these cases are virtually identical to the Guantanamo detainees in *Boumediene* . . . .").

315. *See id.* at 231 ("[F]or detainees who are Afghan citizens, the possibility of friction with the host country cannot be discounted and constitutes a significant practical obstacle to habeas review.").

316. *See id.* ("Providing habeas review for [the three non-Afghan petitioners] is not so onerous, so fraught with danger, or so likely to cause friction with the Afghan government as to warrant depriving them of the protections of the Great Writ.").

317. *Id.* (quoting Boumediene v. Bush, 128 S. Ct. 2229, 2261–62 (2008)).

318. *See id.* at 230–31 ("The only reason these petitioners are in an active theater of war is because respondents brought them there.").

319. *See id.* at 230 ("[I]t would be far more anomalous to allow respondents to preclude a detainee's habeas rights by choosing to put him in harm's way through detention in a theater of war.").

with greater rights.[320] The details of these new tribunals, designed to meet traditional standards of wartime detention, were revealed just days later by the government in the merits brief it submitted in connection with the interlocutory appeal of *Al Maqaleh*.[321]

III. *MAKING SENSE OF THE RIGHT TO CHALLENGE EXECUTIVE DETENTION*

In its traditional role, the executive branch is afforded wide latitude to capture and detain prisoners during active hostilities.[322] But, as the aforementioned case law illustrates, the atypical character of the war on terror has forced the U.S. judiciary to reconsider the position of prisoners to challenge their traditionally uncontroversial detention. *Boumediene*, for the first time in U.S. history, extended constitutional protections to aliens located beyond U.S. borders.[323] More specifically, the Court determined that the Suspension Clause provided wartime prisoners with the ability to judicially challenge their military detention on habeas review.[324] But the holding was confined to

320. *See* Karen De Young and Peter Finn, *U.S. Gives New Rights to Prisoners: Indefinite Detention Can Be Challenged*, WASH. POST, Sept. 13, 2009, at A01 (citing Obama officials as indicating that prisoners in Afghanistan will soon receive enhanced rights in a new review system); Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1 (same).

321. Brief for Respondents-Appellants at 61, Al Maqaleh v. Gates, No. 09-5265 (D.C. Cir. Sept. 14, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf. Under the new review procedure, detainees at Bagram would receive a "personal representative" as well as the ability to testify and call witnesses in their favor. *Id.* at 61–62. The review board, moreover, reaches its determination by a preponderance of the evidence. *Id.* at 62 ("The board will make its determination using the well-established preponderance of evidence standard . . . ."). For the government memoranda outlining the exact nature of the new review procedures, see *Id.* adds. 1–8. For more information on the interlocutory appeal, see *supra* note 286.

322. *See supra* notes 206–07 (recognizing detention of enemy combatants on hostile ground for duration of conflict as a "fundamental . . . incident of war"); *see also infra* notes 383–86 (elaborating on the discretion that the executive holds on the battlefront).

323. *See supra* note 251 and accompanying text (conceding the novelty of its holding); *see also supra* notes 60–77 (establishing that citizens were the only class of persons who received constitutional protection beyond U.S. border prior to *Boumediene*).

324. *See supra* note 251 (extending the protections of the Suspension Clause). As noted earlier, the court had not, prior to *Boumediene*, expressly determined whether a parallel right to habeas corpus inheres in the Suspension Clause. *See supra* note 33. Justice Kennedy in *Boumediene* used language that could be seen as indicating that habeas corpus rests implicitly in the Clause or, alternatively, that the Clause only protects against the arbitrary repeal of the statutory grant of habeas corpus. *Compare*

Guantánamo Bay.[325] So while the Suspension Clause is capable of reaching the shores of Cuba, the all-important question is where else its protections may flow.[326]

As noted earlier, the writ of habeas corpus is presently codified in our statutory scheme as positive law. Part III.A will therefore delineate who can currently rely on the habeas statute as a source of relief and who else must fall back on the Suspension Clause. Part III.B turns to the Suspension Clause and crytically examines *Boumediene* against the law that influenced the case's outcome in order to develop a guide for assessing who else is entitled to the clause's protections. Finally, Part III.C will then use these principles in a set of hypothetical situations to more clearly display the geographic coverage of the Suspension Clause, as it stands under current law.

A. *Statutory Habeas Corpus*

The Court's precedent on the extraterritorial reach of section 2241 is inconsistent on the surface, but a more cogent line of authority emerges by reading the case law in context. In *Eisentrager*, Justice Jackson flatly proclaimed that "[n]othing in . . . our statutes" confers aliens detained abroad with a right to habeas corpus.[327] Yet *Rasul* extended the protections of section 2241 to alien prisoners detained by the United States in Cuba.[328] This anomaly can be ascribed to the fact that *Eisentrager* was

---

Boumediene v. Bush, 128 S. Ct. 2228, 2248 (2008) (endorsing dicta in *St. Cyr* theorizing that the Suspension Clause protects "at the absolute minimum" the privilege "'as it existed in 1789.'" (quoting Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001) (in turn quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)))), *with id.* at 2262 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."). The outcome under either interpretation is the same, so this article will use the term "protections of the Suspension Clause" to refer to whatever right that provision embodies.

325. *See infra* note 341 (recognizing that *Boumediene* only invalidated the MCA as applied to the prisoners at Guantánamo Bay).

326. *See supra* note 11 (expressing curiosity as to where else the Suspension Clause could provide protection beyond Guantánamo Bay).

327. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

328. *See supra* note 210 and accompanying text (permitting the use of statutory habeas by Guantánamo prisoners).

decided under the authority of *Ahrens v. Clarke*.[329] As explained by the *Rasul* Court, *Ahrens* demanded the prisoner's presence—as opposed to the jailor's—within the territorial jurisdiction of the district court in order to satisfy the statutory language of section 2241.[330] An individual detained in Germany would clearly not be within the jurisdiction of a U.S. district court.[331] But *Ahrens* was overruled after *Eisentrager* was decided and section 2241 now only requires the custodian's presence in the jurisdiction of the trial court.[332] Therefore, the use of section 2241 is not presently precluded merely because of a prisoner's location outside of the United States.[333] In fact, some legal writers contend that, after *Munaf*, section 2241 will now "follow the flag" overseas.[334]

The use of section 2241 to challenge executive detention does not presently turn on a prisoner's location, but instead centers on his or her citizenship. Previously, section 2241 was available to citizens and aliens alike.[335] Congress, however, made several important amendments to section 2241 under the

329. *See Eisentrager*, 339 U.S. at 778 (citing Ahrens v. Clarke, 335 U.S. 188 (1948), *abrogated by* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973)).

330. *See* 542 U.S. 466, 477 (2004) ("[*Ahrens* read] the phrase 'within their respective jurisdictions' as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction.").

331. In fact, this is precisely why the district court dismissed the habeas application of the *Eisentrager* prisoners at the trial level and the Supreme Court resorted to "fundamentals." *Id.*

332. *See supra* note 36 and accompanying text (settling that jurisdiction under section 2241 is determined by the *jailor's* location, not that of the prisoner). The precedential value of the passage quoted above, *supra* note 327, must be seen in this light.

333. *See supra* note 36 and accompanying text. *Munaf* is a prime example of a case where section 2241 can run to a prisoner held abroad. *See supra* note 273 (holding that section 2241 runs to U.S. prisoners abroad).

334. *See, e.g.*, Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/ (June 13, 2008, 3:39pm EST) ("[T]he Court has dropped a hint that, in the new global village, habeas will follow the American flag overseas—possibly everywhere except an active battlefield."); *see also* Harlan Grant Cohen, International Decision, Munaf v. Geren, 128 S. Ct. 2207, 102 AM. J. INT'L L. 854, 858 (2008) ("The Court's decision is actually considerably broader than it might have been . . . . [F]ederal courts have jurisdiction over a petitioner [under section 2241] 'when the United States official charged with his detention has ''the power to produce' him.'" (citing *Munaf*, 128 S. Ct. 2207, 2217 (2008) (in turn quoting Wales v. Whitney, 114 U.S. 564, 574 (1885)))).

335. *See supra* note 212 (proclaiming that section 2241 did not discriminate between citizens and aliens as of the time of *Rasul* in 2004).

MCA.[336] By its very terms, the MCA only constricts the statutory habeas rights of *alien* detainees.[337] U.S. citizens can therefore still turn to section 2241 following the enactment of the MCA, irrespective of their location, in order to challenge their detention by the U.S. military.[338] Aliens are currently without this protection.

As a result, alien detainees must overcome section 7(a) of the MCA in order to mount a habeas petition in an article III court.[339] To be sure, this provision of the MCA was determined to be constitutionally infirm in *Boumediene*.[340] But *Boumediene* only served as an invalidation of section 7(a) of the MCA as against aliens detained at Guantánamo, so this provision still forecloses the use of section 2241 by all other alien detainees imprisoned elsewhere.[341] Accordingly, alien detainees held at locations other than Guantánamo must turn to the Suspension Clause in order to invalidate section 7(a) of the MCA.[342]

Boumediene in substance recognized that the jurisdiction-stripping provisions of the MCA are unconstitutional as used

336. *See supra* note 219 (detailing MCA's amendments to section 2241); *see also supra* note 37 and accompanying text (establishing that Congress may alter its statutory scheme within constitutional bounds).

337. *See supra* note 219 (denying "alien detaine[es]" access to section 2241).

338. *See supra* notes 333–34 (indicating that section 2241 is not presently dependent on a prisoner's location within the United States); *supra* note 337 (recognizing that the MCA only denies aliens access to section 2241). *Munaf* again is illustrative in displaying the ability of a U.S. citizen to invoke the protections of secion 2241 following the passage of the MCA. *See supra* note 273 (holding that section 2241 runs to U.S. prisoners abroad in spite of the MCA).

339. To clarify, the MCA does not simply deprive alien petitioners access to the habeas statute, but more broadly deprives competent courts of "jurisdiction" to consider habeas petitions filed by alien enemy detainees—which potentially includes claims asserted under a constitutional right to habeas corpus. *See supra* note 219 (reproducing text of MCA).

340. *See supra* note 251 and accompanying text (proclaiming section 7(a) of the MCA to work an unconstitutional suspension of the writ).

341. *See supra* note 288 and accompanying text (clarifying that *Boumediene* was not a facial invalidation of the MCA).

342. *See supra* note 37 and accompanying text (highlighting that Congress may only amend its positive law to the extent that it comports with the Constitution); *see also* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 214 (2009) (explaining that Bagram petitioners "must look to the constitutional right to habeas corpus as protected by the Suspension Clause, and whether that provision extends to them" due to the MCA).

against anyone who is protected by the Suspension Clause.[343] The majority, however, confined the application of this principle to alien prisoners detained at Guantánamo Bay. As mentioned earlier, a statute cannot possibly transgress the Constitution by depriving a person of a protection to which they are not entitled in the first instance.[344] And the Court's inconsistency in defining the extraterritorial reach of the Constitution is indicative that there is no clear-cut answer as to whether the Suspension Clause is operative in remote locations or contexts other than Guantánamo.[345] Thus, entitlement to the protections of the Suspension Clause becomes the threshold question for all aliens imprisoned abroad at a facility other than Guantánamo who seek to challenge the legality of their detention in a U.S. civilian court.

B. *The Suspension Clause*

Boumediene marks yet another sea change in the extraterritorial jurisprudence of the Supreme Court. This framework departs from a history steeped in a series of rigid techniques for determining the force of constitutional provisions beyond U.S. borders.[346] Unfortunately, the ad hoc nature of the functional approach suffers, as one prominent scholar put it, "from the lack of certainty that bright-line rules would provide."[347] Indeed, there appears to be wide disagreement in academic circles over what implications *Boumediene* may hold.[348] But the overall analysis in *Boumediene* is not entirely novel. The

343. *See supra* note 251 (determining that section 7 of the MCA "effects an unconstitutional suspension of the writ" *because* the Suspension Clause protects detainees held at Guantánamo Bay).

344. *See supra* note 85 (discussing the issue of standing).

345. *See supra* notes 43–77 and accompanying text (navigating the jurisprudential shifts in the area of the Constitution's extraterritorial application).

346. *See supra* notes 43–77 and accompanying text (distilling the case law concerning the reach of the Constitution beyond the U.S. borders).

347. Neuman, *supra* note 255, at 273. This type of judicial minimalism is not uncommon to the Court; it can be found with prominent use at various other points in history where national security was threatened. *See* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50–51 (2004) (identifying the Civil War, World Wars I and II, the Cold War, and the current War on Terror as periods of judicial minimalism). For a more elaborate discussion of judicial minimalism in the Supreme Court, see generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINAMALISM ON THE SUPREME COURT (1999).

348. *See supra* notes 253–55 (advancing several theories with regard to *Boumediene*'s significance).

functional model, as Kennedy called it, can be traced back to the dissent of Justice Harlan in *Reid*.[349] By the time that his "impracticable and anomalous" test was advertised by Kennedy in *Verdugo-Urquidez*, it was generally understood as a model that favored global constitutional coverage under which protections extend unless offset by operative barriers.[350] Within this framework, the elements isolated in *Boumediene* fit neatly into two categories: objective indicia that establish a propensity for constitutional application ("proclivity factors") and considerations that preclude the operation of constitutional rights ("inhibiting factors").[351] This subsection will take up each element of the *Boumediene* functional model, as they were presented in *Al Maqaleh*, and critically analyze each in turn: (a) citizenship; (b) detainee status; (c) process used to reach that determination; (d) nature of the site of apprehension; (e) nature of the site of detention; (f) practical obstacles; and (g) the implicit element of the duration of a prisoner's detention.

1. Citizenship

Citizenship is a central influence in the Court's discussions of the extraterritorial reach of the Constitution, but all that can be gleaned from *Boumediene* is that a lack of citizenship is not dispositive. To use the general outcome of *Boumediene* as a starting point, alien detainees received protection under the Suspension Clause.[352] In this sense, the Court obviously did not find their lack of citizenship dispositive to the constitutional question.[353] The district court in *Al Maqaleh* elaborated on this point in observing that citizenship was not a "litmus test" for determining the extraterritorial reach of the Suspension

349. *See supra* notes 67–68 (advancing an "impracticable or anomalous" test that extends constitutional coverage overseas unless imprudent to do so).

350. *See supra* notes 75–77 (describing the "impracticable or anomalous" test as a theory of "global due process" at the time *Verdugo-Urquidez* was decided).

351. *See supra* note 232 (distilling the functional model as turning on "objective factors" and "practical concerns"); *see also supra* notes 75–77 (signaling that under model of global due process factors that establish a proclivity for constitutional application are weighed against practical considerations).

352. *See supra* note 251 and accompanying text (paraphrasing the general holding of *Boumediene*).

353. *See supra* note 251 and accompanying text (recognizing the novelty of providing noncitizens with constitutional coverage when located abroad).

Clause.[354] This assertion presupposes that *holding citizenship* is also nondispositive as well. But this is not necessarily true; after all, the Court was only confronted with an issue relating to *alien* rights.[355]

The Court previously employed language in *Reid v. Covert* that arguably extended the full range of constitutional rights to all citizens affected by government action abroad.[356] But *Boumediene* qualified that passage. Kennedy chalked up the holding in *Reid* as a result of practical considerations, and not simply the petitioner's citizenship.[357] He also ascribed the outcome in *Ross* as dependent on practical concerns as well.[358] But all that this establishes is that citizenship, like any proclivity factor, is subject to inhibiting limitations.

The Court's past precedent underscores a strong favor for citizenship. The law recognizes inherent distinctions between aliens of hostile and friendly countries, as well as those who have initiated the transition into the U.S. system of laws and those who have not.[359] Accordingly, aliens are afforded more robust protections, in what is described as "an ascending scale of rights," as they increase their integration into U.S. institutions and culture.[360] But because the claim to these safeguards is not as

---

354. 604 F. Supp. 2d 205, 218 (2009).

355. *See supra* note 221 (describing each petitioner as an alien to the United States).

356. *See supra* note 63 (declaring "we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights").

357. *See supra* notes 228–30 and accompanying text (dicussing *Reid* precedent).

358. *See supra* note 228 and accompanying text (providing brief description of *Ross*).

359. *See* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments."); *see also Ex Parte* Quirin, 317 U.S. 1, 30–31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.").

360. *Eisentrager*, 339 U.S. at 770. For instance, (friendly) aliens are provided with limited safeguards when they enter the doors of the United States. *See, e.g.*, Plyer v. Doe, 457 U.S. 202 (1982) (Equal Protection to illegal aliens); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (Just Compensation of Fifth Amendment to non-resident "alien friend"); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (habeas corpus to alien immigrants). After taking steps to establish residence in the country, they receive greater protections. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (Due Process of Fifth Amendment to resident aliens); Bridges v. Wixon, 326 U.S. 135 (1945)

secure as a citizen's, their protections may become circumscribed in times of war if they hold allegiance to an enemy state.[361] In short, courts regard the quality of citizenship, in and of itself, in high esteem.[362]

Because of its great importance, citizenship would likely play a significant role in the Suspension Clause calculus. First, *Boumediene* did not provide an occasion to discuss the impact of citizenship on the domain of the Suspension Clause vis-à-vis the functional model.[363] Moreover, *Ross* and *Reid* only involved the geographic scope of the Fifth and Sixth Amendments.[364] As distinct from the supplementary nature of the protections at issue in those cases, habeas corpus rather basically ensures that executive detentions are carried out within lawful bounds.[365] The Court, accordingly, might be predisposed to give greater weight to citizenship in this context. In fact, there exists strong language in recent case law that resonates with this proposition: the *Hamdi* plurality wrote that a citizen's "interest in being free from physical detention by one's own government" is the most

---

(First Amendment to resident aliens); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Fourteenth Amendment to resident aliens); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (explaining that presence "within the territory of the United States" was decisive to the above cases).

361. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (providing that due to the "ambiguity of [an enemy's] allegiance, his domicile here is held by a precarious tenure" in times of war); *Eisentrager*, 339 U.S. at 775 ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists."). *Eisentrager* clarifies that, even in this context, the settled practice is to review an alien's plea against executive action only to determine that there is, in fact, a state of war and he is an enemy alien subject to the internment or deportation provisions of federal law. 339 U.S. at 775.

362. *See, e.g.*, Fedorenko v. United States, 449 U.S. 490, 520 n.3 (1981) (expressing that "the weighty interest in citizenship should be neither casually conferred nor lightly revoked" in the immigration context (citing Berenyi v. District Director, 385 U.S. 630, 636–37 (1967))); *Harisiades*, 342 U.S. at 586 (recognizing that aliens of any type are not afforded "legal parity with the citizen"); *Eisentrager*, 339 U.S. at 770 (describing citizenship as a "'a high privilege'" (quoting United States v. Manzi, 276 U.S. 463, 467 (1928))).

363. In fact, the Court's caution to not disturb other areas of constitutional law is entirely consistent with the piecemeal practice of judicial minimalism. *See supra* note 347.

364. *See supra* notes 44–50, 60–69 and accompanying text (indicating that both *Reid* and *Ross* involved the extraterritorial application of the Fifth and Sixth Amendments to citizens).

365. *See supra* notes 30–40, 224 (explaining that the writ of habeas corpus serves to ensure that detentions are carried out in accordance with the law).

"elemental of liberty interests" that is not offset by the accusation of treasonous behavior.[366] Though Hamdi was clearly entitled to habeas corpus by virtue of his location within the United States,[367] it would be inconsistent and anomalous with the spirit of the case law interpreting the high privilege of citizenship to deny a U.S. citizen detained abroad the right to challenge the denial of such a significant interest—the freedom of restraint from one's own government—short of some extraordinary exigency.[368]

The foregoing discussion illustrates that a lack of citizenship is clearly not outcome-determinative under the functional test.[369] On the other hand, the Court's strong favor of citizenship in both historic and current case law makes clear that, all else being equal, U.S. citizenship creates a very high proclivity for extending the Suspension Clause to those detained abroad.[370] The Court's precedent also establishes a nuanced approach for cases in the middle—enemy aliens with ties to the United States.[371]

2. Status of the Detainee and Process Used to Reach that Determination

A potential conflict arises in reading the precise wording of these two intertwined criteria. It bears repeating that habeas corpus is a tool used to challenge illegal detention in a variety of

366. Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

367. *Id.* at 525 (explaining that "it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241" even though he was captured abroad because he was presently located in the United States).

368. *See supra* notes 359–62 (emphasizing the importance of citizenship in case law).

369. *See supra* notes 354–55 (citing the outcome in *Boumediene* as an example).

370. *See supra* notes 366–68 and accompanying text (arguing that citizenship carries a presumption that one's government cannot detain an individual without proper review). It is unlikely the Court would ever consider the question of a citizen's constitutional right to extraterritorial application of the Suspension Clause because citizen-detainees are currently entitled to invoke the protections of 28 U.S.C. § 2241 beyond the border of the United States; the Court would only reach the hypothetical situation if section 2241 were amended to the detriment of the citizenry or repealed. *See supra* note 333 (illustrating that the protections of section 2241 run to citizens detained abroad).

371. *See supra* note 360 (underscoring that the law accords greater levels of protection to persons as they increase their connections to U.S. institutions).

contexts.[372] And executive detention may result from a preliminary finding that a prisoner is an enemy combatant[373] or, more permanently, after trial by military commission.[374] But these two elements (detainee status and process) are worded in *Boumediene* in terms specific only to an initial status determination.[375]

Nevertheless, Kennedy went on to compare the process used to reach the *status* of the *Boumediene* prisoners with the process used to *try* the *Eisentrager* prisoners before a military commission.[376] This comparative analysis suggests that the three-prong test in *Boumediene* is not limited solely to initial status challenges, but is rather designed to encompass all extraterritorial contexts where the Suspension Clause might be invoked. Thus, the more appropriate inquiry is one of the general basis for detention.

With this broader understanding in mind, another concern arises in evaluating the two distinct bases for executive detention. It is uncontroversial that the prisoners in both *Eisentrager* and *Boumediene* were designated as enemy combatants.[377] The *Boumediene* majority made a point, though, of observing that the Guantánamo detainees deny their status determinations.[378] Yet, a habeas petition inherently challenges some aspect of a prisoner's detention and thus implies a denial of legitimacy as to some

372. *See supra* note 90 (recognizing the variety of situations in which an executive detention may be challenged and listing examples).

373. *See supra* notes 206–07 and accompanying text (documenting the authority of the President to detain prisoners captured on the battlefield as enemy combatants).

374. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 8 (1946) (habeas petition by alien combatant challenging authority of military commission to try and detain prisoner); *Ex parte* Quirin, 317 U.S. 1 (1942) (habeas petition by alien and citizen combatants challenging the constitutionality of the military commission process).

375. *See* Boumediene v. Bush, 128 S. Ct. 2228, 2259 (framing the inquiry in terms of "status of the detainee" and "process through which that status determination was made").

376. *See Id.* at 2259–60 ("[U]nlike *Eisentrager*, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that . . . there had been a rigorous adversarial process." (internal citation omitted)); *id.* at 2260 ("In comparison the procedural protections afforded to the detainees in the CSRT hearing are far more limited.").

377. *See supra* notes 221, 239 (indicating that the *Eisentrager* and *Boumediene* prisoners were enemy aliens at the time of their military detentions).

378. *See supra* note 243 (identifying that the *Boumediene* petitioners deny their status).

process used to arrive at their imprisonment.[379] Implicit in the habeas petitions filed in *Eisentrager* was that the German prisoners denied the legitimacy of their "trial, conviction, and imprisonment."[380] Even so, Kennedy went on to write that *in contrast* to the *Eisentrager* petitioners, the prisoners in *Boumediene* deny their status.[381] By elevating the claims brought by the Guantánamo prisoners, Kennedy suggests that a challenge based on an initial status determination carries more weight than one based on a subsequent trial by military commission.[382] Express mention of their status denial signifies that the inquiry also contemplates what aspect of the process is disputed.

3. Nature of the Site of Apprehension

Even prior to the ratification of the Constitution, militaries have historically maintained considerable latitude to act against all persons within a warzone due to the extraordinary circumstances present on the battlefront.[383] Among these actions, the ability to detain enemy combatants for the duration of a conflict is widely recognized as a legitimate practice of armed conflict.[384] As a result, the Court is willing to provide greater leeway to the executive on the battlefront[385] because separation-

379. *See supra* note 22 and accompanying text (clarifying the function served by habeas corpus).

380. Johnson v. Eisentrager, 339 U.S. 763, 767 (1950).

381. *See supra* note 243 (comparing the challenge mounted in *Eisentrager* with those presented by the *Boumediene* petitioners).

382. Though both challenges raise important questions, this hierarchy is analytically sound because the status determination is usually the initial basis for detention directly from the battlefield; if that detention is invalid, then so is any subsequent action, such as trial by military commission. The *Hamdi* plurality indicated that it was quite sensitive to the threat posed by capricious battlefield detentions. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 530–31 (2004) (plurality opinion) (citing *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866)).

383. Reid v. Covert, 354 U.S. 1, 33 (1957) ("In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit [executive action against civilians].").

384. *See supra* notes 206–07 (recognizing the detention of enemy combatants on hostile ground for the duration of a conflict as a "fundamental . . . incident to war").

385. *See supra* notes 256–58 (displaying deference in various areas of government affairs). In fact, the Court in *Munaf* made a point to observe that it was concerned about intruding on the executive's authority to conduct military operations because the petitioners were captured and detained in "an active theater of combat." 128 S. Ct. 2207,

of-powers concerns are not as strong when detentions are borne of military necessity.[386]

Since 9/11, however, suspects in the war on terror have been captured throughout the world.[387] A concern arises where an alien is captured somewhere other than a battlefield.[388] Outside of this universally accepted setting, military-led detention implicates a type of executive action that does not enjoy the same set of considerations. By securing broad diplomatic arrangements and generous lease agreements with the host state, the executive sets up a temporary system of governance where military action can go unsupervised and without accountability.[389] Prisoners captured on the battlefield are sent through this system as a practical consequence of their proximity to the detention site. But prisoners captured elsewhere lack this proximate connectivity. This raises a concern that their transfer to a zone of lawlessness is made in part to operate outside of traditional norms. Part of what animated Kennedy's separation-of-powers discussion in *Boumediene* was that the executive strategically sent prisoners to a location where they could exert full control without judicial review.[390]

This, however, does not entirely foreclose the possibility that someone detained on a foreign battlefield can use habeas corpus. In fact, the prisoners that successfully invoked habeas corpus in *Munaf* were apprehended and detained in what the Court

---

2224 (2008) (quoting Brief for the Federal Parties at 16, *Munaf*, 128. S. Ct. 2207 (Nos. 06-1666, 07-394) *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_FederalParties.pdf).

386. On the battlefield, separation-of-powers concerns simply do not find their way into the functional analysis. In this context, the location of combatant detainee confinement is a result of practicality and necessity, not strategy.

387. *See supra* notes 117–29 and accompanying text (listing various countries off the battlefield in which detainees allege that their capture took place).

388. *See supra* note 291 (distinguishing that battlefield detainees are "qualitatively different" from prisoners captured elsewhere).

389. *See supra* notes 32, 234, 317–19 (relying on separation-of-powers principles when the executive creates authority for itself to act without accountability).

390. *See supra* note 234 (declaring that the executive branch cannot bypass judicial oversight by strategically detaining prisoners in Cuba); *cf.* Neuman, *supra* note 11, at 279 ("[T]he Court's salutary inclusion of *both* the site of apprehension and the site of detention as factors should prevent the government from evading constitutional constraint by deliberately moving detainees from locations where the writ protects them (including the mainland United States) to locations where it does not.").

described as "an active theater of combat."[391] Nevertheless, in contrast to non-battlefield detainees, the Court is willing to provide greater deference to the executive branch on the battlefront because separation-of-powers concerns are not as strongly implicated.[392]

4. Nature of the Site of Detention

The objective amount of control over the sites of detention proved to be a pivotal factor in the cases that have addressed the extraterritorial application of habeas corpus. The Court in *Boumediene* was clearly influenced by the fact that the United States exercised plenary control over Guantánamo.[393] The brief opinion in *Hirota* indicates, however, that there is a minimum imperative—U.S. forces must operate under an undisrupted command chain in order to attribute detention practices to them.[394] U.S. control (or lack thereof), in this sense, acts as an absolute inhibitor to constitutional coverage unless and until that minimum level is satisfied.[395]

The difficulty lies in assessing those cases falling between the two extremes. The court in *Al Maqaleh* arrived at the conclusion that the United States commands a degree of control over Bagram that is not quite commensurate with Guantánamo but still objectively high, notwithstanding the facts that U.S. forces are aided by others and U.S. jurisdiction is not exclusive.[396] The

391. *Supra* note 278. The precedential value of *Munaf* must be viewed in current context: the opinion was delivered at a time before the promulgation of the U.S.-Iraq status of forces agreement ("SOFA-I") and before the focus of U.S. forces in the region shifted from combating "terror" to helping restore stability in Iraq. *See supra* notes 111–15, 183 (outlining character of U.S. presence in Iraq before and after formalizing the SOFA-I). The prisoners also pursued relief under section 2241, which is considerably more generous in its application than the Suspension Clause. *See* Cohen, *supra* note 334 ("The Court could have differentiated *Hirota* . . . [but i]nstead, the Court relies mainly on the open-ended language of the habeas statute and the petitioners' presence within the 'actual custody' of the United States.").

392. *See supra* notes 383–86 (recognizing that executive branch does not act with unrestrained power when conducting universally recognized wartime activities).

393. *See supra* note 246 (describing U.S. control as "absolute" and "indefinite").

394. *See supra* notes 269–71 and accompanying text (paraphrasing the case's holding).

395. *See supra* note 351 (differentiating between proclivity factors and inhibiting factors).

396. *See supra* notes 294–97 and accompanying text (detailing the precise nature of U.S. control at Bagram). To simplify matters, nearly every overseas U.S. military facility

analysis of the court reveals that the strict language of the legal documents governing U.S. presence is not conclusive; instead a holistic examination is used to measure to practical day-to-day authority asserted by the United States.[397] Furthermore, any discussion of U.S. control within the country as a whole would be a non sequitur because the inquiry is concerned solely with the control directly over the detention facility.[398] Finally, *Al Maqaleh* looked to *past* control as an aspect of its temporal inquiry, but this conflicts with the basic premise of the *Insular Cases*.[399] The doctrine of territorial incorporation was unconcerned with past presence because every new territory was de facto a "new acquisition."[400]

In sum, the Suspension Clause is inoperative unless a bare minimum is established.[401] But after meeting the initial threshold, the greater the level of U.S. control, the greater the proclivity for application of the Suspension Clause.[402] Once the proper scope of U.S. influence is identified, it is then possible to isolate the constitutionally-relevant level of U.S. control.[403]

5. Practical Considerations

Two distinct prudential limitations can be discerned from recent case law: issues relating to the ongoing military effort and those regarding the maintenance of comity.

The Court in *Boumediene* devoted significant attention to the impact that habeas review would have on military resources, but

---

will fit this classification absent some special diplomatic agreement. *See supra* note 205 (conceding that nearly all overseas U.S. facilities operate with a full degree of control).

397. *See supra* note 298 and accompanying text (pinpointing the "practical" U.S. control).

398. *See supra* note 299 (discounting aid for allies in the control calculus as unrelated to control at the detention facility). Of course, an instrument governing the U.S. presence in the country as a whole may also bear on the authority the United States exercises over its military bases.

399. *See supra* notes 226, 247 (discussing the doctrine of territorial incorporation).

400. *See supra* notes 51–59 accompanying text (supplying a brief background on *Insular Cases*).

401. *See supra* notes 394–95 and accompanying text (recognizing that the Suspension Clause is precluded from operating in places where the United States cannot produce the prisoner).

402. *See supra* notes 350–51 (perceiving that proclivity factors strengthen alien grounds for constitutional protection under a model of "global due process").

403. *See supra* notes 396–400 and accompanying text (identifying the relevant constitutional scope of U.S. control).

did so without reference to military operations in Iraq and Afghanistan.[404] This omission implies that this consideration is only concerned with strain imposed on the military unit directly responsible for supervising the petitioning class of detainees and not U.S. forces-at-large.[405] *Al Maqaleh* further refined this inquiry by breaking down the impact on military operations into detention facility security,[406] procedural difficulties in managing habeas claims,[407] and the number of prisoners who would benefit from a favorable ruling.[408] Given that military resources are not static, it follows that the military unit directly responsible for a detention facility may be strained at one point in time but not at another when the same procedures are used.

Although *Munaf* was forced to bifurcate the analysis of the habeas petition because the question on appeal was statutorily-based, the discussion of equitable barriers in the merits section nevertheless carries constitutional significance.[409] Because habeas corpus is an equitable concept, concerns of interstate comity can directly inhibit a court from exercising its habeas power.[410] This understanding rings with constitutional significance because it teaches that prudential barriers arising from interstate comity may deter a court from issuing the writ, even where all other facts

404. *See supra* note 248 and accompanying text (focusing solely on the "military mission at Guantanamo").

405. *Cf. supra* note 398 and accompanying text (limiting the degree of control to that asserted over the detention facility alone).

406. *See supra* note 307 (describing the burden on detention security).

407. *See supra* note 309 (describing administrative difficulties). The district court in *Al Maqaleh* quickly disposed of this issue because technological advances, which were already in use in the Guantánamo cases, mitigate many administrative burdens. *See supra* note 309 (downplaying the impact of administering habeas petitions due to technological advances).

408. *See supra* note 310 (describing the number of affected detainees).

409. *Munaf* takes on even greater importance because, with the exception of one Bagram petitioner, neither *Boumediene* nor *Al Maqaleh* disposed its case on the ground that U.S. intervention would usurp the jurisdiction of a foreign court. *See supra* notes 249, 311 (punting the comity issue). *Munaf*, however, engages in a lengthy discussion on comity. 128 S. Ct. 2207, 2221 (2008).

410. *See* Francis v. Henderson, 425 U.S. 536, 539 (1976) ("[C]onsiderations of comity and concerns for the orderly administration of criminal justice [may] require a federal court to forgo the exercise of its habeas corpus power." (citing Fay v. Noia, 372 U.S. 391 (1963))); *accord* Danforth v. Minnesota, 128 S. Ct. 1029, 1040 (2008) (indicating that courts "adjust the scope of the writ in accordance with equitable and prudential considerations." (citations omitted)); Duckworth v. Eagan, 492 U.S. 195, 213 (1989) (O'Connor, J., concurring) ("[T]he Court has long recognized that habeas corpus [is] governed by equitable principles").

favor its use.[411] A common theme to modern-day international relations is that "we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.'"[412] As one aspect of this understanding, it is undisputed that all nations have exclusive jurisdiction to punish offenses by any person within its borders unless they expressly or implicitly surrender jurisdiction.[413] This principle precludes domestic courts from reviewing habeas claims that relate to an ongoing or concluded foreign tribunal.[414] *Al Maqaleh* took this a step further by extending the principle to a prisoner who was *potentially* subject to transfer to the host state and did not necessarily even face criminal charges under their custody.[415]

6. Reasonable Amount of Time

Finally, *Al Maqaleh* pointed to a passage in *Boumediene* that indicated that the executive is entitled to a "reasonable period of time" before habeas review would become practical.[416] Specifically, the Court cautioned that it would be an "unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is

411. *See Munaf*, 128 S. Ct. at 2221 ("The question, therefore, even where a habeas court has the power to issue the writ, is 'whether this be a case in which [that power] ought to be exercised.'" (quoting *Ex parte* Watkins, 28 U.S. 193, 201 (1830))).

412. Verdugo-Urdiquez v. United States, 494 U.S. 259, 275 (1990) (quoting Perez v. Brownell, 356 U.S. 44, 57 (1958)).

413. *See* Wilson v. Girard, 354 U.S. 524, 529 (1957) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."). As to this latter point, the Court declared nearly two hundred years ago that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812). Justice Marshall went on to state that "[a]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Id.*

414. *See supra* note 279 (citing authority that disfavors collateral review of foreign tribunals).

415. *See supra* note 311 (precluding U.S. review on possible transfer to Afghan authority). It bears note that *Munaf* involved prisoners who imminently faced transfer to Iraqi authorities. *See supra* note 267 (tracing the procedural history of *Munaf* petitioners).

416. *Al Maqaleh*, 604 F. Supp. 2d 205, 216 (D.D.C. 2009).

taken into custody."[417] In neither case did the courts address where that point lies because six-plus years was seen as exceeding a reasonable amount of time.[418]

This initial window of reasonableness, however, should not be seen as a static concept. Kennedy explained that the initial window of reasonable time is largely a function of the interplay between the desire to carry out detentions under a streamlined executive framework and the role of the judiciary to prevent excessive executive power within the separation-of-powers scheme.[419] As noted earlier, however, detentions carried out directly from the battlefield carry a level of implied legitimacy under the laws of war that detentions off the battlefield do not enjoy.[420] The time it would take to reach a formal disposition would not significantly differ in these two scenarios, but the detention of a prisoner captured from the battlefield is already sustained by international law and the initial window of time set aside for them to exhaust administrative channels of relief should reflect this understanding. While the exact point may be uncertain in these two situations, the discussion of this issue by the courts reveals that time at least initially acts as acts as a strict bar to judicial review.[421]

Although all of the authorities to consider the influence of time have thus far perceived it as an inhibiting factor, time can also act as a proclivity consideration. The Court at other times has displayed great sensitivity to the danger of prolonged detention by an unchecked executive.[422] And with no clear end

417. Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008).

418. *See supra* note 290 and accompanying text (discussing "reasonable amount of time" in cases of the *Boumediene* and *Al Maqaleh* petitioners).

419. *See Boumediene*, 128 S. Ct. at 2275 ("Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' [habeas] role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power."); *see also supra* notes 256–58 (recognizing the prominence with which the separation-of-powers principle figured into the role of habeas corpus in the *Boumediene* opinion).

420. *See supra* notes 383–86 (explaining that detentions carried out on the battlefield do not involve the same separation-of-powers considerations because they are widely accepted as a legitimate practice of war).

421. *See supra* note 351 (distinguishing between proclivity factors and inhibiting factors).

422. *See supra* note 208 and accompanying text (hypothesizing that detention in the current war on terror could last for a prisoner's lifetime); *see also supra* note 258 (cautioning the necessity for restraint on unlimited executive power in times of war).

in sight, the war on terror is already one of the longest in our country's history.[423] The plurality in *Hamdi* took care to warn that traditional laws of war concerning enemy imprisonment may "unravel" in the face of protracted enemy detention.[424] Because the writ is used as a check on the executive, time is clearly a significant consideration. Habeas corpus is a device used to rectify illegal detention, so the longer that a prisoner is detained under what is alleged to be unlawful authority, the graver the potential breach of the principle underlying habeas corpus.[425] Someone imprisoned for decades under the justification of war would certainly have a greater interest in receiving judicial review than someone freshly captured from the battlefield. On the continuum of time, the longer that a prisoner is detained beyond the initial window of reasonableness, the greater their claim to the Suspension Clause would become.[426]

C. *Implications Through Example*

The Court recognizes the inherent authority of the executive to detain persons on the battlefield as enemy combatants.[427] Although the Court has yet to squarely address whether this power extends off the battlefield in the current war on terror,[428] it still remains theoretically possible for the executive to capture suspected combatants anywhere in the world.[429] The following section fleshes out some of the concepts addressed above to better illustrate the current geographic scope of the Suspension Clause. Although this Note is centrally

---

423. *See* RICHARD HOLMES ET AL., OXFORD COMPANION TO AMERICAN MILITARY HISTORY 849 (2001) (specifying that terror conflict is among the longest wars in U.S. history).

424. *See supra* note 208 and accompanying text (warning that the traditional laws of war may "unravel" if war on terror continues into the future).

425. *See supra* notes 30–40, 224 (explaining that the writ of habeas corpus serves to ensure that detentions are carried out within lawful bounds).

426. *See supra* notes 350–51 (explaining that proclivity factors strengthen alien grounds for constitutional protection under a model of "global due process").

427. *See supra* notes 206–07 and accompanying text (authorizing battlefield detentions for the duration of a conflict as a "fundamental . . . incident to war").

428. *See supra* note 206 and accompanying text (noting the Court's decision to vacate consideration of a case involving detention of a terror suspect off the battlefield); *see also supra* note 208 (noting unconventional nature of war on terror).

429. *See supra* notes 117–29 and accompanying text (providing that captures off the battlefield is still a viable option and listing countries in which current detainees were captured).

concerned with the extraterritorial application of the constitutional right to habeas corpus, it is important to first address who can invoke habeas corpus domestically in order to provide a fuller picture of the Suspension Clause's true domain. Therefore, this section will proceed by exploring the habeas rights of detainees domestically, and then internationally.

1. Detention within a U.S. Territory

a. Suspected Citizen Combatant

The writ of habeas corpus is plainly available in both its statutory and constitutional forms to any citizen located within the territory of the United States.[430] This would seem to end the inquiry for any suspected citizen combatant held at a facility within the sovereign territory of the United States. It is of no instance whether said citizen was initially apprehended outside the sovereignty of the United States, even if on a foreign battlefield, because any person presently located within the United States or one of its territories is entitled to invoke the protections of habeas corpus to challenge their detention.[431]

b. Suspected Alien Combatant

There are several under-occupied, high-security military prisons located within the United States that many speculate may be used as a detention site for the remaining Guantánamo Bay inmates once the base is shut down.[432] All aliens that are not confined at Guantánamo Bay naval base remain deprived of statutory habeas corpus by way of the MCA.[433] Therefore, an alien detained at a mainland holding facility must look to the constitutional right to habeas corpus in order to overcome

430. *See supra* note 89 (synthesizing the statutory and constitutional right to habeas corpus within U.S. territory); *see also supra* notes 335–38 (concluding that the MCA does not affect citizens' rights under section 2241).

431. *See supra* note 367 (entitling a citizen combatant to invoke habeas protection because of their present location within the United States, even though captured overseas).

432. *See supra* notes 198–202 and accompanying text (speculating as to where Guantánamo detainees will be transferred).

433. *See supra* note 341 and accompanying text (clarifying that *Boumediene* only served as an as-applied invalidation of the jurisdiction-stripping provisions of the MCA).

section 7 of the MCA and receive review in an article III court.[434] However, the functional approach intimated in *Boumediene* only relates to the *extraterritorial application* of the Suspension Clause and is therefore presumably inapplicable in the domestic arena.[435]

Even without relying on the functional model, the protections of the Suspension Clause should nevertheless run to enemy aliens detained within U.S. borders. For aliens, physical location within a U.S. territory strongly favors application of constitutional protections.[436] And because the Suspension Clause does not discriminate between citizens and aliens, the Court recognizes that it is available to *all individuals* within the United States.[437] This construction is consistent with the writ's common-law application.[438]

It is true that the rights aliens enjoy domestically may be constitutionally circumscribed in times of war if they hold enemy allegiance.[439] However, this general principle does not apply to the entire panoply of limited protections that aliens receive within the United States. The retraction of habeas corpus privileges from aliens, even in times of war, would belie the narrow constitutional grounds provided for its suspension by Congress.[440] The *Eisentrager* Court even acknowledged that aliens with enemy ties are entitled to a brief judicial review of what is referred to in *Boumediene* as their "status determination" if they

---

434. *See supra* notes 342–45 and accompanying text (concluding that alien detainees must turn to Suspension Clause to receive habeas review in wake of MCA).

435. *See supra* note 223 (specifically defining the three-prong functional test as relating to the general "reach" of the Suspension Clause beyond U.S. territory).

436. *See supra* note 360 and accompanying text (stating presumption that aliens within U.S. territory receive limited constitutional protection).

437. *See supra* note 89 (maintaining that all persons within the United States may turn to the Suspension Clause for its protections); *cf.* Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (vesting alien immigrants with the right to habeas corpus). Because the right is available to anyone within the United States, and Guantánamo "[i]n every practical sense . . . is not abroad," *Boumediene v. Bush*, 128 S. Ct. 2229, 22261 (2008), the Court extended statutory and, then later, constitutional habeas corpus to aliens detained there.

438. *See supra* note 225 (collecting founding-era authority that displays aliens within the territorial jurisdiction of the Crown had standing to levy a habeas action).

439. *See supra* note 361 and accompanying text (noting that the rights aliens enjoy during peace may be restrained in times of war if they hold allegiance to an enemy nation).

440. *See supra* note 29 (emphasizing the importance of writ of habeas corpus to Framers given its narrow grounds for suspension).

are detained within the territorial jurisdiction of the United States.[441] In part due to these considerations, the Court has consistently entertained, although not always issued, habeas petitions filed by or on behalf of enemy aliens located within the territorial jurisdiction of the United States.[442]

Munaf instructs, however, that even outside of the functional framework a court must consider equitable barriers before issuing the writ.[443] However, the traditional considerations are inapposite in the case of domestically transferred Guantánamo inmates. Holding prisoners in a U.S. military prison that is already appropriately staffed for the purpose of prison security would not divert or strain resources from the broader military mission at home.[444] And concerns of comity are irrelevant in the domestic context because there is no other government with which habeas proceedings would cause friction.[445] In short, the writ could issue domestically without any major prudential obstacles. An enemy alien held at a detention facility within the United States would thus have standing under the Suspension Clause to challenge their detention on habeas corpus review.

2. Detention Outside of the United States

a. Citizen Combatant Outside the Territorial United States

Because the MCA does not impact citizens, section 2241 still remains a valid avenue of relief for all U.S. citizens.[446] Use of the statute is not precluded by the presence of the citizen petitioner

441. *See supra* note 361 (conceding that an enemy alien is entitled to limited judicial review of executive status determination).

442. *See supra* note 90 (collecting authority entertaining habeas applications by enemy aliens).

443. *See supra* note 411 (subjecting habeas corpus to the equitable discretion of court).

444. *See supra* notes 404–05 (restricting the scope of inquiry to the impact on the military unit directly responsible for detainee operations); *see also supra* note 204 (quantifying how military penal facilities are historically under-occupied and adequately staffed).

445. *See supra* notes 413–15 (indicating that comity relates to usurping authority of another government).

446. *See supra* notes 335–38 (concluding that the MCA does not affect citizens rights under section 2241).

in a foreign country.[447] This does not mean, however, that section 2241 will "follow the flag."[448] The most common subsection of the statute used to seek relief requires U.S. "custody" over the prisoner,[449] which, in the extrajurisdictional context, is a function of control.[450] However, legal control is lacking where U.S. forces are present but operate subject to a "broken" chain of command.[451] Moreover, prudential barriers may prevent an otherwise cognizable habeas application from issuing.[452] Thus, a citizen's overseas habeas rights turn on the level of U.S. control and practical concerns.

i. Detention at a U.S. Military Base

Take the situation of a U.S. citizen combatant captured on the Afghan battlefield and detained at Bagram. *Munaf* found custody satisfied for purposes of section 2241 where the official charged with the prisoner's detention exercises enough control to produce the prisoner.[453] This level of control was displayed at Camp Cropper in Iraq, even though U.S. presence there was uniquely fashioned by a set of diplomatic agreements unlikely to ever be reproduced.[454] But in most other contexts, U.S. control at any of its overseas facilities will far exceed this low threshold.[455] A U.S. court would therefore usually have jurisdiction to hear a claim filed by the U.S. detainee at Bagram.

---

447. *See supra* note 333 and accompanying text (elaborating that section 2241 jurisdiction will attach even where prisoner is located beyond the reach of a federal district court).

448. *Supra* note 334 (quoting a commentator as portending that habeas will "follow the flag" in the wake of *Boumediene*).

449. 28 U.S.C. § 2241(c)(1).

450. *See supra* note 273 and accompanying text (equating custody with the power to produce the prisoner); *see also, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 438 (2004) (explaining that a prisoner may name "the entity or person who exercises legal control" over their custody, when the immediate custodian is unreachable by the process of *any* U.S. district court).

451. *See supra* notes 270, 394 and accompanying text (considering "chain of command" theory on control and custody).

452. *See supra* note 411 (subjecting habeas corpus to the equitable discretion of court).

453. *See supra* note 273 (holding that custody, for purposes of section 2241, lays where the United States has the power to produce the prisoner).

454. *See supra* notes 110–16 and accompanying text (outlining the legal contours of U.S. occupation in Iraq prior to the *Munaf* decision).

455. *See supra* note 205 (conceding that almost any overseas U.S. military facility will necessarily operate with a high level of U.S. control).

In this particular scenario, there is the added element of battlefield capture. As a result, the Court may accord the executive branch greater deference in its detention practice.[456] This fact, however, only weighs on prudential concerns incident to issuing the writ and is distinct from the jurisdictional inquiry under section 2241.[457] It bears noting that in *Munaf* U.S. citizens were denied access to the writ when captured on the battlefield in Iraq.[458] However, the primary reason they were denied the writ was due to concerns of friction with the host government; the wartime authority of the executive branch was only mentioned as a mere afterthought.[459] Moreover, the usual leeway provided to the executive branch in this context is unlikely to overcome the citizen's fundamental interest in being free from physical detention by one's own government in the face of treasonous charges.[460] Consequently, a U.S. citizen detained at any of the U.S. military's traditional bases, such as Bagram, would likely be able to seek relief under section 2241 so long as it would not jeapordize international diplomacy by undermining the prerogative of some domestic entity of the host nation.

ii. Detention by Extraordinary Rendition

The nature of detention is significantly affected where the prisoner is held at a location operated by a third party. The use of extraordinary rendition was not conclusively prohibited by President Obama's January 22, 2009 executive order.[461] Under this program, prisoners are transferred to the temporary *custody*

456. *See supra* notes 384–86 and accompanying text (resolving that executive decisions are accorded greater leeway in the area of battlefield detentions because laws of war recognize practice as a legitimate use of executive power).

457. *See supra* notes 275–78, 409 and accompanying text (observing that practical considerations in analyzing section 2241 in *Munaf* were relevant to the merits of the petition and distinct from the jurisdictional inquiry).

458. *See supra* notes 275–79 and accompanying text (denying habeas relief to U.S. prisoners captured in Iraq).

459. *See supra* note 278 (noting in passing that detentions occurred during active hostilities).

460. *Supra* note 366 and accompanying text (explaining that the interest in being free from one's own government is a "fundamental" liberty interest of all U.S. citizens).

461. *See supra* notes 189–90 and accompanying text (ordering all secret holding facilities run by the United States to close but holding open the continued vitality of extraordinary rendition).

of another country.[462] As in *Munaf*, this simple reality would seem "the end of the jurisdictional inquiry" for purposes of section 2241.[463] After handing over the prisoner to the *custody* of another entity, the United States relinquishes its control over their person.[464] And control over the prisoner is the touchstone of section 2241 jurisdiction.[465] Although the United States might be in a position to request that the prisoner be released back to U.S. custody, this is precisely the type of broken command chain that proved fatal to the habeas application of the Japanese commander in *Hirota*.[466]

Just because the citizen combatant lacks standing to use section 2241 does not mean he is completely without recourse. After all, citizenship is a crucial factor that strongly favors extending constitutional protections.[467] However, prudential obstacles can stand in the way of habeas corpus, even where all other factors favor its application.[468] Skipping ahead directly to the analysis of practical concerns, then, there exists a distinct problem relating to comity. The relief that the hypothetical prisoners would likely seek is release from the country in charge of their detention.[469] It is axiomatic that the United States cannot dictate what another sovereign nation should or should not do.[470] This type of unilateral directive would subvert the comity essential to inter-state harmony[471] far more severely than second-guessing another country's institutions or usurping it of an

462. *See supra* notes 186–87 and accompanying text (summarizing the transfer process involved in extraordinary rendition).

463. *See supra* note 273.

464. *See supra* note 450 (equating custody with control in the international context).

465. *Supra* note 273 and accompanying text (providing that custody under section 2241 is measured by the control a state has over a prisoner).

466. *See supra* notes 270, 394–95 (displaying that broken command chain acts as an absolute inhibitor to extraterritorial application of habeas corpus).

467. *See supra* notes 355–70 and accompanying text (underscoring the importance of citizenship in assessing the reach of the Suspension Clause).

468. *See supra* note 411 (subjecting habeas corpus to the equitable discretion of court).

469. *See supra* notes 22–26 (identifying the traditional relief secured by habeas corpus as relief from custody).

470. *See supra* note 413 (proclaiming that the authority of a nation-state within its own jurisdiction is absolute and exclusive).

471. *See supra* note 412 and accompanying text (perceiving that an essential aspect of modern international relations is that governments must coexist with one another).

opportunity to try suspected criminals.[472] Consequently, a citizen combatant in such a situation would be blocked from seeking refuge under the Suspension Clause.[473]

b. Alien Combatant Outside of the Territorial United States

Unlike citizens, aliens detained abroad are foreclosed from using section 2241 under the MCA.[474] Therefore, they must turn to the Suspension Clause for relief.[475] To date, the two cases to tackle an alien's standing to mount a constitutional habeas challenge involved situations where the petitioner was detained in a location other than his or her point of capture.[476] Justice Kenedy's opinion in *Boumediene* cautiously noted that the constitutional balance would be different if the detention facility was located in an area with ongoing hostilities.[477] The natural question is whether prisoners detained on the battlefield also enjoy the protections of the Suspension Clause and therefore have standing to challenge their detention on habeas review. Constitutional coverage is generally favored under the theory of "global due process" that is associated with the functional model.[478] On the other hand, generally accepted laws of war recognize the inherent wartime authority of a nation to detain enemy combatants from the battlefield.[479]

Take the three petitioners in *Al Maqaleh* who were provided habeas corpus rights, but instead assume that they were captured on the battlefield. The salient question is whether capture in a

472. *See supra* notes 279, 414–15 and accompanying text (restricting the use of habeas corpus when issuing the writ would usurp jurisdiction of foreign tribunals).

473. Given the important prudential barriers present in this situation, the same could be said for an alien combatant.

474. *See supra* note 341 and accompanying text (clarifying that *Boumediene* only served as an as-applied invalidation of the jurisdiction-stripping provisions of the MCA).

475. *See supra* notes 342–45 and accompanying text (concluding that alien detainees must turn to Suspension Clause to receive habeas review in the wake of the MCA).

476. *See supra* notes 233–34, 317–19 (reaching conclusion in part due to separation-of-power concerns present when prisoners are transferred to a remote detention facility).

477. *See supra* note 250 (speculating that *Boumediene* might come out differently if the detention site were located in an active theater of war).

478. *See supra* notes 75–77 (associating the theory of "global due process" that favors constitutional protection with Justice Kennedy's concurrence in *Verdugo-Urquidez*).

479. *See supra* notes 206–07 and accompanying text (authorizing battlefield detentions as"fundamental" and "incident to war").

theater of war would alter the result reached in that case.

Clearly, the site of apprehension does not impact a prisoner's citizenship,[480] the basis for their detention,[481] or U.S. control over the detention facility.[482] These factors therefore remain as they stood in *Al Maqaleh*. Notwithstanding these consistencies, there are several notable differences. First, the procedures used to reach a detainee's status were recently overhauled to conform to generally-accepted international practices.[483] Furthermore, the site of apprehension element is diminished in value from its place in *Boumediene* and *Al Maqaleh* because capture is made on a battlefield.[484] Since these detentions do not implicate the same prospect of unrestrained executive power, they should receive an appropriate level of deference.[485] The issue is thus whether an alien combatant should receive protection under the Suspension Clause when he is held at a facility with a high, but not plenary, degree of control and disputes a presumptively valid detention that was arrived at through a standard process.

There is, however, even more at play when practical concerns are considered. The vast majority of the roughly 800 detainees currently held at new facility at Bagram were detained on the battlefield.[486] The new facility also currently serves as the preferred site for indefinite detention.[487] By inference, a vast majority of all new detainees to go through Bagram's doors

480. *See supra* notes 362–71 and accompanying text (discussing relevant considerations under the citizenship factor).

481. *See supra* notes 372–82 and accompanying text (discussing relevant considerations under the status and process factors).

482. *See supra* notes 393–400 and accompanying text (discussing relevant considerations under the site of detention factor).

483. *See supra* notes 320–21 (revealing new procedures in use at Bagram to determine and periodically review a prisoner's status).

484. *See supra* note 291 and accompanying text (qualifying that prisoners captured on the battlefield are "qualitatively different" than other detainees); *see also supra* notes 206–207 and accompanying text (regarding battlefield detentions as "fundamental" and "incident to war").

485. *See supra* notes 384–86 and accompanying text (resolving that executive decisions are accorded greater leeway in the area of battlefield detentions because laws of war recognize the practice as a legitimate use of executive power).

486. *See supra* notes 163, 170 and accompanying text (disclosing that the current detainee population is around 800, most of which come from the Afghan battlefield).

487. *See supra* note 161 and accompanying text (revealing that that Bagram is the current default location for indefinite detention).

would be battlefield combatants as well.[488] Extending habeas corpus rights to this class of detainees would benefit a large, and continuously growing, number of prisoners.[489] Even with the technological advances used to administer habeas proceedings,[490] the military resources necessary to accommodate this number of habeas petitions would impose a significant strain on the military mission in Afghanistan generally and, more precisely, on the orderly management of the base itself.[491]

In terms of the functional model, these circumstances draw a closer comparison to the situation in *Eisentrager* than *Boumediene* on the Suspension Clause continuum. Standing in the way of extending constitutional protection to these prisoners is the practical difficulty in administering the sheer number of habeas petitions, which bears a strong resemblance to the concern identified by Justice Jackson in *Eisentrager*.[492] Each prisoner is an alien, captured in a location where military action receives considerable deference, and detained on the basis of a process designed to meet generally accepted standards—all of which disfavor extending the protections of the Suspension Clause. The strong, but not absolute, level of U.S. control at Bagram provides a modicum of support for extending constitutional safeguards[493] but is unlikely, on its own, to overcome the practical difficulties noted above. In sum, this situation is more closely analogous to *Eisentrager* than *Boumediene*, making it very likely that the Suspension Clause would not run to

488. *See supra* note 108 and accompanying text (announcing the troop surge in Afghanistan).

489. *See supra* notes 310, 408 and accompanying text (displaying that the number of prisoners that would benefit from a favorable ruling is a relevant practical consideration).

490. *See supra* note 309 (identifying technological advances that mitigate the impact of administering habeas corpus proceedings).

491. *See supra* notes 404–05 (specifying that practical impact on military activity relates only to unit responsible for detainee operations).

492. *See supra* note 240 and accompanying text (drawing attention to the difficulties facing military forces charged with administering habeas petitions overseas). Justice Kennedy in *Boumediene* identified this consideration as playing a crucial role in the outcome of *Eisentrager*. *See supra* note 241.

493. *See supra* notes 294–97 and accompanying text (detailing the precise nature of U.S. control at Bagram).

aliens captured and detained in Afghanistan.[494]

The outcome reached in the above example, however, could be quite different if a prisoner is detained for a prolonged period of time. Unlike all other objective factors, the length of time that a prisoner is held is the only variable that increases at a constant rate over the course of a conflict. As a result, a prisoner's assertion to the Suspension Clause would grow stronger the longer that he or she is detained without judicial review.[495] Speaking in the abstract, it is difficult to establish the type of impact an unreasonably long detention would have on the functional framework. Suffice it to say, a detention so unreasonably long may tip the equities to the point where the constitutional balance in the above example would vest the prisoner with standing to lay claim to the Suspension Clause.

CONCLUSION

In *Boumediene*, the U.S. Supreme Court ventured into new constitutional territory. After nearly two centuries of repose, the basic influence of the Suspension Clause finally reached a head when aliens imprisoned at Guantánamo Bay, Cuba, looked to its language in order to challenge the legality of their detentions. Not only did the Court crystallize its nascent understanding of the protection that inheres in the Clause, it also revealed its current position on the Constitution's extraterritorial force. But the case arguably raised more questions than it answered. Most significant to this Note, the case did not specifically address the extraterritorial force of the Clause beyond Guantánamo Bay. *Boumediene* only provides a loose framework—the "functional model"—for answering this question. This framework, however, assumes greater clarity when it is seen as part of the normative model underpinning the majority's opinion. Against that backdrop, this Note explored the likely operation of the Suspension Clause under the "functional model" in order to give a full picture of its true domain. Simply put, the Suspension

494. *See supra* notes 236–40 and accompanying text (denying protection under the Suspension Clause where there existed practical barriers to executing the writ and the prisoner's citizenship and location disfavored extension).

495. *See supra* notes 423–26 (concluding that a prisoner's right to the protections of the Suspension Clause grows stronger the longer that he or she is detained past the initial "reasonable" window to reach a disposition on their status).

Clause currently stands as a dynamic extraterritorial device in the wake of *Boumediene*. While it might run halfway around in the world, it could just as well stand impotent five feet across the U.S. border. Its length and strength vary depending on the fact-specific circumstances surrounding the prisoner invoking its venerable protection. Although the intersection of constitutional liberties and geography has plagued U.S. courts for as long as the country is old, perhaps the "functional model" will serve as a new panacea for courts confronting these difficult issues. As the "war on terror" progresses and U.S. tribunals continue to adjudicate habeas petitions mounted by prisoners in this war, the analysis contained herein should serve as a useful resource for practitioners, academics, and jurists alike.