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Bagram, Boumediene, and Limited Government

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INTRODUCTION

The United States' prison at Bagram Airbase in Afghanistan will be the next front in the battle over the extraterritorial reach of the Constitution. Habeas litigation on behalf of Bagram detainees will soon establish whether the writ of habeas corpus extends beyond U.S. territory to active war zones, and it will also begin to refine the limits of presidential power in the war on terror. In this Article, we argue that, as the courts begin to wrestle with these issues, their foremost task should be to determine whether the Constitution authorizes the U.S. government to suspend the protections of the writ, rather than to discover whether detainees abroad possess a "right" to judicial review of the legality of their detentions. More broadly, we suggest that the U.S. Supreme Court's new multifactor balancing test for determining the extraterritorial reach of the writ (announced in June 2008 in *Boumediene v. Bush*[1]) must be understood as embodying a limited government approach, rather than a rights-based approach, to defining the global reach of the Constitution.

For more than eight years, the legal struggle over the legitimacy of U.S. post-9/11 detention policy has been narrowly focused on our offshore prison at Guantanamo Bay. In the public consciousness, Guantanamo has become the touchstone for debates about the limits of presidential power and about our commitment as a country to the rule of law. In the courts, these same issues have played themselves out in dozens of cases, including three before the Supreme Court, in which

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

the authority of the Judicial Branch to supervise the detentions at Guantanamo has been challenged.[2]

Numbers alone do not account for the prominence of Guantanamo in the public mind. Although 779 prisoners have spent time there since January 2002, fewer than 200 prisoners remain.[3] While these are significant figures, at present our country holds thousands of prisoners in noncriminal, extrajudicial detention in Iraq, Afghanistan, and other countries around the world.[4]

Part of the reason for the emergence of Guantanamo as ground zero in the fight over detention policy is its proximity to the territorial United States. The prison is, relatively speaking, easily accessible to lawyers who are willing to represent men who are accused of engaging in terrorist activity or associating with terrorist groups. Also, because Guantanamo has been under the complete jurisdiction and control of the United States for decades, lawyers for the detainees recognized that challenges to U.S. detention policy might have a greater chance of success for Guantanamo prisoners than for prisoners in war zones and other far-off locales.

The strategy of focusing initial legal challenges on Guantanamo has borne fruit. In June 2008, the Supreme Court announced in *Boumediene v. Bush* that the Constitution's guarantee of access to the writ of habeas corpus extends to the prisoners at Guantanamo.[5] *Boumediene* was the first decision to hold that the writ could reach noncitizens who are held beyond the territorial United States,[6] and it

2. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004). The Court had granted certiorari in another Guantanamo matter to decide whether a district court judge has the power to order the government to release successful habeas petitioners into the United States; however, the Court vacated its earlier decision when other countries made resettlement offers to the detainees. *See* Kiyemba v. Obama, 130 S. Ct. 1235 (2010).

3. *See* BENJAMIN WITTES & ZAAHIRA WYNE, BROOKINGS INST., THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 1 (2008), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes.pdf (noting that 779 detainees have passed through the facility since January 2002); Andy Worthington, Guantánamo: The Definitive Prisoner List (Updated for 2010) (Jan. 4, 2010), http://www.andyworthington.co.uk/2010/01/04/guantanamo-the-definitive-prisoner-list-updated-for-2010/ (noting that as of December 31, 2009, six prisoners have died at Guantanamo, one has been transferred to the United States to face criminal charges, 574 have been released, and 198 remain).

4. *See, e.g.*, Lindsay Wise, *Mission for Some: Watch over Detainees*, HOUSTON CHRON., Jan. 10, 2010, at A1 (noting that the "number of detainees in U.S. custody in Iraq peaked at about 26,000 in 2007," and that as of January 2010 about 6,000 remained).

5. 128 S. Ct. at 2262.

6. *Id.* The Court had earlier held that *statutory* habeas extended to Guantanamo in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), but Congress stripped statutory jurisdiction in 2005 and 2006. *See* Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005)

seems reasonable to question whether this would have been the result if it were not the case that "[i]n every practical sense Guantanamo is not abroad."[7]

Thus, although it took seven years and three Supreme Court decisions to establish that the Constitution ensures that the Guantanamo petitioners may have their day in court, and although to this day the overwhelming majority of the prisoners have still not had a merits hearing on their habeas petitions,[8] Guantanamo in many ways represents the easy case in challenges to long-term executive detention. Information about prisons in Afghanistan and Iraq, for example, is much harder to come by, and journalists are less likely to press for access to detention centers that are thousands of miles from home. Likewise, volunteer lawyers cannot feasibly visit and represent clients who are detained in distant war zones. As a purely legal matter, too, challenges to extrajudicial detention grow more difficult as the prisoners' connections to the United States grow increasingly remote.

Predictably, therefore, there has been little litigation over whether the protections of the writ reach beyond Guantanamo to other "war on terror" prisons. But the next major phase of the challenge to the President's detention authority has already begun. A handful of prisoners at the Bagram Theater Internment Facility (BTIF) near Kabul, Afghanistan, have filed habeas petitions in U.S. federal court, seeking court review of the legality of their detentions. These petitioners—each of whom has been detained for at least six years without charge, trial, or access to a lawyer—are among more than 600 prisoners being

(codified as amended in scattered sections of 10 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)) (purporting to strip habeas jurisdiction for Guantanamo detainees and replace it with exclusive, but limited, review of CSRT proceedings in the D.C. Circuit); Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 2635–36 (2006)(codified at 10 U.S.C. §§ 948a–950w and scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)) (eliminating habeas corpus for all aliens who are designated as "enemy combatants" or are awaiting a determination of that status).

7. *Boumediene*, 128 S. Ct. at 2261; *see Rasul*, 542 U.S. at 480.

8. More than one year after the *Boumediene* decision was issued, most petitioners have not had merits hearings, notwithstanding Justice Kennedy's admonition that "the costs of delay can no longer be borne by those who are held in custody." *Boumediene*, 128 S. Ct. at 2275. Of the forty-four cases that have been resolved on the merits through February 2010, petitioners have been victorious thirty-three times. Chisun Lee, *An Examination of 41 Gitmo Detainee Lawsuits*, PROPUBLICA (updated Jan. 22, 2010), http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722 (last visited Mar. 12, 2010); Carol Rosenberg & Mark Seibel, *Judge Orders Another Guantanamo Detainee Freed*, MCCLATCHY-TRIB. NEWS SERV., Feb. 25, 2010, http://www.mcclatchydc.com/2010/02/25/88413/judge-orders-another-guantanamo.html (last visited Mar. 12, 2010) (reporting one more habeas merits decision).

held at the U.S. airbase at Bagram.[9] Very little is known about this mass of prisoners or about the reasons for their continued detention.[10]

The federal courts' conclusions about whether habeas extends to U.S. prisoners at Bagram will be crucial to establishing the limits on executive power during wartime. These limits cannot be discerned by the courts without a clear understanding of how the Constitution applies abroad. In this Article we examine these questions, assessing whether the Suspension Clause should have extraterritorial effect at the BTIF.[11] Our analysis proceeds in light of our reading of Justice Kennedy's opinion in *Boumediene* as embodying a limited government theory of the Constitution. This approach focuses on whether the government has exceeded its constitutional mandate, rather than on the rights that the Constitution may afford to an individual.

In Part II of the Article, we provide a brief history of U.S. detention operations at Bagram and describe the procedures used to determine whether the Bagram prisoners are "unlawful enemy combatants."[12] In this Part, we also recount the Guantanamo habeas litigation and Congress's response,[13] setting the stage for our discussion of Justice Kennedy's opinion in *Boumediene* and its multifactor test for determining whether habeas extends extraterritorially. In Part III, we assess Justice Kennedy's self-described "pragmatic" approach to constitutional theory in *Boumediene* and explain why it is best understood as relying on a limited government theory.[14] In Part IV, we assess whether the writ should extend to prisoners at Bagram, applying the multifactor *Boumediene* test through the prism of the limited government approach.[15] We conclude that the writ should extend to detainees at Bagram, just as it extends to detainees at Guantanamo. Finally, we review the one federal court opinion, *Maqaleh v. Gates*,

9. The prisoners' names were made public for the first time in January 2010, in response to a Freedom of Information Act lawsuit filed by the American Civil Liberties Union. *See* Press Release, Am. Civil Liberties Union, ACLU Obtains List of Bagram Detainees (Jan. 15, 2010), http://www.aclu.org/national-security/aclu-obtains-list-bagram-detainees (last visited Mar. 4, 2010). The list, which includes the names of 645 men detained at Bagram as of September 2009, is available at http://www.aclu.org/files/assets/bagramdetainees.pdf.

10. As Amy Davidson pithily observes, "If Guantanamo is, to quote the poetry of Donald Rumsfeld, a known known, Bagram is a known unknown." Posting to Close Read, What's Going On at Bagram?, http://www.newyorker.com/online/blogs/closeread/2009/09/close-read-whats-going-on-at-bagram.html (Sept. 14, 2009).

11. The Suspension Clause of the Constitution provides, "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." U.S. CONST. art. I, § 9, cl. 2.

12. *See infra* notes 17–57 and accompanying text.

13. *See infra* notes 58–75 and accompanying text.

14. *See infra* notes 76–185 and accompanying text.

15. *See infra* notes 186–207 and accompanying text.

addressing the application of habeas to Bagram.[16] We contend that the district court's conclusion—that the writ extends to non-Afghans being detained at Bagram but not to Afghans—is anomalous and can best be explained by the court's failure to recognize the limited government underpinnings of *Boumediene*.

II. BAGRAM, U.S. DETENTION POLICY, AND THE REACH OF THE WRIT

Guantanamo was an informational black hole until volunteer habeas lawyers were given access to their clients in fall 2004.[17] Even as late as spring 2006, a full roster of the prisoners who had been held at the prison had not yet been released.[18] But the proximity of the prison to the mainland United States assured, at least, that journalists would maintain pressure on the government to make the prison more transparent. For the Bagram prison, however, the current state of our ignorance is remarkable. In this Part, we review what we know of the history and present status of the BTIF, describe (as best we can learn) the procedures that have been used to determine the Bagram prisoners' "unlawful enemy combatant" status, and provide an overview of the litigation and legislative fights since 9/11 that have set the legal framework for assessing whether these prisoners can challenge the legality of their detention in U.S. courts.

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16. *See infra* notes 208–225 and accompanying text.

17. *See* Al Odah v. United States, 346 F. Supp. 2d 1, 14–15 (D.D.C. 2004) (holding that Guantanamo petitioners are entitled to counsel and that the government may not engage in "real time monitoring" of attorney-client conversations).

18. In January 2005, Lieutenant Commander Matthew M. Diaz, a staff judge advocate in the Navy who was stationed at Guantanamo, sent a classified list of the 551 men who were being detained at the prison to a lawyer at the Center for Constitutional Rights (CCR). *See* Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAG., Oct. 21, 2007, at 78, 80. The CCR lawyer contacted a federal judge rather than make the information public, and the judge ordered the list to be turned over to the Department of Justice. *Id.* at 80. The list of detainees remained secret, but Diaz was court-martialed and convicted of disclosing secret defense information, after which he served a six-month prison sentence. *Id.* at 83. The Department of Defense first released the names of the 558 detainees who had gone through the Combatant Status Review Tribunal (CSRT) process at Guantanamo on April 19, 2006. *See* Kathleen T. Rhem, *DoD Releases Names of 759 Current, Former Guantanamo Detainees*, AM. FORCES PRESS SERV., May 15, 2006, http://www.defenselink.mil/news/newsarticle.aspx?id=15754. Defense officials released the complete list of names (including the other 201 detainees who had been transferred or released before going through the CSRT process) about one month later. *See* List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 Through May 15, 2006 (May 15, 2006), http://www.defenselink.mil/news/May2006/d20060515%20List.pdf.

A. History of the Bagram Theater Internment Facility

Bagram is something of an accidental prison. Though more than six hundred prisoners are now being held in detention there, Bagram Airbase was never designed to be a long-term detention center. Built by the Soviets during their occupation of Afghanistan, the airbase served during the 1980s as a base of operations for Soviet troops, but it fell into disrepair after the ouster of the Soviets from Afghanistan in the 1990s.[19] Upon the invasion of Afghanistan in late 2001, the U.S. military took over the site, which Pentagon officials described at the time as little more than a "cavernous former machine shop."[20]

Within weeks of taking control of Bagram Airbase, the military converted some of its airplane hangars into structures for the temporary housing of detainees.[21] The site was named the "Bagram Collection Point"—later to be renamed the "Bagram Theater Internment Facility"—and was expected to function as a temporary "collection center" for the intake-screening of prisoners who would be detained long-term elsewhere. In May 2002, the BTIF was designated as the "primary collection and interrogation point" for detainees captured in the Afghan war theater.[22] Because prisoners who were slated for long-term detention were typically sent to Guantanamo[23]—where Bush Administration lawyers had posited that the federal courts would have no jurisdiction over noncitizen detainees[24]—the Bagram facility's detainee population remained consistently low throughout 2002. By mid-2004, when it became increasingly likely that the Guantanamo prisoners would be allowed access to the federal courts, transfers of prisoners to Guantanamo rapidly declined, and the prisoner population at Kandahar and Bagram began to rise.[25]

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19. *See* Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1.

20. *See* Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES, Feb. 26, 2006, at A1.

21. Vice Admiral A.T. Church, Office of the Sec'y of Def., Review of Department of Defense Detention Operations and Detainee Interrogation Techniques 181–82 (2005) [hereinafter Church Report].

22. Amnesty Int'l, USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review 6 (2009) [hereinafter Amnesty Report].

23. *See* CHURCH REPORT, *supra* note 21, at 182–83.

24. *See, e.g.*, Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys General, U.S. Dep't of Justice, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba 1 (Dec. 28, 2001), http://upload.wikimedia.org/wikipedia/commons/8/83/20011228-philbin-yoo-guantanamo-habeus-memo.pdf (last visited Jan. 23, 2010).

25. *See* CHURCH REPORT, *supra* note 21, at 185–86 (noting the increase in prisoner population in military bases in Afghanistan in mid-2004); Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1 (noting that transfers to Guantanamo had "largely shut off" by September 2004).

Until January 2010, the military had refused to publicly release the identities of the prisoners being held at Bagram. Indeed, there are few solid numbers even detailing the population fluctuations at the BTIF.[26] As best we can tell, the prison population grew from about 300 prisoners in early 2004 to about 600 prisoners in July 2008, with a present population (as of September 2009) of approximately 645 prisoners.[27] There is little reason to expect that this population will shrink in the near future, particularly because work proceeds apace on the construction of a $60 million, forty-acre prison at the BTIF, which is designed to replace the current structures and house up to 1,100 prisoners.[28]

As these numbers suggest, the BTIF is no longer just a screening and processing point for detainees, but instead has become a primary long-term detention center in the war on terror. The terms of U.S. agreements with the Afghan government to control the area reflect this long-term commitment. Since 2006, the U.S. military's possession of Bagram Airfield has been formalized by a lease in which Afghanistan consigns all facilities and land located there "for use by the United States and Coalition Forces for military purposes."[29] Like the contract between Cuba and the United States for the use of Guantanamo, the Bagram lease by its terms will remain in effect so long as the United States wishes.[30] Also like the Guantanamo lease, which

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26. In April 2009, the American Civil Liberties Union made a Freedom of Information Act request seeking the names, citizenship, capture date, days detained, capture location, and circumstances of capture of the Bagram prisoners. In July, the Department of Defense acknowledged that the National Detainee Reporting Center was in possession of this information, but refused to release it on national security grounds. *See* Letter from Paul J. Jacobsmeyer, Chief, Office of Freedom of Info., U.S. Dep't of Def., to Melissa Goodman, Am. Civil Liberties Union Found. (July 28, 2009), https://www.aclu.org/pdfs/natsec/bagramfoia_dodappealletter.pdf (last visited Jan. 23, 2010).

27. *See* Press Release, *supra* note 9. As of August 2004, U.S. forces had detained just over 2,000 people since operations began. CHURCH REPORT, *supra* note 21, at 233. These numbers do not reflect the prisoner population at Pul-i-Charki, an Afghan prison complex that now houses an American-financed high-security wing, called the Afghan National Defense Facility. *See* HUMAN RIGHTS FIRST, ARBITRARY JUSTICE: TRIALS OF BAGRAM AND GUANTÁNAMO DETAINEES IN AFGHANISTAN ii (2008), http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf. (last visited Mar. 21, 2010).

28. Eric Schmitt & Tim Golden, *U.S. Set to Build Big New Prison in Afghanistan*, N.Y. TIMES, May 17, 2008, at A1.

29. 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) (emphasis omitted) [hereinafter Bagram Lease], *available at* http://washingtonindependent.com/wp-content/uploads/2009/01/miller-declaration1.pdf (last visited Mar. 21, 2010) (attached as Exhibit 1 to Declaration of Colonel Rose M. Miller, Ruzatullah v. Rumsfeld, No. 06-CV-01707 (D.D.C. Nov. 20, 2006)).

30. *Compare* Treaty Between the United States of America and Cuba, U.S.-Cuba, art. III, May 29, 1934, T.S. No. 866, *available at* http://avalon.law.yale.edu/20th_century/dip_cuba001.asp

provides that "the United States shall exercise complete jurisdiction and control over and within said areas,"[31] the United States maintains complete control over the Bagram Airfield and "shall have exclusive, peaceable, undisturbed and uninterrupted possession of [Bagram Airfield] during the existence of this agreement . . . . without any interruption whatsoever by [Afghanistan] or its agents."[32] In addition, pursuant to a diplomatic agreement, Afghanistan has ceded elements of its sovereignty, including the right to exercise criminal jurisdiction over U.S. personnel and its detainees.[33]

B. The Enemy Combatant Status of the Bagram Prisoners

The Bagram prisoners are all being detained as "unlawful enemy combatants." The procedures used to determine the prisoners' status, however, have been demonstrably inadequate to the task. Indeed, by their terms, they are even less protective than the "closed and accusatorial" procedures that were used for the Guantanamo prisoners and that the Supreme Court disapproved of in *Boumediene*.[34] The result is that there may well be hundreds of men wrongfully detained at

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(last visited Mar. 21, 2010) (the treaty will continue "[s]o long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits"), *with* Bagram Lease, *supra* note 29, ¶ 4 ("The term of this Agreement . . . shall continue until the [United States] or its successors determine that the Premises are no longer required for its use.").

31. Under the terms of the 1903 lease with Cuba, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over Guantanamo, while Cuba "consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418 [hereinafter Guantanamo Lease]. For an exhaustive history of the Guantanamo leases and treaties, see MICHAEL J. STRAUSS, THE LEASING OF GUANTANAMO BAY (2009).

32. Bagram Lease, *supra* note 29, ¶ 9.

33. Diplomatic Note No. 202, Embassy of the United States of America, Kabul 3 (Sept. 26, 2002), *appended to* Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus, Exhibit 2, Maqaleh v. Gates, No. 06-CV-1669 (JDB) (D.D.C. Sept. 15, 2008). The exchange of this note with diplomatic notes from the Afghanistan government, Note No. 791, Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, Fifth Political Department (Dec. 12, 2002), and Note No. 93, Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, American and Canada Political Affairs Department (May 28, 2003), constitutes a formal agreement that remains in force. STEVE BOWMAN & CATHERINE DALE, CONG. RES. SERV., WAR IN AFGHANISTAN: STRATEGY, MILITARY OPERATIONS, AND ISSUES FOR CONGRESS 22 (Feb. 25, 2010), *available at* http://www.fas.org/sgp/crs/natsec/R40156.pdf.

34. Boumediene v. Bush, 128 S. Ct. at 2229, 2270 (2008).

> [E]ven when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

Bagram, entirely innocent of any affiliation with the Taliban or al Qaeda.

This suggestion is not fanciful. The records that are publicly available suggest that most of the detainees who have been taken into custody during the Afghanistan conflict were not, as the Bush Administration would have had us believe, captured on a battlefield by U.S. troops.[35] A March 2005 review of detainee operations, authored by Vice Admiral Albert T. Church, found that prisoners "[came] into U.S. custody in Afghanistan through several means" and that only a "small number . . . were captured during traditional force-on-force fighting against Taliban or al Qaeda groups, or following the seizure of an enemy facility."[36] Most prisoners were instead "captured by opposition groups, such as the Northern Alliance, and transferred to U.S. control."[37] Likewise, Brigadier General Charles H. Jacoby, Jr. reported in 2004 that the basis for U.S. detentions in Afghanistan was "often poorly documented" and that in some locations "cordon and search operations yield[ed] large numbers of detainees without apparent application of specific criteria."[38] Because none of these prisoners were captured wearing a uniform, identifying their status as soldiers or civilians is crucial to assuring that the U.S. government is not indefinitely detaining an innocent person.

As one of us has discussed elsewhere,[39] the U.S. military has utterly failed in Afghanistan to engage in the type of screening required by the Geneva Conventions and U.S. Army regulations, and the results have been disastrous. There are two reasons that a person who is caught near a battlefield might be wearing civilian clothes. One is that the person is an enemy soldier disguised as a civilian; such behavior is,

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Id. at 2270 (citations omitted) (quoting Bismullah v. Gates, 514 F.3d 1291, 1296 (D.C. Cir. 2008) (Ginsburg, C.J., concurring in denial of rehearing en banc)).

35. Vice President Dick Cheney, for example, stated in an interview with CNN, "The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban." CNN, Cheney on Osama and Gitmo, http://edition.cnn.com/2005/US/06/24/cheney/index.html (last visited Jan. 12, 2010) (transcript of interview by Wolf Blitzer with then-Vice President Dick Cheney).

36. CHURCH REPORT, *supra* note 21, at 189.

37. *Id.*

38. BRIGADIER GENERAL CHARLES H. JACOBY, JR., CFC-A AO DETAINEE OPERATIONS REPORT OF INSPECTION ¶¶ 13 (June 26, 2004) [hereinafter JACOBY REPORT]. Among the report's "general observations" were that "there is no consistent program designed to ensure the integrity of capture data or evidence," that the "basis for detention is often poorly documented," and that collection procedures "are confusing and inadequate." *Id.* ¶¶ 13, 18.c.

39. *See* Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 989–90 (2009).

of course, unlawful and a violation of the laws of war.[40] The other reason someone might be wearing civilian dress is that the person is in fact a civilian. How does one tell the difference? The answer is found in Article 5 of the Third Geneva Convention and in section 190-8 of the U.S. Army Regulations, both of which require that a status hearing be held, near in time to the capture, in order to determine the status of the person apprehended.[41] During the Persian Gulf War, the United States held 1,196 of these Article 5 hearings, which determined that the United States had captured innocent civilians in 886 instances, an error rate of seventy-four percent.[42] During the Afghan conflict, not a single Article 5 hearing was held.[43]

Given that these status hearings were never held in the Afghan conflict—and that the captures were not even made, for the most part, by U.S. troops[44]—at the minimum, adequate procedures to ensure a fair hearing are necessary to determine the legitimacy of individual deten-

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40. See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3, which states,

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

See also Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS 93, 118–21 (2004) (discussing other international law provisions regarding uniforms and other emblems distinguishing combatants and civilians).

41. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. See also Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, U.S. Army Reg. 190-8, ¶¶ 1-6(a) to (b) (Oct. 1, 1997), *available at* http://www.army.mil/usapa/epubs/pdf/r190_8.pdf (last visited Mar. 22, 2010), which requires a

> competent tribunal [to] determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

42. U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 578 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf (last visited Mar. 22, 2010).

43. CHURCH REPORT, *supra* note 21, at 187–88 (noting the Geneva Conventions and Army Regulation requirements, but explaining that no such hearings were held because the Bush Administration had made a blanket decision that "the Geneva Conventions did not apply to the conflict with al Qaeda" and that "although the Geneva Conventions did apply to the conflict with the Taliban, the Taliban were unlawful combatants and . . . not entitled to [enemy prisoner of war] status").

44. *See* MARK DENBEAUX & JOSHUA W. DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (Feb. 8, 2006), *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (last visited Mar. 22, 2010) (reviewing military documents and finding that 86% of Guantanamo detainees were initially captured by Northern Alliance or Pakistani security forces, not by U.S. troops).

tions at the BTIF. One might reasonably suspect that scores, if not hundreds, of the prisoners at the BTIF are indeed wrongly detained. At Guantanamo there have been forty-four habeas corpus hearings to date that have been decided on the merits in federal court since the *Boumediene* decision came down, and judges have determined that the petitioners were innocent and illegally detained in thirty-three of those cases.[45] Even leaving aside the fact that one might expect the cases against these petitioners to be stronger than the cases against the hundreds of prisoners who had previously been released from Guantanamo, the habeas merits decisions suggest a 79% error rate with respect to the "enemy combatant" status of these prisoners. That figure is remarkably similar to the 74% error rate that the United States discovered in the immediate aftermath of prisoner captures during the Persian Gulf War.

Clearly, the status hearings provided by the military at Guantanamo, called Combatant Status Review Tribunals (CSRTs), were not adequate to the task of separating combatants from civilians. A glance at the procedures shows why this was inevitably the case. The detainee was allowed to appear in person at the tribunal and, in theory, to call "available" witnesses.[46] He was, however, presumed guilty[47] and was not permitted the assistance of a lawyer.[48] He was

45. *See* Lee, *supra* note 8; Rosenberg & Seibel, *supra* note 8.

46. Another analysis of military documents reveals that in 96% of the CSRTs at Guantanamo no witnesses were allowed to testify for the detainee. Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings CSRT: The Modern Habeas Corpus?* 25–26 (Seton Hall Pub. Law Research Paper No. 951245, Dec. 2006), http://ssrn.com/abstract=951245 (last visited Mar. 22, 2010).

47. CSRT regulations informed officers that the prisoner had already "been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." Memorandum to the Sec'y of the Navy, from Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (last visited Mar. 22, 2010); *see also* U.S. Dept. of Defense, Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2751 (last visited Mar. 22, 2010). New rules, differing in no material respect in relation to the issues discussed in the accompanying text, were promulgated following Congress's passage of the Detainee Treatment Act of 2005. *See* 42 U.S.C. § 2000dd (2006 & Supp. I 2008).

48. The prisoner was instead entitled only to a "personal representative" from the military—a person who by regulation could not be a lawyer, with whom the prisoner would not share a confidential relationship, and who was required to report any inculpatory statements from the prisoner to the tribunal. *See* Memorandum from Gordon England, Sec'y of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, enclosure (1) ¶ C(3) (July 14, 2004), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf (requiring that the personal representative "shall not be a judge advocate"); *id.* enclosure (3) ¶ C(1) (ordering that the personal representative "shall explain to the detainee that no confidential relationship exists or may be formed between" them); *id.* enclosure (3) § D (directing the personal representative to tell prisoners, "None of the information you provide me shall be held in confidence and I may

allowed to see only "reasonably available" evidence, which did not include any of the classified evidence against him. Having never seen the witness's statements, the detainee could not seek to controvert them on the grounds that they were untrustworthy hearsay, or even that they were derived from abuse or torture. In *Boumediene*, the Supreme Court rejected the Bush Administration's argument that these procedures afforded prisoners at Guantanamo adequate process to assure that they were being properly detained.[49]

The procedures in place to determine the status of the Bagram prisoners were even less adequate than the procedures applied at Guantanamo. In fact, no status hearings were held at all until an undisclosed date in 2007, when the Bagram detainees were first called before an Enemy Combatant Review Board (ECRB), now known as the Unlawful Enemy Combatant Review Board (UECRB).[50] The government has kept the implementing guidance for the UECRBs classified, but we know that they resemble the Guantanamo CSRTs in that three military officers determine the detainee's status, relying at least in part on classified information that might not have been made available to the detainee.[51] The detainee is informed only of the "general basis of his detention"[52] and, until recently, has been entitled to make only a written statement in response to allegations that he is an unlawful enemy combatant. In April 2008, Bagram prisoners were allowed for the first time to appear before the board in person.[53] No lawyers are allowed to participate in the hearing, and witnesses may be called only if they are "reasonably available, . . . provided that such interviews would not affect combat, intelligence gathering, law enforcement, or support operations."[54]

In the wake of a district court holding that these procedures do not adequately afford the Bagram detainees an opportunity to rebut the

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be obligated to divulge it at the hearing."). For an example of the dysfunctional relationship of a "personal representative" and a prisoner, see Marc Falkoff, *This Is to Whom It May Concern: A Guantanamo Narrative*, 1 DEPAUL J. SOC. JUST. 153, 160–62 (2008), *reprinted in* THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION AND ABUSE (Marjorie Cohn ed., forthcoming 2010).

49. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2260 (2008) (noting that the review of CSRT proceedings by the appellate court in order to assure that these procedures were followed "cannot cure all defects in the earlier proceedings").

50. *See* AMNESTY REPORT, *supra* note 22, at 18.

51. *See* Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at 9, Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C 2009) (No. 1:06-cv-01669).

52. *Id.* at 8.

53. *See* Declaration of Colonel Charles A. Tennison ¶ 13, Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:06-cv-01669) [hereinafter Tennison Declaration].

54. *Id.* ¶ 12.

evidence against them,[55] the Obama Administration announced that "enhanced detainee review procedures" would henceforth be used at Bagram.[56] These new procedures—which include timelier notice of the basis of internment, an unclassified summary of the specific facts supporting the internment, an opportunity to appear in person before the UECRB, and the assistance of a personal representative[57]—are of course an improvement over the minimalist process in place during the Bush Administration. But they are in fact no more protective than the procedures that the Court has already found inadequate in the Guantanamo context.

C. Habeas Corpus at Bagram: The Legislative, Litigation, and Political Background

We would not now be asking whether habeas corpus extends to Bagram were it not for the successful litigation effort to establish that the writ is operative at Guantanamo. That effort began in early 2002, just months after Guantanamo opened as a "war on terror" detention center. Habeas petitions were filed in federal court for a handful of prisoners, including British and Kuwaiti citizens. These petitions were dismissed by the district court, which concluded that it did not have statutory jurisdiction over habeas applications filed by noncitizens who were being detained in non-U.S. territories.[58] The court of appeals affirmed this dismissal.[59] In June 2004, however, the Supreme Court held in *Rasul v. Bush* that the habeas corpus statute did in fact provide the courts with jurisdiction to hear the habeas petitions from Guantanamo prisoners.[60] "Petitioners contend that they are being held in federal custody in violation of the laws of the United States,"

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55. U.S. District Court Judge John D. Bates, reviewing the procedures used by the UECRBs for the habeas petitioners appearing before him, noted in April 2009 that the

> [d]etainees cannot even *speak* for themselves; they are only permitted to submit a written statement. But in submitting that statement, detainees do not know what evidence the United States relies upon to justify an "enemy combatant" designation—so they lack a meaningful opportunity to rebut that evidence. . . . And, unlike the CSRT process, Bagram detainees receive no review beyond the UECRB itself.

Maqaleh v. Gates, 604 F. Supp. 2d 205, 227 (D.D.C. 2009).

56. *See* Letter from Philip Carter, Deputy Assistant Sec'y of Def. for Detainee Policy, to Senator Carl Levin 1 (July 14, 2009) (revealing that new UECRB procedures for Bagram were approved on July 2, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/09/addendum.pdf (last visited Mar. 23, 2010).

57. *Id.* add. at 2–4 (Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan).

58. *See* Rasul v. Bush, 215 F. Supp. 2d 55, 56 (D.D.C. 2002).

59. *See* Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003), *aff'g* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002).

60. *See generally* Rasul v. Bush, 542 U.S. 466 (2004) (discussing 28 U.S.C. § 2241 (2006)).

the Court said, and the habeas statute, "by its terms, requires nothing more."[61]

The government's response to *Rasul*, once the cases were remanded to the district court and more habeas petitions were filed, was to again seek dismissal of the suits. The government's argument was that, although the courts had jurisdiction to decide whether a petitioner's detention was "in violation of the Constitution or laws or treaties of the United States," the Guantanamo petitioners *possessed* no constitutional rights that *could* be violated, and that therefore, as a matter of law, the writ could not issue in any of their cases. Two district court judges issued disparate rulings on this issue, leading to an appeal in the case that the petitioners lost and an interlocutory appeal in the case that the prisoners won.[62] While this appeal was pending, Congress passed the Detainee Treatment Act of 2005 (DTA),[63] which appeared to strip the federal courts of jurisdiction over all Guantanamo habeas cases.

In *Hamdan v. Rumsfeld*, however, the Supreme Court again addressed the role of the courts at Guantanamo and held that a fair reading of the DTA—in conjunction with a presumption against statutes with retroactive effect—indicated that Congress had not intended to strip federal courts of habeas jurisdiction over *pending* Guantanamo petitions.[64] In the wake of *Hamdan*, Congress acted again by passing the Military Commissions Act of 2006 (MCA),[65] which clearly sought to strip the jurisdiction of the federal courts to hear habeas petitions from any Guantanamo prisoner, regardless of when the petition was filed.[66] Passage of the MCA set the stage for yet another return to the Supreme Court.

The question before the Court in *Boumediene v. Bush* was whether the Constitution itself required the federal courts to be open to habeas

61. *Id.* at 483–84.

62. *Compare* Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (granting a government motion to dismiss habeas petitions), *with In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) (denying a government motion to dismiss petitions).

63. Pub. L. No. 109-148, 119 Stat. 2742 (codified as amended in scattered sections of 10 U.S.C. and 42 U.S.C.).

64. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 576–84 (2006).

65. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

66. It is indisputable that Congress passed the MCA in response to the Court's decision in *Hamdan*. As the Court observed in *Boumediene v. Bush*, "If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases." Boumediene v. Bush, 128 S. Ct. 2229, 2243 (2008).

petitions from the Guantanamo prisoners.[67] Writing for the Court, Justice Kennedy held on constitutional grounds that the writ did extend to Guantanamo and that the federal courts had jurisdiction to hear the cases. In his opinion, he emphasized that "practical" considerations—and not "formalism"—were the key to determining whether the Suspension Clause's protection of habeas applied extraterritorially.[68] In assessing whether it would be impracticable and anomalous to respect the writ extraterritorially, Justice Kennedy noted that the courts were to consider "at least" "the citizenship and [the] status of the detainee," the "nature of the sites" of capture and detention, and "the practical obstacles inherent in resolving the [petitioner's] entitlement to the writ."[69] This approach was in line with his concurring opinion in *United States v. Verdugo-Urquidez*, about which we will have more to say below.[70] In addition, rather than remand to the lower courts in order to allow them to apply the new multifactor balancing test, the Court held that the prisoners at Guantanamo could invoke the writ.[71]

The *Boumediene* decision, of course, was essential to the hopes of Bagram detainees who were likewise petitioning for their day in court. In contesting the courts' habeas jurisdiction, the Bush Administration had made the same legal arguments for Bagram that it had long made for Guantanamo: that, as noncitizens detained outside the sovereign United States and without any significant voluntary ties to the United States, the detainees were not entitled to seek the writ. Indeed, in their arguments against extending the writ to Guantanamo detainees, the Bush Administration had argued that it would be "arbitrary" to distinguish between

> aliens held at a facility, such as the Bagram Air Force Base in Afghanistan, which is controlled by the U.S. military and located outside the sovereign territory of the United States, and aliens held at a facility, such as the Guantanamo Naval Base in Cuba, which is controlled by the U.S. military and located outside the sovereign territory of the United States . . . .[72]

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67. More particularly, the question was whether by passing the MCA Congress had effectively suspended the writ of habeas corpus in contravention of the Suspension Clause. *See* U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

68. *Boumediene*, 128 S. Ct. at 2258.

69. *Id.* at 2259.

70. *See infra* notes 135–142 and accompanying text (discussing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).

71. *Boumediene*, 128 S. Ct. at 2262–63.

72. *See* Brief for Respondents at 56, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

After losing the *Boumediene* case, however, the government made an about-face and sought to distinguish the legal status of Guantanamo from Bagram. In the district court, government lawyers argued that the Supreme Court's decision in *Boumediene*

> was predicated to a significant extent on the unique status of Guantanamo Bay; the United States has exercised what the Court described as complete jurisdiction and control over Guantanamo Bay for over a century. That exercise of jurisdiction and the distance of Guantanamo Bay from a zone of active hostilities, according to the Court, warranted the extraterritorial application of the Suspension Clause there.
>
> The United States enjoys no similarly unbounded and indefinite control of Bagram Airfield. The U.S. military presence at Bagram is a transient wartime necessity subject to the host nation's sovereignty, and Bagram is, indeed, in an active war zone.[73]

Few were surprised that the Bush Administration would make such an argument, but many were shocked that President Obama would soon adopt the same legal position. In *Maqaleh v. Gates*, in fact, the district court judge "invited" government lawyers to "refine their position" in the Bagram habeas litigation in light of the new Administration and President Obama's issuance of an "Executive Order indicating significant changes to the government's approach to the detention, and review of detention, of individuals held at Guantanamo Bay."[74] The response from the Obama Administration was that it did not want to modify its position.[75]

Whether habeas jurisdiction will extend to the BTIF and its detainees will, therefore, be decided by the courts. More generally, whether certain overseas prisons may operate entirely unsupervised by the Judicial Branch of government will depend on how federal judges apply Justice Kennedy's multifactor balancing test from *Boumediene*, and

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73. Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at 1–2, Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:06-cv-01669).

74. Order at 2, Maqaleh v. Gates, Nos. 06-CV-1669 (D.D.C. Jan. 22, 2009). The Executive Order to which Judge Bates refers is Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

75. Government's Response to This Court's Order of January 22, 2009 at 2, Maqaleh v. Gates, No. 06-cv-1669 (D.D.C. Feb. 20, 2009). In March 2009, President Obama responded to a journalist's question about U.S. detention policy by stating that he had sent a "very clear edict" to his Administration that "we ultimately provide anybody that we're detaining an opportunity through habeas corpus to answer to charges." Helene Cooper & Sheryl Gay Stolberg, *Obama Ponders Outreach to Elements of Taliban*, N.Y. TIMES, Mar. 8, 2009, at A1. This pronouncement seemed at odds with the Administration's legal position in the Bagram habeas cases. According to the *Times*, "Aides later said Mr. Obama did not mean to suggest that everybody held by American forces would be granted habeas corpus or the right to challenge their detention." *Id.*

whether they recognize its animating theory of the extraterritorial reach of the Constitution.

III. THE LIMITED GOVERNMENT PRINCIPLE AND *BOUMEDIENE*

Boumediene required the U.S. Supreme Court to find common threads in the complex and contradictory jurisprudence on the application of the Constitution outside U.S. territory. Under Justice Kennedy's leadership, the *Boumediene* majority adopted a self-styled "functional approach" that drew on several competing and overlapping theories of extraterritoriality.[76] In selecting the factors for its functional approach and in the emphasis it gave each factor in its analysis, the Court appeared to rely heavily on some theories while relegating others to secondary status. In particular, the limited government principle—that all government power, no matter where or against whom it is exercised, is constrained by the Constitution—undergirds and gives force to the *Boumediene* approach.

A. Theoretical Approaches to an Extraterritorial Constitution

The classically vexing question of how the Constitution should apply outside U.S. territory has attracted a vast wave of scholarly interest in the years following 9/11.[77] What were once regarded as exotic issues concerning the nuances of governance in remote U.S. territories became urgent matters of national security in the wake of the U.S. government's global detention scheme and the decision to operate long-term prisons at Guantanamo and Bagram.[78] In their purest form, abstracted from the textures of particular contexts and cases, extraterritoriality theories fall into two broad categories: *membership* approaches, which contend that government power is limited only as it applies within U.S. territory or against a privileged group of persons with some connection to U.S. society, and *globalist* approaches, which

76. *Boumediene*, 128 S. Ct. at 2258.

77. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009).

78. Globalization has, of course, played a role in bringing these issues to the fore. Other nations have also struggled with how domestic courts should limit the exercise of their governments' actions beyond borders. *See* Chimène I. Keitner, *Rights Beyond Borders* (Univ. of Cal., Hastings Coll. of Law, Working Draft, 2009), *available at* http://ssrn.com/abstract=1480886 (identifying commonalities in approaches to extraterritoriality among courts in the United States, Canada, and the United Kingdom).

contend that the Constitution limits, in some fashion, the exercise of government power everywhere and against everyone.[79]

Important differences between membership and globalist approaches are often obscured, however, because the academic discussion almost always focuses on which rights are afforded to which persons in which locations. The debate as it is usually framed looks like this: globalists argue for the universal applicability of constitutional rights in some form, while membership adherents argue for limiting the applicability of rights to privileged persons. The limited government approach, while a species of globalism, illuminates general aspects of extraterritoriality that are often ignored by such rights-based, who-what-where inquiries.

Membership approaches begin with the view of the Constitution as a compact between the government and the people.[80] Noncitizens, particularly those located outside U.S. territory, are not a party to this compact and therefore possess limited, if any, entitlement to its protections. Two strands, *territorialist* and *status* theories, co-exist uncomfortably within the broader membership approach. A strict territorialist theory would hold that the Constitution applies only within U.S. territory. This view was most clearly expressed, if perhaps only in dicta, by the Supreme Court in a nineteenth century case, *In re Ross*: "The Constitution can have no operation in another country."[81] A strong form of status theory would extend protections only to U.S. citizens. Neither strong form has prevailed in the doctrine, of course, since both noncitizen permanent residents and U.S. citizens abroad

79. *See* Kent, *supra* note 77, at 468 (generally describing "globalists" as "argu[ing] that Americans would never have tolerated that the constitutive document establishing their government deem a person entirely defenseless against government power simply because of one's territorial location, in the United States or abroad, or personal status, be it citizen or alien").

80. *See, e.g.*, Keitner, *supra* note 78, at 8–10; Kent, *supra* note 77, at 489–90; Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 6–7 (2004); Eric. A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 40–41; Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2046–47 (2005).

81. *In re* Ross, 140 U.S. 453, 464 (1891). The petitioner in *Ross* was a seaman on an American merchant vessel who was charged with the murder of a fellow crew member aboard the ship in a harbor in Japan. The petitioner was tried and sentenced to death by a court consisting of the U.S. Consul General and four U.S. citizens (although his sentence was later commuted and he was imprisoned in the United States). The petitioner argued that this process deprived him of the right to a grand jury indictment and jury trial. *Id.* at 458. Relying largely on the rationale that the Constitution did not apply outside U.S. territory, the Court rejected his appeal. *Id.* at 480; *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 204–06 (2002) (discussing *Ross*).

have been held unequivocally to be protected by the Constitution.[82] Professor Gerald Neuman has advocated a softer form of membership theory, *mutuality-of-obligation*, which suggests that the government must extend constitutional protections to noncitizens abroad when it asserts a corresponding obligation of the noncitizen to obey legitimate U.S. authority.[83] Generally speaking, membership approaches have been influential in the extraterritoriality jurisprudence, but as we discuss below, *Boumediene* substantially diminishes their importance.

Globalist approaches, in contrast, focus on the Constitution as reflecting the creation of a government whose powers are limited no matter where or against whom they are exercised. These limits derive from the fact that the government's powers are enumerated, rather than plenary, and that these limitations reflect the values and aspirations of the national community as embodied in the Constitution.[84] The strongest form of globalism is a pure *universalist* theory, contending that all constitutional rights extend to everyone everywhere.[85] A softer, pragmatic approach, also referred to as "global due process," contends that certain rights have narrower or nonexistent applicability abroad, depending on the circumstances.[86] The majority approach in *Boumediene* is in many respects a global due process one.[87]

A *limited government* approach is a unique species of globalism that emphasizes the important distinction between limitations and rights, both of which operate to constrain the exercise of government power,

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82. *See* Reid v. Covert, 354 U.S. 1, 12 (1957) (Black, J., plurality opinion) ("The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases.").

83. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 99–100 (1996). The existence of the obligation creates a presumption against which the government may make "specific textual or other arguments [that] may exceptionally demonstrate that a particular right is either reserved to citizens or geographically limited." *Id.* at 99.

84. Chimène Keitner refers to globalist approaches as "Constitution as Conscience." *See* Keitner, *supra* note 78, at 10–11.

85. Many scholars of foreign affairs have argued that the Constitution should be interpreted as extending the same rights—possibly in some more or less diluted form—to noncitizens abroad as it does to U.S. citizens. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 305–07 (2d ed. 1996); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 370–72 (2003); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 875–76 (1989); *cf.* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1350 (2004) (stating that "no human being is without protection under international law and the types of protection are many"). This "universalist" approach is sometimes justified on the ground that the Framers believed in natural rights and that they created a government of limited powers. *See, e.g.*, HENKIN, *supra*, at 306; Lobel, *supra*, at 875–76; *see also* NEUMAN, *supra* note 83, at 5–6 (describing this approach as "universalist").

86. *See* NEUMAN, *supra* note 83, at 113–17.

87. *See* Neuman, *supra* note 77, at 273.

but in different ways.[88] Limitations describe the scope of the power being exercised, while rights describe the particular entitlements that shield the individual from government action. A searching inquiry into the form and scope of the government's exercise of power should, under a limited government approach, precede the analysis of whether the person may invoke rights. At the initial, nonrights stage, courts should ask whether the government action is within the scope of the power granted to it by the Constitution; in other words, the action should have a rational connection to an enumerated power. In addition, courts should consider whether the action is constrained by fundamental limits on the exercise of all government power.[89] Only then should the courts look to the rights that individuals may possess, which further limit the scope of the government's power against them.

Naturally, advocates of a membership approach criticize globalists for what they view as an overly expansive understanding of the *demos*.[90] J. Andrew Kent has argued that little evidence exists in the historical materials for an originalist, rights-based globalism.[91] Moreover, unvarnished universalism implies some pretty absurd results: imagine, for example, that the Fourth Amendment requires U.S. Special Forces to knock and announce before entering a terrorist's Pakistani cave.[92] A global due process approach properly takes account of such difficulties, but it does not itself explain, by reference to founding era principles, why rights should be enforceable abroad, nor does it give courts guidance in weighing the importance of particular rights.[93]

A limited government approach, by contrast, has a strong originalist pedigree. Indeed, as Sanford Levinson has observed, the "central mantra of the founding generation" was that the Constitution established a "limited government of assigned powers."[94] In *Marbury v. Madison*, the Supreme Court declared that "the powers of the legisla-

88. *See* Robert Knowles & Marc D. Falkoff, *Toward a Limited Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 648 (2007).

89. *Id.* at 666–68.

90. *See* Posner, *supra* note 80, at 35–36.

91. *See* Kent, *supra* note 77, at 485–91. Kent also offers originalist evidence for the proposition that the government's foreign affairs powers, if not unlimited, ought to be less constrained than its domestic powers. *See id.* at 488–89. Although this is not the place to explore this topic, we assume that foreign affairs powers are limited, both by the fact of their enumeration and by other unexpressed principles. *See* Knowles & Falkoff, *supra* note 88, at 666–69.

92. *See* Wilson v. Arkansas, 514 U.S. 927, 931–34 (1995) (establishing that the Fourth Amendment requires police to "knock and announce" before entering a home with a search warrant).

93. *See* Knowles & Falkoff, *supra* note 88, at 661–64.

94. Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 708 (2006); *see also* Knowles & Falkoff, *supra* note 88, at 644–45 (discussing founding era views of limited government). The Constitution-as-compact view animating the membership approach was rejected by some early commentators.

ture are defined and limited."[95] Not only would the scope of the government's powers be limited by their enumeration, the founding generation believed, but the exercise of those powers would also be constrained by certain fundamental restrictions that are rooted in the very nature of a just government.[96]

Because *Boumediene* appears to have enshrined globalism in American jurisprudence, it is important to recognize the form of globalism that now most prominently informs the doctrine. A limited government approach stands out as the best candidate because of its roots in founding era principles and, as we discuss below, its persistent presence in extraterritoriality jurisprudence, including *Boumediene.*

B. The Extraterritorial Constitution, From the Insular Cases *to* Boumediene

The jurisprudence on the extraterritorial application of the Constitution can be understood as a series of arguments about the fundamental nature and limits of government power. On the surface at least, *Boumediene* marked the triumph of a particular approach: the "impracticable and anomalous" test, first articulated in 1957 by the younger Justice Harlan in a concurring opinion of *Reid v. Covert.*[97] In 1990, Justice Kennedy picked up on the test in his own concurring opinion in *Verdugo-Urquidez,*[98] and he ultimately applied it on behalf of the majority in *Boumediene.*[99] This inquiry—which looks to the particular circumstances of the case to determine whether the application of a particular constitutional provision is "impracticable and anomalous"—is a species of globalism. However, as we have argued elsewhere, this now-reigning approach derives its power and authority not from its pragmatism, malleability, and sensitivity to policy, but from the principle of limited government.[100]

> It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of *contract*, and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 340, at 309 (Boston, Hilliard, Gray & Co. 1833).

95. Marbury v. Madison, 5 U.S. 137, 176 (1803).

96. *See* Knowles & Falkoff, *supra* note 88, at 668–69.

97. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

98. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

99. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2255–56 (2008).

100. *See* Knowles & Falkoff, *supra* note 88, at 656–67.

As may be discerned from the *Boumediene* decision itself, Justice Kennedy's understanding of the extraterritorial application of the Constitution has its roots in the so-called *Insular Cases*, a series of decisions reached at the turn of the twentieth century following the Spanish-American War.[101] These cases each addressed whether particular constitutional provisions applied to litigants in newly acquired U.S. territories, including Puerto Rico, the Philippines, and Hawaii.[102] Although none of the *Insular Cases* directly addressed extraterritoriality per se, their reasoning has long influenced the Supreme Court's understanding of the reach of the Constitution and the limits of federal power outside of the territorial United States.[103]

Among the *Insular Cases*, *Downes v. Bidwell* contains the Court's fullest exploration of the principles governing extraterritoriality.[104] In *Downes*, the Court held that Congress could tax imports from Puerto Rico despite the Constitution's explicit prohibition on taxing imports from any state, and despite the Court's earlier holding that Puerto Rico was "part of the United States."[105] Justice Brown announced the judgment of the Court and seemed to suggest that Congress could choose whether and how to extend the Constitution to the territories.[106] But Justice Brown's opinion had a relatively minor impact. Instead, it was Justice White's concurring opinion, and the doctrine of territorial incorporation that it articulated, that was applied in the other *Insular Cases* and that shaped the extraterritoriality jurispru-

101. *See Boumediene*, 128 S. Ct. at 2253–55.

102. *See* Dorr v. United States, 195 U.S. 138, 139 (1904) (Philippines); Hawaii v. Mankichi, 190 U.S. 197, 211, 217 (1903) (Hawaii); De Lima v. Bidwell, 182 U.S. 1, 1–2, 200 (1901) (Puerto Rico); Goetze v. United States, 182 U.S. 221, 221–22 (1901) (Puerto Rico and Hawaii); Dooley v. United States (*Dooley I*), 182 U.S. 222, 235–36 (1901); Armstrong v. United States, 182 U.S. 243, 244 (1901); Downes v. Bidwell, 182 U.S. 244 (1901) (Puerto Rico); Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901); Dooley v. United States (*Dooley II*), 183 U.S. 151, 157 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176, 177 (1901).

103. Indeed, the *Insular Cases* were discussed by the *Boumediene* majority in some detail. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2253–55 (2008). *See generally* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (discussing the importance of the *Insular Cases*).

104. *See* Downes v. Bidwell, 182 U.S. 244 (1901).

105. *See Downes*, 182 U.S. at 250–51. The Court had concluded that Puerto Rico was part of the United States in *Dooley I*, 182 U.S. at 235.

106. *See Downes*, 182 U.S. at 278–79. Justice Brown was inconsistent on this point. Later he also acknowledged that the Constitution contains certain "prohibitions [that] go to the very root of the power of Congress to act at all, irrespective of time or place." *Id.* at 277. In any event, this concept was explicitly rejected by the majority in *Boumediene*. *See* 128 S. Ct. at 2258–59 ("The 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.").

dence.[107] Under the commonly understood interpretation of the admittedly murky territorial incorporation doctrine, all constitutional rights apply in full to "incorporated" territories—apparently, those destined for statehood—while in so-called "unincorporated territories," only "fundamental" rights apply.[108]

Yet it is important to note that a clear majority, if not all, of the Justices in *Downes* endorsed the concept that the Constitution limits the exercise of government power, at least in *some* fashion, no matter where or against whom the power is exercised. In fact, *Downes* is best understood as a colloquy on the appropriate application of a limited government approach.[109] Justice Fuller's dissenting opinion, joined by three other Justices, demanded strict adherence to the limited government principle.[110] Yet even Justice Brown, who took the most expansive view of federal power, acknowledged the existence of "prohibitions [that] go to the very root of the power of Congress to act at all, irrespective of time or place," mentioning as examples the provisions forbidding ex post facto laws, titles of nobility, and even the First Amendment.[111]

Most important, however, was Justice White's concurrence, which advanced the territorial incorporation doctrine within a limited government frame.[112] "The government of the United States," he explained, "was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication

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107. *See Downes*, 182 U.S. at 288–89 (White, J., concurring). Justice Gray declared that he agreed "in substance" with Justice White, but emphasized the fact that the case involved a temporary government. *Id.* at 345–46 (Gray, J., concurring).

108. *See id.* at 291 (White, J., concurring). The conventional understanding is that "fundamental" rights apply in unincorporated territories. *See* NEUMAN, *supra* note 83, at 87. However, we believe that this description can be misleading because Justice White did not speak in terms of rights, but in terms of limits on government power. *See* Roosevelt, *supra* note 80, at 2034–35 & n.89.

109. This is the understanding of the Court in *Boumediene*:

> As the Court later made clear, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico . . . , but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."

Boumediene, 128 S. Ct. at 2254–55 (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).

110. *See* Downes v. Bidwell, 182 U.S. 244, 359 (1901) (Fuller, C.J., dissenting) ("The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of question.").

111. *Id.* at 277. In *Lamont v. Woods*, the Second Circuit concluded that an overseas religious program violated the Establishment Clause, relying on *Downes* for the proposition that "the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place." 948 F.2d 825, 834–35 (2d Cir. 1991).

112. *See Downes*, 182 U.S. at 288–89 (White, J., concurring).

from that instrument."[113] In somewhat obscure language, Justice White recognized at least three ways in which the Constitution limits government power, even in "unincorporated" territories. First, there are "regulations as to the form and manner in which a conceded power may be exercised."[114] Second, there exist "inherent, although unexpressed, principles which are the basis of all free government [and] cannot be with impunity transcended . . . [,] restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[115] Finally, there are in the Constitution's text "general prohibitions . . . in favor of the liberty and property of the citizen . . . which are an absolute denial of all authority under any circumstances or conditions to do particular acts," and which are "limitations . . . [that] cannot be under any circumstances transcended, because of the complete absence of power."[116] Of these three government-limiting types—(1) form and manner regulations, (2) unexpressed fundamental restrictions, and (3) general textual prohibitions—only the third potentially describes *rights* as the term is now usually employed in constitutional jurisprudence.[117]

It is ironic that such a rich exploration of limited government can be found in a decision that was arguably driven by political considerations, recognizing expansive government power abroad and granting constitutional status to colonialism at least in part on racist grounds.[118] Nonetheless, the *Downes* opinion's emphasis on limited government yields useful insights for making sense of *Boumediene*. Importantly, *Downes* suggests that the powers of government must be analyzed in two steps: First, has the government been authorized by the Constitu-

113. *Id.* at 288 (White, J., concurring); *see also id.* at 297–98 (White, J., concurring) (asserting that "those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status").

114. *Id.* at 294 (White, J., concurring).

115. *Id.* at 291 (White, J., concurring).

116. *Id.* at 294–95 (White, J., concurring).

117. Unexpressed prohibitions, of course, may be described as natural rights. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–71 (2004); Knowles & Falkoff, *supra* note 88, at 646–47.

118. *See* Neuman, *supra* note 80, at 11 (criticizing the "frank racism and enthusiastic colonialism" in *Downes*); *cf. Downes*, 182 U.S. at 306 (White, J., concurring) (concluding that the United States had a right, as a sovereign nation on par with the European powers, to "protect the birthright of its own citizens" by withholding citizenship from people in the acquired territories that belonged to "an uncivilized race" and could be "absolutely unfit to receive it"); GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 137 (2004) (critiquing the territorial incorporation doctrine as confusing and ill-founded). For an argument that the territorial incorporation doctrine served primarily to ensure that the United States could relinquish control of those territories less conducive to permanent U.S. governance, see generally Burnett, *supra* note 103.

tion to act in the form and manner that it has? Second, if the government has been authorized to act, do expressed or unexpressed restrictions further constrain the exercise of its power?[119] After these inquiries, a *third* step involves asking whether the extraterritorial context requires that the content of expressed rights be modified for pragmatic reasons.[120]

The conversation about limited government that began in *Downes* continued in later cases, even though status and territoriality approaches sometimes appeared to predominate. In *Johnson v. Eisentrager*, the Court held that habeas jurisdiction did not extend to petitions by German nationals who had been captured by U.S. forces in China and who had been accused of aiding the Japanese military in violation of Germany's surrender terms.[121] The prisoners were tried, convicted, and sentenced by a congressionally authorized military commission, then transferred to Landsberg Prison, a U.S. military base in occupied Germany. The *Eisentrager* majority appeared at first to dismiss the petitions on almost purely territoriality and status grounds: enemy aliens captured and held abroad simply lack access to the writ.[122] But as Justice Kennedy would later observe in *Boumediene*, the *Eisentrager* Court's analysis was actually more complex.[123] The Court went on to consider other factors before announcing its holding; the defendants were admitted enemy aliens tried and convicted by military commission, and numerous practical obstacles would have made the operation of habeas exceedingly difficult in a large overseas occupied territory.[124] These latter considerations are examples of the government-limiting types discussed by Justice White

119. Justice White's limited government approach to the extraterritorial reach of the Constitution was explicitly adopted by the Court in *Dorr v. United States*, a case that addressed the right to trial by jury in the unincorporated territory of the Philippines. *See* Dorr v. United States, 195 U.S. 138, 140 (1904). "It may be regarded as settled," the Court explained, "that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government." *Id.* at 140.

120. Christina Duffy Burnett recently offered an interpretation of the *Insular Cases* emphasizing the distinction between the second and third steps. *See* Burnett, *Convenient Constitution*, *supra* note 77, at 980, 1031–33.

121. *See* Johnson v. Eisentrager, 339 U.S. 763, 765–67 (1950).

122. *See id.* at 768. The Court continued, "[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. Though Justice Jackson in fact considered the substance of the Germans' claims, he rejected their argument that the Fifth Amendment "confer[red] a 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 785.

123. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2257–58 (2008).

124. *See id.* at 2257–61.

in *Downes*: the *Eisentrager* Court explored the form and manner in which the government had denied habeas to the prisoners and, possibly, whether the procedures afforded to them breached some unexpressed principles that limited all government power.

The reduced importance of territoriality became clear in *Reid v. Covert*, a 1956 decision holding that the right to a jury trial extended to servicemen's civilian widows who were U.S. citizens located overseas and who had been accused of capital crimes.[125] Justice Black's plurality opinion established that American citizen civilians may invoke full constitutional protections against their government anywhere in the world, reinforcing and expanding, in many respects, the limited government theme of *Downes*.[126] *Reid* "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[127] Moreover, Justice Black stated, "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[128]

Justices Harlan and Frankfurter concurred in the *Reid* result, but their separate opinions offered a more nuanced gloss on extraterritoriality. Justice Harlan's approach, ultimately adopted by the full Court in *Boumediene*, articulated a two-step analysis. First, he addressed the threshold question of whether the government power being invoked (in this case, Congress's Article I power to regulate the armed forces) bore a rational connection to its exercise (the trial, conviction, and imposition of the death penalty by court martial without a jury trial on civilian spouses of service members who were located abroad).[129] This first step is a question of limited government. The second inquiry, whether rights limit the legitimate exercise of that power, "can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[130] Although Congress's

125. *See* Reid v. Covert, 354 U.S. 1, 32–33, 40–41 (1957).

126. *See id.* at 8–9 & n.10. Justice Black, who believed in the wholesale incorporation of the Bill of Rights into the Fourteenth Amendment, clearly disliked the incorporation doctrine. *See* NEUMAN, *supra* note 83, at 91.

127. *Reid*, 354 U.S. at 5.

128. *Id.* at 5–6. In this respect, Justice Black's opinion was strikingly similar to that of the D.C. Circuit opinion that was eventually overruled in *Eisentrager*. *See* Eisentrager v. Forrestal, 174 F.2d 961, 963 (D.C. Cir. 1949).

129. *See Reid*, 354 U.S. at 70 (Harlan, J., concurring).

130. *Id.* at 75 (Harlan, J., concurring). Justice Kennedy quoted this language in his *Verdugo-Urquidez* concurrence. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). Justice Frankfurter's concurrence also emphasized the limited government principle but differed from Justice Harlan in that he did not separate the limited government inquiry from the rights inquiry, but instead balanced the two together. *Compare Reid*, 354 U.S.

power extended to the court martial in the case, Harlan concluded that the defendants' Fifth and Sixth Amendment rights to a grand jury and jury trial in Article III courts prohibited the government from exercising this power.[131]

In a series of majority opinions in 1960, the Court extended the *Reid* holding to require a jury trial in civilian court for service members' dependents and civilian employees of the military, even for noncapital crimes.[132] In *Kinsella*, the Court acknowledged Article III and the Fifth and Sixth Amendments as sources of the defendant's rights, but focused nearly all of its attention on the scope of congressional power and whether it included courts martial for civilian dependents.[133] Observing no practical differences from *Reid*, the Court rejected the government's contention that providing access to Article III courts would have a critical impact on military discipline and declined to engage in "fresh balancing" of the government's asserted power against the defendant's rights. The scope of the government's power alone determined the issue: due process could not, the Court held, expand government power where it did not exist.[134]

Thirty years later, the Court decided *Verdugo-Urquidez*, a decision appearing to adopt a membership approach that was rooted largely in the status of the person against whom government power was exercised. The Court declined to apply the Fourth Amendment's warrant requirement to the seizure by U.S. agents of property located in Mexico and owned by a Mexican national.[135] In his opinion for the Court, Chief Justice Rehnquist concluded that the reference to "the people"

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at 53 (Frankfurter, J., concurring), *with id.* at 66 (Harlan, J., concurring) ("The powers of Congress . . . are constitutionally circumscribed. Under the Constitution Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers.").

131. *See Reid*, 354 U.S. at 75 (Harlan, J., concurring).

132. As Gerald Neuman has observed, the Supreme Court itself seems to have disregarded the fact that the *Reid* plurality reasoning was adopted by the majority in later cases involving U.S. citizens abroad. *See* Neuman, *supra* note 80, at 12–13 & n.64; *see also* Kinsella v. United States, 361 U.S. 234, 249 (1960) (extending *Reid v. Covert* to dependents of service personnel accused of noncapital crimes); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (extending the *Reid* holding to civilian employees of the armed forces accused of capital crimes); McElroy v. Guagliardo, 361 U.S. 281, 284 (1960) (extending the holding to civilian employees of the armed forces accused of noncapital crimes).

133. *See Kinsella*, 361 U.S. at 249.

134. *See id.* at 246 ("Due process cannot create or enlarge power. . . . It deals neither with power nor with jurisdiction, but with their exercise." (citations omitted)). The Court discussed and cited historical materials explaining that the Necessary and Proper Clause did not expand the scope of powers that were delimited by the fact of their enumeration. *See id.* at 247–48.

135. *See Verdugo-Urquidez*, 494 U.S. at 274–75.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

in the Amendment limits its application to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[136] Chief Justice Rehnquist's opinion offered a constricted interpretation of *Reid* that rejected the significance of the broad limited government, even universalist, principles articulated in Justice Black's plurality, insisting that the controlling aspect was the narrower ground that the defendants were U.S. citizens.[137]

However, Justice Kennedy, who had provided the fifth vote for the majority, wrote separately to provide "some explanation of [his] views," which, despite his assurances to the contrary, departed significantly from Chief Justice Rehnquist's.[138] Justice Kennedy adhered to a globalist approach, rather than a membership approach, to extraterritoriality. He declined to accept sweeping generalizations about the inapplicability of the Constitution to noncitizens abroad. Instead, specifically relying on and quoting from Justice Harlan's *Reid* concurrence, Justice Kennedy focused on the particular "conditions and considerations" of particular cases, inquiring whether the application of certain constitutional provisions in certain circumstances would be "impracticable and anomalous."[139] The "first step," he wrote, was the principle that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."[140] He then quoted extensively from Justice Harlan's concurrence and used identical language to evaluate whether the application of the Fourth Amendment to this presumably valid exercise of government power—the extraterritorial search of Verdugo-Urquidez's home—would be "impracticable and anomalous."[141]

As the last Supreme Court decision addressing extraterritoriality prior to 9/11, *Verdugo-Urquidez* led to the widespread belief that the membership approach shaped the doctrine, obscuring the surprisingly dominant strain of globalist, limited government thinking that runs

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but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The defendant in *Verdugo-Urquidez* was detained in a San Diego prison while Drug Enforcement Agency agents searched his home in Mexico, where they obtained evidence that they then sought to use against the defendant in his trial in the United States. *See Verdugo-Urquidez*, 494 U.S. at 274–75.

136. *Verdugo-Urquidez*, 494 U.S. at 265.

137. *See id.*; Neuman, *supra* note 80, at 12–13 & n.64.

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

139. *Id.* at 277–78 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 74 (Harlan, J., concurring)).

140. *Id.* at 277.

141. *Id.* at 277–78 (Kennedy, J., concurring).

through the full range of these extraterritoriality cases and that animates even the "global due process" approach advocated by Justice Kennedy.[142] The existence of this limited government strain set the stage for the Court's rejection of the membership approach in *Boumediene*.

C. Boumediene *As a Limited Government Decision*

Boumediene was a landmark case in several respects. For the first time, the Court invalidated a federal statute that stripped jurisdiction from the federal courts; also for the first time, the Court held that an alternative review mechanism established by Congress violated the Suspension Clause.[143] The government did not suspend the writ but argued instead that it did not exist for aliens at Guantanamo.[144] The Court rejected this contention, confirming that habeas delimits the scope of Congress's power even when exercised outside the sovereign territory of the United States. The Suspension Clause can be understood as both providing a right and, as the Court put it, "an indispensable mechanism for monitoring the separation of powers."[145] The Court's approach emphasized not rights, but limitations. Commentary about *Boumediene* has focused almost exclusively on the pragmatic dimension of the majority's approach to extraterritorial detention.[146] But this focus—and the heated debate about whether it is appropriate to grant the detainee's particular rights—tends to obscure the theoretical foundations of the approach to extraterritoriality employed by the Court. At its core, *Boumediene* is best understood as relying on not a theory of rights or pragmatism, but a theory of limited government.

The Supreme Court in *Boumediene* struck down § 7 of the Military Commissions Act of 2006, which had purported to withdraw jurisdic-

142. Knowles & Falkoff, *supra* note 88, at 656–57.

143. *Boumediene*, 128 S. Ct. at 2240. For a discussion of *Boumediene*'s historical importance, see, for example, Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2009 SUP. CT. REV. 1, 1.

144. *Boumediene*, 128 S. Ct. at 2262 ("The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.").

145. *Boumediene*, 128 S. Ct. at 2259. For a discussion of these two dimensions of the Suspension Clause, see Stephen Vladeck, *The Suspension Clause As a Structural Right*, 62 U. MIAMI L. REV. 275, 302–03 (2009).

146. For scholarly analyses that emphasize the pragmatic nature of *Boumediene*, see Neuman, *supra* note 77; Burnett, *supra* note 77; David Jenkins, *Habeas Corpus and Extraterritorial Jurisdiction After* Boumediene*: Towards a Doctrine of "Effective Control" in the United States*, 9 HUM. RTS. L. REV. 306 (2009).

tion from federal courts to consider habeas corpus petitions from detainees at Guantanamo Bay Naval Base.[147] Justice Kennedy, writing for the majority of five, rejected the government's argument that it could deny habeas to the detainees because they were foreign nationals who were located outside the sovereign territory of the United States.[148] After an extensive survey of the geographical reach of habeas before 1787—treading much of the same ground covered in *Rasul*—the majority deemed the historical evidence "inconclusive," but rejected de jure sovereignty as the "touchstone" for the exercise of habeas jurisdiction.[149]

The lengthy discussion about the history of habeas served as a response to Justice Scalia's dissent, an originalist argument against jurisdiction.[150] The inconclusiveness of this debate allowed Justice Kennedy to expand on the views he had first articulated in his *Verdugo-Urquidez* concurrence.[151] In attempting to make sense of the obscure and difficult jurisprudence on the extraterritorial application of the Constitution, Justice Kennedy found "a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[152] To the profound questions before it, the Court adopted what it called a "functional approach," under which it would consider many factors, including "(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."[153]

The Court weighed these factors together to conclude that habeas "has full effect at Guantanamo Bay."[154] The first factor favored the petitioners because the CSRT process fell "well short of the procedures and adversarial mechanisms that would eliminate the need for

147. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

148. *See id.* at 2240, 2253.

149. *Id.* at 2252–53. For a discussion of the role three types of sovereignty—de jure, de facto, and practical—play in *Boumediene*, see Anthony Colangelo, *"De Facto Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623 (2009).

150. *See Boumediene*, 128 S. Ct. at 2303 (Scalia, J., dissenting). The debate between the majority and the dissenters over the meaning of the historical materials mirrors, in its inconclusiveness, the scholarly debates about the original meaning of the Constitution's allocation of foreign affairs powers. *See* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 94–99, 110 (2009).

151. *See supra* notes 138–142 and accompanying text.

152. *Boumediene*, 128 S. Ct. at 2258.

153. *Id.* at 2259.

154. *Id.* at 2262.

habeas corpus review."[155] With respect to the second factor, the Court distinguished Guantanamo from Landsberg Prison in *Eisentrager* on the ground that the United States maintained indefinite and absolute control over the base without having to answer to its allies.[156] With respect to the third factor, the majority emphasized that Guantanamo is a small geographic area located far from an active theater of war, that "friction with the host government" was not an issue given the totality of U.S. control, and that the government had failed to show that habeas would impair the military mission at the base.[157]

Although Kennedy's opinion explicitly eschews "formalism," it does draw on formal theories of the extraterritorial Constitution. Limited government is the star, but other approaches persist in minor roles. Territoriality, for example, remains significant. If the detainees were held within sovereign United States territory, the Court arguably need not have resorted to its functional approach at all. Territoriality also informs the Court's discussion of jurisdiction and control by the United States.[158] The status of the detainees, too, has some relevance.

However, *Boumediene* substantially reduced the importance of the membership theory that had animated Chief Justice Rehnquist's *Verdugo-Urquidez* majority opinion.[159] Had this membership approach governed exclusively, the detainees would have been held to lack habeas rights because, as noncitizens located abroad with no voluntary connection to U.S. society, they are among the least entitled to the Constitution's protections.[160] Nonetheless, as Gerald Neuman has observed, if one views habeas corpus as a right, then the Court "would seem to need some presumptive category of foreign nationals abroad

155. *Id.* at 2259–60.

156. *See id.* at 2260; *see also* Neuman, *supra* note 77, at 267.

157. *Boumediene*, 128 S. Ct. at 2261–62.

158. Anthony Colangelo has identified "de facto sovereignty" as lying at the core of the Court's application of the writ to Guantanamo: because the Guantanamo Lease provides the United States with complete jurisdiction and control over the base and its laws therefore apply exclusively, the writ runs. *See* Colangelo, *supra* note 149, at 626–27. Although this account explains a great deal about the result in *Boumediene*, it does not, in our view, fully explain why the Court would need to reach as far as it did beyond the lease and evaluate such factors as the military mission at the base, the amount of time the detainees had been in captivity, the detainees' citizenship status, their proximity to the battlefield, and other aspects of the situation seemingly unrelated to jurisdiction or control.

159. *See* Neuman, *supra* note 77, at 272 (concluding that "*Boumediene* provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez*"); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, 51.

160. Indeed, the D.C. Circuit relied, not unreasonably, on the *Verdugo-Urquidez* majority's membership approach in concluding that the detainees lacked constitutional rights. *See* Boumediene v. Bush, 476 F.3d 981, 991–92 (2007).

whose interests the Constitution protects in order to make a functionalist evaluation."[161] Perhaps the fact that the detainees were in U.S. custody allowed the Court to slightly expand the membership circle in order to accommodate them.[162] Indeed, one critic of the decision has argued that the hidden core of Justice Kennedy's *Boumediene* opinion is a "cosmopolitan theory" under which judges have a constitutional obligation to protect the rights of noncitizens.[163]

In addition to territoriality and membership principles, the Court can even be seen as drawing on a soft form of the mutuality-of-obligation theory that was advocated by Professor Neuman. This is a different way to interpret the Court's focus on the fact that the United States has exclusive jurisdiction at the base: because U.S. law is the only law applicable to the detainees and the sole source of the procedures and substantive standards under which their detention would be evaluated, the detainees are entitled to at least some protections provided by that same law. Of course, most detainees have not been charged with crimes under U.S. law, and they were taken to Guantanamo because it was believed—mistakenly, it turns out—to be a law-free zone. And although the government invokes the law of war as a basis for holding the detainees, it does not seek their obedience to its legitimate authority.[164]

It is not surprising that the Court relied on other theories in giving content to the factors in its functionalist approach. Indeed, it is both a strength and weakness of pragmatic, "global due process" approaches that they must necessarily be hybrids constructed from other theories.[165] The advantage of a malleable approach is that the Court can prevent particularly egregious injustices that result from adhering slavishly to a particular paradigm.[166] Moreover, as Justice Kennedy observed, the Court conserves judicial resources by adopting a functional approach because it avoids interfering with the political

161. *See* Neuman, *supra* note 77, at 271. This does not mean, however, that the Court has adopted a form of universalism; Justice Kennedy appears to have ruled out the possibility that the U.S. Constitution extends rights to everyone throughout the globe. *Id.* at 271–72.

162. *See id.* at 271.

163. Posner, *supra* note 80, at 23–25.

164. *See* NEUMAN, *supra* note 83, at 99–100; Knowles & Falkoff, *supra* note 88, at 661.

165. Knowles & Falkoff, *supra* note 88, at 662.

166. *See, e.g.*, Neuman, *supra* note 77, at 272 (discussing Harbury v. Deutch, 233 F.3d 596, 603–04 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* Christopher v. Harbury, 536 U.S. 403 (2002), and asserting that it held, based on *Verdugo-Urquidez* and its membership approach, that the Constitution generally permits U.S. agents to torture foreign national abroad).

branches' activities unless it is truly necessary to preserve constitutional values.[167]

On the other hand, there are two significant difficulties with functional approaches, both of which were raised by the *Boumediene* dissenters. First, functional approaches create uncertainty, and they risk arrogating judicial power.[168] The political branches, having relied on previous understandings about extraterritoriality rooted in membership approaches, could feel that they are victims of "a constitutional bait and switch."[169] Second, functional approaches are susceptible to an endless cat-and-mouse game between the courts and the political branches: the court holds that habeas extends to Guantanamo, so the political branches move the detainees to a location that lacks exclusive U.S. jurisdiction and control, and that is closer to the battlefield; the court responds by declaring, for other reasons, that the writ still runs; and so on.[170]

These criticisms have merit, but they tend to obscure the distinction between functional approaches that draw on multiple rights-based theories of extraterritoriality and functional approaches that examine the policies and procedures utilized by the political branches.[171] Moreover, critics rarely identify or discuss the stage of analysis at which functionalism is employed by the Court. Christina Duffy Burnett argues that the Court "took a wrong turn" with the "impracticable and anomalous" test because it failed to acknowledge the difference between the applicability and content of constitutional provisions.[172] As a result, lower courts appear to be deploying functional-

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167. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2255 (2008) ("[T]he Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.").

168. *See Boumediene*, 128 S. Ct. at 2302–03 (Scalia, J., dissenting) ("[I]t is the Court's 'functional' test that does not (and never will) provide clear guidance for the future. . . . [and] is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.").

169. *Id.* at 2285 (Roberts, C.J., dissenting) ("Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch."). Chief Justice Roberts used the expression here to refer to the Court's apparent invitation to Congress to legislate regarding the detainees, only to reject Congress's ultimate decision to strip habeas jurisdiction. *See id.*

170. *See Boumediene*, 128 S. Ct. at 2285 (Roberts, C.J., dissenting); Knowles & Falkoff, *supra* note 88, at 663.

171. For a discussion of the role that functionalism plays in foreign affairs, see Knowles, *supra* note 150, at 94–100; Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009).

172. Burnett, *supra* note 77, at 1042; *see also id.* at 1031 (concluding that "the 'impracticable and anomalous' test has subordinated constitutional guarantees to functional considerations, even as it has paid lip service to the notion that the Constitution does not stop at the border" and that it "allows for the replacement of considerations of text, structure, history, and precedent with an investigation of whatever strikes a court as appropriate considerations in any given case").

ism before it is necessary, thereby reducing certainty in the doctrine. For Burnett, functional considerations should only be introduced *after* the Court has already determined that a particular provision applies.[173] Similarly, as we have argued, analyses of extraterritoriality frequently fail to distinguish between the content of government power and the content of applicable rights. In our view, then, courts should engage in a three-step process when evaluating an extraterritorial exercise of government power: (1) Is the action taken by the government within the scope of the power granted to it by the Constitution? (2) Which constitutional rights limit the exercise of that power? (3) Which prudential considerations should modify the content of the right in this particular context?

Our limited government approach emphasizes that the Courts must first address the scope of government power on its own terms before discussing applicable rights. At this first stage, they will need to take into account the circumstances in which the power is exercised, the purpose and history of its exercise, and the fundamental limits that constrain the exercise of all government power. Some of these considerations may be described as "functional," while others may be described as "formalist."[174]

Although the U.S. Supreme Court does not explicitly employ this three-step analysis, what is striking about *Boumediene* is the degree to which the Court's holding hinges on the nature of the exercise of government power rather than the rights afforded to the detainees as aliens located abroad. In other words, the considerations most important for the Court's conclusions relate to whether the exercise of power is authorized by the Constitution. In this critical respect, limited government, rather than pragmatism for its own sake, is the dominant theory animating the Court's functional approach. "Even when the United States acts outside its borders," Justice Kennedy wrote, "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[175] Habeas was described as "an indispensable mechanism for monitoring the separation

173. *See id.* at 981. For Burnett, in the initial stage a court should determine "what constitutional provisions authorize the power being exercised, and what constitutional provisions limit it." *Id.* at 1032. We believe that it is important to separate the two phases of the initial stage.

174. Functionalism has no precise meaning; the boundaries between formalism and functionalism are blurry, and there is much overlap between the two broad approaches to constitutional interpretation. *See* Pearlstein, *supra* note 171, at 1555–86; William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998).

175. Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008) (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885) (discussing congressional power over the Utah territory)).

of powers."[176] And the Court stated that it needed to examine the circumstances of the case to ensure that the political branches could not "turn the Constitution on or off at will." [177]

Although the Court concluded that Guantanamo is, "for all practical purposes, U.S. territory," this was not the determinative fact; if it had been, the Court would not have needed to discuss the other factors. Instead, the Court explored the purposes of the government power being exercised: the President's power as Commander in Chief to capture enemy belligerents; Congress's power to make rules for "Captures on Land and Water";[178] and most importantly, Congress's power to limit the applicability of habeas under the Suspension Clause.[179] In discussing the first factor, Justice Kennedy focused entirely on the adequacy of process without exploring the detainees' status. When Kennedy finally did mention the status of the detainees toward the end of the opinion, he did so only to emphasize the length of their detention.[180] The rest of the analysis was devoted to a discussion of logistics—the distance between Guantanamo and the battlefield, the difficulty of conducting habeas hearings, and the connection between the suspension of habeas and the military mission at the base.[181]

There is no question that rights-based approaches play some role in *Boumediene*, but their role appears far stronger at first blush than on closer examination. Justice Kennedy framed the issue as whether the detainees had the "privilege" of habeas corpus, and habeas was referred to as a "right" several times in the opinion.[182] Nonetheless, the Court's discussion of habeas continually returned to its limited government purposes.[183] And again, the lion's share of the Court's analysis was devoted to what is essentially a limited government inquiry.

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176. *Id.*

177. *Id.*

178. *See id.* at 2277; U.S. CONST. art I, § 8, cl. 11.

179. *See id.* at 2277; Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (holding that Congress authorized the President to detain enemy combatants in the war against al Qaeda and the Taliban).

180. *See id.* at 2275. Posner, *supra* note 80, at 30 (questioning the relevance to the determination of extraterritorial habeas of the Court; emphasis on the length of detention).

181. *See Boumediene*, 128 S. Ct. at 2251–74.

182. *See, e.g., id.* at 2260 (observing that "the sites of [the detainees'] apprehension and detention are technically outside the sovereign territory of the United States" and that "this is a factor that weighs against finding they have rights under the Suspension Clause"); *id.* at 2277 ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.").

183. *See id.* at 2246–47 (discussing sources from the founding era and observing that "Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge

The Court's focus on the separation of powers, rather than rights, makes sense if, as Stephen Vladeck has persuasively argued, habeas is best understood not merely as a "right" in the commonly intended sense, but as a structural limitation that constrains the exercise of all government power—a background principle against which the Suspension Clause provides for a limited exception.[184] The true issue in *Boumediene*, then, was not whether the detainees possessed the right to habeas; it was whether Congress had acted within the scope of its power under the Suspension Clause to abrogate habeas at Guantanamo given the time and distance from the battlefield, the process provided the detainees, and the military's mission.

One can discern in *Boumediene* an application of our three-step limited government approach. Under the first step, the Court considered the scope of enumerated powers and the existence of an unexpressed constraint provided by the structural limitation of habeas. Having determined that Congress lacked the power to abrogate habeas, it was not necessary for the Court to reach the second step—whether the detainees possessed rights that would further limit that power. Nonetheless, the discussion of habeas as a right or privilege may be a sign that the Court was in some sense doing so. At the third stage, pragmatic considerations come to the fore, although again it was not necessary in *Boumediene* for the Court to consider the practical constraints that may limit the content of habeas in an extraterritorial context. The Court nonetheless provided guidelines for future cases: Habeas would be available some time well after capture, only after the Executive Branch had made its own determination of a detainee's status; and extra allowances should be made for domestic, emergency situations.[185] Of course, the Court did not analyze the issue precisely in this way. But that may be more the result of an attempt to synthesize a complex jurisprudence than an indication that the Court's approach to future extraterritoriality cases will be purely "pragmatic." Functionalism suffuses *Boumediene*, to be sure, but functionalism is used by the Court, not for its own sake, but to better define the limits of government power.

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detention, the writ preserves limited government"); *id.* at 2247 ("The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.").

184. *See* Vladeck, *supra* note 145, at 302–03.

185. *See Boumediene*, 128 S. Ct. at 2275 (explaining that where it would impose "onerous burdens on the Government . . . , [courts] would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way").

IV. THE STATUS OF BAGRAM AFTER *BOUMEDIENE*

To date, only a handful of detainees at Bagram have petitioned for habeas corpus in the U.S. federal courts.[186] Many more filings, however, may be expected as public attention—and volunteer lawyer resources—turn from Guantanamo to other global U.S. prisons.

In this Part, we explain why *Boumediene*, properly understood through the prism of its underlying limited government theory, compels the conclusion that the writ applies to all prisoners being held at the Bagram prison. We then discuss the only extant legal decision on this issue, in which the district court concluded that the writ extended to three non-Afghan citizens being held at the BTIF but did not extend to an Afghan citizen being held there.[187] We suggest that this result, which the district court itself suggested was "odd" but compelled by *Boumediene*, is a predictable result of attempts to apply Justice Kennedy's multifactor balancing test in a theoretical vacuum.

A. Why the Writ Extends to All Prisoners at Bagram

To determine whether the writ extends to prisoners at Bagram, the federal courts must, of course, apply the factors discussed by Justice Kennedy in *Boumediene*. As with any multifactor balancing test, however, it is far easier to set forth factors to balance than it is to determine how much weight to give to each factor. Unless the underlying rationale for the balancing test is understood and respected, the result of the Court's balancing will run the risk of seeming arbitrary and of generating apparently anomalous results.

In *Boumediene*, Justice Kennedy stated that "at least three factors" were "relevant in determining the reach of the Suspension Clause," including "(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."[188] We agree that each of these considerations is important to assess in the habeas context. But we

186. As this Article goes to print there are only four pending Bagram habeas cases, all of which are consolidated before Judge John D. Bates in the D.C. federal district court. *See* Maqaleh v. Gates, No. 06-CV-1669 (JDB) (D.D.C.); Wazir v. Gates, No. 06-CV-1697 (JDB) (D.D.C.); Bakri v. Obama, No. 08-CV-1307 (JDB) (D.D.C.); Al-Najar v. Gates, No. 08-CV-2143 (JDB) (D.D.C.).

187. Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).

188. *Boumediene*, 128 S. Ct. at 2259. These factors could, in turn, be broken down further to include

> (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of

consider it essential to recognize at the outset that these factors must be deployed in the service of determining, first and foremost, whether Congress has been *authorized* by the Constitution to abrogate the fundamental right to judicial review of the legality of a detention. Only after this authorization has been established should the inquiry turn to detainees' "rights" and, finally, to whether prudential considerations should modify the content of those rights in the particular context of Bagram.

Our chief concern is that the Court's multifactor test will be applied with undue weight given to considerations of detainees' "rights" or the prudential limits on those rights, without first addressing whether the government has the power to eliminate habeas in that context. In other words, the risk from a misinterpretation of *Boumediene* is that courts will weigh its factors without an appreciation for the importance of the limited government purpose that it serves. We expect that application of the balancing test in a theoretical vacuum will lead to anomalous holdings in which the applicability of the writ at Bagram (and to other U.S. detainees around the globe) will appear random or even unprincipled.

Accordingly, the factors in the *Boumediene* test that should be emphasized when assessing the reach of the writ to the BTIF are those relating to the exercise of government power. More particularly, the balancing of factors should be in the service of determining whether the government has been authorized by the Constitution to interfere with the court's supervisory role over detentions—and in particular whether the *de facto* suspension of the writ at Bagram is reasonably related to the exercise of the President's war powers and Congress's power to make rules for captures. The answer to similar questions at Guantanamo was that the political branches were not authorized by the Constitution to eliminate the courts' role in supervising the detentions at Guantanamo. The same conclusion follows inexorably in the Bagram context for largely the same reasons.

The first factor that Justice Kennedy considered in *Boumediene* was the "citizenship and status of the detainee and the adequacy of the process through which the determination was made."[189] In *Boumediene*, the Court determined that, notwithstanding the fact that none of the prisoners at Guantanamo were U.S. citizens, the adequacy of the procedures used to determine that the prisoners were enemy

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apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.

Maqaleh, 604 F. Supp. 2d at 215.

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

combatants was thoroughly insufficient to support the political branch's attempt to abrogate the judicial function by suspending the writ. The CSRT procedures, according to the Court, "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[190]

A comparison of the Guantanamo and Bagram procedures is instructive in this regard. As discussed above,[191] the UECRB process at Bagram is even more deficient than the CSRT process at Guantanamo. Although the petitioners at Guantanamo were not supplied a bill of particulars, they were provided with the "factual basis" of their detention in advance of their CSRT; the petitioners at Bagram were given notice of the basis of their detention only if "operational requirements" permitted.[192] Although the petitioners at Guantanamo were not allowed lawyers, they were assisted by "personal representatives" who might explain the functioning of the tribunal; the petitioners at Bagram were allowed neither lawyers nor personal representatives.[193] Although the petitioners at Guantanamo were not able to see or respond to the classified evidence against them, they were allowed to appear in person before the status tribunal to plead their case; the petitioners at Bagram were neither privy to the evidence against them nor allowed to appear before the status tribunal, and they were allowed only to submit a written statement.[194] Although the petitioners at Guantanamo were denied a real opportunity to call relevant witnesses in their defense, they were allowed to have other detainees in the prison testify before their tribunals; the petitioners at Bagram were not given this privilege.[195] Finally, although the petitioners at Guantanamo were denied true appellate review in the civilian courts of their "enemy combatant" designations, pursuant to the Detainee Treatment Act of 2005, they were allowed to argue to the D.C. Circuit Court of Appeals that the military had failed to adhere to the CSRT regulations that had been promulgated by the military;[196] the Bagram petitioners are entitled to no civilian court appellate review at all.

To the extent a district court restricts itself to comparing the status determination procedures used at Guantanamo with those used at

190. *Id.* at 2260.

191. *See supra* notes 51–57 and accompanying text.

192. *See supra* notes 46–49 and accompanying text.

193. *See supra* note 48 and accompanying text.

194. *See supra* notes 47–49 and accompanying text.

195. *See supra* note 46 and accompanying text.

196. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2742 (codified as amended in scattered sections of 10 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)).

Bagram, this factor evidently points toward recognizing the writ at Bagram. But how heavily should this factor weigh in the *Boumediene* analysis? We suggest that the courts should be wary of focusing too much attention on these procedures, no matter how deficient they appear to be, because this mistakes an issue of limited government for an issue of rights. In fact, the ultimate issue addressed by this factor concerns whether the President's claimed authority—to restrict access to the courts—is reasonably related to the exercise of his powers as Commander in Chief. Just as significant as the inadequacies of the UECRB procedures (or even a more robust version) is the failure of the government to deploy them in a prompt manner by a hearing board whose good faith application of neutral standards might be more readily assumed. The first status hearings at Guantanamo did not take place until fall 2004, after the *Rasul* decision and nearly four years after Guantanamo had opened as a detention center. Likewise, at Bagram, the further in time and farther in place from a detainee's capture that a status hearing occurs, the less the courts should be willing to conclude the government's claimed authority—here, to restrict access to the courts—is reasonably related to the exercise of its war-making powers. At a certain point, a policy of imprisonment and continued detention begins to reveal itself as a crime-control policy rather than as an incident to the war-making function of government.

Similarly, the second of the *Boumediene* factors—the character of the place of capture and of detention—is only pertinent to the degree that these facts shed light on whether the government is acting within the limited war-making sphere that the Constitution has authorized. For example, when the U.S. government captures a prisoner outside of a war zone and also detains him outside of a war zone, there is unlikely to be a reasonable relation between the exercise of war powers and the attempt to block access to the courts. Likewise, it is reasonable to conclude that the government is not acting within its authority when it seeks to deny access to the courts to a detainee who was taken into custody outside of a war zone and was subsequently *brought into* the war zone by the government. (The four Bagram detainees with pending habeas petitions fall into this category.) Concededly, a stronger case that the government is acting within its constitutional grant of authority can be made for the detainee who is captured and detained within a war zone, at least for a reasonable period of time after detention.

The *Boumediene* Court itself did not lay as much stress on the character of the place of detention as is popularly believed. To be sure, the Court deemed it relevant that the United States maintained com-

plete jurisdiction and control over Guantanamo, notwithstanding Cuba's ultimate sovereignty over the area.[197] And Bagram, too, is an area over which the United States maintains tremendous control and a similar type of "constant jurisdiction."[198] Under both the Guantanamo and Bagram leases, for example, the United States has the right to exclusive use of the land;[199] to perpetual possession at its discretion;[200] to occupation with *de minimis* or no rental obligation;[201] to freedom from host country efforts to exert control over the premises;[202] and to the assignment of property to another party without the consent of the host nation.[203] As at Guantanamo, in short, as a practical matter, the United States maintains complete control over Bagram.

That said, a simple comparison between Bagram and Guantanamo threatens to obscure *why* the degree of U.S. government control over the area is an important question. The point of the exercise is not to determine in a theoretical vacuum whether Guantanamo, Bagram, or another territory is in the effective control of the United States. Doing so would give undue primacy to the territorialist considerations that were relegated to a relatively minor role in the *Boumediene* analysis. Rather, it is to determine whether the U.S. government is acting in an area over which it is authorized by the Constitution to suspend access to the courts. The answer to this question hinges on the nature and rationales for the exercise of government power: What specifically is the military mission at Bagram, and what is the connection between this mission and the suspension of habeas? Does holding detainees for more than seven years at Bagram, with the limited process they have been thus far allowed, relate to the fulfillment of this mission?

To be clear, we argue that the geographic location of the place of detention is a pertinent factor in determining whether the writ extends

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197. *See Boumediene*, 128 S. Ct. at 2261.

198. *Id.*

199. *See* Guantanamo Lease, *supra* note 31, art. III; Bagram Lease, *supra* note 29, ¶¶ 1, 9.

200. *See* Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, T.S. No. 866; Bagram Lease, *supra* note 29, ¶ 4.

201. *See* Guantanamo Lease, *supra* note 31, art. I, ¶ 28; Bagram Lease, *supra* note 29, ¶ 5.

202. *See* Bagram Lease, *supra* note 29, ¶ 9.

203. *See id.* ¶ 2. In addition, pursuant to a binding exchange of diplomatic notes, Afghanistan has ceded fundamental elements of its sovereignty, including the right to exercise criminal jurisdiction over U.S. personnel and its detainees; to lay civil claims against the United States for damages within Afghanistan; to regulate the entry and exit of persons in Afghanistan; to charge fees and tolls for the use of Afghan roads and airspace; to inspect vehicles within Afghan territory; to impose taxes; to regulate imports and exports into Afghanistan; to regulate commercial development in Afghanistan; and to the exclusive development, operation and control of telecommunications systems. *See* Diplomatic Note No. 202, *supra* note 33.

extraterritorially to prisoners who seek court review of the legality of the detention, but geography alone can never be determinative of the reach of the writ. Geography is only relevant to the extent that it supports or undermines the government's position that it is authorized by its war powers to restrict prisoner access to the federal courts. Even in contexts where the government's arguments are the strongest (for example, in hot combat zones), *time* must always be factored as a variable into the constitutional equation. A court might conclude, for example, that the federal habeas courts are not open to an enemy combatant who was seized and detained in a combat zone in Kandahar, Afghanistan; that same court cannot, however, declare that the writ somehow "does not extend" to Kandahar. Such a conclusion would be permissible only if the Supreme Court had adopted a territorialist understanding of the reach of the Constitution which, as we have shown above, it has not. Instead, as the length of detention increases, the link between the government's war powers and its attempts to block access to the courts will likely grow increasingly tenuous. To this extent, the limited government conception of the reach of the constitution envisions a "global" writ, in the sense that there is nowhere on earth where the government's power to block access to the courts is perpetual.

Finally, *Boumediene* instructs us to assess the practical obstacles that stand in the way of allowing detainees access to the courts, so that we can determine whether it would be "impracticable and anomalous" to allow habeas petitions to emanate from an extraterritorial locale.[204] Again, a comparison between Bagram and Guantanamo is useful, but it cannot alone be determinative. Obviously, in some ways Bagram is like Guantanamo and in some ways it is different. In assessing the importance of these similarities and differences, we must bear in mind that the goal is to assess whether there is a reasonable relation between the government's power to wage war and its efforts to suspend the role of the courts in overseeing detentions. The government has argued, in both the Bagram and Guantanamo contexts, that it would disrupt the war effort to allow detainees to sue for their release in federal court.[205] Most importantly, according to the government, it

204. *See Boumediene*, 128 S. Ct. at 2262 (citing Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

205. The government argued that the Supreme Court had previously

> recognized that extension of the writ to alien enemies held abroad would "hamper the war effort and bring aid and comfort to the enemy." Indeed, "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and

would divert resources and personnel from the battlefield to the courtroom.

Justice Kennedy acknowledged in *Boumediene* "that there are costs to holding the Suspension Clause applicable in a case of military detention abroad" because habeas proceedings "may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks."[206] Nonetheless, he ultimately found such arguments to be unpersuasive because "[c]ompliance with any judicial process requires some incremental expenditure of resources," and notwithstanding this fact, "civilian courts and the Armed Forces have functioned along side each other at various points in our history."[207] Stated differently, the government could not show a reasonable relation at Guantanamo between its war efforts and its decision to suspend detainee access to the courts.

A similar argument holds true for Bagram. While Bagram is located in a war zone, the degree of U.S. control over the area makes it implausible that the war effort would be significantly impacted by allowing detainees to file habeas corpus petitions in federal court. Particularly in an age when videoconferencing in the courts is common, the practical difficulties would appear more theoretical than actual. Indeed, the fact that some (undisclosed) number of detainees at Bagram were actually captured outside of Afghanistan and brought *to* the war zone suggests that government arguments about the impracticality of allowing access to the courts are hyperbolic. Moreover, the transfer of prisoners into a war zone further undermines any suggestion that there is a reasonable relation between the war effort and the need to suspend access to the courts for Bagram detainees.

In sum, we contend that the *Boumediene* factors cannot be assessed in a mechanistic fashion, but instead must be seen through the prism of a coherent theory of the extraterritorial reach of the Constitution. As detentions lengthen, procedural protections are abandoned, the location of the prison becomes more secure, and access to the courts is

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divert his efforts and attention from the military offensive abroad to the legal defensive at home."

Brief for the Respondents at 19–20, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195 & 06-1196) (internal citation omitted) (quoting Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)); *see also* Brief for Respondents-Appellants at 21, Maqaleh v. Gates, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir. Sept. 14, 2009), *available at* http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf (last visited Mar. 24, 2010) ("The logistical complications created by civil litigation would divert military officials from their proper focus on the mission of winning the ongoing war.").

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

207. *Id.*

made more practicable, it becomes increasingly impossible to contend that the government's refusal to allow access to the courts is reasonably related to its constitutional authority to wage war.

B. The Difficulty of Applying the Boumediene *Factors Without a Theory*

In *Maqaleh v. Gates*, a federal district judge employed the *Boumediene* balancing test in order to determine whether four Bagram detainees could petition for a writ of habeas corpus.[208] One petitioner was an Afghan citizen who was captured in the United Arab Emirates; the second was a Tunisian who was captured in Pakistan; the third was a Yemeni who was captured in Thailand; and the fourth was a Yemeni who was captured (he alleged) somewhere "beyond Afghan borders."[209] All were rendered to Bagram, and all had been held in detention—without charge or trial and without access to a lawyer—for six years or more.[210]

On a motion to dismiss the petitions for lack of jurisdiction, the court concluded that habeas corpus review was available for three of the four petitioners. Recognizing that "it may seem odd that different conclusions can be reached for different detainees at Bagram," the court stated that this was "the predictable outcome of the functional, multi-factor, detainee-by-detainee test" that the Supreme Court mandated in the *Boumediene* case.[211] We agree that the court's conclusion seems odd, but we disagree that it was a necessary consequence of *Boumediene*'s balancing test. Indeed, we believe the district court's decision demonstrates the dangers of applying Justice Kennedy's multifactor test without an underlying theory of why the factors bear on the question of whether habeas review should be available at Bagram.

With respect to the court's analysis of any single *Boumediene* factor, there is relatively little to quibble about in the *Maqaleh* decision. The district court recognized that the Bagram petitioners "are virtually identical to the detainees in *Boumediene*."[212] They are all non-U.S. citizens who were captured overseas and "brought to . . . another country for detention."[213] They have all been determined to be "enemy combatants," and they all contest that determination. The Guantanamo prisoners were afforded inadequate process to contest their

208. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 208.
213. *Id.*

status, and at Bagram the process was "significantly less than the Guantanamo detainees . . . received."[214] The "objective degree of control" of the United States at the BTIF, too, "is not appreciably different than that at Guantanamo."[215] Indeed, only the "practical obstacles" to habeas review seem appreciably different in nature, and it may reasonably be seen to be "in some ways greater than those present for a Guantanamo detainee, because Bagram is located in an active theater of war."[216]

The difficulty with the district court's analysis concerns how these factors are actually "balanced." Understandably, the court seems at a loss to divine the motivating principle behind the *Boumediene* test. How much importance should the reviewing court place on the "practical obstacles" to litigating habeas cases at Bagram? *Which* practical obstacles are the most relevant, and why?

Happily for three of the four petitioners, the court concluded that the practical obstacles to allowing detainees to seek judicial review of the legality of their detentions were *de minimis*. The court held, for example, that videoconferencing obviated the need to transfer prisoners to hearings,[217] and that the government's claim of extraordinary burden was unpersuasive because some expense, time, and personnel has always attended court cases in which the military is a party. Moreover, as the court emphasized, any practical obstacles to judicial review for detainees who had been captured outside of Afghanistan and then brought into the war zone were self-evidently difficulties of the military's own making.[218]

Thus far, nothing in the district court's decision or in its application of the *Boumediene* test is in tension with our underlying limited government theory of the extraterritorial reach of the Constitution. But for the fourth petitioner, the district court gave determinative weight to the fact that he was an Afghan citizen, explaining that "the possibility of friction with the host country cannot be discounted and constitutes a significant obstacle to habeas review."[219] The potential for friction, according to the court, arose because Afghans held in U.S. custody are "subject to transfer to Afghan custody" pursuant to a dip-

214. *Id.* at 209; *see also id.* at 226–27 (discussing the sufficiency of process).

215. *Id.* at 209; *see also id.* at 221–26 (discussing the site of detention).

216. *Id.* at 208; *see also id.* at 227–31 (discussing the practical obstacles).

217. *See id.* at 228.

218. *See id.* at 230–31.

219. *Id.* at 231. The district court noted earlier in the opinion that the Supreme Court had provided "little guidance as to what the citizenship factor means after *Boumediene*" and that "the most this Court can say with any certainty is that U.S. citizenship helps petitioners whereas foreign citizenship does not." *Id.* at 218–19.

lomatic arrangement. If such a transfer were to occur, and if the petitioner were to seek his release in an Afghan court, the local court might end up "applying an entirely different process and legal standards."[220] In addition, if an Afghan prisoner were ordered released, "the prime destination for such release would be Afghanistan," and such "unilateral releases of Bagram detainees by the United States could easily upset the delicate diplomatic balance the United States has struck with the host government."[221]

As an initial matter, it is unclear why the district court put so much weight on these hypothetical concerns. The Afghan petitioner had not been transferred to the control of Afghanistan, and there was no showing that such a transfer was imminent. The *Maqaleh* court seemed to be analogizing from the abstention doctrine (by which the federal courts in some circumstances decline the exercise of their jurisdiction in deference to the state courts),[222] but the decision offers no explanation of why deference to Afghan courts would be appropriate. In addition, the district court's concern about the exercise of concurrent jurisdiction is itself premised on the assumption that the district court would *retain* habeas jurisdiction if the Afghan petitioner were transferred out of U.S. and into Afghan custody. The government, at least, has argued in parallel detainee litigation that federal court jurisdiction would cease upon such a transfer, and at least one district court judge has agreed.[223] Similarly, the court's concern about causing friction if it were to order the military to release an Afghan citizen into Afghanistan is premised on the assumption that the court would possess the power to make such an order and that release is the only remedy available for a habeas petitioner who establishes that his detention is illegal. This is not the law of the D.C. Circuit at present.[224]

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220. *Id.* at 229.

221. *Id.* at 230.

222. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

223. *See* Abdah v. Bush, No. 04-1254, 2005 U.S. Dist. LEXIS 4942, at *13 (D.D.C. Mar. 29, 2005) (noting the government's argument that, upon transfer of Guantanamo prisoners to another country, the district court will no longer have jurisdiction to provide habeas relief); *id.* at *17 ("Petitioners' transfer to another nation would assuredly deprive the court of its jurisdiction."). While we believe that Judge Bates is correct that the court's habeas jurisdiction would survive the transfer of a habeas petitioner to another country (and that the contrary conclusion in *Abdah* is unnecessary dicta), such a position is by no means self-evident.

224. *See* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (vacating a district court order to release seventeen petitioners into the United States), *cert. granted*, 130 S. Ct. 458 (2009), *cert. vacated*, 130 S. Ct. 1235 (2010). We believe that the district court has the power to order the

Most troubling about the district court's conclusion that habeas is not available for an Afghan petitioner detained in Afghanistan is that there is no explanation of why the practical obstacles identified by the court—whether likely to materialize or not—should weigh so heavily in the balance of whether the government may restrict a detainee's access to the courts. In our opinion, there might be a stronger argument for the government's attempt to strip habeas jurisdiction from the courts when a prisoner is captured in a war zone and detained there, at least so long as the detention is for a discrete period of time and the security of the detention site remains unsure. In such circumstances—which are not present at the detention facility at Bagram—the government might more readily contend that its efforts to limit detainees' access to the courts are reasonably related to the war effort.[225] The *Maqaleh* decision, however, provides no compelling explanation for its disparate assessment of the reach of the writ for detainees of different nationalities at Bagram.

V. CONCLUSION

The *Maqaleh* decision demonstrates the risks of not fully appreciating the limited government approach at the heart of *Boumediene*. For too long the debate about the extension of habeas to Guantanamo focused almost exclusively on the status of the detainees (as non-citizens without any prior connection to U.S. society) and the status of the base (as sovereign Cuban territory with complete U.S. jurisdiction and control). The preoccupation with these membership approaches to extraterritoriality obscured the importance of limited government in the extraterritoriality doctrine. *Boumediene* returned limited government to prominence by emphasizing the separation of powers and the connection between habeas restrictions and the government's power to wage war.

Yet commentators and courts have so far viewed *Boumediene* as a purely pragmatic decision. This focus on pragmatism *qua* pragmatism risks increased instability in an already difficult extraterritoriality doctrine, widely divergent results in similar cases, and insufficient regard for core constitutional values. As applied to Bagram and other similar facilities, pure pragmatism risks enabling the government to operate a vast, permanent global prison system beyond court scrutiny.

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release of the detainees, and that at a minimum it could adjudicate the habeas petition on the merits and devise an alternative remedy to release.

225. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008) (noting, in a discussion of practical obstacles that might impact the military mission, that the argument might "have more weight" if Guantanamo "were located in an active theater of war").

Focusing instead on limited government directs the court to the nature and purpose of the government's war powers. These powers can and will include the ability to delay habeas for recently captured prisoners in a battlefield setting. Yet although it is vast, even this power has its limits. As time, distance, and geography vary, the scope of power varies as well. Functionalism and pragmatism will play important roles in determining how to measure this scope.

But one principle lies beyond pragmatism: indefinite detention without any court review is fundamentally inconsistent with any exercise of government power under the U.S. Constitution. This is the promise of *Boumediene*—and of limited government.