SOME HOLDS BARRED: EXTENDING EXECUTIVE DETENTION HABEAS LAW BEYOND GUANTANAMO BAY

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INTRODUCTION

On July 30, 2005, Masood Ahmed Janjua was riding a bus in Pakistan to visit a friend when Pakistani intelligence services abducted him.[1] For seven years, the Pakistani government has held Mr. Janjua in various interrogation facilities throughout Pakistan known to practice torture, including a secret

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[1] Robert Frisk, *Into the Terrifying World of Pakistan's 'Disappeared,'* INDEP., Mar. 18, 2010, http://www.independent.co.uk/opinion/commentators/fisk/robert-fisk-into-the-terrifying-world-of-pakistans-disappeared-1923153.html.

facility sometimes used by the CIA.[2] Mr. Janjua has never been charged with a crime. He does not know why he is being held. He has never seen the inside of a courtroom or been able to challenge his detention. His family has neither seen nor heard from him since he was abducted, learning of his prior whereabouts only from released prisoners or government officials after Mr. Janjua had already been relocated.[3] Before he was abducted, Mr. Janjua ran a successful business school, the College of Information Technology. His wife, Amina, is a leading human rights advocate in Pakistan.[4] He has three children, aged fourteen to twenty, and two aging parents who long to be reunited with him.[5] His family has been devastated emotionally and financially since his disappearance.[6] Pakistani government sources indicate that the Pakistani government has not charged Mr. Janjua and that Mr. Janjua has been and continues to be held by the Pakistanis at the request of the U.S. government.[7] Unfortunately, Mr. Janjua's case is not unique; hundreds of individuals have been forcibly disappeared in Pakistan alone.[8]

The September 11, 2001, terrorist attacks have had a radical impact on the United States and the world. The subsequent war on terror changed the face of modern warfare and created novel legal issues that test the boundaries of separation of powers and sovereignty doctrines. This has been particularly true in the detainee and prisoner-of-war context. With the United States' detention of prisoners in Guantanamo Bay, the Supreme Court and lower federal courts have been forced to grapple with petitions to extend habeas protection to alien detainees held by the United States in offshore facilities.

Federal courts have started to provide some guidance as to when a war-on-terror detainee might be afforded habeas rights. In *Boumediene v. Bush*,[9] the Supreme Court held that the Suspension Clause applied to Guantanamo detainees, giving federal courts jurisdiction to hear detainee habeas petitions.[10] The Supreme Court analyzed three factors that contributed to its decision to extend the Suspension Clause – the citizenship and status of the detainee and the adequacy of the process that determined that status, the "nature of the sites where apprehension and then detention took place," and the "practical obstacles" faced in resolving the prisoner's invocation of the writ – but acknowledged that those factors might not be exhaustive and that they might

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Denying the Undeniable: Enforced Disappearances in Pakistan*, AMNESTY INT'L, July 2008, at 7, *available at* http://www.amnesty.org/en/library/asset/ASA33/018/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008eng.pdf.

[9] 553 U.S. 723 (2008).

[10] *Id.* at 795.

apply differently depending on the factual scenario.[11] In *Al Maqaleh v. Gates*, the U.S. Court of Appeals for the D.C. Circuit reiterated the Supreme Court's explanation that the *Boumediene* factors were not exhaustive.[12] The court of appeals applied the factors set forth in *Boumediene* to deny habeas rights to alien detainees held by the United States at Bagram Air Force Base in Bagram, Afghanistan.[13] The court of appeals explained that one factor against extending habeas rights to the detainees was that the United States did not have de facto control over Bagram in the same way it had over Guantanamo Bay.[14] Although denying the prisoner's claim, the court emphasized that lack of de facto control over a detainment facility was not decisive; it was merely one factor to consider.[15] Thus, the *Boumediene* factors potentially allow claims to be brought by foreign detainees held offshore in circumstances distinguishable from Bagram.

Another context of extraterritorial detention might also help answer the question of what rights alien detainees held by foreign governments possess. In *Arar v. Ashcroft*,[16] the Second Circuit dealt not with a habeas petition but with a Torture Victim Prevention Act civil tort claim against the U.S. government for its extraordinary rendition of the petitioner.[17] The Second Circuit reviewed the case of a Canadian and Syrian dual citizen who was detained in the United States en route to Canada.[18] The U.S. government detained Arar, who the government claimed was a suspected terrorist, for a week in the United States before removing him to Syria.[19] In Syria, Arar was detained for over a year by the Syrian government, interrogated, and tortured.[20] The Second Circuit, however, concluded that Arar's claim ultimately failed because Arar had not established a close enough relationship between the U.S. and Syrian governments to implicate the United States in any activity beyond "encouragement."[21] Yet questions remain about what might result should a detainee establish a more significant relational tie between two such actor-governments.

This Note explores the novel area of law extending habeas rights to war-on-terror detainees, the past precedents that may suggest what direction the jurisprudence will take, and how the jurisprudence should resolve the case of a foreign detainee held by a foreign government at the behest of the United

[11] *Id.* at 766-70.

[12] 605 F.3d 84 (D.C. Cir. 2010).

[13] *Id.* at 87.

[14] *Id.* at 97.

[15] *Id.* at 98.

[16] 585 F.3d 559 (2d Cir. 2009).

[17] *Id.* at 563.

[18] *Id.* at 565.

[19] *Id.* at 565-66.

[20] *Id.* at 566.

[21] *Id.* at 568.

States. Part I reviews habeas law from its historical roots to its modern application in executive detention cases brought about by the United States' detention of aliens at Guantanamo Bay. Part II examines alien detention abroad apart from the habeas context. Part III explores the likelihood and appropriateness of extending the *Boumediene* line of cases to scenarios of alien detainees held abroad by foreign governments at the behest of the United States. The Supreme Court has recently demonstrated a greater willingness to exert its power in the national security realm, no longer giving broad deference to the Executive's wartime powers.[22] The Supreme Court in this realm appears to take a functionalist, case-by-case approach that leaves open the possibility that the Court will exert itself in different executive detention contexts. Given the vital, fundamental individual rights implicated by executive detention, the Supreme Court should continue to actively review the actions of the legislative and executive branches. Further, based on the reasoning supporting its past precedents, the Court should extend jurisdiction to detainees held by foreign nations at the behest of the U.S. government.

I. THE RIGHT TO HABEAS CORPUS

Thomas Jefferson, in his first inaugural address, declared that the writ of habeas corpus protects one of the "essential principles of our government."[23] The Great Writ[24] historically protected "a prisoner's right to challenge the legal basis for the detention and authorized a court to order a prisoner's release should detention authority be lacking."[25] While habeas rights have existed since the inception of the colonial U.S. government, there has been relatively little review of these rights since their ratification into the Constitution in 1788; habeas petitions since Reconstruction have been brought almost exclusively in the immigration or domestic criminal context as collateral to other claims.[26]

A. *Foundations of Habeas Corpus Laws*

During the colonial era, the writ of habeas corpus served as a "vital instrument" that demonstrated "that the King, too, was subject to the law."[27] To protect such an important legal mechanism, the Framers directly provided

[22] *But see* Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 156-66 (2012) (explaining that, while the Supreme Court has not given broad deference to the Executive in its opinions, the practical effect of those opinion reveals a new deference-in-practice to the executive branch).

[23] President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 4-5 (Albert E. Bergh ed., 1905).

[24] *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 96 (1807).

[25] Baher Amzy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 473 (2010) (citing Boumediene v. Bush, 553 U.S. 723, 778 (2008)).

[26] *Id.* at 514.

[27] *Boumediene*, 553 U.S. at 739, 741.

for the writ of habeas corpus in the U.S. Constitution's Suspension Clause: "The Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[28] Congress codified the writ in the Judiciary Act of 1789;[29] its modern counterpart is 28 U.S.C. § 2241.[30] The modern habeas statute gives federal courts jurisdiction to issue habeas writs but does not extend habeas rights to a prisoner unless he falls within certain enumerated categories.[31] To supplement the writ, Congress also passed the Non-Detention Act of 1971,[32] which prohibited executive detention of U.S. citizens unless by act of Congress.[33]

B. *Habeas Corpus in Executive Detention Cases*

Modern habeas law remained confined to the context of domestic criminal cases and immigration cases until the United States commenced the war on terror following the September 11, 2001, terrorist attacks. After the attacks, Congress quickly passed a joint resolution called the Authorization for Use of Military Force (AUMF), granting the executive power to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11, 2001, attacks] or harbored such organizations."[34] On November 13, 2001, the Bush Administration issued a broad military directive that authorized the indefinite detention of terrorist suspects without formal charges, with the possibility of military commission trials instead.[35] On December 21, 2001, the Bush Administration indicated that it would use Guantanamo Bay to detain terrorist suspects captured in Afghanistan.[36] The Bush Administration labeled these

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[28] U.S. CONST. art 1, § 9, cl. 2.

[29] Judiciary Act of 1789 § 14, 1 Stat. 73.

[30] 28 U.S.C. § 2241 (2006).

[31] *See id.* Specifically, the writ will not extend to a prisoner under this statute unless

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

Id. § 2241(c).

[32] 18 U.S.C. § 4001(a) (2006).

[33] Hamdi v. Rumsfeld, 542 U.S. 507, 543-44 (2004) (Souter, J., concurring).

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

[35] Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 2(a)(1), 37 Weekly Comp. Pres. Doc. 1665, 1666 (Nov. 13, 2001).

[36] Donald Rumsfeld, U.S. Sec'y of Defense, News Briefing (Dec. 27, 2001), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2696. The United States

terrorist suspects "enemy combatants" rather than prisoners of war to avoid any due process requirements.[37]

The detention at Guantanamo Bay went unchallenged for over a year, in great part due to the Bush Administration's restrictions on contact between family members or attorneys and the detainees.[38] In 2004, however, the Supreme Court issued its first decision on a Guantanamo detainee's challenge to his detention.[39] Since then, the Court has examined various aspects of the indefinite detention of aliens held in offshore facilities by the United States in a string of cases culminating in *Boumediene*.[40] In each of these cases, the Supreme Court "rejected the Executive's asserted need for nearly unlimited discretion and likewise departed from the expectation that courts will presumptively defer to the President's asserted needs during wartime."[41] Each case developed the Court's recent stance of asserting itself in separation-of-powers issues in the executive detention context and provided insight into the Court's likelihood of expanding this doctrine to other executive detention scenarios. Indeed, the Court has demonstrated a willingness to restrain Executive power in favor of individual rights, even when that individual is not a U.S. citizen. The Court's functionalist methodology in examining these issues allows for a flexible approach to consider each case's unique circumstances, which will likely benefit those detainees seeking relief from indeterminate detention.

1. AUMF and Executive Detention: *Hamdi v. Rumsfeld*

The first case the Supreme Court decided in the executive detention line of cases was *Hamdi v. Rumsfeld*[42] in 2004. The U.S. government claimed that Yaser Hamdi, who was born in Louisiana but had moved to Saudi Arabia as a child, had taken up arms with the Taliban in Afghanistan.[43] Hamdi was

has leased Guantanamo Bay Air Force Base in Cuba since 1903 via a treaty agreement that allowed the United States to maintain "complete jurisdiction and control" over the naval base while Cuba would retain "ultimate sovereignty." Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418.

[37] *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 107 (describing how Bush administration lawyers advised President Bush that he did not need to comply with the Geneva Conventions when handling war-on-terror detainees by creating a legal category that cast such detainees outside the law).

[38] *See* James Meek, *People the Law Forgot*, GUARDIAN, Dec. 2, 2003, http://www.guardian.co.uk/world/2003/dec/03/guantanamo.usa1.

[39] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

[40] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004).

[41] Amzy, *supra* note 25, at 452-53.

[42] 542 U.S. 507 (2004).

[43] *Id.* at 510.

captured in Afghanistan and taken to Guantanamo Bay in January 2002.[44] When the military learned Hamdi was a U.S. citizen, he was transferred to various naval bases in Virginia and South Carolina.[45] In June 2002, Hamdi's father filed a petition for habeas corpus on Hamdi's behalf and on the father's behalf as next friend.[46] The petition claimed that Hamdi had had no contact with his father since Hamdi's capture and that the U.S. government held Hamdi without access to legal counsel and with no knowledge of the charges against him.[47] Because the U.S. government had classified Hamdi as an enemy combatant instead of a prisoner of war, the case directly presented the issue of whether the Bush Administration had the authority to detain Hamdi.[48]

Justice O'Connor, writing for the plurality, concluded that AUMF implicitly gave executive authority to detain suspects that the Executive believed to be threats as enemy combatants.[49] The plurality asserted that the executive detention of such suspects "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."[50] Justices Souter and Ginsburg, while concurring in the judgment, disagreed on this point, concluding that because AUMF did not explicitly authorize executive detention, it could not be read as an act of Congress for purposes of the Non-Detention Act.[51] Both the plurality and concurring opinions agreed, however, that judicial review of Hamdi's habeas petition and his enemy combatant status must be legitimate; the Court would not simply defer to the Executive's claimed sphere of power.[52] The Court thus made its first indications that it would not passively endorse the Executive's military initiatives. The case was vacated and remanded so that Hamdi, as a U.S. citizen, could have a meaningful opportunity to contest the factual allegations for his detention as due process required.[53]

2. Judicial Jurisdiction in Guantanamo: *Rasul v. Bush*

The Court next decided a case that called into question the Court's ability to hear Guantanamo detainee's challenges. In *Rasul v. Bush*,[54] alien citizens captured abroad and detained at Guantanamo Bay challenged their detention

[44] *Id.*

[45] *Id.*

[46] *Id.* at 511.

[47] *Id.*

[48] *Id.* at 516-18.

[49] *Id.* at 518-19.

[50] *Id.* at 518.

[51] *Id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[52] *Id.* at 535-36 (plurality opinion).

[53] *Id.* at 509.

[54] 542 U.S 466 (2004).

with a habeas petition.[55] Petitioners filed actions through relatives in 2002 alleging that none of them had ever engaged in terrorist acts.[56] Petitioners also claimed that they had never been charged with any crime, nor had they been allowed access to legal counsel, courts, or tribunals.[57] The detainees argued that U.S. courts had jurisdiction to hear their habeas petitions because Guantanamo Bay was under the United States' sovereign control.[58] The government countered that aliens detained outside the sovereign borders of the United States could not bring a writ of habeas corpus in U.S. courts.[59]

The Supreme Court held that U.S. courts have jurisdiction under the habeas statute, 28 U.S.C. § 2241, to hear Guantanamo detainees' habeas petitions.[60] Justice Stevens wrote for the majority that the presumption that U.S. statutes do not apply extraterritorially did not apply in this case.[61] Instead, the Court found that the United States exercised "complete jurisdiction and control" over Guantanamo Bay, and thus the area was essentially part of U.S. territory.[62] The Court did not indicate whether Guantanamo's unique status as de facto U.S. territory enabled courts to have jurisdiction under § 2241 or if a court might also have jurisdiction wherever U.S. forces detained alien prisoners.[63] The Court did not elucidate any substantive legal standards and did not decide the merits of the petitioners' habeas petition.[64] Although *Rasul* did not provide many answers, it did start to lay the foundations for the answers found in *Boumediene*.[65]

After *Rasul*, Congress enacted the Detainee Treatment Act of 2005 to amend § 2241, removing federal courts' Article III jurisdiction to hear Guantanamo detainees' habeas petitions.[66] In furtherance of the Act, the Pentagon also created Combatant Status Review Tribunals (Tribunals) to review Guantanamo detainees' enemy combatant status.[67]

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[55] *Id.* at 472.

[56] *Id.* at 471-72.

[57] *Id.* at 472.

[58] *Id.*

[59] *Id.* at 472-73 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950)) (interpreting *Eisentrager* to hold that alien detainees could not bring a habeas petition in the United States when they are not held within U.S. territory).

[60] *Id.* at 480.

[61] *Id.*

[62] *Id.*

[63] *See* Amzy, *supra* note 25, at 456.

[64] *Id.* (criticizing *Rasul* as an "empty substantive vehicle").

[65] *See infra* Part II.B.4.b.

[66] Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (amending 28 U.S.C. § 2241 (2006)).

[67] *Id.*

3. Challenging Congressional Acts: *Hamdan v. Rumsfeld*

The Supreme Court next heard a challenge to executive authority to limit detainee challenges to trials by military commission in *Hamdan v. Rumsfeld*.[68] Petitioner Hamdan was an alien captured by U.S. forces abroad and sent to Guantanamo Bay in June 2002.[69] A year later, the President determined that Hamdan was eligible for trial by military commission, though for undefined crimes.[70] The government waited another year to charge Hamdan officially with conspiracy "to commit . . . offenses triable by military commission."[71] Hamdan pursued writs of habeas corpus and mandamus even though he was in military commission procedures, arguing that the Executive lacked the authority to try him through military commission.[72] Although a plurality of the Supreme Court in *Hamdi* had found that AUMF did not conflict with the Non-Detention Act, a majority in *Hamdan* determined that, while AUMF gave the Executive expansive war powers, it could not be read to replace the limited authority to convene military commissions granted by Congress in the Uniform Code of Military Justice (UCMJ).[73] However, Justice Breyer in his concurrence indicated that the Court would support the President's policies if he were to "return to Congress to seek the authority he believes necessary."[74]

4. Judicial Assertion: *Boumediene v. Bush*

Within months of *Hamdan*, Congress worked with the President to enact the Military Commissions Act of 2006 (MCA).[75] With the MCA, Congress expressly authorized the procedural differences from the UCMJ at issue in *Hamdan* and amended the habeas statute to clarify that federal courts would not have jurisdiction over any pending habeas petitions brought by enemy combatants.[76] The new system granted the D.C. Circuit Court of Appeals exclusive jurisdiction to review "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."[77] The Tribunal would operate as an administrative proceeding conducted by the military to determine if a Department of Defense designation of a detainee as an enemy combatant was proper.[78] The D.C. Circuit could review only

[68] 548 U.S. 557 (2006).

[69] *Id.* at 566.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 567.

[73] *Id.* at 594.

[74] *Id.* at 636 (Breyer, J., concurring).

[75] Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

[76] *Id.*

[77] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(A), 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd-2000dd-1 (2006)).

[78] *See* Amzy, *supra* note 25, at 459-60 (suggesting that the new scheme brought about by

whether the Tribunal's conclusion was "consistent with the standards and procedures specified by the Secretary of Defense" and whether the Tribunal's use of the Secretary of Defense's standards was "consistent with the Constitution and laws of the United States" to the extent both were applicable in a given case.[79]

In *Boumediene v. Bush*, aliens detained at Guantanamo Bay and designated as enemy combatants by the Department of Defense challenged the new military tribunal scheme created by the DTA and MCA.[80] The detainees contended that they had a constitutional privilege of habeas corpus that could not be removed except as set forth in the Suspension Clause.[81] The Supreme Court ultimately agreed, holding that the DTA procedures "are not an adequate and effective substitute for habeas corpus" and that the MCA therefore "operates as an unconstitutional suspension of the writ."[82] The Court declined to address either the question of whether the Executive could legally detain the petitioners or the substantive merit of their habeas petition.[83] Instead, the Court left "[t]hose and other questions regarding the legality of the detention . . . to be resolved in the first instance by the District Court."[84]

a. *Common-Law History of the Writ and Executive Detention Precedent*

Justice Kennedy, writing for the majority, examined the history of the writ and the Court's past precedents.[85] The Court recognized that, at a minimum, the Suspension Clause secured the writ as it existed when the Suspension Clause was ratified.[86] The *Boumediene* parties had different readings of the Suspension Clause's historical reach. The Government argued that the writ in 1789 only reached those territories over which the government was sovereign, while the petitioners contended that the writ extended anywhere the government's officers maintained significant control of a territory.[87] After extensively reviewing the writ as it had been applied by English courts, the Court concluded that because no other law applied in Guantanamo besides U.S. law, conflict with another sovereign's laws was not a concern.[88] Further,

the MCA and DTA represented a collusive arrangement between the Executive branch and Congress to meet executive detainees' legal rights).

[79] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(A), 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd-2000dd-1).

[80] Boumediene v. Bush, 553 U.S. 723, 732 (2008).

[81] *Id.*

[82] *Id.* at 733.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 746-52.

[86] *Id.* at 746.

[87] *Id.* at 746-47.

[88] *Id.* at 751.

judicial enforcement in such a territory would not directly implicate the Court's separation of powers concerns.[89] Therefore, the writ's common-law reach could extend to Guantanamo Bay.[90]

Having determined the extent of the writ's common-law reach, the Court then examined three precedents to support its conclusion that the Suspension Clause extended to Guantanamo Bay. First, the Court reexamined the Insular Cases, the first cases to address the extraterritorial reach of the Constitution.[91] The *Boumediene* Court declined to interpret the Insular Cases as enforcing a limit on the Constitution's reach but instead found that the Insular Cases supported the proposition that the U.S. Constitution's fundamental rights could apply to a foreign territory.[92] Justice Kennedy specifically cited the concurring opinions of Justices Harlan and Frankfurter in *Reid v. Covert*[93] to declare that, "the 'specific circumstances of each particular case' are relevant in determining the geographic scope of the Constitution."[94] Justice Kennedy pointed out that while in *Reid* the prisoner's U.S. citizenship was important, "practical considerations," like detention location, were also considered and were in fact decisive for concurring Justices Harlan and Frankfurter, whose votes were required for a majority.[95]

The Court also reviewed *Johnson v. Eisentrager*,[96] the government's foundational case.[97] In both *Rasul* and *Boumediene*, the government had argued that *Eisentrager* stood for the proposition that the Constitution does not apply abroad where the United States does not have formal sovereign control.[98] The Court disagreed with this reading, however, and rejected the government's assertion that *Eisentrager* supported a "formalistic, sovereignty-based test for determining the reach of the Suspension Clause."[99] Instead, the Court pointed out that *Eisentrager* discussed the concept of territorial sovereignty only twice and focused largely on the practical concerns of extending the writ to individuals detained in foreign territory during wartime.[100] The Court thus concluded that "all the foregoing precedent considered . . . could be

[89] *Id.* at 754-55.

[90] *Id.* at 755.

[91] *Id.* at 756-59.

[92] *Id.* at 757.

[93] 354 U.S. 1 (1957).

[94] *Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 54 (Frankfurter, J., concurring in result)).

[95] *Id.* at 759-60.

[96] 339 U.S. 763, 781 (1950) (determining that German prisoners detained in an Allied Forces prison in Germany during WWII did not have access to the writ to challenge their detention).

[97] *Boumediene*, 553 U.S. at 762.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 763.

harmonized by the 'idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.'"[101]

b. *A Functional Approach*

In *Boumediene*, the Court rejected a bright-line rule in favor of a functional approach.[102] The Court also refused to limit its ruling solely to the unique circumstances of Guantanamo Bay detention.[103] The Court recognized that the real issue in executive detention cases was the separation of powers and stated that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[104] Therefore, it does not matter whether the United States acts outside its borders, since "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[105] The Court declined to announce a formal principle that the Executive and Congress could simply work around.[106] To permit the Executive and Congress the freedom to "switch the Constitution on or off at will . . . would permit 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.'"[107]

The Court found at least three factors relevant to determine the applicability of constitutional rights abroad.[108] To determine the Suspension Clause's reach, the Court considered (1) the detainee's citizenship and status, including the adequacy of the process that determined that status, (2) the nature of the apprehension and detention sites, and (3) any practical obstacles implicated in providing the writ to the detainee.[109] The three factors supported a decision to extend habeas rights to Guantanamo detainees in this case but simultaneously supported the decision in *Eisentrager* to deny habeas rights in that context.[110]

Under the first factor, the Court found that while the detainees in *Boumediene*, like those in *Eisentrager*, were not U.S. citizens, the Guantanamo detainees actually contested their designation as enemy combatants while the *Eisentrager* petitioners did not.[111] The *Eisentrager* petitioners had gone

[101] Amzy, *supra* note 25, at 465 (quoting *Boumediene*, 553 U.S. at 764).

[102] *Id.* at 465-66.

[103] *Boumediene*, 553 U.S. at 765-66 (recognizing the separation-of-powers issue at the heart of this case and declaring that "[t]he test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain").

[104] *Id.* at 765.

[105] *Id.* (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

[106] *Id.*

[107] *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[108] *Id.* at 766.

[109] *Id.*

[110] *Id.* at 766-771.

[111] *Id.* at 766-67 (citing Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)).

through a "rigorous adversarial process to test the legality of their detention."[112] The Court found that the process afforded the *Boumediene* petitioners, however, "f[e]ll well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[113] Additionally, the detainees' access to status-determination review in the court of appeals did little to remedy the defects in the Tribunal process.[114]

The Court also distinguished *Boumediene* from *Eisentrager* on the second factor of its analysis. Because both Landsberg Prison and Guantanamo Bay were technically outside the territorial United States, this factor weighed against the Suspension Clause's extension to the petitioners in both *Eisentrager* and *Boumediene*.[115] The Court, however, took pains to distinguish Guantanamo Bay from Landsberg Prison, emphasizing that the United States had not exercised either absolute or indefinite control over the German prison, as it did over Guantanamo Bay.[116] Thus, while *Eisentrager* remained consistent with the Insular Cases, where the Court held that constitutional rights did not extend to territories that the United States did not intend to govern indefinitely,[117] Guantanamo Bay was in the United States' constant control and thus functionally part of its jurisdiction.[118]

Under the third factor, the Court acknowledged the unavoidable costs in extending the Suspension Clause abroad in the military detention context.[119] Specifically, valuable military resources would need to be diverted to meet due process requirements.[120] While the Court recognized these legitimate concerns, it also reasoned that any due process requires some cost.[121] Complying with the Suspension Clause would not compromise any missions at Guantanamo Bay because the United States had complete control over the territory and the security of the detention facility ameliorated the risk of any real detainee threat.[122] In contrast, at the time *Eisentrager* was decided, the United States and Allied Forces sought control over a large territory that contained potential enemy forces.[123] Additionally, the Suspension Clause's extension to Guantanamo would not cause any conflict with a foreign

[112] *Id.* at 767 (explaining that the *Eisentrager* petitioners had been charged with detailed allegations, were allowed access to counsel, and could introduce their own evidence and cross-examine the government's witnesses).

[113] *Id.*

[114] *Id.*

[115] *Id.* at 768.

[116] *Id.*; *see also* Rasul v. Bush, 542 U.S. 466, 480 (2004).

[117] *Boumediene*, 553 U.S. at 768.

[118] *Id.* at 768-69.

[119] *Id.* at 769.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 770 (citing Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)).

sovereignty; the United States did not need to answer to Cuba for any activities in Guantanamo.[124] If the United States was instead in circumstances in which it was answerable to another sovereign or "the detention facility [was] located in an active theater of war, arguments that issuing the writ would be 'impractical or anomalous' would have more weight."[125] Considering the factual scenario in this case, however, the Court concluded that any practical barriers to providing habeas rights could be overcome by modifying the procedures themselves.[126]

The Court rejected the Government's argument that the Tribunals provided an adequate substitution for habeas courts.[127] While habeas proceedings do not need to resemble a full criminal trial, the writ must nevertheless remain effective. A habeas court "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."[128] To determine whether the Tribunal process authorized by Congress provided an adequate substitute for habeas review, the Court examined "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."[129] The Court concluded that the Tribunal scheme made it difficult for detainees to obtain counsel and find supporting or rebutting evidence. Thus, even if the parties to the system worked in perfect diligence and good faith, there was "considerable risk of error" in the Tribunal's fact-finding.[130] Because the factual record was defective at the Tribunal level and the court of appeals could not review new factual evidence that was not or could not be made available to the Tribunal, the Tribunal fell short of providing a constitutionally adequate substitute for habeas review.[131] Therefore, the DTA review process was facially inadequate to replace habeas corpus.[132]

The Court did not specifically address to what length the habeas statute or the Suspension Clause could be applied outside the territorial United States.[133] It could have limited its holding to the unique circumstances at Guantanamo

[124] *Id.*

[125] *Id.* (citing Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)).

[126] *Id.*

[127] *Id.* at 783 (determining that in executive detention cases, the need for habeas corpus is more urgent than in normal criminal convictions where there has been a neutral tribunal uninterested in the outcome).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 785. The Court asserted that because the consequence of an error in such a system could be indefinite detention, the risk of error was too grave to ignore. *Id.*

[131] *Id.* at 789-90. The Court also rejected as inadequate a detainee's ability to request a new Tribunal to review new evidence because the decision to reconvene was at the Deputy Secretary of Defense's unreviewable discretion. *Id.* at 791.

[132] *Id.* at 792.

[133] *See* Amzy, *supra* note 25, at 482.

Bay.[134] Instead, the Court left the jurisdictional standard open to be decided by lower courts on a case-by-case basis.[135] The Court also did not elucidate a particular substantive legal standard for the Executive's detention of prisoners captured in military operations.[136] Instead, the Court expressly refused to set a standard for the content of habeas claims in this context.[137] In just the first year after *Boumediene*, district courts heard forty habeas petitions from Guantanamo detainees and granted the writ thirty-one times.[138]

c. *Why Not Remand?*

Chief Justice Roberts dissented vigorously, stating that once the Court had affirmatively found jurisdiction, it should have remanded the case to the D.C. Circuit for the petitioners to exhaust remedies under the DTA there.[139] According to Roberts, lower courts could have thus determined whether the DTA gave appropriate process under the Suspension Clause and Due Process Clause on a case-by-case basis, and the Guantanamo detainees would likely have less delay in getting a remedy than if the DTA was scrapped altogether.[140] Instead, Roberts asserted, the majority rushed forward to decide a constitutional issue that it did not yet need to consider.[141]

The *Boumediene* majority acknowledged that, while the normal course of action would be to remand the decision to the D.C. Circuit and require the petitioners to exhaust remedies there, departure from this norm was valid in exceptional circumstances.[142] Given the lack of precedent addressing what would be an adequate substitute for habeas review, the Court reasoned that any remand would lead to further delay before the issue came back before the Court.[143] Certainly, separation-of-powers concerns also played a role in the Court's decision not to remand; as Justice Kennedy wrote for the majority, "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[144] Security consisted of more than the military's freedom to act; it "subsist[ed], too, in

[134] *Id.*

[135] *Id.* at 499.

[136] *Id.* at 449.

[137] *Boumediene*, 553 U.S. at 798.

[138] Amzy, *supra* note 25, at 499-500. However, since this initial increase, the number of writs granted in federal courts to Guantanamo detainees has declined dramatically in the past two years. Linda Greenhouse, *Goodbye to Gitmo*, N.Y. TIMES, May 16, 2012, http://opinionator.blogs .nytimes.com/2012/05/16/goodbye-to-gitmo.

[139] *Boumediene*, 553 U.S. at 803 (Roberts, C.J., dissenting).

[140] *Id.* at 807.

[141] *Id.* at 807-08.

[142] *Id.* at 772 (majority opinion).

[143] *Id.* at 772-73.

[144] *Id.* at 797.

fidelity to freedom's first principles."[145] The Supreme Court thus also intentionally exerted its power in this realm by deciding this case when it did, suggesting that the Court may interject itself more actively in the future.

5. Constructive Custody Abroad: *Munaf v. Geren*

The same day the Supreme Court decided *Boumediene*, a unanimous Court decided a second case that suggested that the Court would more actively police the executive's authority to detain prisoners. In *Munaf v. Geren*, [146] the Court held that federal courts have jurisdiction – under the habeas statute, 28 U.S.C. § 2241 – to review habeas petitions brought by U.S. citizens detained by U.S. forces in Iraq.[147] The Court rejected the government's argument that even though the petitioners were physically held by U.S. forces, those forces were ultimately acting under the international authority of the Multi-National Force, Iraq.[148] The Executive's assertion that the United States did not have custody of the petitioners thus failed to defeat the Court's jurisdiction, just as the Executive's arguments for lack of jurisdiction on foreign soil failed in *Boumediene* and *Rasul*.[149] With both *Boumediene* and *Munaf*, the Court has sent the Executive a clear message that the Executive can no longer be assured of its complete discretion in detaining prisoners abroad.[150]

6. The Bagram Question: Attempts at Applying *Boumediene*

Since *Boumediene*, only one case has attempted to address executive detention of aliens held abroad by U.S. forces. In *Al Maqaleh v. Gates*,[151] detainees sought a writ of habeas corpus for prisoners detained at the U.S. airfield in Bagram, Afghanistan.[152] Bagram was one of the largest American detention centers for enemy combatants.[153] The United States had entered a consignment agreement with the Afghan government to use Bagram for itself

[145] *Id.* (finding freedom from unlawful restraint and personal liberty to be among the most important of freedom's principles).

[146] 553 U.S. 674 (2008).

[147] *Id.* at 686.

[148] *Id.* at 684.

[149] *See* Amzy, *supra* note 25, at 468 (suggesting that the Executive's lack of custody argument in *Munaf* is "equally manipulable by the Executive" as the foreign soil argument in *Boumediene*).

[150] *Id.* Some scholars have argued that the Supreme Court's message to the Executive has been one of mere rhetoric only and that in practice the Executive has retained broad discretion in this area of law. *See, e.g.*, Scheppele, *supra* note 22, at 91. While lower courts have recently applied *Boumediene* and its progeny conservatively, these cases remain good law and continue to provide the basis for the judiciary to reign in executive discretion.

[151] 605 F.3d 84 (D.C. Cir. 2010).

[152] *Id.* at 87.

[153] Matthias Gebauer, *Detainee Abuse Continues at Bagram*, SALON (Sept. 21, 2009), http://www.salon.com/news/feature/2009/09/21/bagram.

and coalition forces for military purposes.[154] In 2007, when the petitioners filed their claims, Bagram was part of an active military combat zone.[155] U.S. forces provided overall security for the base, but coalition forces had separate compounds on the base, access to which was individually controlled.[156] Non-American troops were present as part of both the American-led coalition and NATO's International Security Assistance Force.[157]

The case combined three petitioners' claims.[158] The D.C. district court found for the petitioners on the government's motion to dismiss, extending *Boumediene* to apply to the non-Afghan petitioners in Bagram.[159] The district court concluded that any differences between the Guantanamo and Bagram facilities were negligible and that interests in personal liberty and separation of powers were more pressing.[160] The D.C. Circuit Court reversed and granted the government's motion to dismiss, ruling that the *Boumediene* factors did not apply to Bagram in the same way they applied Guantanamo and that the Suspension Clause did not extend to Bagram detainees.[161]

The court of appeals first rejected the most extreme arguments from both the government and the petitioners.[162] Both parties emphasized the second *Boumediene* factor: whether Bagram was under U.S. sovereignty.[163] The government argued that because Bagram was not effectively part of the United

[154] *Al Maqaleh*, 605 F.3d at 87-88.

[155] *Id.* at 88 (recognizing that the U.S. and coalition forces were engaged in active combat against al Qaeda and the Taliban; that some of these operations were conducted from Bagram; and that Bagram itself had been subject to repeated attacks, including suicide bomb and rocket attacks).

[156] *Id.*

[157] *Id.* (citing S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008); S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003)). The United States estimated that 38,000 non-American troops representing forty-two countries had served the International Security Assistance Force in Afghanistan by February 1, 2010. *Al Maqaleh*, 605 F.3d at 88 (citing International Security Assistance Force, INTERNATIONAL SECURITY ASSISTANCE FORCE AND AFGHAN NATIONAL ARMY STRENGTH & LAYDOWN, ISAF KEY FACTS AND FIGURES, http://www.nato.int/isaf/docu/epub/pdf/placemat.pdf).

[158] *Al Maqaleh*, 605 F.3 at 87 n.1. The case originally combined the petitions of two Yemeni citizens, a Tunisian citizen, and an Afghan citizen. *Id.* Because Bagram was located in Afghanistan, however, the Afghan's claim was separated at the appellate level and not considered for this decision. *Id.*

[159] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 208 (D.D.C. 2009) (finding the petitioner's circumstances in the present case were "virtually identical" to the Guantanamo detainees' circumstances and thus the Suspension Clause should extend to the Bagram detainees).

[160] *Id.* at 208-09.

[161] *Al Maqaleh*, 605 F.3d at 95.

[162] *Id.* at 94-95.

[163] *Id.*

States, there was no de facto sovereignty and thus no Suspension Clause extension to detainees there.[164] The court rejected this argument as too extreme, emphasizing both the Supreme Court's analysis in *Boumediene* that sovereignty alone was not determinative and the high Court's rejection of a formalistic sovereignty test.[165] The court of appeals also disagreed with the petitioners' contention that the United States' lease agreement with Afghanistan for the Bagram territory was sufficient to cause the Suspension Clause's extraterritorial application.[166] The court was particularly concerned that such an understanding would create a potentially unlimited extension of the Suspension Clause to any noncitizens in a number of U.S.-leased facilities.[167] The court declined to read *Boumediene* so broadly.[168]

After rejecting these positions, the court of appeals turned to the *Boumediene* factors themselves.[169] Under the first factor, the court found that the Bagram detainees had essentially the same status as the Guantanamo Bay detainees.[170] Further, the due process afforded the Bagram detainees was less than that afforded the Guantanamo detainees, and thus the Bagram detainees were in a stronger position to argue for the writ under this factor.[171] The court found that the second factor, considering the nature of the apprehension sites and detention, weighed more heavily in the government's favor.[172] The petitioners had been apprehended and detained abroad like the detainees in *Boumediene*. The United States, however, had significantly less control over Bagram than it did over Guantanamo Bay.[173] While the United States had occupied Guantanamo Bay for over a century, despite a hostile Cuban government, the United States' lease of Bagram had no indications of permanence.[174] Importantly, the court reemphasized that "[t]hough the site of detention analysis weighs in favor of the United States and against the petitioners, it is not determinative."[175]

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[164] *Id.*

[165] *Id.* The court of appeals further concluded that the Supreme Court would not have outlined other factors in such detail if it intended de facto sovereignty to be determinative. *Id.*

[166] *Id.* at 95.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 95-98.

[170] *Id.* at 96.

[171] *Id.* (determining that the Unlawful Combatant Enemy Review Board, which determined the status of Bagram detainees, provided even less process than the Combatant Status Review Tribunals that determined Guantanamo detainees' statuses).

[172] *Id.*

[173] *Id.* at 97.

[174] *Id.*

[175] *Id.*

Turning to the third factor, the court of appeals held that the practical obstacles to providing habeas rights to the Bagram detainees, particularly when considered with the second factor, weighed significantly in the government's favor.[176] Afghanistan was a theater of war, and Bagram itself had been a combat target.[177] The Supreme Court in *Boumediene* had determined that the threats that existed around Landsberg Prison had not similarly existed at Guantanamo; at Bagram, threats similar, if not greater, than those faced at Landsberg existed.[178]

The court of appeals concluded that the writ did not extend to Bagram, an active theater of war where the United States had neither de facto nor de jure sovereignty.[179] The court of appeals acknowledged the petitioners' argument that deciding for the government would encourage the government to place detention facilities in combat zones simply to evade judicial review.[180] The court, however, found that such intentional evasion was not extant in the case before it and concluded that resolution of that concern would only occur in a case that specifically raised these issues.[181] The court of appeals pointed out that *Boumediene* itself had clarified its factors were not exhaustive, but rather that *at least* three factors were relevant.[182] Nevertheless, with the weight of the second and third factors, the court of appeals reversed the district court and dismissed the petitioners' case for lack of jurisdiction.[183]

II. BEYOND THE HABEAS CONTEXT

A recent case involving extraordinary rendition [184] may provide additional guidance for resolving a scenario in which the United States has expressly requested the detention of foreign citizens by foreign governments that have no other reason to detain their citizens. While the law in areas beyond the habeas

[176] *Id.*

[177] *Id.*

[178] *Id.* (pointing out that the Supreme Court in *Boumediene* had expressly indicated that arguments against extending the writ would have more weight if the detention center was in an active theater of war).

[179] *Id.* at 98.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 98-99 (suggesting that Executive manipulations could constitute an additional factor in a case in which such evidence is present but that there was no support for the assertion that the government had detained prisoners in Bagram merely to avoid judicial review).

[183] *Id.* at 99.

[184] Extraordinary rendition occurs when government officials detain a suspect and remove him to another country for interrogation, usually under questionable methods amounting to torture. Extraordinary rendition is beyond the scope of this Note, but for additional commentary, see David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 (2006).

context is not binding precedent, cases in these other areas provide general principles that support extension of habeas rights abroad in certain circumstances. This is particularly true in the extraordinary rendition context. The most prominent extraordinary rendition case, *Arar v. Ashcroft*,[185] involves a civil action against the United States rather than a habeas petition. The Court's willingness to recognize these principles in the civil context, where only money damages are at stake, strongly suggests that the Court should extend habeas rights in the far more serious detention context.

In *Arar*, the petitioner, a Canadian and Syrian dual citizen, was detained in a U.S. airport during a stopover en route to Canada.[186] The government detained Arar at the airport overnight, searched him, and questioned him about his relationships with individuals suspected of terrorist ties.[187] Despite Arar's stated fear of torture should he be returned to Syria, the INS ordered him removed to Syria on a finding that he was a terrorist organization member.[188] Arar was flown to Jordan and handed over to Jordanian officials, who in turn delivered him to Syrian officials.[189] Syrian officials detained Arar at a Syrian military intelligence facility for a year, where he was kept in an underground cell, beaten, and interrogated.[190] Canadian officials eventually found Arar and arranged for his removal to Canada.[191]

Arar brought claims against the United States for violations of his rights under the Torture Victim Protection Act (TVPA)[192] and Fifth Amendment, arguing that U.S. officials conspired to send him to Syria, dictated questions to Syrian officials for Arar's interrogations, and received intelligence from the Syrian government about Arar.[193] The district court dismissed Arar's claims and a divided three-judge panel of the Second Circuit affirmed.[194] The Second Circuit decided to hear the case en banc.[195] The en banc court affirmed the

[185] 585 F.3d 559 (2d Cir. 2009).

[186] *Id.* at 565.

[187] *Id.* (describing how the petitioner was questioned by the FBI and INS, forced to wait alone in an airport room all night, moved to a detention center, and denied the opportunity to speak to a lawyer or family).

[188] *Id.* at 565-66.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 566-67.

[192] Torture Victim Protection Act of 1991 § 2(a)(1), 28 U.S.C. § 1350 note (2006). The Act creates a cause of action for civil damages against "any individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." *Id.*

[193] *Arar*, 585 F.3d at 566-67.

[194] *Id.* at 567. Although the panel was divided on some issues, the panel unanimously affirmed the district court's dismissal of Arar's TVPA claim. *See* Arar v. Ashcroft, 532 F.3d 157, 201 (Sack, J., concurring in part and dissenting in part), *vacated en banc on other grounds*, 585 F.3d 559 (2d Cir. 2009).

[195] *Arar*, 585 F.3d at 567.

district court and panel decisions, finding that Arar had not established a close enough connection between the U.S. and Syrian governments to demonstrate that the United States had effectively acted under color of Syrian law.[196]

To bring a TVPA claim, a petitioner must demonstrate that the defendant acted either under color of foreign law or under its authority.[197] The term "color of law" is construed under the same jurisprudence as 42 U.S.C. § 1983.[198] Determining whether a non-state actor acts under color of state law "requires an intensely fact-specific judgment unaided by rigid criteria as to whether the particular conduct may be fairly attributed to the state."[199] The Second Circuit concluded that Arar needed to allege that the defendants, U.S. officials, possessed power under Syrian law and that exercise of that power brought about Arar's harm.[200] The court found that Arar did not prove a close enough connection between the U.S. and Syrian officials because Arar had demonstrated only that the United States had "encouraged" the Syrian government to detain Arar.[201] Therefore, the U.S. officials had not acted under Syrian law, but rather under U.S. federal law.

The dissent disagreed vigorously, pointing out that in the § 1983 context, the Supreme Court had held that private individuals may be found liable for joint activities with state actors even when the private individual had no official state power.[202] In Arar's case, if his allegations were found true, the dissent believed that the defendants' actions were made possible only due to Syria's more permissive laws and the defendants' joint action with Syrian officials.[203] Further, the dissent questioned the majority's reasoning that a line could be drawn between "encouragement" and actual exercise of power under color of foreign law; pointing to agency law, the dissent stated that when two actors engage jointly in criminal activity, they are deemed agents for one another, and it does not matter if only one party engages in the actual torture act.[204]

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[196] *Id.* at 568-69.

[197] Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).

[198] *Id.*

[199] *Arar*, 585 F.3d at 568.

[200] *Id.*

[201] *Id.* The court concluded that Arar's conspiracy allegations established only that the United States had "encouraged and facilitated the exercise of power by Syrians in Syria, not that the United States officials had or exercised power or authority under Syrian law." *Id.*

[202] *Id.* at 628 (Pooler, J., dissenting) (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)). The court found that a defendant does not need to be an officer of the state for § 1983 liability to apply but that it is instead enough that the defendant willfully participates in a joint action with state officials. *Id.*

[203] *Id.*

[204] *Id.* at 629 (suggesting that the majority's argument could be carried to an extreme, such that U.S. officials could be present in the room during a petitioner's torture and still not be held liable for joint action).

Therefore, according to the dissent, Arar's claim should have survived the government's motion to dismiss.[205]

III. EXTENDING REVIEW TO FOREIGN DETAINEES HELD BY FOREIGN GOVERNMENTS

A. *The Changing Jurisprudential Landscape*

The Supreme Court created a vastly different landscape for alien detainees' rights and habeas petitions through the *Boumediene* line of cases. Starting with *Hamdi*, the Supreme Court has demonstrated an unwillingness to place a stamp of approval on the Executive's actions, despite the broad powers traditionally reserved for the Executive with regard to the military.[206] Instead, the Court has recognized the important separation-of-powers issues implicated by the Executive's indefinite detention of prisoners captured in the war on terror and the Court's own important role in preventing the Executive from assuming too much power.[207] The Court embraced its role as protector of the fundamental right of habeas review, recognizing that the Executive could not sidestep compliance with the law by reinventing categories of prisoners or locating them in offshore facilities.[208]

While the Supreme Court has thus far ruled only on procedural habeas questions, it has in the *Boumediene* line of cases importantly indicated that individual liberty is a value worth weighing against military integrity and freedom, even when the individual liberty at stake is not that of a U.S. citizen. These cases create more room for courts to hold the U.S. government accountable for its actions abroad when the government creates circumstances offensive to the Constitution. The Supreme Court's functionalist approach[209] to determine when constitutional rights apply abroad indicates both that the Court is concerned with the Executive's potential manipulation of any bright-line standard and also that the Court recognizes that novel scenarios are bound to arise given the changing face of warfare. This case-by-case approach thus potentially provides greater ability to extend rights to detainees in different contexts. Indeed, the Supreme Court in *Boumediene* declined to limit its holding to the Guantanamo detainee context.[210] This left open the possibility that other contexts could arise in which the Court would be inclined to extend habeas rights.

This is particularly salient for Mr. Janjua and others detained abroad at the behest of the U.S. government. While *Boumediene*, *al Maqaleh*, and *Arar* did not directly address Mr. Janjua's scenario, the cases embody principles that are

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[205] *Id.* at 630.

[206] *See supra* Part I.B.

[207] Boumediene v. Bush, 553 U.S. 723, 797 (2008).

[208] *Id.* at 783.

[209] *See supra* Part I.B.4.b.

[210] *See supra* note 103 and accompanying text.

readily applicable to Mr. Janjua's case. Analyzing Mr. Janjua's situation[211] – an alien detained by a foreign government solely at the behest of the U.S. government – reveals the same concerns as the *Boumediene* line of cases and demonstrates the need to extend habeas rights to similarly situated detainees. The principles in the above described cases support providing Mr. Janjua with the procedural right to challenge his detention through habeas petition.

B. *Application of Boumediene and Maqaleh*

Mr. Janjua's situation implicates the very concerns that the Supreme Court discussed in the *Boumediene* line of cases. While Mr. Janjua's case does not fall under the definition of extraordinary rendition, since he has not been removed to a foreign country, there are many parallels between his case and extraordinary rendition cases. Specifically, as with extraordinary rendition, the U.S. government has ordered Mr. Janjua's enforced disappearance by the Pakistani government to avoid compliance with U.S. law and international conventions.[212] The Supreme Court and the D.C. Circuit have both expressed a concern that the Executive would seek to avoid compliance with the law by sidestepping any standard the Court would elucidate.[213] Further, Mr. Janjua's situation implicates separation-of-powers concerns, an issue with which the Supreme Court in *Boumediene* was particularly concerned. By ordering foreign governments to detain terrorist suspects on behalf of the U.S. government, the Executive sidesteps judicial review of its actions and removes such detainees' rights to challenge their detentions.

The *Boumediene* factors themselves allow habeas rights to be extended to those in Mr. Janjua's circumstances. The first factor, considering the detainee's status and the process afforded in determining that status, appears to weigh in favor of a detainee in Mr. Janjua's circumstances. Such a detainee often has not been charged with any crime, nor given any status whatsoever. Even if a status has been given to such a detainee, it is unlikely that a disappeared person was afforded any process or allowed to rebut that status in any meaningful way. While such detainees are often considered suspected terrorists, their detention should not draw on indefinitely without any formal charges or the opportunity to rebut those charges. The first factor weighs more in this sort of detainee's favor than perhaps those in *Eisentrager*, *Boumediene*, or *Maqaleh* since both the status and status-determination process in the present case provide significantly less protection.

The second factor may not fall in the favor of a detainee in Mr. Janjua's circumstances. Like the detainees in the *Boumediene* line of cases, a detainee in these circumstances would also have been apprehended and detained abroad.

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[211] *See supra* Introduction.

[212] *C.f.* Weissbrodt & Bergquist, *supra* note 184, at 127 (describing extraordinary rendition as a practice in which "perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses").

[213] *See supra* Part I.B.4.b, B.6.

Boumediene and *Al Maqaleh* both considered whether the United States had de facto or de jure sovereignty.[214] In this case, the United States does not have direct control over the territory in which a detainee like Mr. Janjua is held. In such a scenario, a foreign government acts on behalf of the United States' orders, and thus the United States cannot be said to have de jure sovereignty or de facto sovereignty. Yet even if the second factor would not fall in the detainee's favor here, this factor alone is not determinative of whether habeas rights extend to such a detainee.[215] In this case, other factors prove to be more important in determining whether habeas rights should be extended to a detainee in this scenario.

For the third factor, a court should consider any practical obstacles to providing habeas rights to a detainee. In this case, there are no practical obstacles to prevent extension of habeas rights. The Supreme Court in *Boumediene* considered whether there were impractical costs, such as the detention site's location in a combat zone or foreign sovereignty concerns.[216] The D.C. Circuit in *Maqaleh* found against the petitioners because Bagram was located in an active theater of war, which raised too many concerns to extend habeas rights to detainees there.[217] In the scenario considered by this Note, these concerns do not apply. A foreign detainee held by a foreign government is likely not detained in an active theater of war; in Mr. Janjua's circumstances in particular, there is no volatile warzone that would make it too dangerous to provide Mr. Janjua with due process.

Additionally, there are few sovereignty concerns in this scenario. While generally the fact that a foreign government maintains custody of one of its own citizens raises foreign sovereignty concerns,[218] those issues are not raised here. In the circumstances considered by this Note, the detainee is being held solely at the behest of the United States, even though his physical custody remains in his country of origin. In Mr. Janjua's case, for instance, the Pakistani government has stated in official documents that the Pakistani government itself has no charges against Mr. Janjua.[219] It is the United States that is effectively maintaining Mr. Janjua's detention, and any remedies Mr. Janjua seeks against the Pakistani government will be ineffective unless he can reach the true source of his detention: the United States. With the Pakistani government acting in this scenario merely as the muscle for Mr. Janjua's

[214] *Boumediene*, 553 U.S. at 755 (citing Rasul v. Bush, 542 U.S. 462, 480 (2004); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment)); Al Maqaleh v. Gates, 605 F.3d 84, 94-95 (D.C. Cir. 2010).

[215] *See Al Maqaleh*, 605 F.3d at 94-95.

[216] *Boumediene*, 553 U.S. at 770.

[217] *Al Maqaleh*, 605 F.3d at 97.

[218] This is, in fact, the very concern that caused the district court in *Al Maqaleh* to dismiss the fourth petitioner's habeas claims, since the petitioner was an Afghan citizen held in Afghanistan. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 229-30 (D.D.C. 2009).

[219] *Cf.* Fisk, *supra* note 1.

detention, sovereignty concerns are not implicated, because any habeas rights would be sought against the United States. Therefore, the third factor should not work against a detainee in this scenario but should instead extend habeas rights to him.

There are additional considerations that weigh in favor of extending habeas rights to detainees under this scenario. First, the D.C. Circuit suggested in *Al Maqaleh* that an additional factor is whether the United States is placing detainees in locations merely to avoid judicial review.[220] Since detainees in this Note's scenario are held by foreign governments at the request of the United States, it seems reasonable to believe that the United States could not have detained these individuals itself. As mentioned earlier, as in extraordinary rendition cases, the United States has been known to sidestep international legal conventions by holding suspects in offshore facilities with more permissive torture laws. Thus, in this scenario, it is arguable that the United States is attempting to avoid judicial review of its actions.

Another consideration raised by *Arar* favors extending habeas rights in this scenario. While *Arar* involved the civil liability of U.S. officials in Arar's extraordinary rendition to Syria, the Second Circuit also analyzed important joint liability concepts.[221] The Second Circuit declined to extend civil liability to U.S. officials in *Arar* because it did not find a strong enough correlation in the record between the U.S. and Syrian governments.[222] In the scenario considered by this Note, where a detainee is held by a foreign government solely on the United States' orders, there is a much stronger correlation between the U.S. and foreign government. Further, the Second Circuit is the only court to have considered this issue; other circuits might follow the vigorous *Arar* dissent, which presents even stronger support for constructive custody in this scenario. If the United States were considered joint and severally liable for a foreign government's detention and torture of a detainee, like the *Arar* dissent contended it should it be, the United States would then be considered equally responsible and culpable for such a detainee's harm. Courts should consider this kind of civil liability when examining whether a detainee can bring a habeas petition against the United States government: if a court would find that the United States had acted directly enough to be culpable in a civil context, courts should similarly find that the United States had acted directly enough to warrant U.S. judicial jurisdiction for detainees' habeas challenges.

A final consideration for extending habeas rights to a detainee in this scenario is that there are simply no other remedies available. The United States and foreign governments can effectively point their fingers at each other until the detainee has no means to challenge his detention. Personal liberty is a fundamental constitutional right, one that the Supreme Court has recognized

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[220] *Al Maqaleh*, 604 F.3d at 98.

[221] *See* Arar v. Ashcroft, 585 F.3d 559, 567-68 (2d Cir. 2009).

[222] *See id.*

extends to aliens in some contexts and not just to United States citizens. Security concerns are also important, particularly because military integrity is vital to the United States' security. Yet one must weigh security concerns against the indefinite detention of such detainees, the severe impact on detainees and their families, and the moral transgressions implicit in such actions. Because freedom and personal liberty are among the U.S. government's founding principles, courts should be willing to grant jurisdiction in these cases to determine substantively if there is any merit to such habeas claims. Courts can then continue to exercise their discretion using the functional approach elucidated in *Boumediene* to prevent any unacceptable extensions of habeas rights. Considering the number of Guantanamo detainee habeas petitions that have been granted immediately following *Boumediene*, it is vital both for alien detainees held indefinitely abroad and the legitimacy of the U.S. government that courts give consideration to these cases.

CONCLUSION

The September 11, 2001, terrorist attacks and the United States' war on terror changed the face of modern warfare. As military operations continue to become less formal and more global, American jurisprudence will need to adjust to novel situations. The Supreme Court did just that in *Boumediene* and its line of cases, recognizing alien detainees' rights to challenge their indefinite detentions by the U.S. government. This led to dozens of Guantanamo detainees' "enemy combatant" statuses being overturned by courts and to the release of those detainees. Habeas law, however, remains unsettled. It will continue to develop as new scenarios arise and federal courts grapple with consistently applying the flexible, functionalist approach that the Supreme Court elucidated in *Boumediene*. The *Boumediene* functionalist approach should allow for greater alien detainees' rights in myriad scenarios, including those in which alien detainees are held by foreign governments solely at the U.S. government's behest. It is only by holding the Executive accountable for such actions that the judiciary can maintain separation-of-powers principles vital to the American tripartite system and thereby protect fundamental individual rights.