The Consideration of Factual Issues in Extradition Habeas

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“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755 (1987).

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I. INTRODUCTION

The consequences of international extradition equal or exceed those
of most criminal convictions.\(^1\) An individual sought for extradition faces not only a criminal trial and imprisonment,\(^2\) but also being surrendered to a foreign country. Despite the harsh consequences of extradition, those submitted to its rigors are afforded very little process by the Executive and the courts. At the extradition hearing the individual normally is not allowed to contradict the government’s evidence, and the courts’ only involvement is through habeas corpus, a process in which the circuit courts have allowed very limited procedural guarantees. Meant to review the results of the extradition hearing, the process of extradition habeas also denies petitioners the opportunity to contradict the government’s evidence and only requires that the factual findings of the extradition magistrate be supported by “competent evidence.” Such low level of process conflicts with constitutional and statutory mandates, and with the nature of habeas corpus as an original civil procedure, as suggested by recent Supreme Court decisions.

Extradition implies grievous consequences. Individuals subject to extradition, often referred to as “relators,” regularly lose their jobs and properties. After imprisonment and extradition to a foreign country, relators may not have access to proper legal aid and may not be able to obtain necessary help from family and friends. Their family and social relationships may be damaged for lack of regular communication, as they may lack the financial means to pay for phone calls from prison, and family members may not be able to travel. Relators often spend months and even years in the process of extradition, and then more time facing a foreign criminal justice system.

A good example of the dire consequences of extradition is the case of John Demjanjuk, who was charged in Israel with “crimes of murdering Jews” during World War II.\(^3\) The government of Israel believed Demjanjuk to be Ivan Grozny, better known as “Ivan the Terrible,” a sadistic guard at the Nazi extermination camp in Treblinka, Poland. Demjanjuk entered the United States in 1952 from Ukraine and became naturalized as a US citizen in 1958. He worked as a mechanic at a Ford plant in Cleveland Ohio, lived a quiet life, and later retired. Nearly thirty years after coming to the United States, and after a complex denaturalization process, the government of Israel requested his extradition for criminal prosecution.\(^4\) In 1985 at his extradition hearing, no live witnesses testified and the whole proceeding consumed at most

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2. Extradition may be sought for criminal prosecution or to enforce a sentence of conviction.
4. Id.
The extradition magistrate concluded that there was probable cause that Demjanjuk was “Ivan the Terrible,” as charged by the Israelis, and certified his extraditability. Demjanjuk was tried and sentenced to death by an Israeli court, but his conviction was later reversed by the Supreme Court of Israel because of conflicting statements by former Ukrainian guards at Treblinka, some of which identified another guard as Ivan the Terrible. Demjanjuk spent seven years in an Israeli prison before he was able to return home to Cleveland, Ohio.

Despite the grievous consequences of extradition, the extradition hearing is an executive and summary process. The relator is not afforded the opportunity to confront adverse witnesses, and is not allowed to introduce evidence to contradict the government’s case. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are not directly applicable, and the only recourse to review the decision of an extradition magistrate is the filing of a petition for a writ of habeas corpus.

Habeas corpus is an original civil proceeding, collateral to the procedure that ordered the petitioner’s detention, and meant to ensure

5. See id. at 547.
6. Id.
7. Demjanjuk v. Petrovski, 10 F.3d 338, 342 (6th Cir. 1993). But see Robert D. McFadden, John Demjanjuk, Accused of Atrocities as a Nazi Camp Guard, is Dead at 91, N.Y. TIMES, Mar. 17, 2012, at A22, available at http://www.nytimes.com/2012/03/18/world/europe/john-demjanjuk-nazi-guard-dies-at-91.html?pagewanted=all&_r=0 (In 2009 Demjanjuk was deported to Germany to stand trial for the killing of Jews at the Sobibor concentration camp in Poland during World War II, a matter unrelated to his previous charges in Israel. In May 2011 a Munich court found Demjanjuk guilty of the charges against him and sentenced him to five years of imprisonment. Demjanjuk appealed. Pending appeal he was released from prison and moved to a nursing home. Demjanjuk died while his appeal was pending at the age of 91.).
9. Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981) (“An accused in an extradition hearing has no right to contradict the demanding country’s proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof.”); Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973). See Roberto Iraola, Contradictions, Explanations, and the Probable Cause Determination at a Foreign Extradition Hearing, 60 SYRACUSE L. REV. 95, 104 (2009); Jacques Semmelman, The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence, 23 FORDHAM INT’L L.J. 1295, 1296 (2000) (“International extradition proceedings in the U.S. courts are governed by the evidentiary rule that the accused has no right to present a defense to the charges against him, such as an alibi defense, and has no ‘right to introduce evidence which merely contradicts the demanding country’s proof, or which only poses conflicts of credibility.’”) (citations omitted).
that the petitioner’s detention is legal. To assess the legality of detentions, Congress has required and empowered habeas courts to hear and determine the relevant facts. These fact-finding requirements are meant to be more rigorous when the petitioner is detained by the executive through a summary procedure, than when he is detained as the result of a thorough process such as a criminal trial. Despite these statutory mandates, and settled characteristics of habeas corpus, courts in extradition habeas provide petitioners with even less process than they receive in their extradition hearings.

Petitioners in extradition habeas are denied the opportunity to introduce evidence on their behalf, and courts are forbidden from rehearing the evidence. Courts in extradition habeas consider the evidence of criminality against the petitioner through low-level standards of review such as “clear error” and “competent evidence,” even though habeas is an original judicial procedure meant to consider

15. Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999) (Habeas courts regularly “inquire only into (1) whether the committing court had jurisdiction, (2) whether the offense charged is within the treaty, and (3) whether the evidence shows a reasonable ground to believe the accused guilty.”).
17. Competent evidence: Santos v. Thomas, 779 F.3d 1021, 1024 (9th Cir. 2015); In re Assarson, 635 F.2d 1237, 1246 (7th Cir. 1980) (citing Garcia Guillen v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971)) (“On habeas corpus, we must affirm if there was ‘any competent evidence tending to show probable cause.’”); Choe v. Torres, 525 F.3d 733, 738-39 (9th Cir. 2008) (district court’s denial of habeas corpus denied because there was no competent evidence to support the magistrate judge’s finding of probable cause); Ntakirutimana v. Reno, 184 F.3d 419, 427 (5th Cir. 1999) (“Our function on habeas review is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court.”) (citations omitted); Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir. 1986) (“Because the magistrate’s probable cause finding is thus not a finding of fact in the sense that the court has weighed the evidence and resolved disputed factual issues, it must be upheld if there is any competent evidence in the record to support it.”) (citations omitted); Escobedo v. United States, 623 F.2d 1098, 1102 (5th Cir. 1980) (citing Gusikoff v. United States, 620 F.2d 462 (5th Cir. 1980)) (“In reviewing the existence of probable cause to sustain the charges against petitioners ‘or in other words, the existence of a reasonable ground to believe the accused guilty,’ our function ‘is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court.’”); In re Paberalius, 2011 U.S. Dist. LEXIS 57907, at *40 (May 31, 2011) (“This court is not required to determine if Paberalius is guilty of aggravated battery ‘but merely whether there is competent legal evidence which would justify his apprehension and commitment for trial if the crime had been committed in Illinois.’”). Factual findings must be reviewed for clear error: Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir. 1986); In re Ahmad, 726 F. Supp. 389, 397 (E.D.N.Y. 1989), aff’d sub nom, Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990). Sufficient evidence: Haxhiaj v. Hackman, 528 F.3d 282, 286–87 (4th Cir. 2008). Determination of extradition magistrate must be reviewed for any evidence: In re Burt, 737 F.2d 1477, 1483 (7th Cir. 1984); Eain v. Wilkes, 641 F.2d 504, 509 (7th Cir. 1981).
the evidence anew through a standard of proof, and not through appellate-type standards of review. The circuit courts justify the use of these procedures mostly on questionable court jurisprudence from the late nineteenth and early twentieth centuries, and obviate the legislative and jurisprudential developments in habeas law that since have occurred. Some courts have compounded the problem by analogizing extradition habeas with cases of post-conviction habeas filed by state prisoners who question their state court convictions. These analogies are inadequate because of the substantial difference in process received by defendants in criminal cases as opposed to that received by relators in international extradition prior to habeas. The process currently allowed by the courts in extradition habeas is at odds with constitutional and statutory requirements stemming from the Suspension Clause, the Fifth Amendment’s Due Process Clause, and the habeas statute, 28 U.S.C. § 2243. These requirements allow petitioners to meaningfully oppose the government’s evidence, and mandate habeas courts to hear and determine the facts anew. These mandates are also suggested by the recent executive detention cases of *I.N.S. v. St. Cyr*, *Boumediene v. Bush*, and *Hamdi v. Rumsfeld*. Hamdi clarifies that the fact finding requirements in 28 U.S.C. § 2243 are applicable to cases of executive detention, and that low standards of review such as “some evidence” violate the Due Process Clause in contexts such as executive-detention habeas. Boumediene, on the other hand, concludes that the substantive protections of the Suspension Clause go further than due process by providing habeas courts with the fact finding tools necessary to assess the legality of executive detention. Finally, in *St. Cyr* and


19. See infra Part IV.F; Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 56, 100 (2012) (in deciding cases of executive detention habeas, courts should draw from other cases of detention without trial rather than from cases of post-conviction habeas). This article refers to habeas petitions filed by state convicts for relief of their confinement in state prison as either “postconvict” or “state-convict” habeas.

20. *Id.*

21. A discussion of the doctrine of stare decisis is beyond the scope of this Article. The arguments made herein, however, could be used to request the overruling of the jurisprudence discussed in this Article that deny petitioners the opportunity to introduce evidence, and that apply low level standards of review in extradition habeas. See Planned Parenthood v. Casey, 505 U.S. 833 (1992).


25. See infra Part IV.B (discussing implications of § 2243 in extradition habeas); Part IV.E (discussing the inadequacy of the “some evidence” standard in executive-detention habeas).

26. See infra Part IV.D (discussing implications of the Suspension Clause in extradition habeas).

27. 533 U.S. at 301.
Boumediene28 the Court explains that historically habeas courts have engaged in fact finding in cases of executive and pretrial detention, and concludes that the Suspension Clause mandates a scope of review at least as wide as it was by 1789.

Part II of this Article is a brief introduction to international extradition. Part III, on the other hand, provides an introduction to the law of habeas corpus and an abridged account of the writ’s development from the middle ages to the present. This account supports the argument that historically habeas courts have engaged in fact finding in cases of pretrial and executive detention. It also discusses the early Court cases on extradition habeas and the historical development in cases of state convicts. Finally, in Part IV this Article criticizes the current doctrine of habeas corpus in international extradition, and discusses the implications of the Due Process Clause, the Suspension Clause, and 28 U.S.C. § 2243 on extradition habeas.

II. A PRIMER ON INTERNATIONAL EXTRADITION

Extradition hearings are *sui generis*.29 They are regularly held by federal judges who act as magistrates on behalf of the Executive.30 Magistrates have wide discretion in holding these hearings, which are undertaken according to the applicable extradition treaty, the international extradition statute, 18 U.S.C. § 3181, and the body of jurisprudence that has developed.31 None of the Federal Rules of Civil Procedure or the Federal Rules of Evidence applies directly.32 Normally, the country that requests extradition is not a formal party to the proceedings because its interests are represented by the United States government through the appearance of an Assistant United States Attorney.33

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29. *see Bassioni, supra* note 10, *at* 869 (“The hearing, though *sui generis* in nature, is similar to a probable cause hearing in federal criminal cases . . . .”).
30. Hilton v. Kerry, 754 F.3d 79, 83 (1st Cir. 2014); Harshbarger v. Regan, 599 F.3d 290, 292 (3rd Cir. 2010) (“Extradition is an executive rather than a judicial function.”); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993) (citing United States v. Curtis-Wright Export Corp., 299 U.S. 304, 315–22 (1936)) (“The power to extradite derives from the President’s power to conduct foreign affairs, and thus, in extradition the magistrate judge provides “an independent review function delegated to it by the Executive and defined by statute.”); In re Mackin, 668 F.2d 122, 129–30 (2d Cir. 1981) (§ 3184 vests jurisdiction on individual judges to hold extradition hearings, but not on district courts); In re Extradition of Strunk, 293 F. Supp. 2d 1117, 1119 (E.D. Cal. 2003) (“Extradition proceedings are not Article III jurisprudential proceedings. Rather, they derive from Article II of the Constitution.”).
31. *See* Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) (“Since the technical aspects of extradition procedure are not explicitly stated in the treaty, this country’s laws guide the manner in which a decision is made whether or not an individual may be extradited from this country to Israel.”).
32. *See Bassioni, supra* note 10 at 869.
33. *See* Skaftouros v. United States, 667 F.3d 144, 154 (2d Cir. 2011) (citing Wacker v. Bisson,
International extradition has been defined as “the formal surrender of a person by a State to another State for prosecution or punishment.” 34 The government’s burden at the extradition hearing varies from treaty to treaty, but usually the government will have to prove that: (1) the offense for which the extradition is requested is extraditable according to the treaty; 35 (2) there is probable cause to find the relator 36 guilty of that offense; 37 (3) the offense for which extradition is requested constitutes a crime in the United States as well as in the requesting country (“dual criminality”); 38 (4) there is an extradition treaty in force between the United States and the requesting country; 39 and (5) the relator is the person sought by the requesting state. 40 Should the government meet its burden, then the magistrate must consider whether there are any grounds in the treaty, the Constitution, or federal law, to deny the request. 41 Courts have consistently held that extradition treaties are to be liberally construed in favor of extradition so that the United States may comply with its international duties. 42 If there are two viable constructions for an extradition treaty, one that limits extradition, and another that supports it, the one that supports extradition must be adopted. 43

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34 8 F.2d 602, 608 (5th Cir. 1965) (“The complaint in such a proceeding is typically filed by the United States, through the appropriate U.S. Attorney’s Office, acting for and on behalf of the demanding country, which is the ‘real party [in interest].’”).

34. Harvard Research on International Law, Draft Convention on Extradition, Art. 29 Am. J. Int’l L. 21 at Art. 2(a) (Supp. 1935); see also Terliden v. Ames, 184 U.S. 270, 289 (1902) (extradition consists of “the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.”).

35. Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005).

36. “Relator” is the term regularly used to refer to the person who is the subject of the extradition request.

37. Cornejo Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000); see United States v. Lui Kin Hong, 110 F.3d 103, 110 (1st Cir. 1997) (“[U]nder 18 U.S.C. § 3184, the judicial officer’s inquiry is limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered. The larger assessment of extradition and its consequences is committed to the Secretary of State.”).

38. Lui Kin Hong, 110 F.3d at 114 (“The purpose of the dual criminality requirement is simply to ensure that extradition is granted only for crimes that are regarded as serious in both countries.”)

39. Id. at 111.

40. Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976) (“The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws.”); see also Linda Friedman Ramirez, Evolving Extradition, The CHAMPION, Sept.–Oct. 2009, at 44.

41. Bassion, supra note 10, at 870.


43. Id.
Extradition is an executive function. The power vested on extradition magistrates is based on Article II of the Constitution, rather than Article III. Because there is no direct involvement of the judiciary in the extradition hearing, there is no right to appeal. The relator, however, may request a review of the magistrate’s determination by means of a petition for a writ of habeas corpus before the federal district court with jurisdiction, and then may appeal such decision to the corresponding circuit court. The decision of the circuit court, in turn, may be reviewed through certiorari before the Supreme Court.

The United States, on the other hand, cannot appeal a magistrate judge’s adverse determination, but may refile its request because there is no double jeopardy defense in extradition. If after conducting a hearing the magistrate certifies the extradition request, the case will be forwarded to the Department of State where the Secretary will have the final say in the matter. The Secretary of State has the discretion to extradite the relator, refuse extradition, or extradite with conditions.

Even though extradition is an executive function, courts do have a role in extradition. Through habeas, courts have the duty to say what the law is, and have the duty to ensure the legality of the petitioner’s extradition. Thus, in order to preserve in the extradition process a modicum of separation of powers, the scope of habeas review must be wide. Habeas courts must also afford petitioners as much process as necessary to allow them a meaningful chance to rebut all factual and legal contentions against them.

The proper role of habeas corpus in international extradition will be discussed in Part IV of this Article. In order to provide a proper context for such discussion, however, this Article will discuss next the nature of

44. See supra note 30.
45. Id.
46. In re Metzger, 17 F. Cas. 232, 238 (S.D.N.Y. 1847); Ornelas v. Ruiz, 161 U.S. 502, 508 (1896); Wright v. Henkel, 190 U.S. 40, 57 (1903); In re Mackin, 668 F.2d 122, 127–28 (2d Cir. 1981) (citing over a dozen cases supporting such proposition). Choe v. Torres, 525 F.3d 733, 736 n. 2 (9th Cir. 2008) (“While the magistrate judge’s determination that Choe is extraditable is not subject to direct appeal, it is subject to collateral review by way of habeas corpus.”). But see In re Howard, 996 F.2d 1320, 1326 (1st Cir. 1993) (holding that Supplementary Treaty with Great Britain of 1986 provides direct appeal rights for certain provisions of the treaty).
47. Id.
48. See BASSIOUNI, supra note 10, at 911. See also Choe v. Torres, 525 F.3d at 736, n.1 (“Courts may only certify crimes for extradition. 18 U.S.C. § 3184. The ultimate decision whether to extradite is left to the Secretary of State”); In re Mackin, 668 F.2d at 125–30 (orders certifying extraditability are non-appealable because they do not emanate from constitutional courts).
49. In re Mackin, 668 F.2d at 128 (“the requesting party may refile the extradition request.”); United States v. Doherty, 786 F.2d 491, 501–03 (2d Cir. 1986). The Government, however, must be prudent in relifting cases and must not abuse of the process to harass individuals.
50. Choe, 525 F.3d at 736.
habeas corpus and its historical development.

III. THE DEVELOPMENT OF HABEAS CORPUS IN THE UNITED STATES

There are various types of habeas corpus procedures, but the one most commonly discussed, and the one this Article is concerned with, is habeas corpus *ad subjiciendum*. It is in essence a judicial procedure to question the legal basis for a person’s deprivation of liberty. The procedure creates no substantive legal rights, but constitutes a mechanism to enforce rights that are granted elsewhere in the law.

Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court. It was settled over a hundred years ago that ‘[t]he prosecution against [a criminal defendant] is a criminal prosecution, but the writ of habeas corpus … is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right.’ Any possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such nonappellate functions as the allegations of facts, 28 U.S.C. §2242, the taking of depositions and the propounding of interrogatories, §2246, the introduction of documentary evidence, §2247, and, of course, the determination of facts at evidentiary hearings, §2254(d).

The filing of a petition for a writ of habeas corpus initiates a civil case against the person with custody of the petitioner, which is usually a marshal or the warden of the prison where the petitioner is detained. Once a petition is properly presented, the court must promptly grant it, or order the petitioner’s custodian to show cause why the petition should not be granted. The court must schedule a hearing within five days of having received the custodian’s response (return) to its order. If the parties raise any factual issues, then the court must order the custodian to bring the petitioner/prisoner to the hearing. At the hearing, the petitioner may deny the facts alleged against him in the return, or allege

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56. *Id.* § 2243 (2014).
57. *Id.*
any other material facts, and the court may admit evidence orally, through depositions, or affidavits. These cited habeas statutes provide, at a minimum, a skeleton of the rights that must be afforded to a petitioner in habeas corpus.

Habeas rights are recognized in the Suspension Clause of the Constitution and provided by federal statutes. The Suspension Clause provides that “[t]he 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.” There are three main federal statutes that embody such rights: 28 U.S.C. § 2241, the general habeas corpus statute; 28 U.S.C. § 2254, which provides habeas corpus rights in federal courts for state prisoners; and 28 U.S.C. § 2255, which mandates specific habeas protection for federal prisoners. This Article is mostly concerned with §§ 2241, 2243 and 2246, all of which are applicable to petitioners being requested for extradition.

Section 2241 has been construed as creating two main jurisdictional requirements: first that the petitioner be “in custody,” and second, that his custody be “in violation of the Constitution or laws or treaties of the United States.” Once the habeas court determines that these two initial requirements are met, it then must consider whether the petitioner has been detained pursuant to a sentence of conviction by a state or federal court (postconviction), or whether the petitioner is being detained by the Executive without a trial or pretrial. When detention takes place after trial and conviction, petitioners are afforded a more circumscribed review because they are understood to have benefitted from the comprehensive procedural protections of the criminal adversarial process, and must have benefited also from one or various layers of

60. Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (“[A]ll agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that ‘the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,’ and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.”).
61. Boumediene v. Bush, 553 U.S. 723, 739 (2008) (“[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the framers the writ had a centrality that must inform the proper interpretation of the Suspension Clause.”).
63. See supra note 55; Skaffourus v. United States, 667 F.3d 144, 157 (2d Cir. 2011) (“Because extradition orders are regarded as preliminary determinations, and not ‘final decisions’ appealable as of right under 28 U.S.C. § 1291, they may only be reviewed by a petition for a writ of habeas corpus under 28 U.S.C. § 2241.”) (citation omitted).
appellate review. On the other hand, when detention is imposed by the
Executive without a trial, petitioners are entitled to a wider scope of
review, and to more process through habeas, because they are being
detained without significant procedural protections. 65

The issuance of a writ of habeas corpus does not operate as res
judicata against a future request for extradition by the same country.66
Issuance of the writ implies only that the petitioner was illegally
detained as per the particular facts and conditions considered in the
habeas proceeding, and that relief from such imprisonment must be
afforded. 67 The requesting country may file a second or further request
for extradition after the petitioner has been released on habeas, and may
then attempt to cure the defects found by the habeas court. 68 On her
part, the petitioner-relator may appeal the decision of the habeas district
court to the corresponding circuit court, and then through certiorari to
the Supreme Court.69

The law of extradition habeas has developed separately from other
contexts, such as postconviction and military detention. It would be
incorrect, however, to conclude that the history of habeas in other
contexts has not, or should not, influence its development in
international extradition. Its development in the postconviction context,
for example, is relevant to understand why the courts have limited
procedural rights in extradition habeas so much, and why procedures in
extradition habeas must be different.

Next this Article discusses the development of habeas corpus in
England and the United States.

A. A Brief History of Habeas Corpus

The origins of habeas corpus are traced to the middle ages.70
Procedures that have some resemblance to what we now know as habeas
corpus are believed to have been used as early as the times of Edward I
in England.71 Originally, the writ was not meant to protect the public

65. Boumediene, 553 U.S. at 783 ([“w]here a person is detained by executive order, rather than,
say, after being tried and convicted in a court, the need for collateral review is most pressing.”); I.N.S. v.
St. Cyr, 533 U.S. 289, 301 (2001) (“At its historical core, the writ of habeas corpus has served as a
means of reviewing the legality of Executive detention, and it is in that context that its protections have
been strongest.”).


68. 28 U.S.C. § 1291; Brown, 344 U.S. at 458.

69. See Bassiouni, supra note 10, at 911.

70. ROBERT SEARLES WALKER, HABEAS CORPUS, WRIT OF LIBERTY—ENGLISH AND AMERICAN

71. Id.; Boumediene, 553 U.S. at 740 (citing 9 W. HOLDsworth, A HISTORY OF ENGLISH LAW
112 (1926)).
from oppressive or tyrannical governments, or to enforce the rights of
due process.\textsuperscript{72} In its origins, the writ was mostly used by kings, through
their courts, to obtain the presence of prisoners and their jailers in order
to ensure that the jailers were not abusing of their powers.\textsuperscript{73} Thus, the
King’s Bench used the writ mostly to control the power of those who
detained and imprisoned others in the name of the King.\textsuperscript{74}

As the law in England transformed, however, so did habeas corpus.
Some of those transformations were inspired by Magna Carta, which is
considered one of the main philosophical foundations of our current
doctrine.\textsuperscript{75} In its relevant part, Magna Carta provided that “[n]o free
man shall be taken or imprisoned or dispossessed, or outlawed, or
banished, or in any way destroyed, nor will we go upon him, nor send
upon him, except by the legal judgment of his peers or by the law of the
land.”\textsuperscript{76} Prisoners in England, and later in the American colonies,
would fight for their freedom arguing that their imprisonment was
against Magna Carta.\textsuperscript{77}

By the 1600’s, habeas corpus had gone through some
transformations. Courts began using it more as a restraint upon the
powers of the king, than as one of his powers.\textsuperscript{78} In 1640, in response to
abuses by the Crown, the English Parliament extended the right of
habeas corpus through a statute which authorized judges to release those
who had been arbitrarily imprisoned for felonies or treason.\textsuperscript{79} And in
1679, Parliament enhanced those rights by codifying the practices of the
King’s Bench through the Habeas Corpus Act. New provisions were
adopted, such as tripling the number of judges who could issue the writ,
but most importantly, the statute ratified powers already granted to
judges by the common law to check on those acting on the king’s
behalf.\textsuperscript{80}

During the seventeenth century, courts began to use habeas to inquire

\begin{footnotes}
\footnote{72. See Halliday & Wright, supra note 52, at 583, 586–88.}
\footnote{73. Id.}
\footnote{74. NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY, USES,
ABUSES, AND THE FUTURE OF THE GREAT WRIT 4 (2011); see Halliday & Wright, supra note 52, at
672–73.}
\footnote{75. HOLDSWORTH, supra note 9, at 112; Dallin H. Oaks, Legal History in the High Court, 64
MICH. L. REV. 451, 465 (1966).}
\footnote{76. Art. 39, in SOURCES OF OUR LIBERTIES 17 (R. Perry & J. Cooper eds. 1959).}
\footnote{77. WALKER, supra note 70, at 97–98.}
\footnote{79. Halliday & White, supra note 52, at 672; see also Boumediene, 553 U.S. at 742.}
\footnote{80. KING & HOFFMAN, supra note 74, at 5–6. See Oaks, supra note 75, at 466 (1966) (citing
Bushell’s Case, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670)) (Court issued writ of habeas corpus
partly because the return did not set out the particulars of the alleged crime, which in this case was
contempt).}
\end{footnotes}
into the bases of detentions and arrests, and began to dig into facts.81 Contrary to the traditional historical account that habeas petitioners were not allowed to contest the statements provided by jailers in support of detention, it is now understood that judges of the time “generated myriad ways to elicit evidence” from documents and in-person testimony.82 “[J]udges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention.”83 There is also significant evidence that early habeas courts often considered written depositions upon which prisoners were arrested,84 and would even consider oral testimony when examining pre-trial proceedings.85 In Ex Parte Bollman, an early nineteenth century case, the Court examined the written depositions upon which the petitioners had been accused, and discharged them after concluding that they had not committed the crime.86

In the American colonies, use of the writ did not take place until the 1680s.87 Up until this period, there was practically no use for the writ because of the living, political and social conditions of the colonies.88 Social interest in mere survival far outweighed any interests in personal rights.89 Thus, relatively complex legal processes, such as habeas corpus, would have been practically impossible to institute, even though use of the writ in England was well developed.

Habeas corpus presupposes some sort of separation of powers; in particular, it requires the existence of an independent judiciary.90 In the early colonies, however, there was little separation between administrative, adjudicating, and policy-making functions.91 The entities that ran the local governments usually acted as legislatures and

81. Garrett, supra note 19, at 62.
82. Halliday & White, supra note 52, at 588 (“the thrust of early modern usage shows us that the king’s justices were generally ready to investigate the factual and legal ground of imprisonment orders premised on allegations that a person was an enemy alien, a danger to the state, or both.”).
83. Garrett, supra note 19, at 63 (citations omitted).
85. U.S. v. Johns, 4 Dall. 412, 413 (U.S. Cir. Ct. 1806).
86. 8 U.S. 75 (1807).
87. WALKER, supra note 70, at 90.
88. Id. at 91.
89. Id.
91. Id. at 92.
courts, as well as administrative bodies, at the same time. Because the British crown took little interest in the administration and governance of the colonies, the colonists were less pressed to look for protection from executive imprisonment.

Beginning in the 1680s, however, the British Crown became more involved in the administration of the colonies. As part of its larger involvement in colonial affairs, the Crown denied various attempts by the colonies to institutionalize habeas corpus. Such incremental involvement, as well as the Crown's refusal to allow use of the writ, provoked resentment in the colonial population. Thus, it was not until the 1690s that habeas corpus was significantly incorporated into the colonies' legal systems.

By 1776 at least four colonial governments had instituted habeas corpus as part of their statutes, while other colonies rapidly followed. In 1777, however, the British government suspended use of the writ in the colonies until 1783. This and previous manipulations of the writ by the British government reinforced the idea in the colonists that the protections afforded by it were necessary in any healthy form of government. By 1789 Americans clearly understood the value of habeas corpus as a restraint on governmental power. Transcripts of the ratification debates show that the Framers considered the writ an "essential mechanism" to create a government with separated powers, and a means to avoid the abuses against individual liberty that are typical of undivided power.

Even though the framers considered habeas corpus a valuable tool of freedom, they did not include in the Constitution, or later in the Bill of Rights, a provision for habeas corpus as a legal remedy. However, the ratifying conventions and subsequent judicial decisions have interpreted the Due Process Clause of the Fourteenth Amendment as implying a federal habeas corpus right.

92. Id. ("The decade of the 1680's was one of agitation for, rather than use of the writ. New directions of royal policy, the abandonment of 'benign neglect,' created a need not before felt in the colonies—a need for protection against arbitrary executive power of imprisonment.").
93. See id. at 94 ("The very factors that have been advanced to explain the absence of habeas corpus, explain also why it was largely unneeded. The smallness of the communities, the simplicity of governmental form, the equitable nature of law and administration all conspired to produce a quick and summary justice. It was frontier justice in every sense of the term, and prevailed well into the latter half of the Seventeenth century, especially on the local level.").
94. Id. at 101.
95. Id. at 102.
96. Id. at 103.
97. Halliday & Wright, supra note 52, at 673.
98. Id. at 677.
99. Boumediene v. Bush, 553 U.S. 723, 743 (2008) ("Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts.'") (citations omitted).
100. Id. at 739–40 ("Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counselled the necessity for..."
of Rights, any clause literally providing for substantive habeas rights. Instead, Article I of the Constitution provides that “[t]he 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.” 101 The framers assumed that the common law version of the writ remained available as it then existed, and thus served as a basis for the application of these rights by the courts. 102 It was expected that the courts would develop the scope and content of habeas through their rulings in common law cases. 103

As to the issue of scope, the prevailing view is that from 1789 to 1867 the writ was mostly limited to reviewing jurisdictional issues. 104 The Judiciary Act of 1867, however, significantly broadened habeas scope in substance and procedure. It afforded state convicts the right to contest their detentions in federal courts and clarified the powers and duties of habeas courts to find and determine facts. 105 By 1867, Congress was anticipating resistance to its Reconstruction laws by the former confederate states, and thus for the first time granted authority to the federal courts to collaterally review the legality of state convictions. 106 Through the Act, Congress hoped to protect former slaves and federal Reconstruction officials from recalcitrant state officials and judges who refused to follow Reconstructions laws and initiatives. 107

The Act’s jurisdictional coverage, however, was as wide as possible. It was meant to cover all types of detentions by government officials, and not just cases of state convicts. Congress granted jurisdiction upon all federal courts “to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States[.]” 108 The first

specific language in the Constitution to secure the writ and ensure its place in our legal system.”). 101. U.S. CONST., Art. I, § 9, cl. 2.
102. Halliday & Wright, supra note 52, at 677, 680.
103. Id. at 680; WALKER, supra note 70, at 113 (“[I]t is a bit surprising, given the importance of habeas corpus in Anglo–American political and legal thinking, that there was so little attention given it in the debates at Philadelphia, and in the text of the Constitution itself. Nor did it figure in Madison’s composition of the Bill of Rights. Everyone simply assumed that it had an assured place in the legal scheme of things, and the major problem was to demand that it not be suspended without grave cause . . .”).
105. Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 385. See Gary Peller, In Defense of Federal Habeas Corpus Relitigation, 16 HARV. C.R.–C.L.L. REV. 579, 618 (1982) (“Thus, when viewed in its historical context, the broad language of the 1867 Act must be read literally to require relitigation of every federal question; to read it more narrowly would indeed be to tear habeas corpus entirely out of the context of its historical meaning . . .”).
106. KING & HOFFMANN, supra note 74, at 50–51.
107. Id. at 50.
Court case to consider the Act, *Ex parte McCardle*, described the reach of its jurisdiction in these terms:

This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.\(^{110}\)

As stated by Representative Lawrence during discussion of the bill, the Act was meant to “enforce the liberty of all persons . . . to enlarge the privilege of the writ of habeas [sic] corpus, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them.”\(^{111}\)

Among the procedural rights provided to petitioners by the Act were the “taking of testimony and [the] trying [of] . . . facts anew in habeas hearings.”\(^{112}\) The Act specifically provided that “[t]he petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath.”\(^{113}\) It also provided that the habeas court or judge “shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested[.]”\(^{114}\)

These “hearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 U.S.C. § 2243.”\(^{115}\) They “restat[e] what apparently was the common law understanding” of “the power of the federal courts to take testimony and determine the facts *de novo* in the largest terms.”\(^{116}\) According to the Court, “a narrow view of the hearing power would totally subvert Congress’ specific aim in passing the Act of February 5, 1867[.]”\(^{117}\)

After passing of the 1867 Act, the Court seems to have allowed some measure of fact-finding in some cases.\(^{118}\) For example, in *Frank v.*

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109. 73 U.S. 318 (6 Wall.) (1867).
110. *Id.* at 325–26.
114. *Id.*
116. *Id.* (“[T]his Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention.”).
117. *Id.* at 312.
118. *King & Hoffman*, *supra* note 74, at 52–53.
Magnum, the Court stated that a petitioner was entitled to contest the record of his conviction “to a sufficient extent to test the jurisdiction of the state court[.]”

The effect [of the 1867 Act] is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to ‘dispose of the party as law and justice require.’

Such liberality in procedural scope, however, was temporary. Once the political interest in supporting Reconstruction gave way to interests in state sovereignty, “the federal courts reverted to their historic reluctance to intrude in the affairs of the states.” Despite the expansive measures of the 1867 Act, courts remained limiting the scope of postconviction habeas mostly to jurisdictional challenges, and remained providing little process. It was not until the 1950s and 1960s that the Court finally widened its scope.

The scope of habeas corpus in international extradition, on the other hand, was first considered by the Court in Benson v. McMahon, followed by the cases of In re Oteiza y Cortes, Fong Yue Ting v. United States, Ornelas v. Ruiz, Bryant v. United States, Elias v. Ramirez, and Fernandez v. Phillips. Since 1925 the Court has not addressed the issue again. In these cases the Court established the doctrine of “narrow scope” in extradition habeas that remains being cited and partially followed.

In Benson the Court cited to no authorities to conclude that habeas corpus “does not operate as a writ of error” and that:

the main question to be considered upon such a writ of habeas corpus must be, had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul; and also was there sufficient legal ground for his action in committing the

120. Id.
121. KING AND HOFFMAN, supra note 74, at 53.
122. 127 U.S. 457 (1888).
123. 136 U.S. 330 (1890).
124. 149 U.S. 698 (1893).
126. 167 U.S. 104 (1897).
prisoner to await the requisition of the Mexican authorities?129

Even though Benson was decided twenty years after the enactment of the Judiciary Act of 1867, and that the Act provided for the hearing and determination of facts through habeas, the Court made no mention in its decision of either the Act or of its fact-finding provisions.130

Following Benson, the Court again addressed the issue of habeas scope in Oteiza y Cortes, Ornelas, and Fernandez. Oteiza y Cortes uses similar language to Benson to insist in a similar narrow scope of review in extradition habeas, but used the term “competent legal evidence” to describe the standard to be used in considering the evidence of criminality against the relator.131 Oteiza y Cortes also added an additional issue that the habeas court must consider: whether the offense charged is within the treaty.132 As part of its analysis, the Court cited to no authorities other than Benson in support of its narrow scope of review holding.133 Ornelas, on the other hand, followed Benson and Oteiza y Cortes using basically the same language, but added that the issue of extraditability is a “question of mixed law and fact,” although “chiefly of fact,” and that the determination of the magistrate on this matter “cannot be reviewed on the weight of the evidence.”134 Finally, in Fernandez the Court followed the preceding cases to apply the narrow scope of review doctrine. Its main feature, however, is that it further explained that habeas corpus “[i]s not a means for rehearing what the magistrate already has decided.”135 Since Fernandez, the Court has not addressed again the issue of scope in extradition habeas.136

In 1948, Congress made a revision of the federal codes through which it divided habeas corpus legislation into three main statutes: 28 U.S.C. § 2241 et. seq., the successor of § 14 of the Judiciary Act of 1789; 28 U.S.C. § 2254, the substitute of the Habeas Corpus Act of 1867; and 28 U.S.C. § 2255, a new habeas statute addressed to those convicted of federal crimes. Sections 2243 and 2246, also enacted in 1948, deal with procedural rights. Section 2243 provides, inter alia, that the petitioner may deny through habeas any of the facts alleged against him, or allege any other material facts; and that “[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice

132. Id.
133. Id.
require.”137 Section 2246, on the other hand, provides that evidence may be taken in habeas “orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.” These statutes, it must be noted, are generally applicable to all types of habeas proceedings, including extradition habeas, with the exception of § 2254, which was specifically enacted for the protection of state convicts, and § 2255, which seeks to protect those illegally detained pursuant to federal sentences.

Despite these legislative advances, it was not until 1963 that the Court in *Fay v. Noia*138 and *Townsend v. Sain*, two post-conviction cases,139 recognized the procedural rights granted to petitioners by Congress since the 1867 Act. In *Fay v. Noia* the Court held that a federal statutory requirement that petitioners must exhaust state court remedies as a pre-requisite for federal habeas jurisdiction, does not bar federal courts from entertaining habeas petitions unless the petitioner *deliberately bypasses* or avoids the state court’s procedure.140 In *Townsend*, on the other hand, the Court concluded that habeas petitioners do have a right to a rehearing and to a *de novo* determination of facts in certain circumstances, such as when “the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing.”141 The fact-finding powers and duties recognized in *Townsend* are more significant than any recognized by the courts in international extradition, even though *Townsend* is a state convict case constrained by its nature to considerations of comity to the state courts. The Supreme Court142 and Congress143 later limited *Townsend*, but it still stands for the proposition that in certain circumstances even habeas courts reviewing the convictions of state prisoners do have a duty to re hear the case.

During the first decade of the twenty first century, the Court delivered three very important decisions on habeas corpus that are relevant to this Article: *I.N.S. v. St. Cyr*, *Hamdi v. Rumsfeld*, and *Boumediene v. Bush*. In these cases the Court clarified the statutory and constitutional bases of habeas corpus rights and underscored the writ’s importance in our legal system. It stressed the importance of allowing habeas petitioners a meaningful and timely opportunity to contest the factual basis of their

139. 372 U.S. 293 (1963); *Keeney*, 504 U.S. at 5.
140. 372 U.S. at 398–99.
141. 372 U.S. at 313–14.
142. *Keeney*, 504 U.S. at 1.
detentions, and distinguished between postconviction and executive detention cases. According to the Court, petitioners are entitled to more process in habeas when they are detained by the executive without a conviction.

B. Habeas Corpus in Recent Executive Detention Cases: St. Cyr, Hamdi, and Boumediene

1. I.N.S. v. St. Cyr

In 2001 the Court held in *I.N.S. v. St. Cyr* that the Suspension Clause guarantees a substantive right to Habeas Corpus, and that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”\(^{144}\) In *St. Cyr* the Court considered whether immigrants enjoyed habeas jurisdiction pursuant to 28 U.S.C. § 2241 to contest an order of deportation. The Court held that habeas jurisdiction exists over deportation cases despite recent congressional amendments to two immigration statutes that modified the jurisdiction of the federal courts. Habeas corpus in executive detention cases was distinguished from other contexts because “[a]t its core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”\(^{145}\) The Court made a brief review of the early history of habeas corpus in England and the United States, and concluded that historically the writ is meant to protect individuals from illegal detention based on jurisdictional errors, errors of law, and mixed questions.\(^{146}\)

*St. Cyr* did not consider the appropriate standard to review factual findings in immigration habeas because the petitioner only raised legal issues on appeal.\(^{147}\) This Article, on the other hand, will not opine on the law of immigration habeas because the complexities of immigration laws put the issue outside of its scope. It must be noted, however, that the process afforded to non-citizens in removal proceedings prior to habeas is substantially higher than that afforded to relators in

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145. *Id.* (citing Note, *Developments in the Law – Federal Habeas Corpus*, 83 *Harv. L. Rev.* 1038, 1238 (1970)) (“While habeas review of a court judgment was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.”).

146. *Id.* at 301–02 (After concluding that “at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789,” the Court added that “the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes.”); Wang v. Ashcroft, 320 F.3d 130, 142–43 (2d Cir. 2003).

147. *Id.* at 306–08.
extradition. Such additional process may justify differences in the way habeas review takes place in immigration as opposed to extradition. Unlike extradition hearings, 148 removal proceedings afford non-citizens an adversarial hearing where they are allowed to introduce evidence, 149 and cross examine adverse witnesses. 150 In addition, non-citizens may appeal their removal orders to the Board of Immigration Appeals. 151

2. Military Detention

During the last decade, the Court considered a series of military detention cases that dealt with individuals classified by the government as “enemy combatants.” The military detentions in question are similar to detentions in the extradition context because they all involve detention by the Executive without a conviction, and because in all of these cases the detainees were not allowed to cross examine witnesses, or introduce their own evidence to contradict the government’s case. 152

As in extradition, in military detention there are important considerations that weigh in favor of the detainee, such as the right to be free from illegal detention by the government; but also many considerations that weigh in favor of the government. Whereas in military cases the government has a strong interest in protecting national security; in international extradition the government’s interests in the development and maintenance of healthy foreign relations, are weighty considerations.

How these conflicting considerations play out, is essential in considering the proper scope for habeas corpus. From 2004 to 2008 the United States Supreme Court decided various important cases of military detention, including Hamdi and Boumediene. In these cases, the Court set out the most essential procedural considerations when dealing with individuals detained by the Executive.

a. Hamdi v. Rumsfeld

As part of the international coalition’s “war on terror,” the Northern Alliance captured Yaser Esam Hamdi in Afghanistan and turned him

148. See supra note 9 and accompanying text.
150. Whitfield v. Hanges, 222 F. 745, 749 (8th Cir. 1915).
152. See supra note 9 and accompanying text. In the context of extradition, the deprivation of liberty suffered by the relator includes not only the detention imposed by the United States while the extradition proceedings are ongoing, but also the surrendering of the relator to a foreign country for the commencement of criminal proceedings against him, or to serve a criminal sentence.
Hamdi was initially transferred to the U.S. Naval Base in Guantanamo Bay, Cuba, but upon learning that he was an American citizen he was moved to a naval brig in Norfolk, Virginia. Hamdi was arrested pursuant to a congressional Authorization for Use of Military Force (AUMF) which allowed the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001.153

Hamdi filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 through his father. He claimed, \textit{inter alia}, that his detention without charges violated the Fifth and Fourteenth Amendments to the United States Constitution. In response, the government filed a motion to dismiss supported by the declaration of one Michael Mobbs, a Special Advisor to the Under Secretary of Defense for Policy. The government contended that Hamdi was an “enemy combatant,” and that such status justified his indefinite detention without formal charges or proceedings.154 Mobbs’ declaration stated that he was not personally acquainted with the facts relevant to Hamdi’s arrest, but that he had reviewed the relevant records and reports, and thus was familiar with the facts. In his declaration, he set out some of the facts upon which the government supported its understanding that Hamdi was an “enemy combatant.”155 Mobbs further declared that Hamdi was labelled an enemy combatant “[b]ased upon [Hamdi’s] interviews and in light of his association with the Taliban.”156 The government argued that it relied on the Mobbs’ declaration and on a subsequent interview of Hamdi to determine that he met the criteria for “enemy combatant.”157 Mobbs’ declaration, however, was the only piece of evidence presented by the government to the District Court.

The District Court, sitting on habeas, found that the Mobbs declaration alone was not enough to support detention. It criticized the hearsay nature of the government’s evidence and ordered the government to produce “numerous materials for in camera review.” The government sought to appeal the “production order,” but instead the District Court certified to the Fourth Circuit the question of whether the sole declaration of Mobbs was sufficient “to allow a meaningful judicial review of [Hamdi’s] classification as an enemy combatant.”158 The Fourth Circuit reversed the production order. It held that “because it

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156. \textit{Id.} at 513.
157. \textit{Id.}
158. \textit{Id.} at 514.
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was undisputed that Hamdi was captured in a zone of active combat in a foreign theatre of conflict,” no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the government’s assertions was necessary or proper.” 159

When the case came to the Court, it was tasked with determining the extent of factual inquiry, if any, that the habeas court was allowed to exercise. The plurality began its opinion by first considering 28 U.S.C. § 2241 and its companion statutes. 160 Referring to the minimum rights afforded by § 2241, the plurality concluded “that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.” 161 The plurality then assessed some of the habeas court’s remaining fact finding capabilities by applying the balancing test of Mathews v. Elridge. 162 It held that the Fifth’s Amendment’s Due Process clause requires, at a minimum, that an American citizen petitioning for habeas corpus under §2241 be afforded an opportunity to be heard in a timely and “meaningful manner,” and be given “some opportunity to present and rebut facts.” 163 In reversing the Fourth Circuit’s decision, the plurality concluded that “the circumstances surrounding Hamdi’s seizure cannot in any way be characterized as ‘undisputed,’ as ‘those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.” 164

b. Boumediene v. Bush

As in Hamdi, in Boumediene the military detainees were designated by the government as “enemy combatants.” However, whereas Hamdi was an American citizen, imprisoned at the time in Virginia, in Boumediene the habeas petitioners were aliens who remained detained during their legal proceedings at Guantanamo Bay, Cuba. 165 In 2005, and while Boumedine was imprisoned in Guantanamo, Congress passed the Detainee Treatment Act (DTA). This statute mandated new procedures to review the Executive’s determination of “enemy

159. Id. (citing Hamdi v. Rumsfeld, 316 F.3d 450, 459 (2003)).
160. Id. at 525.
161. Id. at 526.
162. Id. at 528-29.
163. Id. at 526, 533.
164. Id. at 526 (citations omitted).
The DTA striped all courts in the United States of jurisdiction to entertain a petition for a writ of habeas corpus on the issue of “enemy combatant” classification. It also limited the review of the “enemy combatant” classification to a direct appeal to the United States Court of Appeals for the District of Columbia.

One of the main issues in Boumediene was whether the protections of the DTA equaled the minimum protections guaranteed to petitioners in habeas corpus, as required by the Suspension Clause. The Court held that they did not. In so doing, the Court explained some of the fact-finding duties of habeas courts as required by due process and the Suspension Clause. It also explained the authority of habeas courts to assess the sufficiency of the evidence, and their duty to admit and consider relevant exculpatory evidence in cases of executive detention.

Having introduced the main principles of international extradition, and having discussed the historical development of habeas corpus, and the recent jurisprudence by the Supreme Court in St. Cyr, Hamdi, and Boumediene, it is now proper to discuss the main issues of habeas corpus in international extradition.

IV. THE PROPER SCOPE OF HABEAS CORPUS IN INTERNATIONAL EXTRADITION: IMPLICATIONS ON EXTRADITION HABEAS OF 28 U.S.C §§ 2241, 2243, 2246; THE DUE PROCESS CLAUSE; THE SUSPENSION CLAUSE; AND THE COURT’S DECISIONS IN ST. CYR, HAMDI AND BOUMEDIENE

Historically, courts have held that the substantive scope of review in extradition habeas is narrow. Its scope is settled to at least cover inquiries as to whether: (1) the extradition magistrate acquired jurisdiction over the issue and the person of the relator; (2) the crime for which extradition is sought is included within the treaty as an extraditable offense; and (3) there is competent evidence to support the

168. Id.
169. Boumediene, 553 U.S. at 786.
finding that there is probable cause to commit the relator to trial.\textsuperscript{171} Many courts, however, have adopted a “wide” or “expanded” substantive scope of review, though maintaining that the scope is narrow.\textsuperscript{172} The wide scope normally includes, in addition to the above inquiries, issues as to whether constitutional, treaty, or statutory rights have been violated.\textsuperscript{173} It has been held, for instance, that constitutional errors in extradition orders must be considered through habeas because the United States government must only act in conformity with the Constitution.\textsuperscript{174}

Even though the circuit courts have widened the scope of extradition habeas on substantive issues, they remain applying the old doctrines of \textit{Benson} and its progeny which conflict with 28 U.S.C. § 2243 and with our modern constitutional doctrines of due process and habeas corpus. Circuit courts regularly refuse to rehear the evidence through habeas and apply low level standards of review such as “clear error,” or “competent evidence” on the extradition magistrates’ determinations of probable cause.\textsuperscript{175} Such process, or the lack thereof, violates due process as mandated by the Fifth Amendment, the Suspension Clause, and the literal mandates of the habeas corpus statutes, 28 U.S.C. §§ 2241, 2243, and 2246. In the next subparts this Article discusses the conflicts between extradition habeas jurisprudence and modern constitutional and statutory law.

\textit{A. The Development of Extradition Habeas Doctrine}

Jurisprudence in extradition habeas has changed little since the late nineteenth century despite significant developments in the law of habeas corpus in other areas. In \textit{Benson v. McMahon} the Court considered for the first time the scope of habeas corpus in extradition, and limited it to

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\item 171. Santos v. Thomas, 779 F.3d 1021, 1024 (9th Cir. 2015); Sacirbey v. Guccione, 589 F.3d 52, 62–63 (2nd Cir. 2009).
\item 172. Ordinola v. Hackman, 478 F.3d 588, 598–99 (4th Cir. 2007) (“Under habeas review, ‘the political offense question is reviewable . . . as part of the question of whether the offense charged is within the treaty.’”); John G. Kester, \textit{Some Myths of the United States Extradition Law}, 76 Geo. L.J. 1441, 1473 (1988) (“It is clear enough from the cases that appellate courts, often without bothering to explain the exact scope of their review, will look at claims that an extradition hearing was conducted in a manner that grossly violated treaty or constitutional guarantees.”).
\item 173. \textit{See In re Burt}, 737 F.2d 1477 (7th Cir. 1984).
\item 175. Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011) (citing \textit{Fernandez}, 268 U.S. at 312); Haxhiaj, 528 F.3d at 286–87; Ntakirutimana, 184 F.3d at 424 (“A writ of habeas corpus in a case of extradition is not a means for rehearing the findings of the committing court.”); In re Manzi, 888 F.2d 204, 205 (1st Cir. 1989); \textit{In re Burt}, 737 F.2d at 1483 (citing \textit{Fernandez}, 268 U.S. at 312); Eain v. Wilkes, 641 F.2d 504, 508–09 (7th Cir. 1981). \textit{But see D’Amico v. Bishop}, 286 F.2d 320, 323 (2d Cir. 1961) (affirming power of district court through habeas to remand case to extradition magistrate for further factual findings.).
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\end{footnotesize}
a narrow set of questions. The Court reaffirmed this position in various cases decided during the late nineteenth and early twentieth centuries, the last of which is Fernandez v. Phillips. In Fernandez, the Court used the following language to refer to the narrow scope of review to be applied:

That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is only available to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Perhaps for lack of guidance from the Court, the circuit courts remain citing Fernandez as the main authority for a narrow scope of review. This narrow scope includes a prohibition to rehear the evidence through habeas, and the use of low level standards of review on the probable cause determination by the extradition magistrate. The doctrines of Fernandez, however, lack substantial authority, ran against provisions of the Judiciary Act of 1867, and today conflict with the habeas corpus statute, the Constitution, and Court jurisprudence.

The authority supporting Fernandez’s doctrines on extradition habeas is difficult to grasp. Fernandez based its legal conclusions mostly on Benson and its progeny, but none of these cases provide a rationale for its conclusions. Benson and its progeny simply cite each other and repeat a similar version of the “narrow scope of review” doctrine. If we track these citations backwards, we end up with Benson, which again, cites to no authority and provides no rationale. Furthermore, the doctrines on extradition habeas in Benson and its progeny directly contravened provisions of the Judiciary Act of 1867, which literally mandated habeas courts to hear and determine the facts. In none of

177. See supra notes 122–28 and accompanying text.
178. See Semmelman, supra note 136, at 1211 (“The Court has repeatedly reaffirmed that these issues are the only ones within the scope of a court’s authority on habeas corpus review of a finding of extraditability. However, the Court has not spoken on the subject since 1926.”).
179. 268 U.S. 311, 312 (1925).
180. See supra note 169.
181. See supra notes 122–36 and accompanying text; supra note 175.
182. Id.
183. Id.
184. See supra note 130 and accompanying text.
these cases did the Court care to explain why its rulings conflicted with the Act, as none of them even cite the statute. None of these cases, additionally, discuss fact finding in extradition habeas in the context of due process or the Suspension Clause.

Since Fernandez, the Supreme Court has not entertained the issue of the proper scope of habeas in extradition although the law of habeas corpus has developed substantially through legislation and jurisprudence. Statutes enacted in 1948, and a wealth of Court jurisprudence in state convict and military detention habeas, have significantly transformed the doctrines of habeas corpus since the early decades of the twentieth century. Most of these developments, however, have not taken root in extradition habeas. In practice, the circuit courts have widened the substantive scope of extradition habeas by considering constitutional and other legal challenges, but they remain citing the doctrine of “narrow scope” as the applicable standard. The circuit

186. These fact-finding provisions in the Act of 1867 are similar to the ones currently contained in 28 U.S.C. § 2243.

187. See In re Burt, 737 F.2d 1477, 1484 (7th Cir. 1984) (“[T]he broad language of Fernandez, which on its face would appear to restrict the scope of inquiry here, must be construed ‘in the context of its time and in the context of subsequent development of the scope of habeas corpus review.’

188. Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978) (Chambers, C.J., concurring) (“The ‘victim’ of an extradition order generally gets a pretty broad review under habeas corpus, notwithstanding preachments that it is extremely limited.”); In re Ahmad, 726 F. Supp. 389, 396 (E.D.N.Y. 1989) (“In practice, however, habeas review in extradition cases has been somewhat broader than Justice Holmes suggested should be the case.”); Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (considering through habeas review a due process constitutional challenge and an alleged violation to the Convention Against Torture and its U.S. implementing legislation); Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011) (“Despite the narrow scope of habeas review in the extradition context, it is nevertheless our duty to ensure that the applicable provisions of the treaty and the governing American statutes are complied with.”); Noriega v. Pastrana, 564 F.3d 1290, 1295 (11th Cir. 2009) (“The issue of whether the treaty of extradition has no force because another treaty or law prevents its operation is a fundamental one reviewable through a writ of habeas corpus.”); Mironescu v. Costner, 480 F.3d 664, 669 (4th Cir. 2007) (“[T]he habeas writ indisputably extends to prisoners being held ‘in violation of the Constitution or laws or treaties of the United States.’”); Hoxha v. Levi, 465 F.3d 554, 562 (3rd Cir. 2006) (“A petitioner facing extradition has standing to challenge the validity of the applicable extradition treaty [between the United States and Albania.]”); Ordinola v. Hackman, 478 F.3d 588, 598 (4th Cir. 2007) (“Under habeas review, ‘the political offense question is reviewable . . . as part of the question of whether the offense charged is within the treaty.’”); In re Artt, 158 F.3d 462, 470 (9th Cir. 1998) (considering constitutionality of extradition scheme created by Supplementary Treaty with Great Britain through § 2241; but refusing to consider through direct appeal an issue of treaty construction); Kester, supra note 172, at 1473 (“It is clear enough from the cases that appellate courts, often without bothering to explain the exact scope of their review, will look at claims that an extradition hearing was conducted in a manner that grossly violated treaty or constitutional guarantees.”); but see Garcia-Guillern v. United States, 450 F.2d 1189, 1193 n.1 (5th Cir. 1971) (“[T]he contention that [extraditee] has never been properly or legally charged with a crime in accordance with the treaty is . . . not appropriate for consideration [on habeas review].”)

189. See Sacirbey v. Guccione, 589 F.3d 52, 62 (2nd Cir. 2009) (“Our review of the denial of a petition for habeas corpus in extradition proceedings is ‘narrow’ in scope.”) (citation omitted); Haxhiaj v. Hackman, 528 F.3d 282, 286 (4th Cir. 2008) (“Habeas review of an extradition certification is quite
courts also refuse to review the evidence *de novo*, as it normally would be the case in any original proceeding, and apply low level standards of review to the probable cause determination by the extradition magistrate. These old doctrines run against the general habeas corpus statute, 28 U.S.C. §§ 2241–46 and are inconsistent with the essence of habeas corpus as an original proceeding, which is collateral to the process that ordered detention; the extradition hearing.

**B. Courts in Extradition Habeas Have a Statutory Duty to Rehear the Evidence and Determine the Facts Anew**

Based on the questionable “narrow scope” doctrine of *Fernandez*, habeas courts in extradition refuse to rehear the evidence and to determine the facts anew. Inherent in this doctrine is the common mistreatment of extradition habeas as an appellate procedure, without giving due consideration to the real nature of habeas as an original procedure, collateral to the procedure that precedes it. In order to comply with 28 U.S.C. § 2243, however, courts must rehear the evidence and find facts *de novo*, unless from the face of the habeas petition it is evident that there are undisputed facts that render the petitioner without relief.

Section 2243 provides in part:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

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Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be

narrow, limited to consideration of whether the extradition court properly exercised jurisdiction, whether the crime upon which extradition is sought qualifies under the relevant treaty as an extraditable offense, and whether the record contains sufficient evidence to support the extradition court’s probable cause determination.”); *Takakutinuma v. Reno*, 184 F.3d 419, 423 (5th Cir. 1999) (“The scope of habeas corpus review of the findings of a judicial officer that conducted an extradition hearing is extremely limited.”); *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir. 1981) (“The scope of habeas corpus review in extradition is a limited one, according due deference to the magistrate’s initial determination.”).

190. See supra notes 15–17.

191. See supra Part IV.A.

192. See *Townsend v. Sain*, 372 U.S. 293, 311–12 (1963) (“The whole history of the writ—its unique development—refutes a construction of the federal courts’ habeas corpus powers that would assimilate its task to that of a court of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations.”), overruled by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).
required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

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The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Section 2243 thus allows petitioners to deny the facts alleged against them, and requires habeas courts to hear and determine the facts anew, unless from the face of the petition it is evident that the petitioner is not entitled to relief as a matter of law. In the context of factual issues, petitioners are not entitled to relief as a matter of law if undisputed facts show the existence of probable cause against them. But, if there are facts in dispute, then the statutory default is for the habeas court to hear and determine the facts. These statutory protections, however, conflict with Benson and the circuit court jurisprudence on extradition habeas. As this Article will argue, this conflict should be resolved in favor of applying the statute.

In Sacirbey v. Guccione, the Second Circuit followed Benson and Fernandez to conclude that it was “not at liberty” to review an extradition order because “habeas corpus is not a writ of error.” Sacirbey’s doctrine, copied from Benson and Fernandez, is often repeated by the circuit courts without analysis. Arguing that habeas is not an appellate procedure, however, contradicts the use of a narrow procedural scope. Precisely because habeas is not an appeal, but an

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193. Sosa v. United States, 50 F.2d 244, 255 (5th Cir. 1977); Wright v. Dickson, 336 F.2d 878, 881 (9th Cir. 1964).
194. 28 U.S.C. § 2243 (2012). See also supra Part IV.E.
195. 28 U.S.C. § 2243; See Ornelas v. Ruiz, 161 U.S. 502, 509 (1896) (extradition issue is one of mixed question of law and facts); see also Brown v. Allen, 344 U.S. 443, 458 (1953); Todd E. Pettys, Federal Habeas Relief and the New Tolerance for “Reasonably Erroneous” Applications of Federal Law, 63 OHIO ST. L.J. 731, 740–41 (2002) (“In a long line of habeas cases culminating in Miller v. Fenton, the Court expressly or implicitly reiterated that federal courts must apply a de novo standard of review when examining state court’s application of law to fact.”).
196. Conflicts between case law and existing congressional statutes must be resolved in favor of the application of the statute. See Parham v. Hughes, 441 U.S. 347, 351 (1979) (“[A] court is not free . . . to substitute its judgment for the free will of the people . . . as expressed in the laws passed by popularly elected legislatures.”); United States v. Nat’l City Lines, Inc., 334 U.S. 573, 589 (1948) (“Court’s power to create common law “does not extend to disregarding a validly enacted and applicable statute or permitting departure from it.”); Northwest Airlines v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (“[T]he task of the courts is to interpret and apply statutory law, not to create common law.”). See also Amy Coney Barret, The Supervisory Power of the Supreme Court, 106 COLUM. L. REV. 324, 336 (2006) (“Insofar as the Supreme Court has adopted supervisory rules that undermine existing statutory schemes, scholars have argued that the Court has impinged upon Congress’s legislative power.”).
197. Sacirbey v. Guccione, 589 F.3d 52, 63 (2nd Cir. 2009).
198. “Writ of error” is an old term to refer to an appeal.
199. See Hiroshi Motomura, Immigration Law and Federal Court Jurisdiction Through the Lens
original and collateral procedure, the court is required, or at least empowered, to consider and determine the facts anew. That is what original proceedings do. The habeas court possesses “plenary powers,” to ensure that the detention in question complies with federal law, the Constitution and U.S. treaties.

The whole history of the writ—its unique development—refutes a construction of the federal courts’ habeas corpus powers that would assimilate its task to that of a court of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations.

Habeas corpus’ nature as an original proceeding leaves little room for interpretation. Habeas is the first and only direct intervention of the courts in the extradition process. It is the means through which our legal system allows for a modicum of separation of powers in international extradition. A de novo determination of facts and a rehearing of the evidence is the only way to ensure a significant involvement of the courts in the process.

One reason why the fact-finding mandates of § 2243 are unavoidable in extradition habeas is that there is no other statute limiting its reach. In state-convict habeas, for instance, Congress has limited the reach of § 2243 by specifying the cases in which a rehearing of the evidence may take place through 28 U.S.C. § 2254. No such limitations, however, have been legislated for extradition habeas, so § 2243 should have free reign. The applicability of § 2243 to extradition habeas is supported by several cases, and by Hamdi which cites § 2243 as applicable in

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201. See Fay v. Noia, 372 U.S. 391, 423–24 (1963) ("[T]he traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceeding from what has gone before."), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5–6 (1992). See also Boumediene v. Bush, 553 U.S. 723, 790 (2008) ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court.").

202. Harris, 394 U.S. at 300.


204. See D’Amico v. Bishop, 286 F.2d 320, 323 (2d Cir. 1961); Sandhu v. Burke, 2000 U.S. Dist. LEXIS 3584, at *56 (S.D.N.Y. Feb. 10, 2000); Skaffuros v. United States, 667 F.3d 144, 158 (2d Cir. 2011) ("Because extradition orders are regarded as preliminary determinations, and not ‘final decisions’ appealable as of right under 28 U.S.C. § 1291, they may only be reviewed by a petition for a writ of habeas corpus under 28 U.S.C. § 2241.") (citing Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976));
matters of executive detention. In *Hamdi*, the Court specifically concluded that Congress, through the enactment of 28 U.S.C. §§ 2243 and 2246, provided at least “some opportunity” for petitioners to introduce evidence at their habeas hearings and contest the government’s evidence.

*Hamdi* is mostly cited for its holding that due process requires that a citizen in military detention be afforded “a meaningful opportunity to contest the factual basis for that detention,” and for using the *Mathews v. Elridge* balancing test to determine the level of process to be applied. However, before the *Hamdi* plurality engaged in its due process analysis, it first suggested that §§ 2241, 2243, and 2246 were applicable in all habeas proceedings.

All agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that “the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,” and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.

The plurality recognized in *Hamdi* the nature of statutory habeas as a collateral and original civil proceeding where the petitioner is entitled to introduce evidence, and where the court has the duty to hear the evidence and find the facts. However, because the cited habeas statutes leave untouched many elemental aspects of procedure, such as the standard of proof to be applied, and the availability of discovery, the Court concluded that courts in habeas “retain some ability” to conduct

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206. *Id.*
207. *Id.* at 509.
208. *Id.* at 528–29.
209. *Id.* at 525–26.
210. *See also* Al-Bihani v. Obama, 590 F.3d 866, 876 (D.C. Cir. 2010).
the proceedings.211 The level of process to be afforded in extradition habeas, besides the statutory rights granted by § 2241 et. seq., is a matter to be assessed by considering the due process balancing test of Mathews.212

C. Due Process and Extradition Habeas

In Hamdi the plurality clarified the fact finding duties of habeas courts as required by 28 U.S.C. §§ 2241 and 2243 in cases of executive detention, and used the balancing test of Mathews v. Elridge213 to clarify other fact finding duties not explicitly required by statute.214 In determining the fact finding duties and powers of courts in extradition habeas, courts must first apply §§ 2241, 2243, and 2246. Then they may apply the balancing test of Mathews to the extradition context to determine any remaining duties and powers not established by statute. Applying the Mathews test to international extradition leads to the conclusion that courts in extradition habeas must use “probable cause” as a standard of proof, and reaffirms the statutory mandate of § 2243 that habeas courts must hear and find the facts anew.

When the plurality applied the Mathews test in Hamdi, it concluded that both sides brought up legitimate concerns: the government claiming autonomy rights to determine the procedures it must follow when it is engaged in a war; and the citizen demanding the process he is due before the government deprives him of his liberty.215 “[F]or balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not ‘deprived of life, liberty, or property, without due process of law,’” the test to be used is the one articulated in Mathews v. Elridge.216

The Mathews balancing test considers, on one side of the scale, the burdens the government would assume by providing greater process.217 Hamdi considered many relevant and legitimate governmental interests advanced by the Executive, such as “ensuring that those who have in fact fought with the enemy during war do not return to battle against the United States;”218 that a trial-like habeas hearing would be a distraction on soldiers whose main mission is to wage war; and that “discovery into

211. Hamdi, 542 U.S. at 526.
212. Id. at 528-29.
215. Id.
216. Id. (citations omitted).
217. Mathews, 424 U.S. at 335.
218. Hamdi, 542 U.S. at 531.
military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.”219  On the other side of the scale, Mathews considers the risks of erroneously depriving an individual of his private interests if the process is reduced, and the “probable value, if any, of additional or substitute procedural safeguards.”220 In assessing the military detainees’ right to be free from the unjustified deprivation of his liberty, the plurality concluded that such right is not “offset by the circumstances of war or the accusation of treasonous behavior, for ‘[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'”221

After weighing these legitimate but conflicting interests, the plurality held that “a citizen- detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.”222 The plurality concluded that these rights to notice and “to be heard” are “essential” and mandated by the Constitution:

“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’ These essential constitutional promises may not be eroded.223

This constitutional right “to be heard” is addressed to petitioners in all types of executive detention habeas, and not just to petitioners in cases of military detention. The broad language used by the plurality in addressing this issue is consonant with such conclusion. The plurality referred to the right “to be heard” as “fundamental” and as an “essential constitutional promis[e],” and insisted that such fundamental right be afforded in a timely and meaningful way.

Even though Hamdi’s conclusion that petitioners are entitled “to be heard” seems broad enough to encompass all cases of executive detention, this Article will apply the Mathews test to the particularities

219. Id. at 532.
220. Mathews, 424 U.S. at 335.
221. Hamdi, 542 U.S. at 530 (citations omitted) (noting that “the importance to organized society that procedural due process be observed,” and emphasizing that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”).
222. Id. at 533.
223. Id. at 533 (citations omitted).
of extradition habeas in order to assess the significance of due process protection under such context. The interests of the government and the petitioner in extradition habeas are obviously different from the ones considered in Hamdi, but several considerations are similar.

The principal government interest in extradition habeas is to fulfill its treaty obligations with the requesting country, whereas the principal interest of the petitioner is to be afforded due process before he is deprived of his constitutional right to be free. Thus, in structuring the procedural framework for extradition habeas, courts must first consider whether any procedural measure violates the applicable extradition treaty. If a procedural measure, such as rehearing the evidence, or using probable cause as the standard of proof, would violate the extradition treaty, then a conflict between the government’s and the petitioner’s interests has arisen that must be subjected to balancing.

Applying “probable cause” as the standard of proof in extradition habeas does not cause a conflict of interest between the petitioner and the government because that is the standard of proof required by statute and United States treaties to consider the evidence of criminality provided by the requesting country. Rehearing the evidence or making de novo factual findings in habeas could neither cause a significant conflict of interest because extradition treaties normally do not specify the procedures that the countries may use to review the initial determination of extraditability. What extradition treaties normally require is that the relator be extradited if the requested country

224. This follows from the fact that the Government is only representing the interests of a foreign country to extradite the relator pursuant to a treaty.

225. See id. at 531 (“We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.”).

226. The international treaties of the United States must abide by the Constitution, and thus the requirements of an extradition treaty must not be enforced against a relator/petitioner if they violate his due process rights. See Reid v. Covert, 354 U.S. 1, 18 (1957) (“This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); Fong Yue Ting v. United States, 149 U.S. 698, 720–21 (1893) (“The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other.”); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . [I]f the two are inconsistent, the one last in date will control the other . . .”); The Cherokee Tobacco, 78 U.S. 616 (1870) (plurality opinion); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597–99 (1884).

227. BASSIOUNI, supra note 10, at 877–78.

228. This is controlled in the United States by statute. See 28 U.S.C. § 2241 (2012). It is settled that the decisions of extradition magistrates may not be appealed, and that the only recourse is the filing of a petition for a writ of habeas corpus. See supra notes 46–47.
finds probable cause that the relator committed the charged offense. 229 This must be done by submitting the relator to a procedure similar to the one regularly used to determine whether one charged with a crime should be committed to trial. 230 Because at the habeas rehearing the court would be applying the probable cause standard allowed by most extradition treaties, there would be no conflict of interest unless in the exceptional case where the applicable treaty required another standard.

The other main governmental interest in extradition habeas is to avoid forcing the foreign country to try the criminal case against the relator in the United States. 231 The bases for such an interest are imminent; the foreign country would regularly be at a disadvantage trying to prove its charges against the relator in the United States, rather than in its own soil where most witnesses and evidence are likely to be located, and where it has its prosecutorial and investigative resources. Rehearing the evidence and applying the probable cause standard in extradition habeas, however, does not equate to forcing the foreign government to prosecute its criminal case in the United States. At the habeas hearing the government would not be required to establish guilt beyond a reasonable doubt; only that there is probable cause that the relator committed the charged offense based on the totality of the evidence presented. Unless habeas procedure requires otherwise, most of the benefits of extradition procedure to the government may be retained in a habeas rehearing. The government would be allowed to introduce hearsay evidence to prove its case, 232 documentary evidence would be easily authenticated through the U.S. Embassy at the foreign country, 233 and any adverse decision against the government would not constrain the government from refiling its extradition request, as neither the defense of double jeopardy nor of res judicata are available to relators. 235 If it loses, the government may refile its extradition request.

Thus, any limitation imposed by the procedural measures at issue on

229. BASSIOUNI, supra note 10, at 877–78; see also infra notes 257–58 and accompanying text.

230. BASSIOUNI, supra note 10, at 877–78; see also infra notes 257–58 and accompanying text.

231. See Santos v. Thomas, 779 F.3d 1021, 1024 (9th Cir. 2015); In re Singh, 123 F.R.D. 108, 115 (D.N.J. 1987); In re Wadge, 15 F. 864, 866 (S.D.N.Y. 1883); See also Benson v. McMahon, 127 U.S. 457, 463 (1888) (“we are not sitting in this court on the trial of the prisoner[].”).


233. 18 U.S.C. § 3190 (2012) (A “certificate of the principal diplomatic or consular officer of the United States” resident in the requesting country shall be proof that the documents to be introduced at the extradition hearing are duly authenticated.) See also U.S. v. Kin Hong, 110 F.3d 103, 119 (1st Cir. 1997).


the government’s interest in complying with its treaty obligations, or on
the foreign government’s interest not to be forced to try its case in the
United States, would be minimal, if any, and would not outweigh a
petitioner’s interest in due process.

After balancing the competing interests, Mathews further requires the
court to consider “‘the risk of an erroneous deprivation’ of the private
interest if the process were reduced and the ‘probable value, if any, of
additional or substitute procedural safeguards.”236 Prior to habeas
relators are summarily processed by magistrate judges who act on behalf
of the Executive237 and through hearings in which they are not allowed
to confront adverse witnesses or to introduce evidence that contradicts
the government’s case.238 Relators face imprisonment while extradition
proceedings are ongoing, and then face being surrendered to a foreign
country for further prosecution and/or imprisonment. The insignificance
of the process afforded to relators in extradition hearings proves the high
risk of an erroneous deprivation of their private interests. It also proves
the probable value of additional procedural safeguards, such as the de
novo review of the evidence through habeas, and the use of probable
cause as a standard of proof. These suggested fact finding tools would
require the habeas court to consider any evidence obtained by the
petitioner after his extradition hearing, as well as all of the reasonably
available evidence.239

Compliance with due process, however, is not the only constitutional
mandate that requires fact finding in habeas. The Suspension Clause
goes further.

D. The Suspension Clause and Extradition Habeas

Boumediene explains that because of the independent nature of
habeas corpus, habeas proceedings are not limited to verifying
compliance with due process in the previous proceedings, and the
Suspension Clause remains applicable.240

Even if we were to assume that the CSRT’s satisfy due process
standards, it would not end our inquiry. Habeas corpus is a
collateral process that exists, in Justice Holmes’ words, to ‘cut
through all forms and go to the very tissue of the structure. It

237. Supra note 30 and accompanying text.
238. Supra note 9.
available evidence demonstrating there is no basis for his continued detention, he must have the
opportunity to present this evidence to a habeas corpus court.”).
240. Id. at 785.
comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell. Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.

Ever since Benson and its progeny, courts have conducted extradition habeas as if it were an appellate procedure, denying the use of fact finding tools, and imposing the burden on the petitioner to establish the illegality of his detention. Habeas corpus, however, is an original and independent judicial procedure meant to ensure the legality of detentions. It is not an appellate procedure, and not a part of the proceedings that ordered detention. Because its purpose is different from the one of the proceeding that ordered detention, compliance with due process in the previous proceeding does not free the habeas court from its duty to comply with the Suspension Clause, and does not deprive it of its plenary powers to assess the legality of the detention.

The Suspension Clause goes further than due process by directly providing a forum with fact-finding powers and duties that allows the petitioner to introduce evidence on his behalf. It places the burden on the government to show that the detention is authorized by law, affords the petitioner a meaningful opportunity to rebut the government’s evidence, and requires the habeas court to consider the sufficiency of the evidence.

In Boumediene the Court set out to explain the reaches of the Suspension Clause and the minimum fact finding duties that it requires. Boumediene, being a military detention case, makes for a good analogy for extradition habeas because detention in the extradition context also

241. Id. (citations omitted).
242. See supra note 175; Skaftouros v. United States, 667 F.3d 144, 157–58 (2d Cir. 2011) (petitioner has burden of proof to establish by the preponderance of the evidence the invalidity of his foreign arrest warrant).
243. See Boumediene, 553 U.S. at 765; Garrett, supra note 19, at 87 (“The Court, after all, articulated throughout that it relied on the Suspension Clause alone to secure habeas process independent of any prior process.”).
244. Id.
245. Id.
246. See id. at 787 (suggesting that government carries the burden of establishing the legality of the detention, but not defining the precise standard of proof: “[t]he extent of the showing required of the Government in these cases is a matter to be determined.”); Garrett, supra note 19, at 59 (“This burden reflects a principle central to the concept of due process: deprivation of an individual’s liberty must be in accordance with the law.”).
247. Id. at 788–90 (“If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court.”).
248. Id. at 786.
constitutes a form of executive detention. Boumedine concludes that petitioners in executive detention habeas are entitled to more process than petitioners in postconviction habeas because of the lesser process received by executive detainees prior to habeas.

The required level of fact-finding in habeas depends on the rigor of the fact finding in the previous proceeding. Thus, where the previous proceeding involves a conviction after trial, “considerable deference is owed to the court that ordered confinement,” but, where a person is detained by executive order, “the need for collateral review is most pressing.” Prior to their habeas cases, the Boumediene petitioners were interrogated by a Combatant Status Review Tribunal (CRT). Through the CRT, petitioners were not allowed to introduce evidence, cross examine the witnesses against them, or obtain discovery. In ruling for the petitioners, the Court construed the role of habeas by insisting that it must be an effective tool to correct errors in the prior proceedings, and that for attaining such effectiveness, the tools of fact finding must be equally effective.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CRT proceedings. This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

As detainees in military cases, relators in extradition hearings are not allowed to confront witnesses and are not allowed an opportunity to contradict the government’s evidence. Courts in extradition habeas, thus, should make up for these deficiencies by affording

249. Boumediene, 553 U.S. at 783 (“What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.”).

250. Boumediene, 553 U.S. at 782. See also Oakes, supra note 75, at 457 (“[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial.”).

251. See supra note 92.
relators/petitioners an opportunity to rebut the government’s evidence, and by reconsidering the whole evidence through the “probable cause” standard of proof.

E. Standard of Proof

Once concluded that a de novo review or rehearing of the evidence is proper, the habeas court must determine the standard of proof it will use. The standard of proof courts in extradition habeas must use to assess evidence of criminality is “probable cause” because that is the standard referred to by United States extradition treaties.256 Using a lower standard of proof, such as “clear error” or “some evidence,” would likely violate the extradition treaty, and would violate due process and the Suspension Clause.257

The extradition treaties of the United States contain similar language pointing to the standard of proof that must be used to consider the evidence for and against the criminal charges.258 United States treaties do not explicitly establish the standard of proof to be used, but refer to the standard used by the national law of the requested country to commit an accused person to trial. For example, the extradition treaty between the United States and Mexico requires extradition “only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.” 259

In the United States the standard of proof used to consider committing an accused person to trial is “probable cause.”

Thus, the United States complies with its extradition treaties if the extradition magistrate and the habeas court demand that the government proves its case pursuant to the same “probable cause” standard required at preliminary hearings in criminal cases.260 The “probable cause” standard used at preliminary hearings to decide on commitment,

256. BASSIOUNI, supra note 10, at 877–78 (“The finding of probable cause is specifically required by legislation in 18 U.S.C. 3184 and is also embodied in United States treaties, but unexplainably, it has not yet been interpreted as emanating from the Fourth Amendment.”).


258. BASSIOUNI, supra note 10, at 877–78.

259. Extradition Treaty, U.S.-Mex., art. 3, May 4, 1978, 31 U.S.T. 5059; see also Extradition Treaty, U.S.-Dom. Rep., art. 1, June 19, 1909, 36 Stat. 2468 (requires the surrender of the fugitive “provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed”).

however, is not the same as the one regularly used at extradition hearings. In preliminary hearings, federal magistrates consider any relevant evidence presented by the accused along with the government’s evidence through a “totality of the evidence approach.”261 In contrast, in extradition hearings the relator is not allowed to confront witnesses, and is not allowed to introduce evidence if the intent is only to contradict the government’s case.262 The government may meet its burden in extradition hearings through hearsay, by introducing affidavits, documents, or live testimony.263

The federal jurisprudence on preliminary hearings has defined probable cause as “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt,” whereas “proof beyond a reasonable doubt,” has been defined as “evidence strong enough to create an abiding conviction of guilt to a moral certainty.”264

A magistrate may become satisfied about probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations. By the same token, a showing of probable cause may stop considerably short of proof beyond reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause.265

As with probable cause determinations in criminal proceedings, in extradition habeas the relator must be allowed an opportunity to rebut the government’s case. The government’s case must be able to overcome its own challenges as well as any challenges presented by the petitioner/relator.266

The evidence, which alone must guide resolution of the probable cause issue is the whole evidence – for the defense, as well as for the prosecution. The magistrate must “listen to . . . [the] versions [of all witnesses] and observe their demeanor and provide an opportunity to defense counsel to explore their account on cross examination.” The magistrate “sits as a judicial officer to sift all

264. Coleman, 477 F.2d at 1202; see also U.S. v. King, 482 F.2d 768, 775 (D.C. Cir. 1973) (“[T]he accused possesses the right to present in his own behalf evidence tending to negate the government’s showing of probable cause at the preliminary hearing.”).
265. Id.
266. Id. at 1204.
the evidence before resolving the probable cause issue. . . .” He “cannot decline to issue subpoenas on the ground that only the Government’s evidence is probative.”

Due process and the Suspension Clause, as well as 28 U.S.C. § 2243, require courts in extradition habeas to allow the petitioner to introduce evidence on his behalf, as suggested in Hamdi and Boumedine. After the petitioner presents his proof, the habeas court must consider the whole evidence by questioning whether there is “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.” Using a standard in extradition habeas less demanding than probable cause, such as “some evidence,” “clear error,” or “competent evidence,” would violate due process and the Suspension Clause because of the low level of process afforded to relators in extradition hearings. The inadequacy of the “some evidence” standard was highlighted in Hamdi, which termed the standard as “ill suited” for circumstances such as those of executive detentions:

Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the “some evidence” standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker.

As in military detention, in international extradition the relator is submitted to an executive procedure where hearsay evidence is admissible and where he is not allowed to confront the government’s

267. Id. (citations omitted).
268. See supra Part IV.C for a discussion of the implications of the Due Process Clause on extradition and Part IV.D for a discussion of the implications of the Suspension Clause on extradition.
269. Coleman, 477 F.2d at 1202.
270. Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (“Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed ‘some evidence’ standard is inadequate.”).
271. Id.
witnesses, or introduce evidence to contradict the government’s case. A
prior proceeding with such low level of process must not be considered
through habeas by applying an appellate-type standard of review such as
“some evidence” or “clear error.” The probable cause standard used
for commitment determinations in criminal cases, as defined in Coleman
v. Burnett, must be used as the standard of proof in extradition habeas.
This is required by the low level of process afforded in extradition
hearings, the nature of habeas as an original and collateral procedure,
and the United States extradition treaty commitments.

F. The Analogy with Postconviction Habeas

Criminal and extradition procedures are different in many significant
ways. Despite the marked differences between these two procedures,
several courts have used analogies between cases of postconviction and
extradition habeas to determine the fact finding powers and duties of
courts in extradition habeas. These analogies are inadequate,
however. Unlike in extradition habeas, in postconviction habeas there
are clear statutory and court-wrought limitations on the rehearing of
evidence. These limitations are based on constitutional requirements of
comity and deference to the state courts, considerations of judicial
economy, and the extraordinary differences in the process afforded to
defendants in state criminal proceedings as compared to that afforded to
relators in extradition hearings.

In 1867 Congress extended to state convicts the right to have their
convictions reviewed in federal court through habeas corpus. Even
though the Judiciary Act of 1867 literally required fact finding by

273. For examples of extradition cases using inappropriate analogies to cases of postconviction
habeas, see Skafarou, 667 F.3d at 157–58 (using analogies with postconviction cases Pinkney v.
Keane, 920 F.2d 1090, 1094 (2d Cir. 1990), and Walker v. Johnson, 312 U.S. 275, 286 (1941), to
support placing the burden of proof on the petitioner to prove by the preponderance of the evidence that
the foreign arrest warrant was defective, and that the statute of limitations had lapsed); Sacirbey, 589
F.3d at 63 (citing postconviction case Drake v. Portuondo, 553 F.3d 230, 239 (2d Cir. 2009), in support
of the adopted standard for habeas corpus review). See also In re Ahmad, 726 F. Supp. at 396 (citing
postconviction habeas statute, 28 U.S.C. § 2254, as source for grounds upon which habeas corpus may
be granted). For an example of an inadequate postconviction analogy in another context of executive-
detention habeas see Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010) (citing to postconviction
habeas statute 28 U.S.C. § 2254(c)(1) to argue that “[w]here factual review has been authorized, the
burden in some domestic circumstances has been placed on the petitioner to prove his case under a clear
and convincing standard.”). See also Garrett, supra note 19, at 100 (“In several areas, judges draw on
postconviction habeas rules regarding discovery and fact-finding. This practice is troublesome, given
that in the postconviction context, habeas rules presume that fact-finding occurred at criminal trial, on
appeal, or during the state postconviction process.”).
274. See Boumediene v. Bush, 553 U.S. 723, 782 (2008); see also Garrett, supra note 19, at 100.
habeas courts, the Court refused to fully apply this norm until its
decisions in *Fay v. Noia*[^276] and *Townsend v. Sain*.[^277] As per the clarified
standards, habeas courts were required to rehear the evidence considered
by the state court when: (1) the merits of the factual dispute were not
resolved in the previous hearing; (2) the factual determination being
reviewed is not fairly supported by the record as a whole; (3) the fact-
finding procedure below was not adequate to afford a full and fair
hearing; (4) there is a substantial allegation of newly discovered
evidence; (5) the material facts were not adequately developed; or (6)
for any reason it appears that the habeas applicant was not afforded a
full and fair factual hearing.[^278] Whenever any of these requirements
were not fulfilled, habeas courts still had the power to rehear the
evidence if in their discretion they found it appropriate.[^279]

Thirty years later, and in the midst of an overload of postconviction
cases coming from the state courts, the Court reversed its protective
trend towards state convicts. Concerns over the number of habeas
petitions filed by state convicts, and considerations of comity and
deffence to the state courts, were cited by the Court as justification.[^280]
The Court reasoned that state courts have equal rights and duties to the
federal courts in the construction and application of constitutional rights,
and thus concluded that comity considerations mandated restraint in the
processing of postconviction cases.[^281] In *Tamayo-Reyes* the Court
limited the more liberal doctrine of *Townsend* by imposing further
requirements before a federal court may entertain a postconviction
habeas petition. The doctrine of “cause and prejudice” adopted in
*Tamayo-Reyes* does permit a rehearing of the evidence, but in addition
to proving that the finding of facts by the state court was unreasonable,
the petitioner must prove that the unreasonable determination of facts
was not his fault, and that he was prejudiced by it.[^282]

In reaction to *Tamayo-Reyes*, Congress in 1996 limited federal habeas
jurisdiction for cases coming from the state courts through the

[^276]: 372 U.S. 391, 416 (1963) (“The elaborate provisions in the Act for taking testimony and
trying the facts anew in habeas hearings lend support to this conclusion . . .”), overruled in part by


[^278]: Id. See also Brown v. Allen, 344 U.S. 443, 458 (1953); *Ex Parte* Hawk, 321 U.S. 114, 117
(1944) (a state prisoner would be entitled to a hearing “where resort to state court remedies has failed to
afford a full and fair adjudication of the federal contentions raised . . . because in the particular case the
remedy afforded by state law proves in practice unavailable or seriously inadequate.”).

[^279]: Brown, 344 U.S. at 458.

[^280]: See Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992) (“It is hardly a good use of scarce
judicial resources to duplicate fact finding in federal court merely because a petitioner has negligently
failed to take advantage of opportunities in state-court proceedings.”).

[^281]: Id.

Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA amended 28 U.S.C. 2254 to eliminate certain instances in which a state-convict habeas case could be re-litigated in federal court.\footnote{283. Section 2254 is limited to state-convict cases, and thus does not apply to cases of extradition habeas. If Congress wanted to limit habeas jurisdiction in extradition cases it would have amended §§ 2241, 2243, and 2246, as it did with § 2254 to constrain the fact finding duties and powers of habeas courts in general.} As currently enacted, § 2254(d) limits re-hearings in federal courts to cases that have been decided on their merits in state court, and in which the state court criminal proceeding: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”\footnote{284. 28 U.S.C. § 2254(d).}

Postconviction cases such as Tamayo-Reyes and § 2254, however, are inadequate sources to make analogies for extradition habeas. The limitations imposed by Tamayo-Reyes and § 2254 on post-conviction habeas are based on concerns of judicial economy and federalism, and on consideration of the extensive procedure afforded to defendants in criminal cases.\footnote{285. See Tamayo-Reyes, 504 U.S. at 8 (“As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner’s failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum.”).} These concerns, however, are not relevant to the extradition context.\footnote{286. See Boumediene v. Bush, 553 U.S. 723, 774 (2008) (“AEDPA applies, moreover, to federal, postconviction review after criminal proceedings in state court have taken place. As of this point, cases discussing the implementation of that statute give little helpful instruction (save perhaps by contrast) for the instant cases, where no trial has been held.”).} Extradition hearings are held before magistrates who act on behalf of the Executive, so in extradition habeas there are no issues of federalism, and no duty of comity to a superior court or court of equal ranking.\footnote{287. See Boumediene, 553 U.S. at 782 (“In contrast to ‘inferior’ tribunals of limited jurisdiction, courts of record had broad remedial powers, which gave the habeas court greater confidence in the judgment’s validity.”). See also Tamayo-Reyes, 504 U.S. at 8. Considerations of comity and deference, not relevant to extradition, include for example the “inevitable friction” that results when a federal habeas court overturn[s] either the factual or legal conclusions reached by the state-court system.” Id. See also Stephen I. Vladeck, D.C. Circuit After Boumediene, 41 SETON HALL L. REV. 1451, 1467 (2011) (“A closer read of Boumediene suggests that the opposite should be true— that the Guantánamo detainees should receive more process than those who seek to use habeas collaterally to attack state-court convictions since their detention does not result from convictions obtained in a court that [ordered confinement].”).} All the opposite, extradition habeas is the first encounter of the relator-petitioner with an Article III court and the only chance for the courts to influence these proceedings as part of our
separation of powers political scheme.288

On the other hand, issues of judicial economy relevant in state-convict habeas are practically non-existent in extradition habeas. The burden that cases of extradition habeas impose on the federal courts is very low as compared to that imposed by petitions from state convicts. To get a sense of the contrast, the number of habeas corpus petitions filed by state-court inmates in federal courts raised from 1,020 in 1961 to 8,059 in 1982,289 and from approximately 8,000 in 1983 to approximately 17,000 in 2007.290 In contrast, by the mid 1980’s the number of extradition requests received and submitted by the United States barely exceeded 500 per year,291 whereas from 1990 to 2002 the United States received approximately from 670 to 950 requests for extradition per year from foreign governments.292

Considerations of judicial economy are also affected by the differences in the complexities of extradition versus criminal procedures. Extradition cases are summary procedures mostly limited to a hearing where the magistrate considers legal arguments, affidavits and other documents presented by the parties. The Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply. Criminal cases, on the other hand, usually involve the consideration of live testimony by lay and expert witnesses, the application of procedural and evidentiary rules, complex pre-trial litigation, and various layers of appellate procedures.

In conclusion, postconviction habeas is an inappropriate analogy for extradition habeas.293 Extradition habeas is much more similar to habeas in military detention where the detainee is also previously processed by the Executive and afforded substantially less process than through a regular criminal case.294 Federal courts, thus, should follow Hamdi and Boumediene when formulating doctrine for extradition

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288. See Boumediene, 553 U.S. at 765 (the Suspension Clause is “an indispensable mechanism for monitoring the separation of powers.”); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).


290. See King & Hoffmann, supra note 74, at 60.


293. See supra note 285; see also Boumediene, 553 U.S. at 774.

294. See supra note 30.
Habeas.

G. Classical Habeas and Extradition

There is one final reason why courts in extradition habeas should reheat the evidence: the Court has held that the scope of protection of the Suspension Clause must be at least as wide as it was by 1789, \(^{295}\) and the historical evidence suggests that habeas courts have often engaged in fact-finding in cases of executive and pretrial detention.\(^{296}\)

The scope of habeas has always been wider when reviewing the decisions of courts of inferior jurisdiction.\(^{297}\) There is, for example, substantial evidence that British judges, as early as the seventeenth century, regularly considered live testimony and documents in habeas proceedings when dealing with cases of pre-trial detention.\(^{298}\) As explained by professor Oaks: “[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial.”\(^{299}\) Early American courts also observed similar practices as explained in \textit{Boumediene}:

It appears the common-law habeas court’s role was most extensive in cases of pretrial and noncriminal detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer’s return was not followed (or at least not with consistency) in such cases.

There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive “where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting.”\(^{300}\)


\(^{296}\) \textit{See supra} notes 81–85 and accompanying text.

\(^{297}\) Oaks, \textit{supra} note 75, at 456.

\(^{298}\) \textit{See Garrett, supra} note 19, at 62.

\(^{299}\) Oaks, \textit{supra} note 75, at 457.

\(^{300}\) \textit{Boumediene v. Bush}, 553 U.S. 723, 780 (2008) (citations omitted); \textit{see e.g., Ex parte Pattison}, 56 Miss. 161, 164 (1878) (noting that “[w]hile the former adjudication must be considered as
The detention that takes place after a magistrate issues a certificate of extraditability deserves the widest scope of protection as it historically has been afforded to those subject to detention without trial. The main principle behind this norm could be surmised from Chief Justice Rehnquist’s statement in United States v. Salerno: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Thus, in order to carefully assess whether a relator/petitioner should be detained and extradited without previously affording him the procedural protections of a trial, the habeas court must provide the petitioner with a meaningful opportunity to rebut the government’s facts and should review the evidence de novo. As noted by Professor Garrett:

Judges should draw habeas process directly from the core of “traditional habeas corpus process,” which remains largely unchanged from common law practice and the earliest federal statutes. While judges must develop the details of how habeas functions in detention challenges, they should draw that process from habeas jurisprudence designed to provide a judge with power to scrutinize the factual and legal authorization for a detention rather than, for example, sources of postconviction law.

V. CONCLUSION

Petitioners in extradition habeas are entitled to more process than the courts currently afford them. As the case law stands now, courts in extradition habeas cannot rehear the evidence, and must review the determination of probable cause under low standards such as “clear error,” “competent evidence,” and “some evidence.” Such low level of process conflicts with constitutional and statutory rights afforded to petitioners through the Suspension Clause, the Fifth Amendment’s Due Process Clause, and 28 U.S.C. § 2243.

The current state of affairs in the law of extradition habeas is mostly

conclusive on the testimony then adduced” “newly developed exculpatory evidence . . . may authorize the admission to bail.”); Ex parte Foster, 5 Tex. Ct. App. 625, 644 (1879) (construing the State’s habeas statute to allow for the introduction of new evidence “where important testimony has been obtained, which, though not newly discovered, or which, though known to [the petitioner], it was not in his power to produce at the former hearing; [and] where the evidence was newly discovered.”); People v. Martin, 7 N.Y. Leg. Obs. 49, 56 (1848) (“If in custody, on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him. . . .”).

302. See Garrett supra note 19, at 56.
the result of lack of guidance from the Court, and reliance by the circuit courts on questionable and obsolete authority. The Court has not considered the issue of the proper scope of habeas corpus in extradition since *Fernandez v. Phillips* in 1925. *Fernandez* is the last of a string of cases, which began with *Benson v. McMahon* in 1888, in which the Court applied a narrow scope of review and disallowed any fact finding in extradition habeas. The narrow scope doctrine of *Benson*, however, conflicted with clear mandates of the Judiciary Act of 1867 that literally required habeas courts to hear and find the facts, as it is now required by 28 U.S.C. § 2243. *Benson* cited no authority to support its conclusions on fact finding and even failed to mention the 1867 Act.

Section 2243 requires higher levels of process through habeas than the courts allow. It literally mandates habeas courts to hear and determine the facts, and grants petitioners the right to rebut the government’s contentions under oath. The applicability of § 2243 to cases of executive detention, such as extradition habeas, has been clarified by various cases and by the plurality in *Hamdi v. Rumsfeld*, which also concluded that due process requires that petitioners in cases of executive detention be allowed more process than they are currently afforded. To consider the issue of due process, the plurality applied the balancing test of *Mathews v. Elridge* and concluded that petitioners in cases of executive-detention habeas deserve at least a meaningful opportunity to rebut the government’s case.

In *Boumediene v. Bush* the Court followed *Hamdi* by clarifying some of the fact finding powers and duties of habeas courts in cases of executive detention. In *Boumediene*, however, the Court concluded that the Suspension Clause goes further than the Due Process Clause by providing habeas courts with the fact finding tools necessary to ascertain the legality of detentions. The Court reached this conclusion after an extensive historical analysis of habeas corpus in England and the United States, and after concluding that historically habeas courts have engaged in fact finding in cases of detentions without trial.

As to the proper standard of proof, *Hamdi* concludes that “some evidence” is a standard of review, and thus it is “ill suited” for cases of executive-detention habeas. Standards of review such as “some evidence,” “competent evidence” and “clear error,” may be suited for certain appellate procedures, but not for an original procedure such as habeas, which requires a standard of proof. Thus, the proper standard to consider evidence of criminality in extradition habeas is the *de novo* application of “probable cause,” as it is regularly applied in the preliminary hearings of federal criminal cases, and as described by the D.C. Circuit in *Coleman v. Burnett*. “Probable cause” is the proper standard for extradition habeas because it is the standard required by

When an individual is detained by the government without a conviction, the protections of the Suspension Clause must be at their highest. These protections are particularly relevant in cases of international extradition because of its dire consequences. The Suspension Clause, due process, and 28 U.S.C. § 2243 require that the petitioner be afforded the opportunity to rebut the government’s case, and that the facts be reconsidered through the application of the “probable cause” standard of proof, as it has been defined in Coleman v. Burnett. The adoption of these procedural measures is necessary to accomplish a modicum of separation of powers in the extradition process.

Extradition habeas must not be reduced to mere formalism simply because the petitioner will be, or has been, tried by the foreign country that requests him. Courts must carefully consider the detention of an individual and his surrender to a foreign country when the individual has not been convicted in the United States of a crime. As noted by the Court in Boumediene, “[w]ithin the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”303