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Boumediene v. Bush and the New Common Law of Habeas

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BOUMEDIENE V. BUSH AND THE NEW COMMON LAW OF HABEAS

Baher Azmy^{*}

In Boumediene v. Bush, the Supreme Court issued yet another sharp rebuke of the Bush Administration's wartime detention practices. In ruling that the protections of the Suspension Clause reach extraterritorially to Guantanamo (and perhaps beyond) and striking down the jurisdiction-stripping provision of the Military Commissions Act of 2006, the Court went significantly farther than had the triad of prior enemy combatant cases – Hamdi v. Rumsfeld, Rasul v. Bush and Hamdan v. Rumsfeld. Indeed, for the first time in its history, the Court invalidated the collaborative efforts of the political branches during wartime. In so doing, Boumediene elevated the judiciary to a preeminent role in reviewing wartime detention operations, assuming exclusive jurisdiction and control over habeas cases brought by 200-plus Guantanamo detainees.

In effect, Boumediene issued a largely unlimited invitation to the lower courts to create a whole new corpus of habeas law in the context of military detention – one that has largely remained undeveloped since Reconstruction. This article provides a normative justification for the Court's asserted role and bridges the gap between the theoretical basis undergirding the decision and several concrete questions the district courts will have to consider on remand.

Specifically, after situating Boumediene as a landmark separation-of-powers ruling, this article addresses now-ripe substantive law questions the Court left open for case-by-case adjudication. First, the article considers whether the protections of the Suspension Clause apply to what some are calling "Obama's Guantanamo" – the large U.S. detention center in Bagram, Afghanistan. Second, it evaluates the substantive limitations from the law of war which may now constrain what the executive has so far asserted is nearly unlimited authority to detain enemy combatants in the "global war on terrorism." In addition, this article develops a broad procedural framework to govern the factual development in up to hundreds of largely unprecedented de novo habeas hearings that may occur in the district court. This article thus seeks to make a substantial contribution to what will surely be an ongoing discussion about this new common law of habeas.

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INTRODUCTION

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

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

¹ The CSRT is an ad hoc administrative body the Bush Administration engineered hastily after the Supreme Court's rulings in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466 (2004) to evaluate the Defense Department's prior assessment that each detainee in Guantanamo was an enemy combatant. See text accompanying *infra* notes __ to __. See also Baher Azmy, *Rasul and the Intra-territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 398-400 (2007) (describing creation and implementation of CSRT process).

² Unclassified Summary of Basis for Tribunal Decision, Enclosure (3) [hereinafter "Summary for Tribunal Decision"], available at: http://law.shu.edu/csjs/kurnaz/files/fact_ex_a.pdf at 8.

³ See text accompanying *infra* notes __ to __.

⁴ See Gov't Return to Habeas Petition, *Kurnaz v. Bush*, No. 05-1135 (ESH) (D.D.C. Oct. 19, 2004), Dkt #11, Summary for Tribunal Decision at 1 ("I am here because Selcuk bombed somebody? I was not aware he had done that.").

⁵ See text accompanying *infra* notes __ to __.

⁶ See *supra* note __.

⁷ See Richard Bernstein, *One Muslim's Odyssey to Guantanamo*, N.Y. TIMES, June 5, 2005 (reporting that Bilgin suicide bomber allegations are untrue); see also Submission of Detainee Murat Kurnaz to the Administrative Review Board, Office of Administrative

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

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

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

Review of Detention of Enemy Combatants, dated February 1, 2005, Exh. 6 (affidavit of Bilgin swearing that he is alive and has not undertaken any suicide bombing); Exh. 7 (letter of local German prosecutor attesting that Bilgin suicide bomber charges are obviously false), available at http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Transcript_Set_5_20000-20254.pdf.

⁸ See *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d 455, 465, 476 (D.D.C. 2005) (explaining that classified CSRT charges against Kurnaz lack credibility and that other charges, even if true, could not lawfully support detention); see also Carol Leonnig, *Evidence of Innocence Rejected at Guantanamo*, WASH. POST, Dec. 5, 2007, at A01 (discussing recently declassified documents demonstrating U.S. and German government officials were aware of Kurnaz’s innocence despite his enemy combatant classification); *60 Minutes: Nightmare at Guantanamo Bay* (CBS television broadcast March 30, 2008) (disclosing evidence of innocence in Kurnaz’s case); Baher Azmy, *Epilogue to MURAT KURNAZ, FIVE YEARS OF MY LIFE* 239, 235-51 (2008) (describing weakness of allegations against Kurnaz).

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

¹⁰ Pub. L. No. 109-148, div. A, tit. X, §1005(e) (replacing statutory habeas procedures codified at 28 U.S.C. § 2241 with an alternative scheme for review by the D.C. Court of Appeals of military detention decisions).

¹¹ Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2636 (codified at 28 U.S.C. § 2241(e) (2006)) (eliminating federal habeas jurisdiction to hear pending or future habeas petitions brought by enemy combatants).

¹² See text accompanying *infra* notes __ to __.

¹³ Kurnaz was released from Guantanamo in August 2006, though not by court order. According to the government, he is still properly classified as an enemy combatant. His habeas petition is pending in the district court.

¹⁴ 128 S. Ct. 2207 (2008).

¹⁵ See text accompanying *infra* notes __ to __. At oral argument in *Boumediene*, Petitioner’s counsel, Seth Waxman, vividly described the Kurnaz scenario, see

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

Viewed one way, the decision easily falls along the continuum of previous "enemy combatant" cases such as *Hamdi*, *Rasul*, and *Hamdan v. Rumsfeld*¹⁸ (a grouping I refer to as the "Enemy Combatant Triad"). The Court in *Boumediene*, as it had in these cases, authoritatively rejected the executive's assertion it should have unfettered discretion to conduct detention wartime operations free from any judicial supervision. Viewed another way, however, the Court went significantly farther than it had ever previously. Largely setting aside a premise of the Steel Seizure Case¹⁹ which governed the Enemy Combatant Triad, the *Boumediene* Court refused to defer to the concerted efforts of the political branches, where the judicial power should presumptively be at its weakest.

As a result, the Court elevated the judiciary to a preeminent role in reviewing wartime detention operations, assuming exclusive jurisdiction and control over habeas cases brought by 200-plus Guantanamo detainees. Equally important, the Court chose not to limit its holding to the peculiar legal and physical space of Guantanamo Bay. Instead, it set forth a broad and assertedly judicially-manageable framework to ascertain what, if any, constitutional rights might apply to other extraterritorial executive conduct. In addition, while the Court identified core deficiencies in the DTA process, it declined either to define the substantive law that would govern the executive's asserted authority to detain enemy combatants or to set forth a detailed procedural framework by which the hundreds of habeas cases should proceed in the lower courts.

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf at 74-76, a rendering that led Supreme Court commentator Marty Lederman to describe Waxman's use of this example as "one of the most powerful I've ever seen." Marty Lederman, *Quick Reactions to Boumediene Oral Argument*, SCOTUSblog, website, (Dec. 5, 2007, 12:12 EST), <http://www.scotusblog.com/wp/quick-reactions-to-boumediene-oral-argument/>.

¹⁶ See text accompanying *infra* notes ___ to ___.

¹⁷ See text accompanying *infra* notes ___ to ___.

¹⁸ 548 U.S. 557 (2006).

¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Jackson, J., concurring) (setting forth a continuum of executive power in which Presidential action supported by Congress is entitled to the greatest judicial deference).

As this article explains, *Boumediene* issued a largely unlimited invitation to the lower courts to create a whole new *corpus* of habeas law in the context of military detention – a body of law that has largely remained undeveloped since Reconstruction. Not surprisingly, the decision was subject to heated censure from within the Court²⁰ and without,²¹ as critics attacked the Court’s failure to defer to political branches in the arena of military judgment or to provide meaningful guidance for administering its broad decree.

This article praises *Boumediene*’s historic judgment, defending the Courts’ asserted role as necessary and correct. This article also attempts to bridge the gap between the strong normative value of separation of powers which undergirds the Court’s decision and the concrete questions regarding the applicability of this norm to the future cases the district courts will be adjudicating on remand. In so doing, the article develops a comprehensive framework for what will be an ongoing discourse about this new common law of habeas.²²

Part I develops the context for understanding the significance of *Boumediene* as a landmark separation-of-powers decision by demonstrating the way in which, in terms of doctrinal and practical effect, it marks a significant departure from the *Hamdi-Rasul-Hamdan* Triad. Part II explains the decision along the interrelated axes of substance and methodology. In deciding whether the Suspension Clause has force extraterritorially, the Court rejected a series of proposed categorical rules and a constrained reading of the historical record that would have limited constitutional rights only to places over which the United States exercises formal political sovereignty. In its place, Part II explains, the Court developed a robust theory of separation of powers obligating the judiciary to prevent the executive from manipulating formal jurisdictional rules in

²⁰ *Boumediene*, 128 S. Ct. at 2293 (Roberts, J., dissenting) (“So, who has won? . . . Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.”).

²¹ See Juliet Eilperin, *McCain Applauded for Opposition to Court Decision on Guantanamo Bay*, WASH. POST, June 13, 2008 (quoting Republican Presidential nominee John McCain calling *Boumediene* “one of the worst decisions in the history of this country”).

²² Significantly, the Obama Administration has sent strong signals that it will continue to defend Bush Administration legal positions implicated by the *Boumediene* decision. See *infra* notes ___ and ___. Moreover, the Obama Administration’s promise to close Guantanamo in one year does not mean that courts will stop or delay the adjudication of outstanding habeas petitions filed in the district courts. Therefore, there is every reason to believe that the common law habeas review of military detentions will be as significant tomorrow as it is today.

order to deliberately “evade the constraints of law.” This Part contends that, in adopting this striking “anti-manipulation” principle, the Court internalized a currently-prevailing public narrative about the Bush Administration’s legal positions adopted in support of executive operations – that they were policy-driven, unduly instrumental and willfully evasive of legal limits. This Part concludes by arguing that the Court’s rejection of congressional judgment in this case was entirely within the Court’s competence and was an appropriate exercise of the judicial role.

Part III explores the parameters of two critical substantive law questions governing the status of Guantanamo detainees which the Supreme Court left open for future resolution. First, do the protections of the habeas corpus statute or the Suspension Clause apply beyond the peculiar territorial space of the Guantanamo Bay Naval Base? Specifically, this Part considers whether, under *Boumediene*’s functionalist test and its predominant separation-of-powers concern, courts would have jurisdiction to entertain habeas petitions filed by enemy combatants detained by the U.S. military in Bagram Airfield in Afghanistan – a large prison now being referred to as “Obama’s Guantanamo.”²³ Second, what substantive body of law governs the executive’s legal authority to detain someone it classifies as an enemy combatant and what core constraints may be judicially imposed on such authority? I contend that the district courts should apply the international law of armed conflict to limit the scope the detention authority which the executive has heretofore asserted to be virtually unlimited.

Part IV addresses the procedural framework that will have to govern these novel enemy combatant cases. Recognizing that habeas is a flexible, adaptable remedy, the Court emphasized that new factual development would be essential to resolve these novel habeas cases. In this sense the Court ordered no ordinary remand; it did not announce a narrow substantive change in law²⁴ or produce an arguably new interpretation of a long-standing procedural rule.²⁵ Rather, it directed district courts to conduct *de novo* habeas hearings of a kind they have not done for over one hundred years; and it did so with little more than an expression of confidence in their “competence and expertise.”²⁶ Drawing on the limited precedent in this area as well as the prominent role that the Court proclaimed habeas corpus should play in our separation-of-powers

²³ See Warren Richey, *Next flash point over terror detainees: Bagram prison*, CHRISTIAN SCI. MONITOR, Feb. 12, 2009.

²⁴ See, e.g., *Crawford v. Washington*, 541 U.S. 26 (2004) (limiting the admissibility of hearsay evidence under the Constitution’s Confrontation Clause).

²⁵ See, e.g., *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (altering pleading standard under Fed. R. Civ. P. 8(a)(2)).

²⁶ *Boumediene*, 128 S. Ct. at 2276.

scheme, this Part attempts to describe a procedural and evidentiary framework to govern these habeas cases. In the course of this discussion, this article demonstrates that these standards can be employed prudently and incrementally and without posing a serious risk to national security; they are also necessary to preserve the Suspension Clause's guarantee of "freedom from arbitrary and unlawful restraint and the personal liberty."²⁷

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

Boumediene is an extraordinary decision, both because of what it specifically portends for the future adjudication of a great number of cases involving wartime detentions and also for where it stands relative to the previous, landmark cases of the Enemy Combatant Triad, *Hamdi-Rasul-Hamdan*.²⁸ All of these cases share several fundamental attributes with *Boumediene*. All rejected the executive's asserted need for nearly unlimited discretion²⁹ and likewise departed from the expectation that courts will routinely defer to the president's needs during wartime.³⁰ All start with a baseline presumption in favor of liberty and include paeans to the Courts' central role in protecting fundamental constitutional values.³¹ All appear to follow an approach which Professors Fallon and Meltzer have described as the Common Law Model of adjudication – in which

²⁷ *Boumediene*, 128 S. Ct. at 2244.

²⁸ I do not include *Padilla v. Rumsfeld*, 542 U.S. 426 (2004) in this grouping, because its holding is exclusively jurisdictional, setting forth a rule regarding the appropriate district in which a habeas petition should be filed, rather than adjudicating a substantive principle of law. See Jenny Martinez *Process and Substance in the War on Terror*, 108 COLUM. L. REV. 1013, 1032 (2008) (describing the *Padilla* case as representative of "the triumph of process over substance" through a form of "process as avoidance.").

²⁹ The claim that the Court departed from an obligation to defer to the executive branch is best manifested by dissenting opinions which, in each case, sided with the President. See, e.g., *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting) (arguing that the majority's interpretation of precedent is "unthinkable" when such asserted "departure has a potentially harmful effect upon the Nation's conduct of a war."); see also *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting); *Hamdan*, 548 U.S. at 678 (Thomas, J., dissenting); *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting).

³⁰ See William H. Rehnquist, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (1998) (documenting "the reluctance of courts to decide a case against the government on an issue of national security during a war").

³¹ See, e.g., *Hamdi*, 542 U.S. at 531 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment to those principles for which we fight abroad"); see also *Rasul*, 542 U.S. at 474; *Hamdan*, 548 U.S. at 636; *Boumediene*, 128 S. Ct. at 2277; see also Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 S. CT. REV. 1 (noting that *Hamdi* and *Hamdan*'s interpretations of congressional enactments give "liberty the benefit of the doubt.").

courts employ a “creative, discretionary function in adapting constitutional and statutory language . . . to novel circumstances.”³²

However, even along this continuum, there appears a significant doctrinal demarcation: by invalidating concerted action of both Congress and the President during wartime, *Boumediene* crossed a threshold never before traversed in Supreme Court history. Specifically, the Triad cases can be seen as respecting congressional prerogatives and unique institutional role, while carrying out the Court’s duty of protecting the legislative sphere from executive encroachment where individual rights are at stake. All three cases thus fall comfortably within the accepted *Youngstown* framework: where executive actions are authorized by Congress, as the plurality believed in *Hamdi*, the executive power is at its zenith; but where such action is expressly or implicitly denied by Congress, as in *Hamdan* and *Rasul*, executive power is at its lowest ebb.³³ Employing this framework – which effectively requires applying, deferring to or interpreting congressional enactments – has obvious normative and institutional appeal. It recognizes that, as a matter of democratic theory, elected representatives are and should be primarily responsible for setting the boundaries for executive action during times of war or emergency.³⁴ It also recognizes that Congress, with all the tools and presumed expertise of a resourceful and open deliberative body, is generally in a better institutional position than the courts to weigh the competing policy considerations effecting a delegation or restriction of executive wartime authority.³⁵

In *Hamdi*, the plurality opinion authored by Justice O’Connor concluded that Congress’ September 2001 Authorization for the Use of Military Force (“AUMF”) included both the authority for the executive to direct force against persons who were associated with the September 11

³² Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, 120 HARV. L. REV. 1, 3 (2007).

³³ See *Youngstown*, 343 U.S. at 607- 609 (Jackson, J., concurring); see also Mark C. Rahdert, *Double-Checking Emergency Power: Lessons from Hamdi and Hamdan*, 80 TEMP. L. REV. 451 (2007) (noting that “if Congress remains passive . . . there is little the judiciary can do to restrain executive emergency power,” and predicting that under his model, it would be doubtful that the Court in *Boumediene* would take the course it ultimately did and strike down the MCA); Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson’s Wartime Security Jurisprudence and the Detention of “Enemy Combatants,”* 68 ALB. L. REV. 1127, 1138-42 (2005).

³⁴ See, e.g., Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2002).

³⁵ John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 809 (2004) (“[C]ourts work best at interpreting formal sources of law and applying the law to facts that are easily gathered and understood in the context of a bipolar dispute. They do less well the more a dispute becomes polycentric, in that it involves more actors, more sources of law, and complicated social, economic, and political relationships.”).

attacks, as well as the derivative authority to detain those persons as “enemy combatants” in order to keep them from a “return to the fight.”³⁶ The detention of such persons, the plurality concluded, “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”³⁷ Justice Souter, joined by Justice Ginsburg, dissented from this part of the plurality’s ruling because they concluded that the AUMF did not provide specific or clear enough authority to overcome the prohibitions on executive detention contained in a pre-existing provision of the Non-Detention Act³⁸ – a law that prohibits the imprisonment of U.S. citizens, except by act of Congress.³⁹

Thus the opinions of the plurality and Justice Souter interpreted silence or ambiguity in the AUMF differently. That of course, produced a significant practical consequence: the plurality upheld a novel and questionable use of executive power which was rejected by Justice Souter – a judgment that led some commentators even to conclude that *Hamdi* represented a significant victory for the Bush administration.⁴⁰ Yet, despite proposing differing outcomes, O’Connor’s plurality and Souter’s concurrence fall methodologically within the *Youngstown* framework: each looks to whether the executive action was delegated by Congress (though employing meaningfully different burdens of proof) and can claim that their decision to uphold or reject the asserted lawful delegation of power was supported by a coordinate branch of government.⁴¹

In *Rasul*, the Court held that U.S. courts had jurisdiction under the habeas statute, 28 U.S.C. §2241, to hear petitions filed by detainees held in Guantanamo, despite the government’s protest that the U.S. did not

³⁶ *Hamdi*, 542 U.S. at 518-19.

³⁷ *Id.* at 518.

³⁸ 18 U.S.C. § 4001(a).

³⁹ *Hamdi*, 542 U.S. at 544 (Souter, J., concurring) (noting that §4001(a) was adopted “for the purpose of avoiding another *Korematsu*,” and therefore to “preclude reliance on vague congressional authority . . . as authority for detention or imprisonment at the discretion of the Executive.”).

⁴⁰ See, e.g., David B. Rivkin Jr. & Lee A. Casey, *Bush’s Good Day in Court*, WASH. POST, Aug. 4, 2004, at A19 (praising aspects of the decision which grant the President broad legal discretion, including the conclusion that “enemy combatants” including U.S. citizens captured in the conflict against the Taliban can be detained indefinitely).

⁴¹ Significantly, the plurality did import certain limitations into the AUMF, in order to cabin executive discretion. First, as described later, it interpreted the AUMF in accordance with “longstanding law-of-war principles” which imposes important limitations on the class of persons the executive is authorized to detain and the permissible purposes and duration of detention. See Section III(B), *infra*. Second, it imported elementary due process requirements, entitling an accused enemy combatant to notice and an opportunity to be heard on the factual basis for his detention. *Hamdi*, 542 U.S. at 533.

exercise formal sovereignty over that territory.⁴² The Court deemed inapplicable a canon of judicial construction which presumes that statutes do not reach extraterritorially; because of Guantanamo's peculiar status, over which the United States exercises "complete jurisdiction and control," it is functionally *a part of* U.S. territory.⁴³ Justice Stevens' majority opinion was relatively opaque about whether the habeas statute was limited to the arguably unique territorial status of Guantanamo, as much of the Court's rhetoric seemed to suggest, or if it could extend to all locations where foreign prisoners are held by U.S. forces and the court has personal jurisdiction over the respondent⁴⁴ – in Justice Scalia's prophecy, "to the four corners of the earth"⁴⁵ Scholars have variously viewed the Court's attempt to harmonize the habeas statute's unlimited provision for habeas jurisdiction with the peculiar circumstances of the Administration's detention policy as "disingenuous,"⁴⁶ or "plausible."⁴⁷ Nevertheless, the Court's interpretation appears consistent with the Triad's functionalist perspective, by rejecting the talismanic significance of sovereignty or citizenship rules and by ensuring that Congress and judiciary together have a role in checking executive branch operations. More fundamentally, the Court signaled to the executive that it could not locate detention operations completely outside the constraints of law.⁴⁸

Because *Rasul* did not decide the merits of any habeas petition nor set any particular standards for adjudicating constitutional or international law rights, it has been largely perceived as an empty substantive vehicle.⁴⁹ Nevertheless, it did plant seeds for future development of constitutional and habeas law norms for subsequent litigation. First, the Court signaled that detainees held in Guantanamo possessed a fundamental constitutional right to be free from arbitrary detention, foreshadowing precisely the functional analysis regarding the extraterritorial application of fundamental rights that the Court later expressly adopted in *Boumediene*.⁵⁰

⁴² *Rasul*, 542 U.S. at 480.

⁴³ *Id.*

⁴⁴ *See Rasul*, 542 U.S. at 483-84.

⁴⁵ 542 U.S. at 498 (Scalia, J., dissenting).

⁴⁶ Robert J. Pushaw, *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?* (manuscript at 4, on file with the author).

⁴⁷ Fallon & Meltzer, *supra* note __ at 28.

⁴⁸ *See* Joseph Margulies, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 3 (2006) (describing *Rasul* as a rejection of the administration's efforts to construct a "prison beyond the law."); Fallon & Meltzer, *supra* note __ at 28 ("a denial of jurisdiction could have established Guantanamo as a permanent law-free zone, where the writs of no country's courts would run").

⁴⁹ *See* Yoo, *Enemy Combatants and Judicial Competence*, *supra* note __ at 87 ("*Rasul* studiously avoided any discussion of the substantive rights").

⁵⁰ *See* Azmy, *Rasul and the Intra-territorial Constitution*, *supra* note __ at 406-413 (arguing that footnote 14 of the *Rasul* opinion and the "cases cited therein," endorsed the

Second, extending statutory habeas jurisdiction to Guantanamo *necessarily* carries with it an entitlement to substantive adjudication of the petition, even absent an entitlement to individual rights based on the constitution or international law. Specifically, the assertion of habeas jurisdiction pursuant to §2241(c)(1) of the habeas statute – the provision that codified the habeas provisions Section 14 of 1789 Judiciary Act⁵¹ – requires the custodian to justify the petitioner’s deprivation of liberty by providing a sufficient legal and factual basis to detain – a requirement that exists independent of an analysis of whether the custody is in “violation of the Constitution” under §2241(c)(3).⁵² This is an elementary lesson from Chief Justice Marshall’s opinion in *Ex parte Bollman*, in which, after five days of hearings on treason charges related to the Aaron Burr conspiracy, the Court concluded “there is not sufficient evidence” to detain, and ordered the petitioner’s release.⁵³ The jurisdiction-stripping provisions of the DTA and MCA, of course, eliminated this kind of substantive development of habeas law. Yet, by invalidating Congress’ statutory repeal, *Boumediene* effectively secured *Rasul* – and its latent potential – on constitutional footing.

In *Hamdan*, the Court considered a challenge to the legality of the President’s November 2001 Executive Order authorizing the trial of enemy combatants by military commissions. Before reaching the merits, the Court rejected two significant challenges to its jurisdiction, ruling that it was unnecessary to abstain from decision until after *Hamdan*’s commission had been completed,⁵⁴ and that the DTA provision purporting

functional approach Justice Kennedy elaborated in his concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) to extending fundamental constitutional rights). In the post-*Rasul* litigation, one court agreed that *Rasul* and the cases it relied upon in the footnote implicitly signaled that fundamental due process rights applied in Guantanamo. *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d at 481. Another court concluded that *Rasul* effected no change in substantive rights. *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005). On appeal of those rulings, the D.C. Circuit reprised its prior conclusion that aliens held in Guantanamo enjoyed no constitutional rights, *Boumediene v. Bush*, 476 F. 3d 981, 992 (D.C. Cir. 2007), which the Supreme Court overruled in *Boumediene*.

⁵¹ Judiciary Act of 1789, 1 Stat. 73 (1789). See *Carbo v. United States*, 364 U.S. 611, 618-19 (1961) (tracing development of Section 14 into modern 1948 codification at 28 U.S.C. §2241(c)(1). The Judiciary Act was passed six months after the Constitution’s ratification and Section 14 has always been thought to incorporate the common law understanding of habeas corpus. See *INS v. St. Cyr*, 533 U.S. 289, 305 (2001).

⁵² See Jared Goldstein, *Habeas Without Rights*, 2007 WISC. L. REV. 1165, 1181 (2007) (“in the 124 reported federal habeas decisions between 1789 and 1867, only five involve allegations that the petitioner’s rights were violated. All of the other reported federal habeas cases involve allegations that detention was unauthorized by law.”); see also *Strait v. Laird*, 406 U.S. 341, 353 (1972) (Rehnquist, J., dissenting) (explaining that actions under 2241(c)(1) are distinct from those under (c)(3)).

⁵³ 8 U.S. at 125.

⁵⁴ *Hamdan*, 548 U.S. at 586-87.

to strip the courts, including the Supreme Court, of jurisdiction to hear habeas petitions filed by Guantanamo detainees did not apply to pending cases.⁵⁵ On the merits, the Court held that, while the AUMF may have “activated the President’s war powers,” it could not be read to displace the limited grant of authority to convene military commissions provided by Congress under the Uniform Code of Military Justice (“UCMJ”)⁵⁶ – a statute which prohibits the use of military commissions if (as in *Hamdan*) their procedures are inconsistent with the laws of war or if such compliance would prove “impracticable.”⁵⁷

Yet, as Justice Thomas asked in his *Hamdan* dissent, if the AUMF could be read to authorize Hamdi’s detention in accordance with the requirements of the Non-Detention Act, why could it not also be read to authorize Hamdan’s military commission in accordance with the requirements of the UCMJ?⁵⁸ There are a variety of principled explanations for this apparent divergence between the cases,⁵⁹ including that the Court moved closer to a heightened clear statement requirement proposed in Justice Souter’s *Hamdi* dissent.⁶⁰ That move, in turn, might reflect an increasing impatience with the Executive’s seemingly imperial assertions of power, an impatience that reached an apex in *Boumediene*.⁶¹ But this may just be arguing around the margins. Although the cases come to opposite conclusions regarding the clarity of the congressional authorizations at issue, both *Hamdi* and *Hamdan* ultimately tether their judgments to congressional will and fall within the *Youngstown* framework. Thus, as Dean Harold Koh pronounced, “[i]n *Hamdan*, the Court has given us a *Youngstown* for the twenty-first century,” by confirming that “a democracy must fight even a shadowy war on terror through balanced institutional participation: led by an energetic executive

⁵⁵ *Id.* at 576. The Court purported to rely upon “[o]rdinary principles of statutory construction.” *Id.* That is, to avoid raising a serious constitutional question under the Suspension Clause it, it applied the presumption that Congress does not intend statutes to apply retroactively. *But see id.* at 667 (Scalia, J., dissenting) (arguing that Congress desire to strip jurisdiction over pending cases was conscious and unambiguous).

⁵⁶ *Hamdan*, 542 U.S. at 594.

⁵⁷ See 10 U.S.C. §§801-946 (West 2000); *Hamdan*, 542 U.S. at 594-97.

⁵⁸ *Hamdan*, 548 U.S. at 681-83 (Thomas, J., dissenting).

⁵⁹ Cass Sunstein posits a couple: that detention is more closely perceived as an “incident” to force than the use of military commissions; or, that the Court insists on a heightened clear statement requirement when the executive attempts to depart from “standard adjudicative forms” such as traditional military tribunals. Sunstein, *Clear Statement Principles*, *supra* note __ at 17.

⁶⁰ See, e.g. Sean Mulryne, *A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation-of-Powers Principles*, 38 SETON HALL L. REV. 279, 312-318 (2008) (noting *Hamdan* Court’s adoption of Souter’s more stringent clear statement requirement from *Hamdi*); *Hamdan*, 548 U.S. at 692 (Thomas, J., dissenting) (claiming majority employed a “new, clear-statement approach”).

⁶¹ See text accompanying *infra* notes __ to __.

but guided by an engaged Congress and overseen by a skeptical judicial branch.”⁶²

Justice Breyer’s concurrence suggested a way out of the problem *Hamdan* created for the Administration – that the Court would ultimately ratify the President’s policy goals as long as he “return[s] to Congress to seek the authority he believes necessary.”⁶³ The political branches promptly took up Justice Breyer’s suggestion. Congress, working with the President, enacted the Military Commissions Act of 2006 within months of the *Hamdan* decision. The Act gave express congressional authorization for numerous procedural departures from UCMJ practice that had been a part of the President’s earlier Executive Order.⁶⁴ The Act also resolved any potential ambiguity in the DTA’s jurisdiction-stripping provisions by amending the habeas statute to make clear that the courts would have no jurisdiction over any pending habeas cases filed by enemy combatants.⁶⁵ Finally, for those enemy combatants foreclosed from plenary habeas review, the MCA revived the DTA’s alternate review scheme, which had been nullified by *Hamdan*.⁶⁶

That newly-revived DTA scheme conferred exclusive jurisdiction on the D.C. Circuit Court of Appeals to “determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”⁶⁷ The CSRT was, in turn, understood to be a “non adversarial” administrative proceeding established by the military to assess whether the Defense Department’s prior designation of a detainee as an enemy combatant was correct.⁶⁸ The

⁶² Harold Koh, *Setting the World Right*, 115 YALE L. J. 2350, 2364 (2006).

⁶³ *Hamdan*, 548 U.S. at 692 (Breyer, J., concurring).

⁶⁴ See Jennifer K. Elsea, Cong. Research Serv., THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF THE PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE (2006), *available at* <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (concluding MCA Commissions are substantially similar to those created by the President’s previous Executive Order).

⁶⁵ MCA § 7(b). See also 152 Cong. Rec. S10367 (daily ed. Sept. 28, 2006) (statement of Sen. Graham) (“The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.”).

⁶⁶ See MCA § 7(a) (precluding any courts from reviewing enemy combatant determinations, except through alternate court of appeals review scheme created by DTA § 1005(e)(1)).

⁶⁷ DTA § 1005(e)(3)(A).

⁶⁸ See Memorandum from Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2003), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter “Wolfowitz Order”]. The adequacy of the CSRT process was exhaustively contested by the parties in the post-*Rasul* litigation, see Azmy, *Rasul and the Intra-territorial Constitution*, *supra* note __ at 399-400, and was evaluated in detail by the Court in *Boumediene*, see text accompanying *infra* notes __ to __.

substance of DTA review in the court of appeals was limited to consideration only of: (i) whether the CSRT enemy combatant determination was “consistent with the standards and procedures specified by the Secretary of Defense; or (ii) whether the use of the Secretary’s standards and procedures “is consistent with the Constitution and laws of the United States,” to “the extent that the Constitution and laws of the United States are applicable.”⁶⁹ The DTA thus represented Congress’s ratification of the adequacy of the CSRT process created by the executive.

In *Boumediene*, the Court explained that if the “ongoing dialogue between and among the branches of Government is to be respected” the Court had to acknowledge Congress’ desire, manifested by the MCA’s response to *Hamdan*, to definitively strip the Courts of jurisdiction over pending cases.⁷⁰ The “respect” the Court accorded to its sister branch of government only went so far, of course, for the *Boumediene* Court in the next breath held that this clearly manifested congressional intent was nevertheless unconstitutional. Thus, in striking down the MCA and holding that the congressionally endorsed procedures for detainee hearings in the DTA were unconstitutional, *Boumediene* marks the first time that the Court has invalidated a wartime decree of the executive without having the institutional support of Congress.⁷¹ The Court did this unabashedly, in spite of the normative arguments in favor of deference to legislative decisionmaking and ultimately, I argue, correctly.

II. *BOUMEDIENE*’S ASSERTION OF JUDICIAL PREEMINENCE

Boumediene’s decision to wrest greater supervision of detainee operations from the political branches was complex in its reasoning but stark in its result. Two doctrinal components are particularly significant. First, by concluding that functional, rather than formalistic, considerations should define the geographical scope of the Suspension Clause, the Court signaled that the executive would be unable to “manipulate” bright line jurisdictional rules to “evade legal constraint.”⁷² Second, in reaching beyond the jurisdictional question to conclude that the DTA’s alternative review scheme was unconstitutional on the merits, the Court rejected

⁶⁹ DTA § 1005(e)(3)(D).

⁷⁰ *Boumediene*, 126 S. Ct. at 2243.

⁷¹ *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting) (excoriating Court’s majority for acting alone where “[i]t is therefore clear that Congress and the Executive-both political branches-have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war.”); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004) (noting that historically, courts in wartime do not strike down government action if “Congress, as well as the executive, has endorsed the action.”).

⁷² See text accompanying *infra* notes ___ to ___.

Congress' arguably superior institutional judgment related to wartime policy. Instead, the Court set the minimal requirements of the writ and announced that those requirements must be adjudicated immediately on remand by the district courts under standards the courts alone would develop.

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

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

1. Separation of Powers

The Court began its discussion by eulogizing the writ as a essential structural feature of the Constitution. According to the Court, the Framers understood the writ to be a “vital instrument” for the protection of liberty because its history signified, among other things, that “that the King, too, was subject to the law.”⁷³ History also taught the Framers, however, that the writ’s protections could easily be swept aside by the political branches in times of crisis and “no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power.”⁷⁴ Recognizing the writ “to be an essential mechanism in the separation-of-powers scheme,” the Framers committed to safeguard the otherwise vulnerable common law writ through “specific language in the Constitution to secure the writ and ensure its place in our legal system.”⁷⁵ The explicit constitutional protection of the writ through the Suspension Clause strengthened the courts’ authority, providing it with

⁷³ *Boumediene*, 128 S. Ct. at 2245.

⁷⁴ *Id.* at 2246. Here, Justice Kennedy makes explicit his view that structural constitutional guarantees are the best preservative of liberty. *See id.* (quoting *Loving v. United States*, 517 U.S. 748, 756, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (“[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny”); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”)).

⁷⁵ *Id.* at 2244.

the mechanism to check the “practice of arbitrary imprisonments”⁷⁶ to “preserve[] limited government”⁷⁷ and to protect against the “cyclical abuses” of power by the political branches.⁷⁸ It does so by “calling the jailer to account” thereby ensuring that the executive cannot employ its detention power without valid authority rooted in positive law. In short, absent formal suspension by Congress,⁷⁹ the Clause guarantees a role for the courts in checking the actions of coordinate branches.⁸⁰

The Court thus concluded that these structural features of the constitutional design embodied in the writ’s protections determined the geographical scope of the writ. It is the “separation-of-powers doctrine, and the history that influenced its design [that] must inform the reach and purpose of the Suspension Clause.”⁸¹

2. *Functional Jurisdictional Rules*

a. History

The Court then addressed the parties’ arguments about the common law history of the writ, recognizing that the Suspension Clause protected “at an absolute minimum” the writ as it existed when the Suspension Clause was ratified.⁸² The government argued that the writ in

⁷⁶ *Boumediene*, 128 S. Ct. at 2247 (quoting THE FEDERALIST NO. 84 (Alexander Hamilton)).

⁷⁷ *Id.* at 2247.

⁷⁸ *Id.*

⁷⁹ U.S. CONST. art I, § 9 (“The Privilege of the Writ of *Habeas corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”).

⁸⁰ “It ensures that, except in periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” *Boumediene*, 128 S. Ct. at 2247 (quoting *Hamdi*, 542 U.S. at 536).

⁸¹ *Boumediene*, 128 S. Ct. at 2247.

⁸² *Id.* at 2248 (quoting *St. Cyr*, 533 U.S. at 301). The Court was careful “not to foreclose” the possibility that the Suspension Clause has developed to expand the protections it originally codified in 1789. *Id.* Given the very strong separation-of-powers concerns perceived by the Court, had the Court been persuaded by the government’s and Justice Scalia’s conclusive reading regarding the narrow historical reach of the writ in 1789 (rather than concluding the history was indeterminate), it seems likely that the Court would have taken a road to expanding the Suspension Clause’s protections beyond those that existed at common law. That option was certainly available to the Court. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996) (assuming, without holding, that the Suspension Clause protects the substantive scope of the writ as it exists today, not merely as it existed in 1789); *Swain v. Pressley*, 430 U.S. 372, 380 n. 13 (suggesting, without holding, that Congress may not be authorized to “totally repeal all post-18th Century developments in this area of law”); *Ex Parte Yenger*, 75 U.S. at 95 (“the great spirit and genius of our institution has tended to the widening and enlarging of the habeas jurisdiction of the courts and judges of the United States.”); *see also* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980) (noting that the “writ has always expanded

1789 reached only territories over which the Crown was sovereign, while the Petitioners argued that the writ followed the King's officers wherever they exercised significant control over the territory.⁸³ The Court concluded that the history presented by competing sides was ultimately indeterminate, but its exegesis of that history is worth attention because it surfaces a unifying concern about judicial limits on executive power.⁸⁴

In particular, the Court puzzled over the English courts' relationship to Scotland, Ireland and Canada. As the government and Justice Scalia in dissent emphasized, the writ did not run to Scotland even though that land was "controlled by the English monarch,"⁸⁵ suggesting mere territorial control of the kind the U.S. exercises over Guantanamo would not be sufficient. The writ did, however, run to Canada, even though it was three thousand miles away; it also ran to Ireland, which, unlike Scotland, remained separate from the English Crown.⁸⁶ For the Court, this seemingly disparate treatment could be best explained by "prudential considerations," rather than a "categorical or formal conception of sovereignty."⁸⁷ Specifically, the Court emphasized that Canadian and Irish courts still applied the same English law used by English courts domestically; Scotland, by contrast, even after its union with England, "continued to maintain its own laws and court system."⁸⁸ Thus, extending the writ—and English legal rules—to Scotland might have produced "embarrassment" in the form of conflicting interpretations of law or an inability to enforce English judgments in Scotland.⁸⁹ Such "prudential barriers" have no relevance in Guantánamo, the Court recognized, because "[n]o Cuban court has jurisdiction to hear these

alongside developing substantive understandings of liberty"); *Developments in the Law – Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1269 (1970) ("[T]he history of two centuries of expansion through a combination of statutory and judicial innovation in England must have led [the Framers] to understand habeas corpus as an inherently elastic concept not bound to its 1789 form."); *but see* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers"). The Court likely perceived this conclusion was not necessarily to resolve the case and may have created future uncertainty in broader habeas doctrine.

⁸³ *Boumediene*, 128 S. Ct. at 2248-52.

⁸⁴ Near the end of its historical discussion, the Court makes an intriguing comparison to *Brown v. Board of Education*. At one level, the Court is simply suggesting that the historical evidence here, as with the Fourteenth Amendment Framers' understanding of the applicability of the Equal Protection Clause to public schools, is disputed and therefore inconclusive. But surely the Court is also implicitly expressing, as it did in *Brown*, a view that rights may expand over time, rather than be tethered to historical practice.

⁸⁵ *Id.* at 2250.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (citing 1 BLACKSTONE 98, 109).

⁸⁹ *Boumediene*, 128 S. Ct. at 2250.

petitioners' claims, and no law other than the laws of the United States applies" there.⁹⁰ In other words, if U.S. law did not apply in Guantánamo, then no law would apply. The absence of any judicially-enforceable law there, in turn, implicated the court's core separation-of-powers concerns.

b. Precedent

The Court then examined three sets of precedent in support both of its functional approach and, ultimately, its conclusion that the Suspension Clause applies to Guantánamo (and potentially elsewhere). First, the Court examined the so-called *Insular Cases*, which addressed the constitutional status of island territories the U.S. obtained following victory in the Spanish-American War— also the period in which the United States secured its control over Guantánamo as a condition for ending its occupation of Cuba.⁹¹ For those Territories “destined for U.S. statehood,” full constitutional rights would apply, while noncitizen inhabitants of unincorporated territories were entitled to enjoy only “fundamental” rights in the Constitution.⁹² Recognizing the “inherent practical difficulties” of enforcing the Constitution “always and everywhere,” the fundamental rights doctrine announced in the *Insular Cases* allowed the Court “to use its power sparingly and *where it would be most needed*.”⁹³ Next, the Court considered *Reid v. Covert*, in which a plurality concluded that the Bill of Rights applies to protect U.S. citizens abroad, in all circumstances.⁹⁴ The Court formally endorsed Justice Harlan’s concurring opinion which rejected the plurality’s categorical rule; Harlan’s functional approach instead instructed courts to extend a fundamental constitutional right to persons abroad if its application would not be “impracticable and anomalous.”⁹⁵

Finally, the Court reviewed the cornerstone of the Administration’s detention policy, *Johnson v. Eisentrager*.⁹⁶ Contrary to the categorical reading of *Eisentrager* advanced by the government in both *Rasul* and *Boumediene*, that neither the statutory writ nor the Constitution applies to places over which the U.S. is not formally sovereign, the Court recognized that “practical considerations” largely animated the Court’s resistance to

⁹⁰ *Id.* at 2251.

⁹¹ See Gerald L. Neumann, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 39 (2004).

⁹² *Boumediene*, 128 S. Ct. at 2254, 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1979)).

⁹³ *Boumediene*, 128 S. Ct. at 2255 (quoting in part *Balzac*, 258 U.S. at 312) (emphasis added).

⁹⁴ 354 U.S. 1, 14 (plurality opinion).

⁹⁵ *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

⁹⁶ 339 U.S. 763 (1950).

extending constitutional rights to the German prisoners held in Landsberg Air Force Base in post-War Germany.⁹⁷ Sovereignty was not, in fact, crucial to the court’s opinion: it was only mentioned twice in an opinion that spent considerably more time describing the practical difficulties of extending the writ (and Constitutional rights) to persons held in another country during active hostilities.⁹⁸ Indeed, all of the foregoing precedent considered by the Court could be harmonized by the “idea that questions of extraterritoriality turns on objective factors and practical concerns, not formalism.”⁹⁹

Though the case is hardly mentioned in *Boumediene*, the Court also put an end to the categorical reading of *United States v. Verdugo-Urquidez*,¹⁰⁰ as well as the normative theory underlying such a reading. In *Verdugo-Urquidez*, Justice Rehnquist’s plurality opinion held that an alien could not invoke the protections of the Fourth Amendment to challenge a warrantless search and seizure of his property in Mexico, and suggested further that constitutional rights categorically would not apply outside U.S. sovereign territory.¹⁰¹ The D.C. Circuit had twice interpreted *Verdugo-Urquidez* to hold broadly that Guantanamo detainees, as aliens without “property or presence in this country,” enjoy no constitutional rights under the Fifth Amendment or the Suspension Clause.¹⁰² That categorical view which precludes recognition of constitutional rights over places in which the U.S. is not sovereign has a very plausible theoretical foundation – one that can be called a norm of reciprocity. This reciprocity norm dictates that the Constitution should apply only to persons who are members of the political community, i.e., who are constituted by the founding document. Under such a constitutional compact, persons are entitled to enjoy the fruits of constitutional liberty if they have voluntarily submitted themselves to constitutional constraints.¹⁰³

⁹⁷ *Boumediene*, 128 S. Ct. at 2257.

⁹⁸ *Id.* at 2257-58.

⁹⁹ *Id.* at 2258.

¹⁰⁰ *Verdugo-Urquidez*, 494 U.S. at 269.

¹⁰¹ *Id.* at 273. Rehnquist in fact suggested that *Eisentrager* “was emphatic” in rejecting “the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Id.* at 269.

¹⁰² See *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev’d sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004) (quoting *People’s Mojahedin Org. v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)); see also *Boumediene*, 476 F.3d at 992 (quoting *People’s Mojahedin*, 182 F. 3d at 22, *rev’d* 128 S. Ct. 2229 (2008)).

¹⁰³ According to Justice Scalia, entitlement to constitutional rights turns on citizenship alone, that is, those persons who consent to be governed or constituted by the Constitution. *Boumediene*, 128 S. Ct. at 2063 (Scalia, J., dissenting) (constitutional rights are derived “from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government”). See Neuman, *supra* note __, at 6-7 (classifying this theory as a “membership approach” which “treats certain individuals or

As his concurring opinion in *Verdugo-Urquidez* and majority opinion in *Boumediene* make clear, Justice Kennedy rejects both such a bright line rule and the theory underlying it. He rejects both in part because he sees the constitution less as a compact than as fundamental law chosen by citizens to apply to its rulers wherever they act.¹⁰⁴ It could also be, as Professor Eric Posner suggests, because Kennedy is a “cosmopolitan” judge more disposed to engage with foreign legal norms and is more likely to view rights as having some transnational force.¹⁰⁵ Those are partial, but not full explanations. As shown in the next section, the normative justification that most fully accounts for his view is rooted in separation of powers and a concern about executive manipulation of legal rules.

3. An Anti-Manipulation Principle

The categorical view rejected by the Court has some natural advantages over the functional approach it endorsed. As Justice Scalia stressed, bright-line jurisdictional rules promote clarity and predictability for the political branches who have to interpret them;¹⁰⁶ on the other hand, functional rules subject to the interpretation by the Court tend to aggrandize power to a judicial branch that is both politically unaccountable and generally ill-equipped to make hard choices regarding, for example, the location of enemy combatant detention operations.¹⁰⁷ Functional standards also impose costs on litigants who value the predictability of clear rules. The debate over the comparative advantages of bright line versus functional rules parallels the historical debate over the incorporation of the Bill of Rights to the States¹⁰⁸ and, indeed, surfaces many of the same considerations in the even older debate between rules versus standards.¹⁰⁹

locales as participating in a privileged relationship with the constitutional project, and therefore entitled to the benefit of constitutional provisions.”).

¹⁰⁴ See *Verdugo-Urquidez*, 494 U.S. at 269 (Kennedy, J., concurring).

¹⁰⁵ Eric Posner, *Boumediene and the March of Judicial Cosmopolitanism* 13 (August 2008), available at <http://ssrn.com/abstract=1211426>; see also David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47 (2008), available at <http://ssrn.com/abstract=1272202> (suggesting *Boumediene* can be seen as a part of greater acceptance of international human rights norms by U.S. courts).

¹⁰⁶ *Boumediene*, 128 S. Ct. at 2294.

¹⁰⁷ *Boumediene*, 128 S. Ct. at 2302 (Scalia, J., dissenting) (“the Court’s ‘functional’ test . . . does not (and never will) provide clear guidance for the future”); *id.* at 2303 (“the ‘functional’ test is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.”).

¹⁰⁸ See Neuman, *supra* note __ at 12-13.

¹⁰⁹ See, e.g., Carol Rose Ackerman, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

In this case, the Court felt compelled—and rightly so—to reject any bright line geographical rules regarding the reach of the writ or even to limit its ruling, as it easily could have done, to the arguably unique physical and political space of Guantánamo. The Court did so because it feared that the executive could simply manipulate any fixed rule by moving detention operations to the other side of it and therefore, “govern without legal constraint.”¹¹⁰ The predictability and clarity of a bright line rule that Justice Scalia sees as a virtue, Justice Kennedy likely perceives as a vice because any such rule might ultimately “be subject to manipulation by those whose power it is designed to restrain.”¹¹¹ To thereby permit the political branches the latitude to “switch the Constitution on and off at will” would produce a “striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”¹¹²

Thus, the Court set forth three functional and highly subjective criteria to permit the Court to “say what the law is” regarding the applicability of constitutional rights abroad. Specifically, in determining the reach of the Suspension Clause, the Court will consider: (1) the citizenship and status of the detainee and the adequacy of the process under which a status determination was made; (2) the nature of the sites of apprehension and detention; and (3) the “practical obstacles” involved in judicially resolving petitioner’s habeas petition.¹¹³ According to *Boumediene*, an analysis of these criteria supported *Eisentrager*’s decision to deny the German petitioners constitutional rights; while each, by contrast, supports the extension of the writ to the detainees in

¹¹⁰ *Boumediene*, 128 S. Ct. at 2259. The Court suggested one way in which the government’s proposed rule might invite abuse: where, for example, the government would surrender formal sovereignty to a territory, but enter into a lease granting total control to the U.S. *Id.* Arguably the government has done just this in its lease agreement over the Bagram Airfield and prison. See text accompanying *infra* notes __ to __.

¹¹¹ *Boumediene*, 128 S. Ct. at 2259.

¹¹² *Id.* (quoting *Marbury v. Madison*, 1 Cranch (3 U.S.) 137, 177 (1803)). The Court also makes a very intriguing reference to the Habeas Corpus Act of 1679, whose lessons the Court must have thought highly relevant to the controversy before it. The 1679 Habeas Corpus Act was passed in response to attempts by the Crown to evade the requirements of the landmark 1640 Habeas Corpus Act (which eliminated the Star Chamber and rejected the King’s prerogative to detain by mere “special command”) by exiling prisoners beyond the court’s newly fortified jurisdiction. Specifically, the 1679 Act was passed in response to abuses by the Earl of Clarendon, Lord High Chancellor of England, who was actually *impeached* for imprisoning English subjects “in remote islands, garrisons and other places, thereby to prevent them from the benefit of the law.” Duker, *supra* note __ at 53. As the Court suggests, that history may seem “remote in time” 128 S. Ct. at 2277, but it is highly relevant today. In light of that history, the Court must think it appropriate to prevent the same abuses which produced the 1679 Act.

¹¹³ *Boumediene*, 128 S. Ct. at 2259.

Guantánamo,¹¹⁴ and as discussed below, potentially to other large-scale detention operations such as in Bagram, Afghanistan. Because the executive cannot now be assured of complete discretion to conduct detention operations outside the jurisdiction of the court, it may well have to increase its compliance with the law. Enforcing the Suspension Clause in these circumstances thus helps to “maintain the delicate balance of governance that is itself the surest safeguard of liberty.”¹¹⁵

It is fair to ask if the Court’s concern about executive manipulation is overstated or even inappropriate. It is likewise reasonable to ask whether the Court should not have been more “minimalist” as it arguably had been in *Hamdi* and *Hamdan*,¹¹⁶ and expressly limit its decision to the precise facts before it relating to detention operations in Guantánamo alone. I believe the Court’s skepticism about executive conduct was deep and its open-ended decision was justified.

By the time *Boumediene* was argued, the Court had had very learned about a series of policy-driven legal strategies designed by the executive to evade the jurisdiction of U.S. courts and the constraints of law.¹¹⁷ Specifically, it was aware of the executive’s decision to deny persons apprehended in Afghanistan, or anywhere else as part of the broader war on terror, the humanitarian protections of the Geneva Conventions.¹¹⁸ The Court knew of the Administration’s strategy to initially locate detention operations outside the jurisdiction of the U.S. courts, where interrogations and status determinations could proceed unobstructed by law,¹¹⁹ and was also likely aware that, following the

¹¹⁴ With respect to the first criteria, all of the detainees asserted they are not combatants, and the administrative CSRT process employed to judge their combatant status was woefully deficient; they thus were unlike the German prisoners whose combatancy was undisputed and who were afforded a full trial by military commission at which their war crimes were judged. *Id.* at 2259-60. With respect to the second criteria, Guantánamo—over which our jurisdiction is complete and effectively permanent—is far different from Landsberg Air Force base, over which our control was temporary and contingent. *Id.* at 2260. Finally, with respect to the third criteria, because the U.S. exerts plenary control over the Naval Base, which is located thousands of miles from any active combat zone, there would be no excessive burden on the military to adjudicate habeas petitions. *Id.* at 2261.

¹¹⁵ *Boumediene*, 128 S. Ct. at 2247.

¹¹⁶ See Sunstein, *supra* notes __ and __.

¹¹⁷ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1785, 1689-91 (1976) (emphasizing the impact that practical and political considerations have on courts).

¹¹⁸ See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dept. of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dept. of Defense (Jan. 22, 2002); see also *Hamdi*, 542 U.S. at 548 (Souter, J., concurring) (criticizing government for its failure to comply with Geneva Prisoner of War Convention).

¹¹⁹ See Memorandum from Patrick F. Philbin & John Yoo, Office of Legal Counsel,

Court's decision extending the statutory writ to Guantánamo, the Bush Administration effectively ceased transferring prisoners to Guantánamo,¹²⁰ preferring to exploit either secret "black sites"¹²¹ or military bases in Afghanistan it viewed beyond the jurisdiction of U.S. courts.¹²²

The Court was certainly mindful of the infamous "Torture Memos" issued by the Office of Legal Counsel¹²³ which, through contorted, sometimes incompetent¹²⁴ and ultimately self-serving reasoning,¹²⁵ provided near blanket immunity to Administration officials and interrogators from criminal or civil liability under otherwise applicable anti-torture statutes. It also knew well the government's strategic and arguably manipulative attempts to avoid judicial review in cases such as *Padilla* and *Al-Marri*.¹²⁶ Additionally, the Court had surely heard much

to William J. Haynes, II, General Counsel, Dept. of Defense 1 (Dec. 28, 2001). *See also* John Yoo, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142-43 (2006) (explaining that while "[n]o location was perfect," Guantánamo seemed "to fit the bill," in order to allow military interrogations without worrying about their lawfulness).

¹²⁰ Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1 (reporting that Administration officials "effectively halted the movement of new detainees into Guantánamo" in a September 2004 meeting).

¹²¹ *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01 (describing series of secret detention facilities operated by the CIA in various countries, designed to hold and interrogate high level terror suspects).

¹²² *See infra* at ___. Golden & Schmitt, *supra* note __ (reporting that U.S. military is operating a makeshift prison facility in Bagram, Afghanistan, where it holds approximately 400 prisoners as "enemy combatants"); Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005 at A1 (reporting on intentions of "senior administration officials" to transfer up to half the current Guantánamo detainees to prisons in Saudi Arabia, Afghanistan and Yemen as a result of recent "adverse court rulings" regarding the Administration's power in Guantánamo).

¹²³ *See* Memorandum for William J. Haynes II, General Counsel for the Department of Defense, from Jay S. Bybee, Assistant Attorney General, *Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Forces in Afghanistan* (August 2, 2002); Memorandum for William J. Haynes II, General Counsel for the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogations of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003). Both Memos were later revoked by the subsequent head of the Office of Legal Counsel. *See* Jack Goldsmith, *The Terror Presidency* 151 (2007).

¹²⁴ *See, e.g.,* Harold Koh, *No Torture, No Exceptions*, WASH. MONTHLY, Jan-Mar. 2008 (describing the legal opinions in these memos "to be a disgrace, not only to that office, but to the entire legal profession").

¹²⁵ *See Restoring the Rule of Law, Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 113th Cong. (2008) (Joint Statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison and Christopher H. Schroeder criticizing the Memo as a "one-sided justification for conferring legal immunity" on government actors).

¹²⁶ In *Padilla*, just two days before the district court was to hold a hearing on Padilla's motion to dismiss the material witness warrant, the President designated Padilla an "enemy combatant" and transferred him to Defense Department custody. *See* Padilla ex

about the international condemnation of the legal regime in Guantánamo and the conditions under which detainees were housed and interrogated.¹²⁷ And, the Court was well-educated by the increasing studies and anecdotes (many of which were described in briefs of Petitioners and *amici*) which demonstrate that many, if not most of the detainees in Guantánamo, were far from the hardened terrorists the Administration earlier claimed them to be.¹²⁸

rel. *Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 48-49 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom.*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), (describing the government's "disappointing conduct" in the case), *rev'd* 542 U.S. 426 (2004). On the question before the Court of whether the filing of Padilla's habeas petition in New York was proper, four justices emphasized that his transfer had been "shrouded in secrecy," and that the government should not be permitted "to obtain a tactical advantage as a consequence of an *ex parte* proceeding." *Padilla*, 542 U.S. at 431. He was later held incommunicado for months, and subject to a brutal regime of isolation and interrogation which rendered him arguably clinically insane. See Motion to Dismiss Indictment for Outrageous Government Conduct, *United States v. Padilla*, No. 04-06001 (S.D. Fla. 2006). Moreover, two days before its opposition to Padilla's petition for certiorari from the Fourth Circuit's decision approving his detention was due, the government indicted the putative enemy combatant in a seemingly transparent attempt to moot Supreme Court review of their actions. *Padilla v. Hanft*, 423 F. 3d 582, 584-85 (4th Cir. 2005) (explaining that the Government's strategic maneuvering had "given rise to at least an appearance that the purpose of these actions may be to avoid consideration by the Supreme Court.").

Similarly, Ali al-Marri, a lawful permanent resident who was apprehended in his home in Peoria, Illinois and charged with federal bank and credit card fraud, was designated an "enemy combatant" the Monday after a district court judge scheduled a motion to suppress. See *Al-Marri v. Pucciarelli*, 543 F.3d 213, 237 (2008) (Motz, dissenting). Attorney General Ashcroft explained that, while in the criminal justice system, al-Marri refused offers to "improve his lot" by cooperating with FBI investigators; al-Marri was thus transferred to the military because he "insisted" on becoming "a hard case," presumably because he elected to assert his constitutional entitlement to trial by jury. John Ashcroft, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 168-69 (2006).

¹²⁷ See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 ("investigators had found a system devised to break the will of the prisoners at Guantánamo . . . through 'humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.'"); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, *Economic, Social and Cultural Rights Civil and Political Rights*, U.N.Doc.E/CN.4/2006/120 (Feb. 15, 2005), available at http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf (hereinafter *UN Report*) (The UN Special Rapporteur on Torture concluded that interrogation techniques used at Guantánamo such as "the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days[,] and prolonged isolation were perceived as causing severe suffering . . . [and] that the simultaneous use of these techniques is even more likely to amount to torture."); see also Jane Mayer, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

¹²⁸ For example, Secretary Rumsfeld labeled the detainees as among "the most dangerous, best trained, vicious killers on the face of the earth." Katharine Q. Seelye,

In light of all of this evidence, the Court was justifiably suspicious that the executive would seek to evade even nominal supervision by the courts and equally concerned that the executive was unable to act appropriately in the absence of any judicial supervision. Thus, Justice Roberts' suggestion that the Court's decision is ultimately "about control of federal policy regarding enemy combatants"¹²⁹ misses the mark. The Court did not prefer one policy outcome over another; it merely wished to ensure that the executive abides by elementary constraints of the law.

B. THE INADEQUACY OF THE DTA: REBUKE OF CONGRESS

After deciding that the Suspension Clause has extraterritorial reach and thereby reversing the D.C. Circuit on the jurisdictional question it reached, the Court went further to decide that the congressionally-created alternative review scheme in the DTA was an "inadequate substitute" for the core protections of the common law writ and therefore violated the Suspension Clause. The Court thus not only rejected the concerted judgment of the political branches regarding the appropriate balance of liberty and national security, it declined to follow the more cautious course that Justice Roberts argued was required – a remand to the D.C. Circuit to exhaust procedures under the DTA and develop a full factual record regarding its adequacy as a substitute. While acknowledging that this was the traditional approach, the Court nevertheless concluded that, "the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."¹³⁰

Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare, N.Y. TIMES, Jan. 28, 2002, at A6. Studies brought to the Court's attention demonstrated this position to be grotesquely exaggerated. See Mark Denbeaux *et al.*, Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (reviewing defense department data to reveal that only 8% of detainees are alleged to have been al Qaeda fighters and 55% were never even alleged to have engaged in a hostile act); Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006 at 13 (studying defense department disclosures about detainees and concluding "fewer than 20% . . . have ever been Qaeda members," that "perhaps hundreds of the detainees were not even Taliban foot soldiers," and that the "majority were . . . handed over by reward-seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability"); Tom Lasseter, *America's Prison for Terrorists Often Held the Wrong Men*, MCCLATCHY NEWSPAPERS ("An eight-month McClatchy investigation in 11 countries on three continents has found that [there are] perhaps hundreds [of men] whom the U.S. has wrongfully imprisoned in Afghanistan, Cuba and elsewhere on the basis of flimsy or fabricated evidence, old personal scores or bounty payments"); *They Came for the Chicken Farmer*, Editorial, N.Y. TIMES, March 7, 2005 (describing case of chicken farmer in Pakistan, detained because his name resembled Taliban finance minister's).

¹²⁹ *Boumediene*, 128 S. Ct. at 2279 (Roberts, J., dissenting).

¹³⁰ *Boumediene*, 128 S. Ct. at 2261-62.

1. *Honoring Congress' Will In Order to Reject its Judgment*

In evaluating the adequacy of the DTA as a substitute for habeas, the Court noted at the outset that there was little precedent to guide it; indeed, the Court had never before held that a statute violated the Suspension Clause.¹³¹ Yet it was clear that, in contrast to other habeas statutes the Court had considered “adequate,”¹³² the DTA was not meant to be “coextensive” with traditional habeas. For example, DTA review is lodged with the court of appeals, rather than the district court, and the jurisdictional scope of review prohibits the introduction of new evidence or contravention of facts previously found by a CSRT panel.¹³³ The DTA contains no savings clause which might “preserve habeas review as a last resort.”¹³⁴ Equally important, the Court would not interpret the DTA in a manner which would rectify its constitutional defects because Congress meant, in enacting the DTA, specifically to provide these detainees fewer rights than they previously had in habeas.¹³⁵ “We cannot ignore the text and purpose of a statute in order to save it.”¹³⁶ Thus, the Court would respect Congress’ intentions, even if it rejected the adequacy of its judgment.

2. *The Scope of the Writ at Common Law*

In order to make its’ own judgment about the comparative adequacy of the DTA, the Court had to develop an understanding of the baseline protections of the writ at common law which are, “at a minimum,” constitutionally protected by the Suspension Clause. All parties agreed that the common law writ protected a prisoner’s right to challenge the legal basis for the detention and authorized a court to order a

¹³¹ For a discussion of the “adequate substitute” standard governing congressional restrictions of habeas under the Suspension Clause, see Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. __ (forthcoming 2008).

¹³² See *Boumediene*, 128 S. Ct. at 2264 (discussing *Felker v. Turpin*, 518 U.S. 651 (1996)); *id.* at 2265 (discussing *Swain v. Pressley*, 430 U.S. 372, 381 (1977) and *United States v. Hayman*, 342 U.S. 205, 223 (1952)).

¹³³ See 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (the MCA authorizes limited DTA review “by design” because “[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record”) (remarks of Sen. Cornyn); 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (“the DTA does not allow re-examination of the facts . . . and it limits the review to the administrative record.”) (remarks of Sen. Kyl).

¹³⁴ *Id.*

¹³⁵ *Boumediene*, 128 S. Ct. at 2265 (“If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.”).

¹³⁶ *Id.* at 2272.

prisoner's release should detention authority be lacking.¹³⁷ As a result, the government conceded that, despite the statute's silence on these issues, the Court could construe the DTA to authorize the Court of Appeals to order a prisoner's release in certain circumstances and to permit petitioners to challenge the President's legal authority to detain them.¹³⁸

Critically, however, the DTA could not be read, consistent with Congress' intent, to authorize the Court of Appeals to hear challenges to the factual basis for the detention, that is, to introduce evidence to challenge the factual determinations by the CSRT. Thus, whether habeas practice at common law permitted factual challenges became the core dispute between the parties. The government argued that at common law habeas courts categorically did not hear challenges to the factual conclusions of a prior adjudicative body.¹³⁹ The Court rejected this static, formalistic reading of the writ; the Court stressed that at common law habeas was "above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances."¹⁴⁰

As the Court explained, on the one hand, habeas review of petitions filed by persons criminally convicted by a court of competent jurisdiction or court of record was extremely limited.¹⁴¹ The presumption against permitting factual challenges to such a judgment is motivated primarily by two concerns. First, courts generally considered themselves without power to review the judgment of a court of equal jurisdiction and competence as if sitting as an appellate court.¹⁴² Second, judgments made by courts of record would have been secured by a "fair, adversary proceeding."¹⁴³ On the other hand, a habeas court's scope of review was

¹³⁷ *Boumediene*, 128 S. Ct. at 2266, 2271.

¹³⁸ *Id.* at 2271-72.

¹³⁹ Brief of Respondent at 47-48, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (2006) ("Br. Respondent").

¹⁴⁰ *Boumediene*, 128 S. Ct. at 2267 (quoting *Schlup v. Delo*, 513 U.S. 298 (1995)). For a comprehensive evaluation of the scope of the habeas inquiry at common law, see P.D. Halliday & G.E. White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

¹⁴¹ *Boumediene*, 128 S. Ct. at 2267-68. See also *Ex Parte Watkins*, 28 U.S. 103, 106 (1833) (stating that a habeas court will not review the judgment of "a court of record whose jurisdiction is final"); *Brenan's Case*, 116 Eng. Rep. 188, 192 (1747) (habeas court will not review judgment of "court having competent jurisdiction to try and punish the offense").

¹⁴² *Boumediene*, 128 S. Ct. at 2268 ("where relief is sought from a sentence that resulted from the judgment of a court of record . . . considerable deference is owed to the court that ordered confinement"); see also *Ex Parte Toney*, 11 Mo. 661, 661-62 (1842) ("The party must resort to his writ of error or other direct remedy to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive.").

¹⁴³ *Boumediene*, 128 S. Ct. at 2268. See generally R.J. Sharpe, *THE LAW OF HABEAS CORPUS* 51 (1989) ("trial by common law was thought to provide the subject with adequate protection, and the possibility of allowing a convicted person some method of

far more extensive “where there had been no previous judicial review.”¹⁴⁴ This includes cases challenging pretrial detention,¹⁴⁵ military impressments,¹⁴⁶ prisoner of war determinations,¹⁴⁷ and other noncriminal detentions.¹⁴⁸ In sum, it is in the context of reviewing the legality of executive detention that the writ’s “protections have been strongest.”¹⁴⁹

3. *Inadequacy of the DTA*

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

challenging the correctness of a conviction by *habeas corpus* was viewed with considerable misgiving”); see also *Bushell’s Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670) (undertaking broad review of factual basis for detention for contempt because, unlike a case of “treason or felony” where a prisoner would have had an “indictment and trial,” “our judgment ought to be grounded upon our own inferences and understandings” and not upon the lower court’s).

¹⁴⁴ *Boumediene*, 128 S. Ct. at 2267; *Oaks*, *supra* note __ at 266. (noting that the writ’s “most essential task” is “freeing persons from illegal official restraints of liberty not founded in judicial action”).

¹⁴⁵ *Boumediene*, 128 S. Ct. at 2267; see also *Duker, Legal History*, *supra*, note __ at 43 (explaining that “when the writ of *habeas corpus* performed its ancient function of eliciting the cause of imprisonment, or of enforcing the right to bail or release from confinement under void process prior to trial, there was seldom, if ever, any circumstance where a court of record had previously determined factual issues” and in those cases, a habeas court was free to consider and determine facts); *Ex Parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (ordering release of man held in detention by federal marshals because of insufficient factual or legal basis shown in the respondent’s return).

¹⁴⁶ See, e.g., *Delaware v. Clark*, 2 Del. Cas. 578 (Del. Ch. 1820) (discharging petitioner based on affidavits and live testimony from third parties proving that petitioner had enlisted while intoxicated and without his father’s authorization); *Good’s Case*, 96 Eng. Rep. 137 (K.B. 1760) (discharging petitioner on basis of affidavit explaining that he was not a sailor, but a ship-carpenter immune from impressment).

¹⁴⁷ *Bollman*, 8 U.S. at 135 (reviewing written depositions to determine whether there was “sufficient evidence of [petitioners’] levying war against the United States” to justify detention); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795) (reviewing “affidavits of several of the most respectable inhabitants of the western counties” affirming that petitioner had not engaged in treasonous activity during an insurrection); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing affidavits submitted by petitioner and a third party in review of a Swedish national’s detention as a prisoner of war); *United States v. Villato*, 2 U.S. (2 Dall.) 370 (C.C. Pa. 1797) (Spanish privateer introduced evidence challenging his detention for treason).

¹⁴⁸ *New Jersey v. Drake*, No. 34942, N.J. State Archives, Minutes Book No. 113, Folio p. 261 (N.J. Nov. 15, 1814) (reviewing extensive contradictory evidence addressing circumstances of slave-petitioner’s purchase, and the credibility of the various affiants and ordering petitioner freed); *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (discharging woman from custody after reviewing doctor’s affidavit and conducting examination of petitioner’s mental condition); *R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (considering petitioner’s testimony on “oath in Court” that “she went in danger of her life by [her husband]” and should be freed from his custody).

¹⁴⁹ *St. Cyr*, 501 U.S. at 533.

substantial deference from a habeas court¹⁵⁰ because of “myriad deficiencies” in the CSRT process. Those deficiencies included an irreparable structural bias in the CSRT fact-finding which presumed the correctness of the government’s “enemy combatant” designation – as well as all evidence submitted in support of that designation – but provided no similar presumption in favor of exculpatory evidence, even if it came from the same source.¹⁵¹ That structural bias was exacerbated through denial of access to counsel,¹⁵² which rendered it practically impossible for detainees to obtain and present evidence on their behalf, or to even see the classified evidence purporting to justify their detention.¹⁵³ The CSRT panels, which were under the formal chain of command of Defense Department officials, also lacked neutral or unbiased decision-makers. Having already determined each of the detainees under review to be enemy combatants,¹⁵⁴ DOD officials exerted pressure on panels to ratify those designations.¹⁵⁵ And unlike any other proceedings constituted under U.S. law, the CSRTs could, and regularly did, consider evidence procured by torture and coercion.¹⁵⁶

¹⁵⁰ *Boumediene*, 128 S. Ct. at 2269-70.

¹⁵¹ CSRT Procedures, Encl. 2(B)(1). *See also In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d at 475 (describing unfairness resulting from presumption in favor of government’s evidence).

¹⁵² Detainees were permitted the assistance of a non-lawyer military officer to act as a “personal representative,” but that person was only permitted to explain procedures, but not to advocate on a detainees behalf in a CSRT proceeding. CSRT Procedures, Encl. 1(G)(11).

¹⁵³ *See infra* note ____.

¹⁵⁴ Deputy Defense Secretary Paul Wolfowitz, instructed in the very order creating the CSRTs, that each of detainees before a CSRT panel had been adjudged enemy combatants “through multiple levels of review by officers of the Department of Defense.” Wolfowitz Order, *supra* note ____.

¹⁵⁵ In important testimony (replicated in a declaration filed with the Court), Lieutenant Colonel Stephen Abraham, a long-time military intelligence officer, described his experience as a member of a CSRT panel:

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

Testimony of Stephen Abraham, Lt. Colonel, U.S. Army Reserve, before the House Armed Services Committee (July 26, 2007). *See also* Carol Leonnig, *Evidence of Innocence Rejected at Guantanamo*, WASH. POST, Dec. 5, 2007, at A01 (published day of oral argument).

¹⁵⁶ By regulation, all evidence in favor of the government’s case was given a presumption of correctness by the CSRT, including evidence procured by torture. Thus, for example, detainee Mamdouh Habib had been rendered from Pakistan to Egypt, where interrogators got him to “confess” to a number of claims, after subjecting him to a brutal regime of torture. His CSRT, however, ignored his claims that his confession was

Of these “myriad deficiencies,” the one the Court thought “most relevant” was “the constraints on the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant.”¹⁵⁷ Notably, the Court simply did not accept the proposition that the CSRT procedures, as written, were sufficient; such formalism, advanced by the Government and adopted by Justice Roberts, ignored the practical reality and actual operation of the CSRT system, which departed substantially from rosy portrayals of a fair adversarial system.¹⁵⁸ In sum, the Court agreed that the “closed and accusatorial” CSRT process produced a “considerable risk of error in the tribunal’s findings of fact.”¹⁵⁹

Once the Court was convinced that the CSRT’s factual determinations were unreliable, the problem with DTA review became apparent. The DTA precluded the Court of Appeals from considering newly discovered evidence that was not or could not have been made available to the CSRT. As such, the CSRT record – and the suspect findings resulting from the tribunal’s defective procedures – could not be challenged under the appellate review.¹⁶⁰ In contrast, common law habeas courts had the power to review new evidence relevant to the legality of executive detention and would not be locked into factual determinations by the detaining official.¹⁶¹ The Kurnaz example vividly underscored the inadequacy of the DTA for the Court.¹⁶² As described, under the DTA

coerced and untrue, and nevertheless found him to be an enemy combatant. *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d at 473.

¹⁵⁷ *Boumediene*, 128 S. Ct. at 2269; *see also id.* at 2273 (CSRTs “lack the necessary adversarial character”).

¹⁵⁸ The claim that the CSRTs provided “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants” *Boumediene*, 128 S. Ct. at 2279 (Roberts, J., dissenting) is both irrelevant in the context of utterly novel and potentially indefinite detentions undertaken outside the requirements of the Geneva Conventions, and overly simplistic to the extent that it ignored the ways in which the CSRTs functioned in practice.

¹⁵⁹ *Boumediene*, 128 S. Ct. at 2270 (internal citations omitted).

¹⁶⁰ Judge Rogers observed that “[f]ar from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.” *Boumediene*, 476 F. 3d at 1007 (Rogers, J., dissenting).

¹⁶¹ *See* text accompanying *supra* notes __ to __. As Justice Holmes explained:
[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from outside, not in subordination to the [prior] proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

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

¹⁶² Supreme Court commentator Mary Lederman remarked that about the Petitioner’s use of the Kurnaz anecdote: “Seth Waxman in rebuttal seized on Justice Kennedy’s critical question, and, in my humble opinion, gave one of the more powerful and effective rebuttals I’ve ever seen — one that addresses not only Justice Kennedy’s question, but also goes to the heart of why . . . this system of indefinite detention is fatally flawed.”

review scheme the CSRT's finding that Kurnaz's friend "engaged in a suicide bombing" would have to be accepted as true by the reviewing court, even though it is objectively false.¹⁶³ Ultimately, the Court declared that "an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceeding" is "constitutionally required" by the Suspension Clause in this context.¹⁶⁴

4. *Rushing to Judgment?*

Why did the Court reach this ultimate question? Justice Roberts vigorously asserted that the Court should have, after finding jurisdiction, remanded to the D.C. Circuit and required the Petitioners to exhaust their remedies under the DTA; this would permit the lower court to assess, in the context of specific cases, whether the DTA provides an adequate process under either the Suspension Clause or the Due Process Clause.¹⁶⁵ Indeed, by deciding the question of the inadequacy of a congressional remedy in the abstract, outside of a case-by-case evaluation, the Court cut short any "ongoing dialogue between and among the branches of Government"¹⁶⁶ it seemed to earlier endorse. Yet while acknowledging that remand to exhaust administrative remedies would have been the ordinary course, the Court suggested that it had heard enough.¹⁶⁷ Measured against the "gravity of the separation-of-powers issues" raised by the cases, and the substantial, additional delay petitioners would face, the Court appropriately decided to act conclusively.¹⁶⁸

And, how can we explain the Court's rejection of the political branches' judgment regarding the adequacy of the DTA remedy and their implicit endorsement of the CSRT process, particularly when that judgment arises in the national security context?¹⁶⁹ Perhaps the Court was impatient with Congress, viewing it as overly acquiescent to the executive

Marty Lederman, *Quick Reactions to Boumediene Oral Argument*, SCOTUSBLOG, Dec. 5, 2007, <http://www.scotusblog.com/wp/quick-reactions-to-boumediene-oral-argument/>.

¹⁶³ Examples like this could be multiplied. See Brief of Petitioner El Banna, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (Sup. Ct. 2007). The Court focused on the example of Mohammed Nechla, whose request to have his employer called as a witness was denied by his CSRT, but whose lawyer has since located the employer and wished to introduce such exculpatory evidence. *Boumediene*, 128 S. Ct. at 2271.

¹⁶⁴ *Boumediene*, 128 S. Ct. at 2272.

¹⁶⁵ *Boumediene*, 128 S. Ct. at 2283 (the Court "rushes to decide the fundamental question of the reach of *habeas corpus* when the functioning of the DTA may make that decision entirely unnecessary, and it does so with scant idea of how DTA judicial review will actually operate").

¹⁶⁶ Cf. *Boumediene*, 128 S. Ct. at 2243.

¹⁶⁷ *Id.* at 2263.

¹⁶⁸ *Boumediene*, 128 S. Ct. at 2263.

¹⁶⁹ See *Boumediene*, 128 S. Ct. at 2280 (Roberts, C.J., dissenting) ("The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate.")

branch's demands during wartime. The DTA, for example, was raised as part of a Defense Appropriations bill, passed without any hearings or meaningful floor debate; similarly, the MCA was rushed through on the eve of midterm congressional elections.¹⁷⁰ Thus, the Court may have thought that the way in which Congress acceded to executive demands in the context of war powers at the expense of individual rights—like the way Congress often readily accedes to the national government's demands at the expense of states' rights—demonstrated yet another context in which Congress has an “underdeveloped capacity for self-restraint.”¹⁷¹

Irrespective of this possibility, however, it is not at all clear why the Court *should* have deferred to Congress' judgment regarding the adequacy of a DTA-CSRT review scheme.¹⁷² Such a judgment does not involve any empirical or policy considerations of the sort that may justify great deference to a more institutionally competent legislative branch.¹⁷³ The central question in *Boumediene* was a classically judicial one, requiring a judgment about the substantive protections of the writ at common law, the significance of separation-of-powers principles when liberty interests are at stake, and the minimal procedural safeguards a detention review scheme must have to meet constitutional requirements. As Justice White remarked, “[o]ne might think that if any class of concepts would fall within the definitional abilities of the judiciary, it

¹⁷⁰ See, e.g., Editorial, *Protect Habeas corpus at Guantanamo*, WASH. POST, Dec. 15, 2005 at A32 (noting that the stripping provision of DTA was not brought before any congressional committee or the subject of any hearings); Editorial, *Dealing With Detainees*, WASH. POST, Nov. 15, 2005, at A20 (arguing the DTA is another in a series of examples of Congress “enabling the administration”); Editorial, *Careless Congress*, L.A. TIMES, Nov. 3, 2006, at p. 28 (arguing that Congress abdicated its constitutional responsibility by enacting MCA, leaving the Court to “clean up” its mess); Editorial, *Rushing Off A Cliff*, N.Y. TIMES, Sept. 28, 2006 (arguing the MCA was pushed through an “irresponsible” Congress so that Republicans would look good before the mid-term elections).

¹⁷¹ *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528, 545 (1985) (O'Connor, J., dissenting); see also Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 796, 797 (1995) (arguing that Congress cannot be trusted to preserve federalism because “[e]very breach of the constitutional fabric becomes a new fundraising opportunity and a new television spot in one’s campaign for reelection”); Charles B. Schweitzer, *Comment: Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71, 99-100 (1995) (noting that judicial review of criminal laws passed under commerce power is necessary because “few members of Congress would oppose a crime bill for fear of appearing ‘soft’ on the issue.”).

¹⁷² Cf. *Boumediene*, 128 S. Ct. at 2298 (Scalia, J., dissenting) (“What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.”).

¹⁷³ See, e.g., *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (social and economic legislation); *Lopez v. United States*, 514 U.S. 549, 602 (Breyer, J., dissenting) (empirical judgments regarding connection between guns and educational productivity).

would be that class having to do with procedural justice.”¹⁷⁴ Moreover, the central wisdom of the Suspension Clause is to mandate a robust judicial role in checking abuses of power by the political branches.

Justice Kennedy acknowledged that it may be difficult for those who encounter the daily realities of wartime to accept the Court’s abstract reasoning, or to bear the significant additional cost that compliance with the ruling will impose on them. With the long history of the Great Writ and Suspension Clause in view, Justice Kennedy offered two responses. First, he appears to invert the trope casually rendered by Justice Black in dismissing the claims of Japanese-American detainees in *Korematsu* – that the hardships about which they complain simply “are part of war;”¹⁷⁵ instead, *Boumediene* suggests that hardships endured by the military must be a part of compliance with the law.¹⁷⁶

Second, the Court explained that, in the long-term, there is wisdom in respecting the Court’s role. “Security subsists . . . in fidelity to freedom’s first principles.”¹⁷⁷ Accordingly, executive actions are strengthened and legitimized if done with the approval of the judicial branch, rather than under a claim of pure executive prerogative. And, while the executive retains full control over military decisions, and strategy, “[w]ithin the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”¹⁷⁸ Because of confidence in the importance of that role, the Court accepted as a challenge, what Justice Roberts stated as a criticism: “replac[ing] a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”¹⁷⁹

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

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

¹⁷⁴ *Nixon v. United States*, 506 U.S. 224, 244 (1993) (White, J., concurring).

¹⁷⁵ *Korematsu*, 323 U.S. at 217 (“Hardships are a part of war. And war is an aggregation of hardships”).

¹⁷⁶ *Boumediene*, 128 S. Ct. at 2261 (“compliance with any judicial process requires some incremental expenditure of resources”).

¹⁷⁷ *Boumediene*, 128 S. Ct. at 2277.

¹⁷⁸ *Id.*

¹⁷⁹ *Boumediene*, 128 S. Ct. at 2279.

left open for consideration by district courts on remand. First, under *Boumediene*'s reasoning, would the habeas statute or the Suspension Clause reach U.S. detention operations outside of Guantanamo to what is now the largest holding area for enemy combatants, in Bagram, Afghanistan? Second, what substantive legal standards govern the executive's authority to detain enemy combatants?

A. BEYOND GUANTANAMO: THE GEOGRAPHIC REACH OF THE WRIT

The Court could have, but chose not to, expressly restrict the reach of the Suspension Clause to the arguably unique setting of Guantanamo. That decision partly reflected the Court's concern that a bright line jurisdictional rule would invite executive "manipulation" such as the locating of detention operations on the other side of a jurisdictional line in order to "evade legal constraint."¹⁸⁰ Currently, the jurisdictional line under consideration is in the U.S. Airfield in Bagram, Afghanistan, now the site of the largest detention operations for enemy combatants by the U.S.. A number of habeas cases have been filed in federal district court in Washington, D.C. on behalf of prisoners detained there, making these the first meaningful test of the *Boumediene*'s reach. Significantly, the Obama administration has endorsed the position, previously taken by the Bush Administration, that neither the habeas statute nor the Suspension Clause permits federal courts to hear habeas petitions filed from Bagram.¹⁸¹ Accordingly, the courts must resolve this question.

1. The Bagram Airfield

The Bagram Airfield, located approximately 40 miles north of Kabul, is the largest U.S. military base in Afghanistan. Although there is a significant multi-national presence on the Airfield, as part of an International Security Assistance Force ("ISAF") of NATO, the United States military exercises control over the Airfield and a U.S. officer is in command of the ISAF. Specifically, the U.S. entered into an "Accommodation Consignment Agreement" (hereinafter "Bagram Lease Agreement") in 2006, in which the "Host Nation," Afghanistan, consigns all land and facilities at Bagram Airfield for the indefinite and "exclusive, peaceable, undisturbed and uninterrupted" use by the United States.¹⁸² As

¹⁸⁰ See text accompanying *supra* notes at ___ - ___.

¹⁸¹ Government's Response to This Court's Order of January 22, 2009, Al Maqaleh, *et al.*, v. Gates, No. 06-1669 (D.D.C. Feb. 20, 2009) (stating that the Obama Justice Department "adheres to its previously taken position").

¹⁸² See Accommodation Consignment Agreement For Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America, Sept. 26, 2006, ¶ 8, 9, attached as Exhibit 1 to Declaration of Colonel James W. Gray,

described fully below, material terms of the Bagram Lease Agreement bear a striking similarity to those terms of the Guantanamo Lease Agreement that the Court found should not be interpreted in a manner that would preclude jurisdiction.¹⁸³

The detention facility in the Airfield is known as the Bagram Theater Internment Facility, which is under the exclusive command and control of the U.S. military.¹⁸⁴ The number of detainees held at Bagram increased following the 2004 *Rasul* decision granting Guantanamo detainees access to the writ; though exact figures are unavailable, recent estimates suggest that the Bagram prison holds over 670 detainees.¹⁸⁵ Many have been held for over six years. And, while a number were apprehended in Afghanistan, it appears that others were brought to Bagram from outside that theater of hostilities.¹⁸⁶ The government also plans to build a new prison on the Airfield, intended to house an additional 1100 detainees.¹⁸⁷ Though information about Bagram is far more limited than that now available about Guantanamo, there have been numerous reports of torture and other abuses committed by prison guards and interrogators.¹⁸⁸

dated March 3, 2007, *Maqaleh v. Gates*, No. 06-1669 (JDB), Dkt. #7 (D.D.C.) (hereinafter “Bagram Lease Agreement”).

¹⁸³ See text accompanying *infra* notes ___ to ___.

¹⁸⁴ Declaration of Colonel Charles A. Tennison, ¶2, attached to Gov’ts Mtn to Dismiss Habeas Petition, *Wazir v. Gates*, No. 06-1697 (JDB) (D.D.C.), Dkt #12-2.

¹⁸⁵ Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008 at A1.

¹⁸⁶ See Karen DeYoung and Del Quentin Wilber, *Britain Acknowledges 2 Detainees Are in U.S. Prison in Afghanistan*, WASH. POST, Feb. 27, 2008 (reporting admission of British government that it transferred two Pakistani citizens apprehended in Iraq into U.S. custody at Bagram); see also Editorial, *A Reckoning at Bagram: Mr. Obama must give those held at the Afghan air base a way to challenge their detentions*, WASH. POST, March 7, 2009 (stating that 30 Bagram prisoners were apprehended outside of Afghanistan). Petition for Habeas Corpus at ¶¶ 3-4, *Amin Al Bakir v. Bush*, No. No. 08-1167 (D.D.C. Aug. 14, 2008); (Yemeni national seized from Thailand); Petition for Habeas Corpus at ¶ 12, *Redha Al-Najar v. Gates*, No. 08-2134 (JBD) (D.D.C. Dec. 10, 2008) (seized from Karachi, Pakistan).

¹⁸⁷ Golden, *Prison Expands in Afghanistan*, *supra* note ___.

¹⁸⁸ See, e.g., Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan*, April 2008 (reporting on abuses of prisoners held by U.S. in Afghan prisons, including sexual assault, physical and psychological abuse and even murder); Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, ASSOCIATED PRESS, Oct. 1, 2006 (reporting on Bagram detainee’s claims of abuse including solitary confinement for eleven months, starvation, beatings, exposure to freezing temperatures, and sexual humiliation); Douglas Jehl, *Army Details Scale of Abuse at Afghan Jail*, N.Y. TIMES, March 12, 2005, at A1 (describing Army investigatory report documenting widespread abuse of prisoners in Bagram prison); Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 1, 2005, at A1 (reporting on homicide of two Afghan detainees in Bagram prison).

2. A Suspension Clause Puzzle

As described below, application of *Boumediene*'s new three-part functional test may well compel a conclusion that the Suspension Clause applies to U.S. detention operations in Bagram. Critically, however, the Suspension Clause, and habeas jurisdiction, are not self-executing.¹⁸⁹ Rather, the Clause is only implicated if Congress withdraws a statutory right to habeas already clearly in existence.

Yet, how can one account for the peculiar – and arguably unique feature – of the Suspension Clause which makes an entitlement to constitutional protection turn on the pre-existence of a statutory right (thereafter taken away)?¹⁹⁰ As Professor Hartnett has explained, part of the “puzzle” of habeas corpus, can partially be resolved by considering Chief Justice Marshall’s analysis in *Bollman*.¹⁹¹ Marshall explains that since there is no freestanding habeas jurisdiction, a court’s power to award the writ “must be given by written law.”¹⁹² At the same time, such “written law” is itself constitutionally compelled; that is, the Suspension Clause actually imposed on Congress an *obligation* to codify the common law writ by statute.¹⁹³ Once Congress met its obligation by passing the original habeas corpus statute as part of the Judiciary Act of 1789 (which is substantively identical to the current codification at 28 U.S.C. §2241(c)(1)),¹⁹⁴ the Suspension Clause likewise prevents Congress from

¹⁸⁹ See *St. Cyr*, 533 U.S. 340 (Scalia, J., dissenting).

¹⁹⁰ For example, imagine two habeas petitioners identically situated in Bagram, who file separate actions. In the first, the district court concludes the habeas statute applies to Bagram, but in the second action a different court concludes it does not. Only the first court will undertake any analysis to see if the Suspension Clause applies and thus offer the petitioner any constitutional protection to overcome the MCA’s jurisdiction stripping provision; the case in the second court is, by contrast, finished without need to interpret the MCA or the Suspension Clause. In the posited scenario, a petitioner who has preexisting statutory habeas rights has, as a practical matter, more constitutional protections than an identically situated petitioner who a court deems has no statutory habeas rights.

¹⁹¹ See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 269 (2005); see also Vladeck, *The Suspension Clause as a Structural Right*, *supra* note __; Gerald Neuman, *The Habeas Corpus Suspension Clause after INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555 (2002).

¹⁹² *Id.*

¹⁹³ And, as Justice Marshall further explained of Congress’ obligation: “Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.” *Bollman*, 8 U.S. at 136 (1807); see Hartnett, *supra* note __ at 270 (“The obligation to provide for the privilege of the writ of habeas corpus is parallel to the obligation to provide for the establishment of the Supreme Court.”)

¹⁹⁴ See *supra* note at __.

removing it absent the conditions of rebellion or invasion the Clause expressly contemplates.¹⁹⁵

Therefore, just as in *Boumediene*, where the Court found that the MCA's repeal of habeas violated the Suspension Clause only after *Rasul* had held that habeas statute applied in the first instance, so too a court can reach the question of whether the Suspension Clause protects the writ's application to Bagram, only after deciding that the habeas statute applies there, and was repealed by § 7 of the MCA. Although I suspect a court would ultimately import *Boumediene*'s functional criteria into the statutory context, I will proceed by analyzing these questions in a doctrinally distinct manner.

3. *The Habeas Statute and the MCA*

A discussion of the extraterritorial reach of the habeas statute must start with the somewhat cryptic reasoning of *Rasul*. Reading *Rasul* in combination with *Braden v. 30th Judicial District*,¹⁹⁶ and *Munaf v. Geren*,¹⁹⁷ one could conclude that a district court has jurisdiction over any petition filed where a detainee's custodian resides, regardless of the citizenship of the detainee or location of the petitioner's detention. In *Munaf*, the Supreme Court concluded that a district court has jurisdiction over a petition filed by a U.S. citizen being held by U.S. forces in Iraq who answer to a U.S. chain of command.¹⁹⁸ The habeas statute itself contains no territorial limitation nor, as *Rasul* noted, does it distinguish between a citizens and aliens.¹⁹⁹ Moreover, following the Court's decision in *Braden*, a habeas petitioner need not be detained in the jurisdiction of a U.S. district court in which the petition is filed; only the custodian need be.²⁰⁰ Under a logical reading of these cases, therefore, if a district court has jurisdiction over a habeas petition filed by a U.S. citizen held by U.S. forces in Bagram Airfield, then it would therefore also have jurisdiction over a petition filed by an alien held in the same circumstances, even independent of the level of control the U.S. exercised over the territory.²⁰¹

¹⁹⁵ U.S. CONST., art. I, § 9, cl. 2.

¹⁹⁶ 410 U.S. 484 (1973).

¹⁹⁷ 128 S. Ct. 2207 (2008).

¹⁹⁸ *Munaf*, 128 S. Ct. at 2212.

¹⁹⁹ *Rasul*, 542 U.S. at 481 ("there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship"); *id.* ("the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. . . . Section 2241, by its terms, requires nothing more.") (footnote and citation omitted).

²⁰⁰ *Rasul*, 542 U.S. at 479 (citing *Braden*, 410 U.S. at 497).

²⁰¹ See *Rasul*, 542 U.S. at 481 ("Aliens held at the [Guantanamo Naval] base, no less than American citizens, are entitled to invoke the federal courts 'authority under' the habeas statute").

Despite its syllogistic appeal, there is strong reason to doubt that, even in the statutory context, a court would accept a per se, global jurisdictional rule for alien-filed habeas petitions. Like his majority opinion in *Boumediene*, Kennedy's concurrence in *Rasul* emphasized practical reasons the habeas statute should extend to Guantanamo specifically.²⁰² The majority opinion in *Rasul*, despite some recognition of the plain, unlimited terms of the statute's text,²⁰³ also repeatedly emphasized its particular applicability to Guantanamo, over which the U.S. "exercises complete jurisdiction and control."²⁰⁴ Most importantly, the Court appeared to couple the scope of the statutory writ with its historical, common law "antecedents" which turned "on the practical question of the exact extent and nature of the jurisdiction and dominion exercised in fact by the Crown."²⁰⁵ Thus, there is good reason to suspect that a court, in considering the geographic reach of the habeas statute, would expressly apply the three-part functional approach specifically constructed in *Boumediene* to determine the reach of the Suspension Clause.²⁰⁶

Assuming the habeas statute applies to aliens held at Bagram, does the MCA strip the district courts of jurisdiction to hear such statutory claims? Section 7(a) prohibits the exercise of district court jurisdiction over petitions filed by any alien who has been "determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."²⁰⁷ While Bagram detainees do undergo an "enemy combatant" determination by an administrative process called an Unlawful Enemy Combatant Review Board ("UECRB"),²⁰⁸ one could argue that the "determination" Congress had in mind as a predicate for its attempted jurisdiction stripping was one made by a CSRT specifically. After all, most of the debate in Congress over the jurisdiction stripping provisions focused on the asserted adequacy or inadequacy of the proposed DTA review of CSRT determinations and paid no attention to the UECRB process which is quite different. Moreover, the argument that

²⁰² *Rasul*, 542 U.S. at 487-88 (Kennedy, J., concurring) (emphasizing the "unchallenged and indefinite control that the U.S. has long exercised over Guantanamo Bay," and that Guantanamo detainees, unlike those in *Eisentrager* are subject to "[i]ndefinite detention without trial or other proceeding,").

²⁰³ See *Rasul*, 542 U.S. at 483-84.

²⁰⁴ 542 U.S. at 476; *id.* at 471 (U.S. has "plenary and exclusive jurisdiction").

²⁰⁵ *Id.* at 482.

²⁰⁶ Justice Souter suggested as much in his concurrence in *Boumediene*: "But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question." 128 S. Ct. at 2278 (citing *Rasul*, 542 U.S. at 473, 481-83).

²⁰⁷ MCA § 7(a).

²⁰⁸ See text accompanying *infra* notes ___ to ___.

MCA §7 should not apply to Bagram petitioners is strengthened by the strong presumption against repeals of the writ absent “specific and unambiguous statutory directive” by Congress.²⁰⁹

On the other hand, the plain terms of the MCA do not set such a requirement. The particular phrasing of MCA § 7 – “determined ... to have been properly detained” – suggests that a proper determination must come in two steps: first, an initial determination by military officials that the detainee is an enemy combatant, then second, a review of that determination by the Defense Department.²¹⁰ In Guantanamo, the second step happens to come in the form of a CSRT, while in Bagram, the UECRB follows this two-step process by undertaking a summary review of the initial enemy combatant designation made by a relevant commander. Moreover, in light of the *Boumediene* Court’s desire to respect the jurisdiction-stripping demands embodied in the MCA’s response to the *Hamdan* decision,²¹¹ a court would likely assume that a Congress which intended to preclude habeas review from Guantanamo wished even more strongly to preclude habeas review over detention operations in Bagram.

4. Application of the Suspension Clause to Bagram

If courts find that the MCA’s jurisdiction-stripping provision is applicable to these detentions, then the question remains regarding the reach of the Suspension Clause to Bagram. Under *Boumediene*’s functional approach, “at least three factors” are relevant to deciding if the Suspension Clause applies extraterritorially: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place, and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.²¹² The Court did not direct how to weigh the factors against each other or if all must be satisfied. It only offered us the guideposts set by the detentions in *Eisentrager* (where the factors tilt against extension of the writ) and the detentions in Guantanamo (where they tilt toward extension).

a. Citizenship, Status and Process

Application of this first factor seems to run entirely in a Bagram petitioner’s favor. First, *Rasul* and *Boumediene* make clear that non-

²⁰⁹ *St. Cyr*, 533 U.S. at 300; *Hamdan*, 126 S. Ct. at 2765.

²¹⁰ *See Al Marri v. Wright*, 487 F. 3d 160, 168 (2007).

²¹¹ *See* text accompanying *supra* notes ___ to ___.

²¹² *Boumediene*, 128 S. Ct. at 2259.

citizenship alone does not preclude access to the writ.²¹³ Second, unlike the petitioners in *Eisentrager* who conceded their “enemy alien” status (as soldiers for the enemy army), Bagram petitioners, like Guantanamo petitioners before them,²¹⁴ assert that they are civilians or otherwise not properly classified as enemy combatants.²¹⁵

In addition, the amount and quality of the “process” Bagram detainees received falls short not only of the “trial by military commission” the *Eisentrager* petitioners received, but is also short of the CSRT process *Boumediene* already deemed insufficient to foreclose access to the writ.²¹⁶ Under the UECRB process in place in Bagram, a detainee is permitted to see a summary of charges against him if “operational requirements” permit and, as of April 2008, has been granted a right to personally appear before a UECRB panel.²¹⁷ Nevertheless, the Bagram detainee is not given counsel or a personal representative, is unable to confront the evidence purporting to justify his detention and faces similarly insurmountable obstacles to presenting evidence in his own defense as did a Guantanamo detainee under a CSRT.²¹⁸ Finally, a Bagram detainee is not afforded even the limited right to appeal, as the DTA procedures were not made applicable to habeas petitions filed outside of Guantanamo.²¹⁹ If the CSRT-DTA process is an inadequate substitute for habeas, the UECRB surely is as well.²²⁰

b. Sites of Detention and Apprehension

This is perhaps the most significant of the three factors set out by the Court. Following *Boumediene*, the touchstone for Suspension Clause applicability is not the U.S.’s technical or formal sovereignty, but rather its “de facto sovereignty” – “the objective degree of control the Nation exerts over foreign territory.”²²¹ There is a strong argument that the extent of the U.S. control over Bagram, while not identical to Guantanamo, is nevertheless sufficient to confer habeas jurisdiction under *Boumediene*.

²¹³ *But see Boumediene*, 128 S. Ct. at 2303 (Scalia, J., dissenting) (“it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad”).

²¹⁴ *See Boumediene*, 128 S. Ct. at 2259 (in contrast to *Eisentrager*, “the detainees deny they are enemy combatants”); *see also Rasul*, 542 U.S. at 486 (detainees “are individuals who claim to be wholly innocent of wrongdoing”).

²¹⁵ *See supra* note ____.

²¹⁶ *Boumediene*, 128 S. Ct. at 2260.

²¹⁷ Tennison Decl. ¶13-14.

²¹⁸ *See* text accompanying *infra* notes ____ to ____.

²¹⁹ *See* DTA § 1005(e).

²²⁰ *See Boumediene*, 128 S. Ct. at 2269 (“What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral”).

²²¹ *Id.* at 2252.

To start with, the Landsberg Air Force Base distinguished by *Boumediene* was “under the jurisdiction of the combined Allied Forces,” and the U.S. military was “answerable to its allies for all activities occurring there.”²²² By contrast, the Bagram Airfield and prison are under the “exclusive” command and control of the U.S. military, and the U.S. needs the approval of neither its allies nor the Afghan government for its operations there.²²³ Thus, in Bagram, like in Guantanamo, “the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”²²⁴ And, in contrast to the U.S. government’s absence of plans for the long-term occupation of Germany,²²⁵ the U.S. is entitled to *indefinite* use of the Bagram Airfield and there is currently no anticipated end date to U.S. control there.²²⁶

In addition, the Lease Agreements in force in Bagram bears substantial similarities to that in Guantanamo.

Indicia of Control	Guantánamo Leases	Bagram Lease
1. Ultimate ownership	Cuba retains “ultimate sovereignty” over Guantanamo Bay	“[T]he HOST NATION [Afghanistan] is the sole owner of the premises.”
2. Exclusive Use Rights.	“[T]he Republic of Cuba consents that during this period of the occupation by the United States...the United States shall exercise complete jurisdiction and control over and within said areas.”	Afghanistan “hereby consigns to the UNITED STATES to have and to hold for the exclusive use of the UNITED STATES Forces land, facilities, and appurtenances (sic) currently owned by or otherwise under the control of

²²² *Boumediene*, 128 S. Ct. at 2260.

²²³ Bagram Lease Agreement at ¶ 8; Tension Decl. ¶¶ 12-14; *see also* Respondent’s Motion to Dismiss at 22, *Wazir v. Gates*, No. 1:06-CV-01697 (RBW), Dkt. # 5 (“the detention operation at Bagram is under the command and control of the U.S. military, and petitioner is in the legal custody of the United States”). The broad Status of Forces Agreement (“SOFA”) the U.S. entered into with Afghanistan confirms the significant U.S. license on its military base. Under that SOFA, U.S. forces are entirely immune from any criminal prosecution by the Afghan government, and are immune from any civil liability for crimes unless it occurs outside the scope of their duties. *See* T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. *See also* Chuck Mason, Cong. Res. Serv., STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT AND HOW HAS IT BEEN UTILIZED? 7-8, Dec. 8, 2008.

²²⁴ *Boumediene*, 128 S. Ct. at 2261. *But see* Anthony J. Colangelo, “*De Facto Sovereignty*”: *Boumediene and Beyond*, available at ssrn.com/abstract=1275413 (2008) (arguing that jurisdiction, rather than control, should be the dispositive factor for establishing extraterritorial jurisdiction under Suspension Clause).

²²⁵ *Id.* at 2260.

²²⁶ Lease Agreement at ¶ 4. Indeed, the U.S. has announced that operations in Afghanistan will be escalated, and could last for a significant additional period of years. Helene Cooper, *Putting Stamp of Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES, Feb. 18, 2009 at A1.

Indicia of Control	Guantánamo Leases	Bagram Lease
		Afghanistan....” Afghanistan “warrants that the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession without any interruption whatsoever by [Afghanistan] or its agents.”
3. Right to Perpetual Possession, Subject to U.S. Termination	“So long as the United States of America shall not abandon the said naval station of Guantánamo Bay...”	The lease continues in effect “until the UNITED STATES or its successors determine that the Premises are no longer required for its use.”
4. Consideration	“[A]nnual sum of two thousand dollars, in gold coin.”	Rights to U.S. granted “without rental or any other consideration for use of the premises” but for “mutual benefits derived” by each government.
5. Host Country’s Lack of Control over territory.	No provisions entitling Cuban government to enter or control.	U.S. may “hold and enjoy the Premises during the period of this agreement without any interruption whatsoever by the HOST NATION or its agents.”
6. Right to of U.S. to Assign Agreement	U.S. lacks right to assign.	U.S. “shall have the right to assign this agreement to a successor nation or organization.”
7. Current duration of Lease	Executed 1903 (105 years).	Executed 2006 (2 years).

The Lease terms thus suggest that the U.S. has a similarly unconstrained practical control over its operations in Bagram. And a clear lesson of *Rasul* and *Boumediene* is that simply because Afghanistan retains sovereignty over the remainder of the country or simply because Afghanistan retains “sole owner[ship]” over the Airfield itself, does not foreclose the Court’s jurisdiction, any more than Cuba’s retention of “ultimate sovereignty” over Guantanamo did. Accepting that argument would be to invite precisely the type of executive manipulation *Boumediene* eschewed – leaving ultimate ownership or sovereignty with the host government while retaining total control to undertake any military or detention operations there. To the contrary, the very essence of the separation-of-powers construct embedded in the Suspension Clause is to prevent the executive from simply contracting away judicial review of its conduct in order to operate outside of any “legal constraint.”²²⁷

²²⁷ *Boumediene*, 128 S. Ct. at 2258-59.

Some material differences between the detention operations in Guantanamo and Bagram persist, however. Most significantly, Guantanamo is literally oceans away from any battlefield and arguably as insulated from military conflict as a naval base inside Florida. By contrast, the Bagram Airfield, while currently secure and stable, is in a country where there are ongoing combat operations. Moreover, unlike U.S. presence in Guantanamo, the U.S. control over the Airfield is welcomed by the Afghan government, as part of an understanding (if not formal consideration) for U.S. military assistance in stabilizing and securing the country against forces hostile to the current Afghan government.²²⁸

Perhaps these considerations are relevant only to the third of the *Boumediene* factors: whether there are practical obstacles inherent in extending the writ. However, these considerations might also get to what is implicit in the Court's apparent concern with the government's conduct in Guantanamo. That is, are the detentions in Afghanistan a product of conflicts ongoing in neighboring Afghan provinces, such that they could be considered a "necessary incident to the use of force" clearly authorized by the AUMF in Afghanistan?²²⁹ Or, has Bagram simply become a Guantanamo by another name – a locale for the detention of persons apprehended anywhere in the world, even thousands of miles from any battlefield, as part of the Executive's asserted authority to conduct the "global war on terror."²³⁰ The *Boumediene* Court was no doubt concerned about the site of a detainee's apprehension, emphasizing at the very outset that some of the petitioners were seized "in places as far away from [the battlefield in Afghanistan] as Bosnia and Gambia,"²³¹ The Bagram prison population has been growing steadily, ever since the Court's decision in *Rasul* effectively stopped the transfer of prisoners to Guantanamo.²³²

²²⁸ See Tension Decl. ¶ 2 (explaining that part of the mission of the military force at Bagram is to "enhance the sovereignty of Afghanistan"); Joint Declaration of the United States-Afghanistan Strategic Partnership at 1 ("decades of civil war, political violence, and interference in Afghanistan's internal affairs make Afghanistan's security, sovereignty, independence, and territorial integrity particularly crucial areas for U.S.-Afghan cooperation.").

²²⁹ *Hamdi*, 542 U.S. at 518.

²³⁰ Eric Schmidt, *Two Prisons, Similar Issue for President*, N.Y. TIMES, Jan. 27, 2009 at A1 (explaining that Bagram Air Base presents an "equally difficult problem" to the Obama administration as Guantanamo and describing Bagram as "the preferred alternative to detain terrorism suspects"); Laura King, *The World; Guantanamo's fallout for U.S. allies; The move to shut the facility leads to tough questions in Pakistan and Afghanistan*, L.A. TIMES, Jan. 24, 2009 at A3 (pointing out that Obama's decision [to close Guantanamo] probably will have repercussions at other U.S. detention facilities, including the large one at Bagram airfield outside Kabul" where prisoners have "suffered even more systematic abuse and deprivation of rights than those at Guantanamo").

²³¹ *Boumediene*, 128 S. Ct. at 2241.

²³² See *supra* note ____.

And, a number of the Bagram detainees were not captured on the Afghan battlefield, but in third countries far from the ongoing conflict.²³³ Under *Boumediene*'s separation-of-powers framework, these facts form the strongest grounds for judicial supervision, to ensure the executive is not employing the Bagram prison to detain any enemy combatant, captured anywhere in the world, based on nothing more than executive say-so.

c. Practical Obstacles "Inherent" in Resolving
Entitlement to the Writ

The third factor may appear to pose the greatest obstacle to the application of the Suspension Clause (or the habeas statute) to Bagram. In *Boumediene*, the government had presented "no credible arguments" that adjudicating habeas petitions in Guantanamo would compromise the military mission there and, in light of the "plenary control" the U.S. maintains over the base, the Court believed no such arguments could reasonably be made.²³⁴ By contrast, the Court credited the *Eisentrager* Court's concern about "judicial interference" with military operations in Germany, where American forces faced "potential security threats" from "enemy elements, guerilla fighters and 'were-wolves.'"²³⁵ Unlike the island fortification of Guantanamo, Bagram is actually reasonably proximate to ongoing hostilities against a range of "enemy elements," hostilities which may well increase in the coming months and years.²³⁶ Thus one can certainly foresee credible arguments being made by military personnel in Afghanistan about the negative consequences of "judicial interference" with operations there.

Nevertheless, this fact necessarily should not necessarily defeat jurisdiction, particularly for those detainees imported to the prison from outside Afghanistan. First, the Bagram Airfield is currently heavily fortified and secure. Thus, as *Boumediene* instructed, a court should not accept a conclusory argument that the extension of the writ "may divert the attention of military personnel from other pressing tasks."²³⁷ Balancing military tasks with compliance with law is something the military has done and can do. In any event, diversion of the some portion of military resources is ultimately cost of adhering to the constitutional

²³³ See *supra* note __ (habeas petitioners allege seizure in Thailand, Dubai and Pakistan). See also, DeYoung & Wilber, *Britain Acknowledges 2 Detainees*, *supra* note __ (reporting admission that British government transferred two Pakistani citizens apprehended in Iraq into U.S. custody in Bagram); Editorial, *A Bagram Reckoning*, *supra* note __ (stating 30 Bagram prisoners were apprehended outside Afghanistan).

²³⁴ *Boumediene*, 128 S. Ct. at 2261.

²³⁵ *Id.* (quoting *Eisentrager*, 339 U.S. at 784). Cf. *Boumediene*, 128 S. Ct. at 2261 ("Security threats are not apparent" at Guantanamo).

²³⁶ See *supra* note __.

²³⁷ *Boumediene*, 128 S. Ct. at 2261.

requirements of the Suspension Clause applicable.²³⁸ Second, it is not entirely clear that military cost, even if sufficiently particularized and compelling, is a *jurisdictional* concern. Though its discussion of this issue brief, the Court appears to have identified two kinds of “practical obstacles” at issue. One is an obstacle “inherent in resolving” an entitlement to the writ, such as the possibility that a judgment would produce friction with the host government or the possibility of conflicting with the host government’s law.²³⁹ Because the U.S. is answerable to “no other sovereign” for its acts on the base, there is nothing *inherently* unreasonable in a court exercising jurisdiction over its detentions in Bagram.

Another obstacle is the cost measured in terms of diversion of resources or risk to personnel. Yet, while potentially significant obstacles, these costs may be temporary or remediable. Thus, if a court were presented with specific, credible evidence regarding the disruption of military operations, it has options short of dismissing for lack of jurisdiction.²⁴⁰ First, there is, of course, a difference between jurisdiction and the merits. Thus, after assuming jurisdiction based on the balance of the three factors set out in *Boumediene*, a court is free to dismiss on the merits, either based the resolution of a legal question, or after adopting summary procedures short of what I argue below are required to adjudicate the Guantanamo petitions. Habeas is, above all, a flexible, adaptable remedy. Thus, for example, if a “return” or answer to the habeas petition provides credible affidavit testimony that the petitioner was captured on a battlefield in Afghanistan, rather than imported from some other place, and authorized by the terms of the AUMF and the laws of war,²⁴¹ a court could dismiss on the merits without discovery, witness confrontation or other potential judicial interferences with military operations. Courts have followed this procedure in adjudicating the

²³⁸ *Id.* Cf. *id.* at 2275 (concluding “the costs of delay can no longer be borne by those who are held in custody”).

²³⁹ *Boumediene*, 128 S. Ct. at 2261-62; cf. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (concluding it would be “impractical and anomalous” to apply Fourth Amendment to warrantless seizure by Mexican officials because of the difficulty of finding a magistrate there to issue a warrant, and because a sovereign country like Mexico operates an entirely different legal system and may have different conceptions of “reasonableness” or norms regarding privacy).

²⁴⁰ Indeed, a point that is often lost is that the Court in *Eisentrager* actually did reach the merits of the petitioners’ Fifth Amendment and Geneva Convention claims, despite its conclusion that significant military concerns counseled against such course. *Eisentrager*, 339 U.S. at 785 (no Fifth Amendment right “of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States”); *id.* at 788-90 (dismissing claims under Geneva Conventions).

²⁴¹ See *Hamdi*, 542 U.S. at 513, 518.

habeas petitions of World War II prisoners of war detained inside the United States.²⁴²

More controversial cases, involving, for example, the detention of persons apprehended far from the Bagram prison and thus not susceptible to summary disposition under the laws of war, may well justify the imposition of greater procedural requirements, and correspondingly greater costs on the military.²⁴³ Still another option for a court short of a jurisdictional dismissal, would be to develop case-specific procedures to address the particular obstacles identified by the military, including even delaying the disposition of the merits until a difficulty can be resolved or subsides. This process, for example, ensures that a petitioner's case would not be forever lost to judicial review, months or even years after whatever military obstacle had been overcome.²⁴⁴

B. SUBSTANTIVE LIMITATIONS ON THE EXECUTIVE'S DETENTION POWER

In *Boumediene*, the Court recognized that challenges to the custodian's legal authority to detain are a core attribute of habeas, protected by the Suspension Clause,²⁴⁵ and recognized that the Guantanamo detainees' "most basic" legal claim is that "the President has no authority under the AUMF to detain them indefinitely."²⁴⁶ Nevertheless, it expressly disavowed any intention to "address the content" of such legal claims, which would have to be determined on remand.²⁴⁷

Accordingly, unless interrupted by new legislation giving substantive content to an enemy combatant definition, the Court set in

²⁴² See *In re Territo*, 156 F. 2d 142 (1946) (affirming dismissal on the merits of habeas petition brought by Italian prisoner of war lawfully held under the Geneva Conventions). This is not to say that *no* persons apprehended on or near the battlefield would have a meritorious petition. For example, Ahmad Jawad, an Afghani reporter assisting Canadian journalists in Afghanistan, was mistakenly detained by U.S. forces for up to a year, before he was finally released. See Gloria Galloway, *Afghan Reporter Gunned Down in Kandahar City*, THE GLOBE AND MAIL, Mar. 11, 2009; see also *Hamdi*, 542 U.S. at 534 (explaining that habeas procedures even for battlefield captures must be sufficient to ensure that an "errant tourist, embedded journalist or local aid worker has a chance to prove military error").

²⁴³ See text accompanying *supra* notes ____.

²⁴⁴ *Boumediene* specifically contemplates modifications to accommodate military needs as they arise. 128 S. Ct. at 2262 ("To the extent barriers arise, habeas corpus procedures likely can be modified to address them").

²⁴⁵ *Boumediene*, 128 S. Ct. at 2268.

²⁴⁶ *Id.* at 2271. The Court further framed this inquiry as, "whether the President has such authority turns on whether the AUMF authorizes – and the Constitution permits – the indefinite detention of 'enemy combatants' as the Department of Defense defines that term." *Id.*

²⁴⁷ *Id.* at 2276.

motion a process, to be played out in the district courts on a case-by-case basis, by which the detainees can challenge the legal sufficiency of their detentions. This is an important and welcome development. For years, despite a tidal wave of scholarly and international criticism, the government has asserted a nearly unlimited authority to detain persons it has apprehended anywhere in the world, as part of its asserted “global war on terror.”²⁴⁸ Specifically, although the government has often asserted that its enemy combatant designations, even ones made for persons apprehended thousands of miles from any battlefield, are consistent with the laws of war and the Court’s decision in *Hamdi*, it has not yet been meaningfully held to account for its numerous departures from the elementary limitations imposed by the laws of war its authority to detain. This section does not attempt to catalogue, let alone resolve, the universe of controversies that such potentially large-scale judicial review might produce; rather, it merely attempts to highlight the ways in which, absent congressional intervention, potential case-specific adjudication might meaningfully constrict the executive’s expansive claims of detention authority.

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

The AUMF authorizes the use of “all necessary and appropriate force” against “nations, organizations or persons” who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,” and those who “harbored such organizations or persons.”²⁴⁹ The authorization of force requires a nexus to the September 11th attacks, and does not authorize the president to use force against any future terrorist threat the president might discern.²⁵⁰ Although the AUMF

²⁴⁸ See, e.g., Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 101 (2009); Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 Y.B. of INT’L HUMANITARIAN L. 232 (2009); Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 U.C.L.A. J. INT’L L. & FOREIGN AFF. 1 (2007); John Cerone, *Misplaced Reliance on the “Law of War,”* 14 NEW ENG. J. INT’L & COMP. L. 57 (2007); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006); Marco Sassoli, *Query: Is There a Status of “Unlawful Combatant”?*, 80 INT’L L. STUD. 57 (2006); Leila N. Sadat, *Terrorism & the Rule of Law*, 3 WASH. U. GLOBAL L. REV. 135 (2004); Jordan J. Paust, *War, and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE INT’L L. J. 325 (2003).

²⁴⁹ AUMF § 2(a), Pub. L. 107-40, 115 Stat. 224.

²⁵⁰ See Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2108 (2005) (“If an individual had no connection to the September 11 attacks, then he is not covered as a ‘person’ under the AUMF even if he subsequently decides to commit terrorist acts against the United States.”). Indeed, the President first requested broader authority to use force against persons unconnected with September 11 “to deter and pre-empt any future acts of terrorism and aggression against

does not expressly speak to the power to detain, in *Hamdi* the Court concluded that detention of the combatants engaged in armed conflict is “so fundamental and accepted an incident to war” as to be a “necessary and appropriate” exercise of force permissibly delegated to the President.²⁵¹ *Hamdi*’s conclusion, in turn, expressly depended upon an understanding of “long-standing law-of-war principles.”²⁵² Under the laws of war, if one can lawfully use force against a combatant by “universal agreement and practice,” then one can detain him in order to prevent his “return to the field of battle” to “tak[e] up arms once again.”²⁵³

In *Hamdi*, the Court accepted that the government’s proffered definition of enemy combatant in that case – that is, someone who was “part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan *and* who ‘engaged in an armed conflict against the United States’ there” – was authorized under the laws of war.²⁵⁴ Accordingly, the Court concluded that the AUMF would authorize the detention of the “limited category” of persons such as Hamdi, who had joined “the military arm of an enemy government,”²⁵⁵ “affiliated with a Taliban military unit,” “engaged in battle” with them, and “surrendered his Kalashnikov assault rifle” to his Northern Alliance captors.²⁵⁶ In reaching this conclusion, the Court distinguished Hamdi’s situation, which could be resolved by resort to a “clearly established principle of the law of war,” from a situation in which “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”²⁵⁷ In the latter case, the AUMF might not be read to provide detention authority. In other words, the AUMF can authorize no more than what the laws of war authorize.²⁵⁸ Thus, as *Hamdi* itself

the United States,” but Congress refused. Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002).

²⁵¹ *Hamdi*, 542 U.S. at 518 (plurality opinion).

²⁵² *Id.* at 521.

²⁵³ *Id.* (quoting *Quirin*, 317 U.S. at 28); *see also Territo*, 156 F.2d at 145 (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front”). By contrast, “indefinite detention for the purpose of interrogation is not authorized.” *Id.* at 521.

²⁵⁴ *Hamdi*, 542 U.S. at 526 (quoting Respondent’s Brief at 3) (emphasis added).

²⁵⁵ *Id.* at 519 (quoting *Quirin*, 312 U.S. at 37-38))

²⁵⁶ *Id.* at 513; *see also id.* at 523 (referring to the “context of this case: a United States citizen captured in a foreign *combat zone*”) (emphasis omitted); *id.* at 509 (describing allegation that Hamdi “took up arms with the Taliban during this conflict” in Afghanistan).

²⁵⁷ *Id.* at 520, 521.

²⁵⁸ *See Murray Schooner v. The Charming Betsy*, 2 Cranch 64, 188 (1804) (Marshall, C.J.) (“an act of Congress ought never to be construed to violated the law of nations if any other possible construction remains”); *see also Bradley & Goldsmith*, 118 HARV. L.

recognizes, in all subsequent cases in which the government relies on authority contained in the AUMF, courts must look to the laws of war to ascertain if a person is properly classified as an enemy combatant.²⁵⁹

2. *Combatants, Civilians and Direct Participation in Hostilities*

Under the laws of war governing international armed conflicts, there are two categories of persons against whom force – and by implication, detention – can be lawfully employed. First is the category of genuine combatants. A combatant is a member of a State’s armed forces that is engaged in hostilities and who is answerable to a chain of command.²⁶⁰ All other persons are considered civilians and can neither be intentionally targeted by force or subject to long-term detention.²⁶¹ The Supreme Court has already accepted this distinction between combatant and civilian as defining detention power under the laws of war.²⁶²

REV. at 2095 (where “an international law requirement . . . was a condition of the exercise of the particular authority” under the AUMF a “violation of international law would negate a claim of claimed authority under the AUMF”).

²⁵⁹ *Hamdi*, 542 U.S. at 522 n. 1 (“The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”).

²⁶⁰ GC III, Art. 4(A)(1) (defining prisoners of war as “Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”); *see also* Protocol Additional [I] to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2) 1125, U.N.T.S. 3, 16 I.L.M. 1391 (defining a “combatant” as one who is a part of the “organized armed forces, groups and units which are under a command responsible to [a] Party for the conduct of its subordinates.”).

²⁶¹ As the authoritative Commentary to the Fourth Geneva Convention explains “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention *There is no intermediate status.*” (emphasis added). Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (Jean S. Pictet ed., 1958).

²⁶² *Compare Hamdi*, 542 U.S. at 513 (allegations that Hamdi was an armed member of the Taliban military unit engaged in armed conflict in zone of active hostilities would support detention authorized by laws of war) *and Quirin*, 317 U.S. at 20, 21 (petitioners, having worn uniforms of the German Marine Infantry when they came ashore from German military submarines, were part of “military arm of enemy government” and thus “enemy belligerents within the meaning of . . . the law of war”) *with Ex parte Milligan*, 71 U.S. (4 Wall) 2, 6-7 (1866) (despite accusations of “joining and aiding” a “secret society” for the “purpose of overthrowing the Government,” “holding communication with the enemy,” “conspiring to seize munitions of war stored in the arsenals,” and “to liberate prisoners of war” in Indiana at a time when it “was constantly threatened to be invaded by the enemy,” petitioner could not be a combatant under laws of war and was subject to trial only by civilian authority) *and Hamdi*, 542 U.S. at 522 (“Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.”).

In addition, civilians who directly participate in hostilities alongside combatants lose their protected status and can be targeted with lethal force, and thereby also detained.²⁶³ The “direct participation” standard is not totally free from ambiguity or immune to reasonable judicial interpretation.²⁶⁴ At a minimum, because a predominant purpose of the laws of war is to protect civilians from harm, the “direct participation” standard cannot be loosely construed.²⁶⁵ It requires that the individual have taken up arms, or otherwise joined an armed conflict in a manner that bears a direct, causal relationship to harm on the battlefield.²⁶⁶ A recent, prominent decision by the Israeli Supreme Court concluded that a civilian “bearing arms (openly or concealed) who is on his way to the place where he will use them against the army” meets the direct participation standard, but a civilian who only “generally supports the hostilities against the army,” by “sell[ing] food or medicine to an unlawful combatant” or “aid[ing] the unlawful combatants by general strategic analysis, and grant[ing] them logistical, general support including monetary aid” does not meet the standard.²⁶⁷ In addition to this directness requirement, there is also a requirement that the civilian has intended to

²⁶³ Third Geneva Convention, art. 3(1) (prohibiting attacks on civilians “taking no active part in the hostilities”); Department of the Navy, *Commander’s Handbook on the Law of Naval Operations* 11.3 (1995) (U.S. Navy Handbook) (“Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked.”); 1 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* 19-20 (2005) (noting that State practice “establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”).

²⁶⁴ *Public Comm. Against Torture*, 46 I.L.M. 375, 392 (2006) (describing debate over whether “a person driving a truck carrying ammunition” meets “direct participation” standard).

²⁶⁵ The “principle of distinction” – referred to as “the grandfather of all principles” in humanitarian law – holds “that military attacks should be directed at combatants and military property, and not civilians or civilian property.” Dep’t of the Army, *Law of War Handbook* 166 (2004). Under this law of war principle, combatants should know they can be punished for attacking civilians and civilians should know they can lose protection from attack for participating in hostilities; with those lines drawn, hostilities should be limited to only genuine combatants, i.e. uniformed soldiers or those who directly assist them on the battlefield.

²⁶⁶ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 516 (Sandoz et al. eds. 1987) (“Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”); Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37, at VII (2000) (same).

²⁶⁷ *Public Comm. Against Torture in Israel*, 46 I.L.M. at 391-92. See also Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 535 n. 93 (2005) (cooking is not a function that would constitute direct participation in hostilities).

cause harm to enemy military forces.²⁶⁸ There is also a durational requirement, limiting authority to target or capture civilians for past, “detached” acts of hostilities.²⁶⁹

In light of substantial commentary and authoritative international case law on the subject, U.S. courts are competent to set parameters on, and adjudicate past decisions to detain persons as combatants or civilians active in hostilities. It is a common law question. Indeed, the military historically has recognized its obligation to abide by elementary limitations on targeting and detention authority, which it has acknowledged turns on important case-by-case distinctions.²⁷⁰ Notably, of course, even those who support terrorist organizations, but whose actions fall below the direct participation standard, may still be subject to criminal prosecution in U.S. courts.²⁷¹

3. *Reigning in Global Detention Authority*

Since the 2004 creation of the CSRTs (and, likely earlier) the government had been employing a definition of “enemy combatant” to cover detainees held in Guantanamo that is far broader than the one

²⁶⁸ International Committee of the Red Cross at 618 (acts under standard must, “by their nature and purpose [be] intended to cause actual harm to the personnel and equipment of the armed forces”); Schmitt, *supra* note __ at 538 (stating that a civilian’s *mens rea* “is the seminal factor” in evaluating direct participation of hostilities).

²⁶⁹ *Public Comm. Against Torture*, 46 I.L.M. at 393 (“[A] civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past.”) At the same time, a civilian who has not “detached” himself from hostility but is preparing for future acts of hostility such as Osama Bin Laden and senior members of al Qaeda, may not be immune. *Id.* at 393 (“[R]egarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.”). This standard is consonant with the functional goal of detention articulated by *Hamdi*, which is to prevent a “return to the battlefield” to “take up arms again.” *Hamdi*, 542 U.S. at 518.

²⁷⁰ See, e.g., U.S. Navy Handbook 11.3 (“Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.”). During the Vietnam War, the military encountered a problem similar to the one encountered during the Afghanistan conflict: difficulty distinguishing civilians who were merely supporting Vietcong from those who were genuine combatants or directly participating in hostilities. Nevertheless, the U.S. military made concerted efforts to do so, and instituted military procedures, codified now at Army Regulation 190-8, to have hearings on the field to resolve any ambiguity regarding a detainee’s status. See Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* 76 (2006); George S. Prugh, *Law at War: Vietnam 1964-1973* 75-76 (1975).

²⁷¹ See, e.g., 18 U.S.C. § 2384 (criminalizing conspiracy to overthrow, make war or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of “material support or resources” to terrorist organizations); 18 U.S.C. § 2332B (criminalizing “acts of terrorism transcending national boundaries”).

considered and authorized in *Hamdi*. Under the order governing the CSRT process:

The term “enemy combatant” shall mean an individual who was part of *or supporting* Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²⁷²

Judge Joyce Hens Green – the first judge to review this definition – observed that the modifier in the second sentence “includes,” suggests that the first sentence represents the outer limits of the definition and that, therefore, mere “support” for the Taliban, Al Qaeda or associated forces would be enough to justify indefinite detention.²⁷³ Under the government’s stated view, “support” does not require knowledge, intent, materiality or directness; therefore, as the government famously conceded, it had power to detain a “little old lady from Switzerland” who unwittingly sends a check to what she believes is an Afghan orphanage that is really a front for the Taliban.²⁷⁴

Although Judge Green determined that such a definition would be overbroad and in violation of applicable due process principles for those detainees who have nothing more than a vague “association” with terrorist groups,²⁷⁵ she did not consider whether the definition was authorized by the laws of war. In any event, her decision was stayed for years pending ultimate disposition in the Supreme Court in *Boumediene*. In the interim, the government relied on this definition to detain a large number of detainees who have had no meaningful connection with an armed conflict which might justify detention under *Hamdi* and the laws of war. As a prominent study of Defense Department has revealed, a tiny portion were captured on the battlefield by U.S. forces, fewer than half of the detainees are alleged even to have engaged in a “hostile act” and many are held for little more than having stayed at hotels raided by Pakistani police, fleeing from troops fighting the Taliban, owning a rifle or Casio watch or wearing “olive drab clothing.”²⁷⁶

²⁷² See Wolfowitz Order, *supra* note 141, at 1 (emphasis added).

²⁷³ *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d at 475.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 476 (“Absent other evidence, it appear that the government is indefinitely holding [detainee Murat Kurnaz] – possibly for life – solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process.”).

²⁷⁶ Mark Denbeaux et al., *Report on Guantanamo Detainees, A Profile of 517 Detainees through Analysis of Defense Department Data* at 17 (2006).

In post-*Boumediene* habeas proceedings, the government has proposed an “enemy combatant” definition that is effectively identical to the broad definition it employed in CSRT proceedings, one which authorizes detention based on mere “support” for “forces engaged in hostilities against the United States or its coalition partners.”²⁷⁷ Though the government has not specifically defined the range of conduct constituting “support” which would justify detention, it has claimed that those who support the enemy’s war efforts “are no less enemy combatants than those actually on the front lines.”²⁷⁸ Significantly, there are strong signals that the Obama Administration will continue to defend a very broad enemy combatant definition.²⁷⁹

Neither laws of war nor Supreme Court precedent²⁸⁰ support the government’s broad conception. As described, even the “direct participation” standard requires a causal nexus with battlefield activities. Yet under the government’s view, it could lawfully kill or indefinitely detain those who merely provided financial support, manufacturing support, providers of support services (such as clerics and medics or government personnel) and those who paid taxes to support the Taliban regime.²⁸¹ The new definition proffered by the government definition contains no intent or knowledge requirement, which would again appear to sweep in those, such as iconic “little old lady” in Switzerland who unknowingly provides financial support to the Taliban. In addition, the definition is not bounded by the armed conflict for which Congress authorized the use of force in September 2001 – i.e. those “responsible for the September 11 attacks;”²⁸² rather, it would appear to extend to any person “supporting” any type of “hostilities” anywhere in the world.²⁸³

²⁷⁷ See Respondent’s Resp. to Sept. 8 Order Requiring Concise Statement of Definition of “Enemy Combatant,” *Boumediene v. Bush*, No. 04-cv-1166 (RJL), Dkt # 170 (Sept. 10, 2008).

²⁷⁸ See Gov’t Brief Stmt of Legal Basis for Detention of Pet’rs, *Boumediene v. Bush*, No. 04-cv-1166 (RJL), Dkt #169, (Sept. 5, 2008).

²⁷⁹ See Charlie Savage, *Obama’s War on Terror May Resemble Bush’s in Some Areas*, N.Y. TIMES, Feb. 17, 2009 (noting that Solicitor General-designee Elena Kagan testified in her confirmation hearing that the U.S. should be able to detain under the laws of war someone suspected of financing al Qaeda even if he were captured in the Phillipines, thousands of miles from a zone of armed conflict).

²⁸⁰ See *supra* note __ (discussing Supreme Court precedent which distinguishes membership in enemy armed forces from mere civilian activity under the laws of war).

²⁸¹ Bradley & Goldsmith, *supra*, 2115 (observing that in modern wars the class of people “who support[] the war effort . . . would include everyone”).

²⁸² *Hamdi*, 542 U.S. at 517.

²⁸³ It was presumably on this theory that the government held the *Boumediene* petitioners who were alleged to have conspired to bomb the U.S. embassy in Sarajevo, Bosnia – thousands of miles from the conflict with the Taliban. See Br. of Respondents, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 at 45. In post-*Boumediene* habeas hearings, and after 7 years of relying on such allegations, the government dropped this charge, but

Notably, of course, laws are meant to apply neutrally. Thus, if this definition were accepted as part of the international laws of war, it would necessarily apply to the U.S. side of the conflict – justifying the use of force or indefinite military detention of civilians in the U.S. who provide financial, manufacturing or administrative support for forces engaged in hostilities abroad.

Since the *Boumediene* decision, courts already have begun the process of setting the boundaries of the government’s detention authority. For example, in devising a legal definition of “enemy combatant,” federal district court judge Richard Leon rejected both the government’s proposed mere “support” concept and the petitioners proposed “direct participation in hostilities on the battlefield” concept. Believing himself obligated to defer to a definition created by the political branches, he accepted the “enemy combatant” definition used in the CSRT process.²⁸⁴ Thus, while mere support is insufficient, Judge Leon found that the AUMF authorizes the detention of anyone who has “committed a belligerent act” or who has “*directly* supported hostilities in aid of enemy forces.”²⁸⁵ In practice, Judge Leon has applied this definition fairly broadly, concluding that a “mere cook” for an Arab brigade assisting the Taliban in its fight against the Northern Alliance could be found to have “directly supported hostilities,”²⁸⁶ and as well as someone who stayed at known al Qaeda “guesthouses;”²⁸⁷ but, he declined to decide because of insufficient factual support, whether the government could detain as enemy combatants five

it is unclear if it did this because of lack of confidence in legal authority or lack of confidence in factual support for the charges, or for some other undisclosed reason.

²⁸⁴ Order, *Boumediene v. Bush*, No. 04-1166, Dkt. # 237 (D.D.C. Oct. 27, 2008). Judge Leon believed that definition had been “blessed” by Congress when it imposed the DTA-CSRT review scheme as part of the Military Commissions Act of 2006. *Id.* at 3. His assumption is questionable because a judge still has the authority, if not the obligation, to interpret that definition consistent with “longstanding law-of-war principles.” See *Hamdi*, 542 U.S. at 518.

²⁸⁵ *Id.* (emphasis added). Although Judge Leon accepted the CSRT definition, he did not read it as broadly as Judge Green had before. See *supra* note _____. Judge Leon appears to view the “includes” clause not as an example, but as a required limitation; thus, for him, any support must be “direct” and “in aid of hostilities.”

²⁸⁶ Mem. Order, *Al Bihani v. Obama*, No. 05-1312, Dkt. #89 at 9 (D.D.C. Jan. 28, 2009), (“Simply stated, faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient ‘support’ to meet this Court’s definition,” particularly because “as Napoleon himself was fond of pointing out: ‘an army marches on its stomach’”). Judge Leon also emphasized that the petitioner was assigned a rifle (which he did not fire) and retreated alongside Taliban forces at the direction of a Taliban commander, after coalition bombing, for future deployment. *Id.* at 8-9.

²⁸⁷ Mem. Order, *Sliti v. Bush*, No. 05-0429, at 7-8 (D.D.C. Dec. 30, 2008).

Bosnians who were alleged to have had a “mere plan,” without more, to travel to Afghanistan to support the Taliban.²⁸⁸

In *Al-Marri v. Pucciarelli*, the Fourth Circuit, en banc, ruled 5-4 that the AUMF authorized the detention of a lawful permanent resident apprehended by law enforcement officers inside the United States, thousands of miles from any active hostilities, based on allegations that he was trained with al Qaeda between 1996 and 1998 and was sent here to serve as a sleeper agent to facilitate future terrorist activities inside the United States.²⁸⁹ The opinions constituting the majority concededly departed from longstanding law-of-war principles, in light of what they perceived to be an unprecedented conflict against a transnational non-state force such as al-Qaeda.²⁹⁰ Though none of the majority opinions could agree on a single definition of enemy combatant, all three proffered definitions sought to impose a “limiting principle on enemy combatant definitions that the Government has failed to suggest.”²⁹¹ Thus, each imposed some requirement that the individual personally participated (or attempted to) in a hostile act against the United States on behalf of an enemy force.²⁹² Judge Wilkinson also cautioned against an overly broad reading suggested by the government, which could lead to “absurd results” such as the indefinite detention of anyone the President believes “aided” or “was associated with” any organization remotely linked to the September 11th attacks.²⁹³

After the Supreme Court granted certiorari in *Al-Marri* in the 2008-2009 term to decide, among other things, the permissible scope of the AUMF, the Obama Administration announced that he would be transferred from military custody to face indictment in Illinois on “material support for terrorism charges.” Accordingly, the Court dismissed *Al-Marri*’s petition as moot and vacated the Fourth Circuit’s opinion.²⁹⁴ As a result, without any precedential guidance from the court

²⁸⁸ Mem. Order, *Boumediene v. Bush*, No. 04-1166, at 7-9 (D.D.C. Nov. 20, 2008)

²⁸⁹ 534 F. 3d 213 (4th Cir. 2008) (en banc).

²⁹⁰ The dissenting judges agreed with the original panel majority opinion, that the AUMF could not support the detention of someone who was neither a member of the enemy government (the Taliban), nor engaged in any armed conflict in a zone of active hostilities. *Al-Marri*, 534 F. 3d at 227 (Motz, J., dissenting).

²⁹¹ *Al-Marri*, 534 F. 3d at 322 (Wilkinson, J., concurring in part and dissenting in part).

²⁹² *Id.* at 325; *id.* at 285 (Williams, C.J., concurring in part and dissenting in part); *id.* at 259 (Traxler, J., concurring in the judgment).

²⁹³ *Id.* at 226, 286 & n. 4. Similarly in *Parhat v. Gates*, 532 F.3d 834, 844 (D.C. Cir. 2008) the D.C. Circuit, interpreting CSRT enemy combatant definition as part of a DTA review, concluded that “even under the Government’s own definition, the evidence must establish a connection between [the allegedly hostile group at issue] and al Qaeda or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word ‘associated.’”

²⁹⁴ See Summary Order, *Al-Marri v. Spagone*, No. 08-368, (S. Ct. Mar. 6, 2008).

of appeals or the Supreme Court, the district courts will continue the common law process of developing limits on the executive's detention authority.

IV. COMMON LAW PROCEDURAL RULES

In addition to inviting district courts to review legal questions regarding the geographical reach of the Suspension Clause and the content of the substantive law governing the executive's asserted authority to detain, *Boumediene* recognized that Guantanamo detainees (and perhaps others) had the right to challenge the factual basis of their detention.²⁹⁵ Yet beyond acknowledging its faith in the "expertise and competence" of district courts²⁹⁶ and cautioning them to proceed "prudently" and "incrementally,"²⁹⁷ the Court has offered little specific guidance to courts on remand for the adjudication of factual disputes or mixed questions. To add to this uncertainty, the 200-plus *de novo* reviews of Guantanamo habeas petitions the Court set in motion have little precedent since Reconstruction, after which habeas petitions have been almost universally brought as collateral challenges to prior criminal court convictions or to immigration proceedings. Yet, despite the novelty and size of the task before the courts, they are amply equipped with the elementary tools to resolve these cases, and, despite criticism of *Boumediene*'s mandate, they are also competent to do so without interfering with core areas of military discretion.

This section addresses some core procedural and evidentiary rules courts are beginning to use to frame their habeas cases, mindful that variations in application and interpretation among the district courts are both possible and defensible as a part of a natural evolution of this new corpus of law. Specifically, this section starts with a discussion of the concept of "constitutional habeas" vis-à-vis the habeas corpus statute. It then discusses core procedural requirements, such as burden of proof, and what entitlement petitioners might have to discovery and an evidentiary hearing, and evidentiary issues such as the use of hearsay and available protections for classified information. A number of judges in post-*Boumediene* proceedings have already issued summary Case Management Orders setting forth standards on some of the same issues identified here

²⁹⁵ *Boumediene*, 128 S. Ct. at 2266–69 (because "the writ must be effective . . . [t]he habeas court must have sufficient authority to conduct a meaningful review of . . . the cause for detention"); *id.* at 2270 (habeas "includes some authority to assess the sufficiency of the Government's evidence against the detainee.").

²⁹⁶ *Id.* at 2276 ("We make no attempt to anticipate all the evidentiary issues and access to counsel issues that will arise during the course of the detainees' habeas corpus proceedings. These and other remaining questions are within the expertise and competence of the district court to address in the first instance.").

²⁹⁷ *Hamdi*, 542 U.S. at 539.

for discussion.²⁹⁸ The orders are both summary and, to the extent that certain rules were adopted over the government's objection, they are also contestable. Thus, a full explication of the reasoning underlying these orders is still necessary to comprehend this emerging common law of habeas.

A. CONSTITUTIONAL HABEAS VS. THE HABEAS STATUTE

In light of *Boumediene*'s constitutional holding, what authority governs the disposition of the pending habeas cases? In post-*Boumediene* proceedings arising in a variety of contexts, the government has taken the position that *Boumediene*, relying as it did on the Suspension Clause of the Constitution, merely protected the right to "constitutional habeas."²⁹⁹ Under its theory, "constitutional habeas" refers to those rights or procedures inherent to the common law writ which were "constitutionalized" by the Suspension Clause. Accordingly, the Guantanamo habeas petitioners would be entitled only to those procedural rights that existed in 1789, which would not include an entitlement to an evidentiary hearing, discovery or any other procedural devices associated with "modern statutory habeas proceedings."³⁰⁰ This position reflects an understandable but clearly erroneous view of the Suspension Clause and its relationship to the habeas statute.

In short, *Rasul* held that the courts had jurisdiction over habeas corpus petitions filed under the habeas statute, 28 U.S.C. § 2241.³⁰¹ In 2006, and for the very purpose of foreclosing these statutory habeas proceedings, Congress passed § 7 of the MCA, amending the habeas statute to add section 2241(e).³⁰² *Boumediene* held that this provision, at least as applied to Guantanamo detainees, "effects an unconstitutional suspension of the writ."³⁰³ Although the Court *reasoned* that the alternative DTA-CSRT review scheme ratified by the MCA was not an

²⁹⁸ Specifically, in July 2008, the Chief Judge of the District Court for the District of Columbia ordered the pending Guantanamo habeas cases consolidated before District Court Judge Thomas Hogan for resolution of common issues. After hearing from the parties, he issued a Case Management Order setting forth a scheduling framework for the disposition of cases, and setting standards regarding burden of proof, admissibility of hearsay, and entitlement to evidentiary hearings, among other issues. See Case Management Order, *In Re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (Nov. 6, 2008) (hereinafter "Hogan CMO"). Other judges in the district largely adopted the Hogan CMO, but made additions or alterations as they saw fit.

²⁹⁹ See Gov't Brief Regarding Procedural Issues at 1, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, Dkt. # 225 (July 25, 2008).

³⁰⁰ *Id.*

³⁰¹ 542 U.S. at 473.

³⁰² MCA § 7.

³⁰³ 128 S. Ct. at 2274; *id.* at 2275 ("The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp. 2007)").

“adequate substitute” for the writ as it existed at common law and thus violated the Suspension Clause, it does not follow that the Guantanamo petitioners are limited to pursuing the writ in its baseline common law form. Instead, under elementary principles of constitutional remedy, § 7 of the MCA and § 2241(e) are not law; they are void.³⁰⁴ A court must therefore “disregard” these provisions, and proceed under the pre-existing statutory authority.³⁰⁵ Therefore, the Guantanamo detainees are now in exactly the same position they were in prior to the passage of the MCA and are in the same position as any habeas petitioner invoking the federal habeas jurisdiction under § 2241 today: each have full access to the habeas statute, including the corresponding procedural protections of 28 U.S.C. §§ 2243-2248.³⁰⁶

One could attempt to view the government’s conception of “constitutional habeas” as one in which the MCA’s repeal of statutory habeas remained in force and only those portions that are constitutionally-compelled (by virtue of their existence at common law) were reinstated by *Boumediene*. However, Congress did not include in the MCA provision at issue a savings clause that would have entitled a court to limit those habeas procedures to those it deems to be constitutionally required;³⁰⁷ rather, the Court struck down the MCA’s jurisdictional repeal *in toto*. Nor did Congress in the MCA attempt to separate § 2241’s statutory grant of jurisdiction from the corresponding statutory procedures governing that grant, incorporated into subsequent sections of that statute at 28 U.S.C. §§ 2243-2248.³⁰⁸

³⁰⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“[A]n act of the legislature, repugnant to the constitution, is void.”).

³⁰⁵ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); *see also Klein*, 80 U.S. at 147-48; *accord Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1872); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953) (“If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.”).

³⁰⁶ This elementary logic is confirmed by the *Boumediene* Court’s comparison of DTA procedures with 28 U.S.C. § 2241. The Court noted, “[t]he differences between the DTA and the habeas statute that would govern in MCA §7’s absence, 28 U.S.C. § 2241, are likewise telling.” 128 S. Ct. at 2266 (internal citations omitted) (emphasis added).

³⁰⁷ *Cf. Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223. *Boumediene*’s observation that “we do not hold that an adequate substitute must duplicate statutory proceedings under § 2241 in all respects,” 128 S. Ct. at 2274, is not to the contrary. The Court was merely explaining that, even though the DTA is unconstitutional, the Court would not specifically catalogue the ways in which any *future* statute Congress may consider in its place might be an adequate substitute for the writ.

³⁰⁸ As described, *see* Section III(A)(2), because the Suspension Clause has no independent force, the term “constitutional habeas” cannot refer to some set of procedures that exist after Congress takes away statutory habeas. *Bollman*, 8 U.S. at 94 (the power to award the writ by any of the courts of the United States, must be given by

Thus, as *Hamdi* explained, “§ 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review.”³⁰⁹ Those provisions provide habeas petitioners with an opportunity to traverse, or rebut, the government’s return to the writ,³¹⁰ to undertake discovery upon a showing of good cause,³¹¹ to have disputed factual questions decided by an evidentiary hearing, and to have the matter resolved “as law and justice require.”³¹² And, while the habeas statute provides the basic operating structure to govern the disposition of a case, because “there is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus,” courts must themselves on a case-by-case basis fill in the “necessary facilities and procedures for an adequate inquiry.”³¹³

B. PROCEDURAL RULES

1. *From Returns to Hearings*

All habeas cases must start with a return and may end with an evidentiary hearing. Under the habeas statute, after the petitioner files a non-frivolous habeas petition, the government must file a return or answer to the writ, setting forth the “cause for commitment,” – i.e. the legal and factual basis for the executive’s asserted authority to detain.³¹⁴ The statute ordinarily requires the respondent to file a return within a period of days,³¹⁵ but in the post-*Boumediene* cases, district court judges, responding to the government’s asserted need to review voluminous evidence in the numerous cases ripe for review, set a modulated, long-term schedule for the filing of returns. Further, under these circumstances, the government was also permitted to file amended returns in response to earlier-filed cases, so that the government could present the “best available evidence” to justify each of the detentions.³¹⁶ Thereafter, according to the habeas statute and procedures adopted by the district court in the Guantanamo habeas cases, petitioners are entitled to file a traverse, or

written law”). To the extent that the term has any utility, it is best understood as an obligation imposed on the Congress by the Suspension Clause to provide statutory authority for the writ, *see* Hartnett, *supra* note __ at 269.

³⁰⁹ 542 U.S. at 525.

³¹⁰ 28 U.S.C. § 2243, ¶ 6.

³¹¹ 28 U.S.C. § 2246.

³¹² 28 U.S.C. § 2243, ¶ 7, ¶ 8.

³¹³ *See* Harris v. Nelson, 395 U.S. 286, 300 (1969); *id.* at 293 (“The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.”).

³¹⁴ 28 U.S.C. § 2243.

³¹⁵ *Id.* (within 3 days, or if granted, an extension for 20 days).

³¹⁶ Scheduling Order ¶ 4, In re Guantanamo Bay Detainee Cases, Misc. No. -8-442, (D.D.C. July 11, 2008).

rebuttal, to the government's return. As part of that return, a petitioner can contend that, even assuming the truth of the government's allegations, there is no legal authority to detain – akin to a judgment on the pleadings.

The return can also present affidavit testimony or other factual evidence in support of a claim of innocence,³¹⁷ including facts which demonstrate that the evidence relied upon by the government was procured by torture or coercion.³¹⁸ In order to sharpen the factual disputes between the parties, district courts have the authority to consider and grant requests for discovery by the petitioners³¹⁹ and conduct other intervening procedures well within any district court's competence. Ultimately, and consistent with the court's plenary authority to review habeas cases in the executive detention context, any factual disputes that remain can be resolved by an evidentiary hearing, including the possibility of hearing live testimony if, in the district court's discretion, such testimony is necessary.³²⁰

2. *Burdens of Proof and Presumptions*

Whatever burden of proof is ultimately imposed, it should be the government – rather than a habeas petitioner – who bears it. This requirement is both implied by *Boumediene* itself³²¹ and is most consistent with the elementary theory of habeas: the government's deprivation of an individual's entitlement to liberty must be justified to a judge.³²² In the context of collateral attacks on prior judgments of state or federal criminal courts, the government must satisfy a preponderance-of-the-evidence

³¹⁷ See *Boumediene*, 128 S. Ct. at 2270.

³¹⁸ See *Whaley v. Johnston*, 316 U.S. 101, 104 (1942) (holding that petitioner is entitled to a hearing on “the material issue whether the plea was in fact coerced by the particular threats alleged”); accord *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (“There can be no doubt that, if the allegations [regarding coercion] contained in the petitioner’s motion and affidavit are true, he is entitled to have his sentence vacated”); see also *Stewart v. Overholser*, 186 F.2d 339, 345 (D.C. Cir. 1950) (ordering factual hearing “involving the taking of testimony followed by a decision based on the facts and the law” regarding the petitioner’s sanity).

³¹⁹ See *infra* at ____.

³²⁰ See *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (“The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner’s right to have those issues heard and determined in the manner the statute prescribes.”); *Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) (“When a factual issue is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process.”); *id.* at 342-43 (collecting cases). By contrast, a court clearly has the authority to forego an evidentiary hearing if it concludes that a petitioner’s claims are “vague, conclusory, or palpably incredible.” *Marichoba*, 386 U.S. at 495.

³²¹ *Boumediene*, 128 S. Ct. at 2271 (“The extent of the showing *required of the government* in these cases is a matter to be determined.”) (emphasis added).

³²² See text accompanying *supra* notes ____ to ____.

standard – a standard that can be sometimes be met simply by producing the record of the conviction below. But what should be the standard for a plenary habeas review of an executive detention where there has been no prior adjudication by a court of competent jurisdiction?³²³

According to Justice Harlan’s iconic opinion in *In re Winship*, setting a burden of proof ultimately turns on normative considerations such as: first, what “degree of confidence” a justice system wishes to impose on a factfinder in the correctness of its factual judgment; and, second, how should one assess the “comparative social disutility” of an erroneous outcome: should the risk of error fall on society (if the guilty goes free) or on the individual (if the innocent is punished)?³²⁴ According to Harlan, a preponderance standard makes obvious sense in the civil context because no disproportionate social harm follows from an erroneous judgment in favor of either a plaintiff or a defendant; but, in the criminal context, our society views it to be “far worse to convict an innocent man than to let a guilty man go free.”³²⁵

Although this framework cannot be applied mechanically or with any quantitative precision, it provides some insight here. On the one hand, the risk of an erroneous detention decision for an individual detainee is certainly grave; it includes potentially lifetime detention³²⁶ in an extremely harsh prison environment thousands of miles from home.³²⁷ And, as already described, there is a significant likelihood that an individual detainee has been wrongfully detained.³²⁸ Moreover, as *Boumediene* stressed, “[i]n some of these cases, six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.”³²⁹ On the other hand, the risk of an erroneous release of a

³²³ See *Boumediene*, 128 S. Ct. at 2264 (explaining that “cases discussing implementation of that statute [AEDPA] give little instruction (save perhaps by contrast) for the instant cases, where no trial has been held”).

³²⁴ 397 U.S. 358, 368 (Harlan, J., concurring).

³²⁵ *Id.* at 371, 372.

³²⁶ See *Hamdi*, 542 U.S. at 529 (describing “the interest in being free from physical detention by one’s own government” as “the most elemental of liberty interests”) (citations omitted); Fallon & Meltzer, *supra* note __ at 38 (“Cases involving executive detention pose the most basic threats to personal liberty.”).

³²⁷ See, e.g., Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo*, June 2008, at 2, 34, 37 (describing the severe mental deterioration of many of the 185 detainees held in “supermax-security” conditions in Guantanamo, including hallucinations, multiple suicide attempts, and an “an array of painful and incapacitating psychiatric symptoms”); William Glaberson, *Detainees Mental Health is Latest Battle*, N.Y. TIMES, Apr. 26, 2008 (citing military statistics acknowledging that three-quarters of Guantánamo detainees are in conditions of solitary confinement in Camps 5 and 6).

³²⁸ See *supra* notes __ and __.

³²⁹ 128 S. Ct. at 2275. Moreover, “as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”

detainee is difficult to measure in part because there is considerable uncertainty about the so-called “recidivism rate” of released detainees,³³⁰ and because the releases were not ordered pursuant to a judicial process nor pursuant to any transparent criteria.

The search for an appropriate burden of proof becomes even more elusive in the absence of a uniform substantive definition of wrongdoing.³³¹ For example, one could read *Hamdi* as suggesting that where the operative enemy combatant definition requires having engaged in armed conflict on a battlefield, the petitioner may be made to bear the burden of rebutting credible allegations of his combatancy.³³² Because the risk of misclassifying the narrow and discrete set of actual combatants captured on a battlefield is lower,³³³ it thus might make sense to lower the government’s burden of proof in such cases.³³⁴ At the same time, the government should face a higher burden if the enemy combatant definition is broadened to include more tangential levels of support or association. As Bruce Ackerman explained, “[o]nly a very small percentage of the

Rasul, 542 U.S. at 488 (Kennedy, J., concurring). Matthew Waxman, *Detention as Targeting: Standards of Certainty and Detention of Terrorist Suspects*, 108 COLUM. L. REV. 1365, 1384 (2009) (“The prospect of a conflict with no clear end strains the traditional rules of warfare and vastly multiplies the injury of errors”).

³³⁰ Of the nearly 600 detainees who have been released from Guantanamo by the military, there have no doubt been some who have subsequently either engaged in acts of terrorism or who have joined al Qaeda. Josh White, *Ex Guantanamo Detainee Joined Iraq Suicide Attack*, WASH. POST, May 8, 2008 (reporting that former Saudi detainee engaged in suicide attack in Mosul, Iraq, killing up to seven Iraqis); Carlye Murphy, *Ex-Guantanamo inmates return to militancy in Yemen*, CHRISTIAN SCI. MONITOR, Jan. 29, 2009 (reporting that “two Saudis formerly jailed at the US prison camp in Guantánamo Bay, Cuba, have joined Al Qaeda’s Yemeni branch, and authorities here worry that two other ex-Guantánamo inmates may have strayed back to militancy because they have recently disappeared from their homes.”). At the same time, the military has never provided sufficient details to evaluate consistently shifting claims about a large number of detainees who have “returned to the fight.” See Mark Denbeaux, et al., *Released Guantanamo Detainees and the Department of Defense: Propaganda by the Numbers?* (2009) (scrutinizing the variety of Defense Department claims regarding the number of detainees who have “returned to the fight” and finding them to be exaggerated and to have included persons who merely criticized Guantanamo subsequent to their release).

³³¹ See *supra* Section III(B) (describing variety of “enemy combatant” definitions proposed by petitioners, the government and the courts).

³³² *Hamdi*, 542 U.S. 532-33.

³³³ 542 U.S. 512-12, 523 (noting *Hamdi* was captured in a “foreign combat zone” with an assault rifle as part of a “Taliban unit”); see also *id.* at 549 (Souter, J., concurring) (*Hamdi* “was taken bearing arms on the Taliban side of a field of battle.”).

³³⁴ See *Al-Marri*, 534 F. 3d 213, 228, 229, 232 (Traxler, J., concurring) (attributing *Hamdi*’s departure from baseline due process protections, including a lower burden of proof and acceptance of hearsay to the paradigmatic battlefield capture at issue there). Cf. Fallon & Meltzer, *supra* note __ at 50 (“the central distinction for purposes of appraising the legality, and ultimately the constitutionality of executive detentions of American citizens is between battlefield and nonbattlefield contexts”).

human race is composed of recognized members of the German military, but anybody can be suspected of complicity with al Qaeda.”³³⁵ Because the government has so far advocated a highly elastic definition of enemy combatant (and because an extremely small proportion of Guantanamo detainees were captured during armed conflict on a battlefield),³³⁶ the burden of proof should be sufficiently rigorous.

On balance, Guantanamo detainees should not be made to endure such a serious deprivation of liberty “upon no higher degree of proof than applies in a negligence case.”³³⁷ Instead, I contend that the government should demonstrate the sufficiency of their evidence by clear and convincing evidence.³³⁸ The Supreme Court has insisted on this level of proof in contexts involving substantially similar liberty deprivations such as deportation,³³⁹ denaturalization,³⁴⁰ indefinite civil commitment of “sexually violent predators,”³⁴¹ continued commitment of person found not guilty by reason of insanity,³⁴² and pre-trial detention based on dangerousness.³⁴³ It is also the standard favored by those who argue for the adoption of legislation authorizing preventive detention of suspected terrorists.³⁴⁴

Professors Fallon and Meltzer have argued for a lower standard. They recommend that a habeas court should apply the standard of review set forth in *Jackson v. Virginia*³⁴⁵—one generally used to evaluate the factual sufficiency of the evidence supporting a state court criminal conviction. Under their view, a federal habeas court would ask whether a “rational military decisionmaker could have found by a preponderance of

³³⁵ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1033 (2004). See also Waxman, *supra* note __ at (generally discussing the absence of a standard of proof of combatancy status under the laws of war and observing that: “the broader the definition (i.e., the more distant and indirect the relationship between an individual and a particular terrorist organization or its hostile acts), the more difficult it will be to distinguish fighters from civilians; the narrower the definition . . . the easier it will be to resolve doubt in individual cases.”).

³³⁶ See *supra* note __.

³³⁷ *Woodby v. INS*, 385 U.S. 276, 285 (1966).

³³⁸ See *In re Ballay*, 482 F.2d 648, 662 (D.C. Cir. 1973) (“in situations where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed, such as proof by clear, unequivocal and convincing evidence”).

³³⁹ *Woodby*, 385 U.S. at 286.

³⁴⁰ *Schneiderman v. United States*, 320 U.S. 118 (1943).

³⁴¹ *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997).

³⁴² *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992).

³⁴³ *United States v. Salerno*, 481 U.S. 739, 750 (1987).

³⁴⁴ See Benjamin Wittes, *LAW AND THE LONG WAR: JUSTICE IN AN AGE OF TERRORISM* (2008); David Cole, *Closing Guantanamo: The Problem of Preventive Detention*, THE BOSTON REVIEW, Dec. 13, 2008, available at <http://bostonreview.net/BR34.1/cole.php>.

³⁴⁵ 443 U.S. 308 (1979).

the evidence” that the detainee was an enemy combatant.³⁴⁶ Ultimately, however, this standard is inadequate because it implicitly affords a presumption of reliability to the prior administrative proceeding.

As the Supreme Court emphasized, these are cases challenging executive detention – where the protections of habeas “have been strongest” – not collateral attacks on a prior judgments of a “court of record.”³⁴⁷ The *Jackson* framework – which presumes that the prior, adversarial adjudication pursuant to full constitutional protections on balance ensures reliability to the judgment of conviction – is inapt.³⁴⁸ It makes no more sense to ask if there was sufficient evidence in the prior CSRT record – so one-sided as it was – to support the military’s judgment than it would be to ask if there was sufficient evidence to support a criminal conviction in a criminal trial in which the defendant was prohibited from calling witnesses or confronting the government’s evidence. Indeed, at common law, no habeas court was bound to defer to a prior and presumptively self-serving judgment of an executive official.³⁴⁹ As one court aptly stated, “To require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department in Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity.”³⁵⁰ Thus, consistent with a habeas court’s plenary power in the executive detention context, a CSRT’s prior designation of a petitioner as an “enemy combatant” should be given no deference whatsoever.

The district courts on remand have concluded that the government bears the burden of proof in the habeas hearing by a preponderance of the evidence standard, but have declined to give the CSRT determination any presumptive weight when evaluating the government’s case.³⁵¹ Outside of a jury context, the difference between a clear and convincing standard versus a preponderance standard may ultimately prove to be “quantitatively imprecise.”³⁵² Yet, whichever standard is applied, the

³⁴⁶ Fallon & Meltzer, *supra* note __, at 73.

³⁴⁷ 128 S. Ct. at 2268-70.

³⁴⁸ *Id.* at 2269 (“A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to the procedures designed to insure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures”).

³⁴⁹ Goldstein, *supra* note __ at 1181 and Appendix (collecting cases in which federal courts exercised de novo factual review of executive detentions).

³⁵⁰ *In re Jung Ah Lung*, 25 F. 141, 143 (D. Cal. 1885); *see also Boumediene*, 128 S. Ct. at 2269 (quoting *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)).

³⁵¹ Hogan CMO at 5.

³⁵² *Winship*, 397 U.S. at 370 (Harlan, J., dissenting). So far, there is not a large sampling from which to evaluate the application of the standard, but Judge Leon has as of this writing, found the government’s evidence insufficient in justifying 6 of the 9 cases he has adjudicated.

court should insist not only on a sufficient quantum of evidence, but it should just as importantly display a healthy skepticism about the frequently poor and unreliable *quality* of the evidence relied upon to justify the Guantanamo detentions.³⁵³

3. *Discovery and Exculpatory Evidence*

Despite the absence of conclusive evidence regarding the availability of discovery at common law, it is clear that the habeas statute and *Boumediene* contemplate that Guantanamo petitioners will have a limited opportunity to undertake judicially-managed discovery in these cases. Section 2246 of the federal habeas statute expressly authorizes discovery in habeas proceedings by providing that, if a party introduces an affidavit, the opposing party “shall have the right to propound written interrogatories to the affiants.”³⁵⁴ Further, in *Harris v. Nelson*, the Supreme Court held that, pursuant to the All Writs Act, 28 U.S.C. § 1651, habeas courts are authorized to expand discovery beyond measures specified in § 2246 where “specific allegations before the court show reason to believe that the petitioner may [be] entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.”³⁵⁵ The Court thus instructed district courts to “fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage,” to permit a petitioner to “secur[e] facts where necessary to accomplish the objective of the proceedings.”³⁵⁶ *Boumediene*’s predominant concern with a petitioners’ ability to present

³⁵³ See Declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, Joint Appendix, *Boumediene v. Bush*, No. 06-1195, at 103 (evidence provided to the CSRT panel on which he served “lacked even the most fundamental earmarks of objectively credible evidence.”); *Parhat v. Gates*, 382 U.S. App. D.C. 233, 245 (D.C. Cir. 2008) (documents supporting authority to detain petitioner Parhat “repeatedly describe [his] activities and relationships as having ‘reportedly’ occurred, as being ‘said to’ or ‘reported to’ have happened, and as things that ‘may’ be true or are ‘suspected of’ having taken place. But in virtually every instance, the documents do not say who ‘reported’ or ‘said’ or ‘suspected’ those things”); *id.* at 247 (finding evidence relied upon by CSRTs inherently unreliable and, quoting Lewis Carroll, observing that “the fact that the government has ‘said it thrice’ does not make an allegation true.”).

³⁵⁴ See *Harris*, 394 U.S. at 296 (noting that § 2246 provides for “interrogatories for the purpose of obtaining evidence from affiants where affidavits were admitted into evidence”).

³⁵⁵ 394 U.S. at 299.

³⁵⁶ *Id.* See also *Hamdi*, 542 U.S. at 525 (observing that § 2246 authorizes “the taking of evidence in habeas proceedings by deposition, affidavit or interrogatories”). *Al-Marri*, 534 F. 3d 213, 273 n. 16 (Traxler, J., concurring) (citing “discovery” as part of the “process normally available [to persons] who challenge their executive detention”).

exculpatory evidence likewise suggests that the Court anticipated a managed discovery process to effectuate the purpose of the writ.³⁵⁷

In a typical habeas case, a petitioner must obtain leave of court for an order compelling production of specific discovery, based on “specific allegations” material to some disputed issue of fact.³⁵⁸ The availability of discovery in habeas litigation therefore depends on “the facts of [a] particular case.”³⁵⁹ Still, discovery in a conventional, post-conviction habeas case is generally quite limited. In the post-conviction context, a regime of partially constrained discovery makes sense because a petitioner would have already had (in the earlier proceeding) a full opportunity for discovery pursuant to state or federal rules of criminal procedure, would have been provided full access to exculpatory material pursuant to *Brady v. Maryland*,³⁶⁰ and would have had the full opportunity to confront and cross-examine all the evidence ultimately supporting a judgment in his case. Because of the inadequacy of the CSRT process, these cases are not comparable in that respect: these habeas petitioners are operating on a blank slate. Likely recognizing this comparative discovery disadvantage of these petitioners, the district courts issued a consolidated discovery order in two parts. The first requires a set of automatic disclosures which would not exist in a traditional collateral habeas proceeding. Thus, in all post-*Boumediene* cases, the government must upon request, disclose:

(1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.³⁶¹

³⁵⁷ 128 S. Ct. at 2272. In addition, by instructing habeas courts to “accommodate” the government’s interests in secrecy in certain information, the Supreme Court implied that, in the first instance, habeas petitioners would be able to make requests for disclosure of information. *Boumediene*, 128 S. Ct. at 2276.

³⁵⁸ See *Harris*, 394 U.S. at 300; cf. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.”).

³⁵⁹ Compare *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (Rehnquist, C.J.) (9-0) (holding that “given the facts of this particular case,” the habeas court abused its discretion when it denied discovery to the petitioner), with *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (affirming denial of habeas discovery where discovery request was “based purely on speculation”).

³⁶⁰ 373 U.S. 83 (1963).

³⁶¹ Hogan CMO at 3 (citing *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (“[D]istrict courts have the power to require discovery when essential to render a habeas corpus proceeding effective.”)).

In addition, and more consistent with traditional habeas practice, individual district court judges are authorized to order additional, targeted discovery upon a showing of good cause.³⁶² In demonstrating good cause, the Guantanamo petitioners do face a constraint that typically does not exist in a conventional habeas case: the reality that their petitions arise in a national security context. Thus, the government always has the opportunity to argue that a particular discovery request propounded by a petitioner would impose an “uncommon burden” on ongoing military operations.³⁶³ As *Hamdi* recognized, there are some cases in which “military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted” from having to produce “evidence buried under the rubble of war.”³⁶⁴

A review of a number of discretionary “good cause” discovery orders issued by the district courts in these cases reveals that a substantial portion of such discovery orders are quite limited. For example, a number required disclosure of statements made by clients already in the military’s possession,³⁶⁵ evidence that might reveal the detainee was subject to torture or coercion,³⁶⁶ and a medical examination to evaluate a petitioner’s competence.³⁶⁷ Others order disclosure of a specific, identified document after a petitioner’s demonstration of particularized need.³⁶⁸ Others were

³⁶² See Hogan CMO at 3 (specifying that such “[d]iscovery requests shall be presented by written motion to the Merits Judge and (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner’s detention is unlawful. (citing *Harris*, 394 U.S. at 300)).

³⁶³ See Hogan CMO at 3.

³⁶⁴ 542 U.S. at 531-32. See Hogan CMO at 4 (as part of a “good cause” showing, “petitioner must explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government.”).

³⁶⁵ See, e.g., Order, *Al-Mithali v. Obama*, No. 05-2186, Dkt. #138 (D.D.C. Jan. 9, 2009) (recordings of confessions or statements made by petitioner to any foreign or domestic authority since arrest).

³⁶⁶ Order, *Batarfi v. Bush*, No. 05-0409, Dkt. # 162 (D.D.C. Jan. 15, 2009) (unclassified version) (granting request to produce circumstances surrounding all statements of client upon which government relies; but denying request that petitioner’s counsel receive all prior client statements); *but see* Order, *Al-Ginco v. Bush*, No. 05-1310, Dkt. # 125 (D.D.C. Dec. 23, 2008) (denying request for production of unredacted copies of the petitioner’s statements).

³⁶⁷ Order, *Zuhair v. Bush*, No. 05-0864, Dkt. # 134 (D.D.C. Jan. 15, 2008) (ordering psychological evaluation of petitioner by court-appointed doctor); Order, *Husayn v. Bush*, No. 08-1360, (D.D.C. Nov. 23, 2008) (granting request to have medical expert review petitioner’s medical files); *but see* Minute Order, *Sharbi v. Bush*, No. 05-2348 (D.D.C. Dec. 12, 2008) (denying without prejudice request for medical evaluation pending petitioner’s submission of declaration demonstrating particularized need).

³⁶⁸ Order, *Zemiri v. Obama*, No. 04-02046, Dkt. # 146 (D.D.C. Feb. 9, 2009) (two untranslated letters from petitioner to his wife in government’s possession).

simply denied. None have required the government to produce evidence “buried under the rubble of war.” Thus far, therefore, beyond a general expenditure of time and energy by government and military officials of the kind that *Boumediene* suggested must be tolerated,³⁶⁹ there is no evidence that habeas discovery has interfered with ongoing military operations or otherwise impeded national security.

Finally, on remand, habeas petitioners requested, and were granted, an entitlement to the production of “reasonably available” exculpatory information in the government’s possession that tends to materially undermine the evidence it relies upon in its factual return.³⁷⁰ This is no small burden on government lawyers and military personnel, considering the vast database of evidence and information in its possession and arguably relevant to each detainee. Nevertheless, given *Boumediene*’s concern over habeas court’s ability to examine exculpatory evidence and what I regard is the Court’s related unease about the accuracy of the government’s judgment about the guilt of detainees and the widespread reports of abuse of prisoners in Guantanamo,³⁷¹ the demand to produce exculpatory evidence is not surprising.

In addition to preserving the truth-seeking function of an adversary proceeding,³⁷² the *Brady* requirement limits the opportunity for gamesmanship or malfeasance by the government. As the Court has explained, absent a requirement that the government turn over exculpatory evidence, “the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence,” which is untenable in “a system constitutionally bound to accord defendants due process.”³⁷³ The *Brady* requirement also makes sense in light of reports that a significant number of detentions have been based on testimony of detainees who have been

³⁶⁹ See *supra* note ____.

³⁷⁰ Hogan CMO at 3. See also, *Zemiri*, Order, *supra* note ____ (defining “exculpatory evidence” in Hogan CMO as including “any evidence or information that undercuts the reliability and/or credibility of the Government’s evidence, i.e. such as evidence that casts doubt on a speaker’s credibility, evidence that undermines the reliability of a witness’ identification of Petitioner, or evidence that indicates a statement is unreliable because it is the product of abuse, torture, or mental or physical incapacity”); see also Resp’ts Response to Court’s Request Concerning Orders on Exculpatory Evidence Produced in this and Other Cases, *Zuhair v. Obama*, No. 08-0864, (D.D.C. Feb. 20, 2009), Dkt # 145, Exh. 1 (listing content of orders in all Guantanamo cases regarding production of exculpatory evidence).

³⁷¹ See text accompanying *supra* notes ____ to ____.

³⁷² *United States v. Bagley*, 473 U.S. 667 (1985) (failure to disclose exculpatory information “undermines confidence in the outcome” of a trial). The requirement has been extended to post-conviction habeas proceedings, see *Steidl v. Fermon*, 494 F.3d 623, 469 (7th Cir. 2007), and to other, noncriminal proceedings, see, e.g., *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) (civil immigration proceeding).

³⁷³ *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

tortured, such as Mohammed Al Qatani,³⁷⁴ or who have received highly favorable treatment from the government in exchange for their statements.³⁷⁵ Thus it is safe to assume that but for the *Brady* requirement in these cases, a number of petitioners might not have an opportunity to test the reliability of highly questionable evidence before the court.

C. EVIDENTIARY RULES

1. Hearsay

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

The Federal Rules of Evidence – and their prohibitions on and exceptions permitting hearsay – expressly apply in habeas corpus proceedings.³⁷⁶ In acknowledging that hearsay “may” sometimes – in the specific context of a traditional battlefield detention – be accepted as “the most reliable available evidence,” the *Hamdi* plurality could not have expressed any intent to repeal the Federal Rules of Evidence as they are applied to habeas corpus proceedings.³⁷⁷ Rather, the plurality’s comment must be viewed merely as acknowledging that a court has discretion to admit affidavits under 28 U.S.C. § 2246 or other hearsay under Rules 803 through 807 of the Federal Rules of Evidence, and that the reliability of such hearsay will frequently be the decisive factor as to whether it should be admitted.³⁷⁸ Therefore, any hearsay not admissible under Rules 803-

³⁷⁴ According to the Pentagon, Qatani “[p]rovided detailed information about 30 of Osama Bin Laden’s bodyguards who are also held at Guantanamo.” U.S. Dep’t of Defense News Release, Guantanamo Provides Valuable Intelligence Information, June 12, 2005, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8583>. Even though his incriminating statements formed the basis of a number of factual returns for the petitioners submitted in cases filed prior to *Boumediene*, the government nowhere revealed the now-public interrogation logs demonstrating the extent of his coercion, or the fact that he was losing his sanity.

³⁷⁵ See Del Quintin Welber, *Detainee-Informant Poses Quandary for Government*, WASH. POST, Feb. 9, 2009, (reporting that detainee Yasim Muhammed Basardah provided evidence of highly questionable reliability on scores of detainees he claims to have seen at an Al Farooq training camp, in exchange for favorable treatment by the government).

³⁷⁶ Fed. R. Evid. 1101(e). See *Greiner v. Wells*, 417 F.3d 305, 325-26 (2d Cir. 2005), cert. denied, 546 U.S. 1184 (2006) (excluding hearsay in a habeas case pursuant to Federal Rules of Evidence).

³⁷⁷ See *Hamdi* 542 U.S. at 533-34.

³⁷⁸ The residual hearsay exception, Federal Rule of Evidence 807, permits the introduction of hearsay if it has “circumstantial guarantees of trustworthiness” that are

807 of the Federal Rules of Evidence should be under oath and subject to an opponents' right to test it through "written interrogatories to affiants, or . . . answering affidavits," pursuant to 28 U.S.C. § 2246.

The district courts largely adopted this understanding. Under governing case management orders, a party must affirmatively move for the introduction of hearsay evidence, which may be admitted if the movant establishes that the evidence is "material and relevant" to the legality of the detention, is "reliable," and that the production of alternative nonhearsay evidence "would unduly burden the movant or interfere with the government's efforts to protect national security."³⁷⁹ If a judge admits hearsay, the opposing party is still thereafter permitted an opportunity to challenge the credibility or weight to be given the evidence.³⁸⁰

Accordingly, the each party bears a burden of providing evidence to support the reliability of its hearsay proffer. In a significant ruling regarding the standards for assessing the reliability of the government's evidence (brought under the old DTA procedures), the D.C. Circuit in *Parhat* considered government intelligence reports which asserted there was a connection between the alleged terrorist group of which the petitioners were members and al Qaida and the Taliban. The court rejected this evidence as providing sufficient support for the detainees' classification as enemy combatants because it did not contain any information which would allow the court to assess the reliability of the proffered hearsay reports.³⁸¹ Significantly, the court rejected the government's claim reliability simply because it appeared "in at least three different documents," sarcastically responding with reference to Alice in Wonderland: "The fact that the government has 'said it thrice' does not make an allegation true."³⁸² The Court further noted that whatever interests the government had in withholding disclosure of sources and methods that would otherwise support a reliability determination could be amply accommodated by the courts by, for example, providing

equivalent to the recognized exceptions to the rule against hearsay. Fed. R. Evid. 807. *See* United States v. Dunford, 148 F.3d 385, 392 (4th Cir. 1998) (the requirement of circumstantial guarantees of trustworthiness is the "most important element" for admissibility under the residual hearsay exception). *See also* *Al-Marri*, 534 F.3d at 218 (Traxler, J., concurring) (hearsay is admissible only if government bears its burden to demonstrate that reliance on non-hearsay evidence would be "unduly burdensome").

³⁷⁹ Hogan CMO at 5.

³⁸⁰ *Id.*

³⁸¹ *Parhat*, 382 U.S. App. D.C. at 248 ("[W]e do not suggest that hearsay evidence is never reliable – only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability.").

³⁸² *Id.* at 247; *see also* *Al-Marri*, 534 F.3d at 273 (Traxler, J., concurring) (observing that the Court "is not handcuffed by an inflexible procedure that would demand acceptance of a hearsay declaration from the government simply because the government has labeled [the petitioner] an enemy combatant.").

information only to security-cleared counsel or adopting procedures under the Classified Information Procedures Act (“CIPA”).³⁸³

An obvious area in which courts will have to be mindful of a declarant’s reliability is in assessing the credibility of interrogator’s statements and reports. Of course, it is well recognized that evidence obtained through torture or threats, for example, is too unreliable to be admitted into evidence.³⁸⁴ For example, the judge in the military commission trial of Salim Hamdan, Navy Captain Keith Allred, excluded evidence obtained by the military from Mr. Hamdan in a series of interrogations at the Bagram Air Force Base and in Panshir, Afghanistan, because of the “highly coercive environments and conditions under which they were made.”³⁸⁵ This may compel a similar result in a number of Guantanamo habeas cases, where declarations procured by the government from other detainees implicating an individual Petitioner may well be a product of a similarly “highly coercive environment.”³⁸⁶

Similarly, reports suggest that much of the evidence about those detained came from informants to whom the government paid a comparatively large financial bounty.³⁸⁷ In light of the obvious financial

³⁸³ *Parhat*, 382 U.S. App. D.C. at 247 (citing 18 U.S.C. App. III, §4).

³⁸⁴ *See, e.g., Stein v. New York*, 346 U.S. 156, 182 (1953) (“The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to ... treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt”); *see also Dickerson v. United States*, 530 U.S. 428, 432 (2000).

³⁸⁵ Mike Melia, *Detainee-trial judge bars coerced evidence*, ASSOCIATED PRESS, July 22, 2008.

³⁸⁶ As one of the leading studies on modern torture and interrogation documented: [T]he Guantanamo interrogation system was “hopelessly flawed from the get-go,” according [to] Lt. Col. Anthony Christino. Christino was the senior watch officer for the Joint Intelligence Task Force Combating Terrorism (JITF-CT). Christino concludes that the Guantanamo interrogations were overvalued and their results “wildly exaggerated.” . . . Even if torture were entirely reliable, the way the government selected individuals for detention guaranteed unreliable information since many had no information to give. In reality, torture probably compounded the errors implicit in the selection process. . . . Guantanamo is a textbook case of what not to do. Social scientists know that . . . “the longer people are detained, the greater the risk that what they say will be unreliable.”

Darius Rejali, *TORTURE AND DEMOCRACY* 509, 510 (2007).

³⁸⁷ Richard Leiby, *When Bombs Are Not Enough: The Army's Psyop Warriors Deploy an Arsenal of Paper*, WASH. POST, Dec. 10, 2001 (noting that 18 million leaflets offering bounties were distributed in Afghanistan, and that former Secretary of Defense Donald Rumsfeld stated, “We have leaflets that are dropping like snowflakes in December in Chicago”); *Guantanamo inmates say they were 'sold': Warlords, others 'trumped up charges' for U.S. cash rewards*, MSNBC, May 31, 2006.

incentive in these cases to embellish or fabricate facts, a court would presumably find such statements unreliable at the threshold, even before even providing the government the opportunity to demonstrate that this is the only evidence available.

2. *Confrontation Rights*

The corollary to principles limiting the use of hearsay, is the entitlement to confront a witness by cross examination. The right is a longstanding feature of the common law adversarial system,³⁸⁸ and applies outside the criminal context.³⁸⁹ Thus, where a case proceeds to an evidentiary hearing to resolve outstanding issues of fact, the government or petitioners should generally be afforded the right to cross-examine the testimony of witnesses material to the dispute.³⁹⁰ In those cases that have gone to a full evidentiary hearing, petitioners have been permitted to participate by video conference for non-classified portions of the proceedings.

3. *Protection of Classified Information*

A common criticism leveled at *Boumediene* and supporters of judicial review of the Guantanamo detentions is that it risks disclosure of classified national security secrets. In the habeas cases, as in the criminal context, the district courts have a number of tools to ensure that this government interest is protected.³⁹¹ For example, before obtaining access

³⁸⁸ *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring) (the “right of confrontation is “implicit in the concept of ordered liberty”) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (“[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”) (citation omitted).

³⁸⁹ *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (“This Court has been zealous to protect these [confrontation] rights from erosion . . . [including] in all types of cases where administrative and regulatory actions were under scrutiny”); *see also Hendricks*, 521 U.S. at 353 (civil commitment of violent sexual offenders); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (deportation proceeding); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (termination of government benefits); *United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999) (trials under the UCMJ).

³⁹⁰ *See Hogan CMO* at 6 (“Counsel shall appear for a prehearing conference to discuss and narrow the issues to be resolved at the hearing, discuss evidentiary issues that might arise at the hearing, identify witnesses and documents that they intend to present at the hearing, and discuss the procedures for the hearing.”).

³⁹¹ *See Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS* 85 (May 2008) (concluding after studying eighteen terrorism cases where CIPA has been employed that “CIPA has provided a flexible, practical mechanism for problems posed by classified evidence”); Serrin Turner & Stephen J. Schulhofer, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 25 (2005) (quoting Patrick Fitzgerald as saying, “[w]hen you see how much classified information was involved in that [Kenya embassy bombing] case, and when you see that

to a Guantanamo detainee, all counsel must obtain secret-level security clearance and enter into a restrictive protective order, mandating strict compliance with procedures to protect classified information. The operative protective order specifically prohibits sharing of classified information with detainees, absent leave of court. The government has dedicated a “secure facility,” run by the Department of Justice Court Security Office, in which all classified information must be kept and where habeas counsel must work when preparing any filings containing classified information. Documents can be and are routinely required to be filed under seal. The habeas courts have closed hearings in which any classified information might be disclosed, and even precluded detainees from listening to discussion of classified evidence at hearings.

Federal courts conducting habeas hearings are as competent to balance the government’s interest in national security with the detainee’s interest in a fair process, as are federal courts conducting criminal trials implicating the same competing concerns.³⁹² There does not appear to be on record a single, reliable reported incident in which a detainee or his counsel mishandled classified information in a way that could threaten national security.

CONCLUSION

Nearly seven years after the one of the first habeas petitions was filed on behalf of Kuwaiti citizen Khaled Al-Odah, he and potentially hundreds of other Guantanamo detainees will, for the first time, have a meaningful opportunity to challenge the legality of their detention. This is at last, a welcome development. As *Boumediene* makes clear, detention based on little more than special executive command strikes at the heart of the rule of law and elementary separation-of-powers principles enshrined by the Suspension Clause. Those principles led the Court to decree that the courts will have a significant role in managing wartime detention operations to ensure they comply with the most elementary constraints of law. This judicial process, in turn, will inevitably raise a host of challenging normative, political and practical considerations – but considerations this article has explained are indeed within the “expertise and competence”³⁹³ of the district courts to manage.

there weren’t any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions. I don’t think people realize how well our system can work in protecting classified information.”); *United States v. Abu Ali*, 528 F.3d 210, 250-55 (4th Cir. 2008) (affirming convictions for terrorism-related offenses and explaining in detail how the district court “appropriately balanced” the interests of the government in protecting national security interests and the defendant’s right to a fair trial).

³⁹² See *Parhat*, 382 U.S. App. D.C. at 235.

³⁹³ *Boumediene*, 128 S. Ct. at 2276.