

Executive Detention, *Boumediene*, and the New Common Law of Habeas

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I. INTRODUCTION

In September 2004, thousands of miles from home and after nearly three years of incommunicado detention without legal process, Murat Kurnaz finally learned the U.S. government's reason for detaining him. That day in a grey, ersatz courtroom in Guantanamo Bay, a panel of anonymous military officers comprising his Combatant Status Review Tribunal ("CSRT")¹ announced that Kurnaz was deemed an "enemy combatant" in part because his hometown friend in Germany, Selcuk Bilgin, had "engaged in a suicide bombing."² Under CSRT regulations, a Guantanamo detainee bore the burden of disproving the charges against him.³ Yet, not having seen Bilgin for years and without access to any information, let alone counsel, all Kurnaz could say to defend himself was that he had no idea Bilgin had ever done anything violent and that, "I don't need a friend like that."⁴ Because mere association with a terrorist was sufficient to establish "enemy combatant" status under the CSRT,⁵ his limited defense did not change the Defense Department's judgment.

Also unbeknownst to Kurnaz, earlier that summer lawyers had filed a habeas corpus petition on his behalf challenging his detention in federal court, pursuant to the U.S. Supreme Court's ruling in *Rasul*. As a return (or answer) to the habeas petition, the Government submitted the transcript of Kurnaz's CSRT and the panel's summary written judgment.⁶ Once the lawyers learned the basis for Kurnaz's detention, which had remained secret for years, they took no more than a week to accumulate ample evidence to prove the central charge against Kurnaz was absurd: Bilgin was alive and well in Germany and under no suspicion by German authorities.⁷ The other

1. The CSRT is an ad hoc administrative body the Bush Administration engineered hastily after the Supreme Court's rulings in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), to evaluate the Defense Department's prior assessment that each detainee in Guantanamo was an "enemy combatant." See *infra* text accompanying notes 162–78 (discussing the shortcomings of CSRTs); see also Baher Azmy, *Rasul v. Bush and the Intra-territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 399–400 (2007) (describing creation and implementation of the CSRT process).

2. Declaration of James R. Crisfield Jr. at 11, *Kurnaz [sic] v. Bush*, No. 04-1135 (D.D.C. Oct. 18, 2004) [hereinafter Crisfield Declaration].

3. See *infra* text accompanying notes 163–66 (discussing the deficiencies in the CSRTs, particularly the difficulties of disproving charges).

4. See Crisfield Declaration, *supra* note 2, at 11 ("I am here because Selcuk bombed somebody? I was not aware he had done that.").

5. See *infra* text accompanying notes 294–301 (discussing the minimal support necessary for a determination of enemy combatant status).

6. Respondent's Factual Return to Petition for Writ of Habeas Corpus by Petitioner Murat Kurnaz at 1, *Kurnaz v. Bush*, No. 04-1135 (D.D.C. Oct. 18, 2004).

7. See Richard Bernstein, *One Muslim's Odyssey to Guantánamo*, N.Y. TIMES, June 5, 2005, § 1, at 12 (reporting that Bilgin suicide bomber allegations are untrue); see also The Office of the Sec'y of Def. & Joint Staff, Transcripts and Certain Documents from Admin. Review Bd.

allegations in the return were similarly false or flimsy.⁸ Had Kurnaz been able to proceed with his habeas action in district court, a judge would very likely have granted him—and numerous others like him—the writ.⁹

Instead, Congress foreclosed Guantanamo detainees' access to the Great Writ altogether. Specifically, in passing the Detainee Treatment Act of 2005 ("DTA")¹⁰ and the Military Commissions Act of 2006 ("MCA"),¹¹ Congress replaced *Rasul's* promise of meaningful judicial review of the Executive's "enemy combatant" designations with exceedingly constrained review in the court of appeals that mandated acceptance of the CSRT's frequently dubious factual conclusions.¹² Thus, unlike in a habeas proceeding in district court, under the DTA, the court of appeals would have had to accept as true the CSRT's conclusion that Kurnaz's friend was a suicide bomber, even though it was objectively, demonstrably false.¹³

In *Boumediene v. Bush*,¹⁴ the Court restored the detainees' access to habeas corpus, rejecting for the first time in history the collaborative judgment of the political branches exercised in connection with military operations. Faced with anecdotes like Kurnaz's,¹⁵ compelling arguments

(ARB) Round One, Set 5 20000-20254, at 20080, 20080, http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Transcript_Set_5_20000-20254.pdf (affidavit of Bilgin swearing that he is alive and has not undertaken any suicide bombing); *id.* at 20084, 20084 (letter of local German prosecutor attesting that Bilgin suicide bomber charges are obviously false).

8. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470-71 (D.D.C. 2005) (explaining that classified CSRT charges against Kurnaz lack credibility and that other charges, even if true, could not lawfully support detention); see also Baher Azmy, *Epilogue to MURAT KURNAZ, FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTANAMO* 239, 235-51 (2008) (describing weakness of allegations against Kurnaz); Carol Leonnig, *Evidence of Innocence Rejected at Guantanamo*, WASH. POST, Dec. 5, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/04/AR2007120402307.html> (discussing recently declassified documents demonstrating U.S. and German government officials were aware of Kurnaz's innocence despite his enemy combatant classification); *60 Minutes: Nightmare at Guantanamo Bay* (CBS television broadcast Mar. 30, 2008) (disclosing evidence of innocence in Kurnaz's case).

9. See *infra* note 138 (discussing reports concluding that a large percentage of Guantanamo detainees were neither combatants nor affiliated with terrorist groups).

10. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2740, 2741 (2005) (amending statutory habeas procedures, codified at 28 U.S.C. § 2241, with an alternative scheme for review by the D.C. Court of Appeals of military detention decisions).

11. Military Commissions Act of 2006, 28 U.S.C. § 2241(e) (2006) (eliminating federal habeas jurisdiction to hear pending or future habeas petitions brought by enemy combatants).

12. See *infra* text accompanying notes 162-72 (discussing the inadequacy of fact-finding in CSRTs).

13. Kurnaz was released from Guantanamo in August 2006, though not by court order. According to the Government, he is still properly classified as an enemy combatant. His habeas petition is pending in the district court. *Kurnaz v. Bush*, No. 04-1135 (D.D.C.)

14. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

15. See *infra* text accompanying notes 176-78 (illustrating the DTA review scheme's inadequacies through Kurnaz's ordeal). At oral argument in *Boumediene*, Petitioner's counsel, Seth Waxman, vividly described the Kurnaz scenario. Transcript of Oral Argument at 75-76, *Boumediene*, 128 S. Ct. 2229 (No. 06-1196), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-1195.pdf. This rendering led Supreme Court

regarding the structural defects of the CSRT process,¹⁶ and an increasing skepticism about the Executive's ability to act lawfully absent judicial supervision,¹⁷ the Court ruled that the constitutional protections of the Suspension Clause reached extraterritorially to Guantanamo (and perhaps beyond) and that the DTA's alternative review scheme was not an "adequate substitute" for the full protections of habeas corpus. In effect, the Court decided that the indefinite military detentions in Guantanamo violated fundamental separation-of-powers principles enshrined by the Suspension Clause, even if justified by the executive branch to the satisfaction of the court of appeals, pursuant to standards set by Congress.¹⁸

Viewed one way, the decision easily falls along the continuum of previous "enemy combatant" cases such as *Hamdi*, *Rasul*, and *Hamdan v. Rumsfeld*¹⁹ (a grouping I refer to as the "Enemy Combatant Triad" or the "Triad"). The Court in *Boumediene*, as it had in these cases, authoritatively rejected the Executive's assertion that the executive branch should have full discretion, unfettered by any judicial supervision, to conduct detention operations. Viewed another way, however, the Court went significantly further than it had ever gone before. Largely setting aside a premise of *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*,²⁰ which governed the Enemy Combatant Triad, the *Boumediene* Court refused to defer to the concerted efforts of the political branches, where the judicial power should presumptively be at its weakest.

As a result, the Court elevated the judiciary to a preeminent role in reviewing military detention operations and assumed exclusive jurisdiction and control over habeas cases brought by two-hundred-plus Guantanamo detainees. Equally important, the Court chose not to limit its holding to the peculiar legal and physical space of Guantanamo Bay. Instead, it set forth a broad and assertedly judicially manageable framework to ascertain what, if any, constitutional rights might apply to other extraterritorial executive conduct. In addition, while the Court identified core deficiencies in the DTA process, it declined to define the substantive law that would govern the Executive's asserted authority to detain enemy combatants or to set forth a detailed procedural framework by which the hundreds of habeas cases should proceed in the lower courts.

commentator, Marty Lederman, to describe Waxman's oral argument as "one of the more powerful and effective rebuttals I've ever seen." Posting of Marty Lederman to SCOTUSblog, *Quick Reactions to Boumediene Oral Argument*, <http://www.scotusblog.com/wp/quick-reactions-to-boumediene-oral-argument/> (Dec. 5, 2007, 12:12 EST).

16. See *infra* Section III.B (describing the inadequacies of the DTA and CSRT).

17. See *infra* Section III.A.3 (describing bases for concerns about Executive overreach).

18. *Boumediene*, 128 S. Ct. at 2262–74.

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

20. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 609 (1952) (Jackson, J., concurring) (setting forth a continuum of executive power in which presidential action supported by Congress is entitled to the greatest judicial deference).

As this Article explains, *Boumediene* issued a largely unlimited invitation to the lower courts to create a whole new corpus of habeas law in the context of military detention—a body of law that, save for several marquee Civil War-era cases,²¹ has largely remained undeveloped since Reconstruction. Not surprisingly, the decision was subject to heated censure from within the Court²² and without,²³ as critics attacked the Court's failure to defer to political branches in the arena of military judgment or to provide meaningful guidance for administering its broad decree.

This Article praises *Boumediene's* historic judgment, defending the Court's asserted role as necessary and correct. This Article also attempts to bridge the gap between the strong normative value of separation of powers, which undergirds the Court's decision, and the concrete questions regarding the applicability of this norm to individual cases the district courts have been and will continue to adjudicate on remand. In so doing, this Article develops a comprehensive framework for what will be an ongoing discourse about this new common law of habeas.²⁴

Section II develops the context for understanding the significance of *Boumediene* as a landmark separation-of-powers decision by demonstrating the way in which it marks a significant departure, in terms of doctrinal and practical effect, from the Enemy Combatant Triad. Section III explains the decision along the interrelated axes of substance and methodology. In deciding whether the Suspension Clause has force extraterritorially, the Court rejected a series of proposed categorical rules and a constrained

21. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that citizens cannot be subject to military tribunals when civilian courts are available); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that the executive branch cannot suspend habeas corpus).

22. *Boumediene*, 128 S. Ct. at 2293 (2008) (Roberts, J., dissenting). Justice Roberts observed:

So, who has won? . . . Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

Id.

23. See Posting of Juliet Eilperin to The Trail: A Daily Diary of Campaign 2008, *McCain Applauded for Opposition to Court Decision on Guantanamo Bay*, http://voices.washingtonpost.com/44/2008/06/13/mccain_applauded_for_oppositio.html (June 13, 2008, 12:16 EST) (quoting Republican presidential nominee, John McCain, calling *Boumediene* “one of the worst decisions in the history of this country”).

24. Significantly, the Obama Administration has, in many ways, continued to defend Bush Administration legal positions that the *Boumediene* decision implicates. See *infra* Section IV.B (discussing limitations on detention powers). Likewise, the Obama Administration's promise to close Guantanamo in one year has not, subject to stays of habeas petitions agreed to by the parties, stopped the adjudication of outstanding habeas petitions filed in the district courts. Therefore, there is every reason to believe that the common-law habeas review of military detentions will be as significant tomorrow as it is today.

reading of the historical record that would have limited constitutional rights only to places over which the United States exercises formal political sovereignty. In place of such rules and history, Section III also explains, the Court developed a robust theory of separation of powers that obligated the judiciary to prevent the Executive from manipulating formal jurisdictional rules in an attempt to “govern without legal constraint.” This Section contends that, in adopting this striking “anti-manipulation” principle, the Court internalized a prevailing public narrative that the Bush Administration’s legal positions, adopted in support of executive operations, were policy-driven, unduly instrumental, and willfully evasive of legal limits. This Section concludes by arguing that the Court’s rejection of congressional judgment in this case was entirely within the Court’s competence and was an appropriate exercise of the judicial role.

Section IV explores the parameters of two critical substantive-law questions governing the status of Guantanamo detainees, which the Supreme Court left open for future resolution. First, do the protections of the habeas corpus statute or the Suspension Clause apply beyond the peculiar territorial space of the Guantanamo Bay Naval Base? Specifically, this Section considers whether, under *Boumediene’s* functionalist test and its predominant separation-of-powers concern, courts would have jurisdiction to entertain habeas petitions filed by enemy combatants detained by the U.S. military at Bagram Airfield in Afghanistan—a large prison now referred to as “Obama’s Guantanamo.”²⁵ Second, what substantive body of law governs the Executive’s legal authority to detain someone it classifies as an enemy combatant, and what core constraints may courts impose on such authority? I contend that the district courts should apply the international law of armed conflict to limit the scope of the detention authority—which the Executive has heretofore asserted to be virtually unlimited—and I document the ways in which district courts have started to impose sensible, if still developing, limitations on detention authority asserted in a variety of concrete cases.

Section V addresses the procedural framework that will have to govern these novel enemy-combatant cases. Recognizing that habeas is a flexible, adaptable remedy, the *Boumediene* Court emphasized that new factual development would be essential to resolve these novel habeas cases. In this sense, the Court ordered no ordinary remand; it did not announce a narrow substantive change in law²⁶ or produce an arguably new interpretation of a

25. William McGurn, Editorial, *Obama’s Gitmo*, WALL ST. J., Apr. 21, 2009, at A19; Warren Richey, *Next Flash Point over Terror Detainees: Bagram Prison*, CHRISTIAN SCI. MONITOR, Feb. 12, 2009, § USA, at 1.

26. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (limiting the admissibility of hearsay evidence under the Constitution’s Confrontation Clause).

long-standing procedural rule.²⁷ Rather, it directed district courts to conduct de novo habeas hearings of a kind they have not done for over one hundred years, and the Court did so with little more than an expression of confidence in the district courts' "expertise and competence."²⁸ Drawing on the limited precedent in this area, as well as the prominent role that the Court proclaimed habeas corpus should play in our separation-of-powers scheme, this Section attempts to describe a procedural and evidentiary framework to govern these habeas cases. In the course of this discussion, this Article demonstrates that courts can and have employed these standards prudently and incrementally and without posing any serious risk to national security. Indeed, consistent with the Suspension Clause's paramount concern with guaranteeing "freedom from arbitrary and unlawful restraint and the personal liberty,"²⁹ in the forty habeas petitions that have been fully adjudicated since *Boumediene*, district courts have granted the writ a remarkable thirty-one times.³⁰

II. THE ENEMY COMBATANT TRIAD AND THE *YOUNGSTOWN* BASELINE

Boumediene is an extraordinary decision, both because of what it specifically portends for the adjudication of a great number of cases involving wartime detentions and also for where it stands relative to the previous landmark cases of the Enemy Combatant Triad: *Hamdi*, *Rasul*, and *Hamdan*.³¹ All of these cases share several fundamental attributes with *Boumediene*. All rejected the Executive's asserted need for nearly unlimited discretion³² and likewise departed from the expectation that courts will

27. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 561–63 (2007) (altering the pleading standard under Fed. R. Civ. P. 8(a)(2)).

28. *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008). It is interesting to note, though hard to explain, that only one year later the Court expressed concern about the ability of district courts to manage discovery prudently in the context of challenges to the conduct of high-level government officials. *Iqbal v. Ashcroft*, 129 S. Ct. 1937, 1954 (2009).

29. *Boumediene*, 128 S. Ct. at 2244.

30. See *infra* Appendix (providing a list of habeas cases and their outcomes to date).

31. I do not include *Padilla v. Rumsfeld*, 542 U.S. 426 (2004), in this grouping because its holding is exclusively jurisdictional, setting forth a rule regarding the appropriate district in which a habeas petition should be filed, rather than adjudicating a substantive principle of law. See Jenny Martinez, *Process and Substance in the War on Terror*, 108 COLUM. L. REV. 1013, 1032 (2008) (describing the *Padilla* case as representative of "the triumph of process over substance" through a form of "process as avoidance" (quotation marks omitted)).

32. The claim that the Court departed from an obligation to defer to the Executive Branch is best manifested by dissenting opinions which, in each case, sided with the President. See, e.g., *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting) (arguing that the majority opinion amounted to a "game of bait-and-switch" on the President); *Hamdan v. Rumsfeld*, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting) (calling the majority's opinion "antithetical to our constitutional structure"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) (stating that the *Hamdi* plurality "fail[ed] adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs"); *Rasul v. Bush*, 542 U.S. 466, 506 (2003) (Scalia, J., dissenting) (arguing that the majority's interpretation of

presumptively defer to the President's asserted needs during wartime.³³ All started with a baseline presumption in favor of liberty and included paeans to the Court's central role in protecting fundamental constitutional values.³⁴ All appear to follow an approach that Professors Fallon and Meltzer have described as the Common Law Model of adjudication, in which courts employ a "creative, discretionary function in adapting constitutional and statutory language . . . to novel circumstances."³⁵

However, even along this continuum, there appears a significant doctrinal demarcation: by invalidating concerted action of both Congress and the President during wartime, *Boumediene* crossed a threshold never before traversed in Supreme Court history. Specifically, the Triad cases largely respect Congress's prerogatives and unique institutional role, while carrying out the Court's duty of protecting the legislative sphere from executive encroachment where individual rights are at stake. All three cases thus fall comfortably within the accepted *Youngstown* framework: where Congress authorizes executive actions (as the plurality believed in *Hamdi*) executive power is at its zenith, but where Congress expressly or implicitly denies such action (as in *Hamdan* and *Rasul*) executive power is at its lowest ebb.³⁶ Employing this framework—which effectively requires applying,

precedent is "unthinkable" because its asserted "departure has a potentially harmful effect upon the Nation's conduct of a war").

33. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (1998) (documenting "the reluctance of courts to decide a case against the government on an issue of national security during a war"). That framework, general as it is, contains exceptions as well as nuance. See, e.g., Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 1979 (2009) (suggesting factors that may affect whether courts ultimately give deference to the Executive at wartime, including the nature and size of the conflict, the asserted seriousness of the individual rights violation, whether Congress supports the Executive politically, and the strength or popularity of the sitting President).

34. See, e.g., *Hamdi*, 542 U.S. at 532 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment to those principles for which we fight abroad."); see also *Boumediene*, 128 S. Ct. at 2277 ("Security subsists, too, in fidelity to freedom's first principles."); *Hamdan*, 548 U.S. at 636 ("Where, as here, no emergency prevents consultation with Congress, judicial insistence on that consultation does not weaken our Nation's ability to deal with danger."); *Rasul*, 542 U.S. at 474 (tracing the roots of habeas to English common law); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 1 (noting that *Hamdi* and *Hamdan*'s interpretations of congressional enactments give "liberty the benefit of interpretive doubt").

35. Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, 120 HARV. L. REV. 2029, 2033 (2007).

36. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (noting the three-tiered executive-power framework); see also Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2 (2004) (noting that, historically, courts in wartime do not strike down government action if "Congress, as well as the executive, has endorsed the action"); Mark C. Rahdert, *Double-Checking Emergency*

deferring to, or interpreting congressional enactments—has obvious normative and institutional appeal. It recognizes that, as a matter of democratic theory, elected representatives are and should be primarily responsible for setting the boundaries for executive action during times of war or emergency.³⁷ It also recognizes that Congress, with all the tools and presumed expertise of a resourceful and open deliberative body, is generally in a better institutional position than the courts to weigh the competing policy considerations effecting a delegation or restriction of executive wartime authority.³⁸

In *Hamdi*, Justice O'Connor's plurality opinion concluded that Congress's September 2001 Authorization for the Use of Military Force ("AUMF") included both the authority for the Executive to direct force against persons who were associated with the September 11 attacks, as well as the derivative authority to detain those persons as "enemy combatants" in order to keep them from "taking up arms once again."³⁹ The detention of such persons, the plurality concluded, "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."⁴⁰ Justice Souter, joined by Justice Ginsburg, dissented from this part of the plurality's ruling. Souter concluded that the AUMF did not provide specific or clear enough authority to overcome the prohibitions on executive detention contained in a pre-existing provision of the Non-Detention Act,⁴¹ a law that prohibits the imprisonment of U.S. citizens, except by act of Congress.⁴²

Thus the opinions of the plurality and Justice Souter interpreted silence or ambiguity in the AUMF differently. This, of course, produced a significant practical consequence: the plurality upheld a novel and

Power: Lessons from Hamdi and Hamdan, 80 TEMP. L. REV. 451, 456 (2007) (noting that "if Congress remains passive . . . there is relatively little the judiciary can do on its own to restrain executive emergency power," and predicting that under his model, it would be doubtful that the Court in *Boumediene* would take the course it ultimately did and strike down the MCA).

37. See, e.g., Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (noting that the Framers "placed the power of war and peace with the legislative branch").

38. BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE AND THE WAR ON TERROR 117 (2008) (arguing that judicial review of military decisions depends upon "an unrealistic assessment of judicial competence and capacity to evaluate military actions"); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 809 (2004) (arguing that courts "do less well the more a dispute becomes polycentric, in that it involves more actors, more sources of law, and complicated social, economic, and political relationships").

39. *Hamdi*, 542 U.S. at 518–19.

40. *Id.* at 518.

41. 18 U.S.C. § 4001(a) (1971).

42. *Hamdi*, 542 U.S. at 543–44 (Souter, J., concurring) (noting that § 4001(a) was adopted "for the purpose of avoiding another *Korematsu*," and therefore to "preclude reliance on vague congressional authority . . . as authority for detention or imprisonment at the discretion of the Executive").

questionable use of executive power—a judgment that even led some commentators to conclude that *Hamdi* represented a significant victory for the Bush Administration.⁴³ Yet, despite proposing differing outcomes, O'Connor's plurality and Souter's concurrence fall methodologically within the *Youngstown* framework: each opinion looks to whether Congress delegated the executive action (though the two employ meaningfully different burdens of proof), and each can claim that a coordinate branch of government supported its decision to uphold or reject the asserted lawful delegation of power. Moreover, both the plurality and the Souter concurrence concluded that, while Congress may have authorized the detention of “enemy combatants” such as Hamdi—i.e. persons who actually engaged in hostilities in a zone of combat⁴⁴—judicial supervision of Hamdi's habeas petition and scrutiny of the Executive's “enemy combatant” classification must be meaningful, and not just a rubber-stamp of the Executive's claimed superior institutional judgment.⁴⁵ Thus, drawing upon common-law balancing principles it developed in the due-process context, the Court insisted that Hamdi “receive notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.”⁴⁶

In *Rasul*, the Court held that U.S. courts had jurisdiction under the habeas statute, 28 U.S.C. § 2241, to hear petitions filed by detainees held in Guantanamo, despite the Government's protest that the United States did not exercise formal sovereignty over that territory.⁴⁷ The Court deemed inapplicable a canon of judicial construction which presumes that statutes do not reach extraterritorially.⁴⁸ Because of Guantanamo's peculiar status as a territory over which the United States exercises “complete jurisdiction and

43. See, e.g., David B. Rivkin, Jr. & Lee A. Casey, Editorial, *Bush's Good Day in Court*, WASH. POST, Aug. 4, 2004, at A19 (praising aspects of the decision which grant the President broad legal discretion and the conclusion that “enemy combatants,” including U.S. citizens captured in the conflict against the Taliban, can be detained indefinitely).

44. *Hamdi*, 542 U.S. at 513, 523; see also *infra* text accompanying notes 284–301 (discussing the “limited category” of persons detainable as “enemy combatants”).

45. *Hamdi*, 542 U.S. at 535–36 (explaining that the government's position “serves only to condense power into a single branch of government”); *id.* at 535 (explaining that, while deference is owed to military judgments regarding “actual prosecution of war,” courts must “exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims [of individual rights] like those presented here”).

46. *Id.* at 533 (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)). In addition to importing this due-process constraint on executive conduct under the AUMF, the court imposed another constraint that this Article describes in detail later: it interpreted the AUMF in accordance with “longstanding law-of-war principles” which impose important limitations on the class of persons the executive is authorized to detain and the permissible purposes and duration of detention. *Id.* at 521; see Section IV.B (discussing limitations on detention powers).

47. *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

48. *Id.*

control,” it is functionally *a part of* U.S. territory.⁴⁹ Justice Stevens’s majority opinion was relatively opaque about whether the habeas statute (1) was limited to the arguably unique territorial status of Guantanamo, as much of the Court’s rhetoric seemed to suggest, or (2) could extend to all locations where U.S. forces hold foreign prisoners, meaning the courts have personal jurisdiction over respondents⁵⁰—in Justice Scalia’s prophecy, “to the four corners of the earth.”⁵¹ Scholars have variously viewed the Court’s attempt to harmonize the habeas statute’s unlimited provision for habeas jurisdiction with the peculiar circumstances of the Administration’s detention policy as “distort[ed]”⁵² or “entirely plausible.”⁵³ Nevertheless, the Court’s interpretation appears consistent with the Triad’s functionalist perspective, by rejecting the talismanic significance of sovereignty or citizenship rules and by ensuring that Congress and the judiciary together have a role in checking executive-branch operations. More fundamentally, the Court signaled to the Executive that it could not locate detention operations completely outside the constraints of law.⁵⁴

Because *Rasul* did not decide the merits of any habeas petition, nor set any particular standards for adjudicating constitutional- or international-law rights, it has been largely perceived as an empty substantive vehicle.⁵⁵ Nevertheless, it did plant seeds for future development of constitutional- and habeas-law norms for subsequent litigation.

First, the Court signaled that detainees held in Guantanamo possessed a fundamental constitutional right to be free from arbitrary detention.⁵⁶ This

49. *Id.*

50. *Id.* at 483–84.

51. *Id.* at 498 (Scalia, J., dissenting).

52. Robert J. Pushaw, *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1055 (2007).

53. Fallon & Meltzer, *supra* note 35, at 2059.

54. See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 45 (2006) (describing *Rasul* as a rejection of the Administration’s efforts to construct a “prison beyond the law”); Fallon & Meltzer, *supra* note 35, at 2059 (“[A] denial of jurisdiction could have established Guantánamo Bay as a permanent law-free zone, where the writs of no country’s courts would run.”).

55. See JOHN YOO, *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 87 (2005) (“*Rasul* studiously avoided any discussion of the substantive rights.”).

56. See Azmy, *supra* note 1, at 406–12 (arguing that footnote 15 of the *Rasul* opinion endorsed the functional approach that Justice Kennedy elaborated in his concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring), to extend fundamental constitutional rights where it would not be “impracticable and anomalous” to do so). In the post-*Rasul* litigation, one court agreed that *Rasul*, and the cases it relied upon in the footnote, implicitly signaled that fundamental due-process rights applied in Guantanamo. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). Another court concluded that *Rasul* effected no change in substantive rights. *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.C. Cir. 2005). On appeal of those rulings, the D.C. Circuit reprised its prior conclusion that aliens held in Guantanamo enjoyed no constitutional rights, *Boumediene v. Bush*, 476 F.3d 981,

foreshadowed precisely the functional analysis regarding the extraterritorial application of fundamental rights that the Court later expressly adopted in *Boumediene*.

Second, extending statutory habeas jurisdiction to Guantanamo necessarily carries with it an entitlement to substantive adjudication of the petition, even absent an entitlement to individual rights based on the Constitution or international law. Specifically, the assertion of habeas jurisdiction pursuant to § 2241(c)(1) of the habeas statute—the provision that codified section 14 of the 1789 Judiciary Act⁵⁷—requires the custodian to justify the petitioner’s deprivation of liberty by providing a sufficient legal and factual basis to detain. This requirement exists independent of an analysis of whether the custody is in “violation of the Constitution” under § 2241(c)(3).⁵⁸ This is an elementary lesson from Chief Justice Marshall’s opinion in *Ex parte Bollman*,⁵⁹ in which, after five days of hearings on treason charges related to the Aaron Burr conspiracy, the Court concluded “there is not sufficient evidence” to detain and ordered the petitioner’s release.⁶⁰ The jurisdiction-stripping provisions of the DTA and MCA, of course, eliminated this kind of substantive development of habeas law. Yet, by invalidating Congress’s statutory repeal, *Boumediene* effectively secured *Rasul*—and its latent potential—on constitutional footing.

In *Hamdan*, the Court considered a challenge to the legality of President Bush’s November 2001 Executive Order authorizing the trial of enemy combatants by military commissions. Before reaching the merits, the Court rejected two significant challenges to its jurisdiction, ruling that it was unnecessary to abstain from decision until after *Hamdan*’s commission had been completed⁶¹ and that the DTA provision purporting to strip the courts, including the Supreme Court, of jurisdiction to hear habeas petitions filed

992 (D.C. Cir. 2007), which the Supreme Court overruled in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

57. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified as amended at 28 U.S.C. § 2241(c) (2000)); see *Carbo v. United States*, 364 U.S. 611, 614–19 (1961) (tracing the development of section 14 into the modern 1948 codification at 28 U.S.C. § 2241(c)(1)). The Judiciary Act was passed six months after the Constitution’s ratification, and section 14 has always been thought to incorporate the common-law understanding of habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001).

58. For a thorough discussion of this critical concept, see Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1181 (“[I]n the 124 reported federal habeas decisions between 1789 and 1867, only five involve allegations that the petitioner’s [sic] rights were violated. All of the other reported federal habeas cases involve allegations that detention was unauthorized by law.” (footnote omitted)); and also *Strait v. Laird*, 406 U.S. 341, 353 (1972) (Rehnquist, J., dissenting) (explaining that actions under § 2241(c)(1) are distinct from those under § 2241(c)(3)).

59. *Ex parte Bollman*, 8 U.S. 75 (1807).

60. *Id.* at 135.

61. *Hamdan v. Rumsfeld*, 548 U.S. 557, 586–87 (2006).

by Guantanamo detainees did not apply to pending cases.⁶² On the merits, the Court held that, while the AUMF may have “activated the President’s war powers,” it could not be read to displace the limited grant of authority to convene military commissions provided by Congress under the Uniform Code of Military Justice (“UCMJ”)⁶³—a statute which prohibits the use of military commissions if (as in *Hamdan*) their procedures are inconsistent with the laws of war or if such compliance would prove “impracticable.”⁶⁴

Yet, as Justice Thomas asked in his *Hamdan* dissent, if the AUMF could be read to authorize Hamdi’s detention in accordance with the requirements of the Non-Detention Act, why could it not also be read to authorize Hamdan’s military commission in accordance with the requirements of the UCMJ?⁶⁵ There are a variety of principled explanations for this apparent divergence between the cases,⁶⁶ including that the Court moved closer to a heightened clear-statement requirement proposed in Justice Souter’s *Hamdi* dissent.⁶⁷ That move, in turn, might reflect an increasing impatience with the Executive’s seemingly imperial assertions of power, an impatience that reached an apex in *Boumediene*.⁶⁸ But this may just be arguing around the margins. Although the cases come to opposite

62. *Id.* at 576. The Court purported to rely upon “[o]rdinary principles of statutory construction.” *Id.* at 575–76. That is, to avoid raising a serious constitutional question under the Suspension Clause, the Court applied the presumption that Congress does not intend statutes to apply retroactively. *But see id.* at 667 (Scalia, J., dissenting) (arguing that Congress’s desire to strip jurisdiction over pending cases was conscious and unambiguous).

63. *Id.* at 594 (majority opinion).

64. *See id.* at 620–23 (citing Article 36 of the UCMJ and stating that “rules applied to military commissions” must apply uniformly to “those applied in courts-martial” unless deemed “impracticable”). Significantly, the Court also concluded that, at a minimum, Common Article 3 of the Geneva Conventions applied to Hamdan and the conflict against al Qaeda, *id.* at 630–31, and thus prohibited the use of the cruel, inhuman, and degrading interrogation techniques reportedly being employed by the Administration worldwide. While this conclusion (which was not necessary to resolve the question presented) can be seen as sending a shot across the Administration’s unilateralist bow, the Court did not rule that the Geneva Conventions were self-executing or otherwise cognizable in habeas; it thus declined an invitation to establish an independent, substantive constraint on the Executive’s detention power that could be developed in subsequent habeas cases.

65. *Hamdan*, 548 U.S. at 681–83 (Thomas, J., dissenting).

66. Cass Sunstein posits two possibilities. First, he posits that detention is more closely perceived as “incidental” to force than the use of military commissions. Sunstein, *supra* note 34, at 36. Second, he posits that the Court insists on a heightened clear-statement requirement when the Executive attempts to depart from “standard adjudicative forms,” such as traditional military tribunals. *Id.* at 4.

67. *See, e.g., Hamdan*, 548 U.S. at 692 (Thomas, J., dissenting) (arguing that the majority employed a “new, clear-statement approach”); Sean Mulryne, *A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation-of-Powers Principles*, 38 SETON HALL L. REV. 279, 312–18 (2008) (discussing why the *Hamdan* Court adopted Souter’s more stringent, clear-statement requirement expressed in *Hamdi*).

68. *See infra* text accompanying notes 126–38 (positing reasons for the *Boumediene* Court’s increasing concern about potentially abusive Bush Administration practices).

conclusions regarding the clarity of the congressional authorizations at issue, both *Hamdi* and *Hamdan* ultimately tether their judgments to congressional will and fall within the *Youngstown* framework. Thus, as Dean Harold Koh pronounced, “In *Hamdan*, the Court has given us a *Youngstown* for the twenty-first century,” by confirming that “a democracy must fight even a shadowy war on terror through balanced institutional participation: led by an energetic executive but guided by an engaged Congress and overseen by a skeptical judicial branch.”⁶⁹

Justice Breyer’s concurrence suggested a way out of the problem *Hamdan* created for the Administration: the Court would ultimately ratify the President’s policy goals as long as he “return[s] to Congress to seek the authority he believes necessary.”⁷⁰ The political branches promptly took up Justice Breyer’s suggestion. Congress, working with the President, enacted the Military Commissions Act of 2006 within months of the *Hamdan* decision. The Act gave express congressional authorization for numerous procedural departures from the UCMJ practices that had been a part of the President’s earlier executive order.⁷¹ The Act also resolved any potential ambiguity in the DTA’s jurisdiction-stripping provisions by amending the habeas statute to make clear that the courts would have no jurisdiction over any pending habeas cases filed by enemy combatants.⁷² Finally, for those enemy combatants foreclosed from plenary habeas review, the MCA revived the DTA’s alternate review scheme, which had been nullified by *Hamdan*.⁷³

That newly revived DTA scheme conferred exclusive jurisdiction on the D.C. Circuit Court of Appeals to “determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”⁷⁴ The CSRT was, in turn, understood to be a “non-adversarial” administrative proceeding established by the military to assess whether the Defense Department’s prior designation of a detainee as an

69. Harold Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2364 (2006).

70. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

71. See generally JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF THE PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE (2006), available at <http://www.fas.org/spp/crs/natsec/RL33688.pdf> (comparing MCA Commissions to DOD military commissions and UCMJ court martial).

72. Military Commissions Act of 2006 § 7(b), 28 U.S.C. § 2241 (2006); see also 152 CONG. REC. S10,367 (daily ed. Sept. 28, 2006) (statement of Sen. Graham) (“The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.”).

73. See Military Commissions Act of 2006 § 7(a) (precluding any courts from reviewing enemy combatant determinations, except through the alternate court-of-appeals review scheme created by Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2743 (2005)).

74. Detainee Treatment Act § 1005(e)(3)(A).

enemy combatant was correct.⁷⁵ The substance of DTA review in the court of appeals was limited to consideration only of: (1) whether the CSRT enemy-combatant determination was “consistent with the standards and procedures specified by the Secretary of Defense”; or (2) whether the use of the Secretary’s standards and procedures “is consistent with the Constitution and laws of the United States,” to “the extent that the Constitution and laws of the United States are applicable.”⁷⁶ Congress thus ratified the executive-created CSRT process through the DTA.

In *Boumediene*, the Court explained that if the “ongoing dialogue between and among the branches of Government is to be respected” the Court had to acknowledge Congress’s desire, manifested by the MCA’s response to *Hamdan*, to definitively strip the courts of jurisdiction over pending cases.⁷⁷ The “respect” the Court accorded to its sister branch of government only went so far, of course. The *Boumediene* Court in its next breath held that Congress’s clearly manifested intent was nevertheless unconstitutional. Although the decision clearly built upon the Court’s skepticism toward claims of executive prerogative asserted in the Triad cases, in striking down the MCA and holding that the congressionally endorsed procedures for detainee hearings in the DTA were unconstitutional, *Boumediene* marks the first time that the Court has invalidated the collaborative judgment of the political branches to develop policy in the context of a military conflict.⁷⁸ The Court did this unabashedly, in spite of the normative arguments in favor of deference to legislative decision making, and ultimately, this Article argues, came to the correct conclusion.

III. *BOUMEDIENE*’S CONCLUSIVE ASSERTION OF JUDICIAL PREEMINENCE

Boumediene’s decision to wrest greater supervision of detainee operations from the political branches was complex in its reasoning but stark in its result. Two doctrinal components are particularly significant. First, by concluding that functional, rather than formalistic, considerations

75. See Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter Wolfowitz Order] (discussing the procedures for foreign nationals held as enemy combatants at Guantanamo Bay). The parties in post-*Rasul* litigation exhaustively contested the adequacy of the CSRT process. Azmy, *supra* note 1, at 399–400. The Court in *Boumediene* evaluated the process in detail. See *infra* text accompanying notes 163–72 (discussing the deficiencies of the CSRT process).

76. Detainee Treatment Act § 1005(e)(3)(D).

77. *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008).

78. See *id.* at 2296 (Scalia, J., dissenting) (excoriating the Court’s majority for acting alone where “[i]t is therefore clear that Congress and the Executive—both political branches—have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war”); Issacharoff & Pildes, *supra* note 36, at 5 (noting the Court’s emphasis on the importance of bilateral institutional endorsement of both the legislative and executive branches of new legal structures to address “exigent security contexts”).

should define the geographical scope of the Suspension Clause, the Court signaled that the Executive would be unable to “manipulate” bright-line jurisdictional rules to govern absent “legal constraint.”⁷⁹ Second, in reaching beyond the jurisdictional question to conclude that the DTA’s alternative-review scheme was unconstitutional on the merits, the Court rejected what the Government argued was Congress’s superior institutional judgment regarding wartime policy. Instead, the Court set the minimal requirements of the writ—a judgment that is in fact well within the judiciary’s core competency—and announced that those requirements must be adjudicated immediately on remand by the district courts under standards the courts alone would develop.

A. *THE GEOGRAPHICAL SCOPE OF THE WRIT: REBUKE OF THE EXECUTIVE*

In *Boumediene*, the Government argued that constitutional protections do not apply to noncitizens in Guantanamo or any other territories where the United States does not exercise formal political sovereignty. In rejecting this position, the Court emphasized the significance of the Suspension Clause in preserving a robust judicial role in a constitutional system of separation of powers. It also emphasized the advantages of functional and pragmatic considerations, rather than static, formalistic rules, in evaluating the applicability of constitutional norms. So framed, the Court demonstrated clearly to the political branches that it would have final authority to review conduct undertaken outside the territorial United States that infringed on individual liberty.

1. Separation of Powers

The Court began its discussion by eulogizing the writ as an essential structural feature of the Constitution. According to the Court, the Framers understood the writ to be a “vital instrument” for the protection of liberty because its history signified, among other things, “that the King, too, was subject to the law.”⁸⁰ History also taught the Framers, however, that the writ’s protections could easily be swept aside by the political branches in times of crisis and “no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power.”⁸¹ Recognizing the writ “to be an essential mechanism in the

79. See *infra* text accompanying notes 114–18; 139–41 (discussing why the Court chose not to restrict the reach of the Suspension Clause to Guantanamo).

80. *Boumediene*, 128 S. Ct. at 2245.

81. *Id.* at 2246. Here, Justice Kennedy makes explicit his view that structural constitutional guarantees are the best preservative of liberty. See *id.* (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.” (quoting *Loving v. United States*, 517 U.S. 748, 756 (1996))); *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

separation-of-powers scheme,” the Framers committed to safeguard the otherwise vulnerable common-law writ through “specific language in the Constitution to secure the writ and ensure its place in our legal system.”⁸² The explicit constitutional protection of the writ through the Suspension Clause strengthened the courts’ authority, providing them with the mechanism to check the “practice of arbitrary imprisonments,”⁸³ to “preserve[] limited government,”⁸⁴ and to protect against the political branches’ “cyclical abuses” of power.⁸⁵ The Clause does so by “calling the jailer to account,” thereby ensuring that the Executive cannot employ its detention power without valid authority rooted in positive law. In short, absent formal suspension by Congress,⁸⁶ the Clause guarantees a role for the courts in checking the actions of coordinate branches.⁸⁷

The Court thus concluded that these structural features of the constitutional design, embodied in the writ’s protections, determined the geographical scope of the writ. It is the “separation-of-powers doctrine, and the history that influenced its design [that] must inform the reach and purpose of the Suspension Clause.”⁸⁸

2. Functional Jurisdictional Rules

a. History

The Court then addressed the parties’ arguments about the common-law history of the writ, recognizing that the Suspension Clause protected “‘at an absolute minimum’” the writ as it existed when the Suspension Clause was ratified.⁸⁹ The Government argued that the writ in 1789 reached only

82. *Boumediene*, 128 S. Ct. at 2244–46.

83. *Id.* at 2247 (quoting THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (C. Rossiter ed., 1961)).

84. *Id.* at 2247.

85. *Id.*

86. U.S. CONST. art I, § 9, cl. 2 (“The Privilege of the Writ of *Habeas corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

87. *Boumediene*, 128 S. Ct. at 2247 (“It ensures that, except in periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004))).

88. *Id.* at 2247. See generally Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009) (emphasizing the centrality of separation-of-powers principles to the result in *Boumediene*).

89. *Boumediene*, 128 S. Ct. at 2248 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). The Court was “careful not to foreclose” the possibility that the Suspension Clause has developed to expand the protections it originally codified in 1789. *Id.* Given the very strong separation-of-powers concerns the Court perceived, had the Government’s and Justice Scalia’s conclusive reading regarding the narrow historical reach of the writ in 1789 persuaded the Court (rather than concluding the history was indeterminate), it seems likely that the Court would have expanded the Suspension Clause’s protections beyond those that existed at common law. That

territories over which the Crown was sovereign, while the petitioners argued that the writ followed the King's officers wherever they exercised significant control over the territory.⁹⁰ The Court concluded that the history presented by competing sides was ultimately indeterminate, but its exegesis of that history is worth attention because it surfaces a unifying concern about judicial limits on executive power.⁹¹

In particular, the Court struggled over the English courts' relationship with Scotland, Ireland, and Canada. As the Government and Justice Scalia in dissent emphasized, the writ did not run to Scotland even though that land was "controlled by the English monarch,"⁹² suggesting that mere territorial control of the kind the United States exercises over Guantanamo would not be sufficient. The writ did, however, run to Canada, even though it was three thousand miles away; it also ran to Ireland, which, unlike Scotland, remained separate from the English Crown.⁹³ The Court could best explain this seemingly disparate treatment by "prudential considerations," rather than a "categorical or formal conception of sovereignty."⁹⁴ Specifically, the Court emphasized that Canadian and Irish courts still applied the same English law that English courts use domestically; Scotland, by contrast, even after its union with England, "continued to maintain its own laws and court system."⁹⁵ Thus, extending the writ—and English legal rules—to Scotland might have produced "embarrassment" in the form of conflicting

option was certainly available to the Court. *See, e.g.,* *Felker v. Turpin*, 518 U.S. 651, 652–54 (1996) (assuming, without holding, that the Suspension Clause protects the substantive scope of the writ as it exists today, not merely as it existed in 1789); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977) (suggesting, without holding, that Congress may not be authorized to "totally repeal all post-18th Century developments in this area of law"); *Ex parte Yerger*, 75 U.S. 85, 102 (1868) ("[T]he great spirit and genius of our institution has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States."); *see also* WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 3 (1980) (noting that the writ has always expanded alongside developing substantive understandings of liberty); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1269 (1970) ("[T]he history of two centuries of expansion through a combination of statutory and judicial innovation in England must have led [the Framers] to understand habeas corpus as an inherently elastic concept not bound to its 1789 form."). The Court likely perceived that this conclusion was not necessary to resolve the case and may have created future uncertainty in broader habeas doctrine.

90. *Boumediene*, 128 S. Ct. at 2248–52.

91. Near the end of its historical discussion, the Court makes an intriguing comparison to *Brown v. Board of Education*, 347 U.S. 483 (1954). At one level, the Court is simply suggesting that the historical evidence here, as with the Fourteenth Amendment Framers' understanding of the applicability of the Equal Protection Clause to public schools, is disputed and therefore inconclusive. But surely the Court is also implicitly expressing, as it did in *Brown*, a view that rights may expand over time, rather than remain tethered to historical practice.

92. *Boumediene*, 128 S. Ct. at 2249, 2304 (Scalia, J., dissenting).

93. *Id.* at 2250 (majority opinion).

94. *Id.*

95. *Id.* (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* *98, *109).

interpretations of law or an inability to enforce English judgments in Scotland.⁹⁶ Such “prudential barriers” have no relevance in Guantanamo, the Court recognized, because “[n]o Cuban court has jurisdiction to hear these petitioners’ claims, and no law other than the laws of the United States applies” there.⁹⁷ In other words, if U.S. law did not apply in Guantanamo, then no law would apply. The absence of any judicially enforceable law there, in turn, implicated the Court’s core separation-of-powers concerns.

b. Precedent

The Court then examined three sets of precedent in support both of its functional approach and, ultimately, its conclusion that the Suspension Clause applies to Guantanamo (and potentially elsewhere). First, the Court examined the so-called *Insular Cases*, which addressed the constitutional status of island territories the U.S. obtained following victory in the Spanish-American War—also the period in which the United States secured its control over Guantanamo as a condition for ending its occupation of Cuba.⁹⁸ For those territories “destined for U.S. statehood,” full constitutional rights would apply, while noncitizen inhabitants of unincorporated territories were entitled to enjoy only “fundamental” rights in the Constitution.⁹⁹ Recognizing the “inherent practical difficulties” of enforcing the Constitution “always and everywhere,” the fundamental-rights doctrine announced in the *Insular Cases* allowed the Court “to use its power sparingly and *where it would be most needed*.”¹⁰⁰

Next, the Court considered *Reid v. Covert*,¹⁰¹ in which a plurality concluded that the Bill of Rights applies to protect United States citizens abroad, in all circumstances.¹⁰² The Court formally endorsed Justice Harlan’s concurring opinion which rejected the plurality’s categorical rule; Harlan’s functional approach instead instructed courts to extend a fundamental constitutional right to persons abroad if its application would not be “impracticable and anomalous.”¹⁰³

96. *Id.* (majority opinion).

97. *Boumediene*, 128 S. Ct. at 2251.

98. See Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 39 (2004) (discussing early twentieth century *Insular Cases* and arguing that U.S. functional control over Guantanamo is sufficient to confer jurisdiction).

99. *Boumediene*, 128 S. Ct. at 2254, 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1979)).

100. *Id.* at 2255 (quoting in part *Balzac*, 258 U.S. at 312) (emphasis added).

101. *Reid v. Covert*, 354 U.S. 1 (1957).

102. See *id.* at 14, 40–41 (plurality opinion) (holding that wives of soldiers are entitled to a trial by jury as stipulated in the Bill of Rights).

103. *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

Finally, the Court reviewed the cornerstone of the Administration's detention policy, *Johnson v. Eisentrager*.¹⁰⁴ Contrary to the categorical reading of *Eisentrager* advanced by the Government in both *Rasul* and *Boumediene*—that neither the statutory writ nor the Constitution applies to places over which the U.S. is not formally sovereign—the Court recognized that “practical considerations” largely animated the Court's resistance to extending constitutional rights to the German prisoners held at Landsberg Air Force Base in post-war Germany.¹⁰⁵ Sovereignty was not, in fact, crucial to the Court's opinion: it was only mentioned twice in an opinion that spent considerably more time describing the practical difficulties of extending the writ (and constitutional rights) to persons held in another country during active hostilities.¹⁰⁶ Indeed, all of the foregoing precedent considered by the Court could be harmonized by the “idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”¹⁰⁷

Though the case is hardly mentioned in *Boumediene*, the Court also put an end to the categorical reading of *United States v. Verdugo-Urquidez*,¹⁰⁸ as well as the normative theory underlying the reading. In *Verdugo-Urquidez*, Justice Rehnquist's plurality opinion held that an alien could not invoke the protections of the Fourth Amendment to challenge a warrantless search and seizure of his property in Mexico, and suggested further that constitutional rights categorically would not apply outside U.S. sovereign territory.¹⁰⁹ The D.C. Circuit had twice interpreted *Verdugo-Urquidez* to hold broadly that Guantanamo detainees, as aliens without “property or presence in this country,” enjoyed no constitutional rights under the Fifth Amendment or the Suspension Clause.¹¹⁰ That categorical view, which precludes recognition of constitutional rights in places over which the U.S. is not sovereign, has a very plausible theoretical foundation. This theory could be called a norm of reciprocity. This reciprocity norm dictates that the Constitution should apply only to persons who are members of the political community, i.e., who are constituted by the founding document. Under such a constitutional compact, persons are entitled to enjoy the fruits of constitutional liberty if they have voluntarily submitted themselves to constitutional constraints.¹¹¹

104. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

105. *Boumediene*, 128 S. Ct. at 2257.

106. *Id.* at 2257–58.

107. *Id.* at 2258.

108. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

109. *Id.* at 273–75. Rehnquist suggested that *Eisentrager* “was emphatic” in rejecting “the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Id.* at 269.

110. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom*; *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

111. According to Justice Scalia, entitlement to constitutional rights turns on citizenship alone; that is, those persons who consent to be governed or constituted by the Constitution.

As his concurring opinion in *Verdugo-Urquidez* and majority opinion in *Boumediene* make clear, Justice Kennedy rejects both such a bright-line rule and the theory underlying it. He rejects both in part because he sees the Constitution less as a compact than as fundamental law citizens choose to apply to their rulers wherever they act.¹¹² It could also be, as Professor Eric Posner suggests, because Kennedy is a “cosmopolitan” judge more disposed to engage with foreign legal norms and more likely to view rights as having some transnational force.¹¹³ Those are only partial explanations. As shown in the next section, the normative justification that most fully accounts for his view is rooted in separation of powers and a concern about executive manipulation of legal rules.

3. An Anti-Manipulation Principle

The categorical view that the Court rejected has some natural advantages over the functional approach that the Court endorsed. As Justice Scalia stressed, bright-line jurisdictional rules promote clarity and predictability for the political branches that have to interpret them and the potential litigants who have to follow them.¹¹⁴ On the other hand, functional rules are subject to the Court’s interpretation and innovation. And, on this view, the rules tend to aggrandize power to a judicial branch that is both politically unaccountable and generally ill-equipped to make hard choices regarding, for example, the location of enemy combatant detention operations.¹¹⁵

Boumediene, 128 S. Ct. at 2306 (Scalia, J., dissenting) (explaining that constitutional rights are derived “from the consent of the governed, . . . in which citizens (not ‘subjects’) are afforded defined protections against the Government”); see Neuman, *supra* note 98, at 6–7 (classifying this theory as a “membership approach,” which “treats certain individuals or locales as participating in a privileged relationship with the constitutional project, and therefore entitled to the benefit of constitutional provisions”).

112. *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

113. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, CATO SUP. CT. REV., 2007–2008, at 23, 24–25, available at http://www.cato.org/pubs/scr/2008/Boumediene_Posner.pdf; see also David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 60, available at http://www.cato.org/pubs/scr/2008/Boumediene_Cole.pdf (suggesting *Boumediene* can be seen as a part of greater acceptance of international-human-rights norms by U.S. courts).

114. *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting).

115. *Id.* at 2302 (Scalia, J., dissenting) (“[T]he Court’s ‘functional’ test . . . does not (and never will) provide clear guidance for the future.”); *id.* at 2303 (“[T]he ‘functional’ test . . . is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.”). It is interesting to observe that the majority and dissenting justices’ views are in some tension with the traditional account of functionalism versus formalism in the separation-of-powers canon. In cases such as *Mistretta v. United States*, 488 U.S. 361 (1989), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *INS v. Chadha*, 462 U.S. 919 (1983), the adoption of formalist, bright-line, rules are viewed as the best limitation on executive discretion, while functionalist criteria are associated (positively or negatively) with tolerance for innovation by the political branches.

Nevertheless, in this case the Court felt compelled—and rightly so—to reject any bright-line geographical rules regarding the reach of the writ. It even refused to limit its ruling, as it easily could have done, to the arguably unique physical and political space of Guantanamo. The Court did so because it feared that the Executive could simply manipulate any fixed rule by moving detention operations to the other side of Guantanamo and, therefore, “govern without legal constraint.”¹¹⁶ The predictability and clarity of a bright-line rule that Justice Scalia sees as a virtue, Justice Kennedy likely perceives as a vice because any such rule might ultimately “be subject to manipulation by those whose power it is designed to restrain.”¹¹⁷ To thereby permit the political branches the latitude to “switch the Constitution on and off at will” would produce a “striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”¹¹⁸

Thus, the Court set forth three functional and highly subjective criteria to permit the Court to “say what the law is” regarding the applicability of constitutional rights abroad. Specifically, in determining the reach of the Suspension Clause, the Court will consider: “(1) the citizenship and status of the detainee and the adequacy of the process [under] which a status determination was made; (2) the nature of the sites . . . [of] apprehension and . . . detention”; and (3) the “practical obstacles” involved in judicially resolving the petitioner’s habeas petition.¹¹⁹ According to *Boumediene*, an analysis of these criteria supported the *Eisentrager* Court’s decision to deny the German petitioners constitutional rights; while each, by contrast, supports the extension of the writ to the detainees in Guantanamo¹²⁰ and, as discussed below, potentially to other large-scale detention operations such as in Bagram, Afghanistan.

116. *Boumediene*, 128 S. Ct. at 2259. The Court suggested one way in which the Government’s proposed rule might invite abuse: where, for example, the Government would surrender formal sovereignty to a territory, but enter into a lease granting total control to the U.S. *Id.* Arguably, the Government has done just this in its lease agreement over the Bagram Airfield and prison. See *infra* text accompanying notes 242–52 (describing terms of the U.S.–Afghanistan Lease Agreement over the Bagram Airfield).

117. *Boumediene*, 128 S. Ct. at 2259.

118. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

119. *Id.* at 2259.

120. With respect to the first criteria, all of the detainees asserted they are not combatants, and the administrative CSRT process employed to judge their combatant status was woefully deficient; thus, they were unlike the German prisoners whose combatancy was undisputed and who were afforded a full trial by military commission at which their war crimes were judged. *Id.* at 2259–60. With respect to the second criteria, Guantanamo—over which our jurisdiction is complete and effectively permanent—is far different from Landsberg Air Force base—over which our control was temporary and contingent. *Id.* at 2260. Finally, with respect to the third criteria, because the U.S. exerts plenary control over the Naval Base, which is located thousands of miles from any active combat zone, there would be no excessive burden on the military to adjudicate habeas petitions. *Id.* at 2261.

It is also significant that, on the same day it decided *Boumediene*, the Court unanimously held in *Munaf v. Geren*¹²¹ that courts possess jurisdiction under the habeas statute to review petitions filed by U.S. citizens detained by U.S. forces in Iraq.¹²² In so holding, the Court rejected the Executive's claim that because the U.S. forces (who maintained the physical custody of the petitioners) were ultimately acting under the "international authority" of the Multi-National Force-Iraq—the coalition of countries engaged in military operations in Iraq and sanctioned by the United Nations—the petitioners could not be said to be "in custody . . . of the United States."¹²³ Thus, the fiction of detention "by international authority" that the Executive asserted in an attempt to defeat the Court's jurisdiction in *Munaf* proved no more persuasive than the fiction of detention "on foreign soil" the Executive asserted to defeat the Court's jurisdiction in *Rasul* and *Boumediene*. It should be plain that the *Munaf* fiction is equally manipulable by the Executive as the *Boumediene* fiction. In either case, because the Executive cannot now be assured of complete discretion to conduct detention operations outside the jurisdiction of the courts, it may well have to increase its compliance with the law. Enforcing the Suspension Clause in these circumstances thus helps "to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."¹²⁴

It is fair to ask if the Court's concern about executive manipulation is overstated or even inappropriate. It is likewise reasonable to ask whether the Court should have been more "minimalist," as it arguably had been in *Hamdi* and *Hamdan*,¹²⁵ and expressly limit its decision to the precise facts before it relating to detention operations in Guantanamo alone. I believe the Court's skepticism about executive conduct was deep and its open-ended decision was justified.

By the time the Court heard arguments for *Boumediene*, it had learned about a series of policy-driven legal strategies designed by the Executive to evade the jurisdiction of U.S. courts and the constraints of law.¹²⁶

121. *Munaf v. Geren*, 128 S. Ct. 2207 (2009).

122. *Id.* at 2217–18. The petitioners were being held by U.S. forces pending trial by the Iraqi government for alleged crimes committed on Iraqi sovereign territory, after which they would either be transferred to serve their sentence or released if acquitted. The Court also unanimously held that, because the petitioners were duly charged with crimes by the Iraqi government after voluntarily entering its sovereign territory and because they were being held in the context of a full military campaign abroad, the habeas court did not have the authority to issue a preliminary injunction preventing the petitioners' ultimate transfer to Iraqi officials for prosecution. *Id.* at 2223–24.

123. *Id.* at 2216 (quoting 28 U.S.C. § 2241(c)(1)).

124. *Boumediene*, 128 S. Ct. at 2247 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536).

125. See generally Sunstein, *supra* note 34 (discussing "liberty-promoting minimalism").

126. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689–91 (1976) (emphasizing the impact that practical and political considerations have on courts).

Specifically, the Court was aware of the Executive's decision to deny persons apprehended in Afghanistan, or anywhere else as part of the broader war on terror, the humanitarian protections of the Geneva Conventions.¹²⁷ The Court knew of the Administration's strategy to initially locate detention operations outside the jurisdiction of the U.S. courts, where interrogations and status determinations could proceed unobstructed by law.¹²⁸ The Court was also likely aware that, following the Court's decision extending the statutory writ to Guantanamo, the Bush Administration effectively ceased transferring prisoners to Guantanamo,¹²⁹ preferring to exploit either secret "black sites"¹³⁰ or military bases in Afghanistan that it believed to be beyond the jurisdiction of U.S. courts.¹³¹

The Court was certainly mindful of the infamous "Torture Memos" issued by the Office of Legal Counsel¹³² which, through contorted,

127. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Jan. 22, 2002) (stating that international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces do not apply to members of al Qaeda or the Taliban militia); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 548–49 (2004) (Souter, J., concurring) (criticizing the Government for its failure to comply with the Geneva Prisoner of War Convention).

128. See Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., & John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, Dep't of Def. 1 (Dec. 28, 2001) (stating that federal district courts likely lack jurisdiction over habeas petitions filed by alien detainees who are held outside the sovereign territory of the United States); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142–43 (2006) (explaining that while "[n]o location was perfect," Guantanamo seemed "to fit the bill," because it would allow for military interrogations without worrying about their lawfulness).

129. Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1 (reporting that Administration officials "effectively halted the movement of new detainees into Guantánamo" in a September 2004 meeting).

130. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01 (describing a series of secret detention facilities operated by the CIA in various countries, designed to hold and interrogate high-level terror suspects).

131. See discussion *infra* Section IV.A.1 (discussing the Bagram Airfield); see also Golden & Schmitt, *supra* note 129 (reporting that the U.S. military is operating a makeshift prison facility in Bagram, Afghanistan, where it holds approximately five-hundred prisoners as "enemy combatants"); Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005 at A1 (reporting on intentions of "senior administration officials" to transfer up to half the current Guantanamo detainees to prisons in Saudi Arabia, Afghanistan, and Yemen as a result of recent "adverse court rulings" regarding the Administration's power in Guantanamo).

132. See generally Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Feb. 26, 2002) (discussing how *Miranda* warnings are unnecessary in custodial interrogations); Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 14, 2003) (discussing the legality of military interrogation of alleged enemy combatants held in foreign countries). The subsequent head of the Office of Legal Counsel later revoked both memos. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 151 (2007).

sometimes incompetent,¹³³ and ultimately self-serving reasoning,¹³⁴ provided near blanket immunity to Administration officials and interrogators from criminal or civil liability under otherwise applicable anti-torture statutes. The Court also knew well the Government's strategic and arguably manipulative attempts to avoid judicial review in cases such as *al-Marri v. Pucciarelli*¹³⁵ and *Padilla*.¹³⁶ Additionally, the Court had surely heard much about the international condemnation of the legal regime in Guantanamo and the conditions under which detainees were housed and interrogated.¹³⁷ And, the Court was well educated by the increasing studies

133. See, e.g., *No Torture. No Exceptions*. WASH. MONTHLY, Jan.-Mar. 2008, at 16, 37 (Harold Hongju Koh describing the legal opinions in these memos "to be a disgrace, not only to that office, but to the entire legal profession").

134. See generally *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 113th Cong. (2008) (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison, and Christopher H. Schroeder, professors of law) (criticizing the Memo as a "one-sided justification for conferring legal immunity" on government actors), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3550&wit_id=7411.

135. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

136. In *Padilla*, just two days before the district court was to hold a hearing on Padilla's motion to dismiss the material witness warrant, the President designated Padilla as an "enemy combatant" and transferred him into Defense Department custody. See *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 48-49 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (describing the government's "disappointing conduct" in the case), *rev'd*, 542 U.S. 426 (2004). On the question before the Court of whether the filing of Padilla's habeas petition in New York was proper, four justices emphasized that his transfer had been "shrouded . . . in secrecy," and that the Government should not be permitted "to obtain a tactical advantage as a consequence of an *ex parte* proceeding." *Padilla*, 542 U.S. at 459. Padilla was later held incommunicado for months and subject to a brutal regime of isolation and interrogation, which arguably rendered him clinically insane. See generally *Motion to Dismiss Indictment for Outrageous Government Conduct, United States v. Padilla*, No. 04-06001 (S.D. Fla. Oct. 4, 2006) (arguing that the Government's conduct toward Padilla was outrageous and illegal). Moreover, two days before its opposition to Padilla's petition for certiorari from the Fourth Circuit's decision approving his detention was due, the Government indicted the putative enemy combatant in a seemingly transparent attempt to moot Supreme Court review of their actions. *Padilla v. Hanft*, 423 F.3d 582, 585 (4th Cir. 2005) (explaining that the Government's strategic maneuvering had "given rise to at least an appearance that the purpose of these actions may be to avoid consideration . . . by the Supreme Court").

Similarly, Ali al-Marri, a lawful permanent resident who was apprehended in his home in Peoria, Illinois and charged with federal bank and credit-card fraud, was designated an "enemy combatant" the Monday after a district-court judge scheduled a motion to dismiss. *al-Marri*, 534 F.3d at 219-20 (4th Cir. 2008). Attorney General Ashcroft explained that, while in the criminal-justice system, al-Marri refused offers to "improve his lot" by cooperating with FBI investigators; al-Marri was thus transferred to the military because he "insisted on becoming a hard case," presumably because he elected to assert his constitutional entitlement to trial by jury. JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 168-69 (2006).

137. See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 ("[I]nvestigators had found a system devised to break the will of the prisoners at Guantánamo . . . through 'humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.'"). See generally JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008) (discussing the genesis

and anecdotes (many of which were described in briefs of the petitioners and *amici*) which demonstrate that the Administration's earlier claims that Guantanamo detainees were hardened terrorists were startlingly exaggerated, if not categorically false.¹³⁸

To be sure, one should not solely attribute the decision to the perceived excesses of the Bush Administration. It is, in fundamental respects, perfectly aligned with the role of a constitutional court in a separation-of-powers system, and more particularly, a core, historic function of the Great Writ: namely, to prevent secret, lawless detention and to prevent the far-from-novel practice of "disappearing" asserted threats to the State. Consider then the Court's intriguing reference to the Habeas Corpus Act of 1679. The Act was enacted in response to attempts by the Crown to evade the requirements of the landmark 1640 Habeas Corpus Act (which itself eliminated the Star Chamber and rejected the King's prerogative to detain by mere "special command") by exiling prisoners beyond the court's newly fortified jurisdiction. Specifically, the 1679 Act was passed in response to abuses by

of harsh interrogation techniques employed in secret CIA prisons and on Guantanamo detainees); U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Human Rights, Economic, Social, and Cultural Rights Civil and Political Rights, *Situations of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006), available at <http://www.un.org/en/documents/> (type "E/CN.4/2006/120" into "search by symbol" box; then search; then select "English") [hereinafter *UN Report*] (The UN Special Rapporteur on Torture concluded that interrogation techniques used at Guantanamo such as "the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days[,] and prolonged isolation were perceived as causing severe suffering . . . [and] that the simultaneous use of these techniques is even more likely to amount to torture").

138. For example, Secretary Rumsfeld labeled the detainees as "among the most dangerous, best trained, vicious killers on the face of the earth." Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6. Yet studies repeatedly brought to the Court's attention by petitioners and *amici* demonstrated this position to be grotesquely exaggerated. See MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (reviewing Defense Department data to reveal that only eight percent of detainees are alleged to have been al Qaeda fighters and fifty-five percent were never even alleged to have engaged in a hostile act against the United States); Editorial, *They Came for the Chicken Farmer*, N.Y. TIMES, Mar. 8, 2006, at A22, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E7DF1231F93BA35750C0A9609C8B63> (describing the case of a chicken farmer in Pakistan, detained because his name resembled the Taliban deputy foreign minister's name); Tom Lasseter, *Day 1: America's Prison for Terrorists Often Held the Wrong Men*, MCCLATCHY NEWSPAPERS, June 15, 2008, <http://www.mcclatchydc.com/detainees/story/38773.html> ("An eight-month McClatchy investigation in 11 countries on three continents has found that [there are] perhaps hundreds [of men] whom the U.S. has wrongfully imprisoned in Afghanistan, Cuba and elsewhere on the basis of flimsy or fabricated evidence, old personal scores or bounty payments."); Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006, at 13, 13 (studying Defense Department disclosures about detainees and concluding that "fewer than 20 percent . . . have ever been Qaeda members[,] that "perhaps hundreds . . . of the detainees were not even Taliban foot soldiers," and that "[t]he majority were . . . handed over by reward-seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability").

the Earl of Clarendon, Lord High Chancellor of England, who was actually *impeached* for attempting to imprison English subjects “in remote islands, garrisons and other places, thereby to prevent them from the benefit of the law.”¹³⁹ As the Court suggests, that history may seem “[r]emote in time,”¹⁴⁰ but remains relevant today when considering the proper role of the judicial and executive branches.

In light of all of this history and the emerging evidence about similar practices by the present executive branch, the Court was justifiably suspicious that the Executive would seek to evade even nominal supervision by the courts and equally concerned that the Executive was unable to act appropriately in the absence of any judicial supervision. Thus, Justice Roberts’s suggestion that the Court’s decision is ultimately “about control of federal policy regarding enemy combatants”¹⁴¹ seriously misses the mark. The Court did not prefer one policy outcome over another; vindicating the deepest normative concern embodied in the Suspension Clause, the Court properly wished to ensure that the Executive abides by elementary constraints of the law.

B. THE INADEQUACY OF THE DTA: REBUKE OF CONGRESS

After deciding that the Suspension Clause has extraterritorial reach, and thereby reversing the D.C. Circuit on its jurisdictional holding, the Court went further, deciding that the congressionally created alternative-review scheme in the DTA was an “inadequate substitute” for the core protections of the common-law writ and therefore violated the Suspension Clause. The Court thus not only rejected the concerted judgment of the political branches regarding what it asserted to be the appropriate balance of liberty and national security, the Court declined to follow the more cautious course that Justice Roberts argued was required—a remand to the D.C. Circuit to exhaust procedures under the DTA and develop a full, factual record regarding its adequacy as a substitute. While acknowledging that this was the traditional approach, the Court nevertheless concluded that “the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.”¹⁴²

1. Honoring Congress’s Will in Order to Reject Its Judgment

In evaluating the adequacy of the DTA as a substitute for habeas, the Court noted at the outset that there was little precedent to guide it; indeed, the Court had never before held that a statute violated the Suspension

139. DUKER, *supra* note 89, at 53 (quoting *Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England*, 6 ST. TRIALS 291, 330 (1663–1667)).

140. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

141. *Id.* at 2279 (Roberts, J., dissenting).

142. *Id.* at 2263 (majority opinion).

Clause.¹⁴³ Yet it was clear that, in contrast to other habeas statutes the Court had considered “adequate,”¹⁴⁴ the DTA was not meant to be “coextensive” with traditional habeas. For example, DTA review is lodged with the courts of appeals, rather than the district courts, and the jurisdictional scope of review prohibits the introduction of new evidence or contravention of facts previously found by a CSRT panel.¹⁴⁵ The DTA contains no savings clause which might “preserve habeas review as a last resort.”¹⁴⁶ Equally important, the Court would not interpret the DTA in a manner which would rectify its constitutional defects because Congress, in enacting the DTA, specifically meant to provide these detainees fewer rights than they previously had in habeas.¹⁴⁷ “We cannot ignore the text and purpose of a statute in order to save it.”¹⁴⁸ Thus, the Court would respect Congress’s intentions, even if it rejected the adequacy of its judgment.

2. The Scope of the Writ at Common Law

In order to make its own judgment about the comparative adequacy of the DTA, the Court had to develop an understanding of the baseline protections of the writ at common law that are, “at a minimum,” constitutionally protected by the Suspension Clause. All parties agreed that the common-law writ protected a prisoner’s right to challenge the legal basis for the detention and authorized a court to order a prisoner’s release should detention authority be lacking.¹⁴⁹ As a result, the Government ultimately conceded at oral argument that, despite the statute’s silence on these issues, the Court could construe the DTA to authorize the courts of appeals to

143. For a discussion of the “adequate substitute” standard governing congressional restrictions of habeas under the Suspension Clause, see Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. 411 (2008).

144. See *Boumediene*, 128 S. Ct. at 2264 (discussing *Felker v. Turpin*, 518 U.S. 651 (1996)); *id.* at 2265 (discussing *Swain v. Pressley*, 430 U.S. 372, 381 (1977) and *United States v. Hayman*, 342 U.S. 205, 223 (1952)).

145. See 152 CONG. REC. S10,403 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn) (explaining that the MCA authorizes limited DTA review “by design” because “[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record”); 152 CONG. REC. S10,268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) (“[T]he DTA does not allow re-examination of the facts . . . and it limits the review to the administrative record.”).

146. 152 CONG. REC. S10,268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl). Quite to the contrary, DTA review was designed only to ensure that a CSRT followed the Department of Defense’s “standards and procedures,” and those procedures left the Secretary of Defense with ultimate authority to release or continue to detain a prisoner, regardless of the judgment of a CSRT panel.

147. *Boumediene*, 128 S. Ct. at 2265 (“If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.”).

148. *Id.* at 2271.

149. *Id.* at 2266, 2271.

order a prisoner's release in certain circumstances and to permit the petitioners to challenge the President's legal authority to detain them.¹⁵⁰

Critically, however, the DTA could not be read, consistent with Congress's intent, to authorize the courts of appeals to hear challenges to the factual basis for the detention, that is, to introduce evidence to challenge the factual determinations by the CSRT. Thus, whether habeas practice at common law permitted factual challenges became the core dispute between the parties. The Government argued that at common law habeas courts categorically did not hear challenges to the factual conclusions of a prior adjudicative body.¹⁵¹ The Court rejected this static, formalistic, and historically dubious reading of the writ; the Court stressed that at common law habeas was "above all, an adaptable remedy"—its "precise application and scope changed depending upon the circumstances."¹⁵²

As the Court explained, on the one hand, habeas review of petitions filed by persons criminally convicted by a court of competent jurisdiction or court of record was extremely limited.¹⁵³ The presumption against permitting factual challenges to such a judgment is motivated primarily by two concerns. First, courts generally considered themselves without power to review the judgment of a court of equal jurisdiction and competence—as if sitting as an appellate court.¹⁵⁴ Second, judgments made by courts of record would have been secured by a "fair, adversary proceeding."¹⁵⁵

150. *Id.* at 2271–72.

151. Brief of Respondent at 47–48, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (2007).

152. *Boumediene*, 128 S. Ct. at 2267 (quoting *Schlup v. Delo*, 513 U.S. 298 (1995)). For a comprehensive evaluation of the scope of the habeas inquiry at common law, see generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

153. *Boumediene*, 128 S. Ct. at 2267–68; see also *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 572 (1833) (discussing when a court has jurisdiction to award a writ of habeas corpus); *Brenan's Case*, (1747) 116 Eng. Rep. 188, 192 (Q.B.) (stating that a habeas court will not review the judgment of a "[c]ourt having competent jurisdiction to try and punish the offense").

154. *Boumediene*, 128 S. Ct. at 2268 ("[W]here relief is sought from a sentence that resulted from the judgment of a court of record . . . considerable deference is owed to the court that ordered confinement."); see also *Ex parte Toney*, 11 Mo. 661, 661–62 (1848) ("The party must resort to his writ of error or other direct remedy to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive.").

155. *Boumediene*, 128 S. Ct. at 2268; see also *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007, 1009–10 (Ct. Com. Pl.) (undertaking broad review of the factual basis for detention for contempt because, unlike a case of "treason or felony" where a prisoner would have had an "indictment and trial," "our judgment ought to be grounded upon our own inferences and understandings" and not upon the lower court's). See generally R. J. SHARPE, *THE LAW OF HABEAS CORPUS* 51 (1989) ("Trial by common law was thought to provide the subject with adequate protection, and the possibility of allowing a convicted person some method of challenging the correctness of a conviction by habeas corpus was viewed with considerable misgiving.").

On the other hand, a habeas court's scope of review was far more extensive "where there had been little or no previous judicial review."¹⁵⁶ This includes cases challenging pretrial detention,¹⁵⁷ military impressments,¹⁵⁸ prisoner-of-war determinations,¹⁵⁹ and other noncriminal detentions.¹⁶⁰ In sum, it is in the context of reviewing the legality of executive detention that the writ's "protections have been strongest."¹⁶¹

3. Inadequacy of the DTA Remedy

In *Boumediene*, the Court concluded that the CSRT could not be considered a court of record whose determinations would be entitled to

156. *Boumediene*, 128 S. Ct. at 2267; see also Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 266 (1965) (noting that the writ's "most essential task" is "freeing persons from illegal official restraints of liberty not founded in judicial action").

157. *Boumediene*, 128 S. Ct. at 2267; see also *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452-53 (1806) (ordering the release of a man held in detention by federal marshals because of insufficient factual or legal basis shown in the respondent's return); Dallin H. Oaks, *Legal History in the High Court: Habeas Corpus*, 64 MICH. L. REV. 451, 457-58 (1966) (discussing judicial review of habeas corpus applications). Oaks explained that:

When the writ of habeas corpus performed its ancient function of eliciting the cause of imprisonment, or of enforcing the right to bail or to release from confinement under void process prior to trial, there was seldom, if ever, any circumstance where a court of record had previously determined any factual issues.

Id. In those cases, a habeas court was free to consider and determine the facts. *Id.*

158. See, e.g., *State v. Clark*, 2 Del. Cas. 578, 580-81 (Del. Ch. 1820) (discharging the petitioner based on affidavits and live testimony from third parties proving that petitioner had enlisted while intoxicated and without his father's authorization). See generally Richard Good's Case, (1760) 96 Eng. Rep. 137, 137 (K.B.) (discharging the petitioner on the basis of an affidavit explaining that he was not a sailor, but a ship carpenter immune from impressment).

159. *Ex parte Bollman*, 8 U.S. 75, 135 (1807) (reviewing written depositions to determine whether there was "sufficient evidence of [petitioners'] levying war against the United States" to justify detention); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (reviewing "affidavits of several of the most respectable inhabitants of the western counties" affirming that the petitioner had not engaged in treasonous activity during an insurrection); *United States v. Villato*, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797) (explaining how a Spanish privateer introduced evidence challenging his detention for treason); *R v. Schiever*, (1759) 97 Eng. Rep. 551, 551-52 (K.B.) (reviewing affidavits submitted by petitioner and a third party in review of a Swedish national's detention as a prisoner of war).

160. Brief for the Petitioners at 22 n.22, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195) (discussing a case in which the Court reviewed extensive contradictory evidence addressing circumstances of slave-petitioner's purchase and the credibility of the various affiants, and ordering the petitioner freed (citation omitted)); *R v. Turlington*, (1761) 97 Eng. Rep. 741, 741-42 (K.B.) (discharging a woman from custody after reviewing a doctor's affidavit and conducting an examination of the petitioner's mental condition). See generally *The King v. Lee*, (1676) 83 Eng. Rep. 482 (K.B.) (considering the petitioner's testimony on "oath in Court" that "she went in danger of her life by [her husband]" and should be freed from his custody). See also ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 27-28 n.55 (discussing *Ex parte Bollman* and the legality of detentions in the context of military enlistments).

161. *INS v. St. Cyr*, 533 U.S. 289-301 (2001).

substantial deference from a habeas court because of “myriad deficiencies” in the CSRT process.¹⁶² Those deficiencies included an irremediable structural bias in the CSRT fact-finding that presumed the correctness of the Government’s “enemy combatant” designation—as well as all evidence submitted in support of that designation—but provided no similar presumption in favor of exculpatory evidence, even if it came from the same source.¹⁶³ That structural bias was exacerbated through denying access to counsel,¹⁶⁴ which rendered it practically impossible for detainees to obtain and present evidence on their behalf, or to even see the classified evidence purporting to justify their detention.¹⁶⁵ Numerous CSRT proceedings would make Franz Kafka blush: shackled detainees, thousands of miles from home, stand alone before anonymous tribunal officers and in anguished protest ask how they can possibly meet a burden of proving themselves innocent of charges and evidence they are forbidden to see.¹⁶⁶ The CSRT panels, which

162. *Boumediene*, 128 S. Ct. at 2269–70.

163. Memorandum from Gordon England, Deputy Sec’y of Def., Dep’t of Def., to Sec’y of the Military Dep’ts, Chairman of the Joint Chiefs of Staff, & Under Sec’y of Def. for Policy enc. 2 para. B(1) (Jul. 14, 2006), *available at* www.defenselink.mil/news/Aug2006/D20060809CSRTProcedures.pdf [hereinafter CSRT Procedures]; *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 462, 467 (D.D.C. 2005) (describing the unfairness resulting from the presumption in favor of the Government’s evidence).

164. Detainees were permitted the assistance of a non-lawyer military officer to act as a “personal representative,” but that person was only permitted to explain procedures, not to advocate on a detainee’s behalf in a CSRT proceeding. CSRT Procedures, *supra* note 163, enc. 1 para. G(2).

165. *See infra* notes 480–81 and accompanying text (arguing that the concern regarding disclosure of classified information is overstated).

166. For example, one detainee was told that “[a]n al Qaeda leader said he knew you at a terrorist training camp.” But when the detainee asked who made the allegation, the Tribunal President responded that “[t]he only information we have is that he is a leader. This Tribunal doesn’t have his name. It is not available to you in the unclassified.” The Office of the Sec’y of Def. & Joint Staff, Testimony of Detainees Before the Combatant Status Review Tribunal, Set 21 1645–1688, at 1659, 1661, http://www.dod.mil/pubs/foi/detainees/csrt_arb/Set_21_1645-1688_Revised.pdf (testimony of detainee #1016). A Bosnian detainee was told he was an “associate” of an al Qaeda operative, but the Tribunal refused to disclose the operative’s name or the purported basis for the frustration. The detainee, exclaimed:

[T]hese are accusations that I can’t even answer. I am not able to answer them. . . . I don’t have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

The Office of the Sec’y of Def. & Joint Staff, Testimony of Detainees Before the Combatant Status Review Tribunal, Set 53 3870–3959, at 3912, 3926, http://www.dod.mil/pubs/foi/detainees/csrt_arb/Set_53_3870-3959.pdf (testimony of detainee #10004). The Bosnian detainee also pled with the Tribunal to obtain specifically identified evidence proving he was in Croatia and could not have engaged in wrongdoing, which produced the following exchange: “Tribunal President: You have the opportunity to get that information. I do not know how or what the procedure is, but you really should take the opportunity to get that information. Detainee: How when I am in GTMO?” *Id.*

were under the formal chain of command of Department of Defense (“DOD”) officials, also lacked neutral or unbiased decision-makers. Having already determined each of the detainees under review to be enemy combatants,¹⁶⁷ DOD officials exerted pressure on panels to ratify those designations.¹⁶⁸ And unlike any other proceedings constituted under U.S. law, the CSRTs could, and regularly did, consider evidence procured by torture and coercion.¹⁶⁹

Of these “myriad deficiencies,” the one the Court thought “most relevant” was “the constraints on the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant.”¹⁷⁰ Notably, the Court simply did not accept the proposition that the CSRT procedures, as written, were sufficient; such formalism, advanced by the Government and adopted by Justice Roberts, ignored the practical reality and actual operation of the CSRT system, which departed substantially from rosy portrayals of a fair adversarial system.¹⁷¹ In sum, the Court agreed that

167. Deputy Defense Secretary Paul Wolfowitz instructed, in the very order creating the CSRTs, that each of the detainees before a CSRT panel had been adjudged enemy combatants “through multiple levels of review by officers of the Department of Defense.” Wolfowitz Order, *supra* note 75, at 1.

168. In important testimony (replicated in a declaration filed with the Court), Lieutenant Colonel Stephen Abraham, “a long-time military intelligence officer . . . , described his experience as a member of a CSRT panel”:

“When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course . . . a new panel was selected that reached a different result.”

Brief for Petitioners El-Banna et al. at 43, *Al-Odah v. United States*, No. 06-1196 (Aug. 24, 2007) (quoting Statement of Lieutenant Colonel Stephen Abraham, U.S. Army Reserve, Upholding the Principle of Habeas Corpus for Detainees, Before the House Armed Services Committee (July 26, 2007)); *see also* Leonnig, *supra* note 8 (explaining “that the military’s determinations about detainees are . . . ‘based on the entirety of the information before DoD’”).

169. By regulation, all evidence in favor of the Government’s case was given a presumption of correctness by the CSRT, including evidence procured by torture. Thus, for example, detainee Mamdouh Habib had been rendered from Pakistan to Egypt, where interrogators got him to “confess” to a number of claims, after subjecting him to a brutal regime of torture. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (D.D.C. 2005). His CSRT, however, ignored his claims that his confession was coerced and untrue, and nevertheless found him to be an enemy combatant. *Id.*

170. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008); *see also id.* at 2273 (stating that CSRTs “lack the necessary adversarial character”).

171. The claim that the CSRTs provided “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants,” *Boumediene*, 128 S. Ct. at 2279 (Roberts, J., dissenting), is both irrelevant, when considered in the context of an utterly novel system of potentially indefinite detention undertaken outside the requirements of the Geneva Conventions, and overly simplistic, to the extent that it ignored the ways in which the CSRTs functioned in practice.

the “closed and accusatorial” CSRT process produced a “considerable risk of error in the tribunal’s findings of fact.”¹⁷²

Once the Court was convinced that the CSRT’s factual determinations were unreliable, the problem with DTA review became apparent. The DTA precluded the courts of appeals from considering newly discovered evidence that was not or could not have been made available to the CSRT. As such, the CSRT record—and the suspect findings resulting from the tribunal’s defective procedures—could not be challenged under the appellate review.¹⁷³ In contrast, common-law habeas courts had the power to review new evidence relevant to the legality of executive detention and would not be locked into factual determinations by the detaining official.¹⁷⁴ As Justice Holmes explained: “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from outside, not in subordination to the [prior] proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”¹⁷⁵ The Kurnaz example vividly underscored the inadequacy of the DTA for the Court.¹⁷⁶ As described, under the DTA-review scheme the CSRT’s finding that Kurnaz’s friend “engaged in a suicide bombing” would have to be accepted as true by the reviewing court, even though it is objectively false.¹⁷⁷ Ultimately, the Court declared that “an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record

172. *Boumediene*, 128 S. Ct. at 2270 (citations omitted).

173. Judge Rogers in the D.C. Circuit observed that “[f]ar from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.” *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

174. See *supra* text accompanying notes 149–61 (discussing the common-law treatment of habeas).

175. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

176. Supreme Court commentator Mary Lederman remarked that about the Petitioner’s use of the Kurnaz anecdote:

Seth Waxman in rebuttal seized on Justice Kennedy’s critical question, and, in my humble opinion, gave one of the more powerful and effective rebuttals I’ve ever seen—one that addresses not only Justice Kennedy’s question, but also goes to the heart of why . . . this system of indefinite detention is fatally flawed.

Posting of Marty Lederman to SCOTUSblog, Quick Reactions to *Boumediene* Oral Argument, <http://www.scotusblog.com/wp/quick-reactions-to-boumediene-oral-argument/> (Dec. 5, 2007, 12:12 p.m.).

177. Examples like this could be multiplied. See Brief of Petitioner El Banna at 13, *Boumediene v. Bush*, 128 S. Ct. 2229 (2007) (No. 06-1195). The Court focused on the example of Mohamed Nechla, whose request to have his employer called as a witness was denied by his CSRT, but whose lawyer has since located the employer and wished to introduce such exculpatory evidence. *Boumediene*, 128 S. Ct. at 2273.

in the earlier proceeding” is “constitutionally required” by the Suspension Clause in this context.¹⁷⁸

4. Rushing to Judgment?

Why did the Court reach this ultimate question? Justice Roberts vigorously asserted that the Court should have, after finding jurisdiction, remanded to the D.C. Circuit and required the petitioners to exhaust their remedies under the DTA. This would permit the lower court to assess, in the context of specific cases, whether the DTA provided an adequate process under either the Suspension Clause or the Due Process Clause.¹⁷⁹ Indeed, by deciding the question of the inadequacy of a congressional remedy in the abstract, outside of a case-by-case evaluation, the Court cut short any “ongoing dialogue between and among the branches of Government”¹⁸⁰ it seemed to earlier endorse in connection with its decision in *Hamdan*. Yet while acknowledging that the ordinary course was to remand and to exhaust administrative remedies, the Court suggested that it had already heard enough.¹⁸¹ Measured against the “gravity of the separation-of-powers issues” raised by the cases, the seemingly irremediable structural flaws of the CSRT process, and the substantial, additional delay the petitioners would face from incremental adjudication of the DTA by the lower court, the Court appropriately decided to act conclusively.¹⁸²

And, how can we explain the Court’s rejection of the political branches’ judgment regarding the adequacy of the DTA remedy and their implicit endorsement of the CSRT process, particularly when that judgment arises in the national-security context?¹⁸³ Perhaps the Court was impatient with Congress, viewing it as overly acquiescent to the executive branch’s demands during wartime. The DTA, for example, was raised as part of a Defense Appropriations bill, passed without any hearings or meaningful floor debate; similarly, the MCA was rushed through Congress on the eve of midterm congressional elections.¹⁸⁴ Thus, the Court may have thought that the way in

178. *Id.* at 2272.

179. *Id.* at 2283 (Roberts, C.J., dissenting) (arguing that the Court “rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary, and it does so with scant idea of how DTA judicial review will actually operate”).

180. *Id.* at 2243 (majority opinion).

181. *Id.* at 2263 (stating that the costs of further delaying the case outweigh any benefits of remand).

182. *Boumediene*, 128 S. Ct. at 2263.

183. *Id.* at 2279 (Roberts, C.J., dissenting) (“The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate.”).

184. See, e.g., Editorial, *Careless Congress*, L.A. TIMES, Nov. 3, 2006, at 28 (arguing that Congress abdicated its constitutional responsibility by enacting the MCA, leaving the Court to “clean up” its mess); Editorial, *Dealing with Detainees*, WASH. POST, Nov. 15, 2005, at A20

which Congress acceded to executive demands in the context of war powers at the expense of individual rights—like the way Congress often readily accedes to the national government’s demands at the expense of states’ rights—demonstrated yet another context in which Congress had an “underdeveloped capacity for self-restraint.”¹⁸⁵

Irrespective of this possibility, however, it is not at all clear why the Court *should* have deferred to Congress’s judgment regarding the adequacy of a DTA-CSRT review scheme.¹⁸⁶ Such a judgment does not involve any empirical or policy considerations of the sort that may justify great deference to a more institutionally competent legislative branch.¹⁸⁷ The central question in *Boumediene* was functionally and historically a judicial one, requiring a judgment about the substantive protections of the writ at common law, the significance of separation-of-powers principles when liberty interests are at stake, and the minimal procedural safeguards a detention-review scheme must have to meet constitutional requirements. As Justice White remarked, “One might think that if any class of concepts would fall within the definitional abilities of the Judiciary, it would be that class having to do with procedural justice.”¹⁸⁸ Indeed, the central wisdom of the Suspension Clause is to mandate a robust judicial role in checking abuses of power by the political branches.

Justice Kennedy acknowledged that it may be difficult for those who encounter the daily realities of wartime to accept the Court’s abstract reasoning or to bear the significant additional cost that compliance with the ruling will impose on them. With the long history of the Great Writ and

(arguing that the DTA is another in a series of examples of Congress “enable[ing] the administration”); Editorial, *Protect Habeas Corpus at Guantanamo*, WASH. POST, Dec. 15, 2005, at A32 (noting that the stripping provision of DTA was not brought before any congressional committee, nor was it the subject of any hearings); Editorial, *Rushing Off a Cliff*, N.Y. TIMES, Sept. 28, 2006, at A22 (arguing that the MCA was pushed through an “irresponsible” Congress so that Republicans would look good before the mid-term elections).

185. *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 588 (1985) (O’Connor, J., dissenting); see also Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 796–97 (1995) (arguing that Congress cannot be trusted to preserve federalism because “[e]very breach of the constitutional fabric becomes a new fundraising opportunity and a new television spot in one’s campaign for reelection”); Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71, 99–100 (1995) (noting that judicial review of criminal laws passed under the commerce power is necessary because “few members of Congress would oppose a crime bill for fear of appearing ‘soft’ on the issue”).

186. *Cf. Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting) (“What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.”).

187. See, e.g., *United States v. Lopez*, 514 U.S. 549, 619 (Breyer, J., dissenting) (discussing empirical judgments regarding the connection between guns and educational productivity). See generally *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955) (discussing the deference given to Congress regarding social and economic legislation).

188. *Nixon v. United States*, 506 U.S. 224, 248 (1993) (White, J., concurring).

Suspension Clause in view, Justice Kennedy offered several responses. First, he conceded that habeas review of executive detention is not triggered immediately upon custody; rather, the executive branch is entitled to a “reasonable period of time” to classify and process the detainee, before judicial scrutiny is required.¹⁸⁹ Second, Kennedy appears to invert the trope casually rendered by Justice Black in dismissing the claims of Japanese-American detainees in *Korematsu*—that the hardships about which internees complain simply “are part of war.”¹⁹⁰ Instead, *Boumediene* suggests that hardships endured by the military must be a part of compliance with the law.¹⁹¹

Finally, the Court explained that, in the long-term, there is wisdom in respecting the Court’s role. “Security subsists . . . in fidelity to freedom’s first principles.”¹⁹² Accordingly, executive actions are strengthened and legitimized if done with the approval of the judicial branch, rather than under a claim of pure executive prerogative. And, while the Executive retains full control over military decisions and strategy, “[w]ithin 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 authority of the Executive to imprison a person.”¹⁹³ Because of its confidence in the importance of that role, the Court accepted as an obligation what Justice Roberts stated as a criticism: “replac[ing] a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”¹⁹⁴

IV. DEVELOPMENT OF LEGAL RULES: THE SUBSTANTIVE SCOPE OF THE WRIT

By striking down the jurisdiction-stripping provisions of the MCA, the Court revived access to the writ for hundreds of detainees held in Guantanamo and, potentially, those held in other locations. While the subsequent Section addresses the novel set of procedural rules and standards the lower courts may use to govern their plenary habeas hearings,

189. *Boumediene*, 128 S. Ct. at 2275–76 (“[I]t likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody.”). This consideration is similar to that made by Kennedy in his *Rasul* concurrence. See *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (“Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”).

190. *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (“[H]ardships are part of war, and war is an aggregation of hardships.”).

191. *Boumediene*, 128 S. Ct. at 2261 (“Compliance with any judicial process requires some incremental expenditure of resources.”).

192. *Id.* at 2277.

193. *Id.*

194. *Id.* at 2279.

this Section turns to two important legal questions *Boumediene* left open for consideration by district courts on remand. First, under *Boumediene*'s reasoning, would the habeas statute or the Suspension Clause reach U.S. detention operations outside of Guantanamo, such as the largest holding area for alleged "enemy combatants" in Bagram, Afghanistan? Second, what substantive legal standards govern the Executive's authority to detain persons seized as part of military operations against suspected terrorists?

A. *BEYOND GUANTANAMO: THE GEOGRAPHIC REACH OF THE WRIT*

The Court could have, but chose not to, expressly restrict the reach of the Suspension Clause to the arguably unique setting of Guantanamo. That decision partly reflected the Court's concern that a bright-line jurisdictional rule would invite executive "manipulation," such as locating detention operations on the other side of a jurisdictional line in order to "evade legal constraint."¹⁹⁵ Currently, the jurisdictional line under consideration is the U.S. airfield in Bagram, Afghanistan, now the site of the United States' largest detention operation for "enemy combatants."¹⁹⁶ Detainees filed a number of habeas cases in 2007 in the U.S. District Court for the District of Columbia on behalf of prisoners detained there, producing a recent, thoughtful district-court decision extending *Boumediene*'s reach to a category of non-Afghani detainees transferred to Bagram from third countries.¹⁹⁷ Significantly, the Obama Administration formally endorsed the position previously taken by the Bush Administration: neither the habeas statute nor the Suspension Clause permits federal courts to hear habeas petitions filed from Bagram.¹⁹⁸ In its appeal of the district court's decision conferring habeas jurisdiction, the Obama Administration relied on doctrine and rhetoric eerily similar to that employed by its predecessor in defending the

195. See *supra* text accompanying note 79 (describing the Court's rationale for a functionalist rule).

196. On March 13, 2009, the Department of Justice under President Obama filed a brief "refining" the Executive's position on its detention authority, in which it abandoned the term "enemy combatant." Respondents' Memorandum at 1646, 2378, *In re Guantanamo Bay Detainee Litigation*, Nos. 08-442, 05-0763 (D.D.C. Mar. 13, 2009). While the Administration dropped the concise label, the scope of the detention power the Administration claimed remained substantively the same. See *id.* at 1 ("[T]he President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks."). A more full discussion of the Obama Administration's claimed detention authority appears in Section IV.B. Since all of the known detainees held in Bagram and Guantanamo were initially detained and described as "enemy combatants" and that, therefore, many courts and commentators have also used this term, I continue to employ it throughout the Article.

197. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009).

198. Government's Response to This Court's Order of January 22, 2009 at 2, *Maqaleh*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06-1669) (stating that the Department of Justice under President Obama "adheres to its previously articulated position").

detention operations in Guantanamo.¹⁹⁹ Indeed, Obama Administration officials have perversely defended these operations in Bagram in part on the grounds that the decision to close Guantanamo creates an urgent need for a new executive detention locale to detain indefinitely hundreds of suspected terrorists.²⁰⁰

1. The Bagram Airfield

The Bagram Airfield, located approximately forty miles north of Kabul, is the largest U.S. military base in Afghanistan. Although there is a significant multi-national presence on the Airfield as part of NATO's International Security Assistance Force ("ISAF"), the U.S. military exercises control over the Airfield and a U.S. officer commands the ISAF. Specifically, the United States entered into an "Accommodation Consignment Agreement" (hereinafter "Bagram Lease Agreement") in 2006, in which the "Host Nation," Afghanistan, consigned all land and facilities at Bagram Airfield for the indefinite and "exclusive, peaceable, undisturbed and uninterrupted" use by the United States.²⁰¹ The material terms of the Bagram Lease Agreement, described fully below, bear a striking similarity to the terms of the Guantanamo Lease Agreements.²⁰²

The detention facility in the Airfield—known as the Bagram Theater Internment Facility—is under the exclusive command and control of the U.S. military.²⁰³ The number of detainees held at Bagram increased following the 2004 *Rasul* decision granting Guantanamo detainees access to the writ; though exact figures are unavailable, recent estimates suggest that the Bagram prison holds over 630 detainees,²⁰⁴ many of whom have been

199. See Brief for Respondents–Appellants at 18, *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. Sept. 14, 2009) ("Habeas rights under the United States Constitution do not extend to enemy aliens detained in the active war zone at Bagram Airfield in Afghanistan."); Karen De Young & Peter Finn, *U.S. to Give New Rights to Afghan Prisoners: Infinite Detention Can be Challenged*, WASH. POST, Sept. 13, 2009, at A01 (quoting an administration official's assertion that "[h]abeas is inappropriate for the battlefield").

200. Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, § A, at 1.

201. See Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support at exh. A to Tennison Declaration, *Wazir v. Gates*, 629 F. Supp. 2d 63 (D.D.C. 2009) (No. 06-1697) [hereinafter Bagram Lease Agreement] (offering, as an exhibit to the Tennison Declaration, the Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield).

202. See *infra* text accompanying notes 240–53 (discussing the application of the Suspension Clause to Bagram and the similarities between the Guantanamo and Bagram leases).

203. Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support at exh. 1 ¶ 2, *Wazir*, 629 F. Supp. 2d 63 (No. 06-1697) [hereinafter Tennison Declaration].

204. Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1.

held for over seven years. And, while a number were apprehended in Afghanistan, it appears that others were brought to Bagram from outside that theater of hostilities.²⁰⁵ The Government also plans to build a new prison on the Airfield, intended to house an additional 1100 detainees.²⁰⁶ Although information about Bagram is far more limited than that now available about Guantanamo, there have been a wealth of reports of torture and other abuses committed by prison guards and interrogators, no doubt emerging in part from the absence of legal or humanitarian constraints on detention operations there.²⁰⁷

2. A Suspension Clause Puzzle

As described below, application of *Boumediene's* new three-part functional test may well compel the conclusion that the Suspension Clause applies to U.S. detention operations in Bagram. Making such a determination requires confronting a variation of a puzzle left to us by Justice Marshall's interpretation of the Suspension Clause.²⁰⁸ According to the prevailing understanding of Justice Marshall's dicta in *Bollman*,²⁰⁹ the Suspension Clause and federal habeas jurisdiction are not self-executing; rather, "the power to award the writ by any of the courts of the United States

205. See Karen De Young & Del Quentin Wilber, *Britain Acknowledges 2 Detainees Are in U.S. Prison in Afghanistan*, WASH. POST, Feb. 27, 2008, at A04 (reporting the admission of the British government that it transferred two Pakistani citizens apprehended in Iraq into U.S. custody at Bagram); see also *Maqaleh*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) (reciting the allegations of four habeas petitioners who each asserted that they were seized outside of Afghanistan and rendered to Bagram); Petition for Writ of Habeas Corpus (Al-Najar) at 4, *Maqaleh*, 604 F. Supp. 2d 205 (No. 08-2134) (seized from Karachi, Pakistan); Petition for Writ of Habeas Corpus & Complaint for Declaratory & Injunctive Relief (Al Bakri) at 2, *Maqaleh*, 604 F. Supp. 2d 205 (No. 08-1167) (Yemeni national seized from Thailand); Editorial, *A Reckoning at Bagram; Mr. Obama Must Give Those Held at the Afghan Air Base a Way to Challenge Their Detentions*, WASH. POST, Mar. 7, 2009, at A12 (stating that thirty Bagram prisoners were apprehended outside of Afghanistan).

206. Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 1, 2005, at A1 (reporting on the homicide of two Afghan detainees in the Bagram prison).

207. See, e.g., HUMAN RIGHTS FIRST, ARBITRARY JUSTICE: TRIALS OF BAGRAM AND GUANTANÁMO DETAINEES IN AFGHANISTAN 20–21 (2008), <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf> (reporting on abuses of prisoners held by the United States in Afghan prisons, including sexual assault, physical and psychological abuse, and even murder); Golden, *supra* note 206; Douglas Jehl, *Army Details Scale of Abuse at Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1 (describing Army investigatory report documenting widespread abuse of prisoners in Bagram prison); Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, WASH. POST, Oct. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100100309.html> (reporting on a Bagram detainee's claims of abuse, including solitary confinement for eleven months, starvation, beatings, exposure to freezing temperatures, and sexual humiliation).

208. See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 272 (2005) (explaining that several provisions of the Constitution as well as Supreme Court precedent could be read to render the Suspension Clause without practical effect to review forms of executive detention).

209. *Ex parte Bollman*, 8 U.S. 75, 94–95 (1807).

must be given by written law.”²¹⁰ Thus, under this view, Congress implicates the Suspension Clause only if it withdraws a statutory right already in existence.²¹¹

Yet, how can one account for the peculiar feature of the Suspension Clause, which has conventionally been thought to make an entitlement to constitutional protection turn on the preexistence of a statutory right (thereafter taken away)? As Professor Hartnett explains, Marshall himself believed that Congress was constitutionally obligated to codify the common-law writ into “written law,” and thereby provide federal courts with habeas jurisdiction.²¹² Much like when Congress met its obligation by passing the original habeas corpus statute as part of the Judiciary Act of 1789 (which is substantively identical to the current codification at 28 U.S.C. § 2241(c)(1)), the Suspension Clause likewise prevents Congress from removing it absent the conditions of rebellion or invasion the Clause expressly contemplates.²¹³

This puzzle produced no complications in *Boumediene* because *Rasul* had already made clear that the habeas statute applied to Guantanamo; thus, MCA section 7’s attempted repeal of Guantanamo detainees’ statutory habeas plainly implicated the Suspension Clause. But complications emerge when attempting to apply *Boumediene*’s Suspension Clause jurisdictional analysis to Bagram. Courts adhering to *Bollman*’s dicta would feel compelled to decide whether the habeas statute applied to Bagram prior to considering a Suspension Clause violation. This could produce anomalous results. For example, imagine that one court concludes that the habeas statute applies to Bagram, while another court concludes it does not. In such a scenario, the first court will consider a petitioner’s entitlement to constitutional

210. *Id.* at 95 (noting that if that power had not been vested by statute, “the privilege itself would be lost, although no law for its suspension be enacted”); Hartnett, *supra* note 208, at 269.

211. *See* *INS v. St. Cyr*, 533 U.S. 289, 304 (2001) (holding that the Suspension Clause and federal habeas jurisdiction must be activated by Congress). Justice Scalia suggested in his dissenting opinion that if the Suspension Clause is tethered to a preceding congressional judgment to make the writ available, then the Suspension Clause cannot be violated if Congress permanently amends or retracts the scope of statutory habeas, “lest the Clause become a one-way ratchet.” *Id.* at 340 n.5 (Scalia, J., dissenting). For criticisms of this view, see Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 570–87 (2002) (arguing that Justice Scalia’s arguments are unpersuasive and ignore “voluminous contrary evidence”).

212. And, as Justice Marshall further explained of Congress’s obligation:

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

Ex parte Bollman, 8 U.S. at 136; *see* Hartnett, *supra* note 208, at 270 (“The obligation to provide for the privilege of the writ of habeas corpus is parallel to the obligation to provide for the establishment of the Supreme Court.”).

213. U.S. CONST. art. I, § 9, cl. 2.

protection under the Suspension Clause, while the second court will consider the case closed without any further analysis under the Suspension Clause. Such an occurrence would suggest a petitioner who has preexisting statutory habeas rights has, as a practical matter, more constitutional protections than an identically situated petitioner whom a court deems has no statutory habeas rights.

Though a detailed discussion of this puzzle is beyond the scope of this Article, it is worth at least raising the possibility that Marshall's view of the Suspension Clause as non-self-executing is no longer viable in the federal-detention context. Perhaps, as Professor Eric Freedman argues, Marshall's dicta represented an incorrect view of the Suspension Clause, even at the time it was decided.²¹⁴ Perhaps one should view the dicta as anachronistic, considering it was issued at a time when Marshall would have believed that the absence of federal habeas jurisdiction would not preclude the availability of habeas for federal prisoners in *some* forum, such as in state court—a possibility that was later arguably foreclosed in *Tarble's Case*.²¹⁵ Or, to put it differently, perhaps Marshall himself did not contemplate a scenario in which, absent a federal habeas statute, a federal detainee would have no access to the writ.²¹⁶

Indeed, though the question was not presented to the Court, perhaps *Boumediene* itself calls into question the prevailing interpretation of *Bollman's* dicta. To the extent the Court was seriously concerned with preserving the judiciary's role in the constitutional system of separation of powers—in which the Suspension Clause plays a central role—and to the extent the Court was deeply troubled by the political branches' attempts to “decide when and where [the Constitution's] terms apply,”²¹⁷ it may well follow that it is the Court's role to determine whether a common-law habeas is available and protected by the Suspension Clause, regardless of a statute. Otherwise, the Executive could locate detention operations where it was clear the habeas statute does not apply, “leading to a regime in which Congress and the President, and not [the C]ourt ‘say what the law is.’”²¹⁸

Ultimately, in confronting this puzzle, it would be most sensible for courts to interpret the habeas statute specifically to extend to Bagram (or other potential locations) in order to avoid the serious constitutional

214. FREEDMAN, *supra* note 160, at 20–28.

215. Stephen I. Vladeck, *Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 279 (2008).

216. Professor Hartnett suggests that one way to harmonize Marshall's expectation that habeas jurisdiction would have to exist in some court with the reality that, following *Tarble's Case*, state courts arguably have no jurisdiction to hear federal habeas petitions, is to recognize that individual Justices (as opposed to the Supreme Court en banc) have original jurisdiction to hear federal habeas petitions. Hartnett, *supra* note 208, at 258–59.

217. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008).

218. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

question of whether the Suspension Clause is self-executing.²¹⁹ And, even in following this approach, there are two alternatives for courts addressing the jurisdictional reach of habeas to pursue: first, a court might conclude that the habeas statute applies globally to noncitizens in U.S. custody; alternatively, a court might develop functionalist criteria to evaluate whether the habeas statute applies on a case-by-case basis. Because *Boumediene's* three-part functionalist test regarding the applicability of the Suspension Clause seems largely to build on *Rasul's* functionalist analysis regarding the applicability of the habeas statute, both inquiries are deeply related. Indeed, courts may simply choose to import *Boumediene's* more elaborate criteria into the statutory context. I will nevertheless proceed by analyzing these questions in a doctrinally distinct manner.

3. The Habeas Statute and the MCA

A discussion of the extraterritorial reach of the habeas statute must start with the somewhat cryptic reasoning of *Rasul*. Reading *Rasul* in combination with *Braden v. 30th Judicial District*²²⁰ and *Munaf v. Geren*,²²¹ one could conclude that a district court has jurisdiction over any petition filed where a detainee's custodian resides, regardless of the citizenship of the detainee or location of the petitioner's detention. In *Munaf*, the Supreme Court concluded that a district court had jurisdiction over a petition filed by a U.S. citizen being held by U.S. forces in Iraq who answered to a U.S. chain of command.²²² The habeas statute itself contains no territorial limitation nor, as *Rasul* noted, does it distinguish between citizens and aliens.²²³ Moreover, following the Court's decision in *Braden*, a habeas petitioner need not be situated in the jurisdiction of the U.S. district court in which he files a petition; only the custodian need be.²²⁴ Under a logical reading of these cases, therefore, if a district court has jurisdiction over a habeas petition filed by a U.S. citizen held by U.S. forces in Bagram Airfield, then it would also have jurisdiction over a petition filed by an alien held in the same

219. See *Zadvydas v. Davis*, 533 U.S. 678, 695–96 (2001) (finding that “an alien’s liberty interest is . . . strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent”); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (construing the statute to “entirely preclude review . . . would give rise to substantial constitutional questions” regarding the Suspension Clause).

220. *Braden v. 30th Judicial District*, 410 U.S. 484 (1973).

221. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

222. *Id.* at 2212.

223. *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (“[T]here is little reason to think that Congress intended the statute’s geographical coverage to vary depending on the detainee’s citizenship.”); *id.* at 483–84 (“[T]he answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States Section 2241, by its terms, requires nothing more.” (footnote and citation omitted)).

224. *Id.* at 478–79 (citing *Braden*, 410 U.S. at 494–95).

circumstances, even independent of the level of control the United States exercised over the territory.²²⁵

Despite its syllogistic appeal, there is strong reason to doubt that, even in the statutory context, a court would accept a per se, global jurisdictional rule for alien-filed habeas petitions, even in the statutory context. Like his majority opinion in *Boumediene*, Kennedy's concurrence in *Rasul* emphasized practical reasons the habeas statute should extend to Guantanamo specifically.²²⁶ The majority opinion in *Rasul*, despite some recognition of the plain, unlimited terms of the statute's text,²²⁷ also repeatedly emphasized its particular applicability to Guantanamo, over which the United States "exercise[s] complete jurisdiction and control."²²⁸ Most importantly, the Court appeared to couple the scope of the statutory writ with its historical, common-law "antecedents" which turned "on the practical question of 'the exact extent and nature of the jurisdiction and dominion exercised in fact by the Crown.'"²²⁹ Thus, there is good reason to suspect that a court, in considering the geographic reach of the habeas statute, would expressly apply the three-part functional approach specifically constructed in *Boumediene* to determine the reach of the Suspension Clause.²³⁰

4. Application of the Suspension Clause to Bagram

If courts find that the MCA's jurisdiction-stripping provision is applicable to these detentions, then the question remains regarding the reach of the Suspension Clause to Bagram. Under *Boumediene's* functional approach, "at least three factors" are relevant to deciding if the Suspension

225. See *id.* at 481 ("Aliens held at the [Guantanamo Naval] base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241 [the habeas statute].").

226. *Id.* at 487–88 (Kennedy, J., concurring) (emphasizing the "unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay," and that Guantanamo detainees, unlike those in *Eisentrager* are subject to "[i]ndefinite detention without trial or other proceeding").

227. See *id.* at 483–84 (finding that § 2241 requires "nothing more" than the custodian be reached by service of process).

228. *Rasul*, 542 U.S. at 471, 475 (asserting that the United States has "plenary and exclusive jurisdiction").

229. *Id.* at 482 (citing *R. v. Cowle*, (1759) 97 Eng. Rep. 587, 598–99 (K.B.)).

230. Justice Souter suggested as much in his concurrence in *Boumediene*. "But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question." *Boumediene v. Bush*, 128 S. Ct. 2229, 2278 (2008) (Souter, J., concurring) (citing *Rasul*, 542 U.S. at 473, 481–83). Curiously, in *Maqaleh*, even though the parties contested the issue of the habeas statute's applicability to Bagram, Judge Bates simply assumed, without discussing whether the statute did apply to Bagram, that section 7 of the MCA stripped district courts of that statutory jurisdiction. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 212–14 (D.D.C. 2009)

Clause applies extraterritorially: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”²³¹ The Court did not direct how to weigh the factors against each other. It only offered the guideposts set by the detentions in *Eisentrager* (where the factors tilt against extension of the writ) and the detentions in Guantanamo (where they tilt toward extension).

a. Citizenship, Status, and Process

Application of this first factor seems to run entirely in a Bagram petitioner’s favor. First, *Rasul* and *Boumediene* make clear that non-citizenship alone does not preclude access to the writ.²³² Second, unlike the petitioners in *Eisentrager*, who conceded their “enemy alien” status (as soldiers for the enemy army), Bagram petitioners, like Guantanamo petitioners before them,²³³ assert that they are civilians or otherwise not properly classified as “enemy combatants.”

In addition, the amount and quality of the “process” Bagram detainees received falls short of the “trial by military commission” the *Eisentrager* petitioners received and is no better than the CSRT process *Boumediene* already deemed insufficient to foreclose access to the writ.²³⁴ Sometime in 2007, the military put in place an Unlawful Enemy Combatant Review Board (“UECRB”) process in Bagram, which permitted a detainee to see a summary of charges against him if “operational requirements” permit and, as of April 2008, granted a detainee the right to personally appear before a UECRB panel.²³⁵ The Bagram detainee is not given counsel or a personal representative, he is unable to confront the evidence purporting to justify his detention, and he faces similarly insurmountable obstacles to presenting

231. *Boumediene*, 128 S. Ct. at 2259. The Court also suggested that the length of a petitioner’s detention is a relevant consideration and that “[t]he Executive is entitled to a reasonable period of time to determine a detainee’s status before a court entertains that detainee’s habeas corpus petition.” *Id.* at 2275–76. While this reasonable rule of abstention suggests a court should not consider a habeas petition within a period of weeks or months of apprehension, it could not forestall review of the overwhelming majority of Bagram petitioners who may have been detained for a period of years.

232. *See Maqaleh*, 604 F. Supp. 2d at 218 (“United States citizenship is plainly not a litmus test—otherwise *Boumediene* would not have come out the way it did.”). *But see Boumediene*, 128 S. Ct. at 2303 (Scalia, J., dissenting) (“[I]t is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad.”).

233. *See Boumediene*, 128 S. Ct. at 2259 (in contrast to *Eisentrager*, “the detainees deny they are enemy combatants”); *see also Rasul*, 542 U.S. at 485 (detainees “are individuals who claim to be wholly innocent of wrongdoing”).

234. *Boumediene*, 128 S. Ct. at 2260.

235. Tension Declaration, *supra* note 203, ¶ 13–14.

evidence in his own defense as a Guantanamo detainee faced under a CSRT.²³⁶ Finally, a Bagram detainee is not afforded even the limited right to appeal, as the DTA procedures were not made applicable to habeas petitions filed outside of Guantanamo.²³⁷ On the eve of the deadline for the Government's brief appealing the *Maqaleh* decision, the Obama Administration announced new plans to impose an administrative-review system in Guantanamo slightly more developed than the UECRB, but which merely replicated the discredited CSRT system in Guantanamo.²³⁸ If the CSRT-DTA process was an inadequate substitute for habeas, the administrative review system in Bagram is surely inadequate as well.²³⁹

b. *Sites of Detention and Apprehension*

This is perhaps the most significant of the three factors set out by the Court. Following *Boumediene*, the touchstone for Suspension Clause applicability is not the United States' technical or formal sovereignty, but rather its "de facto sovereignty"—"the objective degree of control the Nation exerts over foreign territory."²⁴⁰ There is a strong argument that the extent of U.S. control over Bagram, while not identical to Guantanamo, is nevertheless sufficient to confer habeas jurisdiction under *Boumediene*.

To start with, *Boumediene* distinguished the Landsberg Prison, noting that it was "under the jurisdiction of the combined Allied Forces," and that the U.S. military was "answerable to its allies for all activities occurring

236. See *supra* text accompanying notes 170–73 (describing the Court's assessment of CSRT deficiencies). As the district court in *Maqaleh* noted:

Obvious obstacles, including language and cultural differences, obstruct effective self-representation by petitioners such as these. Detainees cannot even *speak* for themselves; they are only permitted to submit a written statement. But in submitting that statement, detainees do not know what evidence the United States relies upon to justify an "enemy combatant" designation—so they lack a meaningful opportunity to rebut that evidence.

Maqaleh, 604 F. Supp. 2d at 227.

237. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(c), 119 Stat. 2739, 2741–42 (2005).

238. See De Young & Finn, *supra* note 199. The implementation of a new and assertedly more robust review system in Bagram was presumably designed to support the Government's argument on appeal that habeas jurisdiction is inappropriate in light of what it claims are adequate executive efforts to determine a detainee's status. The timing of the announcement, however—made only on the day before the Government's appellate brief was due—suggests that more judicial supervision of executive conduct, not less, is required.

239. See *Boumediene*, 128 S. Ct. at 2269 ("What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."); *Maqaleh*, 604 F. Supp. 2d at 227 ("[W]hile the important adequacy of process factor strongly supported the extension of the Suspension Clause and habeas rights in *Boumediene*, it even more strongly favors petitioners here.").

240. *Boumediene*, 128 S. Ct. at 2252.

there.”²⁴¹ By contrast, the Bagram Airfield and prison are under the “exclusive” command and control of the U.S. military, and the United States needs the approval of neither its allies nor the Afghan government for its operations there.²⁴² Thus, in Bagram, as in Guantanamo, “the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”²⁴³ And, in contrast to the U.S. Government’s absence of plans for the “long-term occupation of Germany,”²⁴⁴ the United States is entitled to *indefinite* use of the Bagram Airfield, and there is currently no anticipated end date to U.S. control there.²⁴⁵

In addition, the Lease Agreements in force in Bagram bear substantial similarities to those in Guantanamo.²⁴⁶

241. *Id.* at 2260.

242. Bagram Lease Agreement, *supra* note 201, ¶ 8; Tension Declaration, *supra* note 203, ¶¶ 11–13; *see also* Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support at 22, *Wazir v. Gates*, 629 F. Supp. 2d 63 (D.D.C. 2009) (No. 06-1697) (“[T]he detention operation at Bagram is under the command and control of the U.S. military, and ‘petitioner is in the legal custody of the United States.’” (citations omitted)). The broad Status of Forces Agreement (“SOFA”) that the United States entered into with Afghanistan confirms the significant U.S. license on its military base. Under that SOFA, U.S. forces are entirely immune from any criminal prosecution by the Afghan government and are immune from any civil liability for crimes unless they occur outside the scope of their duties. 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., Sept. 26, 2002–May 28, 2003, Temp. State Dep’t No. 03-67, *available at* 2003 WL 21754316, at *2. The SOFA also permits U.S. personnel to enter and leave Afghanistan without a passport and exempts U.S. imports and exports from taxation or regulation. *Id.* at *1; *see also* R. CHUCK MASON, CONG. RESEARCH SERV., STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT AND HOW HAS IT BEEN UTILIZED? 7–10 (2009), *available at* <http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (offering a “historical perspective on the inclusion of a SOFA as part of comprehensive bilateral by the United States with Afghanistan”).

243. *Boumediene*, 128 S. Ct. at 2261.

244. *Id.* at 2260.

245. Bagram Lease Agreement, *supra* note 201, ¶ 4. Indeed, the United States has announced that operations in Afghanistan will escalate and could last for a significant additional period of years. *See* Helene Cooper, *Putting Stamp on Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES, Feb. 18, 2009, at A1 (describing troop escalation in Afghanistan).

246. The following is a variation of a comparative chart prepared by Petitioners’ counsel in *Maqaleh v. Gates*. Petitioners’ Opposition to Respondents’ Motion to Dismiss for Lack of Jurisdiction at 12–14, *Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06-CV-01669).

Indicia of Control	Guantanamo Leases²⁴⁷	Bagram Lease²⁴⁸
1. Ultimate Ownership	Cuba retains “ultimate sovereignty” over Guantanamo Bay. Art III, T.S. No. 418.	“[T]he HOST NATION [Afghanistan] is the sole owner of the premises” ¶ 8.
2. Exclusive Use Rights	“[T]he Republic of Cuba consents that during this period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas” Art III, T.S. No. 418.	Afghanistan “hereby consigns to the UNITED STATES to have and to hold for the exclusive use of the UNITED STATES Forces land, facilities, and appurtenances [sic] currently owned by or otherwise under the control of [Afghanistan]” ¶ 1. Afghanistan “warrants that the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession” ¶ 9.
3. Right to Perpetual Possession, Subject to U.S. Termination	“So long as the United States of America shall not abandon the said naval station of Guantanamo” Art. III, T.S. No. 866.	The lease continues in effect “until the UNITED STATES or its successors determine that the Premises are no longer required for its use.” ¶ 4.

247. For the various lease agreements with Cuba, see generally Treaty of Relations, U.S.-Cuba, May 29, 1934, T.S. No. 866; Agreement Between the United States of America and Cuba for the Lease of Coaling or Naval Stations, U.S.-Cuba, July 2, 1903, T.S. No. 426; Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 16–23, 1903, T.S. No. 418. The relevant articles are indicated in the table.

248. For the substance of the Bagram Lease, see Bagram Lease Agreement, *supra* note 201. The relevant paragraphs are indicated in the table.

Indicia of Control	Guantanamo Leases ²⁴⁷	Bagram Lease ²⁴⁸
4. Consideration	“[A]nnual sum of two thousand dollars, in gold coin . . .” Art. 1, T.S. No. 426.	Rights to United States granted “without rental or any other consideration for use of the premises,” ¶ 5, but for “mutual benefits to be derived” by each government. ²⁴⁹
5. Host Country’s Lack of Control over territory	No provisions entitling Cuban government to enter or control.	United States shall “hold and enjoy the Premises during the period of this agreement without any interruption whatsoever by [Afghanistan] or its agents.” ¶ 9.
6. Right of United States to Assign Agreement	United States lacks right to assign.	United States “shall have the right to assign this agreement to a successor nation or organization . . .” ¶ 2.
7. Current Duration of Lease	Executed 1903.	Executed 2006. ²⁵⁰

The Lease terms thus suggest that the United States has a similarly unconstrained, practical control over its operations in Bagram. And a clear lesson of *Rasul* and *Boumediene* is that simply because Afghanistan retains sovereignty over the remainder of the country, or simply because Afghanistan retains “sole owner[ship]” over the Airfield itself, does not foreclose the Court’s jurisdiction any more than Cuba’s retention of “ultimate sovereignty” over Guantanamo did. Accepting that argument would be to invite precisely the type of executive manipulation *Boumediene* eschewed—leaving ultimate ownership or sovereignty with the host government while retaining total control to undertake any military or detention operations there. To the contrary, the very essence of the

249. It is not clear if the parties included this consideration as form language in order to satisfy the elementary requirements of contract, or if they intended to refer to something more substantive, such as the strategic benefits each party derives from having the United States run the prison as a part of stabilization efforts in Afghanistan. If it is the former, the case for jurisdiction is stronger; if it is the latter, the case for jurisdiction is weaker.

250. While the United States has had “complete and uninterrupted control of the bay for over 100 years,” U.S. presence in Afghanistan has been considerably shorter. The district court in *Maqaleh* suggested this difference weakened (but not fatally) the case for jurisdiction over Bagram, but perhaps it should not. To the extent that the United States has the authority to maintain a presence there under the lease in perpetuity, and to the extent that hostilities against suspected terrorists in Afghanistan and beyond will likely continue for at least another generation, Bagram appears to be an appealing location for long-term detention operations outside of the law as did Guantanamo, irrespective of the duration of U.S. presence there.

separation-of-powers construct embedded in the Suspension Clause is to prevent the Executive from simply contracting away judicial review of its conduct in order to operate outside of any “legal constraint.”²⁵¹

Some material differences between the detention operations in Guantanamo and Bagram persist, however. First, under the terms of the governing Status of Forces Agreement, it appears that Afghanistan may have concurrent jurisdiction over Afghans who commit crimes on the Airfield (while, for example, working there). Because Cuba has no jurisdiction over any crimes committed by any citizen, Cuban or otherwise, committed at Guantanamo, the United States arguably has a greater level of jurisdiction—whatever that sometimes ambiguous term can mean—over all activities at Guantanamo than at Bagram. However, that level of jurisdictional control should not be dispositive. Because U.S. officials are themselves answerable to no one else for conduct they undertake at the Airfield—for example, torture or prisoner abuse—there is a compelling reason for the exercise of habeas jurisdiction in light of the Court’s strong functionalist concern with preserving separation of powers and limiting the possibility of executive abuse.²⁵²

More significantly, Guantanamo is literally oceans away from any battlefield and, arguably, as insulated from military conflict as a naval base inside Florida. By contrast, the Bagram Airfield, while currently secure and stable, is in a country where there are ongoing combat operations. Moreover, unlike the U.S. presence in Guantanamo, the U.S. control over the Airfield is welcomed by the Afghan government as part of an understanding (if not formal consideration) for U.S. military assistance in stabilizing and securing the country against forces hostile to the current Afghan government.²⁵³

Perhaps these considerations are relevant only to the third of the *Boumediene* factors: whether there are practical obstacles inherent in extending the writ. However, these considerations might also get to what is implicit in the Court’s apparent concern with the Government’s conduct in

251. *Boumediene v. Bush*, 128 S. Ct. 2229, 2258–59 (2008).

252. *See* *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 223 (D.D.C. 2009) (“Nor do the differences in jurisdiction drastically undercut the objective degree of control at Bagram. ‘Jurisdiction,’ like sovereignty, is merely a label, and *Boumediene* rejected the argument that a label like ‘sovereignty’ is determinative in assessing the reach of the Suspension Clause.”). *But see* Anthony J. Colangelo, “*De Facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 662–76 (2009) (arguing that jurisdiction, rather than control, should be the dispositive factor for establishing extraterritorial jurisdiction under the Suspension Clause).

253. *See* *Tennison Declaration*, *supra* note 203, ¶ 2 (explaining that part of the mission of the military force at Bagram is to “enhance the sovereignty of Afghanistan”); Press Release, White House, Joint Declaration of the United States-Afghanistan Strategic Partnership 1 (May 23, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050523-2.html> (“Decades of civil war, political violence, and interference in Afghanistan’s internal affairs make Afghanistan’s security, sovereignty, independence, and territorial integrity particularly crucial areas for U.S.-Afghan cooperation.”).

Guantanamo. That is, are the detentions in Afghanistan a product of conflicts ongoing in neighboring Afghan provinces, such that they could be considered a “necessary incident to the use of force” authorized by the AUMF in Afghanistan?²⁵⁴ Or, has Bagram simply become a Guantanamo by another name—a locale for the detention of persons apprehended anywhere in the world, even thousands of miles from any battlefield, as part of the Executive’s asserted authority to conduct the “global war on terror.”²⁵⁵ The *Boumediene* Court was no doubt concerned about the site of a detainee’s apprehension, emphasizing at the very outset that some of the petitioners were seized “in places as far away from [the battlefield in Afghanistan] as Bosnia and Gambia.”²⁵⁶ The Bagram prison population has been growing steadily, ever since the Court’s decision in *Rasul* effectively stopped the transfer of prisoners to Guantanamo.²⁵⁷ And, a number of the Bagram detainees were not captured on the Afghan battlefield but in third countries far from the ongoing conflict.²⁵⁸ Under *Boumediene*’s separation-of-powers framework, these facts form the strongest grounds for judicial supervision to ensure the Executive is not employing the Bagram prison to detain any enemy combatant, captured anywhere in the world, based on nothing more than executive say-so.²⁵⁹

c. *Practical Obstacles “Inherent” in Resolving Entitlement to the Writ*

The third factor may appear to pose the greatest obstacle to the application of the Suspension Clause (or the habeas statute) to Bagram. In *Boumediene*, the Government had presented “no credible arguments” that adjudicating habeas petitions in Guantanamo would compromise the military mission there and, in light of the “plenary control” the United States maintains over the base, the Court believed no such arguments could

254. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

255. Eric Schmidt, *Two Prisons, Similar Issue for President*, N.Y. TIMES, Jan. 27, 2009, at A1 (explaining that Bagram Air Base presents an “equally difficult problem” for the Obama Administration as Guantanamo and describing Bagram as “the preferred alternative to detain terrorism suspects”); Laura King, *Obama’s Guantanamo Decision Having Repercussions in Afghanistan, Pakistan*, L.A. TIMES, Jan. 24, 2009, at A3 (pointing out that “Obama’s decision [to close Guantanamo] likely will have repercussions at other U.S. detention facilities, including the large one at Bagram airfield outside Kabul” where prisoners have “suffered even more systematic abuse and deprivation of rights than those at Guantanamo”).

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

257. See Golden, *supra* note 206, at A1 (stating that the number of detainees at Bagram rose from about one hundred in 2004 to about five hundred in 2007).

258. See *supra* note 205 (discussing various allegations made by Bagram prisoners who claimed that they were captured outside of Afghanistan).

259. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 216 n.7 (D.D.C. 2009) (“This Court’s concern with the unrestrained power of [the Executive Branch] to determine the availability of habeas corpus simply by choosing to send a detainee to Bagram rather than Guantanamo is precisely the concern that animated the Supreme Court’s separation-of-powers observations in *Boumediene*.”).

reasonably be made.²⁶⁰ By contrast, the Court credited the *Eisentrager* Court's concern about "judicial interference" with military operations in Germany, where American forces faced "potential security threats" from "enemy elements, guerilla fighters and 'were-wolves.'"²⁶¹ Unlike the island fortification of Guantanamo, Bagram is reasonably proximate to ongoing hostilities against a range of "enemy elements," hostilities which may well increase in the coming months and years.²⁶² Thus, one can certainly foresee military personnel in Afghanistan making credible arguments about the negative consequences of "judicial interference" with operations there.

Nevertheless, this fact should not necessarily defeat jurisdiction, particularly for those detainees rendered to the prison from outside Afghanistan. First, the Bagram Airfield is currently heavily fortified and secure. Thus, as *Boumediene* instructed, a court should not accept a conclusory argument that the extension of the writ "may divert the attention of military personnel from other pressing tasks."²⁶³ Balancing military tasks and compliance with law is something the military has done and can do.²⁶⁴ And, in the case of persons that the Government has rendered to Afghanistan from third countries for activities allegedly undertaken there, the Executive cannot claim a burden in searching for evidence or pulling witnesses or personnel from an active battlefield; indeed, having chosen to render a detainee to Bagram, the Executive should be estopped from claiming any burden associated with the presence of hostilities.²⁶⁵ In any event, diversion of some portion of military resources is ultimately the cost of adhering to the constitutional requirements of the Suspension Clause.²⁶⁶

260. *Boumediene*, 128 S. Ct. at 2261.

261. *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)) (first set of quotation marks omitted); *cf. id.* at 2261 ("Similar threats are not apparent [at Guantanamo].").

262. *See supra* note 120 (explaining that because Guantanamo is thousands of miles away from an active combat zone, there would not be an excessive burden on the military to adjudicate habeas petitions).

263. *Boumediene*, 128 S. Ct. at 2261.

264. Comparing the concerns about providing process in Bagram to the tribunals considered in *Eisentrager*, the district court in *Maqaleh* stressed that, "if such a 'rigorous adversarial process' was provided at a hastily-constituted military tribunal in post-war China, then it strains credulity to believe that it is impractical to provide meaningful process to detainees held at a large, secure military base, like Bagram, under complete U.S. control." 604 F. Supp. 2d at 228. The court also noted that concerns regarding gathering evidence or producing the petitioner for a hearing are "significantly mitigated today by technological advances," that "[r]eal-time video-conferencing provides a workable substitute for an in-court appearance," and that this "is the process being used" to adjudicate habeas hearings for Guantanamo detainees. *Id.*

265. *Id.* at 228–29.

266. *Cf. Boumediene*, 128 S. Ct. at 2275 ("[T]he costs of delay can no longer be borne by those who are held in custody."); *see also Maqaleh*, 604 F. Supp. 2d at 228 (noting that asserted burdens on the Executive fall "mainly on lawyers and administrative personnel involved, not on those who would otherwise be on the battlefield").

Second, it is not entirely clear that military cost, even if sufficiently particularized and compelling, is a *jurisdictional* concern. Though its discussion of this issue was brief, the Court appears to have identified two kinds of “practical obstacles” at issue. One is an obstacle “inherent in resolving” an entitlement to the writ, such as the possibility that a judgment would produce friction with the host government or conflict with the host government’s law.²⁶⁷ Because “the United States is answerable to no other sovereign” for its acts on the base, there is nothing *inherently* unreasonable in a court exercising jurisdiction over its detentions in Bagram.²⁶⁸

Another obstacle is the cost measured in terms of diversion of resources or risk to personnel. Yet, while these costs are potentially significant obstacles, they may be only temporary or remediable. Thus, if a court were presented with specific, credible evidence regarding the disruption of military operations, it has options short of dismissing for lack of jurisdiction.²⁶⁹ First, there is, of course, a difference between jurisdiction and the merits.²⁷⁰ Thus, after assuming jurisdiction based on the balance of the three factors set out in *Boumediene*, a court is free to dismiss on the merits, either based on the resolution of a legal question or after adopting summary procedures short of what I argue below are required to adjudicate

267. *Boumediene*, 128 S. Ct. at 2259, 2261–62; cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (concluding that it would be “impractical and anomalous” to apply the Fourth Amendment to warrantless seizure by Mexican officials because of the difficulty of finding a magistrate there to issue a warrant, and because a sovereign country like Mexico operates an entirely different legal system and may have different conceptions of “reasonableness” or norms regarding privacy).

268. *Maqaleh*, 604 F. Supp. 2d at 230. The district court in *Maqaleh* relied on this factor in denying habeas jurisdiction over one of the four Bagram petitioners because, even though he was, like the others under consideration, apprehended far from the battlefield (in Dubai), he was an Afghan citizen. Specifically, the court noted that because the U.S. and Afghan governments had been contemplating transferring Afghani prisoners in Bagram to Afghani custody, a U.S. court’s order releasing an Afghani citizen on habeas “could easily upset the delicate diplomatic balance the United States has struck with the host government.” *Id.* It is not clear why this is so. If a U.S. court orders an Afghani citizen released from U.S. government control because it rejects the U.S. government’s asserted legal authority to detain him, why would the Afghan government, who up to that point has not been involved in the apprehension or detention, feel aggrieved? If it possesses independent reasons to detain one of its citizens, it can arrest him after the court orders him released from U.S. custody. See *Munaf v. Geren*, 128 S. Ct. 2207, 2221 (2008) (explaining that “Iraq would be free to arrest and prosecute” habeas petitioners if they were released).

269. Indeed, a point that is often lost is that the Court in *Eisenstrager* actually did reach the merits of the petitioners’ Fifth Amendment and Geneva Convention claims, despite its conclusion that significant military concerns counseled against such course. *Johnson v. Eisenstrager*, 339 U.S. 763, 785 (1950) (finding no Fifth Amendment “right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States”); *id.* at 789–90 (dismissing claims under Geneva Conventions).

270. See *Vladeck*, *supra* note 215, at 281 (arguing that *Eisenstrager*’s progeny has harmed habeas law by conflating the merits with the availability of the writ).

the Guantanamo petitions. Habeas is, above all, a flexible, adaptable remedy. Thus, for example, if a “return” or answer to the habeas petition provides credible affidavit testimony that the petitioner was captured on a battlefield in Afghanistan, rather than imported from some other place, and his detention is authorized by the terms of the AUMF and the laws of war,²⁷¹ a court could dismiss on the merits without discovery, witness confrontation, or other potential judicial interferences with military operations. Courts have followed this procedure in adjudicating the habeas petitions of World War II prisoners of war detained inside the United States.²⁷²

More controversial cases, involving, for example, the detention of persons apprehended far from the Bagram prison, and thus not susceptible to summary disposition under the laws of war, may well justify the imposition of greater procedural requirements, and correspondingly greater costs on the military.²⁷³ Still another option for a court, short of a jurisdictional dismissal, would be to develop case-specific procedures to address the particular obstacles identified by the military, including even delaying the disposition of the merits until a difficulty can be resolved or subsides. This process, for example, ensures that a petitioner’s case would not be forever lost to judicial review, months or even years after overcoming the military obstacle.²⁷⁴

B. SUBSTANTIVE LIMITATIONS ON THE EXECUTIVE’S DETENTION POWER

In *Boumediene*, the Court recognized that challenges to the custodian’s legal authority to detain are a core attribute of habeas protected by the Suspension Clause.²⁷⁵ It recognized that the Guantanamo detainees’ “most

271. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 513, 518, 538 (2004) (explaining that the Government’s right to detain an individual caught fighting with the Taliban for the duration of the conflict is “fundamental and accepted,” and explaining that due process might be satisfied by summary status assessments under Article V of the Geneva Conventions and parallel military regulations).

272. See *In re Territo*, 156 F.2d 142, 144, 148 (1946) (affirming dismissal on the merits of a habeas petition brought by an Italian prisoner of war lawfully held under the Geneva Conventions). This is not to say that *no* persons apprehended on or near the battlefield would have a meritorious petition. For example, Jawad Ahmad, an Afghani reporter assisting Canadian journalists in Afghanistan, was mistakenly detained by U.S. forces for nearly a year before he was finally released. Gloria Galloway & Graeme Smith, *Afghan Reporter Gunned Down in Kandahar City*, THE GLOBE AND MAIL (Toronto), Mar. 11, 2009, at A13; see also *Hamdi*, 542 U.S. at 534 (explaining that habeas procedures, even for battlefield captures, must be sufficient to ensure that an “errant tourist, embedded journalist, or local aid worker has a chance to prove military error”).

273. See *supra* note 205 and accompanying text (listing habeas petitioners detained at Bagram but seized in Iraq, Pakistan, and Thailand).

274. *Boumediene* specifically contemplates modifications to accommodate military needs as they arise. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (“To the extent barriers arise, habeas corpus procedures likely can be modified to address them.”).

275. *Id.* at 2266 (“We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held

basic” legal claim is that “the President has no authority under the AUMF to detain them indefinitely.”²⁷⁶ Nevertheless, the Court expressly disavowed any intention to “address the content” of such legal claims, which would have to be determined on remand.²⁷⁷

Accordingly, the Court set in motion a process, being played out in the district courts on a case-by-case basis, by which the detainees can challenge the legal sufficiency of their detentions. Unless new legislation interrupts this process by giving substantive content to an enemy combatant definition, it will continue to be an important and welcome development. For years, despite a tidal wave of scholarly and international criticism,²⁷⁸ the Government has asserted a nearly unlimited authority to detain persons it has apprehended anywhere in the world as part of its asserted “global war on terror.” Specifically, although the Government has often asserted that its enemy-combatant designations, even ones made for persons apprehended thousands of miles from any battlefield, are consistent with the laws of war and the Court’s decision in *Hamdi*, it has not yet been meaningfully held to account for its numerous departures from the elementary limitations imposed by the laws of war on its authority to detain. This Section does not attempt to catalogue, let alone resolve, the universe of controversies that such potentially large-scale judicial review might produce; rather, it merely attempts to highlight the ways in which, absent congressional intervention, potential case-specific adjudication might meaningfully constrict the Executive’s expansive claims of detention authority.

The preliminary results of the process of case-specific adjudication have been remarkable. But in light of the breadth of the Executive’s asserted detention authority and the inaccuracy of the initial classifications of detainees in Guantanamo, the results have been also largely predictable: as of the time of this writing, of the forty cases that have gone to judgment on the merits, district judges have granted the writ *thirty-one* times. In other

pursuant to ‘the erroneous application or interpretation’ of relevant law.” (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

276. *Id.* at 2271. The Court stated that “whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of ‘enemy combatants’ as the Department of Defense defines that term.” *Id.* at 2271–72.

277. *Id.* at 2276.

278. For a discussion of the enemy combatant designation, see generally John Cerone, *Misplaced Reliance on the “Law of War,”* 14 *NEW ENG. J. INT’L & COMP. L.* 57 (2007); Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 *UCLA J. INT’L L. & FOREIGN AFF.* 1 (2007); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 *U. RICH. L. REV.* 845 (2009); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 *YALE J. INT’L L.* 325 (2003); Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 *Y.B. INT’L HUMANITARIAN L.* 232 (2009); Leila N. Sadat, *Terrorism & the Rule of Law*, 3 *WASH. U. GLOBAL STUD. L. REV.* 135 (2004); Marco Sassoli, *Query: Is There a Status of “Unlawful Combatant”?*, 80 *INT’L L. STUD.* 57 (2006); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 *STAN. L. REV.* 415 (2006).

words, the writ has vindicated the liberty of seventy-five percent of the detainees who have had their cases heard post-*Boumediene*.

1. The AUMF, *Hamdi*, and the Law-of-War Detention Framework

The AUMF authorizes the use of “all necessary and appropriate force” against “nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” and those who “harbored such organizations or persons.”²⁷⁹ The AUMF requires a nexus to the September 11th attacks and does not authorize the President to use force against any future terrorist threat the President might discern.²⁸⁰ Although the AUMF does not expressly speak to the power to detain, in *Hamdi* the Court concluded that detention of the combatants engaged in armed conflict is “so fundamental and accepted an incident to war” as to be a “necessary and appropriate” exercise of force permissibly delegated to the President.²⁸¹ *Hamdi*’s conclusion, in turn, expressly depended upon an understanding of “longstanding law-of-war principles.”²⁸² Under the laws of war governing international armed conflicts, if one can lawfully use force against a combatant by “universal agreement and practice,” then one can detain him in order to prevent his “return[] to the field of battle” to “tak[e] up arms once again.”²⁸³

In *Hamdi*, the Court accepted that the Government’s proffered definition of enemy combatant in that case—that is, someone who was “part of or supporting forces hostile to the United States or coalition partners [in Afghanistan and who] engaged in an armed conflict against the United States” in Afghanistan—was authorized under the laws of war.²⁸⁴ Accordingly, the Court concluded that the AUMF would authorize the detention of the “limited category” of persons such as Hamdi, who had

279. Authorization for Use of Military Force Against Terrorists, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

280. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2108–09 (2005) (arguing that “[i]f an individual had no connection to the September 11 attacks, then he is not covered as a ‘person’ under the AUMF even if he subsequently decides to commit terrorist acts against the United States”). Indeed, the President first requested broader authority to use force against persons unconnected with September 11th “to deter and pre-empt any future acts of terrorism or aggression against the United States,” but Congress refused. David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002) (quoting a draft joint resolution authorizing the use of force).

281. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

282. *Id.* at 521.

283. *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)); see also *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front . . .”). By contrast, “indefinite detention for the purpose of interrogation is not authorized.” *Hamdi*, 542 U.S. at 521.

284. *Hamdi*, 542 U.S. at 526 (quoting Respondent’s Brief at 3).

joined “the military arm of an enemy government,”²⁸⁵ “affiliated with a Taliban military unit,” “engaged in battle” with coalition forces, and “surrender[ed] his Kalashnikov assault rifle” to his Northern Alliance captors.²⁸⁶ In reaching this conclusion, the Court distinguished Hamdi’s situation, which could be resolved by resorting to a “clearly established principle of the law of war,” from a situation in which “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”²⁸⁷ In the latter case, a court might not read the AUMF to provide detention authority. In other words, the AUMF can authorize no more than what the laws of war authorize.²⁸⁸ Thus, as *Hamdi* itself recognizes, in all subsequent cases in which the Government relies on authority contained in the AUMF, courts must look to the laws of war to ascertain if they can properly classify a person as an enemy combatant.²⁸⁹

2. Combatants, Civilians, and Direct Participation in Hostilities

Under the laws of war governing “international armed conflicts,” there are two categories of persons against whom the Government can lawfully employ force—and by implication, detention.²⁹⁰ First is the category of

285. *Id.* at 519 (quoting *Quirin*, 312 U.S. at 37–38).

286. *Id.* at 513 (citations omitted); *see also id.* at 523 (referring to the “context of this case: a United States citizen captured in a *foreign* combat zone”); *id.* at 510 (describing allegations that Hamdi “took up arms with the Taliban during this conflict” in Afghanistan).

287. *Id.* at 520–21.

288. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”); *see also Bradley & Goldsmith, supra* note 280, at 2095 (noting that where “the international law requirement . . . was a condition of the exercise of the particular authority” under the AUMF a “violation of international law would negate a claim of implied authority under the AUMF”).

289. *Hamdi*, 542 U.S. at 522 n.1 (“The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”).

290. Prominent law-of-war scholars and advocates have argued the United States lacks *any* authority to detain persons not captured in connection with an “international armed conflict”—that is, conflicts defined by international law as involving the intervention of armed forces between nation-states that are “High Contracting Parties” to the Geneva Conventions. *See* Brief for Amici Curiae Experts in the Law of War at 4, *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08-368) (“The law-of-war roles [sic] governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention. . . . Authorization, if any, must instead be found in domestic law.”); Majid Khan’s Supplemental Memorandum Regarding the Gov’t’s Det. Auth. at 5–11, *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009) (No. 06-1690) (contending that, unlike the law of war governing international armed conflicts considered in *Hamdi*, the law of war is silent on, and implicitly *denies*, authority to detain persons apprehended in a non-international armed conflict as exists against al Qaeda); Rona, *supra* note 278, at 237 (discussing the international humanitarian law definition of “international armed conflict”). Under this view, the only authority by which the government could detain would be its domestic criminal

genuine combatants. A combatant is a member of a nation-state's armed forces that is engaged in hostilities and who is answerable to a chain of command.²⁹¹ The law considers all other persons civilians that can neither be intentionally targeted by force nor subject to long-term detention.²⁹² The Supreme Court has already accepted this distinction between combatant and civilian as defining detention power under the laws of war governing international armed conflicts.²⁹³

law. See Rona, *supra* 278, at 240–41 (echoing this view). This is a contested view, even in the human-rights community, and one that has not gotten traction in the courts. See, e.g., *Gherebi*, 609 F. Supp. 2d at 57–62 (finding parallel detention authority for NIACs [non-international armed conflicts] as in IACs [international armed conflicts] and concluding that, “whenever the President can lawfully exercise military force, so, too, can he incapacitate the enemy force through detention rather than death”); Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 377 (2005) (“Internment is . . . clearly a measure that can be taken in non-international armed conflict”).

A full evaluation of the competing views of detention authority in a NIAC is beyond the scope of this Article. I do share the concern expressed by these scholars about permitting “the existence of a non-international armed conflict *somewhere* in the world [to] necessarily trigger[] application of the laws of war *everywhere*,” Brief for Amici Curiae Experts in the Law of War at 16, *al-Marri*, 129 S. Ct. 1545 (No. 08-368), and thereby allowing the government to indefinitely detain any person it captures anywhere in the world, merely on suspicion of being a terrorist. Ultimately, however, even if the courts continue to reject the view that there is *no* detention authority in connection with a NIAC, as discussed in the following analysis, there are other ways in which the Executive’s asserted detention authority can be constrained, by analogy to the limitations on detention authority applicable in “international armed conflicts.”

291. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (defining prisoners of war as “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces”); see also Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43(1)–(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (defining a “combatant” as one who is a part of the “organized armed forces, groups and units which are under a command responsible to [a] Party for the conduct of its subordinates”).

292. As the authoritative Commentary to the Fourth Geneva Convention explains, “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention *There is no intermediate status.*” 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, *construed in* JEAN S. PICTET, COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (1958), available at http://www.loc.gov/rf/frd/Military_Law/pdf/GC_1949-IV.pdf (emphasis added).

293. *Compare Hamdi*, 542 U.S. at 513 (discussing allegations that Hamdi was an armed member of the Taliban military unit engaged in armed conflict in a zone of active hostilities that would support detention authorized by laws of war), and *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942) (stating that the petitioners, having worn uniforms of the German Marine Infantry when they came ashore from German military submarines, were part of “military arm of the enemy government” and thus “enemy belligerents within the meaning of . . . the law of war”), with *Ex parte Milligan*, 71 U.S. 2, 6–7 (1866) (stating that despite accusations of “joining and aiding . . . a secret society . . . for the purpose of overthrowing the Government,” “holding communication

In addition, civilians who directly participate in hostilities alongside combatants lose their protected status and can be targeted with lethal force and, thereby, also detained.²⁹⁴ The “direct participation” standard is not totally free from ambiguity or immune to reasonable judicial interpretation.²⁹⁵ At a minimum, because a predominant purpose of the laws of war is to protect civilians from harm, courts should not loosely construe the “direct participation” standard.²⁹⁶ It requires that the individual have taken up arms or otherwise joined an armed conflict in a manner that bears a direct, causal relationship to harm occurring on the battlefield.²⁹⁷ It cannot include mere membership in an organization, aspiring to become a member, or even training to engage in future hostilities, at least absent some affirmative acts.²⁹⁸ A prominent decision by

with the enemy,” “conspiring to seize munitions of war stored in the arsenals,” and “to liberate prisoners of war” in Indiana at a time when it “was constantly threatened to be invaded by the enemy,” the petitioner could not be a combatant under the laws of war and was subject to trial only by civilian authority).

294. Geneva Convention III, *supra* note 291, art. 3(1) (prohibiting attacks on persons “taking no active part in the hostilities”); U.S. OFFICE OF THE CHIEF OF NAVAL OPERATIONS, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11.3 (1995) (“Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked.”).

295. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005], 46 I.L.M. 373 & 375, 392 (describing the debate over whether “a person driving a truck carrying ammunition” meets the “direct participation” standard); Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1123–26 (2008) (highlighting the ambiguity beyond those “paradigm cases” which clearly meet the direct participation standard).

296. The “principle of distinction”—referred to as “the grandfather of all principles” in humanitarian law—holds “that military attacks should be directed at combatants and military property, and not civilians or civilian property.” MAJOR KEITH E. PULS, LAW OF WAR HANDBOOK 166 (2004), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2004.pdf. Under this law-of-war principle, combatants should know that the Government can punish them for attacking civilians, and civilians should know they can lose protection from attack for participating in hostilities; with those lines drawn, hostilities should be limited to only genuine combatants, i.e., uniformed soldiers or those who directly assist them on the battlefield. *See id.* (discussing the widely known principle).

297. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 516 (Yves Sandoz et. al. eds., 1987).

298. *Compare* Hamliily v. Obama, 616 F. Supp. 2d 63, 73 (D.D.C. 2009) (defining “direct participation” to include “senior terrorist leaders and terrorist weapons specialists . . . by virtue of their ongoing special skills or senior leadership positions and involvement in or planning of combat operations”) and Declaration of Gary D. Solis at 3–8, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166 (RJL)) (discussing and defining “direct participation”), and Derek Jinks & Ryan Goodman, *Replies to Congressional Authorization: International Law, U.S. War Powers and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2657 (2005) (arguing that mere membership, without a command role, is insufficient to constitute “direct participation,” and that “local intelligence, intermediate logistics, recruiting, [and] training” is insufficient to waive civilian status), with A.P.V. ROGERS, LAW ON THE BATTLEFIELD 33 (2d ed. 2004) (explaining that continued membership in the fighting forces of a group is sufficient to constitute direct

the Israeli Supreme Court concluded that a civilian “bearing arms (openly or concealed) who is on his way to the place where he will use them against the army” meets the direct participation standard, but a civilian who only “generally supports the hostilities against the army,” by “sell[ing] food or medicine to an unlawful combatant” or “aid[ing] the unlawful combatants by general strategic analysis, and grant[ing] them logistical, general support including monetary aid” does not meet the standard.²⁹⁹ In addition to this directness requirement, there is also a requirement that the civilian intended to cause harm to enemy military forces.³⁰⁰ There is also a durational requirement limiting authority to target or capture civilians for past, “detached” acts of hostilities.³⁰¹

In any event, in light of substantial commentary and authoritative international case law on the subject, U.S. courts are competent to set parameters on and adjudicate past decisions to detain persons as combatants or civilians active in hostilities. It is a common-law question. As courts have grappled with the intersecting doctrines governing detentions, they have by and large competently managed their obligation as habeas courts under a separation-of-power scheme and, in important respects, reigned in the scope of the Government’s detention authority.

3. Reigning in Global Detention Authority

a. Support and Substantial Support

Since the 2004 creation of the CSRTs (and likely earlier), the Bush Administration employed a definition of “enemy combatant” to cover detainees held in Guantanamo that was far broader than the one considered and authorized in *Hamdi*. Under the order governing the CSRT process:

participation). See also Chesney & Goldsmith, *supra* note 295, at 1122–23 (suggesting that Congress could legislate detention authority, consistent with the AUMF and the laws of war, for those who are in the “command structure” of al Qaeda).

299. HCJ 769/02 *Pub. Comm. Against Torture in Israel*, 46 I.L.M. at 391–92.

300. INT’L COMM. OF THE RED CROSS, *supra* note 297, at 618 (stating that acts under the direct-participation standard must, “by their nature and purpose[, be] intended to cause actual harm to the personnel and equipment of the armed forces”); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 538 (2005) (stating that a civilian’s mens rea “is the seminal factor” in evaluating direct participation of hostilities).

301. HCJ 769/02 *Pub. Comm. Against Torture in Israel*, 46 I.L.M. at 393 (stating that a civilian “is not to be attacked for the hostilities which he committed in the past”). At the same time, a civilian who has not “detached” himself from hostility but is preparing for future acts of hostility, such as Osama Bin Laden and the senior members of al Qaeda, may not be immune. *Id.* (“[R]egarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.” (citation omitted)). This standard is consonant with the functional goal of detention articulated by *Hamdi*, which is to prevent a “return to the battlefield” to “take up arms . . . again.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (emphasis added).

[T]he term “enemy combatant” shall mean an individual who was part of *or supporting* Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.³⁰²

Judge Joyce Hens Green—the first judge to review this definition—observed that the modifier in the second sentence, “includes,” suggests that the first sentence represents the outer limits of the definition and that, therefore, mere “support” for the Taliban, al Qaeda, or associated forces would be enough to justify indefinite detention.³⁰³ And, under the Bush Administration’s stated view, “support” did not require knowledge, intent, materiality, or directness; therefore, as the Government famously conceded, it had power to detain a “little old lady from Switzerland” who unwittingly sends a check to what she believes is an Afghan orphanage that is really a front for the Taliban.³⁰⁴ In addition, the definition in the Bush Order was not bound by the requirement for an armed conflict, for which Congress authorized the use of force in September 2001—i.e., against those responsible for the September 11th attacks.³⁰⁵ Rather, this definition appears to extend to any person “supporting” any type of “hostilities” anywhere in the world.³⁰⁶ Under the Bush Administration’s view, the military presumably could lawfully kill or indefinitely detain those who merely provided financial support, manufacturing support, or support services (such as clerics and medics or government personnel), and those who paid taxes to support the Taliban regime.³⁰⁷

Although Judge Green determined that such a definition would be overbroad and in violation of applicable due-process principles for those detainees who have nothing more than a vague “association” with terrorist

302. Wolfowitz Order, *supra* note 75, at 1 (emphasis added).

303. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

304. *Id.*

305. See *Hamdi*, 542 U.S. at 518 (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban . . . are individuals Congress sought to target in passing the AUMF.”).

306. See Brief of Respondents at 62–63, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196) (arguing that the CSRT authorizes “the detention of any ‘individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States’”). The Government presumably held the *Boumediene* petitioners, who were alleged to have conspired to bomb the U.S. embassy in Sarajevo, Bosnia—thousands of miles from the conflict with the Taliban, on this theory. In post-*Boumediene* habeas hearings, and after seven years of relying on such allegations, the Government dropped this charge, but it is unclear if it did this because of a lack of confidence in legal authority, a lack of confidence in factual support for the charges, or for some other undisclosed reason.

307. Bradley & Goldsmith, *supra* note 280, at 2115 (observing that in modern wars the class of people “who support[] the war effort . . . would include everyone”).

groups,³⁰⁸ she did not consider whether the laws of war authorized the definition. In any event, the courts stayed her decision for years pending ultimate disposition in the Supreme Court of *Boumediene*. In the interim, the Government relied on this definition to detain dozens of individuals who had no meaningful connection with an armed conflict that might have justified detention under *Hamdi* and the laws of war.³⁰⁹

In post-*Boumediene* habeas proceedings, the Bush Administration maintained its elastic “enemy combatant” definition,³¹⁰ despite emerging skepticism in the courts.³¹¹ District Court Judge Richard Leon, the first judge to consider the Government’s detention authority under the laws of war, accepted a slightly modified “enemy combatant” definition used in the CSRT process,³¹² concluding that the AUMF authorizes the detention of anyone who has “committed a belligerent act” or who has “directly supported hostilities in aid of enemy forces.”³¹³ In practice, Judge Leon has applied this definition fairly broadly, concluding that a “mere cook” for an Arab brigade assisting the Taliban in its fight against the Northern Alliance could be

308. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 476. The court stated:

Absent other evidence, it would appear that the government is indefinitely holding [detainee Murat Kurnaz]—possibly for life—solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process.

Id.

309. DENBEAUX ET AL., *supra* note 138, at 17 (reporting that according to DOD’s own charges, a tiny portion were captured on the battlefield by U.S. forces, fewer than half of the detainees were even alleged to have engaged in a “hostile act” and many were held for little more than having stayed at hotels raided by Pakistani police, fleeing from troops fighting the Taliban, owning a rifle or Casio watch, or wearing “olive drab clothing”).

310. *See* Response of Respondent to Sept. 8, 2008 Order Requiring Concise Statement of Definition of “Enemy Combatant,” *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166 (RJL)).

311. For example, in *al-Marri*, Judge Wilkinson cautioned against an overly broad reading of detention authority suggested by the Government, which could lead to “absurd results,” such as the indefinite detention of anyone the President believes “aided” or “was associated with” any organization remotely linked to the September 11th attacks.” *al-Marri v. Pucciarelli*, 534 F.3d 213, 323–25 (4th Cir. 2008).

312. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. 2008). Judge Leon believed that the definition had been “blessed” by Congress when it imposed the DTA-CSRT review scheme as part of the Military Commissions Act of 2006. *Id.* His assumption is questionable because a judge still has the authority, if not the obligation, to interpret that definition consistent with “longstanding law-of-war principles.” *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (referring to the AUMF’s ability to “detain for the duration of the relevant conflict”).

313. *Boumediene*, 579 F. Supp. 2d at 196 (emphasis added). Although Judge Leon accepted the CSRT definition, he did not read it as broadly as Judge Green had before. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474–80 (D.D.C. 2005) (discussing the detention of “enemy combatants”). Judge Leon appears to view the “includes” clause not as an example, but as a required limitation; thus, for him, any support must be “direct” and “in aid of hostilities.” *Hamdi*, 542 U.S. at 518.

found to have “directly supported hostilities,”³¹⁴ along with someone who had a mere plan to travel to Afghanistan to fight against the U.S. and serve as “an al Qaeda facilitator,”³¹⁵ as well as someone who stayed at known al Qaeda “guesthouses,” on the theory that this proves membership in al Qaeda.³¹⁶ But, he declined to decide, because of insufficient factual support, whether the Government could detain five Bosnians as enemy combatants where the Government alleged they had a “mere plan,” without more, to travel to Afghanistan to support the Taliban.³¹⁷

Several months after taking office, the Obama Administration formally abandoned the term “enemy combatant” and modified slightly the Executive’s asserted detention authority under the AUMF.³¹⁸ The Obama Administration’s position is that it is authorized to detain “persons who were part of, or *substantially* supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition

314. *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 40 (D.D.C. 2009) (memorandum order) (“Simply stated, faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient ‘support’ to meet this Court’s definition,” particularly because “as Napoleon himself was fond of pointing out: ‘an army marches on its stomach.’”). In the district court decision, Judge Leon also emphasized that the Taliban assigned the petitioner a rifle (which he did not fire), and he retreated alongside Taliban forces at the direction of a Taliban commander, after coalition bombing, for future deployment. *Id.* at 39–40. Judge Leon also emphasized that the Taliban assigned the petitioner a rifle (which he did not fire), and he retreated alongside Taliban forces at the direction of a Taliban commander, after coalition bombing, for future deployment. *Id.* Judge Leon’s decision was recently affirmed in *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010). The D.C. Circuit opinion granted the Executive a broader detention authority than the Obama Administration arguably had even asked for, and in a concurring opinion, Judge Janice Brown seriously questioned the propriety and efficacy of the ongoing project of district court adjudication of habeas petitions. *See id.* at **12 (Brown, J., concurring). Judge Brown stated:

[I]t is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantanamo context.

Id. As such, much of the opinion challenges the central conclusion of this Article. While *Al-Bihani* was issued too close to the publication date of this Article to permit a direct response to the opinion, I believe much of the Article suggests that the court’s concerns about judicial supervision of the Guantanamo detentions is seriously exaggerated.

315. *Boumediene*, 579 F. Supp. 2d at 198.

316. *Sliti v. Bush*, 592 F. Supp. 2d 46, 51 (D.D.C. 2008) (memorandum order).

317. *Boumediene*, 579 F. Supp. 2d at 197 (memorandum order); *see also* *el Gharani v. Bush*, 593 F. Supp. 2d 144, 148–49 (D.D.C. 2009) (positing that “attendance at [an al Qaeda] military training camp” and that being “a courier for certain senior al Qaeda operatives” would be “strong evidence of enemy combatancy” but concluded that the Government had not proved that either of these propositions were more likely than not, and granted the petitioner the writ).

318. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52–53 (D.D.C. 2009).

partners, including any person who has committed a belligerent act.”³¹⁹ Under the Obama Administration’s view, because authority merely “includes” but does not require a belligerent act, mere membership in the Taliban or al Qaeda (or in co-belligerent cases) would make one detainable. According to the Administration, “evidence relevant” to such a determination “might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaeda.”³²⁰ In addition, the “substantial support” element of the definition intended to cover individuals “who are not technically part of al-Qaeda, but who have some meaningful connection to the organization by, for example, providing financing.”³²¹

b. Subject to the Armed Organization’s Chain of Command

Recently, several district-court judges have largely accepted the Obama Administration’s proposed detention authority, albeit with important limitations. In so doing, these courts rejected the framework set forth above, in which those who are not formally a member of a nation-state’s “armed forces” must be considered civilians detainable only if they “directly participate” in hostilities³²² on the grounds that this dualistic framework does not make sense in the context of the non-international armed conflict that currently exists against the Taliban and al Qaeda.³²³ These courts note that the AUMF authorized the use of force against those who were “part of . . . organizations” responsible for September 11th, which necessarily includes al Qaeda. They further note that Common Article 3, which governs non-international armed conflicts of the kind against al Qaeda, necessarily contemplates the detention of “members of armed forces who have laid down their weapons” by instructing that these persons be treated “humanely.”³²⁴ Accordingly, it concludes that the laws of war support the authority to detain (incident to the authority to target) persons who are “part of” the “armed force” of al Qaeda (or associated forces), even if they did not directly participate in hostilities.³²⁵

319. See *id.* at 53 (explaining the Government’s modified standard for detaining individuals).

320. *Id.* at 62–63.

321. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009).

322. See *supra* Section IV.B.2 (discussing the scope of participation an individual must have in order to “directly participate”).

323. See *Hamlily*, 616 F. Supp. 2d at 73 (concluding that the absence of a formalized “combatant status” in non-international armed conflicts “does not, by default, result in civilian status for all, even those who are members of enemy ‘organizations’ such as al Qaeda”); *Gherebi*, 609 F. Supp. 2d at 62–70 (discussing the inherent problem of determining who is a member of the Taliban and al Qaeda “armed forces”).

324. *Hamlily*, 616 F. Supp. 2d at 73; *Gherebi*, 609 F. Supp. 2d at 65.

325. *Hamlily*, 616 F. Supp. 2d at 74 (citing ICTY decisions to support the proposition that “in a non-international armed conflict, membership in an armed group makes one liable to

In defining detention authority, these courts imported principles from international armed conflicts and concluded that members of al Qaeda and the Taliban are tantamount to uniformed members of the “armed forces” who the Government can target under the Geneva Conventions and, according to *Hamdi*, detain to prevent return to the battlefield. Under the international armed-conflict principles, these courts imported to a non-international armed conflict the principle that the most important distinguishing characteristic of an “armed force” is its organization pursuant to a chain of command.³²⁶ According to these courts, al Qaeda and the Taliban employed a command structure (even if not as precise or accountable as in traditional States’ armed forces), and as such, members of these groups cannot be deemed mere civilians by default. Rather, relying on principles developed in the context of international armed conflict, the courts concluded that persons who “‘receive and execute orders’ from the enemy’s ‘command structure’” are members of the “armed forces”;³²⁷ at the same time, “[s]ympathizers, propagandists, and financiers” cannot be so considered.³²⁸ Completing the analogy to the law governing international armed conflicts, these courts concluded that such civilian sympathizers and financiers are not detainable by the military “unless they take a direct part in the hostilities.”³²⁹

Thus, an al-Qaeda member tasked with housing, feeding or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda’s chain of command.³³⁰

Nonetheless, these courts did significantly cabin the Obama Administration’s proposed authority to detain based on a person’s

attack and incapacitation independent of direct participation in hostilities”); *Gherebi*, 609 F. Supp. 2d at 65. The court stated:

[T]he fact that “members of armed forces who have laid down their arms and those placed *hors de combat*” are not “taking [an] active part in the hostilities” necessarily implies that “members of armed forces” who have not surrendered or been incapacitated *are* “taking [an] active part in the hostilities” simply by virtue of their membership in those armed forces.

Id. (quoting Geneva Convention III, *supra* note 291, at art. 3(1)).

326. *See Gherebi*, 609 F. Supp. 2d at 68 (quoting Protocol I, *supra* note 291, art. 43(1)) (describing the principle characteristic of an “armed force”).

327. *Id.* (quoting Protocol I, *supra* note 291, art. 43(1)).

328. *Id.*

329. *Id.* at 69.

330. *Id.*; *see also Hamlibly*, 616 F. Supp. 2d at 75 (concurring with the “command structure” framework adopted in *Gherebi*).

“substantial support” for al Qaeda or the Taliban in similar ways. In *Hamlibly*, the court simply rejected “substantial support” as an independent basis to detain, but recognized that such support might form circumstantial evidence under a functional test to determine if someone was, in fact, “part of” the enemy armed forces.³³¹ In *Gherebi*, the court simply interpreted “substantial support” to be coterminous with membership in the “command structure” of the enemy organization.³³²

c. Durational Limitations

Applying the laws of war to the detention of suspected Taliban and al Qaeda members is particularly confounding because of the “broad and malleable” nature of this conflict,³³³ which already exceeds the length of any prior military conflict in which the U.S. has engaged. The *Hamdi* plurality recognized that the so-called “war on terror” could last generations and thereby potentially result in lifetime detentions of persons captured in connection with that conflict. Yet the Court avoided directly grappling with this concededly troubling prospect. On the one hand, the Court noted that as long as active hostilities were still ongoing in Afghanistan, the laws of war justified Hamdi’s detention in order to prevent him from returning to the battlefield; on the other hand, the Court noted that “indefinite detention for the purpose of interrogation is not authorized” and that if the “practical circumstances of a given conflict” reveal themselves to be unlike those which

331. *Hamlibly*, 616 F. Supp. 2d at 76–77. The court stated:

For example, if the evidence demonstrates that an individual did not identify himself as a member, but undertook certain tasks within the command structure or rendered frequent substantive assistance to al Qaeda, whether operational, financial or otherwise, then a court might conclude that he was a “part of” the organization.

Id.; accord *Al Rabiah v. United States*, No. 02-828 (CKK), 2009 WL 3083077, at *4 (D.D.C. Sept. 17, 2009) (adopting the reasoning in the *Hamlibly* opinion); *Al Mutairi v. United States*, No. 02-828 (CKK), 2009 WL 2364173, at *4 (D.D.C. July 29, 2009) (same); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (same).

332. *Gherebi*, 604 F. Supp. 2d at 70. The court stated:

Any attempt by the government to apply its “substantial support” standard in a manner contradictory to these principles would give rise to the constitutional concerns raised by the petitioners regarding the clarity of the scope of Congress’s delegation of authority to the President and, as such, would have to be rejected by the Court.

Id.; see also *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685, at *10 (D.D.C. Aug. 21, 2009) (stating the fact that the petitioner was expelled from an alleged al Qaeda training camp for breaking rules demonstrates that he did not “‘receive[] and execute . . . orders’ from the enemy’s combat apparatus” (alteration in original) (quoting *Gherebi*, 609 F. Supp. 2d at 69)).

333. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

informed the creation of the laws of war, then this prior understanding may “unravel.”³³⁴

Drawing on this tension, two district-court decisions have modified traditional law-of-war principles governing preventive detention by recognizing an important implicit durational limitation on the Executive’s detention authority—one that may resolve the troubling prospect of lifetime detention acknowledged by *Hamdi*. In *Basardh v. Obama*,³³⁵ the court granted the writ to a detainee who was widely known to have cooperated with the U.S. military throughout his detention in Guantanamo and to have implicated numerous other detainees there.³³⁶ While the reliability of his information was certainly called into question,³³⁷ the record nevertheless revealed that other detainees had sent him death threats and word of his perceived betrayal had reached his home country of Yemen.³³⁸ Emphasizing a core principle articulated in *Hamdi*, the court explained that “the AUMF requires some nexus between the force (i.e., detention) and its purpose (i.e., preventing individuals from rejoining the enemy to commit future hostile acts).”³³⁹ The AUMF does not, the court explained, “authorize unlimited, unreviewable detention” where the Authorization’s “purpose can no longer be attained.”³⁴⁰ Accordingly, because Basardh’s “ties with the enemy have been severed”—assuming he ever had any—“and any realistic risk that he could rejoin the enemy has been foreclosed,” his detention could no longer be justified under the AUMF.³⁴¹

334. *Id.* at 521.

335. *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009)

336. *See generally id.* (granting the writ to a detainee on the basis that there was no risk that the detainee would rejoin the enemy).

337. *See* Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, WASH. POST, Feb. 3, 2009, at A1 (noting the issues of credibility presented by detainee testimony).

338. *Basardh*, 612 F. Supp. 2d at 32.

339. *Id.*

340. *Id.*

341. *Id.* at 35. Other courts have expressed sympathy with Judge Huvelle’s approach, but have declined to conclude that a petitioner who may have been “part of” al Qaida, but who no longer presents a risk to return to the battlefield, is not detainable. Judge Hogan concluded that a petitioner was not “a threat to the security of the United States,” because the evidence revealed that the petitioner was, “at best, a low-level al-Qaida figure,” that he did not “even finish[] his weapons training,” did not “plan[], participate[] in, or kn[o]w of any terrorist plots” and was otherwise “a model prisoner during his seven years of detention.” *Anam v. Obama*, No. 04-1194 (TFH), 2010 WL 58965, at *14 (D.D.C. Jan. 6, 2010); *see also id.* (“The Court fails to see how, based on the record, Petitioner poses any greater threat than the dozens of detainees who recently have been transferred or cleared for transfer.”). Nevertheless, despite the “normative appeal” of Judge Huvelle’s approach, the court believed its “hands are tied,” such that it was required to order any person who was nominally a “part of” Al Qaida detainable, even if they cannot be considered a threat to national security. *Id.* at 3–4; *see also* *Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (declining to follow *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009), to order the release of someone the court deemed not to be dangerous, despite recognizing “the power of Judge Huvelle’s argument”).

Similarly, in the remarkable case of *Al-Ginco v. Obama*,³⁴² the court considered the petition of a detainee who “spent a brief period of time in the company of al Qaeda” (eighteen days in a training camp), but who al Qaeda later suspected of being a U.S. spy.³⁴³ Al Qaeda members tortured Al Ginco for months until he confessed, and he was then imprisoned in a brutal Taliban prison for one and a half years.³⁴⁴ He was apprehended fleeing the abandoned prison after the U.S. invasion of Afghanistan and turned over to U.S. forces.³⁴⁵ He thereafter was imprisoned for seven more years—this time by the United States in Afghanistan and Guantanamo.³⁴⁶ The question for the court was “whether a prior relationship between a detainee and al Qaeda (or the Taliban) c[ould] be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered to be ‘part of’ either organization.”³⁴⁷ Expressing outright consternation that the Government could think otherwise,³⁴⁸ the court concluded that the “answer, of course, is yes.”³⁴⁹ Concluding that whatever nominal “preexisting relationship” Al Ginco had with al Qaeda had since been destroyed, the court granted the writ.³⁵⁰

Thus, both courts depart sensibly from a premise of the law of war governing international armed conflicts between nation-states, in which a detainee’s loyalty to the detaining power’s enemy—that is, his formal citizenship—can never be vitiated. By contrast, as these courts recognize, where membership in a non-state entity’s armed forces turns on functional considerations rather than upon citizenship, the Executive’s detention power can be limited or vitiated by intervening events or simply the passage of time.

d. Potential Limitations on the Writ’s Remedy

As promising as a number of the post-*Boumediene* district-court decisions have been in carrying out the Supreme Court’s mandate, a recent and hotly contested decision by the D.C. Circuit appears in great tension with the Court’s instruction that habeas impose a meaningful check on the discretion of the political branches. The decision suggests, absent reversal by the Supreme Court, a serious limitation on the writ’s remedial scope. In *Kiyemba*

342. *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).

343. *Id.* at 129.

344. *Id.*

345. *Id.*

346. *Id.* at 125.

347. *Al Ginco*, 626 F. Supp. 2d at 128.

348. *Id.* at 128–29 (noting that the Government’s position “defies common sense” and exclaiming “I disagree!” with the assertion that Basardh could still be considered “part of” al Qaeda in light of the destruction of any preexisting relationship).

349. *Id.* at 128.

350. *Id.* at 130.

v. Obama,³⁵¹ the D.C. Circuit reversed a decision by the district court which had the Government “produce the body” of seventeen Uigher detainees—i.e., transfer the detainees to his Washington, D.C. courtroom.³⁵² The district court found that the Uighurs’ continued detention was unlawful on the grounds that the Government itself conceded that they were not enemy combatants (or in the Government’s peculiar phrasing, “no longer enemy combatants”).³⁵³ The court also acknowledged that repatriation to China presented a serious risk of torture.³⁵⁴ Because their detention was unlawful, and the district court ordered their release into the United States solely to effectuate their rights guaranteed under habeas, the court in no way ordered the Government to parole the petitioners or otherwise grant them lawful immigration status in the U.S.³⁵⁵ Nevertheless, the D.C. Circuit concluded that “[n]ot every violation of a right yields a remedy,” and that the Executive had plenary authority under its immigration-enforcement power to exclude aliens from American shores.³⁵⁶

The decision is problematic in a number of ways, not least because it is dismissive of core components of the Court’s decision in *Boumediene*. For example, the D.C. Circuit appears to turn the separation-of-powers framework explicated in *Boumediene* on its head by concluding that a court cannot ask “anything more” of the Executive than a representation of its best efforts in repatriating the detainees elsewhere.³⁵⁷ In so doing, the court largely ignores the core premise of habeas by which a court “must have the power to order the conditional release of an individual unlawfully detained.”³⁵⁸ Relying rigidly on immigration-law precedent, the D.C. Circuit treated the unlawfully detained petitioners as if they were seeking voluntary entry into the United States, when in fact their predicament as non-repatriable detainees in Guantanamo was solely the fault of the executive branch in the first instance.³⁵⁹ Furthermore, the court formalistically concluded that the Constitution (and thus the Supreme Court’s ruling that due process requires release of immigrant detainees who cannot be

351. *Kiyemba v. Obama*, 555 F. 3d 1022 (D.C. Cir. 2009). Judge Raymond Randolph—whose dismissive view of detainee’s rights had been reversed already by the Supreme Court in *Rasul*, *Hamdan*, and *Boumediene*—wrote for the majority. *Id.* at 1023.

352. *Id.* at 1023, 1032.

353. *Id.* at 1024.

354. *Id.*

355. *Id.* at 1031.

356. *Kiyemba*, 555 F.3d at 1027.

357. *Id.* at 1029.

358. *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008).

359. And, as such, the state-created-danger doctrine, emerging in the due-process context, would suggest that the Executive is obligated to relieve the conditions of the danger that the Executive placed upon the petitioners in the first place. *See Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C.C. 2001) (“[T]he State also owes a duty of protection when its agents create or increase the danger to an individual.”).

repatriated³⁶⁰) does not protect aliens held in Guantanamo because they remain outside the “sovereign territory” of the United States. In reaching this conclusion, the D.C. Circuit willfully ignored the functionalist criteria adopted by the Court in *Boumediene* for assessing the extraterritorial reach of the Constitution. It cited instead the plainly distinguished, if not fully discredited, decision in *Eisentrager*. The practical result of *Kiyemba* is that for the significant number of detainees who cannot be returned home because of a risk of torture, winning a habeas petition does not guarantee them release; indeed, after winning his habeas petition on remand, Mr. Boumediene himself was left remedy-less in *Kiyemba*’s wake—at least until the French government agreed to accept him. The Government has resettled a number of the seventeen unlawfully detained Uighers in foreign countries, but others remain in U.S. custody. The Supreme Court recently granted *Kiyemba*’s cert petition, thus it might just reach the question presented by the case if many habeas “winners” still languish in Guantanamo.

V. COMMON LAW HABEAS RULES

In addition to inviting district courts to review legal questions regarding the geographical reach of the Suspension Clause and the content of the substantive law governing the Executive’s asserted authority to detain, *Boumediene* recognized that Guantanamo detainees (and perhaps others) had the right to challenge the factual basis of their detention.³⁶¹ Yet beyond acknowledging its faith in the “expertise and competence” of district courts³⁶² and cautioning them to proceed “prudent[ly]” and “incremental[ly],”³⁶³ the Court offered little specific guidance to courts on remand for the adjudication of factual disputes or mixed questions. To add to this uncertainty, the two-hundred-plus de novo reviews of Guantanamo habeas petitions the Court set in motion have little precedent since Reconstruction, after which habeas petitions have almost universally been brought as collateral challenges to prior criminal-court convictions or to immigration proceedings. Yet, despite the novelty and size of the task before the courts, they are proving themselves amply equipped to resolve these

360. See *Zadvydas v. Davis*, 533 U.S. 678, 699–700 (2001) (stating that the Fifth Amendment’s Due Process Clause entitles a removable alien to be released from custody after a reasonable period of detention, if that alien cannot be repatriated).

361. *Boumediene*, 128 S. Ct. at 2269 (stating that because “the writ must be effective . . . [t]he habeas court must have sufficient authority to conduct a meaningful review of . . . the cause for detention”); *id.* at 2270 (stating that habeas “includes some authority to assess the sufficiency of the Government’s evidence against the detainee”).

362. *Id.* at 2276 (“We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings. . . . These and other remaining questions are within the expertise and competence of the District Court to address in the first instance.”).

363. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004).

cases and are competent to do so without interfering with core areas of military discretion.

This Section addresses elementary procedural and evidentiary rules that courts are beginning to use to frame their habeas cases, mindful that variations in application and interpretation among the district courts are both possible and defensible as a part of a natural evolution of this new corpus of law.³⁶⁴

A. CONSTITUTIONAL HABEAS VS. THE HABEAS STATUTE

In light of *Boumediene*'s constitutional holding, what authority governs the disposition of the pending habeas cases? In post-*Boumediene* proceedings arising in a variety of contexts, the Government took the position that *Boumediene*, relying on the Suspension Clause of the Constitution, merely protected the right to "constitutional habeas."³⁶⁵ Under its theory, "constitutional habeas" refers to those rights or procedures inherent to the common-law writ which were "constitutionalized" by the Suspension Clause. Accordingly, it would entitle the Guantanamo habeas petitioners only to those procedural rights that existed in 1789, which would not include an entitlement to an evidentiary hearing, discovery, or any other procedural devices associated with "modern statutory habeas proceedings."³⁶⁶ This position reflects an understandable but clearly erroneous view of the Suspension Clause and its relationship to the habeas statute.

In short, *Rasul* held that the courts had jurisdiction over habeas corpus petitions filed under the habeas statute, 28 U.S.C. § 2241.³⁶⁷ In 2006, and for the very purpose of foreclosing these statutory habeas proceedings, Congress passed section 7 of the MCA, amending the habeas statute to add

364. A number of judges in post-*Boumediene* proceedings have already issued summary Case Management Orders setting forth standards on some of the same issues identified here for discussion. Specifically, in July 2008, the Chief Judge of the District Court for the District of Columbia ordered the pending Guantanamo habeas cases consolidated before District Court Judge Thomas Hogan for resolution of common issues. After hearing from the parties, he issued a Case Management Order ("CMO") setting forth a scheduling framework for the disposition of cases and setting standards regarding burden of proof, admissibility of hearsay, and entitlement to evidentiary hearings, among other issues. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241 (D.D.C. Nov. 6, 2008), amended by 2008 WL 5245890 (D.D.C. Dec. 16, 2008). Other judges in the district largely adopted Judge Hogan's CMO but made additions or alterations as they saw fit. The orders are both summary and, to the extent that certain rules were adopted over the government's objection, they are also contestable. Thus, a full explication of the reasoning underlying these orders is still necessary to comprehend this emerging common law of habeas.

365. Government's Brief Regarding Procedural Framework Issues at 6, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (TFH) (D.D.C. July 25, 2008) (arguing that "the procedures [in habeas cases on remand] should contain only those required by the Suspension Clause itself").

366. *Id.*

367. *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

§ 2241(e).³⁶⁸ *Boumediene* held that this provision, at least as applied to Guantanamo detainees, “effects an unconstitutional suspension of the writ.”³⁶⁹ The Court reasoned that the alternative DTA-CSRT review scheme ratified by the MCA was not an “adequate substitute” for the writ as it existed at common law, and thus the scheme violated the Suspension Clause. However, it does not follow that the Guantanamo petitioners are limited to pursuing the writ in its baseline common-law form. Instead, under elementary principles of constitutional remedy, section 7 of the MCA and § 2241(e) are not law; they are void.³⁷⁰ A court must therefore “disregard” these provisions and proceed under the pre-existing statutory authority.³⁷¹ Therefore, the Guantanamo detainees are now in exactly the same position they were in prior to the passage of the MCA and are in the same position as any habeas petitioner invoking the federal habeas jurisdiction under § 2241 today: each has full access to the habeas statute, including the corresponding procedural protections of 28 U.S.C. §§ 2243–2248.³⁷²

Thus, as *Hamdi* explained, “§ 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review.”³⁷³ Those provisions provide habeas petitioners with an opportunity to traverse, or rebut, the Government’s return to the writ,³⁷⁴ to undertake discovery upon a showing of good cause,³⁷⁵ to have an evidentiary hearing to resolve the factual questions in

368. Military Commissions Act of 2006 § 7, 28 U.S.C. § 2241(e) (2006).

369. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008); *id.* at 2275 (“The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp. 2007).”).

370. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[A] law repugnant to the constitution is void.”).

371. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); *accord* *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1872) (holding that courts must take notice of and give effect to public acts granting pardons); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953) (“If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.”); *see also* *United States v. Klein*, 80 U.S. 128, 147–48 (1871) (holding that courts must still take notice of and give effect to pardons after an act that allowed the President to grant the pardon is repealed).

372. This elementary logic is confirmed by the *Boumediene* Court’s comparison of DTA procedures with 28 U.S.C. § 2241. *Boumediene*, 128 S. Ct. at 2266. The Court noted, “[t]he differences between the DTA and the habeas statute that would govern in MCA § 7’s absence, 28 U.S.C. § 2241, are likewise telling.” *Id.* (citations omitted) (emphasis added). This view is also consistent with the widely accepted understanding, described in Section IV.A.2, *supra*, of the Suspension Clause as non-self-executing. *Ex parte Bollman & Ex parte Swartwout*, 8 U.S. (1 Cranch) 75, 94 (1807) (noting that “the power to award the writ by any of the courts of the United States . . . must be given by written law”).

373. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).

374. 28 U.S.C. § 2243 (2006).

375. *Id.* § 2246.

dispute, and to have the matter disposed of “as law and justice require.”³⁷⁶ And, while the habeas statute provides the basic operating structure to govern the disposition of a case, because “there is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus,” courts must themselves on a case-by-case basis fill in the “necessary facilities and procedures for an adequate inquiry.”³⁷⁷

B. PROCEDURAL RULES

1. From Returns to Hearings

All habeas cases must start with a return and may end with an evidentiary hearing. Under the habeas statute, after the petitioner files a non-frivolous habeas petition, the Government must file a return or answer to the writ, setting forth the “cause for commitment”—i.e. the legal and factual basis for the Executive’s asserted authority to detain.³⁷⁸ The statute ordinarily requires the respondent to file a return within a period of days,³⁷⁹ but in the post-*Boumediene* cases, district court judges, responding to the Government’s asserted need to review voluminous evidence in the numerous cases ripe for review, set a modulated, long-term schedule for the filing of returns. Further, under certain circumstances in which good cause was shown, the Government was also permitted to file amended returns in response to earlier-filed cases, so that the Government could present the “best available evidence” to justify each of the detentions.³⁸⁰ Thereafter, according to the habeas statute and procedures the district court adopted in the Guantanamo habeas cases, the petitioners are entitled to file a traverse, or rebuttal, to the Government’s return.

As part of that traverse, a petitioner can contend that, even assuming the truth of the Government’s allegations, there is no legal authority to detain—akin to a judgment on the pleadings. The traverse can also present affidavit testimony or other factual evidence in support of a claim of innocence,³⁸¹ including facts which demonstrate that the Government relied

376. *Id.* § 2243.

377. *See* Harris v. Nelson, 394 U.S. 286, 300 (1969); *id.* at 292 (“The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.” (quoting Townsend v. Sain, 372 U.S. 293, 312 (1963))).

378. 28 U.S.C. § 2243.

379. *Id.* (requiring filing within three days, or if granted, an extension for twenty days).

380. *In re* Guantanamo Bay Detainee Litigation, 564 F. Supp. 2d 14, 15–16 (D.D.C. 2008) (scheduling order).

381. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2269–70 (2008) (explaining that the core fault of CSRT was its failure to “admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding” or to allow petitioners “to supplement the record”).

upon evidence procured by torture or coercion.³⁸² To sharpen the factual disputes between the parties, district courts have the authority to consider and grant the petitioners' requests for discovery³⁸³ and conduct other intervening procedures well within any district court's competence. Ultimately, and consistent with the court's plenary authority to review habeas cases in the executive-detention context, an evidentiary hearing can resolve any factual disputes that remain, including the possibility of hearing live testimony if, in the district court's discretion, such testimony is necessary.³⁸⁴

2. Burdens of Proof and Presumptions

The Government—rather than a habeas petitioner—bears the burden of proof. This requirement is both implied by *Boumediene*³⁸⁵ and is most consistent with the elementary theory of habeas: the Government's deprivation of an individual's entitlement to liberty must be justified to a judge. In the context of collateral attacks on state or federal criminal courts' prior judgments, the Government must satisfy a preponderance-of-the-evidence standard—a standard that can sometimes be met simply by producing the record of the conviction below. But what should be the standard for a plenary habeas review of an executive detention where no court of competent jurisdiction has previously adjudicated the matter?³⁸⁶

According to Justice Harlan's iconic concurrence in *In re Winship*,³⁸⁷ setting a burden of proof ultimately turns on normative considerations such as: first, what "degree of confidence" a justice system wishes to impose on a

382. See *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (holding that the petitioner is entitled to a hearing on "the material issue [of] whether the plea was in fact coerced by the particular threats alleged"); accord *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("There can be no doubt that, if the allegations [regarding coercion] contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated."); see also *Stewart v. Overholser*, 186 F.2d 339, 345 (D.C. Cir. 1950) (ordering a factual hearing "involving the taking of testimony followed by a decision based on the facts and the law" regarding the petitioner's sanity).

383. See *infra* Section V.B.3 (discussing the petitioners' ability to compel discovery).

384. See *Walker v. Johnston*, 312 U.S. 275, 286 (1941) ("The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined in the manner the statute prescribes."); see also *Stewart*, 186 F.2d at 342 ("When a factual issue is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process."); *id.* at 342–43 (collecting cases). By contrast, a court clearly has the authority to forego an evidentiary hearing if it concludes that a petitioner's claims are "vague, conclusory, or palpably incredible." *Machibroda*, 368 U.S. at 495.

385. *Boumediene*, 128 S. Ct. at 2271 ("The extent of the showing required of the government in these cases is a matter to be determined." (emphasis added)).

386. See *id.* at 2264 ("[C]ases discussing implementation of that statute [the AEDPA] give little instruction (save perhaps by contrast) for the instant cases, where no trial has been held.").

387. *In re Winship*, 397 U.S. 358 (1970).

factfinder in the correctness of its factual judgment; and, second, how one should assess the “comparative social disutility” of an erroneous outcome—should the risk of error fall on society (if the guilty goes free) or on the individual (if the innocent is punished)?³⁸⁸ According to Justice Harlan, a preponderance standard makes obvious sense in the civil context because no disproportionate social harm follows from an erroneous judgment in favor of either a plaintiff or a defendant; in the criminal context, however, our society views it to be “far worse to convict an innocent man than to let a guilty man go free.”³⁸⁹

Although this framework cannot be applied mechanically or with any quantitative precision, it provides important insight here. On the one hand, the risk of an erroneous detention decision for an individual detainee is certainly grave; it includes potentially lifetime detention³⁹⁰ in an extremely harsh prison environment thousands of miles from a prisoner’s home.³⁹¹ And, as already described, there is a significant likelihood that an individual detainee has been wrongfully detained.³⁹² Moreover, as *Boumediene* stressed, “In some of these cases, six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.”³⁹³ On the other hand, the risk of an erroneous release of a detainee is difficult to measure in part because there is considerable uncertainty about the so-called “recidivism rate” of released detainees,³⁹⁴ and because the releases were not

388. *Id.* at 370, 371 (Harlan, J., concurring).

389. *Id.* at 372.

390. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (describing “the interest in being free from physical detention by one’s own government” as “the most elemental of liberty interests”) (citations omitted); Fallon & Meltzer, *supra* note 35, at 2069 (“Cases involving executive detention pose the most basic threats to personal liberty.”).

391. *See, e.g.*, HUMAN RIGHTS WATCH, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO 3, 34, 37 (2008), available at <http://www.supermaxed.com/NewSupermaxMaterials/Locked-Up-Alone-Guantanamo-HRW.pdf> (describing the severe mental deterioration of many of the 185 detainees held in “supermax-security” conditions in Guantanamo, including hallucinations, multiple suicide attempts, and an “array of painful and incapacitating psychiatric symptoms”); William Glaberson, *Detainees’ Mental Health is Latest Legal Battle*, N.Y. TIMES, Apr. 26, 2008, at A1 (citing military statistics acknowledging that three-quarters of Guantanamo detainees are in conditions of solitary confinement in Camps 5 and 6).

392. *See supra* note 138 (describing several incidents in which individuals were wrongfully detained or imprisoned).

393. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008). Moreover, “as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.” *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring); *see also* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1384 (2008) (“The prospect of a conflict with no clear end strains the traditional rules of warfare and vastly multiplies the injury of errors.”).

394. Of the nearly six-hundred detainees the military has released from Guantanamo, there have no doubt been some who have subsequently either engaged in acts of terrorism or who have joined al Qaeda. Caryle Murphy, *Ex-Detainees Rejoin Al Qaeda*, CHRISTIAN SCI. MONITOR, Jan. 27, 2009, available at <http://www.csmonitor.com/2009/0127/p01s03-wome.html> (“Two Saudis formerly jailed at the US prison camp in Guantánamo Bay, Cuba, have joined al Qaeda’s

ordered pursuant to a judicial process nor pursuant to any transparent criteria.

The search for an appropriate burden of proof becomes even more elusive in the absence of a uniform substantive definition of wrongdoing.³⁹⁵ For example, one could read *Hamdi* as suggesting that where the operative enemy combatant definition requires having engaged in armed conflict on a battlefield, the petitioner may be made to bear the burden of rebutting credible allegations of his combatancy.³⁹⁶ Because the risk of misclassifying the narrow and discrete set of actual combatants captured on a battlefield is lower,³⁹⁷ it might make sense to lower the Government's burden of proof in such cases.³⁹⁸ At the same time, the Government should face a higher burden where it broadens the enemy-combatant definition to include more tangential levels of support, membership, or association. As Bruce Ackerman explained, "Only a very small percentage of the human race is composed of recognized members of the German military, but anybody can be suspected of complicity with al Qaeda."³⁹⁹

Yemeni branch, and authorities here worry that two other ex-Guantánamo inmates may have strayed back to militancy because they have recently disappeared from their homes."); Josh White, *Ex Guantanamo Detainee Joined Iraq Suicide Attack*, WASH. POST, May 8, 2008, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703456.html> (reporting that a former Kuwaiti detainee engaged in a suicide attack in Mosul, Iraq, killing up to seven Iraqis). At the same time, the military has never provided sufficient details to evaluate consistently shifting claims about a large number of detainees who have "returned to the fight." See MARK DENBEAUX ET AL., RELEASED GUANTANAMO DETAINEES AND THE DEPARTMENT OF DEFENSE: PROPAGANDA BY THE NUMBERS? 7 (2009), available at http://law.shu.edu/publications/guantanamoReports/propaganda_numbers_11509.pdf (scrutinizing the variety of Defense Department claims regarding the number of detainees who have "returned to the fight" and finding them to be exaggerated and to have included persons who merely criticized Guantanamo subsequent to their release).

395. See *supra* Section IV.B (describing the variety of "enemy combatant" definitions proposed by petitioners, the government, and the courts).

396. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004).

397. *Id.* at 523 (noting that Hamdi was captured in a "foreign combat zone" with an assault rifle as part of a "Taliban unit"); see also *id.* at 549 (Souter, J., concurring) (noting that Hamdi "was taken bearing arms on the Taliban side of a field of battle").

398. See *al-Marri v. Pucciarelli*, 534 F.3d 213, 228–29, 232 (4th Cir. 2008) (attributing *Hamdi's* departure from baseline due-process protections, including a lower burden of proof and acceptance of hearsay, to the paradigmatic battlefield capture at issue there); cf. Fallon & Meltzer, *supra* note 35, at 2081 ("[T]he central distinction for purposes of appraising the legality, and ultimately the constitutionality of executive detentions of American citizens is between battlefield and non-battlefield contexts.").

399. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1033 (2004); see also DENBEAUX ET AL., *supra* note 138, at 2 (summarizing the findings that the Government detains many people who are not on the terrorist watchlist); Waxman, *supra* note 393, at 1381 (discussing generally the absence of a standard of proof of combatancy status under the laws of war). Waxman also observed that:

[T]he broader the definition (i.e., the more distant and indirect the relationship between an individual and a particular terrorist organization or its hostile acts), the

On balance, the Government should not make Guantanamo detainees endure such a serious deprivation of liberty “upon no higher degree of proof than applies in a negligence case.”⁴⁰⁰ Instead, the Government should demonstrate the sufficiency of its allegations by clear and convincing evidence.⁴⁰¹ The Supreme Court has insisted on this level of proof in contexts involving substantially similar liberty deprivations such as deportation,⁴⁰² denaturalization,⁴⁰³ indefinite civil commitment of “sexually violent predators,”⁴⁰⁴ continued commitment of persons found not guilty by reason of insanity,⁴⁰⁵ and pre-trial detention based on dangerousness.⁴⁰⁶ Those who argue for the adoption of legislation authorizing preventive detention of suspected terrorists also favor the standard.⁴⁰⁷

Professors Fallon and Meltzer have argued that a habeas court should apply the standard of review the Court set forth in *Jackson v. Virginia*⁴⁰⁸—one generally used to evaluate the factual sufficiency of the evidence supporting a state-court criminal conviction. Under their view, a federal habeas court would ask whether a “rational military decisionmaker could have found by a preponderance of the evidence that the []detainee was an enemy combatant.”⁴⁰⁹ Ultimately, however, this standard is inadequate because it effectively presumes that the prior adversarial adjudication was adequate procedurally and thus presumptively entitled to some deference.⁴¹⁰ In these

more difficult it will be to distinguish fighters from civilians; the narrower the definition . . . the easier it will be to resolve doubt in individual cases.

Id.

400. *Woodby v. INS*, 385 U.S. 276, 285 (1966).

401. *See In re Ballay*, 482 F.2d 648, 662 (D.C. Cir. 1973) (“[I]n situations where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed, such as proof by clear, unequivocal and convincing evidence.”).

402. *Woodby*, 385 U.S. at 286.

403. *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

404. *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (noting the Kansas legislature’s requirement of clear and convincing evidence).

405. *Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992).

406. *United States v. Salerno*, 481 U.S. 739, 750–51 (1987).

407. *See* BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN AN AGE OF TERROR* 34–35 (2008) (discussing the circumstances in which the Court has traditionally upheld detention based on clear and convincing evidence); David Cole, *Closing Guantanamo: The Problem of Preventive Detention*, BOSTON REV., Dec. 13, 2008, <http://bostonreview.net/BR34.1/cole.php> (arguing that the clear-and-convincing-evidence standard would protect detainees by helping the Government determine “whether continued detention is necessary”).

408. *Jackson v. Virginia*, 443 U.S. 307 (1979).

409. Fallon & Meltzer, *supra* note 35, at 2104 (discussing the *Jackson* standard and the reasons courts should adopt it).

410. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008) (“A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to the procedures designed to insure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures.”).

cases, it makes no more sense to ask if there was sufficient evidence in the prior CSRT record—so one-sided as it was—to support the military’s judgment than it would to ask if there was sufficient evidence to support a criminal conviction in a criminal trial in which the defendant was prohibited from calling witnesses or confronting the Government’s evidence. Indeed, at common law, no habeas court was bound to defer to a prior and presumptively self-serving judgment of an executive official.⁴¹¹ Thus, consistent with a habeas court’s plenary power in the executive-detention context, courts should give no deference whatsoever to a CSRT’s prior designation of a petitioner as an “enemy combatant.”

The district courts on remand have concluded that the Government bears the burden of proof in the habeas hearing by a preponderance-of-the-evidence standard, and have declined to give the CSRT determination any presumptive weight when evaluating the Government’s case.⁴¹² Outside of a jury context, the difference between a clear-and-convincing standard and a preponderance standard may ultimately prove to be “quantitatively imprecise.”⁴¹³ Yet in an encouraging development, even while employing the preponderance-of-the-evidence standard, courts have not only examined the quantum of the Government’s evidence, but have, more importantly, displayed a healthy skepticism about the frequently poor and unreliable *quality* of the evidence relied upon to justify the Guantanamo detentions.⁴¹⁴ District courts have accordingly followed the court of appeals’s admonition

411. As one court long ago explained, “to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department in Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity.” *In re Jung Ah Lung*, 25 F. 141, 143 (D. Cal. 1885); see also Goldstein, *supra* note 58, at 1181 (collecting cases in which federal courts exercised de novo factual review of executive detentions).

412. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *3, § II(A) (D.D.C. Nov. 6, 2008) (declaring that the Government bears the burden of proof by a preponderance of the evidence).

413. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

414. *Parhat v. Gates*, 532 F.3d 834, 846 (D.C. Cir. 2008). The Court explained that the documents supporting authority to detain Parhat

repeatedly describe [his] activities and relationships as having “reportedly” occurred, as being “said to” or “reported to” have happened, and as things that “may” be true or are “suspected of” having taken place. But in virtually every instance, the documents do not say who “reported” or “said” or “suspected” those things.

Id.; see also Reply to Opposition to Petition for Rehearing app. at vi, *Al Odah v. United States*, No. 06-1196 (June 22, 2007) (declaration of Lieutenant Colonel Stephen Abraham, U.S. Army Reserve, explaining that the evidence provided to the CSRT panel on which he served “lacked even the most fundamental earmarks of objectively credible evidence”).

in *Parhat* to reject evidence based on mere speculation or repetition and to proffer some basis to assess a piece of evidence's reliability.⁴¹⁵

The case of *Ali Ahmed v. Obama*⁴¹⁶ provides a comprehensive application of the preponderance standard to government evidence to date. At the threshold, Judge Kessler rejected the claim that the Government's evidence should be given a categorical presumption of accuracy, based as it often was on second- and third-hand hearsay and procured by torture. The court also rejected the Government's proffered "mosaic theory" in which the probity of any one piece of evidence should not be evaluated in isolation, but should be presumed more reliable where it appears as part of a broader pattern of similar evidence.⁴¹⁷ The court insisted instead that each piece of evidence must be independently reliable.⁴¹⁸ The district court considered evidence proffered by each of four witnesses unreliable because one witness was a notoriously uncredible government collaborator; another's statements were "equivocal and lacking in detail and description"; another's came from a witness with a history of mental illness and who had offered the statements during a period in which he was tortured in Bagram; and yet another's was little more than a "nine-word hearsay allegation" transmitted to an interrogator without the use of an interpreter.⁴¹⁹ The district court likewise rejected the Government's allegations that Ali Ahmed engaged in battle or that he stayed at an al Qaeda guesthouse because, lacking any direct evidence in support, such allegations amounted to little more than guilt by association with others who may have engaged in prohibited conduct.⁴²⁰

In the *Boumediene* merits hearing on remand, Judge Leon found that evidence consisting exclusively of "information contained in a classified document from an unnamed source," linking five of six Bosnian petitioners to an alleged plan to travel to Afghanistan, was insufficient to sustain the Government's preponderance burden, particularly where the Government could not provide "enough information to adequately evaluate the

415. *Parhat*, 532 F.3d at 847 ("[T]he factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.")

416. *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009).

417. *Id.* at 56. *But see* *Hammany v. Obama*, 604 F. Supp. 2d 240, 244 (D.D.C. 2008) (concluding, despite the petitioner's criticism, that the Government's evidence "cannot be viewed in a vacuum," and granting extra weight to a government document locating petitioner in Tora Bora because of separate evidence from an Italian law-enforcement agency regarding the petitioner's alleged membership in "a terrorist cell that provided assistance and support to various Islamic terrorist organizations").

418. *Ali Ahmed*, 613 F. Supp. 2d at 56 ("The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different and certainly cannot govern the Court's ruling.")

419. *Id.* at 57, 61.

420. *Id.* at 59–60, 63–65.

credibility and reliability of this source's information."⁴²¹ Similarly, in *Al-Mutairi*, the Court concluded that the Government's evidence failed to meet the preponderance threshold because it fell short of demonstrating that the petitioner trained with or became a member of an association assertedly connected with al Qaeda.⁴²² Likewise, in *Al-Adahi*, the court held the Government to its burden by rejecting the Government's claim that slight variations in the petitioner's account of how he sustained an injury on a motorcycle revealed a false "cover story" meant to conceal the truth that he was injured in battle. While the court would accept that such variations may generally be relevant to the petitioner's credibility, the "serious allegation" that the petitioner "took up arms. . . . cannot rest on mere conjecture, with no hard evidence to support it."⁴²³

3. Discovery and Exculpatory Evidence

Despite the absence of conclusive evidence regarding the availability of discovery at common law, it is clear that the habeas statute and *Boumediene* contemplate that the Guantanamo petitioners will have a limited opportunity to undertake judicially managed discovery in these cases. Section 2246 of the federal habeas statute expressly authorizes discovery in

421. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008). For the sixth petitioner, Judge Leon found that the Government had provided sufficient evidence to corroborate the allegation that this petitioner was an al Qaeda facilitator and had put the petitioner's credibility into question. *Id.* at 198. In *Gharani v. Bush*, Judge Leon similarly found that the unreliable quality of the Government's evidence could not sustain the government's burden to justify Gharani's detention by a preponderance of the evidence. He mused:

Putting aside the obvious and unanswered questions as to how a Saudi minor from a very poor family could have even become a member of a London-based [al Qaeda] cell, the Government simply advances no corroborating evidence for these statements it believes to be reliable from a fellow detainee, the basis of whose knowledge is—at best—unknown.

593 F. Supp. 2d 144, 149 (D.D.C. 2009); *see also* *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685, at *12 (D.D.C. Aug. 21, 2009) (rejecting an accusation by a witness because of a host of "serious credibility problems that undermine the reliability of his statements").

422. The court explained:

Taking this evidence as a whole, the Government has at best shown that some of Al Mutairi's conduct is consistent with persons who may have become a part of al Wafa or al Qaida, but there is nothing in the record beyond speculation that Al Mutairi did, in fact, train or otherwise become a part of one or more of those organizations, where he would have done so, and with which organization.

Al Mutairi v. United States, No. 02-828 (CKK), 2009 WL 2364173, at *14 (D.D.C. July 29, 2009).

423. *Al-Adahi*, 2009 WL 2584685, at *15 (footnote omitted); *see also* *Al Rabiah v. United States*, No. 02-828 (CKK), 2009 WL 3083077, at *1 (D.D.C. Sept. 17, 2009) (describing the evidentiary record as "surprisingly bare" and granting habeas). *But see* *Awad v. Obama*, No. 05-CV-2379, 2009 WL 2568212, at *6 (D.D.C. Aug. 12, 2009) (describing evidence against the petitioner as "gossamer thin" but nevertheless concluding that the Government had met its burden).

habeas proceedings by providing that, if a party introduces an affidavit, the opposing party shall have the right to propound written interrogatories to the affiants.⁴²⁴ Further, in *Harris v. Nelson*, the Supreme Court held that, pursuant to the All Writs Act, 28 U.S.C. § 1651, habeas courts are authorized to expand discovery beyond measures specified in § 2246 where “specific allegations before the court show reason to believe that the petitioner may . . . [be] entitled to relief.”⁴²⁵ The Court thus instructed district courts to “fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage,” which would permit a petitioner to “secur[e] facts where necessary to accomplish the objective of the proceedings.”⁴²⁶ *Boumediene’s* predominant concern with a petitioner’s ability to present exculpatory evidence likewise suggests that the Court anticipated a managed but meaningful discovery process to effectuate the purpose of the writ.⁴²⁷

In a typical habeas case, a petitioner must obtain leave of court for an order compelling production of specific discovery, based on “specific allegations” material to some disputed issue of fact.⁴²⁸ The availability of discovery in habeas litigation therefore depends on “the facts of [a] particular case.”⁴²⁹ Still, discovery in a conventional, post-conviction habeas case is generally quite limited. In the post-conviction context, a regime of partially constrained discovery makes sense because a petitioner would have already had (in the earlier proceeding) a full opportunity for discovery pursuant to state or federal rules of criminal procedure. The court would also have provided the petitioner with full access to exculpatory material pursuant to *Brady v. Maryland*⁴³⁰ and would have had the full opportunity to

424. See *Harris v. Nelson*, 394 U.S. 286, 296 (1969) (noting that § 2246 provides for “interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted in evidence”).

425. *Id.* at 299–300.

426. *Id.* at 299; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (observing that § 2246 authorizes “the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories”); *al-Marri v. Pucciarelli*, 534 F.3d 213, 273 n.16 (4th Cir. 2008) (Traxler, J., concurring) (citing discovery as part of the “process normally available [to persons] who challenge their executive detention”).

427. *Boumediene v. Bush*, 128 S. Ct. 2229, 2272 (2008). In addition, by instructing habeas courts to “accommodate” the Government’s interests in keeping certain information secret, the Supreme Court implied that, in the first instance, habeas petitioners would be able to make requests for disclosure of information. *Id.* at 2276.

428. *Harris*, 394 U.S. at 300; cf. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.”).

429. Compare *Bracy*, 520 U.S. at 909 (holding unanimously that “given the facts of this particular case,” the habeas court abused its discretion when it denied discovery to the petitioner), with *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (affirming the denial of habeas discovery where the discovery request was “based purely on speculation”).

430. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

confront and cross-examine all the evidence ultimately supporting a judgment in his case. Because of the inadequacy of the CSRT process, these cases are not comparable in that respect: these habeas petitioners are operating on a blank slate.

Likely recognizing this comparative discovery disadvantage of these petitioners, the district courts issued a consolidated discovery order in two parts. The first requires a set of automatic disclosures which would not exist in a traditional collateral habeas proceeding. Thus, in all post-*Boumediene* cases, the Government must, upon request, disclose:

(1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.⁴³¹

In addition, and more consistent with traditional habeas practice, individual district-court judges are authorized to order additional, targeted discovery upon a showing of good cause.⁴³² In demonstrating good cause, the Guantanamo petitioners do face an obstacle that typically does not exist in a conventional habeas case: the reality that their petitions arise in a national-security context. Thus, the Government always has the opportunity to argue that a particular discovery request propounded by a petitioner would impose an “undue burden” on ongoing military operations.⁴³³ *Hamdi* acknowledged the possibility that “military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted” by having to produce “evidence buried under the rubble of war.”⁴³⁴ Yet again underscoring the difference between the Guantanamo detainees and the paradigmatic battlefield detainee, Yasser Hamdi, the Government has not, as of yet, successfully invoked this principle.

The district courts have been developing the parameters for discovery under the governing case-management order on a case-by-case basis, as

431. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *2, § I(E)(1) (D.D.C. Nov. 6, 2008) (“[D]istrict courts have the power to require discovery when essential to render a habeas corpus proceeding effective.” (quoting *Harris*, 394 U.S. at 300 n.7)).

432. *See id.* at *2, § I(E)(2) (specifying that such “[d]iscovery requests shall be presented by written motion to the Merits Judge and (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; [and] (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner’s detention is unlawful”).

433. *Id.* at *3, § II(B).

434. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32 (2004); *cf. In re Guantanamo Bay Detainee Litigation*, 2008 WL 4858241, at *2, § I(E)(2) (explaining that, as part of a “good cause” showing, petitioner must “explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government”).

would any common-law court interpreting a new federal discovery rule. A review of a number of discovery orders demonstrates that the courts are reaching an appropriate balance between compelling the Government to produce information and limiting the Government's obligation to comply with discovery demands that are too broad. For example, a number of orders required disclosure of statements made by clients, in whatever form, already in the military's possession,⁴³⁵ disclosure of documents supporting intelligence assessments purportedly justifying the detention,⁴³⁶ evidence that might reveal the detainee was subject to torture or coercion,⁴³⁷ and other orders requiring a medical examination to evaluate a petitioner's competence.⁴³⁸ Others order disclosure of a specific, identified document after a petitioner's demonstration of particularized need,⁴³⁹ including

435. See, e.g., *Al Odah v. Obama*, 601 F. Supp. 2d 322, 323 (D.D.C. 2009) (requiring the production of all of the petitioner's statements that the government relied upon); *Al-Ghizzawi v. Obama*, 600 F. Supp. 2d 5, 7 (D.D.C. 2009) (same); *Zemiri v. Obama*, No. 04-2046, 2009 WL 311858, at *1 (D.D.C. Feb. 9, 2009) (same); *Al-Mithali v. Bush*, No. 05-cv-2186 (ESH), 2009 WL 71517 (D.D.C. Jan. 9, 2009) (same). Recognizing the frequently coercive context of detainee interrogation, the courts have also required the Government to disclose the *circumstances* in which any statements relied upon were made. *Rabbani v. Obama*, No. 05-1607 (RMU), 2009 WL 2588702, at *3 (D.D.C. Aug. 20, 2009) ("Evidence that such a statement was elicited under conditions of torture or coercion constitutes 'circumstances' evidence that must be produced under § I.E.1 [of the CMO]."); *Al Habashi v. Bush*, 591 F. Supp. 2d 1, 2 (D.D.C. 2008) (ordering the Government to detail the "circumstances surrounding those interviews [of the petitioner] and the resulting statements [made] by petitioner").

436. See *Razak v. Obama*, No. 05-1601 (GK), 2009 WL 2222988, at *2 (D.D.C. July 22, 2009) (ordering the Government to produce any objects or documents in its possession that it relied on to justify the detention).

437. Order at 7, *Abdah v. Obama*, No. 04-01254 (HHK) (D.D.C. Apr. 4, 2009) (ordering disclosure of the circumstances in which the petitioner made statements, including the duration of interrogation and physically or psychologically coercive techniques used); Order at 1-3, *Batarfi v. Gates*, No. 05-0409 (EGS) (D.D.C. Feb. 10, 2009), 2009 U.S. Dist. LEXIS 34731 (ordering the Government to produce specified information regarding the petitioner). *But see* *Al Ginco v. Bush*, No. 05-1310 (RJL), 2008 WL 5381777, at *1 (D.D.C. Dec. 23, 2008) (order denying a request for the production of unredacted copies of the petitioner's statements).

438. *Zuhair v. Bush*, 592 F. Supp. 2d 16, 17 (D.D.C. 2008) (ordering a psychological evaluation of the petitioner by a court-appointed doctor); *Husayn v. Gates*, 588 F. Supp. 2d 7, 11 (D.D.C. 2008) (granting a request to have a medical expert review the petitioner's medical files because "access to [Petitioner's] medical information is necessary to make strategic determinations that are essential to legal representation, such as whether petitioner has the mental capacity necessary to assist in preparing and presenting his defense"). *But see* *Al Sharbi v. Bush*, 601 F.Supp.2d 317, 318 (D.D.C. 2009) (denying without prejudice a motion for discovery, but ordering the Government to file a declaration pertaining to Al Sharbi's past mental and medical health treatment at Guantanamo Bay).

439. Order at 3-5, *Abdah*, No. 04-01254 (HHK) (requiring the disclosure of information regarding the payment of bounties or other monetary incentives from the Government to third parties for apprehension or transfer of the petitioners); *Zemiri*, 2009 WL 311858, at *1 (order requiring disclosure of two untranslated letters from the petitioner to his wife in the government's possession).

targeted interrogatories or requests for admissions.⁴⁴⁰ Others were simply denied.⁴⁴¹ None have required the Government to produce evidence “buried under the rubble of war.”

This is not to say that the discovery process has been entirely smooth. The Government has resisted every single discovery request propounded by the petitioners, no matter how relevant or routine; and in a number of cases, judges have expressed genuine exasperation at the level of (non)compliance with standard discovery obligations.⁴⁴² In any event, beyond the Government and military officials’ general expenditure of time and energy of the kind that *Boumediene* suggested must be tolerated,⁴⁴³ there is no evidence that habeas discovery has interfered with ongoing military operations or otherwise impeded national security.

Similarly, habeas petitioners requested, and were granted based on *Brady* principles, an entitlement to the production of “reasonably available evidence” in the Government’s possession that tends to materially undermine the evidence the Government relies upon in its factual return.⁴⁴⁴ Over government protestations about the burden associated with their compliance, the courts have properly construed “reasonably available evidence” to extend broadly to all government lawyers working on all habeas cases, and not just to what a particular government attorney encounters

440. See *Al-Ansi v. Obama*, No. 08-1923 (GK), 2009 WL 2600751, at *3 (D.D.C. Aug. 20, 2009) (granting the petitioner’s interrogatory and request “that the Government ‘identify the source of information in the following intelligence reports and produce any documents or memoranda reflecting on the source’s credibility’”); *Rabbani*, 2009 WL 2588702, at *8 (granting the petitioner’s request to “submit a list of narrowly tailored interrogatories to be answered by [Khalid Shaykh Mohammad]” because the government relied on allegations from KSM to justify the petitioner’s detention); *Al-Adahi v. Obama*, 608 F. Supp. 2d 1, 2 (D.D.C. 2009) (“Petitioner is permitted to submit an interrogatory to determine if any evidence pertaining to the interrogations during this time period might exist in a database outside of the JTF-GTMO/OARDEC . . .”).

441. See *Razak*, 2009 WL 2222988, at *1 (denying a discovery request because the “information does not tend to materially undermine allegations brought by the Government, and therefore does not fall within the confines of § I.D.I” of the case-management order).

442. *Al Odah v. United States*, No. Civ.A.02-828, 2009 WL 382098, at *4 (D.D.C. Feb. 12, 2009) (“The Court has lost confidence in Respondent’s current counsel If this Judge cannot rely on him to comply with the Court’s orders, then this Judge cannot rely on any of his representations.”); *Batarfi*, 602 F.Supp.2d at 119 (ordering the Government to show cause why it should not be held in contempt for failure to comply with a court discovery order).

443. See *supra* text accompanying note 191 (arguing that, under *Boumediene*, the military must bear some incremental costs in order to meet its obligations to comply with law).

444. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *1, § I(D)(1) (D.D.C. Nov. 6, 2008); see also Respondents’ Response to Court’s Request Concerning Orders on Exculpatory Evidence Production in this and Other Cases at exh. 1, *Zuhair v. Obama*, No. 08-CV-0864 (EGS) (D.D.C. Feb. 20, 2009) (listing numerous exculpatory definitions used by seven different judges in seven separate Guantanamo Bay habeas cases); *Zemiri*, 2009 WL 311858, at *1 (defining “exculpatory evidence” in Judge Hogan’s CMO as including “any evidence or information that undercuts the reliability and/or credibility of the Government’s evidence”).

when working on an individual petitioner's case.⁴⁴⁵ The courts have thus shifted the burden of the notoriously chaotic and disorganized state of the detainee files upon the Government to conduct thorough reviews, rather than upon a particular detainee to guess, with particularity, what exculpatory evidence might exist outside his own file.

A substantial number of the Guantanamo detentions turn on statements made by witnesses or third-party accusers. Accordingly, under the Government's exculpatory-evidence obligations, it must disclose all exculpatory evidence made by accusers and witnesses whom the Government relies upon in its factual return.⁴⁴⁶ The Government must also disclose exculpatory evidence it possesses about such witnesses and accusers, such as evidence that casts doubt on a witness's credibility stemming from his mental health or favorable government treatment⁴⁴⁷ or that indicated a statement was unreliable as the product of torture or abuse.⁴⁴⁸ Given *Boumediene's* concern over habeas courts' ability to examine exculpatory

445. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 5245890, at *1 (D.D.C. Dec. 16, 2008) ("In this context, the term 'reasonably available evidence' means evidence contained in any information reviewed by attorneys preparing factual returns for all detainees; it is not limited to evidence discovered by the attorneys preparing the factual return for the petitioner."). Reasonably available evidence has also been interpreted to include information compiled by the Executive Task Force created by President Obama's January 22, 2009 Exec. Order No. 13,492 § 4(c)(1), 74 Fed. Reg. 4897 (Jan. 22, 2009), which mandates ongoing administrative review of the detainee files; *see Bin Attash v. Obama*, 628 F. Supp. 2d 24, 38 (D.D.C. 2009) ("The Court cannot turn a blind eye to the Task Force's emergence as a reasonably available source of information that has the prospect of revealing significant exculpatory evidence.").

446. *Ali Ahmed v. Obama*, No. 05-1678, 2009 WL 377065, at *1 (D.D.C. Feb. 12, 2009) (ordering the Government to "produce . . . exculpatory evidence related to statements made by any other individuals that the Government relies on to establish its case for detention"); *Rabbani v. Obama*, 608 F. Supp. 2d 62, 67 (D.D.C. 2009) (requiring disclosure of any statements made by individuals, upon whose statements the Government relies, that deny or materially undermine an assertion that the petitioner is affiliated with al-Qaeda).

447. *See Al Ghizzawi v. Obama*, 600 F. Supp. 2d 5, 7-8 (D.D.C. 2009) (applying evidence related to the primary accuser's credibility, mental health, inducements, or promises of favorable treatment made to the accuser); *Ali Ahmed*, 2009 WL 377065, at *1 (ordering the government to "produce all credibility assessments made by agents of the United States Government related to those individuals whose statements the Government relies on to establish its case for detention"); *Zemiri*, 2009 WL 311858, at *1-2 (ordering the production of exculpatory information concerning the petitioner or convicted "Millennium Bomber," Ahmed Ressay, with whom the petitioner allegedly associated, that the Canadian government previously provided to the U.S. government, as well as any cooperation agreements between Ressay and the U.S. government).

448. *Ameziane v. Obama*, No. 05-392 (ESH), 2009 WL 691124, at *1 (D.D.C. Mar. 6, 2009) (ordering the Government to conduct an exculpatory-evidence search and to certify that all exculpatory evidence had been disclosed, including that which was "the product of abuse, torture, or mental or physical incapacity"); Order at 2, *Ghanem v. Obama*, No. 05-1638 (CKK) (D.D.C. Feb. 6, 2009) (ordering the Government to produce any "evidence that indicates a statement is unreliable because it is the product of abuse, torture, or mental or physical incapacity").

evidence, the Court's related unease about the accuracy of the Executive's judgment about the detainees' guilt, and the widespread reports of prisoner abuse in Guantanamo, the Court's insistence on the production of exculpatory evidence is unsurprising.⁴⁴⁹ Indeed, the requirement is also manifestly necessary given that a significant number of detentions have been based on testimony of detainees who have been tortured, such as Mohammed Al Qatani,⁴⁵⁰ or who have received highly favorable treatment from the Government in exchange for their statements.⁴⁵¹ Thus as a number of habeas cases have already demonstrated, the *Brady* requirement imposed on the Government in these cases was essential in order provide detainees with a meaningful opportunity to test the reliability of highly questionable evidence before the court.

C. EVIDENTIARY RULES

1. Hearsay and Torture

The Government maintains a strong interest in the use of hearsay because of a difficulty in producing some witnesses or evidence procured long ago or far away. Likewise, Guantanamo petitioners detained thousands of miles from the sites of their apprehension, and without prior meaningful access to witnesses may need to rely on hearsay affidavits in support of their case. What are the limits on the use of this otherwise notoriously unreliable form of testimony?

The Federal Rules of Evidence—and their prohibitions on and exceptions permitting hearsay—expressly apply in habeas corpus

449. In addition to preserving the truth-seeking function of an adversary proceeding, *United States v. Bagley*, 473 U.S. 667, 678 (1985) (failing to disclose exculpatory information “undermines confidence in the outcome of [the] trial”), the *Brady* requirement, which has extended to post-conviction habeas proceedings, see *Steidl v. Fermon*, 494 F.3d 623, 469 (7th Cir. 2007), and to other, noncriminal proceedings, see *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) (civil immigration proceeding), limits the opportunity for gamesmanship or malfeasance by the Government. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (explaining that absent a requirement that the Government turn over exculpatory evidence, “the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence,” which is untenable in “a system constitutionally bound to accord defendants due process”).

450. According to the Pentagon, Qahtani “[p]rovided detailed information about 30 of Osama Bin Laden’s bodyguards who are also held at Guantanamo.” Press Release, U.S. Dep’t of Def., Guantanamo Provides Valuable Intelligence Information (June 12, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8583>.

451. See Wilber, *supra* note 337 (reporting that detainee Yasim Muhammed Basardah provided highly questionable and unreliable evidence on scores of detainees that he claims to have seen at an Al Farooq training camp, in exchange for favorable treatment by the Government).

proceedings.⁴⁵² Thus, in acknowledging that hearsay “may” sometimes—in the specific context of a traditional battlefield detention—be accepted as “the most reliable available evidence,” the *Hamdi* plurality could not have expressed any intent to repeal the Federal Rules of Evidence as they are applied to habeas corpus proceedings.⁴⁵³ Rather, the plurality’s comment must be viewed merely as acknowledging that a court has discretion to admit affidavits under 28 U.S.C. § 2246 or other hearsay under Rules 803 through 807 of the Federal Rules of Evidence, and that the reliability of such hearsay will frequently be the decisive factor as to whether it should be admitted.⁴⁵⁴ Therefore, any hearsay not admissible under Rules 803 through 807 of the Federal Rules of Evidence should be under oath and subject to an opponent’s right to test it through “written interrogatories to affiants, or . . . answering affidavits,” pursuant to 28 U.S.C. § 2246.

In *Parhat*, the D.C. Circuit ruled (in the context of a proceeding brought under the DTA) that hearsay evidence is admissible only if a party submits additional information which permits the court to assess the reliability of the proffered hearsay reports.⁴⁵⁵ The district courts largely adopted this understanding. Under governing case-management orders, a party must affirmatively move for the introduction of hearsay evidence, which may be admitted if the movant establishes that the evidence is “material and relevant” to the legality of the detention, is “reliable,” and that the production of alternative non-hearsay evidence “would unduly burden the movant or interfere with the Government’s efforts to protect national security.”⁴⁵⁶ If a judge admits hearsay, the opposing party is still thereafter permitted an opportunity to challenge its credibility or weight.⁴⁵⁷ In *Parhat*, the court rejected the Government’s claim that an incriminating statement in a hearsay record was reliable simply because it appeared “in at least three

452. FED. R. EVID. 1101(e); see *Greiner v. Wells*, 417 F.3d 305, 325–26 (2d Cir. 2005), *cert. denied*, 546 U.S. 1184 (2006) (excluding hearsay in a habeas case pursuant to Federal Rules of Evidence).

453. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (accepting hearsay as evidence because it was the most reliable available).

454. The residual hearsay exception permits the introduction of hearsay if it has “circumstantial guarantees of trustworthiness” that are equivalent to the recognized exceptions to the rule against hearsay. FED. R. EVID. 807. See *United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998) (explaining that the requirement of circumstantial guarantees of trustworthiness is the “most important element” for admissibility under the residual hearsay exception); see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 218 (4th Cir. 2008) (Motz, J., concurring) (explaining that hearsay is admissible only if the Government bears its burden to demonstrate that reliance on non-hearsay evidence would be “unduly burdensome”).

455. *Parhat v. Gates*, 532 F.3d 844, 849 (D.C. Cir. 2008) (“[W]e do *not* suggest that hearsay evidence is never reliable—only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability.”).

456. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *3, § 2(C) (D.D.C. Nov. 6, 2008).

457. *Id.*

different documents,” sarcastically responding with reference to Lewis Carroll: “The fact that the Government has ‘said it thrice’ does not make an allegation true.”⁴⁵⁸ Similarly, in several habeas cases, district courts have rejected conclusory, speculative, equivocal, or otherwise unreliable hearsay statements the Government proffered.⁴⁵⁹ They have also rejected government arguments that *Hamdi* authorized a presumption of accuracy or authenticity for the Government’s evidence. As one court noted, much of the evidence is based on multiple hearsay or contested translations or whose accuracy is otherwise “hotly contested for a host of different reasons.”⁴⁶⁰ Or, as another court pointed out, the Government mistakenly maintained for years (i.e., prior to the petitioner’s opportunity to contest the evidence against him in a genuine adversarial process), that the petitioner “manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report.”⁴⁶¹

Another of the most obvious and important areas in which courts must scrutinize a declarant’s reliability is in assessing the credibility of an interrogator’s statements and reports. Many are rife with the fruits of torture, coercion, and abuse. Of course, it is well recognized that evidence obtained through torture or threats, for example, is too unreliable to be admitted into evidence.⁴⁶² Furthermore, the moral taint of such evidence

458. *Parhat*, 532 F.3d at 848 (quoting LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (1876)); *Al Rabiah v. United States*, No. 02-828 (CKK), 2009 WL 3083077, at *9–10 (D.D.C. Sept. 17, 2009) (“Although [the first alleged eyewitness’s] allegations are filled with inconsistencies and implausibilities, the Government continues to rely on him as an eyewitness to Al Rabiah’s activities at Tora Bora. . . . [T]he only consistency with respect to [a second alleged eyewitness’s] allegations is that they repeatedly change over time.”).

459. *See, e.g., Al Rabiah*, 2009 WL 3083077, at *1 (granting habeas corpus after the Government offered only a coerced statement from the petitioner and a handful of alleged eyewitnesses on whom the government no longer relied); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (finding a nine-word hearsay document insufficient to meet the government’s required standard of evidence); *el Gharani v. Bush*, 593 F. Supp. 2d 144, 149 (D.D.C. 2009) (granting a petition for habeas corpus because the evidence provided was nothing more than “a mosaic of tiles bearing [murky images]”); *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (granting a habeas corpus petition because the Government’s sole evidence was a classified document from an unnamed source with no corroborating evidence).

460. *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685, at *4 (D.D.C. Aug. 21, 2009); *see also Al Rabiah*, 2009 WL 3083077, at *1 (“One of the central functions of the Court in this case is ‘to evaluate the raw evidence’ proffered by the Government Simply assuming the Government’s evidence is accurate and authentic does not aid that inquiry.” (quoting *Parhat*, 532 F.3d at 847)).

461. *Al Mutairi v. United States*, No. 02-828 (CKK), 2009 WL 2364173, at *3 (D.D.C. July 29, 2009).

462. For example, the Court explained in *Stein v. New York*:

The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to . . . treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

requires its exclusion from court proceedings at common law⁴⁶³ and as a matter of elementary due process.⁴⁶⁴ In the striking case of Mohammed Jawad, the petitioner's counsel moved to suppress "confessions" made by an Afghan juvenile admitting responsibility for throwing a grenade at U.S. soldiers, procured after months of intense forms of physical and psychological abuse—including the use of painful stress positions, threats of violence, sleep deprivation, mental and emotional exploitation, and solitary confinement deliberately designed to break him.⁴⁶⁵ On the eve of a suppression hearing, the Obama Administration conceded that statements they previously relied upon to defend his detention were the impermissible product of coercion. Thereafter, exclaiming the *Jawad* case to be an "outrage" that was "riddled with holes"⁴⁶⁶ and presented with no other evidence to justify detention, Judge Huvelle granted the writ and ordered Jawad released to his home country of Afghanistan.⁴⁶⁷ Because of the highly coercive interrogation environments—and numerous instances of torture—in facilities in Afghanistan⁴⁶⁸ and Guantanamo,⁴⁶⁹ courts will likely regularly exclude detainees' confessions or incriminating statements as unreliable.⁴⁷⁰

Stein v. New York, 346 U.S. 156, 182 (1953); *see also* Dickerson v. United States, 530 U.S. 428, 432 (2000) (discussing the voluntariness of confessions). Forms of coercion that fall short of actual torture or violence may still render a statement involuntary, and, thus, excludable: "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960); *see, e.g.*, Spano v. New York, 360 U.S. 315, 322–23 (1959) (discussing the eight hours of questioning in the middle of the night by multiple interrogators in concert); Malinski v. New York, 324 U.S. 401, 419 (1945) (stating that statements are involuntary where the suspect was stripped naked and questioned, and subsequently questioned over three days while being held incommunicado); Chambers v. Florida, 309 U.S. 227, 241 (1940) (discussing how statements are involuntary where given after five days of questioning in an unfamiliar and threatening setting after an all-night interrogation).

463. *See* A (FC) v. Sec'y of State, [2005] UKHL 71, [51] (Eng.) (ruling inadmissible evidence gained by the torture of witnesses by a foreign government and stating that the "common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention").

464. *See* Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (explaining that statements extracted under coercion are categorically inadmissible not only "because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law").

465. *See* Bacha (a.k.a. Jawad) v. Obama, No. 05-2385, 2009 WL 2149949, at *1 (D.D.C. July 17, 2009) (filed under seal); *see also* Del Quintin Weber, *ACLU Says Government Used False Confessions*, WASH. POST, July 2, 2009, at A5 (detailing Jawad's allegations of torture).

466. William Glaberson, *U.S. Judge Challenges Evidence on Detainee*, N.Y. TIMES, July 23, 2009, at A22.

467. *See* Bacha v. Obama, No. 05-2385, 2009 WL 2365846, at *1 (D.C.C. July 30, 2009).

468. *See* Ben Fox, *Afghan Jail Conditions Hamper Gitmo Prosecutions*, ASSOCIATED PRESS, Aug. 8, 2009, available at <http://abcnews.go.com/International/wirestory?id=8283667> (describing detainee abuse allegations in Bagram that would make criminal prosecution difficult).

469. As one of the leading studies on modern torture and interrogation documented:

Al Rabiah presents a less sensational, but far more typical, case of detention by coerced confession. Upon Al Rabiah's initial detention in Guantanamo in early 2002, intelligence analysts concluded that Al Rabiah, a Kuwaiti Airlines employee who had traveled to Afghanistan to undertake charitable work, should not be detained;⁴⁷¹ yet, as the court explained, the petitioner began to "confess" to wrongdoing based on interrogators' insistence, believed to be common practice in Guantanamo, that confession in any of a variety of scenarios would be the only way out of Guantanamo.⁴⁷² Remarkably, as Al Rabiah's implausible and inconsistent confessions frustrated subsequent interrogators, they chose to progressively ratchet up the harshness of interrogation techniques employed against him⁴⁷³ in an apparent effort to get the petitioner to adopt one version which might pass minimal scrutiny. In the end, however, the version the Obama Administration attempted to defend, was still wildly "incredible":

The evidence in the record reflects that, in 2001, Al Rabiah was a 43 year old who was overweight, suffered from health problems, and had no known history of terrorist activities or links to terrorist

[T]he Guantanamo interrogation system was "hopelessly flawed from the get-go," according [to] Lt. Col. Anthony Christino. Christino was the senior watch officer for the Joint Intelligence Task Force Combating Terrorism (JITF-CT) . . . Christino concludes that the Guantanamo interrogations were overvalued and their results "wildly exaggerated." . . . Even if torture were entirely reliable, the way the government selected individuals for detention guaranteed unreliable information since many had no information to give. In reality, torture probably compounded the errors implicit in the selection process. . . . Guantanamo is a textbook case of what not to do. Social scientists know that . . . "the longer people are detained . . . the greater the risk that what they say will be unreliable."

DARIUS REJALI, TORTURE AND DEMOCRACY 509–10 (2007).

470. See, e.g., *Ahmed v. Obama*, 613 F. Supp. 2d 51, 63 (D.D.C. 2009) (rejecting evidence proffered by the Government "due to the fact that it was elicited at Bagram amidst actual torture or fear of it"); Mike Melia, *Detainee-Trial Judge Bars Coerced Evidence*, ASSOCIATED PRESS, July 22, 2008, available at http://www.boston.com/news/nation/articles/2008/07/22/detainee_trial_judge_bars_coerced_evidence/ (reporting the exclusion of confessions by Salim Hamdan in his military commissions because of the "highly coercive environments and conditions under which they were made").

471. *Al Rabiah v. United States*, No. 02-828 (CKK), 2009 WL 3083077, at *13 (D.D.C. Sept. 17, 2009) ("[E]vidence in the record during this period consists mainly of an assessment made by an intelligence analyst that Al Rabiah should not have been detained.").

472. *Id.* at *17. The court quotes Al Rabiah explaining his confessions:

[A] senior [redacted] interrogator came to me and said: "There is nothing against you. But there is no innocent person here. So, you should confess to something so you can be charged and sentenced and serve your sentence and then go back to your family and country, because you will not leave this place innocent."

Id. at *16.

473. Unfortunately, the Department of Defense has redacted all of the court's obviously detailed references to the forms of abuse employed against Al Rabiah, even though virtually all interrogation techniques used on detainees in Guantanamo are a matter of public record.

activities. . . . Given these facts, it defies logic that in October 2001, after completing a two-week leave form at Kuwait Airlines where he had worked for twenty years, Al Rabiah traveled to Tora Bora and began telling senior al Qaeda leaders how they should organize their supplies in a six square mile mountain complex that he had never previously seen and that was occupied by people whom he had never previously met, while at the same time acting as a supply logistician and mediator of supply disputes that arose among various fighting factions.⁴⁷⁴

In granting Al Rabiah the writ, the court, like the court in *Jawad and Ahmed*, expressed considerable exasperation in the Government's persistent attempts to argue for the reliability of these confessions.⁴⁷⁵

2. Confrontation Rights

The corollary to principles limiting the use of hearsay is the defendant's entitlement to confront a witness by cross examination. The right is a longstanding feature of the common-law adversarial system⁴⁷⁶ and applies outside the criminal context.⁴⁷⁷ Thus, where a case proceeds to an evidentiary hearing to resolve outstanding issues of fact, the Government or the petitioners should generally be afforded the right to cross-examine the testimony of witnesses material to the dispute.⁴⁷⁸ In those cases that have

474. *Al Rabiah*, 2009 WL 3083077, at *19. In another manifestly implausible confession identified by the court, the petitioner "confessed to traveling in July 2001 to Afghanistan where he entered bin Laden's Kandahar home unsearched by bodyguards, where bin Laden greeted him by name, and where he then challenged bin Laden's ethos during a long conversation where bin Laden sought to justify his beliefs to Al Rabiah." *Id.* at *19 n.19.

475. *Id.* at *19 ("[T]he Government has been forced by its theory of detention to search for the least detailed and least inculpatory version of Al Rabiah's confessions *in order for the evidence in this case to even make sense* . . .").

476. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." (quoting *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (N.C. 1794) (per curiam))); *see Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring in the result) (the "right of confrontation is 'implicit in the concept of ordered liberty'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969))).

477. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) ("This Court has been zealous to protect these [confrontation] rights from erosion . . . in all types of cases where administrative and regulatory actions were under scrutiny."); *see also Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (civil commitment of violent sexual offenders); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (termination of government benefits); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (deportation proceeding); *United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999) (trials under the UCMJ).

478. *See In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), 2008 WL 4858241, at *4, § III(B)(2) (D.D.C. Nov. 6, 2008) ("Counsel shall appear for a prehearing conference to discuss and narrow the issues to be resolved at the hearing, discuss evidentiary issues that might arise at the hearing, identify witnesses and documents that they intend to present at the hearing, and discuss the procedures for the hearing.").

gone to a full evidentiary hearing, the petitioners have been permitted to participate by video conference for non-classified portions of the proceedings. Other courts have signaled that where the Government intends to rely heavily upon hearsay reports, the petitioner's counsel should have an opportunity to cross-examine government officials who prepared them.⁴⁷⁹

3. Protection of Classified Information

A common criticism leveled at *Boumediene* and supporters of judicial review of the Guantanamo detentions is that we risk disclosure of classified national-security secrets. In the habeas cases, as in the criminal context, the district courts have a number of tools to ensure that this government interest is protected, including the Classified Information Procedures Act.⁴⁸⁰ For example, before obtaining access to a Guantanamo detainee, all counsel must obtain secret-level security clearance and enter into a restrictive protective order, mandating strict compliance with procedures to protect classified information. The operative protective order specifically prohibits sharing classified information with detainees, absent leave of court. More restrictive procedures are in place to govern the habeas cases of the so-called "high value detainees," i.e., those detainees who the CIA secreted in "black sites" prior to their transfer to Guantanamo. The Government dedicated a "secure facility," run by the Department of Justice Court Security Office, in which all classified information must be kept and where habeas counsel must work when preparing any filings containing classified information. Courts routinely require counsel to file documents under seal. The habeas courts have closed hearings in which counsel might disclose any classified information and even preclude detainees from listening to discussions of classified evidence at hearings.

479. See Transcript of Hearing at 18, *Sadkhan v. Obama*, 608 F. Supp. 2d 33 (D.D.C. 2009) (No. 05-1487) (Judge Collyer: "I just—I cannot accept that you could present interrogator summaries of what other detainees have said as evidence against the petitioner, and then not permit his counsel to question them. I mean, if they're still in Guantanamo, they're available.").

480. See *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (noting that CIPA would adequately protect classified sources from public disclosure even where the Government must reveal information for the court to assess the source's reliability) (citing Classified Information Procedures Act, Pub. L. No. 96-456, § 4, 94 Stat. 2025, 2025 (1980), *reprinted in* 18 U.S.C. app. at 814 (2006)); see also *United States v. Abu Ali*, 528 F.3d 210, 253–55 (4th Cir. 2008) (affirming convictions for terrorism-related offenses and explaining in detail how the district court "appropriately balanced" the interests of the Government in protecting national security interests and the defendant's right to a fair trial); SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 25 (2005) ("When you see how much classified information was involved in that [Kenya embassy bombing] case, and when you see that there weren't any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions." (quoting Patrick Fitzgerald)); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS* 85 (2008) (concluding, after studying eighteen terrorism cases involving CIPA, that "CIPA has provided a flexible, practical mechanism for problems posed by classified evidence").

Federal courts conducting habeas hearings are as competent to balance the Government's interest in national security with the detainee's interest in a fair process, as are federal courts conducting criminal trials implicating the same competing concerns.⁴⁸¹ There does not appear to be on record a single, reliable reported incident in which a detainee or his counsel mishandled classified information in a way that could compromise national security. Indeed, the assertion that recognizing the writ's fundamental basic protections in these cases risks harm to the security of the country is not only utterly unsubstantiated, it has things precisely backwards.

VI. CONCLUSION

Nearly nine years after one of the first habeas petitions was filed on behalf of Kuwaiti citizen Khaled al-Odah, he finally has had a meaningful opportunity to challenge the legality of his detention, as have numerous other Guantanamo detainees. This is, at last, a welcome development. As *Boumediene* makes clear, detention based on little more than special executive command strikes at the heart of the rule of law and elementary separation-of-powers principles enshrined by the Suspension Clause. Those principles led the Court to decree that the courts will have a significant role in managing executive detention operations to ensure they comply with the most elementary constraints of law. This judicial process, in turn, will inevitably raise a host of challenging normative, political, and practical considerations. But these considerations, as this Article has explained, are indeed properly within the "expertise and competence"⁴⁸² of the district courts to manage.

481. *Parhat*, 532 F.3d at 836.

482. *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008).

APPENDIX: UNCLASSIFIED OPINIONS AND ORDERS GRANTING
OR DENYING HABEAS IN GUANTANAMO CASES

HABEAS WRIT GRANTED

<i>Date</i>	<i>Citation</i>
Oct. 9, 2008	In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (D.D.C. 2008), <i>rev'd sub nom.</i> Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), <i>cert. granted</i> , 130 S. Ct. 458 (2009).*
Nov. 20, 2008	Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008).†
Jan. 14, 2009	el Gharani v. Bush, 593 F. Supp. 2d 144 (D.D.C. 2009).
Apr. 15, 2009	Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009).
May 11, 2009	Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009).
June 22, 2009	Al Gincio v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009).
July 29, 2009	Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. 2009).
July 30, 2009	Bacha v. Obama, No. 05-2385 (ESH), 2009 WL 2365846 (D.D.C. July 30 2009).
Aug. 21, 2009	Al-Adahi v. Obama, No. 05-280 (GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009).
Sept. 25, 2009	Al Rabiah v. United States, No. 02-828 (CKK), 2009 WL 3083077 (D.D.C. Sept. 17 2009).
Nov. 19, 2009	Mohammed v. Obama, No. 05-1347 (GK), 2009 WL 5065616 (D.C.C. Nov. 19, 2009).
Dec. 15, 2009	Hatim v. Obama, No. 05-1429 (RMU), 2009 WL 5191429 (D.D.C. Dec. 15, 2009).

HABEAS WRIT DENIED

<i>Date</i>	<i>Citation</i>
Nov. 20, 2008	Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008).†
Dec. 30, 2008	Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. 2008).
Dec. 30, 2008	Al Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008).
Jan. 28, 2009	Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. 2009), <i>aff'd</i> , No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010).
Apr. 2, 2009	Hammamy v. Obama, 604 F. Supp. 2d 240 (D.D.C. 2009).
Aug. 19, 2009	Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. 2009).
Aug. 31, 2009	Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009).

* The court granted the writ to seventeen Uighur petitioners.

† The court granted the writ to five petitioners and denied it to one.

<i>Date</i>	<i>Citation</i>
Sept. 3, 2009	Order, Barhoumi v. Obama, No. 05-1506 (RMC) (D.D.C. Sept. 3, 2009).
Jan. 6, 2010	Anam v. Obama, No. 04-1194 (TFH), 2010 WL 58965 (D.D.C. Jan. 6, 2010)