CALLING THE GOVERNMENT TO ACCOUNT: HABEAS CORPUS IN THE AFTERMATH OF *BOUMEDIENE*

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In June 2008, the Supreme Court issued *Boumediene v. Bush*,[1] its last and arguably most significant ruling in the long-running Guantánamo Bay detainee habeas corpus litigation. Previously, in *Rasul v. Bush*,[2] the Court had upheld the right of Guantánamo Bay detainees to seek judicial review under the federal habeas corpus statute and, in *Hamdan v.*

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1. Boumediene v. Bush, 553 U.S. 723 (2008).
2. Rasul v. Bush, 542 U.S. 466 (2004).

Rumsfeld,[3] it had invalidated on separation of powers grounds the presidentially-created military commissions established to try Guantánamo detainees for war crimes.[4] The Court also had previously held in *Hamdi v. Rumsfeld*[5] that an American citizen, allegedly captured on a battlefield in Afghanistan and detained in the United States, was entitled to due process under the Constitution, including notice and a meaningful opportunity to be heard before a neutral decision maker.[6] *Rasul* and *Hamdan*, however, were statutory rulings, and each prompted congressional attempts to eliminate habeas corpus jurisdiction.[7] *Hamdi*'s holding was limited to U.S. citizens, and thus did not address the constitutional rights, if any, possessed by non-citizens held at Guantánamo or elsewhere outside the United States.[8]

In *Boumediene*, the Supreme Court ruled that detainees held at Guantánamo had a right to habeas corpus under the Constitution's Suspension Clause[9] and invalidated legislation seeking to deprive them of this right.[10] More broadly, the Court rejected the government's proposed framework for assessing the Constitution's application abroad. The constitutional rights of non-citizens, the Court said, did not necessarily stop at the nation's borders but could extend extraterritorially, depending on a functional assessment of whether the application of the particular right was "impracticable" or "anomalous."[11]

Boumediene had an immediate impact on Guantánamo detainee habeas cases. It meant that these cases, many of which had been pending for more than six years at the time of the Supreme Court's decision, would finally proceed towards merits adjudication in the district court. At the time of the Court's decision, approximately 265 prisoners

3. 548 U.S. 557 (2006). Additionally, in *Hamdan* the Court found that Congress had not eliminated habeas corpus jurisdiction over pending Guantánamo habeas petitions. *Id.* at 572-84 (finding that the Detainee Treatment Act of 2005 eliminated habeas jurisdiction only over future, and not pending, habeas petitions, filed by or on behalf of Guantánamo detainees).

4. *Id.* at 634-36.

5. 542 U.S. 507 (2004).

6. *Id.* at 533.

7. *See* Military Commission Act of 2006, Pub. L. No. 105-366, § 7(a), 120 Stat. 3600, 3635-36 (2006); Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2689 (2005). *Hamdan* also prompted congressional efforts to reestablish military commissions. *See* Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473 (2007).

8. *Hamdi*, 542 U.S. at 577.

9. 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.").

10. *Boumediene*, 553 U.S. at 792.

11. *Id.* at 759-60.

remained at Guantánamo.[12] *Boumediene* meant that those prisoners would, at minimum, have an opportunity to present evidence and rebut the government's allegations before a federal judge.[13] Further, by grounding the habeas right in the Constitution, *Boumediene* foreclosed the type of explicit congressional repeal that followed the Court's previous decisions in *Rasul* and *Hamdan*.

Boumediene's significance, moreover, transcended individual detainee habeas cases.[14] The decision marked the first time the Supreme Court had invalidated a statute because it violated the Suspension Clause.[15] The Court also recognized in *Boumediene* that constitutional rights could extend to non-citizens abroad, thus rejecting the government's argument that constitutional protections were necessarily limited by territory and citizenship.[16] Consequently, non-citizens detained elsewhere outside the United States might have a right to habeas corpus or other constitutional protections. Additionally, the Court took the unprecedented step of invalidating the joint action of the political branches acting on a military matter during a time of armed conflict (though admittedly an armed conflict of a different nature and duration than prior post-World War II conflicts such as the Vietnam War and Korean War).[17] The Court thus refused to defer to the executive where judicial power should have been at its weakest under the framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*.[18]

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12. *See* News Release, U.S. Dep't of Defense, Detainee Transfer Announced (July 2, 2008), *available at* http://www.defense.gov/releases/release.aspx?releaseid=12037.

13. *Boumediene*, 553 U.S. at 791-92.

14. I discuss *Boumediene*'s significance at length in JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 158-65 (2011). For other accounts, see for example, Baher Azmy, *Executive Detention, Boumediene and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantánamo Bay*, 2008 CATO SUP. CT. REV. 47 (2008); Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009); Steven I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009).

15. Neuman, *supra* note 14, at 761.

16. Cole, *supra* note 14, at 48.

17. *Id.*

18. 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) (explaining that the president's power is at its zenith when the president acts "pursuant to an express or implied authorization of Congress"). For a discussion of *Boumediene* and *Youngstown*, see Azmy, *supra* note 14, at 452-55.

Numerous commentators have thus accorded *Boumediene* "landmark" status[19]—an assessment that I share in certain respects.[20] *Boumediene*, however, left important questions unresolved. The Court, for example, declined to decide the scope of the executive's authority to detain individuals under the 2001 Authorization for Use of Military Force (AUMF), the statutory justification for all "enemy combatant" detentions after 9/11.[21] Although the issue had been fully briefed, the Court provided no further additional guidance on this issue—other than acknowledging its centrality to the detainee habeas petitions that would be addressed in the lower courts.[22] The Court also did not define the contours of the habeas review process, expressly leaving various "evidentiary and access-of-counsel" issues to the "expertise and competence" of the district courts to address in the first instance.[23] Nor did the Court determine whether the Suspension Clause extended beyond Guantánamo.[24] To the contrary, the Court's multi-factored, functional test for determining the Suspension Clause's reach left uncertain whether detainees held by the U.S. at other off-shore facilities, such as Bagram Air Base in Afghanistan, could obtain habeas review. *Boumediene* was, in short, both the beginning and end of a longstanding dialogue: conclusively resolving the right of prisoners at Guantánamo to access the federal courts through habeas corpus, but ensuring continued litigation—and political debate—over important substantive and procedural questions bearing on the legality of their detention. In these and other areas, *Boumediene* reflected the Court's continued caution and sense of its own limitations in affecting policy in the war on terrorism.[25]

For these and other reasons, a number of commentators have questioned *Boumediene*'s significance. Joseph Margulies and Hope

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19. *See, e.g.*, Azmy, *supra* note 14, at 451; Marc D. Falkoff & Robert Knowles, Boumediene, *Bagram, and Limited Government*, 59 DEPAUL L. REV. 851, 879 (2009); Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617, 624 (2009); Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Response to Terrorism*, 60 J. LEGAL. EDUC. 373, 373 (2011); Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 506 (2009).

20. HAFETZ, *supra* note 14, at 158-64.

21. *Boumediene*, 553 U.S. at 788, 796.

22. *See id.*

23. *Id.* at 796.

24. *Id.* at 793-95.

25. For a general discussion about some limits on the Court's role in the nation's governance, including on terrorism issues, see Frederick Schauer, Forward, *The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006). *See also* Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011) (discussing the Supreme Court's role in post-9/11 national security cases).

Metcalf, for example, argue that the effort to vindicate legal rights through litigation has had limited impact on the Guantánamo detentions and other post-9/11 incursions on civil liberties, while obscuring the effect of broader historical, political, and social forces.[26] Helen Duffy explains how the years of protracted litigation required to produce *Boumediene* undermines the force of the Court's judgment and the habeas process itself.[27] Aziz Huq's empirical study of post-*Boumediene* habeas decisions concludes that *Boumediene*'s actual impact on Guantánamo detainee cases has been relatively limited.[28]

These criticisms reflect a broader skepticism about the Court's war on terrorism jurisprudence. Owen Fiss has noted the Court's failure to grapple with the underlying constitutional questions raised by military detentions conducted outside the criminal justice system.[29] Similarly, Jenny Martinez has criticized the Court's extensive focus on procedural questions, which often masked or avoided altogether larger substantive issues.[30] Martinez, for example, describes the Court's failure to resolve important and hotly contested questions surrounding the scope of the executive's detention authority and, by implication, around the legality of the war on terror itself.[31] Judith Resnik has contrasted the judiciary's resistance to executive and legislative encroachments on habeas corpus with its refusal to provide redress to prisoners for prior unlawful confinement and mistreatment.[32] Placing the war on terror habeas decisions in this broader context, Resnik finds disturbing parallels with jurisprudence involving criminal defendants, convicted prisoners, and immigrants whose access to the courts has diminished significantly during the past several decades.[33]

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26. Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 373, 433 (2011).

27. Helen Duffy, Human Rights Litigation and the 'War on Terror,' 90 INT'L REV. OF THE RED CROSS 573, 578 (2008), *available at* http://www.law.columbia.edu/ipimages/Human_Rights_Institute/ctlm%20docs/HelenDuffyInterrightsICRC.pdf.

28. Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010).

29. Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEG. STUD. 235 (2006), *available at* http://www.law.yale.edu/documents/pdf/TheWarAgainstTerrorism.pdf (discussing the Court's 2004 decisions in *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, and *Rasul v. Bush*).

30. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

31. *Id.* at 1017-18. Martinez would likely view *Boumediene* as an example of "process as substance." *Id.* at 1040-48.

32. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010).

33. *Id.* at 585-86.

Only the passage of time can provide the perspective necessary to assess fully *Boumediene*'s impact. That said, *Boumediene* has already spawned extensive litigation in the more than three years since it was issued, as lower courts have sought to resolve the Guantánamo detainee habeas cases. In the process, district and appellate judges have addressed an array of questions, including the standards and procedures governing challenges to the military detention of terrorism suspects; the judiciary's power to grant relief and to review decisions by the executive to transfer prisoners to other countries; and the extension of habeas corpus to the U.S. detention center at Bagram Air Base in Afghanistan.

This Article surveys this post-*Boumediene* jurisprudence and assesses its implications. Although it is too early to draw any definitive conclusions, the growing body of habeas decisions provides a window into *Boumediene*'s impact and the legacy of the post-9/11 enemy combatant decisions more generally. In particular, the Article describes the significance and limitations of what *Boumediene* described as a critical function of habeas: calling the government to account by requiring that it provide a lawful basis for a prisoner's detention.[34]

Part I provides an overview of *Boumediene* and the Guantánamo detainee habeas corpus litigation that preceded it. Part II describes how lower courts have been applying *Boumediene* and grappling with the questions it left open in the course of resolving individual detainee habeas cases. Part III explains how *Boumediene* and its application highlight the continuing tensions and contradictions of U.S. detention policy in the decade after 9/11. It also examines some legacies of the enemy combatant cases and the role—and limits—of habeas corpus in holding the government accountable for national security detentions conducted outside the criminal justice system.

I. OVERVIEW OF *BOUMEDIENE*

A. Pre-Boumediene Habeas Corpus Litigation

Boumediene was the product of six-plus years of litigation over the threshold question of whether prisoners held at the U.S. Naval Base at Guantánamo Bay could seek habeas corpus review of their detention.[35] The U.S. government transferred the first prisoners to Guantánamo in January 2002; the first habeas petitions challenging the legality of the

34. *Boumediene*, 553 U.S. at 745-46.
35. *See id.* at 732.

Guantánamo detentions were filed the following month.[36] In moving to dismiss the petitions, the government argued that, as non-citizens held outside the United States, Guantánamo detainees had no right to access the U.S. courts under federal statute or the Constitution.[37] The government relied principally on *Johnson v. Eisentrager*, a World War II-era case dismissing the habeas petitions of twenty-one German soldiers held at a U.S. military base in Allied-occupied Landsberg, Germany, following their capture, trial, and conviction by military commission for war crimes in Nanjing, China.[38] In *Eisentrager*, the Court had held that enemy aliens captured, tried, and detained outside of the United States had no right to habeas corpus.[39]

The lower courts dismissed the Guantánamo detainee habeas petitions, relying heavily on *Eisentrager*.[40] But in June 2004, the Supreme Court reversed, ruling in *Rasul v. Bush* that Guantánamo detainees had a right to seek habeas corpus review under the federal habeas statute.[41] The Court described both the history and purpose of the habeas writ, which had long served as bulwark against wrongful detention by the executive.[42] *Rasul*, however, did not address whether the detainees had constitutional rights, nor did it describe the standards or procedures governing resolution of the Guantánamo habeas petitions.[43] The decision prompted a vigorous dissent by Justice Scalia, who argued in favor of retaining *Eisentrager*'s bright-line restriction on habeas corpus based on territory and citizenship.[44] The Court's ruling, Scalia warned, threatened to extend the habeas statute "to the four corners of the earth" and invited unprecedented interference with the executive in time of war.[45]

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36. HAFETZ, *supra* note 14, at 31. In total, the United States has held 779 prisoners at Guantánamo since January 2002. *See* Andy Worthington, *Guantánamo: The Definitive Prisoner List (Part I)*, http://www.andyworthington.co.uk/guantanamo-the-definitive-prisoner-list-part-1/ (last visited Jan. 8, 2011).

37. *See Boumediene*, 553 U.S. at 762-63.

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

39. *Id.* at 777-78.

40. Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002).

41. Rasul v. Bush, 542 U.S. 446, 473 (2004); 28 U.S.C. § 2241 (2006).

42. *See Rasul*, 542 U.S. at 474-75 ("Executive imprisonment has been considered oppressive and lawless since [the Magna Carta]. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.") (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting)).

43. *See Rasul*, 542 U.S. at 483-85.

44. *Id.* at 488-89 (Scalia, J., dissenting).

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

Two significant developments followed. First, the Defense Department established a military review board, the Combatant Status Review Tribunal (CSRT), to determine whether the detainees were properly classified as "enemy combatants."[46] The CSRT responded to Supreme Court's suggestion in *Hamdi* that a battlefield detainee's status could potentially be resolved through a properly constituted military tribunal.[47] The CSRT quickly concluded its review, determining that all except 38 of the 558 detainees whose cases it considered were enemy combatants.[48] Second, Congress sought to eliminate the Guantánamo detainees' statutory right to habeas through its enactment of the Detainee Treatment Act ("DTA") in December 2005.[49] In place of habeas, the DTA created a more limited review mechanism in which a Guantánamo detainee could appeal an adverse CSRT finding directly to the U.S. Court of Appeals for the D.C. Circuit.[50] The government defended the DTA by arguing that Guantánamo detainees had no constitutional right to habeas corpus and, alternatively, that any such right was adequately protected by the DTA's provision for appellate review of CSRT determinations.[51]

The Supreme Court addressed the DTA's elimination of habeas corpus in June 2006 in *Hamdan v. Rumsfeld*, the second of its three Guantánamo detainee decisions.[52] There, the petitioner, Salim Hamdan, was facing war crimes charges before the military commissions established under President Bush's November 13, 2001 executive order.[53] Hamdan argued that the commissions lacked authority over both him and his alleged offense.[54]

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46. Memorandum from Paul Wolfowitz, Deputy Sec'y of Defense, to Sec'y of Navy on Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf.

47. *Hamdi*, 542 U.S. at 538 (plurality opinion).

48. Mark Denbeaux & Joshua Denbeaux, *No-Hearings Hearing: CSRT: The Modern Habeas Corpus*? 9-10 (Dec. 2006) (unpublished manuscript), *available at* http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf; HAFETZ, *supra* note 14 at 133.

49. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2740, 2741 (2005) (amending habeas statutory procedures, codified at 28 U.S.C. § 2241(2006)).

50. *Id.* § 1005(e)(3)(D); Azmy, *supra* note 14, at 459-60 (discussing the limited scope of DTA review).

51. *See* Azmy, *supra* note 14, at 477-78.

52. *Hamdan*, 548 U.S. 557.

53. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); *Hamdan*, 548 U.S. at 568-69.

54. *Hamdan*, 548 U.S. at 575. Hamdan was charged with conspiracy to commit war crimes. *Id.* at 569-70. *See also id.* at 595-613 (plurality opinion of Stevens, J.) (rejecting "conspiracy" as a basis for a war crime prosecution).

The district court granted Hamdan's habeas petition and enjoined further commission proceedings,[55] but the D.C. Circuit reversed, holding that Congress had authorized the creation of the President's military commissions and that Hamdan could not seek judicial enforcement of his claim that the commissions violated the Geneva Conventions.[56] In November 2005, the Supreme Court granted certiorari.[57] When Congress enacted the DTA the following month, the government moved to dismiss Hamdan's case for lack of jurisdiction.[58] The Supreme Court denied the government's motion.[59] It held, as a matter of statutory construction, that the DTA did not eliminate jurisdiction over habeas cases pending at the time of the DTA's passage and that it repealed habeas jurisdiction only over future-filed petitions.[60] The Court thus preserved its authority to adjudicate the merits of Hamdan's habeas challenge to the military commissions, which the Court then found violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.[61] The Court thus also preserved jurisdiction over other pending Guantánamo habeas petitions.[62] Those petitions, which challenged executive detention without charge, constituted the overwhelming majority of Guantánamo cases.[63] The Court's ruling, however, did not resolve whether the federal courts would have jurisdiction over habeas petitions filed by or on behalf of any future prisoners brought to Guantánamo.[64] More importantly, the Court deferred decision on the constitutionality of jurisdiction-stripping.[65]

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55. Hamdan v. Rumsfeld, 344 F. Supp. 2d 142 (D.D.C. 2004).

56. Hamdan v. Rumsfeld, 415 F.3d 33, 37-40 (D.C. Cir. 2005). The D.C. Circuit further held that the Geneva Conventions did not help Hamdan since they did not bar his trial by military commission. *Id.* at 40-43.

57. *Hamdan*, 548 U.S. at 572 (describing the procedural history).

58. *Id.*

59. *Id.*

60. *Id.* at 575-84. The Court also rejected the government's alternate contention that it should abstain from deciding Hamdan's challenge until after the military commission proceedings had concluded. *Id.* at 584-90.

61. *Id.* at 594-613.

62. *Id.* at 575-76.

63. *See* HAFETZ, *supra* note 14, at 149. To date, only six military commission cases have been completed: four were the result of plea bargains, two of trials. *See The Guantanamo Trials*, HUMAN RIGHTS WATCH, http://www.hrw.org/features/guantanamo (last visited Sept. 10, 2011). Charges have been sworn against twelve other detainees, including against five individuals for the alleged roles in the 9/11 attacks. All other detainees have been—and continue to be—held without charge. HAFETZ, *supra* note 14, at 149.

64. *See Hamdan*, 548 U.S. 557.

65. *Id.* at 577.

Following *Hamdan*, Congress enacted the Military Commissions Act of 2006 ("MCA").[66] Like the DTA, the MCA included a provision repealing habeas corpus.[67] This repeal was broader, eliminating habeas jurisdiction over a petition filed by or on behalf of any alien detained as an "enemy combatant," regardless of where he was being held.[68] Thus, for the second time, Congress responded to a Supreme Court ruling upholding the Guantánamo detainees' right to habeas corpus with legislation seeking to eliminate that right.[69] This time, however, Congress left no doubt about its intention: the MCA expressly applied to all enemy combatant detainee habeas petitions, past, pending, or future.[70] Thus, the Court would have to address the question it avoided deciding in *Rasul* and *Hamdan*: whether the Constitution's Suspension Clause protected non-citizens detained at Guantánamo.[71]

In January 2007, the D.C. Circuit upheld the MCA's elimination of habeas corpus.[72] Again, it relied heavily on *Eisentrager* in holding that non-citizens imprisoned outside the United States had no right to habeas corpus under the Constitution.[73] After initially denying certiorari, the Court granted the detainees' petition to reconsider and agreed to hear the case.[74]

B. Boumediene v. Bush

The central question in *Boumediene* was whether the MCA violated the Suspension Clause by eliminating habeas corpus for non-citizens held at Guantánamo Bay.[75] The Court addressed this question in two parts: first, could Guantánamo detainees invoke the Suspension Clause's protections; and, if so, did DTA review of CSRT findings provide an

66. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

67. *Id.* § 7.

68. *Id.*

69. In addition to repealing habeas corpus, the MCA reestablished military commissions (this time with explicit congressional authorization), narrowly construed the United States' obligations under Common Article 3 of the Geneva Conventions, and made it more difficult to prosecute individuals under the War Crimes Act for abuses of prisoners. *See* HAFETZ, *supra* note 14, at 152-53.

70. MCA § 7(b) (stating that the Act's amendments to 28 U.S.C. § 2241(e) "shall apply to all cases, without exception, pending on or after the date of enactment").

71. *See Rasul*, 542 U.S. 466. *See also Hamdan*, 548 U.S. 557.

72. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

73. *Id.* at 990-91.

74. Al Odah v. United States, 551 U.S. 1161 (2007).

75. *Boumediene*, 553 U.S. at 732.

adequate and effective substitute for habeas corpus, thus obviating any Suspension Clause concerns.[76]

Writing for the Court in a 5-4 decision, Justice Kennedy emphasized the interrelated purposes of the Suspension Clause: preserving individual liberty against arbitrary and unlawful government action and providing a judicial check against executive overreaching.[77] The Suspension Clause, Kennedy explained, "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailor to account."[78] Specifically, the Suspension Clause preserves the judiciary's authority to demand that the executive provide a lawful basis for a prisoner's confinement.[79] The Suspension Clause, Kennedy said, also serves a structural function.[80] By securing judicial review of claims of unlawful detention, it provides an important limit on the political branches, thus serving as "an essential mechanism in the [Constitution's] separation-of-powers scheme."[81] Kennedy, however, did not address the tension inherent in his argument, where a court's intervention has the effect of legitimizing policy rather than changing it by sanctioning the exercise of executive power.[82]

A central question posed by *Boumediene* was whether the Suspension Clause's protections were limited by territory or citizenship.[83] The government argued that the Constitution had no force outside the United States, except with respect to U.S. citizens.[84] Specifically, the government asserted that the Constitution, and thus the Suspension Clause, did not extend to non-citizens detained at Guantánamo, despite the United States' total, exclusive, and permanent control over that territory, because the United States lacked formal sovereignty there.[85] Under this line of reasoning, Congress remained free to restrict or eliminate the right to habeas that it had provided to Guantánamo detainees under federal statute as it was not bound by the

76. *See id.* at 732-33.
77. *Id.* at 732-99.
78. *Id.* at 745.
79. *Id.* at 739-44.
80. *Id.* at 743-44.
81. *Boumediene*, 553 U.S. at 744.
82. *See generally* Huq, *supra* note 28, at 386-87, 417 (noting *Boumediene*'s limited effect on detention policy despite the Court's emphasis on habeas' executive-checking function).
83. *Boumediene*, 553 U.S. at 739-44.
84. *Id.* at 746.
85. *Id.*

constraints of the Suspension Clause with respect to non-citizens held outside the United States' borders.[86]

In addressing this question, the Court first looked to the history of habeas corpus to determine whether the Suspension Clause applied extraterritorially to non-citizens.[87] That history, Kennedy explained, was known to the Constitution's Framers and confirmed their suspicion of uncontrolled and undivided government power.[88] Kennedy, however, concluded that the historical record was inconclusive, finding no analogue to Guantánamo in common law habeas jurisprudence.[89]

The Court turned next to its own precedents addressing the Constitution's extraterritorial application.[90] Here, Kennedy leaned heavily on the series of decisions known as the Insular Cases, which addressed the Constitution's application to Puerto Rico, Guam, the Philippines, and other overseas territories that the United States had acquired beginning in the late Nineteenth Century but that did not become part of the United States.[91] Although Congress did not extend the Constitution's protections to these so-called "unincorporated territories" by statute, the Court held that certain "fundamental personal rights declared in the Constitution" applied to the inhabitants of these territories and constrained the exercise of government power there.[92] As the Insular Cases instructed, the question was not whether the Constitution applied to unincorporated territories but "which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."[93] The answer turned not on formal constructs like "political sovereignty," the Court said, but on other, more pragmatic considerations.[94]

Kennedy traced this line of reasoning through the Court's later jurisprudence. He explained that *Johnson v. Eisentrager*, for example, turned not on a bright-line test based on citizenship and territoriality but

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86. *Id.*

87. *Id.* at 742-46.

88. *Id.* at 742.

89. *Boumediene*, 553 U.S. at 752.

90. *See id.* at 745-66.

91. *Id.* at 756.

92. Balzac v. Porto Rico, 258 U.S. 298, 312 (1922); *see also Boumediene*, 553 U.S. at 756-59 (discussing the *Insular* Cases).

93. *Balzac*, 258 U.S. at 312.

94. *Boumediene*, 553 U.S. at 758-59. *But see* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011) (criticizing the Court's analysis in *Boumediene* and concluding that the Insular Cases do not support the extraterritorial application of constitutional rights).

rather on the practical obstacles to extending habeas rights to enemy aliens convicted by military commissions for law-of-war violations and detained in Germany during the Allied Powers' post-war occupation there.[95] The absence of plenary U.S. control over Landsberg Prison and the difficulties of producing prisoners in federal court (as the Court then believed habeas required) counseled against the exercise of habeas jurisdiction in that context.[96] In *Reid v. Covert*, decided seven years later, the four-Justice majority emphasized the prisoners' American citizenship in holding that the Fifth and Sixth Amendments precluded the court-martial of civilians abroad.[97] But, as Kennedy noted, practical considerations relevant to the prisoners' place of confinement and trial mattered both to the *Reid* majority and to Justices Harlan and Frankfurter, whose votes were necessary to the Court's disposition.[98] The critical question, as Harlan put it in his concurring opinion, was whether the extension of a particular constitutional guarantee was "impracticable" and "anomalous" under the circumstances.[99]

In *Boumediene*, the Court distilled these precedents into a multi-factored test designed to determine the Suspension Clause's extraterritorial reach.[100] The test considered at least the following: "(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."[101]

Applying this test, the Court held that the Suspension Clause extended to detainees at Guantánamo.[102] Although non-citizens, detainees there had received only the flawed and limited CSRT procedures to challenge their confinement.[103] Unlike the prisoners in *Eisentrager*, who had been tried by a military commission, the Guantánamo detainees had not received any form of trial.[104] The CSRT, the Court explained, fell "well short" of the procedures and adversarial safeguards required to eliminate the need for habeas corpus review.[105]

95. *Johnson*, 339 U.S. 763.
96. *Boumediene*, 553 U.S. at 762-63.
97. Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion).
98. *Boumediene*, 553 U.S. at 759-62.
99. *Reid*, 354 U.S. at 74-75 (Harlan, J. concurring).
100. *Boumediene*, 553 U.S. at 766.
101. *Id.*
102. *Id.* at 732.
103. *Id.* at 766-67.
104. *Id.* at 767.
105. *Id.*

For example, the CSRT denied detainees the assistance of counsel, which significantly limited detainees' access to evidence and ability to rebut the government's allegations, and afforded a presumption of validity to the government's evidence.[106]

As to the second factor, the Court acknowledged that the *Boumediene* petitioners, like the *Eisentrager* petitioners, were being held outside the sovereign territory of the United States.[107] But the U.S. Naval Station at Guantánamo Bay, unlike Landsberg Prison after World War II, was under the complete and permanent control of the United States. Guantánamo "[i]n every practical sense . . . is not abroad," Kennedy explained.[108]

The third factor, the Court found, also favored the Suspension Clause's application to Guantánamo.[109] Although habeas review of detentions would require some expenditure of military funds and resources, that expenditure would be minimal, and federal litigation would not compromise the military mission given the level of security at Guantánamo and the detention center's distance from active hostilities.[110] By contrast, the Court said, in *Eisentrager* habeas review risked significant interference with military operations in post-World War II Germany, where the United States was responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million at a time when the United States faced potential security threats from a defeated enemy.[111] Thus, in concluding that practical obstacles should not bar habeas jurisdiction over detentions at Guantánamo, the Court refused to defer to the executive's assessment of the risks that judicial review posed to military operations,[112] much as it had refused in *Hamdan* to defer to the executive's assessment of the necessity of military commissions and the impracticality of adhering to the rules governing courts-martial.[113]

After finding that the Suspension Clause applied to Guantánamo, the Court had to decide whether DTA review of CSRT proceedings provided an adequate and effective substitute for habeas corpus, thus obviating

106. *Boumediene*, 553 U.S. at 767.

107. *Id.* at 768.

108. *Id.* at 769. Kennedy had made the same point in his *Rasul* concurrence. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) ("Guantánamo Bay is in every practical respect a U.S. territory.").

109. *Boumediene*, 553 U.S. at 769.

110. *Id.*

111. *Id.* at 769-70.

112. *Id.*

113. *Hamdan*, 548 U.S. at 620-25.

any Suspension Clause problems presented by the legislation.[114] The D.C. Circuit had not addressed this question, finding only that the petitioners had no constitutional right to habeas.[115] The government thus urged the Supreme Court to remand and allow the D.C. Circuit to address the adequate and effective substitute issue in the first instance.[116] The Court refused, citing the additional delay the detainees would suffer.[117]

The Court summarized the essential attributes of any adequate and effective substitute for habeas as a meaningful opportunity for a prisoner to demonstrate that he is being held without legal basis and the power of a court to authorize release in appropriate cases.[118] The necessary scope of habeas review, the Court said, depended partly on the nature of the detention and the rigor of any prior proceedings.[119] The need for review was strongest in cases of executive detention without trial, as in the Guantánamo habeas cases.[120] These prisoners faced continued indefinite detention without charge based solely on the CSRT's determination that they were "enemy combatants."[121]

The Court's analysis thus focused on the CSRT's shortcomings and the D.C. Circuit's inability to overcome them in light of the DTA's limited scope of review.[122] The Court summarized the CSRT's deficiencies, including: the denial of counsel, the extensive use of classified information not shared with the detainee, and the absence of restrictions on hearsay.[123] Without deciding whether the CSRT met constitutional due process,[124] the Court found that there was

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114. *Boumediene*, 553 U.S. at 771-72. For the Court's prior precedents discussing adequate and effective substitutes for habeas corpus, see Swain v. Pressley, 430 U.S. 372 (1977), and United States v. Hayman, 342 U.S. 205 (1952).

115. *Boumediene*, 553 U.S. at 772.

116. *Id.* at 772.

117. *Id. at* 772-73.

118. *Id.* at 779.

119. *Id.* at 781.

120. *Id.* at 783.

121. *Boumediene,* 553 U.S. at 783.

122. *Id.* at 787.

123. *Id.* at 784-85.

124. The Court instead distinguished the Suspension and Due Process Clauses, explaining that the former provides a layer of additional (or collateral) review, which is strongest and most searching where the underlying process is least rigorous, as in the case of executive detention without trial. *See id.* at 785. For a different conception of the relationship between the Suspension and Due Process Clauses, which harmonizes rather than distinguishes the two constitutional safeguards, see *Hamdi*, 542 U.S. at 556-58 (Scalia, J., dissenting) (explaining that the Suspension Clause secures the right to a jury trial guaranteed by the Due Process Clause).

"considerable risk of error in [its] findings of fact,"[125] a risk inherent in any "'closed and accusatorial'" process.[126]

The Court concluded that DTA review was too narrow to compensate for these deficiencies.[127] It acknowledged that it might be possible to construe the DTA to provide for D.C. Circuit review of the President's legal authority to detain and to consider evidence reasonably available to the government at the time of the CSRT determination that was not made part of the CSRT record.[128] However, the DTA still did not allow the detainee to introduce newly discovered evidence that could not have been made part of the CSRT record because it was unavailable either to the government or the detainee when the CSRT made its finding.[129] Given the CSRT's other procedural shortcomings and the potential length of detention resulting from an erroneous determination, the Court found that the DTA review process failed to provide an adequate and effective substitute for habeas.[130]

The Court did, however, signal some potential limits on the writ's availability and scope.[131] For example, the Court stated that a foreign citizen seized abroad might not be able to invoke a district court's habeas jurisdiction the moment he is taken into custody.[132] Indeed, even where habeas jurisdiction attaches, Kennedy explained, a court should afford proper deference to reasonable procedures created by the executive for screening and initial detention.[133] The Court also underscored the government's "legitimate interest in protecting sources and methods of intelligence gathering."[134] It ultimately left resolution of these and other evidentiary questions to "the expertise and competence" of district judges to address in the first instance.[135]

In the course of implementing *Boumediene*, the D.C. district and appeals courts have had to address many of the questions the Supreme Court left open regarding the contours of the Suspension Clause-based habeas right and the standards bearing on the legality of a prisoner's

125. *Boumediene*, 553 U.S. at 785.
126. *Id.* (quoting Bismullah v. Gates, 514 F.3d 1291, 1296 (D.C. Cir. 2008) (Ginsburg, C.J., concurring)).
127. *Id.* at 788-89.
128. *Id.* at 787-89.
129. *Id.* at 790-91.
130. *Id.* at 790-92.
131. *Boumediene*, 553 U.S. at 793.
132. *Id.*
133. *Id.* at 793-94.
134. *Id.* at 796.
135. *Id.*

confinement.[136] In the process, they have developed an emerging body of national security detention jurisprudence, with implications that transcend the Guantánamo detainee cases.

II. APPLICATION OF *BOUMEDIENE*

This Part provides an overview of post-*Boumediene* lower court habeas decisions. These decisions cover four general areas: (1) the standards and procedures employed to determine whether a detainee is being lawfully held; (2) the power of district judges to issue a remedy for unlawful detention; (3) the judiciary's authority to review the executive's decision to transfer detainees from Guantánamo to another country; and (4) whether the Suspension Clause applies to prisoners detained at Bagram in Afghanistan. While these issues have not been definitively resolved, the decisions addressing them offer insight into *Boumediene*'s impact and the emerging law surrounding military counter-terrorism detentions after 9/11.

A. Boumediene and the Law of Detention

Boumediene's most significant effect has been to launch the first sustained judicial inquiries into the legality of the Guantánamo detentions. Prior to *Boumediene*, courts had not decided the merits of any Guantánamo habeas petition. Prior litigation had focused instead almost exclusively on jurisdictional,[137] emergency medical,[138] and access-to-counsel issues.[139] Since *Boumediene*, however, district judges have

136. Although federal courts in general have jurisdiction over habeas petitions brought by prisoners held at Guantánamo, the Supreme Court suggested in *Boumediene* that the D.C. federal courts are the only appropriate venue for those petitions, *id.* at 793-94, and the D.C. district court and D.C. Circuit have accordingly exercised "a de facto form of exclusive jurisdiction over any and all claims arising out of Guantánamo." Stephen I. Vladeck, *The D.C. Circuit after Boumediene*, 42 SETON HALL L. REV. (forthcoming).

137. *See, e.g.*, Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (holding that the court lacks jurisdiction to hear habeas petitions brought by or on behalf of non-citizens held outside the sovereign territory of the United States), *aff'd sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004).

138. *See, e.g.*, Al-Joudi v. Bush, 406 F. Supp. 2d 13 (D.D.C. 2005) (holding that counsel shall have access to their clients and their clients' medical records upon notice that a client is being force fed or in need of emergency medical attention).

139. *See, e.g.*, Al Odah v. United States, 346 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (rejecting the government's proposed restrictions on attorney-client communications). Also, before *Boumediene*, parallel litigation was initiated in the D.C. Circuit under the DTA's petition for review procedure. Bismullah v. Gates, 503 F.3d 137 (D.C. Cir. 2007) (describing, inter alia, the government's production requirements under the DTA). In

decided 63 Guantánamo habeas cases: in 38 of those cases, courts have found no lawful basis for the detention; in 25 of those cases, district courts have upheld the detention.[140] The D.C. Circuit has thus far issued sixteen decisions on appeals of those rulings: it has reversed a district court habeas grant and directed a denial in three cases;[141] vacated a district court habeas grant and remanded for further proceedings in three cases;[142] affirmed habeas denials in eight cases;[143] and vacated and remanded habeas denials for further proceedings in two cases.[144] Although several certiorari petitions have been filed, the Supreme Court has not heard a Guantánamo habeas case since *Boumediene* and has denied multiple petitions.[145]

An important issue in the post-*Boumediene* habeas litigation is the substantive detention standard—that is, the category of persons that may lawfully be detained by the military. In *Hamdi*, the Court ruled that the President could detain in military custody an individual (including a U.S. citizen) who fought against the United States or its allies in Afghanistan on behalf of the Taliban and who was captured during the armed conflict there.[146] The Court said this detention was authorized under the 2001

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those cases, the litigation centered primarily on procedural and evidentiary questions. The one DTA merits decision was issued the day after *Boumediene*. *See* Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (holding that there was insufficient evidence under the DTA to support the conclusion that Parhat was an "enemy combatant").

140. *See Guantanamo Decisions*, Email from Brian Foster to Jonathan Hafetz, Oct. 14, 2011 (on file with author).

141. Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011); Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011); Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

142. *See* Latif v. Obama, No. 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011); Hatim v. Gates, 632 F.3d 720 (D.C. Cir. 2011); Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010).

143. *See* Khan v. Obama, 655 F.3d 20 (D.C. Cir. 2011); Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011); Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011); Esmail v. Obama, 639 F.3d 1075 (D.C. Cir. 2011); Al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010); Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010); Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

144. *See* Al Warafi v. Obama, 409 Fed. Appx. 360, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010).

145. For cases denying certiorari, see Awad v. Obama, 131 S. Ct. 1814 (2011); Al-Bihani v. Obama, 131 S. Ct. 1814 (2011); Al Odah v. United States, 131 S. Ct. 1812 (2011); Al Adahi v. Obama, 131 S. Ct. 1001 (2011). The Supreme Court granted certiorari in one post-*Boumediene* Guantánamo habeas case, *Kiyemba v. Obama,* 130 S. Ct. 458 (2009), to address a district court's power to order a remedy from unlawful detention. The Court, however, did not issue a decision in that case, but instead vacated the lower court ruling and remanded to the court of appeals to determine what further proceedings were necessary in light of changed circumstances. *See infra* Part II.B.

146. Hamdi v. Rumsfeld, 542 U.S. 507, 516-19 (2004) (plurality opinion).

Authorization for Use of Military Force (AUMF),[147] which grants the President the authority to use "all necessary and appropriate military force against those nations, organizations, or persons" which he determines were responsible for the 9/11 attacks and those who harbored them.[148] The Court read the AUMF's text against the background of longstanding law-of-war principles, concluding that detaining those who captured while taking up arms against an opposing country's military force on a battlefield is "a fundamental incident of waging war."[149] The Court left open for future consideration whether the AUMF authorized detention in cases that had a more tenuous connection to such traditional law-of-war principles.[150] The government subsequently mooted the two cases, *Padilla v. Hanft*[151] and *al-Marri v. Spagone*,[152] that presented the most aggressive and nontraditional uses of military detention power after 9/11—the military detention of individuals arrested in the United States—to avoid a Supreme Court ruling on the merits. In *Boumediene*, the Court affirmed that *who* may be held by the military is central to detainee habeas petitions, but declined to provide any further guidance on the permissible scope of that category.[153]

The Obama administration claimed that under the AUMF it could detain the individuals who planned, authorized, committed, or aided the 9/11 attacks, those who harbored them, and those 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 partners, including any person who has committed a belligerent act, or has directly supported hostilities in aid of such armed forces."[154] This definition largely tracked the Bush administration's

147. *Id.* at 518.

148. Authorization for Use of Military Force, 115 Stat. 224 (2001).

149. *Hamdi*, 542 U.S. at 519 (plurality opinion).

150. *Id.* at 522 n.1.

151. Padilla v. Hanft, 547 U.S. 1062 (2006) (denying certiorari to review the domestic military detention of an American citizen arrested in the United States following the detainee's transfer to the civilian justice system for criminal prosecution).

152. al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (vacating lower court judgment upholding the military detention of a legal alien arrested in the United States and remanding the case with instructions to dismiss as moot following the alien's transfer to the civilian justice system for criminal prosecution).

153. Boumediene v. Bush, 553 U.S. 723, 788 (2008) (stating that habeas corpus, or any adequate substitute for it, must permit the petitioners to assert "their most basic [legal] claim: that the President has no authority under the AUMF to detain them indefinitely").

154. The new administration first articulated its position during the post-*Boumediene* habeas litigation. *See* Respondents' Mem. Regarding the Scope of the Govt's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442, filed Mar. 13, 2009 (D.D.C.) (TFH) [hereinafter Gov't Detention Mem.]. The Obama administration also eschewed any reliance on the

interpretation of AUMF-based detention authority, with the exception that the Obama administration believed that the detainee's support for al-Qaeda, the Taliban, or associated forces had to be "substantial" and that this standard itself was informed by the law of war.[155]

After *Boumediene*, two district judges issued lengthy rulings on the scope of the President's detention authority under the AUMF. In *Gherebi v. Obama*,[156] Judge Walton adopted a standard that hewed to the Obama administration's, with several qualifications.[157] Judge Walton ruled that the terms "part of" and "substantially supported" required that the government provide evidence that at the time of his capture the detainee was a "member[ ] of the enemy organization's armed forces" within the meaning of the laws of war.[158] He said that the AUMF was broad enough to reach non-fighters but did not extend to mere "[s]ympathizers, propagandists, and financiers."[159] The critical question, Judge Walton said, was whether the individual "receive[s] and execute[s] orders within [the enemy organization's] command structure," thus making those individuals analogous to combatants under the laws of war.[160]

In *Hamlily v. Obama*,[161] Judge Bates adopted a similar approach. Bates focused on whether the petitioner was "part of" a group hostile to the United States.[162] Although Judge Bates did not find that providing "substantial support" alone constituted a basis for detention under the AUMF, he said that such support could provide evidence that a person was "part of" al-Qaeda, the Taliban, or an associated force.[163] Both Judge Bates and Judge Walton recognized the government's legal authority to detain those individuals who either committed a belligerent act or were part of an enemy's armed forces, a functional test that focused on the individual's relationship to the enemy organization's military command structure. The "command structure" test itself suggested that the government had to demonstrate a petitioner's nexus to armed conflict by requiring proof that he received and executed orders within a military chain-of-command. The decisions nevertheless also appeared to extend

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President's inherent authority as commander-in-chief under Article II of the Constitution, which the prior administration had embraced as an alternative basis for military detention in the war on terrorism. *Id.*

155. *Id.*
156. 609 F. Supp. 2d 43 (D.D.C. 2009).
157. *Id.* at 70-71.
158. *Id.* at 71.
159. *Id.* at 68.
160. *Id.* at 68-69.
161. 616 F. Supp. 2d 63 (D.D.C. 2009).
162. *Id.* at 71-76.
163. *Id.* at 70-77.

the President's detention authority beyond the battlefield circumstances of *Hamdi*, suggesting that a person could be militarily detained even if he did not take up arms against U.S. or coalition forces in the Afghan theater. They thus accepted the premise of a global armed conflict against transnational terrorist organizations while also seeking to cabin the scope of military detention authority in that conflict through incorporation of traditional law-of-war concepts like a service in an enemy armed force. Other judges adopted standards similar, if not identical, to those articulated in *Gherebi* and *Hamlily*.[164]

The D.C. Circuit, in turn, adopted a more expansive view of the executive's detention power under the AUMF. It has ruled that evidence that an individual operated within al-Qaeda's command structure is "sufficient but is not necessary to show that he is 'part of' the organization" within the meaning of the AUMF.[165] Determinations, the appeals court explained, must be made on a case-by-case basis, and a person need not receive and execute orders from within al-Qaeda's command structure to be part of that organization.[166] Other indicia might show a person was part of al-Qaeda, such as evidence that he was accepted by al-Qaeda and joined the organization in hostilities against U.S. or allied forces.[167] Additionally, while the "purely independent conduct of a freelancer" does not provide a basis for a person's detention on the ground that he is part of al-Qaeda,[168] evidence of association with other al-Qaeda members can itself be probative of al-Qaeda membership.[169] Further, the D.C. Circuit has said other circumstantial evidence, such as having stayed at an al-Qaeda guesthouse, is "powerful," if not "overwhelming" evidence that an individual is part of al-Qaeda.[170] The D.C. Circuit, in short, has adopted a malleable, case-by-case approach in which various facts may be probative—indeed, often highly probative—that a person is part of al-Qaeda even if that person never took part in hostilities.

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164. *See, e.g.*, Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. 2009) (adopting the *Hamlily* standard). For an excellent summary of the district court litigation, see *Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases: A Report from Former Federal Judges*, HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT (June 2010), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/Habeas-Works-final-web.pdf [hereinafter *Habeas Works*].

165. Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); *accord* Salahi v. Obama, 625 F.3d 745, 752 (D.C. Cir. 2010).

166. *Bensayah*, 610 F.3d at 725.

167. *See, e.g.*, Awad v. Obama, 608 F.3d 1, 3-4 (D.C. Cir. 2010).

168. *Bensayah*, 610 F.3d at 725; *accord Salahi*, 625 F.3d at 752.

169. Uthman v. Obama, 637 F.3d 400, 405 (D.C. Cir. 2011).

170. al-Adahi v. Obama, 613 F.3d 1102, 1108 (D.C. Cir. 2010).

In *Al-Bihani v. Obama*, a D.C. Circuit panel suggested that a person could be detained under the AUMF, even if he is not part of al-Qaeda, as long as he "purposefully and materially support[ed]" enemy forces in hostilities against the U.S. or its coalition partners.[171] The panel noted that the Military Commissions Act of 2006, as amended in 2009, authorized the trial of "unprivileged enemy belligerents," a category that includes those who purposefully and materially support enemy forces in hostilities against the U.S. or coalition partners.[172] If a person can be tried by a military commission, the court reasoned, *a fortiori,* he can be detained under the AUMF on the theory that detention is a lesser-included power of the power to try.[173] But while this argument may have some intuitive appeal, the category of individuals who may be detained indefinitely may overlap but is ultimately distinct from the category of individuals who may be prosecuted for war crimes.[174] The MCA, moreover, did not purport to define the category of persons who could be detained without charge under the AUMF.[175]

Even more controversial was the *Al-Bihani* panel's suggestion that international law did not inform the President's detention power under the AUMF.[176] This statement contradicted the Supreme Court's analysis in *Hamdi*,[177] as well as prior Supreme Court decisions that looked to the law of war in assessing the validity of the President's assertion of military jurisdiction over individuals during wartime.[178] The statement also contradicted the executive's own view of its detention authority under the AUMF, which it maintained was informed by the law of

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171. Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010).

172. Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, tit. xviii, § 948(a) 123 Stat. 2190 (2009). *See also Al-Bihani*, 590 F.3d at 872-73 (discussing the MCA).

173. *Al-Bihani*, 590 F.3d at 872-73.

174. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2010).

175. In fact, the MCA's legislative history suggests Congress explicitly disavowed reliance on the MCA to define the detention standard under the AUMF. *See* H.R. REP. NO. 111-288 (2009) (Conf. Rep.), 2009 WL 3244665, at *669 (statute's definition of who may be tried by military commission "is not intended to address the scope of the authority of the United States to detain individuals in accordance with the laws of war or for any other purpose"); *see also* Steve Vladeck, *Judge Randolph Pulls Another Fast One—But Will Anyone Notice,* PRAFSBLAWG, (Feb. 19, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/02/judge-randolph-pulls-another-fast-one-but-will-anyone-notice.html (last visited May 19, 2011).

176. *Al-Bihani*, 590 F.3d at 871-72.

177. *Hamdi*, 542 U.S. at 518-20 (looking to law-of-war principles to determine the scope of the president's detention power under the AUMF).

178. *See, e.g.*, Ex parte Quirin, 317 U.S. 1, 27-31 (1942) (looking to the law of war to determine the president's authority to try combatants for war crimes).

war.[179] In his concurring opinion in *Al-Bihani*, Judge Williams noted that the panel's statements on international law appeared inconsistent with *Hamdi* and were divorced from application to any particular argument in the case.[180]

The full court denied the petitioner's request for rehearing en banc.[181] In an opinion concurring in the denial of rehearing, seven judges characterized as dicta the *Al-Bihani* panel's statements about the applicability of international law to the interpretation of the AUMF.[182] Thus, the view that international law does not inform construction of the President's detention authority under the AUMF appears to be a minority one on the circuit.[183] Since *Al-Bihani*, however, other D.C. Circuit panels have avoided discussing international law in discussing the legal standard for detention under the AUMF.[184]

In addition to addressing the substantive detention standard, lower courts have considered various procedural and evidentiary issues in the post-*Boumediene* Guantánamo habeas litigation. Following *Boumediene*, and after full briefing and argument by the parties, Chief Judge Hogan issued a Case Management Order ("CMO") to establish the basic rules and deadlines for the habeas cases in the D.C. district courts.[185] Hogan's CMO created a framework for discovery and merits hearings that became the basic model used by other judges in the district.[186] The CMO requires the government to disclose exculpatory evidence,[187] evidence on which

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179. *See* Gov't Detention Mem., *supra* note 154, at 1-2.

180. *Al-Bihani*, 590 F.3d at 885 (Williams, J., concurring). The panel opinion, moreover, subsequently considered the petitioner's international law-of-war arguments in deciding whether his detention was authorized under the AUMF, rejecting them on the merits. *Id.* at 874-75.

181. Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010).

182. *Id.* at 1 (Sentelle, C.J., joined by Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, J.J., concurring in the denial of rehearing en banc).

183. *Al-Bihani*, 619 F.3d at 9-10 (Kavanaugh, J.) (concurring in the denial of rehearing en banc).

184. *See, e.g.*, *Salahi*, 625 F.3d at 751-52 (addressing the legal standard for detention but avoiding discussion of how that standard is informed by international law).

185. *See* In re Guantánamo Bay Detainee Litigation, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008), *amended by* 2008 WL 5245890 (D.D.C. Dec. 16, 2008). The amendments to the CMO extended the government's time to file a factual return, limited the government's duty to produce evidence, and clarified the government's duties regarding the production of exculpatory evidence, the procedures for handling classified information, and the petitioner's obligation to file a traverse. The CMO, as amended, remains in effect.

186. *See Habeas Works*, *supra* note 164 (discussing the CMO).

187. In re Guantánamo Bay Detainee Litigation, No. 08-0442, 2008 WL 5245890 at *1 (D.D.C. Dec. 16, 2008) (requiring the government to disclose to the petitioner "all reasonably available evidence in its possession that tends materially to undermine the

the government relies,[188] and additional evidence if the detainee can demonstrate good cause.[189] Although the precise formulations of the government's discovery obligations have varied, judges have applied the CMO to require the government to provide a detainee's counsel with a range of information.[190] At the same time, judges have sought to shield the government from overly broad and burdensome discovery requests.[191]

Significant controversy has centered on the government's use of hearsay evidence and the burden of proof. The plurality in *Hamdi* noted that hearsay might need to be accepted "as the most reliable available evidence from the government" in enemy combatant habeas corpus proceedings.[192] The Court in *Boumediene* did not directly address this issue, but noted that district judges must accommodate the government's legitimate national security interests in adjudicating detainee habeas petitions.[193] In line with *Hamdi* and *Boumediene*, the CMO permits district judges to admit and consider hearsay evidence that is "material and relevant to the legality of the petitioner's detention" based on a showing that the evidence is "reliable and that the provision of non-hearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security."[194] District judges have generally admitted hearsay evidence without engaging in an item-by-item analysis. Rather than exclude evidence that would otherwise be inadmissible under the Federal Rules of Evidence,[195] judges have instead focused on how much weight to accord it in light of other evidence

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information presented to support the government's justification for detaining the petitioner").

188. *Id.* (defining the government's disclosure obligations with respect to documents and statements by the petitioner in its possession that it relies on to justify the petitioner's detention, as well as the circumstances under which those statements were made or adopted).

189. *Id.* (detailing requirements for additional discovery, including the requirement that the request explain why discovery is sought and why the request, if granted, is likely to produce evidence that that demonstrates the petitioner's detention is unlawful).

190. *Habeas Works*, *supra* note 164, at 18-20 (describing district judges' rulings on discovery issues). Courts, for example, have required the government to disclose exculpatory evidence that "a bounty or other payment was made for the capture of the petitioner; evidence that a third party witness was tortured; and negative identifications by other detainees." *Id.* at 19 (summarizing rulings).

191. *Id.* at 18-20.

192. *Hamdi*, 542 U.S. at 533-34 (plurality opinion).

193. *Boumediene*, 553 U.S. at 796 (stating that district judges should accommodate the government's "legitimate interest in protecting sources and methods of intelligence gathering . . . to the greatest extent possible").

194. *In re Guantánamo Bay Detainee Litigation*, 2008 WL 5245890, at *1.

195. *See* FED. R. EVID. 802-807.

presented.[196] In making this determination, courts have looked to various case-specific factors, including any inconsistency or absence of detail in the hearsay statement, the lack of corroborating evidence, and evidence of torture or other abuse at the time the statement was made.[197]

The D.C. Circuit has followed a similar approach, ruling that hearsay is always admissible in detainee habeas cases and that the operative question is what weight to accord it.[198] The D.C. Circuit has emphasized not only the *Hamdi* plurality's statement regarding the admissibility of hearsay, but also district judges' sophistication and experience as fact-finders who, under *Boumediene*, are charged with making an assessment of the legality of executive detention independent of any fixed procedural regime.[199] In addition, the D.C. Circuit has noted that a critical restriction on hearsay—the Sixth Amendment's Confrontation Clause—applies only in criminal prosecutions and thus does not apply in military detention habeas cases.[200] The issue, however, remains contested, with petitioners arguing that a district court's admission of hearsay is restricted by the Federal Rules of Evidence and the Constitution.[201]

Another disputed issue concerns the standard of proof. The CMO provides that the government must prove the lawfulness of a petitioner's detention by a preponderance of the evidence, the standard urged by the government.[202] A number of petitioners, however, have argued that a more rigorous standard of proof—beyond a reasonable doubt or, alternatively, clear and convincing evidence—is warranted by the severe deprivation of liberty resulting from prolonged indefinite detention.[203] The D.C. Circuit has rejected this argument, holding that a preponderance of the evidence is constitutional without deciding the minimum permissible standard.[204] One D.C. Circuit panel, however, has suggested that a standard lower than preponderance of the evidence

196. *Habeas Works*, *supra* note 164, at 22. At least one district judge, however, has taken a less accommodating approach to the government's reliance on hearsay evidence. *See* Bostan v. Obama, 662 F. Supp. 2d 1, 4-5 (D.D.C. 2009) (ruling, inter alia, that the government cannot rely on conclusory assertions that the use of non-hearsay evidence would be an undue burden).

197. *Habeas Works*, *supra* note 164, at 22-23.

198. *Al-Bihani*, 590 F.3d at 879; *accord Awad*, 608 F.3d at 7; *accord* Barhoumi v. Obama, 609 F.3d 416, 422 (D.C. Cir. 2010).

199. *Al-Bihani*, 590 F.3d. at 880.

200. *Id.* at 879.

201. *See* Brief for National Association of Criminal Defense Lawyers as Amicus Curiae on Petition for a Writ of Certiorari Supporting Petitioners at *11-16, Al-Odah v. United States, No. 10-439 (D.C. Cir. Oct. 28, 2010).

202. *In re Guantánamo Bay Detainee Litigation*, 2008 WL 5245890, at *1.

203. *See Al-Bihani*, 590 F.3d at 878 (summarizing petitioners' argument).

204. *See, e.g.*, *id.* at 878; *Al-Adahi*, 613 F.3d at 1103.

might be appropriate in the Guantánamo habeas cases,[205] while other D.C. Circuit judges similarly advocated a highly deferential review of the government's evidence.[206] The Supreme Court has thus far declined to address this issue.[207]

The debate over the standard of proof reflects a larger divide between circuit and district judges over how to treat the government's evidence. One area of division concerns the government's "mosaic theory." Originally employed in intelligence-analysis, the mosaic theory is premised on the notion that pieces of evidence must be evaluated as a whole rather than examined independently. Several district judges have rejected the government's reliance on this theory in detainee habeas proceedings. Judge Kessler, for example, invalidated the detention of a Yemini prisoner based on allegations that he had attended a training camp in Afghanistan frequented by Taliban and al-Qaeda fighters, but without evidence that the detainee had fought against the United States or supported terrorism.[208] The "mosaic theory," Kessler said, "is only as persuasive as the tiles which compose it and the glue which binds them together."[209] The D.C. Circuit, however, has sharply criticized Judge Kessler and other district judges for taking an unduly atomized view of the government's evidence.[210]

Circuit Judge Randolph has taken one of the most extreme positions on the issue, asserting that judges must undertake a "conditional probability" analysis in reviewing the evidence.[211] (In public remarks, Judge Randolph has openly criticized the Court's decision in *Boumediene* for finding a constitutional right to habeas review.[212]). In Judge Randolph's view, even if a given fact does not prove the ultimate proposition (i.e., that the detainee is an "enemy combatant" or "unprivileged enemy belligerent"), that fact makes it more likely that other facts establish this ultimate proposition and counsels in favor of a

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205. *Al-Bihani*, 590 F.3d at 878 n.4 (noting other possible standards).

206. *See Esmail*, 639 F.3d at 1077-78 (Silberman, J., concurring).

207. *See, e.g.*, Al Adahi v. Obama, 131 S. Ct. 1001 (2011) (denying certiorari).

208. Ahmed v. Obama, 613 F. Supp. 2d 51, 55-56 (D.D.C. 2009).

209. *Id.* at 56.

210. *See, e.g.*, *Salahi*, 625 F.3d at 753; *Al-Adahi*, 613 F.3d at 1105.

211. *Al-Adahi*, 613 F.3d at 1105-06.

212. *See* Hon. A. Raymond Randolph, *Joseph Story Distinguished Lecture: The Guantánamo Mess, Address Delivered to the Heritage Foundation*, THE HERITAGE FOUNDATION (Oct. 20, 2010), *available at* http://www.heritage.org/Events/2010/10/Guantanamo-Mess (comparing the *Boumediene* justices to Tom and Daisy Buchanan in F. Scott Fitzgerald's *The Great Gatsby*, "careless people, who smashed things up . . . and let other people clean up the mess they had made").

finding the petitioner detainable under the AUMF.[213] Circuit Judge Silberman has advocated a similar approach, arguing that a D.C. Circuit judge should not order the release of a Guantánamo detainee if he or she believes it "somewhat likely that the petitioner is an al-Qaeda adherent or an active supporter."[214] In the typical criminal case, Judge Silberman argues, a judge may be willing to overturn a conviction where he or she is confident that the defendant committed the crime but where the prosecution lacks sufficient evidence to prove it. But when a person is suspected of terrorist activity, he says, judges should not apply the same logic given "the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism."[215] Thus, Judge Silberman concludes, a preponderance of the evidence standard in Guantánamo habeas proceedings is both "unnecessary" and "unrealistic."[216]

It remains unclear whether, and to what extent, such views constitute an outlier position on the D.C. Circuit or instead represent an unusually frank assessment of more widely shared opinions.[217] At a minimum, however, Judge Randolph and Judge Silberman's opinions highlight a larger disagreement between D.C. circuit and district judges over the nature and scope of the judicial inquiry mandated by *Boumediene* and over the quality and quantity of evidence the government must produce to meet its burden of showing a petitioner is detainable.[218] Their opinions also highlight a broader tendency within the D.C Circuit towards an asymmetrical application of the standard of review: with Circuit judges inclined to defer to district court judges' findings that the government's evidence is sufficient to justify detention but not to afford the same deference to district court determinations that the government has failed to meet its burden of justifying a petitioner's detention.

The D.C. Circuit's increasingly restrictive view of executive detention habeas review is illustrated by the recent ruling in *Latif v. Obama*.[219] There, the D.C. Circuit panel ruled that district judges must presume the accuracy of government intelligence reports unless rebutted

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213. *Id.*

214. *See Esmail*, 639 F.3d at 1078 (Silberman, J., concurring).

215. *Id.*

216. *Id.*

217. For a discussion of this issue, see Vladeck, *The D.C. Circuit after* Boumediene, *supra* note 136.

218. *See* Stephen I. Vladeck, Book Review, *Habeas Corpus: The New Habeas Provision*, 124 HARV. L. REV. 941, 977 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS*: FROM ENGLAND TO EMPIRE (2010)).

219. Latif v. Obama, __ F.3d __, No. 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011).

by the petitioner. While the presumption applies only to the accuracy of what the report describes (e.g., that the detainee, in fact, made a particular statement to the interrogator), and not to the underlying truth of the information itself, that distinction may make little difference in practice. Under *Latif*, a person may thus be detained indefinitely based on a single government interrogation report—precisely the type of report district courts have previously found unreliable—without the government's having to present any corroborating evidence. As Circuit judge Tatel noted in dissent, the ruling "comes perilously close to suggesting that whatever the government says must be treated as true."[220] With this ruling, he explained, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[221]

Boumediene and the subsequent lower court litigation has required the government to demonstrate to a federal judge a legal and factual basis for the continued detention of prisoners at Guantánamo. It also has afforded those prisoners with an opportunity to contest the government's allegations and present evidence of their own with the assistance of counsel. Yet, it is far from clear how much difference this process has made in altering executive branch determinations about who should continue to be held. The broad and malleable standard for AUMF-based detention, the government's overwhelming and often exclusive reliance on intelligence reports, summaries and other hearsay evidence that a detainee cannot meaningfully rebut, and the substantial deference afforded the government's evidence have made it increasingly difficult for detainees to prevail and limited the impact of *Boumediene*. While district court decisions during the early stages of the post-*Boumediene* habeas process resulted in rulings invalidating the detention in an overwhelming majority of cases, subsequent D.C. Circuit rulings have chilled the granting of petitions, enabled the government to obtain reversals of previous habeas grants, and contributed to the development of a detention jurisprudence weighted heavily in favor of the executive. Since the D.C. Circuit began issuing a critical mass of decisions in July 2010, district judges have denied 10 habeas petitions in Guantánamo cases and granted none, compared with 22 habeas petitions granted and 15 denied in the two years before that.[222]

Some commentators have criticized the post-*Boumediene* habeas litigation for a different reason. A Brookings Institution report, for example, argues that federal judges have effectively usurped Congress's

220. *Id.* at *30 (Tatel, J., dissenting) (internal quotation marks and citation omitted).
221. *Id.* (internal quotation marks and citation omitted).
222. Editorial, *Reneging on Justice at Guantánamo*, N.Y. TIMES, Nov. 19, 2011.

law-making function.[223] The report contends that Congress, not judges, should write the law surrounding detention, legislating explicit standards and procedures—not only to resolve the Guantánamo habeas cases, but also to provide a broader framework for future national security-related detentions.[224] The report cites inconsistent judicial decision making as evidence of the need for a legislative solution.[225] Several D.C. district judges have spoken out as well, arguing that judges should be interpreting legislatively established standards rather than creating detention policy through ad hoc decision-making.[226] A number of lawmakers, including Senator Lindsey Graham (R-SC), have called on Congress to enact legislation establishing a more detailed framework for detention.[227]

These criticisms emphasize the need for a clearer detention standard under the AUMF. Judges have struggled to interpret the AUMF's broad language, and issued divergent opinions in the Guantánamo habeas cases as well as other enemy combatant litigation.[228] Judicial constructions of the AUMF have helped sustain a de facto detention system in the absence of express congressional authorization or legislative delineation of standards and procedures.[229] In addition, open-ended detention raises

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223. Benjamin Wittes et al., *The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking,* THE BROOKING INSTITUTE (Jan. 22, 2010).

224. *Id.* at 1-3.

225. *Id.* at 6-7.

226. *See* Chisun Lee, *Judges Urge Congress to Act on Indefinite Terrorism Detentions*, PRO PUBLICA (Jan. 22, 2010, 3:45 PM), http://propublica.org/article/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122.

227. *Id.*

228. *See, e.g.*, al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008) (en banc). The Fourth Circuit's en banc opinion in *al-Marri* contained *four* different interpretations of the President's power to detain under the AUMF, including three different interpretations from among the five judges who found legislative authority to detain the petitioner based on the facts alleged. *See id.* at 217 (Motz, J., concurring) (finding no authority under the AUMF to detain a legal resident arrested in the United States); *id.* at 253-54 (Traxler, J., concurring) (finding that the AUMF authorizes the detention of a person who associates with al-Qaeda and comes to the United States to engage in "hostile and war-like acts"); *id.* at 285 (Williams, C.J., concurring in part, dissenting in part) (AUMF authorizes the detention of a person who "(1) . . . attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force"); *id.* at 325 (Wilkinson, J., concurring in part, dissenting in part) (AUMF authorizes the detention of a person who "(1) [is] a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization").

229. *See id.* at 223-24 & n.6 (Motz, J., concurring) (noting that the Supreme Court has permitted exceptions to detention without criminal process only in narrow circumstances

difficult questions, and judges have expressed concern with the prospect of holding someone indefinitely, potentially for life in prison, based on significantly less evidence and fewer procedural safeguards than in criminal cases.[230] Partly in response to these concerns, the Obama administration issued an executive order setting up a system of periodic, internal review for Guantánamo detainees who have been approved for continued detention.[231]

New legislation, however, risks compounding rather than resolving these problems. The Guantánamo detainee litigation is *sui generis*, and the current situation is a product of years of overbroad claims of executive power and extrajudicial detention. In many respects, it provides a poor basis around which to construct a new law of detention. Congress, moreover, *has* previously legislated in the detention area: twice attempting to strip the courts of jurisdiction over Guantánamo habeas petitions and creating an alternative framework—DTA review of CSRT findings—that significantly limits the judiciary's ability to inquire into the basis for a Guantánamo prisoner's confinement. The Court rejected this legislative framework in *Boumediene* because it denied the petitioners the meaningful opportunity guaranteed by the Suspension Clause to challenge the executive's allegations against them.[232] The Court's refusal to allow any further delay in resolving the Guantánamo detainee cases pervades *Boumediene*.[233] "[T]he costs of delay can no longer be borne by those who are held in custody," the Court explained in rejecting the government's plea to give the DTA review scheme a chance to operate before finding it was an ineffective substitute for habeas.[234] The Court accordingly instructed the district courts to address unresolved procedural and evidentiary issues and decide the detainees' cases on the merits.[235] Further legislative efforts to intervene would undoubtedly lead to the type of additional delay the Court refused to accept in *Boumediene*, raising a new crop of separation-of-powers and

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and "only when a *legislative* body has explicitly authorized the exception") (emphasis in original).

230. *See* Lee, *supra* note 226; *see also* Awad v. Obama, 642 F. Supp. 2d 20, 27 (D.D.C. 2009) (describing the evidence against petitioner as "gossamer thin" but sufficient to justify his continued detention under the AUMF).

231. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13277 (Mar. 7, 2011); *see also* Charlie Savage, *Detainee Review Proposal Is Prepared for Obama*, N.Y. TIMES (December 21, 2010), *available at* http://www.nytimes.com/2010/12/22/us/22gitmo.html.

232. *See Boumediene*, 553 U.S. at 732-33.

233. *See id.* at 773 (finding that "the costs of further delay substantially outweigh" remanding the case to the D.C. Circuit to consider issues it did not address in the first instance).

234. *Id.* at 795.

235. *Id.* at 796.

Suspension Clause questions. This would be particularly true of any legislation that sought to circumscribe a district judge's ability to consider evidence in examining the basis for a petitioner's continued detention, which *Boumediene* identified as the DTA's principal flaw.[236] Moreover, even if Congress were to provide more detailed standards and procedures, courts would still have to interpret their meaning and constitutional validity.[237] New legislation would not end litigation over who could be detained and on what basis, but simply create new questions and lines of inquiry.

B. A Right Without a Remedy?

Boumediene's application has been even more problematic with respect to a court's authority to provide a remedy to those Guantánamo detainees it concludes are being held unlawfully. *Boumediene*, to be sure, did not provide a detailed explanation of the judiciary's remedial powers.[238] It did, however, state that the writ of habeas corpus protected by the Suspension Clause must include the power "to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[239] The D.C. Circuit has deviated from that requirement by effectively depriving the courts of authority to order a prisoner's release from Guantánamo. Congress, moreover, has significantly limited the president's power to transfer detainees from Guantánamo. The result has been an increasing disconnect between the habeas process on the one hand, and the actual impact of that process on the other.

This controversy is illustrated by cases involving the Uighurs, members of a Turkic Muslim minority in northwestern China.[240] The government recognized years ago that it lacked any basis to detain the Uighurs as enemy combatants.[241] It could not, however, safely return the Uighurs to China, where they would likely be jailed or persecuted by Chinese authorities. In 2006, the government successfully repatriated some Uighurs to a third country to avoid an adverse ruling by the D.C.

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236. *Id.* at 783-93.

237. *See Habeas Works*, *supra* note 164, at 28 ("Even the most detailed regulatory schemes require litigation to define the meaning of terms in specific cases.").

238. *Boumediene*, 553 U.S. at 786.

239. *Id.* at 787.

240. Qassim v. Bush, 382 F. Supp. 2d 126, 127 (D.D.C. 2005).

241. *Id.* at 127-28 (noting CSRT's finding that Uighur detainees could not continue to be held as enemy combatants).

Circuit.[242] Although the government was unable to repatriate other Uighur detainees, litigation over the DTA and MCA's jurisdiction-stripping provision delayed further judicial action. Finally, in 2008, in *Parhat v. Gates*, the D.C. Circuit held that the government lacked any legal basis to detain the Uighurs.[243] When the government declined to contest the *Parhat* ruling, the seventeen remaining Uighur detainees subsequently sought release by filing habeas corpus petitions in the district court.[244] The Uighurs argued that if there was no basis for their continued detention, and no third country to send them to consistent with the United States' *non-refoulement* obligations, they were entitled to release into the United States.[245]

In October 2008, District Judge Ricardo M. Urbina granted the Uighurs' habeas corpus petitions and ordered their immediate release into the United States under terms to be set by the court.[246] The government conceded that it had no basis to detain the Uighurs as enemy combatants under the AUMF and provided no evidence that the petitioners otherwise presented a danger to the United States.[247] The government nevertheless argued that the federal courts lacked authority to order a Guantánamo detainee's release into the United States.[248] But Judge Urbina concluded that the Uighurs' continued imprisonment, after the courts had found no basis to hold them, contradicted *Boumediene* and violated the separation of powers by depriving the judiciary of its authority to grant relief from unlawful detention.[249] Judge Urbina thus rejected the government's assertion that a habeas judge's remedial power was limited to requiring the government to use its "best efforts" to resettle the Uighurs in a third country.[250]

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242. Qassim v. Bush, 466 F.3d 1073, 1074 (D.C. Cir. 2006) (dismissing Uighur petitioners' appeal as moot following their repatriation to Albania on the eve of oral argument).

243. Parhat v. Gates, 532 F.3d 834, 854 (D.C. Cir. 2008). The petitioners in *Parhat* had filed their appeal prior to *Boumediene* pursuant to the DTA's review mechanism. The D.C. Circuit issued its decision in *Parhat* the day after the Supreme Court handed down *Boumediene*. The *Parhat* petitioners then filed habeas corpus petitions in the district court to enforce the *Parhat* ruling.

244. *See* In re Guantánamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 34 (D.D.C. 2008).

245. *Id.* at 34.

246. *Id.* at 43.

247. *Id.* at 36.

248. *Id.* at 36-39.

249. *Id.* at 42-43. Judge Urbina also rejected the government's alternative argument: that the Uighurs could continue to be detained under the President's inherent authority to "wind up" wartime detentions. *Id.* at 36-39.

250. *In re Guantánamo Bay Detainee Litigation*, 581 F. Supp. 2d at 42-43.

The D.C. Circuit reversed the judgment of the district court.[251] Writing for a divided panel in *Kiyemba v. Obama*, Judge Randolph held that the federal courts had no power to order the release of Guantánamo prisoners into the United States even where those prisoners could not be detained as enemy combatants and the government had been unable to repatriate them to another country.[252] Citing the political branches' plenary control over immigration, the panel said that federal judges had no power to grant the relief requested by the Uighur petitioners absent a statute expressly authorizing them to order release into the United States.[253] In a concurring opinion, Judge Rogers said that a federal habeas judge had the power to grant this relief, but that the district judge should first have ascertained whether the government had an alternative basis for detaining the Uighurs under the immigration laws before ordering their release.[254]

The Supreme Court granted the Uighurs' petition for certiorari.[255] Prior to oral argument, the government moved to dismiss the petition, noting that all of the Uighur petitioners had received offers of resettlement and that a number had been resettled since the granting of certiorari.[256] The Court vacated the D.C. Circuit opinion and remanded the case to the appeals court to reconsider its prior ruling in light of these new facts.[257] The D.C. Circuit subsequently found that the new facts had no bearing on its analysis and reaffirmed its prior holding that a federal judge had no power to order the release of a Guantánamo detainee into the United States absent express legislative authority.[258] This time, the Supreme Court denied certiorari. In a statement concurring in the denial, four Justices noted that the petitioners had previously received offers of resettlement (at least one of which could be renewed), that there was no evidence that the petitioners' acceptance of these resettlement offers would have put them at risk of torture or other mistreatment, and that the

251. Kiyemba v. Obama, 555 F.3d 1022, 1032 (D.C. Cir. 2009).
252. *Id.* at 1028-29.
253. *Id.* at 1026-29.
254. *Id.* at 1032 (Rogers, J., concurring).
255. Kiyemba v. Obama, 130 S. Ct. 458 (2009).
256. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (per curium).
257. *Id.*
258. *Kiyemba*, 605 F.3d at 1048 (per curiam). In a concurring opinion, Judge Rogers found that, in light of the new facts, the petitioners now "hold the keys to their release from Guantánamo," and that the courts were therefore no longer confronted with choosing between indefinite imprisonment or release into the United States. *Id.* at 1050-51 (Rogers, J., concurring).

government continued to seek other resettlement options.[259] This statement, along with the prior certiorari grant in *Kiyemba*, suggests that as long as there is some meaningful remedy in habeas—i.e., some country willing to accept a petitioner and where the petitioner will not be risk of harm—the Court will not intervene.

Under *Kiyemba*, district judges lack the power to order the release of a prisoner into the United States, even if that prisoner has no other remedy. Without this power, moreover, judges have virtually no influence over the repatriation process, as they cannot pressure the government to resettle a prisoner by threatening to order his release. As a practical matter, once a court grants a habeas petition, judicial involvement ceases, even if the petitioner remains at Guantánamo. *Kiyemba*, one D.C. Circuit judge candidly noted, reduces the habeas review process to one of rendering "virtual advisory opinions" of no practical import.[260]

Kiyemba is not the only constraint on judges' remedial powers. Congress has repeatedly passed legislation intended to prevent the President from releasing any Guantánamo prisoner into the United States.[261] Current legislation bars the use of any military funds for transferring Guantánamo prisoners to the United States for any purpose—whether for release, continued detention, or criminal prosecution.[262] The legislation also places significant restrictions on the executive's ability to transfer Guantánamo prisoners to other countries

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259. Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (statement of Breyer, J., joined by Kennedy, Ginsburg, and Sotomayor, J.J., respecting the denial of the petition for certiorari).

260. *See Esmail*, 639 F.3d 1075, 1078 (Silberman, J., concurring).

261. The first such restriction was added to a defense funding bill in June 2009, while the Uighurs' certiorari petition was pending. *See* Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, 123 Stat. 1859 (2009). Although the bill expired later that year, separate enactments followed, barring various agencies from spending money to cause Guantánamo detainees to be brought to the United States. *See, e.g.*, Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, sec. 552, 123 Stat. 2142, 2177 (2010) (barring the use of agency funds to cause any Guantánamo detainee to be brought to the United States for any purpose, except for criminal prosecution). The only Guantánamo detainee brought to the United States, Ahmed Khalfan Ghailani, was transferred before the legislation prohibiting the use of funds to bring Guantánamo detainees to the United States for criminal prosecution. Ghailani was tried and convicted in federal court, and sentenced to life imprisonment. *See* Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES (Jan. 25, 2011), *available at* www.nytimes.com/2011/01/26/nyregion/26ghailani.html?_r=2.

262. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2010).

even if the executive has cleared those prisoners for release or otherwise determined that their release is in the national interest.[263]

Kiyemba and the transfer-restriction legislation undermine *Boumediene* by denying district courts the power to order or effectuate the release of a detainee from Guantánamo. The scope of a district court's remedial power may be variable and fact-dependent, and legitimate questions may remain about when a court can order a Guantánamo detainee's release into the United States and the conditions it may impose on a release order.[264] But *Boumediene* made clear that under the habeas writ protected by the Suspension Clause district courts must have the power to formulate and issue a release order, where necessary to effectuate the purpose of the writ.[265]

Rather than directing the government to release a prisoner within a prescribed time, judges who find no basis for detention typically instruct the government to "take all necessary and appropriate diplomatic steps to facilitate the prisoners' release forthwith."[266] Additionally, the government has thus far successfully argued that the more than eighty detainees whom it has administratively "cleared for release"—but who it maintains are lawfully detained under the AUMF—are not entitled to habeas hearings because district judges cannot provide any remedy beyond urging diplomatic efforts.[267] Thus, by "clearing" a prisoner for release, the administration can both avoid any judicial inquiry into the legality of that prisoner's detention and retain control over when and under what circumstances he will be released from Guantánamo.

To be sure, the habeas process has impacted Guantánamo, notwithstanding the paucity of court-ordered releases. District courts have facilitated the release of prisoners from Guantánamo by finding

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263. *See id.* § 1033(c)(1) (prohibiting the transfer of any Guantánamo detainee to a country if there is a confirmed case of recidivism by a former Guantánamo detainee who was transferred to that country); *id.* § 1033(b) (requiring a foreign country to provide numerous assertions, including that it has agreed to ensure that a transferred prisoner will not take action to threaten the United States or its citizens or allies and has agreed to share information about the transferred prisoner with the United States regarding the prisoner or his associates that could affect the security of the United States or its allies).

264. *Boumediene*, 553 U.S. at 787.

265. *Id.*

266. *See, e.g.*, *Ahmed*, 613 F. Supp. 2d at 66; Basardh v. Obama, 612 F. Supp. 2d 30, 35-36 (D.D.C. 2009). District court opinions granting a habeas petition and ordering the prisoner's release are the exception. *See* Huq, *supra* note 28, at 429 (citing two examples—the cases of Mohamed Jawad and Alla Ali bin Ali Ahmed—where courts ordered a detainee's release from Guantánamo).

267. *See* Respondents' Mem. in Support of a Stay of Proceedings Involving Pet'rs Who Were Previously Approved for Transfer at 5, *Al Sanani v. Obama*, No. 05-02386-RBW (D.D.C. Mar. 9, 2009) (summarizing the government's argument).

their detention illegal even though the courts did not expressly order release as a remedy. For example, the five petitioners whose detention was invalidated by the district court in *Boumediene v. Bush*[268] were eventually transferred from Guantánamo to another country and released, even though the district court's decision granting their habeas petitions did not order release as a remedy.[269] In addition, the pressure of litigation itself has facilitated the release of several detainees, even before the district court issued any decision on the merits.[270]

But without the potential to remedy illegal detention, district judges are deprived of a critical tool in adjudicating the Guantánamo habeas cases—both directly through a release order or indirectly through pressuring the government to find a diplomatic solution that allows the petitioners safe repatriation to a third country. As a practical matter, *Kiyemba* turns the Supreme Court's decision about constraining executive power on its head by restoring executive discretion over the release of prisoners from Guantánamo.

Kiyemba also contradicts *Boumediene* in another important respect. The petitioners in *Kiyemba* had contended that their release from unlawful detention at Guantánamo was required not only under the Suspension Clause, but also under the Fifth Amendment's Due Process Clause.[271] The D.C. Circuit summarily rejected this claim, stating that as non-citizens detained outside sovereign U.S. territory, the petitioners had no rights under the Fifth Amendment, citing *Eisentrager*[272] and other pre-*Boumediene* precedents.[273] The appeals court ignored the Supreme Court's extensive analysis in *Boumediene*, rejecting any such bright-line test to determine the Constitution's extraterritorial reach.[274] Under *Boumediene*, the appeals court should have undertaken a functional assessment of whether application of the Fifth Amendment's Due

268. 579 F. Supp. 2d 191 (D.D.C. 2008).

269. *Id.* at 198-99. *Accord* Al-Rabiah v. United States, 658 F. Supp. 2d 11, 42 (D.D.C. 2009) (granting Al-Rabiah's habeas petition but not ordering the prisoner's release); Andy Worthington, *Innocent Guantánamo Torture Victim Fouad al-Rabiah Is Released in Kuwait*, ANDY WORTHINGTON BLOG (Nov. 12, 2009), http://www.andyworthington.co.uk/2009/12/11/innocent-guantanamo-torture-victim-fouad-al-rabiah-is-released-in-kuwait/ (noting al-Rabiah's release from Guantánamo and return to Kuwait).

270. *See* William Glaberson, *U.S. Decides to Release Detainee at Guantánamo*, N.Y. TIMES, Mar. 31, 2009, at A17 (noting the government's decision to release Yemeni detainee Dr. Ayman Saaed Abudullah Batarfi from Guantánamo).

271. Kiyemba v. Obama, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009).

272. Johnson v. Eisentrager, 339 U.S. 763, 783-84 (1950).

273. *Kiyemba*, 555 F.3d at 1026-27.

274. *Id.* at 1028.

Process Clause to the petitioners was impracticable or anomalous.[275] And, in light of the Court's Suspension Clause analysis, it is difficult to see how that assessment would lead to any conclusion other than that Guantánamo detainees have a due process right to be free of arbitrary and unlawful detention.[276]

The D.C. Circuit's holding that the Fifth Amendment does not apply to Guantánamo detainees affects issues other than the district court's remedial powers.[277] It has, for example, eliminated another ground for challenging the lawfulness of a petitioner's detention based on the admission of hearsay or standard of proof. It also could deprive petitioners prosecuted in military commissions of a basis to challenge their conviction, for example, by denying them a constitutional right to confront their accusers. *Boumediene*, in short, made possible the extraterritorial application of constitutional protections by replacing a categorical test with a functional one; *Kiyemba* reinstates that categorical test with respect to every constitutional protection except the Suspension Clause.

C. Non-Reviewability of Transfer Decisions

Another issue addressed by courts after *Boumediene* concerns judicial review of executive branch decisions to transfer prisoners from Guantánamo to another country. In line with its ruling on a district court's lack of power to order a habeas petitioner's release from Guantánamo, the D.C. Circuit has barred district judges from examining the executive's exercise of its transfer authority.[278] The Uighur detainees in *Kiyemba* had sought an injunction requiring that the government provide advance notice to the district court and to their counsel before transferring them from Guantánamo.[279] Other detainees had filed similar motions to require advance notice before transfer,[280] and several had

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275. *See supra* notes 95-99 and accompanying text (discussing *Boumediene*); *Boumediene*, 553 U.S. at 766-71.

276. *See generally* Joshua Alexander Geltzer, *On Suspension, Due Process, and Guantánamo: The Reach of the Fifth Amendment after Boumediene and the Relationship Between Habeas Corpus and Due Process*, U. PA. J. CONST. L. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816758 (noting that an understanding of *Boumediene* as entrenching the "impracticable and anomalous" test to determine the extraterritorial application of constitutional provisions to non-citizens suggests that the Due Process Clause would also extend to Guantánamo).

277. *Kiyemba*, 553 F.3d at 1022.

278. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009).

279. *Id.* at 571.

280. *See, e.g.*, Abdah v. Bush, Civ. No. 04-1254 (HHK), 2005 WL 711814 (D.D.C. Mar. 29, 2005). *See generally* Robert M. Chesney, *Leaving Guantánamo: The Law of*

sought to block their transfer outright.[281] Detainees asserted two main grounds for judicial review of their transfer from Guantánamo: to prevent their transfer to a country where they faced likely torture and to prevent their continued detention following transfer. Resolution of the detainee transfer challenges was delayed by the litigation over the DTA, MCA, and the courts' habeas jurisdiction generally.[282] Following *Boumediene*, a divided D.C. Circuit panel held in *Kiyemba II* that federal judges have no authority to bar a detainee's transfer from Guantánamo and, therefore, that no advance notice is required before transferring a detainee to another country.[283] The appeals court denied rehearing en banc, with three judges dissenting,[284] and the Supreme Court denied certiorari.[285]

With respect to the petitioners' concern about transfer to possible torture, the D.C. Circuit noted that the government's policy was not to transfer a detainee to a country where he is likely to be tortured and cited a U.S. official's declaration that the United States "does everything in its power to determine whether a particular country is likely to torture a particular detainee." [286] It is not within the judiciary's province, the court explained, to second guess this executive branch determination, which would require federal courts to pass judgment on foreign legal systems and undercut the U.S. government's ability to speak with one voice.[287]

For similar reasons, the Circuit rejected the suggestion that district judges could bar a petitioner's transfer because he faced continued detention in the country to which he was being transferred.[288] The court acknowledged that, in some circumstances, the U.S. government's negotiations with a receiving country included discussion of the steps that country intended to take to ensure that a detainee would not pose a continuing threat to the United States, including continued detention or

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International Detainee Transfers, 40 U. RICH. L. REV. 657 (2006) (summarizing the federal detainee transfer litigation).

281. *See, e.g.*, Belbacha v. Bush, 520 F.3d 452, 454 (D.C. Cir. 2008).

282. *See* Stephen I. Vladeck, *The Unreviewable Executive:* Kiyemba, Maqaleh, *and the Obama Administration*, 26 CONST. COMMENT. 603, 619 (2010).

283. *Kiyemba II*, 561 F.3d at 516. *Kiyemba II* involved the same petitioners as *Kiyemba*; the difference was that *Kiyemba II* concerned a court's review of the executive's authority to transfer prisoners to another country, whereas *Kiyemba* concerned a court's power to order a detainee's release into the United States.

284. *Id.* at 509.

285. Kiyemba v. Obama, 130 S. Ct. 1880 (2010).

286. *Kiyemba II*, 561 F.3d at 514 (citing the declaration submitted by Pierre-Richard Prosper, United States Ambassador-at-Large for War Crimes Issues).

287. *Id.*

288. *Id.* at 204-05.

criminal prosecution in the receiving country.[289] But any post-transfer confinement would be effected "by the foreign government pursuant to its own laws and not on behalf of the United States," according to a declaration submitted by a U.S. official explaining the government's policy.[290] Judicial review of transfer decisions, the appeals court concluded, would thus raise comity concerns by interfering with a sovereign nation's exclusive authority to detain or prosecute individuals within its territory.[291] It also would raise separation of powers problems for the same reasons as judicial review of transfer-to-torture claims, by requiring courts to second-guess the executive's assessment of circumstances in a foreign nation and interfering with its "ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees."[292] The court expressed no opinion regarding the transfer of detainees that resulted in their continued imprisonment on behalf of the United States in a place where the habeas writ does not extend.[293] But, as the dissent noted, no detainee could as a practical matter ever challenge such a transfer since the panel's decision eliminated any meaningful opportunity for judicial review of the government's assurance that it was no longer exercising custody over the detainee.[294] The dissent protested that, under *Boumediene*, a detainee should have some opportunity to contest his transfer from Guantánamo to another country where he remained imprisoned either by or on behalf of the United States.[295]

The D.C. Circuit relied heavily in *Kiyemba II* on the Supreme Court's opinion in *Munaf v. Geren*, which the Court issued the same day as *Boumediene*.[296] Like *Boumediene*, *Munaf* involved the exercise of habeas jurisdiction over overseas detentions.[297] In *Munaf*, two American citizens held by the Multi-National Force—Iraq (MNF-I), the international coalition operating in Iraq pursuant to United Nations Security Council resolutions, filed habeas corpus petitions in federal

289. *Id.* at 515 n.7. The panel said, however, that concern was absent in the present case, as the U.S. government no longer regarded the Uighurs as "enemy combatants" and thus had no interest in their continued detention. *Id.*

290. *Id.* at 515 (citing the declaration submitted by Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs).

291. *Id.* at 515.

292. *Kiyemba II*, 561 F.3d at 515 (quoting the Prosper declaration).

293. *Id.* at 515 n.7.

294. *Id.* at 525 (Griffith, J., dissenting).

295. *Id.*

296. Munaf v. Geren, 553 U.S. 674 (2008).

297. *Id.* at 679.

district court.[298] In a unanimous decision, the Court upheld the exercise of jurisdiction under the federal habeas statute, notwithstanding the MNF-I's multinational character and international source of authority (i.e., U.N. Security Counsel resolutions), because the two American citizens were in the actual custody and control of the United States.[299] The Court, however, denied relief on the merits, finding that the habeas court could not grant relief where the prisoners were held by the United States for prosecution by the host nation (Iraq) for crimes allegedly committed in that country.[300] Further, the Court rejected the petitioners' argument that a federal habeas court could review their claim that they would face likely torture if transferred to Iraqi authority.[301] Such a determination, the Court explained, was for the executive branch to make and not for the judiciary to question.[302] A brief concurrence by Justice Souter emphasized that the Court's opinion should be limited to its particular facts.[303] In *Kiyemba II*, however, the D.C. Circuit read *Munaf* broadly to bar a habeas judge from reviewing the transfer of any detainee from Guantánamo, even in circumstances where the detainee alleged that he would likely be tortured in the receiving country.[304]

There are several differences between *Munaf* and *Kiyemba II*. *Munaf* involved two petitioners arrested in a foreign country and detained by U.S. officials for transfer to that country for criminal prosecution under its laws.[305] *Kiyemba II*, by contrast, involved petitioners who had been seized by the United States, brought to and held at a prison under its total and exclusive control, and who faced transfer to another country for possible continued detention there.[306] Although the United States claimed that any future detention would be pursuant to the laws of that foreign country, the risk of U.S. influence was considerable, at least where the person's detention was based on an assessment that he posed a

298. *Id.* at 674-80.

299. *Id.* at 685-88.

300. *Id.* at 694-95 (noting that a sovereign nation has exclusive and plenary authority to punish crimes committed within its territory).

301. *Id.* at 700-01.

302. *Munaf*, 553 U.S. at 701-02. The Court declined, however, to address impact of the Foreign Affairs Reform and Restructuring Act of 1998 on the petitioners' possible transfer, finding that the petitioners had not raised any claim under the Act. *Id.* at 703.

303. *Id.* at 706 (Souter, J., concurring) (noting, inter alia, that the petitioners had voluntarily traveled to Iraq, were being held in Iraq by the U.S. during ongoing hostilities there, and were going to be prosecuted by the Iraqi government for crimes committed there).

304. *Kiyemba II*, 561 F.3d at 513-16.

305. *Munaf*, 553 U.S. at 679-82.

306. *Kiyemba II*, 561 F.3d at 513-14.

security risk rather than for any violation of that country's laws.[307] The D.C. Circuit, however, found these distinctions immaterial in light of the broader separation-of-powers and comity concerns articulated in *Munaf*.[308]

Munaf had also left open the question of whether the petitioners could challenge their transfer to Iraqi custody under the Foreign Affairs Reform Restructuring Act ("FARR Act"),[309] which gives domestic effect to the United States' *non-refoulement* obligations under the Convention Against Torture and other forms of Cruel, Inhuman, and Degrading Treatment or Punishment.[310] In *Kiyemba II*, the D.C. Circuit held that the Guantánamo detainees could not rely on the FARR Act to challenge their transfer because Congress had limited judicial review over FARR Act claims to immigration removal proceedings.[311] And, on remand in *Munaf*, the D.C. Circuit concluded that the FARR Act did not provide a U.S. citizen with a right to judicial review of whether he was likely to be tortured if transferred to Iraqi custody.[312]

Kiyemba II, like *Munaf*, underscores the tensions in the Supreme Court's war on terror habeas jurisprudence. In *Boumediene*, the Court described the importance of habeas corpus in ensuring the separation of powers and correcting executive overreaching in national security detentions.[313] To "call the jailer to account,"[314] according to *Boumediene*, a court must be able to meaningfully scrutinize the executive's asserted basis for detention to prevent error, notwithstanding the burdens it imposes on the government in time of war. *Kiyemba II* inverts this separation of powers analysis: judicial review of any transfer decision becomes an unwarranted interference with executive branch discretion that undermines, rather than protects, the proper relations between the branches.[315] Put another way, *Boumediene* suggests that a habeas court should not simply defer to the executive's assessment that a prisoner should be detained; instead, the court should provide the petitioner with a meaningful opportunity to respond to the executive's allegations and

307. *Id.* at 515-16.

308. *Id.* at 516.

309. Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-761, (codified in scattered sections of 22 U.S.C., 8 U.S.C., and 42 U.S.C.).

310. *Munaf*, 553 U.S. at 703 n.6 (noting that petitioners had failed to plead a FARR Act claim).

311. *Kiyemba II*, 561 F.3d at 514-15.

312. Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011).

313. *Boumediene*, 553 U.S. at 742-43.

314. *Id.* at 745.

315. *Kiyemba II*, 561 F.3d at 513-14.

scrutinize its asserted basis for detention.[316] But under *Kiyemba II*, the same court cannot second-guess the executive's determination to transfer the prisoner to a foreign government, despite the risk that the transfer could lead to the prisoner's torture or continued detention.[317] This difference may be explained partly by the comity concerns present in the transfer-review context, which require courts to consider how a foreign sovereign will treat the transferred detainee—a consideration absent when courts are reviewing U.S. detention *simpliciter*. But it also reflects an alternative conception of what it means to exercise habeas corpus jurisdiction over executive action. Under *Boumediene*, the challenged executive action must be justified to a court; under *Kiyemba II*, it need not be, and the executive official who chooses to transfer a prisoner from U.S. custody does not have to provide an accounting of the circumstances surrounding the transfer.

D. Habeas Beyond Guantánamo: The Writ's Non-Extension to Bagram

In rejecting any bright-line limits on the writ's application overseas, *Boumediene* left open the possibility that habeas corpus might extend to other U.S. detention centers. Petitions challenging U.S. detentions at the Bagram Airfield Military Base in Afghanistan presented the first test of the writ's possible extraterritorial reach beyond Guantánamo.[318] The lower courts' resolution of these petitions highlights additional tensions in *Boumediene*'s approach to habeas review of overseas detention.

Bagram is the largest military facility in Afghanistan occupied by United States and coalition forces.[319] The U.S. occupies Bagram pursuant to a lease agreement with Afghanistan.[320] The lease effectively grants the U.S. near-control over Bagram for as long as it wishes.[321] Like the Guantánamo lease, the Bagram lease also disclaims any U.S. sovereignty over the territory.[322] Unlike Guantánamo, however, Bagram is subject to a Status of Forces Agreement ("SOFA"), which the U.S. entered into with Afghanistan to govern the terms of its presence there, and Bagram

316. *Boumediene*, 553 U.S. at 745-46.

317. *Kiyemba II*, 561 F.3d at 516.

318. *See, e.g.*, Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 207 (D.C.C. 2009).

319. A newer facility at Parwan, near Bagram, has replaced the previous U.S. detention facility at Bagram. *See* Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 537 n.50 (2010). For purposes of consistency, this Article will continue to refer to the prison as "Bagram," as judicial opinions do.

320. *See Al Maqaleh*, 604 F. Supp. 2d at 222.

321. *See id.*

322. *See id.* (discussing the terms of the lease).

has a considerable non-U.S. presence.[323] The United States currently detains approximately 1,800 prisoners at Bagram.[324] Those prisoners may contest their detention before military review boards, but are denied access to either U.S. or Afghan courts.[325]

Habeas petitions challenging U.S. detentions at Bagram were originally filed after the Supreme Court's decision in *Rasul v. Bush*, but were delayed pending litigation over the DTA and MCA's jurisdiction-stripping provisions. After *Boumediene*, district judge John D. Bates issued a decision in April 2009 addressing four Bagram habeas petitions in *Al Maqaleh v. Gates*.[326] All four petitioners alleged that they had been seized in another country and brought to Bagram by the United States.[327] *Boumediene*, Judge Bates said, required that courts consider the multiple factors outlined in *Boumediene* to determine whether the Suspension Clause applies extraterritorially.[328] Applying this test, Judge Bates found that the process received by the petitioners, all of whom were foreign nationals, fell "well short" of the CSRT process that the Supreme Court had found inadequate in *Boumediene*.[329] Additionally, Judge Bates determined that the United States' control over Bagram was "practically absolute," even if not as complete as its control over Guantánamo.[330] Bates acknowledged that Bagram, unlike Guantánamo, was located in an active theater of war and thus presented greater obstacles to review than Guantánamo.[331] But, Judge Bates said, those obstacles were not as great

323. *Id.*

324. *See* Molly Hennessy-Fiske, *Review Board Weighs In on Afghan Detainees*, L.A. TIMES, May 11, 2011 (placing the number of detainees at 1,800 detainees); Alissa J. Rubin, *Murky Identities and Ties Hinder NATO's Hunt for Afghan Insurgents, Report Says*, N.Y. TIMES, May 10, 2011 (placing the number of detainees at 1,750).

325. *See* Letter from Phillip Carter, Deputy Assistant Secretary of Defense for Detainee Affairs, to Senator Carl Levin (July 14, 2009), *available at* http://www.scotusblog.com/wp-content/uploads/2009/09/addendum.pdf (describing detainee review boards).

326. *Al Maqaleh*, 604 F. Supp. 2d at 207.

327. *Id.* at 209. The government contested this assertion with respect to one of the detainees, Fadi al Maqaleh, who it says was seized in Afghanistan, and not Pakistan, contrary to what al Maqaleh contended. *See id.* at 210.

328. *Id.* at 214-15 (citing *Boumediene*, 553 U.S. at 766). *See supra* note 101 and accompanying text.

329. *Al Maqaleh*, 604 F. Supp. 2d at 227. Bates assessed only the prior procedures, which had been used to determine the petitioners' status. He did not consider revisions to those procedures that permitted a detainee to appear in person before the military tribunal that made the status determination. *Id.* at 227 n.20.

330. *Al Maqaleh*, 604 F. Supp. 2d at 223.

331. *Id.* at 230.

as the government feared[332] and, moreover, were "largely of the Executive's choosing" since the United States had brought the prisoners to Bagram.[333] Judge Bates thus denied the government's motion to dismiss three of the four petitions.[334] He did, however, dismiss the fourth petition, which had been brought on behalf of an Afghan national.[335] Judge Bates explained that for Afghan nationals, as well as for detainees apprehended inside Afghanistan, the *Boumediene* factors on balance cut against habeas review.[336] In particular, Judge Bates noted possible friction with the Afghan government since, according to the United States, a significant percentage of Afghan detainees at Bagram were expected to be transferred to Afghan custody.[337] Tensions might thus arise if a U.S. court were to entertain an Afghan detainee's habeas petition and reach a different result than an Afghan court, for example, by ordering the detainee's release.[338]

The D.C. Circuit reversed Judge Bates' ruling denying the government's motion to dismiss the three Bagram habeas petitions.[339] The circuit court rejected the government's contention that the Suspension Clause was necessarily limited to Guantánamo or other territories over which the U.S. had de facto sovereignty.[340] Like Judge Bates, the Circuit applied *Boumediene*'s multi-factored test.[341] But while the appeals court agreed with Judge Bates' assessment of the inadequacy of the process the petitioners had received,[342] it found that the other factors weighed against jurisdiction.[343] The Circuit emphasized that, unlike at Guantánamo, the United States had not manifested any intent to occupy Bagram permanently.[344] More importantly, Bagram was located in an active war zone, thus making it more like Landsberg Prison in *Eisentrager* than Guantánamo in *Boumediene*, and presenting significant

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332. *Id.* at 209, 228-29 (describing technological advances that would help facilitate district court resolution of Bagram habeas petitions).

333. *Id.* at 209.

334. *Id.* at 235.

335. *Al Maqaleh*, 604 F. Supp. 2d at 235.

336. *Id.* at 231.

337. *Id.*

338. *Id.* Judge Bates also noted that there might be practical obstacles to exercising habeas review over detainees seized on a battlefield in Afghanistan. *Id.* at 230.

339. Al Maqaleh v. Gates, 605 F.3d 84, 87 (D.C. Cir. 2010).

340. *Id.* at 94.

341. *Id.* at 94-95.

342. *Id.* at 95-96. The court did not consider the new procedures—called Detainee Review Boards (DRBs)—that the administration had put into place while the case was on appeal. *Id.* at 96 n.4.

343. *Id.* at 99.

344. *Id.* at 97.

practical obstacles to litigating habeas cases regardless of a particular petitioner's nationality.[345] Although the appeals court acknowledged that some petitioners had been captured outside of Afghanistan—including one petitioner who was captured in Thailand—it dismissed as speculative the petitioners' suggestion that they were brought to Bagram to avoid habeas review.[346] The Circuit thus rejected the same separation of powers concerns with executive manipulation that had supported the exercise of habeas jurisdiction in *Boumediene*.[347] It emphasized instead the separation of powers concerns associated with the judiciary's review of detentions in a theater of war.

Following the D.C. Circuit's ruling in *al-Maqaleh*, the petitioners sought leave from the district court to amend their complaint.[348] In support of their motion, they proffered new evidence that the United States plans to continue holding some Bagram detainees after it relinquishes control of the prison to Afghanistan.[349] Such evidence, they argue, demonstrates that the United States is using Bagram to circumvent habeas review.[350] Although Judge Bates questioned whether these new facts would ultimately make a difference under the D.C. Circuit's ruling in *al-Maqaleh*, he granted the motion to amend, noting that the application of the *Boumediene* factors is subtle and that a change in circumstances could alter the analysis.[351]

Al-Maqaleh highlights additional limitations of *Boumediene*'s approach to habeas corpus review of executive detention. The Supreme Court had created the possibility that extraterritorial detentions by the United States could be subject to habeas jurisdiction by rejecting any bright-line constraints on the Suspension Clause's application in favor of a multi-factored functional test. No longer could the executive assume that, because it was detaining a non-citizen outside the United States, its actions would be insulated from judicial scrutiny. Moreover, the executive's failure to create an adequate process to review a detainee's status increased the likelihood that a court would find that the Suspension Clause applied and inquire into the legality of the detention.

Yet, the very malleability of *Boumediene*'s test makes habeas review uncertain, permitting a judge to decline jurisdiction based on their assessment of the nature and degree of United States' control over the

345. *Al Maqaleh*, 605 F.3d at 97-98.

346. *Id.* at 98.

347. *Id.*

348. *See* Al Maqaleh v. Gates, Nos. 06-1669, 06-1697, 08-1307, 08-2143, 2011 WL 666883, at *1 (D.D.C. Feb. 15, 2011).

349. *Id.*

350. *Id.*

351. *Id.* at *2.

prison and the judge's perception of the practical obstacles to review. None of these factors bears on whether there is a sufficient legal or factual basis for holding the prisoner. Instead, they provide a justification for courts to avoid passing on the lawfulness of a detention based on their subjective evaluation of the circumstances outlined in *Boumediene*. That the process created by the military at Bagram was inadequate—as both the district and appeals courts found in *al-Maqaleh*—was not enough to warrant habeas review. Thus, although *Boumediene* emphasized the importance of habeas as an error-correction device, it did not require the exercise of jurisdiction, even where risk of error was greater than at Guantánamo. Further, *Al Maqaleh* illustrates the continued leeway for the government to avoid review by bringing prisoners to a place where the writ does not reach: in 2002, that meant bringing prisoners to Guantánamo; after the Supreme Court recognized that habeas reached Guantánamo, it meant bringing them to Bagram. *Boumediene*, in short, ensures only that the executive must operate within the shadow of habeas jurisdiction, which courts can choose to exercise (or not) based on their application of *Boumediene*'s functional test. As *Al Maqaleh* shows, the possibility of extrajudicial detention—and of executive manipulation of the locus of that detention to avoid review—remains.

III. HABEAS CORPUS AS A SAFEGUARD AGAINST UNLAWFUL DETENTION

Boumediene's application by lower courts provides a window into habeas corpus review of national security detentions conducted outside the criminal justice system. At its core, habeas provides a mechanism for holding the government accountable by requiring it to provide the judiciary with a legal and factual basis for detaining a prisoner. Yet, *Boumediene* and subsequent litigation illustrates the complex and sometimes restricted nature of habeas' accountability-generating function. While the courts' exercise of habeas jurisdiction at Guantánamo has required the government to supply a court with the basis for its detention of prisoners there, significant gaps in the exercise of that jurisdiction allow the government to avoid the accountability that habeas can provide. This Part explores those gaps and what they teach about the possibilities—and limits—of habeas corpus as a safeguard against unlawful detention.

A. Habeas and the Law of Detention

Calling the jailor to account in the context of a habeas petition means requiring the government to supply the court with a lawful basis for a

prisoner's confinement.[352] Before *Boumediene,* the government had largely avoided habeas' accountability-forcing process, as courts in the Guantánamo detainee litigation focused principally on whether they had jurisdiction over the petitions rather than the underlying validity of the detentions.[353] Most previous judicial decisions addressing the government's legal authority to detain involved the three enemy combatants held in the United States—Padilla, al-Marri, and Hamdi—and not those held at Guantánamo. *Hamdan,* to be sure, addressed the president's authority to try Guantánamo prisoners through military commissions.[354] But although the Court invalidated the commissions established under Bush's executive order,[355] it did not address the President's power to detain individuals without charge or the process to which they were entitled.[356] Nor did the Court resolve the scope of the armed conflict with al-Qaeda, instead assuming for purposes of the decision that the United States was engaged in a non-international armed conflict with al-Qaeda in Afghanistan.[357] Following *Boumediene,* courts started addressing those questions through their exercise of jurisdiction over Guantánamo detainee habeas petitions. The post-*Boumediene* habeas litigation has engendered a significant and growing body of jurisprudence on military counter-terrorism detentions.

In general, courts have upheld the President's power to detain individuals in military custody under the AUMF in connection with a loosely defined armed conflict against al-Qaeda, the Taliban, and

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352. *Boumediene*, 553 U.S. at 745.

353. Exceptions were the two district court opinions issued in the months after *Rasul* addressing the government's power to detain prisoners at Guantánamo and the validity of the CSRT, which the Defense Department had created to assess whether the prisoners were "enemy combatants." The district courts reached opposite results. *Compare In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (finding that the government's claimed authority to detain under the AUMF was overbroad and that the CSRT denied the detainees due process), *with* Khalid v. Bush, 355 F. Supp. 2d 311, 330 (D.D.C. 2005) (upholding the executive's detention of prisoners at Guantánamo who, the court concluded, had no substantive rights to enforce through their habeas petitions).

354. Hamdan v. Rumsfeld, 548 U.S. 557, 566-67 (2006).

355. *Id.* at 613. The Court held that the commissions established under President Bush's November 13, 2001 order violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.

356. *Id.* Common Article 3 addresses the trial and treatment of prisoners. It prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316. It also prohibits a wide range of abuse, from humiliating and degrading treatment to torture.

357. *Id.* at 628-30. *See also id.* at 641-42 (Kennedy, J., concurring) (noting that the United States is engaged in an armed conflict with al-Qaeda in Afghanistan).

"associated forces." [358] Lower courts have thus construed the President's detention power under the AUMF to reach more broadly than the Supreme Court did in *Hamdi*. In *Hamdi*, the plurality opinion upheld the President's power to detain individuals under the AUMF to prevent their return to the battlefield.[359] It was confined, however, to its alleged facts—an American citizen who took up arms alongside Taliban soldiers against the U.S. and its coalition partners in Afghanistan—and did not address the president's power to detain the broader category of persons held at Guantánamo, which includes non-battlefield detainees.[360] In the post-*Boumediene* habeas litigation, lower courts have refused to limit the President's detention authority under the AUMF to battlefield-based seizures or to those who directly participate in hostilities.[361] D.C. district and appellate judges have instead developed a test, derived loosely from law-of-war principles, that focuses on a petitioner's relationship to the enemy—defined to include al-Qaeda, the Taliban, and associated forces—in a diffuse, transnational conflict.[362] The D.C. Circuit, in particular, has eschewed bright-line rules, rejecting any requirement that the government prove the prisoner was part of an enemy force's "command structure" or that he received and executed orders from within that structure.[363] As a practical matter, the post-*Boumediene* decisions have largely justified military detentions under the AUMF based on some minimal nexus to al-Qaeda, the Taliban, or an associated force, typically, but not necessarily, demonstrated by some connection to or participation in the armed conflict in Afghanistan.

Habeas' accountability-forcing mechanism also includes a process-based component. In *Boumediene*, the Supreme Court clarified that the Suspension Clause requires the government to demonstrate not only its legal authority to hold a prisoner, but also that the detention is justified in fact—that the petitioner actually falls within the legal category of persons who may be held.[364] Absent the creation of an adequate and effective substitute (which the political branches had failed to provide at Guantánamo), the government must discharge this burden in the context of a district court habeas proceeding, in which the petitioner can, with the assistance of counsel, contest the government's allegations and present evidence, and the judge can hold a hearing to resolve disputed facts. In

358. *See supra* Part II. (A)
359. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion).
360. *Id.* at 516-17, 522 n.1.
361. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 67 (D.D.C. 2009).
362. *See supra* notes 161-171, and accompanying text.
363. *See supra* notes 169-170, and accompanying text.
364. *Boumediene*, 553 U.S. at 783.

discussing how habeas provides a fail-safe against wrongful detention, *Boumediene* distinguished the Suspension Clause from the Due Process Clause.[365] The Court explained that even if an underlying military or administrative procedure satisfies due process, as a properly constituted military tribunal created to determine a wartime prisoner's status might, the Suspension Clause still provides for collateral review of that determination.[366] The scope and intensity of that review depends on several factors, including the adequacy of the prior process and the potential length of the detention.[367] The more flawed the underlying process, and the longer the possible detention, the more robust the review of the government's evidence on habeas.[368] In *Boumediene*, the Court found that the inadequacies of the CSRT and the prolonged nature of the Guantánamo detentions required more intensive scrutiny of the government's allegations than Congress had provided through the DTA's appellate review mechanism.[369]

Boumediene, however, spoke only in broad outlines about the Guantánamo detainee habeas process and left its implementation to district judges in the first instance. As described above, lower courts have required discovery of exculpatory evidence; excluded evidence obtained through coercion under a totality of the evidence test; provided detainees the opportunity to present evidence and challenge the government's submissions with the assistance of counsel; and required the government to justify a petitioner's detention under a preponderance of the evidence standard.[370] Courts, however, have generally declined to place restrictions on the government's use of hearsay and rejected the suggestion that the detainees have confrontation rights. In addition, the Amended Protective Order that governs the detainee habeas litigation requires counsel to operate under significant constraints and prevents counsel from sharing classified information with the petitioner.[371] The habeas process that has developed is a *sui generis* hybrid that incorporates elements of both criminal and civil adjudication, albeit one with significantly fewer protections than afforded defendants in the criminal justice system. At bottom, it provides the government significant leeway in what evidence it presents and in what form. In general, the district courts have scrutinized the government's evidence

365. *Id.* at 784.
366. *Id.* at 785.
367. *Id.*
368. *Id.*
369. *Id.* at 790-92.
370. *See supra* notes 183-214, and accompanying text.
371. *See* In re Guantánamo Bay Detainee Litigation, 577 F. Supp. 2d 143, 145-46 (D.D.C. 2009).

more closely and been more exacting in determining whether the government has met its burden. The D.C. Circuit, by contrast, has been markedly more deferential in its review of the government's evidence, as demonstrated, for example, by its acceptance of the government's "mosaic theory"[372] and concepts like "conditional probability"[373] that significantly reduce the government's burden.

What has emerged after nearly a decade of habeas corpus litigation over Guantánamo is a de facto system of indefinite detention, rooted in loosely defined law-of-war principles, coupled with rudimentary procedural safeguards to prevent wrongful confinement by correcting government error and overreaching. The potential of habeas' checking power has been limited by the lower courts'—particularly the D.C. Circuit's—broad and malleable construction of the government's detention authority under the AUMF, excessive deference to the government's evidence, and willingness to consider and credit virtually any form of hearsay, despite significant questions about its reliability.

Several additional points about the post-*Boumediene* habeas process merit comment. The decisions upholding the President's military detention power under the AUMF apply only to extraterritorial seizures. Military detention based on domestic seizures—the issue in *Padilla* and *al-Marri*—has proven far more controversial.[374] In *Padilla* and *al-Marri*, lower courts divided over whether the President could detain militarily a suspected terrorist arrested in the United States.[375] The government eventually mooted both cases by criminally charging the detainees in federal court to avoid Supreme Court review, suggesting the government's concern about an adverse ruling.[376] Although courts have not provided a definitive answer to the question, they have shown

372. *See, e.g.*, Salahi v. Obama, 625 F.3d 745, 753 (D.C. Cir. 2010) (noting that "[t]he evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof")

373. *See* Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

374. *See* al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008) (en banc) (narrowly approving, in a fractured decision, the President's authority to detain militarily a legal resident alien arrested in the United States), *vacated by* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (vacating and remanding with instructions to dismiss as moot); Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005) (concluding that the President has the authority to detain militarily an American citizen arrested in the United States); Padilla v. Rumsfeld, 352 F.3d 695, 698 (2d Cir. 2003) (rejecting that the President has the authority to detain militarily an American citizen arrested in the United States).

375. See al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774 (2006); Padilla v. Hanft, 389 F. Supp. 2d 678 (2005).

376. *US: Criminal Charges Against al-Marri Major Step Forward*, HUMAN RIGHTS WATCH (Feb. 27, 2009), http://www.hrw.org/en/news/2009/02/27/us-criminal-charges-against-al-marri-major-step-forward.

considerable resistance to the application of a law-of-war-based military detention paradigm to the domestic arrest of terrorism suspects.

Further, even in the context of extraterritorial seizures, courts have not resolved the outer limits of the President's AUMF-based military detention authority. Based on publically available sources, nearly all of the Guantánamo habeas cases that have gone to decision thus far have involved petitioners who were detained in or in close proximity to Afghanistan, and who had some nexus to the armed conflict there, however attenuated.[377] Thus, while the test courts have adopted—focusing on whether a person is "part of" al-Qaeda, the Taliban, or an associated force—is not territorially limited, courts have generally not confronted cases in the Guantánamo habeas litigation in which law-of-war detention under the AUMF is extended beyond the armed conflict in Afghanistan.[378] In one Guantánamo habeas case that surfaces this issue, *Salahi v. Obama*, the district court granted the petition of an individual seized in Mauritania who lacked any involvement in the current armed conflict in Afghanistan, finding that he was not part of al-Qaeda.[379] The

377. *See, e.g.*, Uthman v. Obama, 637 F.3d 400, 407-08 (D.C. Cir. 2011) (upholding detention where petitioner traveled to Afghanistan along a route used by al-Qaeda recruits, attended an al-Qaeda guesthouse, and traveled to a region near what was then al-Qaeda's last stronghold in Afghanistan, during a major battle there); Al-Bihani v. Obama, 590 F.3d 866, 872-73 (D.C. Cir. 2010) (upholding detention where petitioner accompanied a Taliban-affiliated brigade on the battlefield in Afghanistan, carried a brigade-issued weapon, cooked for the unit, and retreated and surrendered under brigade orders).

378. The AUMF, as the Supreme Court stated in *Hamdi*, must be interpreted in line with the law of war. *Hamdi*, 542 U.S. at 521. The law of war, in turn, contains criteria to determine what qualifies as armed conflict. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995), *available at* http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (noting that the existence of a non-international armed conflict—i.e., a conflict not between two or more nation states—is typically defined by "protracted armed violence between governmental authorities and organized armed groups or between such groups within a state"). The petitions of prisoners seized outside Afghanistan, and in a place without protracted armed violence, might thus raise questions about the AUMF's permissible scope.

379. Salahi v. Obama, 710 F. Supp. 2d 1, 15-16 (D.D.C. 2010). Another case that raises questions about the geographic scope of the armed conflict with al Qaeda is *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010). *Bensayah* involved an Algerian citizen seized in Bosnia and transported to Guantánamo. *Id.* at 720. *Bensayah*, however, presents a murkier case for determining the scope of the armed conflict since, the locus of his seizure notwithstanding, the government's allegations were based primarily on the petitioner's connection to the armed conflict in Afghanistan. *Id.* at 721-22; *see also* Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (noting that petitioner Bensayah "planned to go to Afghanistan to both take up arms against U.S. and allied forces and to facilitate the travel of unnamed others to Afghanistan and elsewhere"). In any event, the lower court decided the petition without addressing the scope-of-armed-

court did not address the government's position on the global scope of the armed conflict.[380] The D.C. Circuit reversed, citing the district court's improper application of the "part of" test, which it said was overly rigid and failed to take account of recent circuit precedent.[381] The appeals court accepted, without discussion, the government's arguments concerning the scope of the armed conflict. Other possible vehicles for addressing possible limits on the AUMF's geographic scope—such as those Bagram habeas petitions involving prisoners seized outside of and brought to Afghanistan—have been dismissed on jurisdictional grounds[382] or have yet to be decided. As a result, most habeas courts have not seriously grappled with Justice O'Connor's caution in *Hamdi* regarding the potential limits of AUMF-based detention authority that presses against the boundaries of traditional understandings of armed conflict and established law-of-war principles.[383]

An even starker lacunae in habeas' accountability-forcing process, however, is the continued possibility of the government's avoiding adjudication altogether. These gaps may be divided into three broad areas: detentions in places where the writ does not reach; decisions effectively deemed unreviewable even where habeas jurisdiction exists; and inherent limits on the writ rooted in habeas' "in custody" requirement. Each is addressed below. Together, they suggest inherent

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conflict. *Bensayah*, 610 F.3d at 725-27 (vacating district court decision denying habeas relief and remanding for reconsideration of the sufficiency of the evidence that the petitioner was "part of" al-Qaeda).

380. *Salahi*, 710 F. Supp. 2d at 3. The district court in *Salahi* did, however, resist the government's arguments concerning the temporal scope of the armed conflict with al-Qaeda and its implications for AUMF-based detention. *Id.* at 5-6. The government had argued in *Salahi* that the petitioner's swearing of an oath to al-Qaeda in 1991 to fight against Soviet Union-backed communists did not create a rebuttable presumption that he was part of al-Qaeda when he was captured in Mauritania in 2001. *Id.* at 6 n.7. Rather, the court said that this prior al-Qaeda-related activity was one fact to be considered in determining whether the petitioner was still part of the terrorist organization at the time of capture. *Id.* at 6-7, 9-10.

381. *Salahi*, 625 F. 3d at 746-47; *id.* at 751-52 (noting the evidence that the petitioner received and accepted orders within al-Qaeda's "command structure" is relevant, but not necessary, to finding that he was "part of" al-Qaeda within the meaning of the AUMF when captured).

382. *Al Maqaleh*, 605 F.3d at 99. The challenge to the placement of an American citizen in Yemen on a targeted kill list also raised questions about the scope of the armed conflict, but was dismissed on standing and political question grounds. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 40, 52 (D.D.C. 2010).

383. *Hamdi,* 542 U.S. at 521 (plurality opinion) (noting that the Court's understanding that the AUMF authorizes detention is based on "longstanding law-of-war principles" and cautioning that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel").

tensions within *Boumediene* and limits on habeas as a mechanism for rendering the government to accountable for national security detentions.

B. Habeas, Extrajudicial Detention, and Unreviewable Decisionmaking

One of the most obvious limitations of enforcing accountability through habeas is the continued possibility of detention in prisons the writ does not reach. *Boumediene*, as we have seen, rejected a bright-line test for determining the Suspension Clause's extraterritorial application in favor of a multi-factored, functional test that requires courts to consider the prisoner's citizenship, his status and process used to determine it, the circumstances surrounding the place of capture and detention, and the practical obstacles to determining the prisoner's entitlement to the writ.[384] In *Boumediene*, this led to the Suspension Clause's application to Guantánamo and, in turn, to the Court's invalidation of a congressional scheme that provided for limited judicial review of a prior military detention determination.[385] By contrast, the D.C. Circuit in *Al Maqaleh* rejected the exercise of habeas jurisdiction over any Bagram detentions based on the application of *Boumediene*'s functional test,[386] while the district court decision it overturned had held there was jurisdiction only over some of those detentions, depending on the petitioner's nationality and place of capture.[387]

Al Maqaleh highlights the jurisdiction-affirming and jurisdiction-denying potential inherent in *Boumediene*'s functional test. On the one hand, the test's flexibility creates the prospect of subjecting extraterritorial detentions to habeas review by rejecting any bright-line limits on the Constitution's application overseas based on territory or citizenship; on the other hand, that same flexibility provides courts with the leeway to deny review based on their assessment and balancing of the various *Boumediene* factors. In particular, courts can decline to exercise jurisdiction by deeming habeas review impractical, even if the risk of error remains considerable, either because the government's detention standard is overbroad or its procedures insufficiently protective, or some combination of the two. As *Al Maqaleh* suggests, *Boumediene*'s test itself contains jurisdiction-avoiding incentives, such as keeping prisoners in or bringing them to a war zone, which can help tilt the balance of factors against habeas review by making that review more impracticable. *Boumediene* may have highlighted the habeas' dual checking function:

384. *See Boumediene*, 553 U.S. at 766.
385. *Id.* at 771.
386. *Al Maqaleh*, 605 F.3d at 99.
387. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 215-16 (D.D.C. 2009).

protecting the individual against wrongful confinement and ensuring the separation of powers by providing a judicial constraint against executive overreaching. Yet, the Bagram litigation shows that this checking function sometimes operates only indirectly, if at all. The principal difference pre- and post-*Boumediene* is that the executive now knows that it *may* be subject to habeas review under the Suspension Clause when it detains prisoners abroad. But it also knows that it may not be subject to this review and, moreover, that it can decrease the likelihood of review by, for example, altering the locus of detention.

That a judicially-based check on the executive operates only indirectly, however, does not mean that it is insignificant. After *Boumediene*, military and other non-criminal national security detentions necessarily take place in the shadow of habeas review. Even though jurisdiction remains uncertain, the potential for habeas review based on the a court's application of the *Boumediene* factors can help prevent abuses by creating incentives for the government to provide a more adequate process, which the government did during the *Al Maqaleh* litigation when it created a new Detainee Review Board to determine a Bagram prisoner's status, and took steps to prevent the torture and mistreatment of prisoners.

Another accountability gap arises from certain executive actions deemed exempt from habeas review even where courts have jurisdiction, whether under the habeas statute or the Suspension Clause.[388] In *Boumediene*, the Court subjected detentions at Guantánamo to judicial scrutiny under the Suspension Clause to assess their legality. Judges, however, have responded differently when asked to examine executive decisions to transfer prisoners. The result is two different visions of habeas corpus and its role in maintaining the proper separation of powers.

Take the D.C. Circuit's ruling in *Kiyemba II*. Under *Boumediene*, courts have authority to review the detention of prisoners held at Guantánamo.[389] But under *Kiyemba II*, they have no power to review the executive's decision to transfer prisoners from Guantánamo, even if the prisoners allege a risk of likely torture or continued confinement in the receiving state.[390] The Circuit relied heavily in *Kiyemba II* on *Munaf*, which had suggested significant constraints on the exercise of a court's habeas jurisdiction even where the petitioner is not formally beyond the

388. *See* Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 512 (D.C. Cir. 2009) (discussing the basis for statutory habeas jurisdiction after *Boumediene*).

389. *See Boumediene*, 553 U.S. 723.

390. *See Kiyemba II*, 561 F.3d 509.

writ's reach.[391] *Munaf* may have involved highly specific facts: the intra-country hand-over of two U.S. citizens to a host state for prosecution for crimes allegedly committed in that country.[392] But *Munaf* also surfaced broader constraints on habeas review of detainee transfer decisions based on separation of powers and comity concerns. As it stands, there exists a significant disparity between the inquiry conducted by a habeas court into the executive's determination to hold a prisoner at Guantánamo under *Boumediene* and a habeas court's near absolute deference to the executive's decision to transfer a prisoner from Guantánamo under *Kiyemba II*.

In the detainee-transfer context, habeas' accountability-generating function is thus virtually non-existent. Courts do not consider, for example, whether a prisoner's transfer to possible torture violates the *non-refoulement* provision of the FARR Act, which implements the Convention against Torture. Nor do they address whether a transfer will result in a prisoner's continued detention in the receiving country, even where that detention is allegedly at the direction or request of the United States. Ultimately, the non-reviewability of detainee transfers presses against *Boumediene*'s conception of habeas as protecting individual liberty and the separation of powers through judicial scrutiny of executive action.

A related constraint on habeas' accountability-forcing function is the way in which release from U.S. custody can prevent adjudication of the prior detention. As the last decade has shown, the executive has proven nimble in transferring prisoners—whether from U.S. custody to a foreign government or to another form of U.S. custody—as courts were poised to rule on the legality of their detention. U.S. custody remains a *sine qua non* of habeas jurisdiction. An "in custody" requirement has always been part of the federal habeas statute and embodies traditional common-law understandings of the writ.[393] The federal habeas statute presently provides that courts may grant writs to prisoners "in custody" either "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States."[394] Although courts have not addressed the "in custody" requirement for purposes of the Suspension Clause, there is no reason it should vary in material

391. *See id.*

392. Munaf v. Green, 553 U.S. 674, 679-83 (2008).

393. HAFETZ, *supra* note 14, at 193.

394. 28 U.S.C. § 2241(c)(1), (3) (2006). The statute contains other bases for exercising jurisdiction that are not relevant to the type of detentions addressed in this Article; all require U.S. custody. *See id.* § 2241 (c)(2)(4), (5); *see also* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 45-46 (D.D.C. 2004).

respect from the statutory requirement. In short, for a court to exercise habeas jurisdiction, the prisoner must be in U.S. custody.

Courts have interpreted the "in custody" requirement broadly to achieve the writ's purpose as a remedy against unlawful restraints on an individual's liberty.[395] Judges have thus found habeas jurisdiction in various situations where the petitioner was not in the jailor's actual physical custody.[396] Under a theory of "constructive custody," courts have, for example, considered challenges by habeas petitioners imprisoned in one state and subject to a detainer in another state;[397] convicted criminals held in state or federal prison and subject to a deportation order seeking their removal from the United States under the immigration laws;[398] and individuals challenging the conditions imposed on them as part of their parole.[399] In these cases, a government official was responsible for significant restraints on the petitioner's freedom, even if those restraints took a form other than that of direct physical custody.[400]

The "in custody" requirement, however, does not extend to situations where petitioners seek to challenge a prior restraint on their liberty to which they are no longer subject. It also creates evidentiary hurdles to jurisdiction where individuals suffer from ongoing restraints on their liberty through forms of constructive custody that rely on secret or tacit relationships or understandings between the United States and a foreign government. In these circumstances, the "in custody" requirement limits habeas' potential to generate accountability for executive action.

In various cases challenging U.S. detention practices after 9/11, prisoners were either transferred or released from military custody prior to a determination on the merits. Most notably, in *Padilla* and *al-Marri*, the government charged the petitioners with federal crimes and transferred them to civilian custody to avoid Supreme Court review of the legality of their prolonged military confinement as enemy combatants.[401] The United States also has released hundreds of prisoners from Guantánamo after years of detention, most without any court

395. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345, 350 (1973) ("The custody requirement is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.").

396. *See, e.g.*, Justices of Boston Municipal Ct. v. Lydon, 466 U.S. 294, 300 (1984).

397. Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484 (1973).

398. *See* Galaviz-Medina v. Wooten, 27 F.3d 487 (10th Cir. 1994).

399. *See* Jones v. Cunningham, 371 U.S. 236 (1963).

400. *Abu Ali*, 350 F. Supp. 2d at 47-49.

401. *See supra* notes 151 &152.

ruling.[402] Release from military detention, whether to another form of U.S. custody (e.g., to civilian custody pursuant to criminal prosecution) or to another country, has precluded courts from reviewing the validity of the underlying confinement and skewed the law of detention by producing judicial decisions only in those cases the government chooses to have decided. Additionally, the government has avoided decisions on the legality of detentions at Guantánamo by administratively clearing prisoners for release, which it argues obviates the need for habeas review on the theory that there is no relief a court could provide since, under *Kiyemba I*, it cannot order a prisoner's release from Guantánamo under any circumstances.[403] In each of these situations, the government evades being held accountable by a court for a prisoner's military detention—whether because it has released the prisoner outright, transferred him to civilian custody for criminal prosecution, transferred him to a foreign government, or reclassified him administratively.[404]

Some former Guantánamo detainees also have sought habeas review based on collateral consequences flowing from their prior (and still

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402. *See, e.g.*, President Barack Obama, Remarks by the President on National Security at the National Archives, Washington, D.C. (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

403. *See supra* note 258-260 and accompanying text.

404. Another form of accountability is theoretically available through a civil damages action. However, most post-9/11 damages actions challenging counter-terrorism detention practices have thus far been blocked from merits adjudication under various judicially created doctrines, including state secrets, *Bivens* "special factors," and qualified immunity, as well as by jurisdictional bars. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc) (dismissing on state secrets grounds a suit challenging secret detention and torture carried out under the CIA's "extraordinary rendition" program); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) (dismissing on *Bivens* "special factors" grounds a suit challenging U.S. officials' role in the rendition of a Canadian citizen from the United States to torture in Syria); Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (rejecting on qualified immunity grounds a lawsuit by former Guantánamo detainees challenging their torture and other mistreatment by U.S. officials); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103 (D.D.C. 2010) (dismissing on *Bivens* "special factors" grounds and under the MCA's jurisdictional bar to damage suits by current or former alien "enemy combatants" an action brought by family members on behalf of individuals who died in custody at Guantánamo after severe abuse); Lebron v. Rumsfeld, 764 F. Supp. 2d 787 (D.S.C. 2011) (dismissing on *Bivens* "special factors" and qualified immunity grounds a suit by former "enemy combatant" Jose Padilla for his detention and mistreatment in military custody). *But see* Vance v. Rumsfeld, 653 F.3d 591 (7th Cir. 2011) (denying former Defense Secretary Donald Rumsfeld's motion to dismiss a lawsuit brought by two U.S. citizen civilian contractors based on their torture in Iraq), *rehearing en banc granted*; Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (denying government's motion to dismiss Jose Padilla's suit against John Yoo for his role in Padilla's detention and mistreatment in military custody).

unrescinded) designation as "enemy combatants." Those consequences include continued detention by another government, restrictions on travel, stigmatization, and bars on seeking civil damage remedies.[405] A district court rejected this challenge in *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantánamo Bay* and ordered dismissal of the petitions.[406] The court accepted the government's assertion that any restrictions on former Guantánamo detainees' liberty and freedom of movement were the product of the foreign country's "own domestic law and independent determinations."[407] Thus, as in *Kieymba II*, the court refused to look behind the government's assertions regarding the circumstances of a former Guantánamo detainee's treatment in the receiving country.[408] Further, the court stressed the separation of powers and comity concerns presented by judicial scrutiny—over executive branch objections—into a former prisoner's detention and treatment by a foreign government.[409] The court also rejected the former detainees' other collateral consequences arguments, concluding that reputational harm is insufficient when not imposed by operation of law;[410] that the court lacked the power to remedy other restrictions (such as those on travel to the United States);[411] and that being denied a civil remedy (as a result of their "enemy combatant" designation) did not justify the exercise of habeas review.[412] The D.C. Circuit recently affirmed the district court's dismissal of the petitions.[413]

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405. *See* In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantánamo, 700 F. Supp. 2d 119, 130 (D.D.C. 2010). *See generally* Spencer v. Kemna, 523 U.S. 1, 7 (1998) (explaining that a petitioner no longer in custody can prove he continues to present a live case or controversy by demonstrating he suffers "some concrete and continuing injury other than the now-ended incarceration . . . some 'collateral consequence' of the conviction" that is "likely to be redressed by a favorable judicial decision").

406. *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d at 124.

407. *Id.* at 132 (quoting Benkert Decl. ¶5, June 8, 2007).

408. *See id.* (discussing the limits *Kiyemba II*, as well as places on a district court's review of executive action in the detainee-transfer context).

409. *Id.* at 132-33.

410. *Id.* at 133-34.

411. *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d at 134-36 (finding that court cannot remedy petitioners' being placed on the U.S. government's No Fly List since their placement on the list is based on their previously being held at Guantánamo, a fact that will remain regardless what the court decides).

412. *Id.* at 136-37 (finding that absence of a damage remedy is an insufficient collateral consequence and that, in any event, mere fact of petitioners' previously being held at Guantánamo itself may preclude any such remedy).

413. Gul v. Obama, 652 F.3d 12 (D.C. Cir. 2011) (affirming the dismissal of habeas petitions by former Guantánamo detainees challenging their unrescinded designation as

Not all courts have been so willing to accept to the government's representations regarding the circumstances surrounding a prisoner's detention in a foreign country. In *Abu Ali v. Ashcroft*, the district judge denied the government's motion to dismiss the habeas petition of an American citizen who alleged that he was being held in Saudi Arabia at the direction of the United States.[414] The court held that such allegations, if established, warranted the exercise of habeas review under a theory of constructive custody, and ordered jurisdictional discovery.[415] The U.S. government avoided further inquiry by criminally charging the petitioner, who was brought to the United States to face prosecution in the Eastern District of Virginia.[416] The district court's decision in *Abu Ali* thus suggests habeas' potential to hold the government accountable, even where U.S. control over the detention is masked by the use of a foreign proxy.

Abu Ali, however, remains the exception. Other courts have rejected similar arguments,[417] and *Munaf* and *Kiyemba II* make the type of "constructive custody" inquiry ordered in *Abu Ali* more unlikely given the deference those decisions say should be accorded to executive branch representations.[418] Further, proxy detentions are typically secret and based on arrangements between the United States and foreign governments that are difficult to detect or to substantiate with the type of evidence of U.S. involvement that the petitioner had obtained in *Abu Ali* and presented to the court.[419] Given the difficulties of establishing constructive custody when a petitioner is nominally under the authority of a foreign state, individuals may not even file habeas petitions despite their suspicion that the United States is responsible for their detention.[420]

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enemy combatants; holding that the collateral consequences of that designation did not satisfy justiciability requirements under Article III).

414. Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004).

415. *Id.* at 67-69.

416. *See* United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008).

417. *See* Mallouk v. Obama, No. 08-2003, 2009 WL 2424307 (D.D.C. Aug. 4, 2009) (dismissing habeas petition filed on behalf of an American citizen held in the United Arab Emirates, allegedly at the direction of the United States).

418. *See In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantánamo Bay*, 700 F. Supp. 2d at 127-28 (relying on *Munaf* and *Kiyemba II* in rejecting the petitioners' constructive custody argument).

419. *Abu Ali*, 350 F. Supp. 2d at 32-36 (noting that the evidence included statements from Saudi government officials that they had no intention of charging Abu Ali, that they were instructed to "stay away" because the United States was "behind the case," and that Saudi officials would release Abu Ali to American officials if the United States made a formal request).

420. *See* HAFETZ, *supra* note 14, at 198-200 (describing the case of Amir Meshal, an American citizen from New Jersey, who maintains he was secretly detained in Kenya and Ethiopia at the direction or with the active participation of the United States).

Thus, despite *Boumediene*'s rejection of any strict territorial limits on habeas jurisdiction, the government can continue to engage in proxy detention and other softer forms of control, such as repatriation agreements that require a prisoner's continued confinement in the receiving state, to prevent triggering habeas' "in custody" requirement and thereby avoiding judicial review.

C. Habeas, Political Control, and the Absence of a Remedy

Perhaps the most overt threat to habeas-based accountability stems from the limits on judges' remedial powers imposed by post-*Boumediene* judicial decisions and legislation. The D.C. Circuit's decision in *Kiyemba*, along with successive appropriations measures enacted by Congress, effectively prevent judges from ordering the release of a prisoner from Guantánamo even where they have ruled that there is no lawful basis for the prisoner's continued detention. The dilution of habeas into a right without a remedy—where judges can call the jailor to account but cannot enforce their decision by ordering the prisoner's release—undercuts the integrity of the habeas process and highlights the judiciary's limited impact on national security detentions.

The struggle over judges' remedial power is another manifestation of a theme that has defined the Guantánamo habeas litigation from the beginning: Who determines whether a prisoner should be detained: the judiciary or the political branches? Before *Boumediene*, this conflict played out over the issue of jurisdiction and, more specifically, the extraterritorial reach of habeas corpus. After *Rasul* recognized a judicial role over detentions under the habeas statute, Congress twice sought to strip the courts of their habeas jurisdiction: first in the DTA and, following *Hamdan*, in the MCA.[421] In *Boumediene*, the Supreme Court did what it had opted not to do in *Rasul* and *Hamdan*: prevented Congress from denying Guantánamo detainees access to habeas corpus by grounding its ruling in the Constitution's Suspension Clause. The Court thus removed from the realm of further inter-branch dialogue the question whether the courts could exercise habeas corpus jurisdiction over the Guantánamo detentions.

Yet, the tension between political and judicial control over the Guantánamo detentions has continued after *Boumediene*, manifesting itself in other forms. The most dramatic example is the attack on judges' remedial powers. By depriving habeas judges of the authority to order the release of a Guantánamo detainee into the United States, *Kiyemba*

421. *See* Military Commission Act of 2006, *supra* note 7.

restricts the courts' power to grant an effective remedy.[422] Although a judge can invalidate a petitioner's detention, if he or she cannot order that petitioner's release, ultimate control remains in the hands of the executive. The main difference post-*Boumediene* is that the executive exercises this control after judicial review rather than in its absence.

Congress, unable simply to eliminate habeas as it did in the DTA and MCA, also has sought to assert control over the Guantánamo detentions by restricting the power of the courts and, in certain respects, the power of the executive as well. Congress has repeatedly passed legislation barring the release of any Guantánamo detainee into the United States.[423] It has also sought to prevent the President from transferring a Guantánamo detainee to the United States for any purpose, including continued detention or criminal prosecution.[424] These provisions have helped render Obama's order to close Guantánamo a dead letter. A recent proposal, moreover, would expand the Guantánamo detention model by requiring the military detention of certain terrorism suspects captured in the future and requiring the president to seek a waiver from the Secretary of Defense to prosecute them in federal court.[425]

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422. Kiyemba v. Obama, 130 S. Ct. 458 (2009). *Kiyemba I* does not directly address a court's authority to order the release a Guantánamo detainee to his home country or to a third country. Whether the executive could block a judge from ordering a detainee's release to his home country has not been litigated. Following the attempted Christmas Day bombing in 2009, the Obama administration suspended the repatriation of Guantánamo detainees to Yemen. *See Obama Reaffirms Guantánamo Bay prison closure plans*, BBC NEWS, Jan. 5, 2010, http://news.bbc.co.uk/2/ni/8442543.stm. The administration has not, however, sought to apply this ban to Yemenis who won their habeas cases and whose cases the government is not appealing.

423. *See* 2009 Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859; Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142; National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190; Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409. *See also* ANNA C. HENNING, CONG. RESEARCH SERV., R 40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 2 (2010).

424. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. § 1031 (2010) [hereinafter "2011 NDAA"].

425. National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 1032 (2011) (mandating military detention of individuals who are part of al Qaeda or associated forces and who have "participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners"). The mandatory military detention provision excludes U.S. citizens. *See id.*

Additionally, Congress has significantly restricted the president's ability to transfer Guantánamo detainees to another country.[426] Although these transfer restrictions do not apply to action taken by the executive to effectuate a court order, they apply to the more than eighty Guantánamo detainees whom the executive has administratively cleared for release but has been unable or unwilling to repatriate.[427] These "cleared" detainees remain in custody but are unable to obtain habeas hearings because judges believe they cannot grant any further relief than the executive has already provided them: a decision to seek their repatriation to another country. As a practical matter, therefore, cleared detainees are denied what *Boumediene* says the Suspension Clause guarantees: review of their detention and an order directing their release, if necessary.[428] Further, even though the administration may have cleared a detainee for release to another country, it maintains the detainee's designation as an "enemy combatant" (or "unprivileged enemy belligerent" in the government's current terminology). The refusal to rescind the designation makes it more difficult for the administration to repatriate prisoners to another country.

Legislative proposals have sought to limit judicial control over the Guantánamo detentions in other ways. Bills have been introduced that would constrain a court's review by broadening the category of individuals who can be detained, limiting a court's ability to assess the government's evidence, and exempting certain decisions from judicial review altogether. A bill previously introduced by Lindsey Graham (R-SC), for example, would have authorized the President to detain "unprivileged enemy belligerents in connection with the continuing armed conflict with al-Qaeda, the Taliban, and associated forces, regardless of the place of capture until the termination of hostilities."[429] Despite purporting to "reaffirm" the President's existing authority, the

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426. 2011 NDAA, *supra* note 424, § 1033(c) (prohibiting the transfer of a detainee to his home country or any third country where any detainee previously transferred to that country engaged in terrorist activity following his transfer).

427. *See* Carol Rosenberg, *For First Time, all 172 detainees come into view*, MIAMI HERALD, May 1, 2012.

428. *See Boumediene*, 553 U.S. 723.

429. *See* Detention of Unprivileged Enemy Belligerents Act, § 2(b), 112th Cong. (1st Sess. 2011) ("Graham Bill"), *available at* http://www.lawfareblog.com/wp-content/uploads/2011/03/Graham-habeas-bill.pdf. For two different assessments of the proposed legislation, compare Benjamin Wittes, *The Graham Habeas Bill—A Brief Analysis*, LAWFARE BLOG (Mar. 15, 2011), http://www.lawfareblog.com/2011/03/the-graham-habeas-bill-a-brief-analysis/, with Stephen Vladeck, *The Case Against the Graham Bill*, PRAFSBLAWG (Sept. 12, 2010), http://prawfsblawg.blogs.com/prawfsblawg/2010/09/the-case-against-the-graham-bill.html (discussing a prior version of the bill).

Graham bill would have expanded the AUMF in significant respects, including by specifically authorizing detention (which the AUMF did not), expressly denying any geographic limit on the President's detention power (a question on which the AUMF was silent), and extending the President's detention authority to cover "associated forces" without demonstrating any nexus to the 9/11 attacks (whereas the AUMF had confined the President's authority to use force to those nations, persons, or organizations responsible for those attacks or those who harbored them).[430] The Graham bill also sought to lower the government's evidentiary burden to a mere showing of probable cause[431] and create a series of rebuttable presumptions in favor of detention, such as any time a petitioner attended "a military-style training camp or guest-house of the Taliban, al-Qaeda, or associated forces."[432] Like D.C. Circuit decisions in *Kiyemba* and *Kiyemba II*, as well as dicta in *Al Adahi* and other decisions, these measures represent an effort to de-judicialize the Guantánamo habeas process and reassert political branch control over who leaves Guantánamo and when. Such procedures, if enacted, would make it even more difficult for detainees to prevail in their habeas cases.

Thus, despite *Boumediene*'s preservation of habeas jurisdiction under the Suspension Clause, some prisons remain beyond habeas, as *Boumediene* itself had contemplated and as *al-Maqaleh* confirmed. The exercise of habeas jurisdiction, moreover, may be limited even where the Suspension Clause applies. Some decisions remain virtually unreviewable (such as decisions to transfer prisoners to another government); others can be removed from a court's review through a prisoner's transfer or release from custody; and others can be rendered a virtual nullity because courts cannot issue an effective remedy. These gaps in habeas-based accountability not only weaken the writ's potential as a guarantee of individual liberty and check on executive power; they also skew the law surrounding national security detentions by giving the government significant control over which detentions are reviewed and under what circumstances. The Suspension Clause may, as *Boumediene*

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430. Graham Bill, *supra* note 429, § 2(b). In addition, the Graham bill defines "unprivileged enemy belligerent" broadly to include any individual who "has engaged in hostilities against the United States or its coalition partners"; "has purposefully or materially supported hostilities against the United States or its coalition partners"; or "was a member of, part of, or operated in a clandestine, covert, or military capacity on behalf of the Taliban, al-Qaeda, or associated forces." *Id.*, § 3 (adding new 28 U.S.C. § 2256(a)(6) (2006)).

431. *Id.* (adding new 28 U.S.C. § 2256(d)(1)(B) (2006)).

432. *Id.* (adding new 28 U.S.C. § 2256(d)(1)(D) (2006)). The bill also sought to restrict a court's ability to exclude statements made by a detainee, even where those statements were not obtained voluntarily. *Id.* (adding new 28 U.S.C. § 2256(d)(3)(4)(B)(2006)).

says, provide a way for courts to "call the jailer to account."[433] But, more than three years after *Boumediene*, the government still retains significant control over whether, and under what circumstances, it will answer.

IV. CONCLUSION

Ultimately, one might ask what impact, if any, habeas corpus has had at Guantánamo and on war on terrorism detentions generally. Litigation in the decade since 9/11 has highlighted habeas' potential as well as its limitations. On the one hand, habeas has had important effects. It has enabled detainees to obtain access to counsel, subjected military detentions to some judicial process, paved the way for the imposition of international law constraints on detainee treatment, survived several legislative assaults, and made possible an important doctrinal shift regarding the Constitution's extraterritorial application to non-citizens. Habeas remains the most effective tool courts have to force the government to justify why it is depriving an individual of his liberty.

At the same time, habeas suffers from significant limitations as a means of securing accountability for executive detention. Some U.S. detentions still remain beyond federal habeas jurisdiction, as the Bagram litigation shows. Moreover, even at places where the writ extends, such as Guantánamo, habeas review remains vulnerable to efforts by Congress and the courts to restrict its scope and impact. These restrictions threaten to restore much of the political branch control over national security detentions that existed before *Boumediene* and other war on terrorism decisions like *Hamdan*, *Rasul*, and *Hamdi*. In the end, how *Boumediene* is interpreted reveals much about whether calling the jailer to account is more of an ideal of how habeas should work than a description of how it functions in practice.

433. *Boumediene*, 553 U.S. at 745.