HABEAS CORPUS AND DUE PROCESS

and similar papers at core.ac.uk

provided by D

The writ of habeas corpus and the right to due process have long been linked together, but their relationship has never been more unsettled or important. Following the September 11, 2001 attacks, the United States detained hundreds of suspected terrorists who later brought legal challenges using the writ. In the first of the landmark Supreme Court cases addressing those detentions, Hamdi v. Rumsfeld, *the plurality chiefly relied on the Due Process Clause to explain what procedures a court must follow. Scholars assumed due process would govern the area. Yet in* Boumediene v. Bush, *the Court did not take the due process path and instead held that the Suspension Clause extended habeas corpus process to noncitizen detainees at Guantánamo Bay.* Boumediene *correctly grounded the analysis in the Suspension Clause, not the Due Process Clause. The Court held that the Suspension Clause demands a traditional habeas process, simply asking whether the detention is legally and factually authorized. This view challenges the set of standards that judges currently use in executive detention cases and also has implications for domestic habeas; it could ground innocence claims in the Suspension Clause. More broadly, this Suspension Clause theory reflects commonalities in the structure of statutes and case law regulating habeas corpus across its array of applications to executive detention and postconviction review. Habeas review now plays a far more central role in the complex regulation of detention than scholars predicted, because habeas review does not depend on underlying due process rights. A judge instead focuses on whether a detention is authorized. As a result, habeas review can inversely play its most crucial role when prior process is inadequate. Put simply, the Suspension Clause can ensure that habeas corpus begins where due process ends.*

† Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. I thank for their invaluable comments: Kerry Abrams, Michael Collins, Marc Falkoff, Paul Halliday, John Harrison, Aziz Huq, Lee Kovarsky, Tom Lee, Dave Martin, Hiroshi Motomura, Tom Nachbar, Gerald Neuman, Dan Ortiz, George Rutherglen, Colin Starger, Amanda Tyler, Steve Vladeck, Larry Walker, and participants at a University of Virginia School of Law faculty workshop. I thank Mark Johnson for excellent research assistance.

INTRODUCTION

"[S]tandards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained remarkably constant."

– Justice William J. Brennan[1]

"The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal."

– Justice Antonin G. Scalia[2]

---

1 Fay v. Noia, 372 U.S. 391, 402 (1963).

2 Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

The writ of habeas corpus and the right to due process have long been linked together. The Supreme Court has called "[v]indication of due process" the "historic office" of habeas corpus.[3] Following hazy origins at common law, habeas corpus and due process together "formed a powerful current in the stream of constitutionalism."[4] Over time, judges connected notions of due process to the development of the writ of habeas corpus,[5] the "great writ of liberty" that allows a judge to inquire into the legality of a prisoner's detention.[6] Nevertheless, until recently, federal courts have had few occasions[7] to define the relationship between the Suspension Clause of Article I, which limits Congress's ability to suspend the "Privilege of the Writ of Habeas Corpus,"[8] and the Due Process Clauses of the Fifth and Fourteenth Amendments, which state that no person shall be deprived of life, liberty, or property "without due process of law."[9] Instead, the Suspension Clause appeared dormant, its meaning "obscure" and "elusive."[10] The Suspension Clause does not affirmatively define "the power of the court" in "cases in which this great writ shall be issued,"[11] as Chief Justice John Marshall put it; rather, the Clause assumes the existence of the writ and names conditions for suspension. The Supreme Court has repeatedly avoided defining the Clause's content.[12] In contrast, the Court often meticulously defines the procedures the Due Process Clause requires.[13] Scholars noting the Court's avoidance of the problem stated that the relationship between the Suspension

---

3 *Fay*, 372 U.S. at 402.

4 *See* DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 5 (A.E. Dick Howard ed., 1966).

5 *See infra* note 84 and accompanying text.

6 The U.S. Supreme Court has used the phrase "great writ of liberty" in several cases. *See* Burns v. Wilson, 346 U.S. 137, 148 (1953) (Frankfurter, J., opinion); Darr v. Burford, 339 U.S. 200, 225 (1950) (Frankfurter, J., dissenting); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 619 (1842).

7 *See infra* Parts I.C, II.A–B.

8 U.S. CONST. art. I, § 9, cl. 2.

9 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

10 David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 59 (2006); *see also* George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG (n.s.) 397, 398 (2002) ("After more than two hundred years, we still do not know the scope and dimensions of the protection that [habeas corpus] affords against executive detention.").

11 *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830).

12 *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."); *infra* notes 68–72 and accompanying text.

13 *See infra* Part I.B.4.

Clause and the Due Process Clause remained "completely unsettled."[14]

The relationship between the Suspension Clause and the Due Process Clause has sweeping implications for the detention of suspected terrorists and military engagements in multiple countries after September 11, 2001. In *Boumediene v. Bush*, the Supreme Court for the first time clearly gave the Suspension Clause independent force as an affirmative source of judicial power to adjudicate habeas petitions and as a source of meaningful process to prisoners in custody.[15] As a consequence of this decision, Congress now cannot enact jurisdiction-stripping legislation to deny executive detainees access to judicial review of the type that it has twice tried and failed to do in the past decade.[16] A noncitizen detained as a national security threat may now have procedural rights to contest the detention.[17] Even as the Executive has crafted nuanced positions on power and procedure for detaining persons for national security reasons, and even as Congress has adopted new detention-authorizing legislation,[18] the judiciary continues to play a central role, though sometimes unwillingly and deferentially, in detention review.[19] Apart from these specific developments, I argue that the reinvigorated Suspension Clause jurisprudence will continue to have ripple effects across all areas regulated by habeas corpus.

What process must the government use to ensure that it detains the correct people? The traditional assumption was that the Due Process Clause provided the answers. Judges and scholars described a

---

14 Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1364 (2010); *see also* Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 720 (2012) (describing "the relationship between habeas corpus rights and due process protections" as "a surprisingly under-explored topic"). I do not address the novel argument that the Due Process Clauses supersede the Suspension Clause, such that "a suspension of habeas corpus must be unconstitutional unless it satisfies the demands of the Due Process Clause." Redish & McNamara, *supra*, at 1396.

15 *See infra* Part II.

16 *See infra* notes 235–40 and accompanying text.

17 *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (holding that noncitizen petitioners designated as enemy combatants "do have the habeas corpus privilege" and that the government's existing procedures were "not an adequate and effective substitute for habeas corpus").

18 *See* Press Release, President Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (citing the Administration's "effective, sustainable framework for the detention, interrogation and trial of suspected terrorists"); *infra* note 333 and accompanying text (discussing the National Defense Authorization Act for Fiscal Year 2012).

19 *See infra* Part III for analysis of the D.C. Circuit Court of Appeals case law in particular.

functional relationship in which due process supplied the rights while habeas provided the procedural means to vindicate them. Justice Antonin Scalia expressed this view in its starkest form in his *INS v. St. Cyr* dissent, arguing that the Suspension Clause "does not guarantee any content to (or even the existence of) the writ of habeas corpus."[20] Judges and scholars have long assumed that due process offers more protections than habeas corpus, or that the substance of habeas is coextensive with the Due Process Clause.[21] Others have suggested that the Suspension Clause has a "structural" role, entwined with other individual rights guarantees.[22] The U.S. government, in the wake of the September 11, 2001 attacks, adopted the view that noncitizens captured and detained abroad had no due process rights and thus no habeas remedy, and the D.C. Circuit agreed.[23]

In two cases that reshaped habeas jurisprudence, *Hamdi v. Rumsfeld*, decided in 2004,[24] and *Boumediene*, decided in 2008,[25] the Court

---

20 533 U.S. 289, 337 (2001) (Scalia, J., dissenting); *id.* ("[T]he text [of the Suspension Clause] does not confer a right to habeas relief, but merely sets forth when the Privilege of the Writ may be suspended . . . ." (first and second alterations in original) (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1369 (4th ed. 1996)) (internal quotation marks omitted)).

21 *See id.*; WILLIAM F. DUKER, *The Writ of Habeas Corpus, the Constitution, and State Habeas for Federal Prisoners*, *in* A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126, 126 (1980) (arguing the Suspension Clause was designed to protect availability of state habeas for federal prisoners); Redish & McNamara, *supra* note 14, at 1365 (arguing that the Due Process Clause preempts the Suspension Clause); Shapiro, *supra* note 10, at 63–65 (viewing the Suspension Clause as an affirmative guarantee of habeas availability, while also viewing "the habeas corpus remedy [as] essential to the full realization" of other rights, including due process); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 383 (2006) [hereinafter Tyler, *Is Suspension a Political Question?*] ("[A]t their respective cores, the right to due process and the Great Writ are coextensive."); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 921, 924 (2012) [hereinafter Tyler, *Forgotten Core Meaning*] (noting that "[b]y the time of the Founding, the privilege had evolved to encompass not just a generic right to due process, but also a particular demand," a "specific right" not to be jailed outside formal criminal process).

22 *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2070–71 (2007) (emphasizing "the structural role of the Suspension Clause within the Constitution"); Tyler, *Is Suspension a Political Question?*, *supra* note 21, at 342, 384–86 (describing "the relationship between the Great Writ and core due process values"). For a related view that the Clauses should be "read together," see David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2484 (1998).

23 *See, e.g.*, Boumediene v. Bush, 476 F.3d 981, 991–93 (D.C. Cir. 2007) (holding that "the Constitution does not confer rights on aliens without property or presence within the United States" and characterizing the Suspension Clause as just another source of constitutional rights to which such aliens have no claim); Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 26–27, Hicks v. Bush, No. 02-CV-0299 (D.D.C. Oct. 4, 2004) ("[N]on-resident aliens in U.S. custody overseas do not have constitutional rights that can be enforced in a proceeding seeking a writ of habeas corpus." (citing Johnson v. Eisentrager, 339 U.S. 763, 778 (1950))).

24 542 U.S. 507 (2004).

25 553 U.S. 723 (2008).

connected the Suspension Clause and the Due Process Clause in a new way. *Hamdi* seemed to indicate that the Due Process Clause approach had triumphed. The *Hamdi* plurality applied the cost-benefit due process test from *Mathews v. Eldridge*[26] to outline the procedural rights of citizens who challenge their detention.[27] Following *Hamdi*, the precise scope of what due process required seemed the "looming question" for the future of executive detention.[28] In response, the government hastily implemented administrative screening procedures for detainees, ostensibly to comply with the bare minimum that due process appeared to require.[29]

In *Boumediene*, the Court chose a different constitutional path. The Court did not discuss whether Guantánamo detainees had due process rights, but instead held that the Suspension Clause independently supplies process to ensure review of executive detention.[30] The Court put to rest the notion that the Suspension Clause is an empty vessel and regulates only the conditions for congressional suspension of the writ. Instead, the Court held that the Suspension Clause itself extended "the fundamental procedural protections of habeas corpus."[31] The Court's view complements recent scholarship examining the common law origins of habeas corpus.[32] However, while an-

---

26 424 U.S. 319 (1976).

27 *See Hamdi*, 542 U.S. at 528–29 (plurality opinion).

28 Fallon, Jr. & Meltzer, *supra* note 22, at 2093.

29 *See infra* notes 164–69 and accompanying text.

30 *See Boumediene*, 553 U.S. at 785 ("Even if we were to assume that the [new procedures] satisfy due process standards, it would not end our inquiry."). Scholars have given this landmark holding much-deserved attention. *See, e.g.*, Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 1 ("[T]he Supreme Court, . . . for the first time, clearly held . . . that the Constitution's Suspension Clause . . . affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention."); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 538 (2010) ("The Supreme Court had never before found a violation of the Suspension Clause, and the holding of *Boumediene* gives its reasoning a precedential significance that earlier discussions lack."); Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2107–08 (2009) ("Ronald Dworkin may not have been exaggerating when he referred to . . . *Boumediene v. Bush* as 'one of the most important Supreme Court decisions in recent years.'" (footnote omitted) (quoting Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18, 18)).

31 *Boumediene*, 553 U.S. at 798.

32 *See, e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 583, 586–88 (2008) (describing how "the Suspension Clause carried the writ of habeas corpus out of English practice and into American law with little additional jurisprudential baggage" and finding that in Anglo-American jurisprudence, the Great Writ would run where "officials of the king, or his equivalent, were exercising custody," regardless of location, with judges "ready to investigate the factual and legal ground of imprisonment orders premised on allegations that a person was an enemy alien, a danger to the state, or both"). *But see* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 967–68 (2011) (reviewing PAUL D. HALLI-

swering the Suspension Clause question, the ruling created another puzzle. The Court held that a prisoner should have a "meaningful opportunity" to demonstrate unlawful confinement, but it did not specify what process the Suspension Clause ensures, nor to what degree due process concerns influence the analysis.[33] Lower court rulings elaborating on the process for reviewing detainee petitions have displayed confusion as to which sources to rely on.[34] This Article tries to untangle this important knot.

One view of *Boumediene* would treat the Court's decision as a break from the past, grounded in political or separation-of-powers concerns, but with little authority supporting its interpretation of the Suspension Clause. Scholars have largely focused on when and how a government can suspend habeas.[35] This may be due to the enigmatic text of the Suspension Clause, which speaks of a "[p]rivilege" that "shall not be suspended."[36] Because of this language, even scholarship analyzing substantive aspects of the Court's habeas rulings tends to focus on when and whether Congress may authorize detention (or on why the Court tries to avoid substance and tends to dwell on procedure).[37] As noted, scholars often assume due process and habeas corpus rights necessarily accompany each other.[38] Yet the *Boumediene*

DAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) (criticizing the *Boumediene* court for treating the citizenship and status of the detainee and the nature of the detention sites as relevant to the reach of the Suspension Clause when "Halliday's research establishes that the jurisdiction of King's Bench to issue writs of habeas corpus at the time of the Founding was effectively indifferent to the status or location of the detainee").

33 *Boumediene*, 553 U.S. at 729; *see infra* Part II.B.3.

34 *See infra* Part III.

35 This argument has implications for a related question, extensively debated, whether a suspension of habeas closes access to due process remedies (and more broadly, whether a formal suspension can authorize otherwise unconstitutional detention). The problem has rarely arisen, since habeas has rarely been suspended, and I do not directly address that question here. *See* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1560–62 (2007) (arguing suspension of habeas removes merely one remedy for violation of underlying rights); Shapiro, *supra* note 10, at 83–86 (arguing detention authorized by a valid suspension is lawful); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 604–05 (2009) (rejecting the "narrow view . . . that a suspension extinguishes the judicial power to order a prisoner's discharge" but that ordinarily illegal arrests "remain unlawful and unconstitutional" (footnote omitted)).

36 U.S. CONST. art. I, § 9, cl. 2.

37 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV 2047, 2122 (2005); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1016 (2008) (exploring how "'war on terror' litigation in U.S. courts has been fixated on process"); Shapiro, *supra* note 10, at 60–61.

38 *See supra* notes 20–23 and accompanying text. I do not address here important questions of whether due process should run to Guantánamo Bay or other detention sites abroad. *See, e.g.*, Geltzer, *supra* note 14, at 719–21; Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410–11 (2009) ("The logic of *Boumediene*'s five-justice majority opinion is that the Due Process Clause binds the executive worldwide . . . ."); Gerald L. Neuman, *The Extraterritorial Constitution*

Court reaffirmed that habeas rights may do work that due process might not.[39]

In this Article, I argue that *Boumediene* can and should provide a theory of the nature and structure of habeas corpus.[40] While the result in *Boumediene* may not have been inevitable, it is in fact well supported. The Supreme Court has repeatedly emphasized that "[h]abeas is at its core a remedy for unlawful executive detention."[41] Behind such statements lies a longstanding and consistent treatment of habeas process as independent of due process. *Boumediene* rests heavily on rulings stretching back decades, particularly in executive detention cases, which themselves flow from the common law habeas practice.[42] These cases show how habeas process is independent from due process and has great force when due process protections are weakest.

To ground this understanding of the differences between due process and habeas, in Part I, I question a possibly overstated historical connection between habeas corpus and due process, tracing them both to Magna Carta, in a celebratory account of the progress of individual liberty. Due process and habeas corpus share common law origins and core concerns with arbitrary deprivations of liberty,[43] but habeas draws on different sources. I contrast habeas process, grounded in the same process used at common law, with the concept

---

After Boumediene v. Bush, 82 S. CAL. L. REV. 259, 286 (2009) ("The characterization of Guantanamo as effectively U.S. territory for constitutional purposes probably means that the Due Process Clause and the Eighth Amendment apply there . . . ."). By contrast, the D.C. Circuit concluded that although *Boumediene* held that Suspension Clause rights run to Guantánamo Bay, due process rights do not. *See* Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) ("[T]he Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.")

39 *See supra* notes 30–32 and accompanying text.

40 This subject falls within what Jenny Martinez calls "process as substance." Martinez, *supra* note 37, at 1041. Gerald Neuman's essay, exploring this problem, draws attention to the Court's Suspension Clause and Due Process methodology, describing how it "invites future debate" and has profound implications. Neuman, *supra* note 30, at 578. For an excellent pre-*Boumediene* piece sharing a focus on habeas grounded in judicial power, see Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (arguing that individual rights are not necessary for habeas, which is rather a source of judicial power).

41 Munaf v. Geren, 553 U.S. 674, 693 (2008); *see also* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." (footnote omitted)).

42 *See infra* Part II.B. I second the view of Gerald Neuman that "[t]he account of the Suspension Clause in *Boumediene* grows incrementally out of established practice, and makes no revolutionary break." Neuman, *supra* note 30, at 565.

43 *See* Tyler, *Is Suspension a Political Question?*, *supra* note 21, at 383 (noting the sentiments of William Blackstone and Sir Edward Coke that due process and habeas corpus are linked by their concern for personal liberty); *infra* notes 114, 166, 247 and accompanying text.

of due process, which contains a sprawling modern procedural and substantive jurisprudence drawing from diverse areas (e.g., substantive constitutional law, criminal procedure, civil procedure, civil rights law, cost-benefit analysis, standards for incorporating Bill of Rights provisions, and fundamental rights jurisprudence).[44] Real perils arise from analogizing heterogeneous due process standards to habeas process; there is no neat overlap. This disjunction is particularly highlighted by the fact that habeas corpus offers a prisoner process in two ways: First, judges provide habeas process when reviewing whether a detention is authorized, which includes examining whether the detention has adequate factual and legal support.[45] Second, in doing so, the judge may examine whether earlier proceedings comported with due process.[46] The second function overlaps with due process, but not the first, broader function.

Indeed, scholars have not adequately appreciated how habeas corpus can offer far more than due process. In the executive detention context, if there has been no prior judicial process, habeas process—a federal judge asking whether the detention is authorized, often focusing on difficult factual questions—may be particularly central. In decades-old immigration rulings, the Court held that for certain noncitizens with negligible due process rights, habeas corpus permits an inquiry into the legal and factual authorization for the detention.[47] That setting has long made clear how a judge can provide habeas process where a due process claim would not permit doing so. In contrast, in contexts involving prior judicial process, such as a criminal conviction, habeas corpus may offer much less than due process.[48]

This aspect of habeas corpus explains why it, and not due process, would come to play the crucial role in judicial review of national security detention. In Part II, I develop a theory for how, in the wake of the September 11, 2001 attacks and subsequent military action, the *Hamdi* plurality relied chiefly on due process but indicated that habeas process also served a role.[49] I also examine how the Court in *Boumediene*, more carefully than ever before, determined that habeas provides protection distinct from due process.[50] The Court rejected the view that the Due Process Clause dominates the Suspension Clause. To fill in the outlines of habeas process, the *Boumediene* Court

44 *See infra* Part I.B.

45 *See infra* Part I.A.

46 *Id.*

47 *See infra* note 171 and accompanying text; *infra* Part III.A.

48 *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 486–90 (1994).

49 *See infra* Part II.A.

50 *See infra* Part II.B.

viewed the Suspension Clause as compatible with due process, not dependent on or coextensive with it.[51]

In Part III, I develop implications of that relationship between habeas corpus and due process. The *Boumediene* Court directed lower courts to elaborate habeas procedures to examine whether the detention of Guantánamo detainees was authorized. In response, judges crafted rules—multifariously modeled on civil, criminal, and postconviction law—by cherry picking from a raft of due process standards, sometimes from irrelevant contexts, including jurisprudence drawn from the postconviction context in which there already had been a criminal trial.

Discomfort with the institution of habeas corpus has led judges to adopt vague and unsettled procedures. For example, the D.C. Circuit reasons that review of enemy combatant detention is not a "mere extension[ ] of an existing doctrine" but "a whole new branch of the tree."[52] Yet the sparse but powerful habeas process is really the trunk of the tree. Judges should draw habeas process directly from the core of "traditional habeas corpus process,"[53] which remains largely unchanged from common law practice and the earliest federal statutes. While judges must develop the details of how habeas functions in detention challenges, they should draw that process from habeas jurisprudence designed to provide a judge with power to scrutinize the factual and legal authorization for a detention, rather than, for example, sources from postconviction law.[54] *Boumediene* demands such a focus.

In Part IV, I explore the broader potential significance of this view of the Suspension Clause. Habeas corpus has developed along different paths, with different statutes and case law regulating postconviction and executive detainee petitions. The Suspension Clause provides a unified structure. Chief Justice John Roberts, dissenting in *Boumediene*, noted that habeas is "traditionally more limited in some contexts than in others."[55] The core habeas process explains how context matters: in each area, habeas takes on a greater role where due process is constrained. Judges have the strongest Suspension Clause obligation to review legal and factual questions where there was no prior adequate judicial review of detention. This has implications for disparate strands of habeas corpus. For postconviction

---

51 *See infra* notes 289–92 and accompanying text.

52 Al-Bihani v. Obama, 590 F.3d 866, 877 (D.C. Cir. 2010).

53 Boumediene v. Bush, 553 U.S. 723, 778 (2008).

54 *See generally* Lee Kovarsky, *A Constitutional Theory of Habeas Power* (Univ. of Md. Legal Studies, Research Paper No. 2012-27, 2012), *available at* http://ssrn.com/abstract=2061471 (theorizing that the Suspension Clause supplies an Article III habeas power to federal judges absent a suspension of the writ).

55 *Boumediene*, 553 U.S. at 814 (Roberts, C.J., dissenting).

habeas, this reading of the Clause provides new constitutional support for a claim of actual innocence, which the Court has recognized only hypothetically. Similarly, in immigration law, this view of habeas has implications for important unsettled questions regarding judicial review following the REAL ID Act of 2005.[56]

Congress and the Executive have largely accommodated, in the wake of *Boumediene*, a system in which judicial review plays a central role in detention cases, even if judges remain deferential both to congressional authorization for detention and executive procedures for screening and release of detainees.[57] The Suspension Clause may facilitate this equilibrium better than a due process approach, which would focus more on procedure and less on substance. A judge asking whether the Due Process Clause was violated focuses on the minimal adequacy of general procedures, which may not necessarily require a judicial process. A judge asking whether the Suspension Clause was violated asks a different question: whether the process preserves an adequate and effective role for federal judges to independently review authorization of each individual detainee. The specific question for the judge is whether a person is in fact detained lawfully, which is a fundamental question of substance. Despite connections between habeas corpus and due process, the habeas judge's preoccupation with authorization instead of procedure suggests important reasons for the concepts to remain separate. Habeas corpus and due process can share an inverse relationship,[58] meaning that the Suspension Clause can continue to do its work standing alone.

I
The Distinction Between Habeas Corpus and Due Process

A. The Great Writ

The writ of habeas corpus has a much-celebrated and storied history that brings with it "immediate incantation of the Great Writ."[59] The Supreme Court has lauded the "indispensable function of the Great Writ"[60] that "indisputably holds an honored position in our jurisprudence."[61] The traditional purpose of habeas corpus is elemen-

56 *See infra* Part IV.A. Congress enacted the REAL ID Act as Division II of a 2005 supplemental defense spending bill. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, §§ 101–106, 119 Stat. 231, 302–11 (codified at 8 U.S.C. § 1778 (2006)).

57 *See infra* Part III.

58 *See infra* Part IV.A.

59 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970).

60 Brown v. Allen, 344 U.S. 443, 452 (1953).

61 Engle v. Isaac, 456 U.S. 107, 126 (1982).

tal but powerful: to allow a judge to review the legality of a prisoner's detention.[62]

Judges have variously described the writ of habeas corpus as a "right,"[63] a "remedy,"[64] a "procedural right,"[65] or a "mechanism."[66] Those characterizations are each partially correct, but taken alone they may be misleading. Habeas corpus is a writ. It is not a modern cause of action requiring an individual to assert a legal right; it arises from a common law writ. As the Court noted in *Boumediene*, the Suspension Clause refers not to any positive right or remedy but to "[t]he Privilege of the Writ of Habeas Corpus,"[67] which shall not be suspended.[68] Despite this, scholars and courts have long debated whether the Suspension Clause assures any minimum scope or content to the writ and whether lower federal courts, which Congress need not create, must entertain the writ to provide meaningful remedies.[69] In focusing on these issues, scholars seem to be imposing a modern question—what is the scope of the habeas right—on a premodern text with a common law answer—habeas is not a right, but judges may entertain a prayer for the writ and require the jailer to justify the legality of the detention.

The Court gingerly avoided addressing the independent force of the writ before deciding *Boumediene*. For example, in *Ex parte Bollman*, the Court's first ruling on the subject, Chief Justice Marshall famously noted that federal jurisdiction must be given by "written law," but that the first Congress might have felt some "obligation," acting under the "immediate influence of [the] injunction" of the Suspension Clause,

---

62 Boumediene v. Bush, 553 U.S. 723, 745 (2008) ("The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.").

63 Boumediene v. Bush, 476 F.3d 981, 993 (D.C. Cir. 2007) ("The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right*." (quoting Tyler, *Is Suspension a Political Question?*, *supra* note 21, at 374 & n.227)).

64 Fay v. Noia, 372 U.S. 391, 400 (1963) (describing the Great Writ as "affording . . . a swift and imperative remedy in all cases of illegal restraint or confinement" (quoting Sec'y of State for Home Affairs v. O'Brien, [1923] A.C. 603 (H.L.) 609 (appeal taken from Eng.))).

65 *Boumediene*, 553 U.S. at 802 (Roberts, C.J., dissenting) ("Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention.").

66 *Id.*

67 U.S. CONST. art. I., § 9, cl. 2.

68 *Boumediene*, 553 U.S. at 743 ("The word 'privilege' was used, perhaps, to avoid mentioning some rights to the exclusion of others.").

69 *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1162 (6th ed. 2009) ("The constitutional text appears to presuppose the existence of habeas corpus jurisdiction, but it does not affirmatively guarantee a right to habeas corpus . . . ."); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 (viewing the Suspension Clause as "a direction . . . to make the habeas privilege routinely available").

to provide "life and activity" to the writ.[70] The Court more recently stated in *Felker v. Turpin* that it assumed "for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."[71] The Court took a different stance in *INS v. St. Cyr*, stating that the Suspension Clause might "at the absolute minimum" protect the writ "as it existed in 1789."[72]

While the Court had avoided stating whether the Suspension Clause affirmatively guarantees some habeas remedy, it had clearly established that habeas serves a core purpose "as a means of reviewing the legality of Executive detention."[73] Effectuating this purpose may require courts to examine the legal and factual justifications for holding a detainee. Once a petition is filed, the government has the burden of showing that a detention is authorized. This burden reflects a principle central to the concept of due process: deprivation of an individual's liberty must be in accordance with the law. What judges conducting habeas review do, though, which is different from conducting a due process analysis, is to inquire whether the detention is lawful or factually supported.

A judge examining a habeas petition provides process in two ways. First, a judge reviewing a habeas petition may examine law and facts concerning the prior process used to place a person in custody.[74] Postconviction petitions filed by prisoners seeking review of their state criminal convictions, in which judges must consider whether the state violated the defendant's constitutional rights, dominate the federal habeas docket. The second-largest category is postconviction motions by federal prisoners challenging federal convictions, although they are filed chiefly under a statutory analogue to habeas.[75]

Habeas corpus has a second purpose, originally its primary purpose, in which a judge independently examines the justification for the detention.[76] A detainee filing a writ need not allege a violation of a right, just that custody is unauthorized, thereby placing the burden on the Executive to show cause for the detention and requiring the

---

70 8 U.S. (4 Cranch) 75, 94–95 (1807).

71 518 U.S. 651, 664 (1996).

72 533 U.S. 289, 301 (2001) (quoting *Felker*, 518 U.S. at 664); *see also* FALLON, JR. ET AL., *supra* note 69, at 1162–63 (discussing the Court's *INS v. St. Cyr* decision).

73 *St. Cyr*, 533 U.S. at 301.

74 *See* FALLON, JR. ET AL., *supra* note 69, at 1154 ("The primary contemporary use of federal habeas corpus is as a postconviction remedy for prisoners claiming that an error of federal law—almost always of federal constitutional law—infected the judicial proceedings that resulted in their detention.").

75 *Id.*; *see* 28 U.S.C. § 2255 (2006).

76 *See* FALLON, JR. ET AL., *supra* note 69, at 1154 ("[P]ostconviction relief was not the original office of habeas corpus, which focused instead on whether extra-judicial detention—most often by the executive—was authorized by law.").

judge to review the legality of and authorization for the detention.[77] Of course, judges have less to review where prior judges already developed a record and examined the detention. As a result, independent habeas process has become less commonly used.

This traditional habeas process remains crucial, however, where the Executive detains a person without prior judicial process. In general, habeas "protections have been strongest" when "reviewing the legality of Executive detention."[78] Immigration law, which I examine in Part III,[79] also contains decisions, dating back many decades, that emphasize how habeas plays a role even without an underlying due process right.[80] This original function of habeas process, with its common law origins,[81] has become particularly important in national security detentions post-9/11.

B. Common Law Origins

Celebratory accounts of habeas corpus and due process trace back to King John pronouncing Magna Carta to the barons assembled at Runnymede, assuring them that the King was not above the law and that they could not be imprisoned or punished except according to the law of the land.[82] As Justice David Souter wrote in *Hamdi*, "[W]e are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by 'the law of the land.'"[83] The Supreme Court, in *Fay v. Noia*, hailed "the union of the right to due process drawn from Magna Charta and the remedy of habeas corpus accomplished in the [seventeenth] century."[84] Many overstate the historical connection between habeas corpus and due process to Magna Carta. Nevertheless, habeas and due process were, and are, conceptually and practically connected. What is the relationship? An examination of the origins of both concepts shed light on that question.

1. *Origins of Habeas Corpus*

Habeas corpus practice remains, in some respects, closely linked to its common law origins. The Supreme Court describes habeas

---

77 *See id.* at 1153 ("[A]n individual whose liberty is restrained may file a petition seeking issuance of the writ, and thereby require a custodian . . . to justify the restraint as lawful.").

78 *St. Cyr*, 533 U.S. at 301.

79 *See infra* Part III.A.

80 *See infra* note 171 and accompanying text.

81 Engle v. Isaac, 456 U.S. 107, 126 (1982) (noting that habeas has "roots deep into English common law").

82 *See infra* notes 87–88 and accompanying text.

83 Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring).

84 372 U.S. 391, 402 (1963).

corpus as "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law."[85] As Paul Halliday powerfully shows in a book that reshaped our understanding of habeas corpus, the common law writ was not based on a modern concept of individual rights, but rather a royal prerogative and the King's grace and mercy, grounded in a judge's command to a jailer in order to inspect whether a person was properly detained.[86]

Traditional historians traced habeas corpus to Magna Carta, in which feudal barons in England secured a charter from King John pronouncing that no person could be imprisoned or punished "excepting by the legal judgment of his peers, or by the laws of the land."[87] William Church cited to Magna Carta as "form[ing] a basis for hundreds of years on which prisoners unlawfully confined could ground their demand for liberty."[88] However, the notion that habeas corpus originated from Magna Carta was a "myth" and "the two were unrelated in origin," as Daniel Meador developed in a classic treatment.[89] Paul Halliday and G. Edward White write that in an "idealized version of habeas corpus, the history of the writ becomes a history of the ever-greater manifestation of ideals of fairness, due process, and humanitarianism associated with the 'Anglo-American tradition' of justice under law."[90] Magna Carta did not name "a specific process to prevent imprisonment contrary to 'the law of the land,'" and "law of the land" referred to a host of broad concepts.[91]

Habeas corpus originated before Magna Carta from a shifting set of mundane writs that courts employed to "have the body," or to order the moving of prisoners, bringing them before the court and holding sheriffs and other custodians accountable.[92] The modern form of the writ emerged centuries later. Halliday's examination of records of the King's Bench revealed how judges gradually transformed habeas corpus into a means to call to account, on behalf of the King, jailers who detained subjects in a manner "repugnant to common law and common weal."[93] In the seventeenth century, leading up to the En-

---

85 Rasul v. Bush, 542 U.S. 466, 473 (2004) (alteration in original) (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting)).

86 HALLIDAY, *supra* note 32, at 7.

87 *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 2 (Gaunt, Inc. 1997) (1893) (quoting RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 83 (London, John Major & Robert Jennings 1829)).

88 *Id.* §§ 2, 3(a) (recognizing the use of other "ancient writs" before Magna Carta).

89 MEADOR, *supra* note 4, at 5.

90 Halliday & White, *supra* note 32, at 581.

91 HALLIDAY, *supra* note 32, at 16, 137–38.

92 *Id.* at 17, 40–41; *see also* MEADOR, *supra* note 4, at 8–9 (describing early English orders used to bring a person before the court).

93 HALLIDAY, *supra* note 32, at 22, 27.

glish Civil War and Restoration, justices used habeas as a powerful check on other courts, officials, and even Parliament.[94]

This common law process involved legal and factual review of detention.[95] A case began with the filing of a prayer for the writ, which, if granted, permitted the judge to send a writ asking the jailer to explain the cause of the commitment and to produce the prisoner in court. The jailer complied by sending a return and producing the prisoner.[96] In the return, the jailer might raise a defense that common law, statute, or custom authorized the detention. The judge might then order the release of the prisoner. A release might not be based on a violation of a right, but rather because the jailer could not show the detention was authorized by law or sufficient facts.[97]

During the writ's seventeenth-century heyday, justices began to not only inquire into the cause of the detention, but also the initial arrest.[98] As Halliday has shown, judges would even make these inquiries in cases in which another court ordered the detention, including courts of record such as the Privy Council and Star Chamber.[99] The inquiries increased "factual demands made by the writ" and required justices to "read deeply into the returns."[100] Justices did not adopt a particular standard of proof when assessing facts, but "followed the facts of cases rather than rules"; review could depend on elements of the statute providing the basis for detention.[101]

Historians traditionally repeated "[t]he apparent rule against controverting the return,"[102] suggesting that the factual inquiry was limited to the jailer's statement in support of detention.[103] Halliday

---

94 *See id.* at 30–31 ("During the seventeenth and eighteenth centuries, supervising wrongs created by statutes formed most of the writ's business. In the 1640s, . . . [s]ome parliamentary leaders took it upon themselves to reform the nation's conscience as they reformed its governance, . . . [and] many used imprisonment orders to convince the unconvinced. King's Bench met them head on . . . .").

95 *See* Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 974 (2009) (describing how judges would "deploy a host of procedural tools for inquiring into the factual justification for the prisoner's detention"); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535–36 (1998) ("[J]udges were not entirely precluded from reviewing facts on habeas corpus. . . . The main constraint on judicial review of the facts in a return to habeas corpus was the principle that juries must answer to questions of fact and judges to questions of law.").

96 *See* FALLON, JR. ET AL., *supra* note 69, at 1153.

97 *See* HALLIDAY, *supra* note 32, at 104–06.

98 *Id.* at 106.

99 *Id.*

100 *Id.* at 53.

101 *Id.* at 104–05.

102 *Id.* at 109.

103 *Cf.* Fallon, Jr. & Meltzer, *supra* note 22, at 2102 ("[E]arly practice was not consistent: courts occasionally permitted factual inquiries when no other opportunity for judicial review existed."); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of*

has powerfully shown, by examining King's Bench records, that contrary to the letter of this oft-repeated rule,[104] judges "generated myriad ways to elicit evidence," including through written and in-person testimony.[105] Thus, "judges routinely considered extrinsic evidence such as in-court testimony, third party affidavits, documents, and expert opinions to scrutinize the factual and legal basis for detention."[106] During this evolution of the writ, Parliament enacted the English Habeas Corpus Act of 1679, which, though celebrated, may in fact have done little to supplement common law habeas practice.[107]

Habeas corpus did far more than allow judges to supervise compliance with the then-limited notion of "due process," which applied chiefly to felon pretrial process. Instead, habeas corpus permitted broad supervision of the legality of and factual support for a detention. As I describe, in many respects this traditional habeas process remains the practice today in federal executive detentions, based on both current federal habeas statutes and the process federal courts have developed.

2. *Origins of Due Process*

In England, the term "due process" was not in use until long after Magna Carta, which pronounced that no person could be imprisoned or punished "excepting by the legal judgment of his peers, or by the laws of the land."[108] The term "law of the land," was broad and referred to statutes, custom, common law, and prerogative writs.[109] The narrower term "due process" was first used centuries later in a 1354 statute, stating that "no Man of what Estate or Condition that he be, shall be . . . taken, nor imprisoned . . . nor put to Death, without being

---

*Alien*s, 98 COLUM. L. REV. 961, 986 (1998) (noting that the "general statement" that "the petitioner could not controvert the facts stated in the return" "papered over exceptions").

104 The supposed rule had origins in dicta by Lord Coke, which in fact related, as Halliday describes, to an unrelated rule regarding suits for trespass or false imprisonment filed by former prisoners seeking damages *after* their release. HALLIDAY, *supra* note 32, at 108–10. The rule operated to separate civil actions seeking compensation after release from those seeking release from unauthorized detention in the first instance. Judges did not, despite repeating the "apparent rule," require a separate action to challenge facts in a return. *Id.* at 109.

105 *Id.* at 109–11.

106 Brief of Legal Historians as Amici Curiae in Support of Petitioners at 29, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195).

107 31 Car. 2, c. 2 (Eng.); *see* HALLIDAY, *supra* note 32, at 34 ("The . . . Habeas Corpus Act of 1679 had a . . . mixed effect. Many of the practices it prescribed had long been used in King's Bench." (footnote omitted)); MEADOR, *supra* note 4, at 25 ("[C]elebrated though it is, the Act dealt with no profound questions and introduced no new principles.").

108 *See* CHURCH, *supra* note 87, § 2 (quoting THOMSON, *supra* note 87, at 83).

109 HALLIDAY, *supra* note 32, at 145.

brought in Answer by due Process of the Law."[110] Later commentators, beginning with Sir Edward Coke, focused on the words "due process" as fair and judicial process.[111] Habeas corpus was one method by which justices could review custody and prior process.[112] Coke, who famously connected due process to habeas corpus, wrote: "[I]f a man be taken, or committed to prison *contra legem terrae*, against the law of the land, what remedy hath the party grieved? . . . He may have an *habeas corpus* . . . ."[113] Commentators following Coke celebrated habeas corpus and the due process concept as a common law source for individual rights and liberty.[114] Coke described how both due process and habeas corpus enabled judges to ensure against arbitrary and unlawful imprisonment. Habeas provided, however, a broader power to supervise jailers. Habeas corpus did not merely assure compliance with pretrial due process, but empowered the judge to scrutinize the factual and legal authorization of the detention.[115]

3. *The Suspension Clause*

The Suspension Clause stands alone as the only common law writ mentioned in the Constitution. Article I, Section 9 provides: "The

---

110 Liberty of Subject, 1354, 28 Edw. 3, c. 3 (Eng.), *reprinted in* 1 THE STATUTES OF THE REALM 345 (1810); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428 (2010).

111 Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266 (1975) (noting the tendency of scholars to focus on the words "due process of law" at the expense of the remainder of the 1354 statute). Sir Edward Coke famously equated "due proces of law" with "law of the land," as the "true sense and exposition" of the phrase. EDWARDO COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, W. Clarke & Sons 1809) (1642). Coke's conflation of law of the land with due process has been much criticized. *See, e.g.*, MEADOR, *supra* note 4, at 22 ("[T]he final welding together of [habeas corpus and due process] was probably effected by Coke's monumental *Institutes on the Law of England*, though they have been heavily criticized as to quality of scholarship."); Halliday & White, *supra* note 32, at 640 (pointing out "law of the land" also referred in significant part to property law, literally law concerned with land, and more generally with franchises over subjects); Jurow, *supra*, at 271 ("It would have been impossible to subsume all that was considered to be 'the law of the land' in a single statute."). Coke may have simply been describing judicial process, not broader questions of individual rights we now associate with "due process." *See* Jurow, *supra*, at 272, 277. After all, "the word 'process' itself meant writs," including those summoning parties to appear in court. *Id.* at 272.

112 Coke turned from calling "law of the land" as "due proces [*sic*] of the common law" to habeas, noting that orders for arrest must be based on "just cause of suspicion" to "be determined by the justices . . . upon a *habeas corpus*." COKE, *supra* note 111, at 50, 52.

113 *Id.* at 54.

114 As William Blackstone wrote, "Of great importance to the public is the preservation of this personal liberty . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *131. Blackstone also explained that habeas dealt with the "personal liberty of the subject." *Id.* Elsewhere, Blackstone explained that habeas did so by permitting "the court upon an *habeas corpus*" to examine the validity of a confinement "and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." 3 WILLIAM BLACKSTONE, COMMENTARIES *133.

115 *See supra* notes 86–92 and accompanying text.

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."[116] The Clause refers to preserving an existing writ, and it was not discussed extensively at the Constitutional Convention.[117] Halliday and White explain that "the Suspension Clause carried the writ of habeas corpus out of English practice and into American law with little additional jurisprudential baggage."[118]

In the United States, as in England, the common law writ continued to operate as before at the state level, but statutes regulated federal habeas practice. In *Ex parte Bollman*, the Supreme Court declared that the power to issue writs of habeas corpus must be given by "written law," but noted that the first Congress, feeling the "obligation" to give "life and activity" to "this great constitutional privilege,"[119] enacted the Judiciary Act of 1789, which empowered all federal judges to grant the writ.[120] The Act provided that state prisoners could pursue writ-of-error review of state supreme court decisions in the U.S. Supreme Court but could not obtain habeas review of "cause of commitment" in federal courts.[121] The *Ex parte Bollman* Court noted that state courts are "the creatures of a distinct government" and therefore state prisoners lacked statutory means to pursue habeas corpus in federal courts.[122]

In contrast, the Act provided for factual and legal review of detention of federal prisoners. For example, in 1807, following the decision in *Ex parte Bollman*, the Court held five days of hearings to "fully examine[ ]" the evidence before granting the writ.[123] Jared Goldstein

---

116 U.S. CONST. art. I, § 9, cl. 2.

117 Delegates at the Philadelphia Convention disagreed about what circumstances should permit a suspension of the writ, whether suspension should be limited to a specific amount of time, or whether suspension should be permitted at all. *See* DUKER, *supra* note 21, at 128–31 ("[T]he absence of the affirmative clause was insignificant. . . . Every state . . . secured the writ. The chief concern . . . was over the power to suspend." (footnotes omitted)); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1911).

118 Halliday & White, *supra* note 32, at 583.

119 8 U.S. (4 Cranch) 75, 95 (1807).

120 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82; *Bollman*, 8 U.S. (4 Cranch) at 83–84, 101.

121 § 14, 1 Stat. at 81–82 (limiting habeas review to prisoners held under the authority of the United States); § 25, 1 Stat. 85–87 (providing appellate writ-of-error review in the U.S. Supreme Court of final judgments and decrees of state high courts where, *inter alia*, a state statute is challenged as "repugnant to the constitution, treaties or laws of the United States"); 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4[d][i] (6th ed. 2011).

122 8 U.S. (4 Cranch) at 97.

123 *Id.* at 125, 136. Chief Justice Marshall did the same, sitting in a circuit case involving an enemy alien detainee. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG (n.s.) 39, 42–43 (2005). State judges conducted similar factual review of detentions. *See* Halliday & White, *supra*

reviewed federal habeas decisions following the Act through 1867, finding that a wide variety of petitions were "framed as challenges to the custodian's detention authority, not as violations of individual rights," including "fact-based challenges."[124]

The detention versus postconviction distinction—broad factual and legal review of federal detention but more limited review of state and federal criminal convictions—divides habeas corpus jurisprudence to this day, although courts have dramatically expanded federal habeas corpus for both state and federal convicts. The current federal statute governing the writ of habeas corpus generally, 28 U.S.C. §§ 2241–2248, retains language from the First Judiciary Act and provides that a petitioner in federal custody need not lay out a legal claim, but "shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known."[125] Under 28 U.S.C. § 2243, a judge may issue the writ, order a return, and then "determine the facts" to evaluate "the true cause of the detention" specified in the return.[126] Discovery is available during habeas proceedings as well as evidentiary hearings, both of which remain largely unchanged since common law habeas.[127]

Twentieth-century federal prisoner petition rulings follow the same process. Immigration habeas decisions in particular demonstrate this point, because habeas corpus can play a distinctive role where noncitizens may lack due process rights to any additional immigration procedure. For example, in *Ludecke v. Watkins*, the Court upheld discretionary deportation authority under the Alien Enemy Act of 1798 without additional procedures, but noted that judicial review remained available to examine "the construction and validity of the statute" and "whether the person restrained is in fact an alien enemy."[128]

Habeas corpus has other, more varied applications, and in some respects the practice has dramatically changed—chiefly outside the executive detention context. Most significantly, federal habeas statutes have changed with respect to state conviction review. In this con-

---

note 32, at 709–12 (describing and interpreting a Pennsylvania Supreme Court case reviewing custody of enemy aliens detained in War of 1812).

124 Goldstein, *supra* note 40, at 1195.

125 28 U.S.C. § 2242 (2006).

126 *Id.* § 2243. Those statutory procedures have been modified only slightly since the First Judiciary Act.

127 RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 6(a) (2010) (permitting discovery "for good cause").

128 335 U.S. 160, 171 & n.17 (1948). To be sure, such habeas rulings did not adopt any particular standard of proof. *See supra* note 101 and accompanying text (noting that seventeenth century English courts also avoided adopting a uniform standard of proof); *infra* Part III.A (discussing the post-*Boumediene* question of standard of proof).

text judges and scholars have debated whether habeas corpus necessarily requires any particular level of judicial review.[129] Much of the language describing habeas as a "vehicle" for remedying violations of constitutional rights refers to the context of postconviction review. Unlike federal detainees, federal convicts seeking postconviction review must pursue relief under a separate statute, requiring assertion of a right to be released under the constitution or federal law and imposing procedural restrictions on such litigation.[130] Similarly, state prisoners generally must claim that they are "in custody in violation" of the constitution or federal law.[131] In state prisoner petitions, judges must rule on separate federal claims.[132] Federal review of state convictions is deferential; judges grant hearings in limited circumstances.[133] Federal judges defer to legal rulings by state judges,[134] including based on the stringent requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA).[135] After all, unlike executive detainees, federal and state convicts received prior judicial process—a trial, an appeal, and perhaps state habeas. When judges apply exceptions

---

129 *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509–11 (1963) ("Why is it . . . that we go so far to allow relitigation of constitutional questions . . . and yet do not allow any relitigation of the fundamental question of the factual guilt or innocence of the accused?"). Those debates relate to postconviction habeas, not review of federal detention in which there has been no judgment receiving "finality." A related debate about scope of early twentieth century postconviction habeas opinions concerns the relationship between habeas and due process. The Court described early decisions denying habeas as follows: "Absent an alleged jurisdictional defect, 'habeas corpus would not lie for a [state] prisoner . . . if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts.'" Wright v. West, 505 U.S. 277, 285 (1992) (alterations in original) (quoting Fay v. Noia, 372 U.S. 391, 459–60 (1963) (Harlan, J., dissenting)). That view has been criticized as conflating the scope of habeas corpus with that of the Due Process Clause. Thus, Justice O'Connor explained, "[W]hen the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus." *Id.* at 298 (O'Connor, J., concurring); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 597–601 (1993) (describing more complex history in which habeas review was more limited than scope of available constitutional rights, but courts did not conduct purely "jurisdictional" review).

130 28 U.S.C. § 2255 (2006).

131 *Id.* § 2241.

132 For statutory requirements referring to claims, see, e.g., 28 U.S.C. § 2244(d)(1)(D) (timely presentation of claims based on new evidence); *id.* § 2254(d) (standard of review for "any claim that was adjudicated on the merits in State court"); *see also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (requiring "total exhaustion" of each federal claim).

133 *See* 28 U.S.C. § 2254(d)(2), (e).

134 *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that "new constitutional rules of criminal procedure will not be applicable" to petitioners with cases pending postconviction review at the time a new rule is announced).

135 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28 and 42 U.S.C.); *see* Felker v. Turpin, 518 U.S. 651, 664 (1996) (holding that AEDPA restrictions on successive habeas petitions do not amount to an unconstitutional suspension of the writ).

to those restrictions, they typically do so because important new evidence surfaces that no judge has yet examined.[136]

Executive detention challenges are different. In immigration habeas, across a wide range of contexts in which noncitizens seek to challenge decisions to detain or remove them from the United States, Congress has enacted statutes that preserve de novo review of questions of law.[137] However, Congress has provided for deferential review of questions of fact where those questions are committed to administrative discretion or where the case involves a noncitizen with a prior criminal conviction.[138] Congress has provided for broader fact review for asylum cases[139] and de novo fact review where a person's citizenship is at issue.[140] The Supreme Court has also insisted on careful judicial review of indefinite or lengthy detention pending removal.[141] As I develop in Part IV, these complex distinctions in immigration law remain in many respects highly imperfect products of legislative compromises. However, in part due to both the Supreme Court's interventions and judicial and legislative concern with avoiding Suspension Clause problems, habeas corpus plays a comparatively greater role precisely where the detention lacks prior judicial process or extensive due process protections.

4. *The Due Process Clause*

The Due Process Clause of the Fifth Amendment, mirrored in the Fourteenth Amendment, states, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[142] The Clause "imposes procedural limitations on a State's power to take away protected entitlements."[143] Justice Scalia has called the Fifth Amendment an "affirmation of Magna Charta according to Coke,"[144] and early decisions, like the Court's 1856 decision in *Murray's Lessee v. Hoboken Land and Improvement Co.*, invoked Magna Carta to describe process due by looking to "settled usages and modes of proceeding" at common law.[145] In 1884, in *Hurtado v. California*, the Court approved

136 *See infra* note 365 and accompanying text.

137 *See infra* note 473 and accompanying text.

138 *See* 8 U.S.C. § 1252(a)(2)(C), (b)(4)(B) (2006); *infra* Part IV.A.

139 *See, e.g.*, Xi An He v. Holder, 467 F. App'x 558, 559 (9th Cir. 2012) ("We review for substantial evidence the agency's factual findings . . . ."); Ndrecaj v. Holder, 445 F. App'x 428, 430 (2d Cir. 2011) ("We review the factual findings of the [Board of Immigration Appeals] and [Immigration Judge] for substantial evidence." (quoting Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006))).

140 *See* 8 U.S.C. § 1252(b)(5)(B).

141 *See* Zadvydas v. Davis, 533 U.S. 678, 699–702 (2001).

142 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

143 Dist. Attorney's Office v. Osborne, 557 U.S. 52, 67 (2009).

144 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29, 30 (1991) (Scalia, J., concurring).

145 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1856).

of the argument that due process is the "equivalent" of the "law of the land" in Magna Carta.[146] Into the twentieth century, petitioners often filed common law actions, such as trespass, that did not assert due process rights.[147] However, in response, officials could raise a defense that a statute authorized their acts.[148] A court might find the statute unconstitutional and the acts not immunized, citing the Due Process Clause. As in traditional habeas litigation, the constitutional issue arose through anticipation of a defense.

As common law pleading forms eroded, habeas and civil litigation drifted apart. While habeas practice remained largely the same in the federal executive detention context, in civil cases courts began to require the civil rights petitioner to name a constitutional or statutory source for relief.[149] This reflected a slow-to-emerge and more positivist view of rights.[150] The Court now emphasizes that the Due Process Clause requires a court to ask if a particular right is "fundamental to *our* scheme of ordered liberty and system of justice."[151] The focus is on the "essential principle . . . that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[152] Additionally, the Court adapted hearing and notice concepts into standards that apply to the full spectrum of state action.

The result is not one but many due process tests regulating disparate areas where government action touches on life, liberty and property interests, including administrative procedure, criminal investigations and procedure, civil procedure, jurisdiction, and judicial remedies.[153] In areas of civil procedure, most notably personal jurisdiction but also notice requirements, the Court has cited to realities of modern society, as well as costs, and has broken with traditional forms of process.[154] In other areas, including substantive due process,

---

146 110 U.S. 516, 521 (1884).

147 Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510–33 (1989).

148 *See id.*

149 *See* Woolhandler, *supra* note 129, at 623–25 (describing the "gradual replacement of common law pleading with pleading that identified a positive source of law").

150 *See In re* Winship, 397 U.S. 358, 381 (1970) (Black, J., dissenting) (arguing against a "natural law" notion of due process, guided by conceptions of "fundamental fairness"); Twining v. New Jersey, 211 U.S. 78, 100–01 (1908) (rejecting the idea that common law procedures are "fastened upon the American jurisprudence like a straight-jacket").

151 McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

152 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

153 *Id.*

154 *Compare* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing modern notions of process justifying jurisdiction based on "certain minimum contacts" rather than requiring physical presence), *with* Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[I]t is . . . an

the Court has relied on newly formed consensus.[155] In a range of areas affected by activities of administrative agencies, typically involving new property interests in government benefits, the Court applied the *Mathews v. Eldridge* three-part test, weighing the private interest affected, the government interest in not providing added safeguards, and the risk of error absent the procedures.[156]

Due process jurisprudence retains some of the character of its common law origins. The Court has emphasized that the "most elemental" of liberty interests protected by the Due Process Clause is "the interest in being free from physical detention by one's own government."[157] Similarly, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[158] In areas closely impacting personal liberty, the Court rejects application of the *Mathews* test, noting that "fundamental fairness" has been the standard used "[i]n the field of criminal law," in part because Bill of Rights provisions govern criminal procedure directly.[159] The Court has, however, applied *Mathews* in a few contexts relating to deprivations of liberty, including procedures for pretrial detention[160] and involuntary civil commitment.[161] In *Ake v. Oklahoma*, the Court invoked the *Mathews* test regarding trial access to experts necessary for an effective defense, but it also cited concerns of fundamental fairness.[162] On the whole, due process regulation of criminal procedure has become far more substantial and detailed than anything found at common law, covering the entire criminal process from investigations and trials to appeals and postconviction.[163]

---

elementary principle, that the laws of one State have no operation outside of its territory . . . .").

155 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (noting that at the time of the Court's opinion the right to same-sex intimacy was "accepted as an integral part of human freedom in many other countries" and only thirteen states had antisodomy statutes on the books); Roe v. Wade, 410 U.S. 113, 139–40 (1973) ("In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws . . . .").

156 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

157 Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

158 *Foucha*, 504 U.S. at 80 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

159 Medina v. California, 505 U.S. 437, 443 (1992).

160 *See* United States v. Salerno, 481 U.S. 739, 746, 750–51 (1987).

161 *See* Heller v. Doe, 509 U.S. 312, 330–31 (1993); Zinermon v. Burch, 494 U.S. 113, 127–28 (1990); Addington v. Texas, 441 U.S. 418, 425 (1979).

162 470 U.S. 68, 76–82 (1985).

163 *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedures: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 310–12 (2001) (describing the "law of the land" as understood by Coke as requiring that the monarchy, as well as the courts, "to adhere to legal regularity, basing their decisions upon the common law, custom, or statute, and not personal whim").

The sheer breadth of modern due process can distract from areas in which habeas is broader than due process. The Supreme Court has emphasized only in narrowly defined substantive due process decisions that some deprivations of liberty may be barred "regardless of the fairness of the procedures used to implement them,"[164] although overlap is greater, as I discuss in Part IV, in decisions regarding limitations on indefinite civil detention. The focus of a judge using habeas process on the legal and factual authorization for a detention, apart from adequacy of procedure, is quite different from that of a judge relying on modern due process jurisprudence. Due process tests proceed differently by balancing cost, tradition, dignitary interests, liberty interests, federalism, and policy concerns. Indeed, "due process doctrine has developed a strikingly managerial aspect," promoting "schemes and incentives adequate to keep government, overall and on average, tolerably within the bounds of law."[165] In general terms this description of due process has something in common with habeas corpus, but the complex contours of evolving modern aspects of due process jurisprudence, with its various tests adapted to different contexts, share little in common with the core, persistent purpose of habeas corpus: reviewing the basis for detention.

C. A Writ and a Right

In 1963 in *Fay v. Noia*, Justice William Brennan wrote: "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty," adding, "[v]indication of due process is precisely its historic office."[166] In broad strokes, that passage captures how due process and habeas law have long dealt with matters of personal liberty. While majestic, the passage is imprecise. Both due process and habeas corpus are concerned with persons in custody, but in very different ways.[167] Depending on the context, habeas corpus or due process may have different reach.

Not all habeas petitions are grounded in a theory based on a constitutional or federal right. As described, federal prisoners—but not state prisoners—may seek habeas review if "in custody under or by

---

164 Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (noting also that the Court has been "reluctant to expand the concept of substantive due process"); Daniels v. Williams, 474 U.S. 327, 331 (1986).

165 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

166 372 U.S. 391, 401–02 (1963).

167 *See* 28 U.S.C. § 2241(c) (2006) (requiring generally that the writ "shall not extend" unless the applicant is "in custody"); Russell v. City of Pierre, 530 F.2d 791, 792 (8th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 855 (1976) ("The writ of habeas corpus is available only to one who is 'in custody.'" (citing 28 U.S.C. § 2241(c))).

color of the authority of the United States."[168] But, as the Court held in *INS v. St. Cyr*, habeas also permits review of statutory entitlements.[169] Why is that? Legal questions may arise in habeas in ways they could not in a due process challenge. A judge may grant habeas if the statute authorizing the detention is legally invalid. This situation arises when the statute is unconstitutional, conflicts with other law, or when it is valid but does not authorize the type of detention at issue. Factually, the individual may not be of the type who may be detained under the applicable statute. In contrast, due process jurisprudence, aside from substantive due process rulings, focuses on the general adequacy of process used when deciding to detain a person, not on the substantive authorization for the individual detention.

While scholarship has focused on the effect of a suspension or a statute stripping federal courts of habeas jurisdiction, some suggest that lack of a due process right cuts off access to habeas corpus.[170] Habeas process may be provided, however, even in cases without a due process violation. As noted, the Court directly addressed this scenario in immigration rulings involving noncitizens at the border who have limited due process rights. The Court has repeated that habeas corpus nevertheless permits an inquiry into the detention's authorization.[171] In that setting, as in others, habeas corpus may provide remedies where a due process claim would not.

Habeas corpus may prove narrower than due process in other contexts, particularly for state convicts. Convicts cannot raise some due process claims challenging their state trial convictions in a habeas

---

168 28 U.S.C. § 2241(c)(1).

169 *See* INS v. St. Cyr, 533 U.S. 289, 302 (2001) ("[T]he issuance of the writ . . . encompassed detentions based on . . . the erroneous application or interpretation of statutes. It was used to command the discharge of seamen who had a statutory exemption from impressment into the British Navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates." (footnotes omitted)); *see also* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1991 (2000) (discussing a circuit split over whether habeas review encompasses statutorily derived discretionary procedures). Procedural due process also embraces discretionary entitlements, as in leading cases such as *Mathews v. Eldridge*, a case about disability benefits. 424 U.S. 319, 332 (1976) (noting, however, that the Secretary had conceded that the statutory benefit created a "property" interest).

170 *See supra* note 23 and accompanying text.

171 *See, e.g.*, Heikkila v. Barber, 345 U.S. 229, 234–35 (1953) (upholding habeas corpus availability, although the statute at issue barred judicial review of a final deportation order); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (examining the statutory and constitutional authorization for alien exclusion despite the fact that "an alien who seeks admission to this country may not do so under any claim of right"); Ludecke v. Watkins, 335 U.S. 160, 171 & n.17 (1948) (upholding deportation without a hearing under the Alien Enemy Act and rejecting the notion that "some emanation of the Bill of Rights" would render this invalid, but also stating that judicial review remained as to "whether the person restrained is in fact an alien enemy"); United States v. Jung Ah Lung, 124 U.S. 621, 626–32 (1888) (holding that the Chinese Exclusion Act of 1882 did not affect jurisdiction of federal courts to hear habeas petitions). I explore immigration habeas in Part III.A.

petition, especially where some other vehicle is more appropriate.[172] Since states are not constitutionally obligated to provide postconviction procedures,[173] "when a State chooses to offer help to those seeking relief from convictions," due process does not "dictate[ ] the exact form such assistance must assume."[174] On the other hand, due process does help to protect rights to "adequate and effective" access to courts at trial, appeal, and postconviction.[175]

The Suspension Clause speaks of preserving a common law privilege. Does the Suspension Clause also preserve access to certain due process rights—or other procedural or substantive rights? Some claim that regardless of their origins, the Framers meant to join the concepts of due process and habeas corpus together.[176] Due process jurisprudence changed dramatically over time. Could those changes affect the scope of habeas corpus? Could vast changes in the role of federal courts, statutes regulating habeas, and notions of executive power also affect habeas? At times, as noted, the Court assumed that at a minimum "the Suspension Clause protects only the writ as it existed in 1789."[177] In other cases, the Court assumed the writ might expand.[178]

Few expected that the Court would try to fix the affirmative meaning of the Suspension Clause, but ultimately it did just that in its post-9/11 decisions. To careful observers of the Court's decisions regarding habeas corpus and noncitizens in the immigration context, the result should have been no surprise. Even without recognized due process rights, habeas corpus plays an important role.

---

172 *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (determining that a criminally convicted person cannot bring a civil suit challenging the conviction (e.g., for malicious prosecution) until the conviction is overturned by reversal on appeal or by executive pardon).

173 Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) ("[I]t is clear that the State need not provide any appeal at all." (quoting Ross v. Moffitt, 417 U.S. 600, 611 (1974))).

174 *Id.* at 559.

175 Bearden v. Georgia, 461 U.S. 660, 666 (1983) ("Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis . . . ." (footnote omitted)); Griffin v. Illinois, 351 U.S. 12, 20 (1956); *see also* Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (recognizing a defendant's due process right to have "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake").

176 *See supra* notes 144–45 and accompanying text.

177 INS v. St. Cyr, 533 U.S. 289, 304 (2001). Daniel Meltzer has suggested that 1789 is not the relevant year; 1789 is the year of the First Judiciary Act, not the Constitutional Convention (1787) or ratification of the Constitution (1788). Meltzer, *supra* note 30, at 15 n.62.

178 *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 663–64 (1996) ("But we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.").

II
FROM *HAMDI* TO *BOUMEDIENE*

The Supreme Court in *Boumediene* clarified that, standing alone, the Suspension Clause ensures access to certain procedures: "Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant."[179] The Court developed the *substantive* content of the process habeas provides. This is not to say that process can be substantive, but rather that process addresses the underlying question of whether the detention is authorized and is freestanding and distinct. Nevertheless, Justice Anthony Kennedy's majority opinion drew from due process principles to explain what process the Suspension Clause guarantees.[180] This triggered a vigorous debate with Chief Justice Roberts in dissent about the relationship between habeas corpus and due process.[181] The Court's *Hamdi* ruling helps to explain how the Court reached its *Boumediene* result, clarifying that habeas corpus alone ensures access to habeas process, which entails an independent review by a federal judge to examine the legal and factual authorization for a detention. This view of the Suspension Clause anchors the central role for habeas corpus in regulating detentions.

A. *Hamdi*: Due Process and Habeas Process

1. *The* Mathews *Test*

The Supreme Court's plurality opinion in *Hamdi v. Rumsfeld* ultimately relied on the *Mathews v. Eldridge* due process test, merely touching on sources grounded in habeas corpus. This choice set the stage for debates about the relationship between habeas and due process.

Yaser Esam Hamdi was captured by Northern Alliance allies in Afghanistan, who eventually turned him over to the U.S. military.[182] After some unspecified screening, including interrogations, the U.S. military brought him to Guantánamo Bay.[183] The Executive had previously designated Guantánamo Bay as a center for indefinite detention of "enemy combatants," who did not receive Prisoner of War status and were interrogated without access to counsel.[184] The military concluded that Hamdi was an "enemy combatant," to be detained

---

179 Boumediene v. Bush, 553 U.S. 723, 785 (2008).
180 *See infra* Part II.B.3.
181 *See infra* Part II.C.
182 Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).
183 *Id.*
184 *See* David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 128–29 (2005).

indefinitely "without formal charges or proceedings."[185] When the Executive determined that Hamdi was a U.S. citizen, the military transferred him to a naval brig in Norfolk, Virginia, perhaps because the government understood that Hamdi's citizenship might lead to a judicial opinion finding habeas jurisdiction over a Guantánamo detainee.[186]

When Hamdi filed a habeas petition, the district court appointed a federal defender and ordered that counsel be given access to Hamdi, an order that the government appealed.[187] Hamdi challenged his detention, relying on the Due Process Clause among his claims.[188] When pressed, the government submitted a declaration by a defense department official "familiar" with the case, stating that the government had deemed Hamdi an enemy combatant following review by "U.S. military screening team[s]."[189] Although the government's "sole evidentiary support" was hearsay, it maintained that the judge was obligated to dismiss the petition so long as the government could offer "some evidence" that Hamdi was an enemy combatant.[190] The district court rejected that position, calling it "little more than the government's 'say-so,'" but the Fourth Circuit reversed.[191]

The Court, in a plurality opinion authored by Justice Sandra Day O'Connor, ultimately held that the case justified more searching review. The *Hamdi* plurality relied on due process precedent, stating: "The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law" . . . is the test that we articulated in *Mathews v. Eldridge* . . . ."[192]

The *Mathews* cost-benefit balancing test has its merits, including its potential to lend transparency to interest balancing. It is not an outlier approach either. As Stephen Gardbaum put it, "We all live in the age of constitutional balancing."[193] But the Court's claim that the *Mathews* test was the "ordinary" due process "mechanism" may have been more controversial. Scholars have long argued that *Mathews*

185 *Hamdi*, 542 U.S. at 510, 513.

186 *Id.*

187 *Id.* at 512.

188 *See id.* at 511; *see also* 18 U.S.C. § 4001(a) (2006) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

189 *Hamdi*, 542 U.S. at 512–13 (alteration in original).

190 *See id.* at 512, 527.

191 *See id.* at 513–14.

192 *Id.* at 528–29 (quoting U.S. CONST. amend. V).

193 Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 LAW & ETHICS HUM. RTS. 78, 79 (2010). *But see* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 416 (1993) (criticizing from a philosophical angle the asserted "interconnectedness of rights with interests, powers, and consequences").

should be (and largely has been) confined to evaluating administrative hearings.[194] The *Mathews* analysis has been variously criticized for its flexibility, rigidity, focus on quantifying costs, consequentialism, failure to account for other values—particularly dignitary values—and for courts' failure to quantify error rates or other interests.[195] The author of the *Hamdi* plurality, Justice O'Connor, previously supported applying *Mathews* in criminal cases.[196] The *Mathews* test is useful, as Justice O'Connor noted, in the administrative context because there is "no historical practice to consider."[197] In *Hamdi*, Justice O'Connor presumably viewed enemy combatant detention as similarly lacking sufficient guidance from historical practice.

Justice Souter, joined by Justice Ruth Bader Ginsburg concurring, did not agree with the plurality's due process approach.[198] The dissenters, however, more directly confronted the plurality's due process analysis. Justice Scalia mocked how the plurality "claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . *the withdrawal of disability benefits*!"[199] Justice Clarence Thomas dissented, noting that the parties never relied on *Mathews*, and such analysis, if appropriate, was incorrect: "I do not think that the Federal Government's war powers can be balanced away by this Court."[200]

How does one weigh incommensurate and immeasurable interests, individual and national? Balancing interests in a national security detention case would not be easy. The plurality acknowledged that "substantial interests lie on both sides of the scale in this case."[201] The

---

194 *See, e.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1137–38 (1984).

195 *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 53–54 (1976); Rubin, *supra* note 194, at 1046; Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 155 (1978); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 252–57 (2004).

196 Medina v. California, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring).

197 *Id.* at 453–54.

198 Hamdi v. Rumsfeld, 542 U.S. 507, 553–54 (2004) (Souter, J., concurring) (disagreeing with the suggestion that government should benefit from an evidentiary presumption placing the burden on the detainee).

199 *Id.* at 575–76 (Scalia, J., dissenting) (alteration in original) (citation omitted). Scholars have criticized the *Hamdi* Court's use of the *Mathews* analysis. *See, e.g.*, Goldstein, *supra* note 40, at 1206 (noting "the absence of a reliable scale upon which to measure and balance the detainees' liberty interests against the government's national-security interests"); Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 355, 398–400 (2006) (noting that "the interests on both sides can be described with apocalyptic intensity" and that the test is "likely to succumb to a result-oriented malleability"). I do not view the *Mathews* test as more or less malleable than alternatives; it may be more transparent.

200 *Hamdi*, 542 U.S. at 579, 594 & n.5 (Thomas, J., dissenting).

201 *Id.* at 529 (plurality opinion).

private interest was "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[202] Meanwhile, the government asserted its interest in assuring that the enemy does not "return to battle against the United States."[203] The *Hamdi* plurality did not assign numbers or weights, but turned to the outcome: "[A] citizen-detainee . . . must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[204] The plurality left the particulars open. Hamdi would continue to receive a lawyer.[205] A court might admit hearsay evidence and there might be "a presumption in favor of the Government's evidence."[206] In dicta, the plurality suggested that due process need not require judicial process and that the decision maker need not be an Article III judge.[207] Could the government comply with due process but in doing so cut off habeas corpus review entirely?

2. *Habeas Corpus Process*

Perhaps most surprisingly, the *Hamdi* plurality did not heavily rely on the habeas precedent described in Part I regarding executive detentions. Since *Hamdi* was a U.S. citizen, the Court largely avoided discussing cases that extend habeas to noncitizens lacking due process protection. In several crucial passages, however, the plurality did suggest that due process balancing did not end its analysis: "[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."[208] Habeas provides process both to assess the adequacy of prior process and, more fundamentally, to examine the authorization for a detention. While the *Mathews* test may provide guidance where there is "no historical practice to consider,"[209] habeas corpus involves a rich historical practice, which the *Hamdi* plurality drew on. The plurality noted that "[a]bsent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process."[210] Specifically, that process provided the chance to challenge "the factual basis" for the detention.[211] It is not due process alone but rather "the Great Writ of habeas corpus

202 *Id.* (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).
203 *Id.* at 531.
204 *Id.* at 533.
205 *Id.* at 539.
206 *Id.* at 533–34.
207 *Id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").
208 *Id.*
209 Medina v. California, 505 U.S. 437, 453–54 (1992) (O'Connor, J., concurring).
210 *Hamdi*, 542 U.S. at 537.
211 *Id.*

[which] allows the Judicial Branch to play a necessary role . . . as an important judicial check on the Executive's discretion in the realm of detentions."[212]

The importance of this part of the plurality ruling remains underappreciated, perhaps because of its lack of clarity.[213] The plurality indicated that the Suspension Clause ensured the availability of habeas corpus, years before the *Boumediene* Court decided the question. The plurality cited to 42 U.S.C. § 2241 and various companion provisions,[214] which "provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review," including the ability to take "evidence in habeas proceedings by deposition, affidavit, or interrogatories."[215] The plurality concluded that "Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process."[216] The plurality relied not only on federal habeas statutes but also on the Suspension Clause. The plurality noted that absent a suspension, "[a]t all other times, [habeas corpus] has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law."[217] The *Hamdi* plurality relied on the "skeletal outline" of habeas process set out in statutes[218] and, crucially, judicial power grounded in the Suspension Clause and independent of the adequacy of prior process.

3. *A Thicker Due Process?*

Two dissenters advanced a simpler view of the relationship between the Suspension Clause and the Due Process Clause. Justice Scalia, joined by Justice John Paul Stevens, viewed the two clauses as intimately connected. Justice Scalia called habeas corpus "the instrument by which due process could be insisted upon by a citizen illegally imprisoned."[219] But Justice Scalia would not engage in a balancing of interests to decide what process was due.[220] Habeas corpus would sim-

---

212 *Id.* at 536.

213 Jonathan Hafetz is one commentator who focuses on this language and not exclusively on *Hamdi*'s due process language. Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 157–58 (2006) ("[C]ourts have looked to habeas corpus as an independent source of procedural protections . . . .").

214 42 U.S.C. §§ 2241, 2243, 2246 (2006).

215 *Hamdi*, 542 U.S. at 525.

216 *Id.* at 526.

217 *Id.* at 525.

218 *Id.*

219 *Id.* at 555–56 (Scalia, J., dissenting).

220 *See supra* note 208.

ply require release.[221] He pointed out that "[t]he role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal."[222] Habeas corpus does supply process—to review authorization of a detention. That review does not absolve a court of the responsibility to release a person whose detention is unauthorized. Justice Scalia rejected importing the "questionable" *Mathews* analysis, which "has no place where the Constitution and the common law already supply an answer."[223] Habeas corpus required a due process "right of trial" before a competent tribunal, since detention without a trial has traditionally been only narrowly permitted.[224]

The dispute between the majority and dissent relates to the connection between habeas corpus and due process—and also the content of each. The *Hamdi* plurality did not explain its use of *Mathews* balancing, nor the full contours of the process that indefinitely detained citizens would receive. The *Boumediene* Court would later more fully address habeas process and its contours.

B. Boumediene *and Due Process*

Four years after *Hamdi*, the Court finally confronted whether habeas corpus can supply rights where due process might not. In doing so, the Court revisited questions it had engaged with long before in immigration habeas rulings, and it reiterated, over vigorous dissents, that habeas corpus can supply process where due process does not.

After the Court's rulings in *Hamdi* and *Rasul v. Bush*,[225] finding that habeas jurisdiction was available at Guantánamo Bay, the government released Yaser Hamdi,[226] and, within weeks, created a new process to evaluate the status of Guantánamo Bay detainees.[227] The Deputy Secretary of Defense established Combatant Status Review

---

221 Trevor Morrison explored the implications of Justice Scalia's views, which he helpfully terms "suspension as authorization." Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 424 (2006).

222 *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

223 *Id.*

224 *See id.* at 556 (Scalia, J., dissenting) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (Boston, Hilliard, Gray, & Co. 1833)); Tyler, *Is Suspension a Political Question?*, *supra* note 21, at 384 n.280 ("The Court correctly held that due process governed the inquiry; its conclusion, by contrast, that all due process promised the citizen-detainee was a hearing on his status was troubling.").

225 542 U.S. 466 (2004).

226 Press Release, U.S. Dep't of Justice, Statement of Mark Corallo, Dir. of Pub. Affairs, Regarding Yaser Hamdi (Sept. 22, 2004), *available at* http://www.justice.gov/opa/pr/2004/September/04_opa_640.htm.

227 *See* Memorandum from Paul Wolfowitz, U.S. Deputy Sec'y of Def., to the Sec'y of the Navy 1–4 (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf.

Tribunals (CSRTs) to assess whether each Guantánamo detainee was an enemy combatant in order to "comply with the due process requirements identified by the plurality in *Hamdi*."[228] CSRTs did not provide lawyers.[229] CSRTs did, however, provide an assigned Personal Representative who could assist and explain the process, but was not an advocate.[230] The deciding tribunal consisted of three military officers.[231] The detainee could present evidence, but the tribunal operated under the rebuttable presumption that government evidence was "reliable and accurate."[232] Detainees who denied any affiliation with al-Qaeda promptly challenged the hearings as inadequate. One district judge took the view that aliens detained outside the United States lacked rights under the Due Process Clause and dismissed the petitions.[233] A second judge disagreed and concluded the detainees had due process rights.[234] Both judges relied on the Due Process Clause.

Meanwhile, Congress enacted the Detainee Treatment Act of 2005 (DTA), which significantly restricted judicial review of CSRT determinations and military trials of enemy combatants, permitting only review of narrow issues in the D.C. Circuit Court of Appeals.[235] The Court in *Hamdan v. Rumsfeld* ruled that the DTA did not apply retroactively, rendering it ineffective, as the government had ceased adding to the Guantánamo Bay detainee population by 2005.[236] In response, Congress enacted the Military Commissions Act of 2006 (MCA), which provided that the DTA applied retroactively, restricting habeas review

---

228 Boumediene v. Bush, 553 U.S. 723, 734 (2008).

229 *See* Memorandum from Paul Wolfowitz, *supra* note 227, at 1.

230 *See id.*

231 *Id.*

232 Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings—CSRT: The Modern Habeas Corpus?* 5 (Seton Hall Pub. Law, Research Paper No. 951245, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245#%23 (examining how CSRTs worked in practice); *see also* Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 399–400 (2007) (describing the CSRT process); Memorandum from Paul Wolfowitz, *supra* note 227, at 3 (permitting introduction of detainee evidence but with a rebuttable presumption in favor of government evidence).

233 Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).

234 *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

235 Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2740–42 (limiting review to the questions of whether the government executed CSRTs in accordance with U.S. law and in accordance with the standards and procedures promulgated by the Secretary of Defense, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence").

236 Hamdan v. Rumsfeld, 548 U.S. 557, 574–87 (2006); *see* Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 401–05 (2010) ("[T]he aggregate detention population at Guantánamo peaked in 2003 and has been dropping ever since. Anecdotal information suggests that inflows to the base in fact largely dried up in 2004, after the Supreme Court's first interventions in the field.").

to the D.C. Circuit and limiting review to whether the process complied with CSRT procedures and the Constitution.[237]

Like the district courts, the D.C. Circuit relied on the Due Process Clause when reviewing habeas petitions. For example, the D.C. Circuit dismissed the consolidated cases of Lakhdar Boumediene and five Algerian men who were arrested in Bosnia, detained at Guantánamo, and accused of having links to al-Qaeda and planning to bomb a U.S. Embassy.[238] The court reasoned that the petitioners were held outside the United States, had no constitutional rights under either the Suspension Clause or the Due Process Clause, and that regardless, Congress had stripped federal courts of jurisdiction.[239] On appeal, the Supreme Court relied on the Suspension Clause, not the Due Process Clause, and ultimately concluded that the MCA procedures were not "an adequate and effective substitute for habeas corpus," and they "operate[d] as an unconstitutional suspension of the writ."[240] This language, which found for the first time that a statute unconstitutionally suspended the writ, has justifiably been the focus of commentary.

1. *Retelling Habeas History*

Before turning to the constitutional questions, however, the Court began with "a brief account of the history and origins of the writ."[241] Telling and retelling the history of the writ is an ingrained judicial habit, appearing in decisions ranging from *Fay v. Noia*, with the ringing language quoted earlier,[242] to *McCleskey v. Zant*,[243] with varying degrees of detail (and accuracy). The *Boumediene* Court began by gingerly connecting Magna Carta and habeas corpus. "Magna Carta decreed that no man would be imprisoned contrary to the law of the land . . . [but] prescribed no specific legal process to enforce [this principle]."[244] The Court added that "gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled."[245] The Court cited three times to Paul Halliday's work researching King's Bench records, describing a habeas practice

---

237 28 U.S.C. § 2241(e) (2006); Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(b), 120 Stat. 2600, 2636 (providing that the amendment to 28 U.S.C. § 2241(e) would "apply to all cases, without exception, pending on or after the date of the enactment").

238 Del Quentin Wilber, *Cases Against Detainees Have Thinned*, WASH. POST, Nov. 2, 2008, at A2; Andy Worthington, *Profiles: Odah and Boumediene*, BBC NEWS (Dec. 4, 2007, 5:48 PM), http://news.bbc.co.uk/2/hi/7120713.stm.

239 Boumediene v. Bush, 476 F.3d 981, 992–94 (D.C. Cir. 2007).

240 Boumediene v. Bush, 553 U.S. 723, 733 (2008).

241 *Id.* at 739.

242 *Supra* note 84 and accompanying text.

243 499 U.S. 467, 478–79 (1991).

244 *Boumediene*, 553 U.S. at 740 (citing SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 17 (Richard L. Perry & John C. Cooper eds., 1959)).

245 *Id.* (citing 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926)).

very different from the habeas practice historians and judges often detail.[246] Importantly, and perhaps because of this historical grounding, the Court did not directly link habeas corpus to due process. Instead, the Court more accurately described how habeas corpus became "part of the foundation of liberty for the King's subjects," even though the writ developed as "common-law courts sought to enforce the King's prerogative."[247]

The Court did not clearly establish whether the Suspension Clause protects the scope of the writ as it existed at the time it was drafted or whether the scope of the writ's protections "ha[s] expanded" since the Founding.[248] Instead, the Court focused on the development of habeas as a source of power and its growth to encompass detentions of aliens—including those abroad—so long as the jailer could be held accountable as the King's agent.[249] In my view, this is the proper approach; if habeas corpus is a dynamic judicial institution, as history tells us, we should not select an isolated moment in time to fix its definition.

2. *The Suspension Clause Alone?*

The *Boumediene* Court ostensibly did not rely on the Due Process Clause to ground its opinion. Instead, the Court noted that "[e]ven if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry."[250] The Court went on to explain that the Suspension Clause has independent force: "Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant."[251] This passage in the Court's opinion was remarkable. The opinion received substantial attention for this first-time holding that the Suspension Clause was violated and provided a source for judicial review to noncitizen detainees who might not enjoy rights under the Due Process Clause.[252] The opinion has also received deserved attention for its discussion of separation of powers principles.[253] The Court noted that "[t]he separa-

246 *Id.* at 740, 747, 752 (citing Halliday & White, *supra* note 32, at 586).

247 *Id.* at 740–41.

248 *Id.* at 746 (noting that "the analysis may begin with precedents as of 1789").

249 *See id.* at 751 ("[A] categorical or formal conception of sovereignty does not provide a . . . satisfactory explanation for the general understanding that prevailed. . . . English law did not generally apply in Scotland . . . , but it did apply in Ireland. . . . This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland . . . but would run to Ireland.").

250 *Id.* at 785.

251 *Id.*

252 *See supra* note 30.

253 Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 51 (2010). The *Hamdi* plurality also contains important separation-of-powers language. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (plurality opinion) ("[T]he

tion-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause."[254] Repeatedly, the majority cited to the writ's historical purpose as a check on arbitrary exercise of executive discretion.[255] Taking that language seriously, the Court emphasized that habeas is an independent judicial process, which does not require assertion of any underlying due process or constitutional violation. Further, the Suspension Clause draws meaning from its structural role in the Constitution as a check on Congress and the Executive: it is "an indispensable mechanism for monitoring the separation of powers."[256] What then does the resulting Suspension Clause process consist in?

Reflecting a view that the meaning of the Suspension Clause is not fixed in time, the *Boumediene* majority drew on modern due process sources, while rejecting the view that habeas requires assertion of underlying due process rights. The Court suggested that the Due Process Clause influenced its analysis in a striking passage:

> The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards").[257]

I will return to the *Mathews* citation. The language stating that process depends on the "rigor of any earlier proceedings" is not inconsistent with a focus on habeas process.[258] A reviewing judge may have far less work to do if earlier proceedings have already developed a record.

In the next passage, the Court developed how much process habeas must provide by turning to rulings regarding "adequate and effective" substitutes for habeas corpus.[259] The Court cited to *United States v. Hayman*[260] and *Swain v. Pressley*,[261] the two cases in which the Court inquired "into the adequacy of substitute habeas procedures" though "the prisoners were detained pursuant to the most rigorous

---

position that the courts must forgo any examination of the individual case . . . cannot be mandated by any reasonable view of separation of powers . . . .").

254 *Boumediene*, 553 U.S. at 746.

255 *Id.* at 744–45, 785, 794, 797; Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 411–12 (2009); Vladeck, *supra* note 30, at 2110–11. *But see* Huq, *supra* note 236, at 386, 395 (describing "a touch of the ineffable" to the Court's separation-of-powers discussion).

256 *Boumediene*, 553 U.S. at 765.

257 *Id.* at 781 (alteration in original).

258 *See id.*

259 *See id.* at 733.

260 342 U.S. 205 (1952).

261 430 U.S. 372 (1977).

proceedings imaginable, a full criminal trial."[262] The Court distinguished *Hayman* and *Swain*, concluding that the MCA "test[s] the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not."[263] The statutes in *Hayman* and *Swain* dealt with postconviction challenges brought after a trial;[264] they did not address executive detention. Both statutes sought to replicate habeas corpus, attempting to streamline collateral review without limiting access to judicial review. Both statutes also contained safety valves permitting a convict to file a habeas petition if substitute review was not adequate or effective.[265] Neither of the "adequate substitute" cases dealt with cutting off judicial review of detentions.

While establishing the independent force of the Suspension Clause, the *Boumediene* Court also addressed the relationship between habeas corpus and due process. The Court noted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."[266] Although the Court also added that the scope of "the underlying detention proceedings" could affect the scope of habeas, the Court referred to cases involving prior military trials, where one would expect deference to prior juridical determinations.[267]

Thus, the Court emphasized that habeas corpus serves a special role where prior judicial process is lacking, and if prior process is inadequate, habeas corpus will serve a greater role. Citing to the historical purposes of the writ, the Court noted that "common-law habeas corpus was, above all, an adaptable remedy."[268] The Court stressed that "the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[269] In sum, the Suspension Clause ensures access to process and a remedy. The *Hamdi* plurality said as much, but less explicitly.[270] The *Boumediene* Court cited to evidence that, despite the supposed "black-letter rule" that common law courts would not examine facts in the jailer's return, courts did review such facts, and similarly, U.S. practice "routinely allowed prisoners to intro-

---

262 *Boumediene*, 553 U.S. at 785.

263 *Id.* at 779.

264 *See Swain*, 430 U.S. at 385 (Burger, C.J., concurring) (noting that traditionally the writ was used "to inquire into the cause of commitment not pursuant to judicial process"); *supra* note 262 and accompanying text.

265 28 U.S.C. § 2255 (2006); D.C. CODE § 3-110(g) (2001).

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

267 *Id.* at 786 (citing *In re* Yamashita, 327 U.S. 1 (1946), and *Ex parte* Quirin, 317 U.S. 1 (1942)).

268 *Boumediene*, 553 U.S. at 779.

269 *Id.* at 787.

270 *See supra* notes 215–17 and accompanying text.

duce exculpatory evidence that was either unknown or previously unavailable to the prisoner."[271]

The Court emphasized that a detainee must have an opportunity to develop not just facts but also law, in order to determine whether the detention is based on "erroneous application or interpretation" of law.[272] By drawing on "common-law habeas corpus" and more recent habeas sources, the Court outlined an affirmative vision of the Suspension Clause that focuses on the availability of the release remedy, an examination of questions of law, and fact-finding—in short, whether through habeas or a substitute the detainee will receive a "traditional habeas corpus process."[273]

3. *Influence of Due Process on Habeas*

Given this framework, the Court also had to decide whether an alternative form of judicial process was an "adequate" or "effective" substitute for habeas. To make this determination, the Court did not solely rely on sources grounded in a traditional habeas process connected to review of executive detentions. Instead, the Court noted that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings"[274] and cited to *Mathews*.[275] Yet, habeas is less sensitive to prior process in the detention context, since "[e]ven when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant."[276] After noting that the Suspension Clause independently secures "traditional habeas corpus process," the Court illustrated its understanding by turning to an analysis mirroring that in *Hamdi*.

The Court proceeded by "analogizing the Suspension Clause inquiry to the quest for factual accuracy in the procedural due process balancing test of *Mathews v. Eldridge*."[277] When turning to whether CSRTs could adequately find facts, the Court stated: "Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that . . . there is considerable risk of error in the tribunal's findings of fact."[278] In the same breath that the Court disclaimed a due process analysis, the Court cited to a *Mathews*-type due process concern with risk of error. Outside the context of *Mathews* balancing, error is an important due process concern; procedural due process rules generally seek to pre-

271 *Boumediene*, 553 U.S. at 780.
272 *Id.* at 779 (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).
273 *Id.* at 778–79.
274 *Id.* at 781.
275 424 U.S. 319, 335 (1976).
276 *Boumediene*, 553 U.S. at 785.
277 Neuman, *supra* note 30, at 554.
278 *Boumediene*, 553 U.S. at 785.

vent "mistaken or unjustified deprivation of life, liberty, or property."[279] The *Boumediene* Court tied risk of error to inadequacy of CSRT process.[280] The Court added that the private interest was great "given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more."[281]

With this sort of informal balancing, the Court generated a set of procedures. First, the Court explained that the habeas court "must have the means to correct errors that occurred during the CSRT proceedings."[282] The court must have "some authority to assess the sufficiency of the Government's evidence against the detainee," suggesting more searching review than required by the Due Process Clause.[283] Further, the court must provide access to discovery and "must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[284]

In that passage, the Court made another remarkable but little-noticed move, suggesting a due process source unrelated to *Mathews*, sounding instead in criminal procedure. Based on *Brady v. Maryland* and its progeny, the state must provide material exculpatory evidence to the defense at a criminal trial.[285] In the national security detention context, far more than in the criminal prosecution context, evidence may be almost entirely within the government's custody; indeed it may be dispersed among different federal agencies. However, the Court did not use the word "material," which limits what the state must disclose under the *Brady* rule.[286] Instead, the Court stated that the state must disclose "relevant" evidence.[287] This suggests a broader discovery standard than at a criminal trial, which is sensible, as habeas process does not culminate in a trial but rather judicial review of the evidence.

Still, the Court left important issues open, as in *Hamdi*. The Court did not define the standard for granting discovery, the burden of proof, or the underlying standard for detention. Nor did the Court rule out the possibility that some other judicial process could be con-

---

279 Carey v. Piphus, 435 U.S. 247, 259 (1978).

280 *See* 553 U.S. at 785 ("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.'" (citing Bismullah v. Gates (*Bismullah III*), 514 F.3d 1291, 1296 (D.C. Cir. 2008) (per curiam))).

281 *Id.*

282 *Id.* at 786.

283 *Id.*; *see supra* notes 108–15 and accompanying text.

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

285 Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see infra* Part III.A.

286 *See Brady*, 373 U.S. at 87.

287 *See supra* note 284 and accompanying text.

stitutionally adequate: "We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus."[288]

The Court was clear in rejecting the view that the Due Process Clause supplants habeas corpus, and it did not suggest that the Due Process Clause incorporates habeas corpus.[289] The Suspension Clause operates independently. The Court cited to habeas cases and federal habeas practice, noting that "[f]ederal habeas petitioners long have had the means to supplement the record on review, even in the post-conviction habeas setting."[290] At times the Court highlighted the importance of having an "Article III court in the exercise of its habeas corpus function" review the record.[291] As part of the mixed discussion, the Court also drew from due process principles and jurisprudence—but in a careful way, without suggesting that due process applied or operated as a limit. The *Boumediene* Court walked a delicate line. The Court clearly felt it needed to describe habeas process in some detail, justifiably fearing that lower courts would not comply with a bare command to simply examine authorization for a detention. Nor was the Court wrong to make the links to *Mathews* and *Hamdi*.[292] The Court, after all, articulated throughout that it relied on the Suspension Clause alone to secure habeas process independent of any prior process.

C. What is an Adequate Substitute for Habeas?

Dissenting Justices advocated a different view of the relationship between the Suspension Clause and the Due Process Clause. In particular, the debate between the majority and Chief Justice Roberts elucidates the difference between using a due process versus a habeas process analysis.

Roberts began his dissent by defining habeas corpus in procedural terms, stating: "Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention."[293]

---

288 *Boumediene*, 553 U.S. at 779.

289 *See* HERTZ & LIEBMAN, *supra* note 121, § 7.2[d]; *supra* note 30 and accompanying text; *see generally* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994) (discussing the possibility that the Fourteenth Amendment Due Process Clause incorporates the Suspension Clause against the states).

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

291 *Id.* at 790.

292 *Cf.* Neuman, *supra* note 30, at 553 (noting the *Mathews* citation as "[p]erhaps the most significant innovation of the *Boumediene* opinion," which "could be cause for regret").

293 *Boumediene*, 553 U.S. at 802 (Roberts, C.J., dissenting). Chief Justice Roberts also accused the Court of providing due process protections to Guantánamo detainees, but "without bothering to say what due process rights the detainees possess." *Id.* at 801 (Roberts, C.J., dissenting).

Roberts's view is that due process analysis can displace habeas analysis, placing him in dispute with the majority about the relationship between due process and habeas corpus. The *Boumediene* petitioners were not citizens (only Hamdi and two others detained abroad post-9/11 have been U.S. citizens).[294] Roberts argued, "[S]urely the Due Process Clause does not afford *non*-citizens in such circumstances greater protection than citizens are due."[295] He added that if prior CSRT process was adequate, "there is no need to reach the Suspension Clause question" since "[d]etainees will have received all the process the Constitution could possibly require, whether that process is called 'habeas' or something else."[296] He ignored, however, that habeas can offer noncitizens more than due process; habeas may be a "mechanism for contesting the legality" of a detention, but it is not merely a "procedural right."[297]

The *Boumediene* majority opinion almost entirely spoke past the dissent, because it adopted a fundamentally different view that the Suspension Clause guarantees a process independent of due process. As a result, the Court also had a completely different view of *Hamdi* and the adequacy of the DTA. The Court pointed out that *Hamdi* was not a case about habeas process, but rather due process: "None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they."[298] As a result, the *Hamdi* plurality "concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause."[299] The *Boumediene* Court noted crucially that "there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's Due Process rights begins."[300] As a result, the *Hamdi* plurality "had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes."[301]

Roberts countered that due process should begin and end the analysis, analogizing to postconviction habeas. As the majority noted, the DTA provided for a form of judicial review of detentions, includ-

---

294 Jeffrey Kahn, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5041, 5042 (2010).

295 *Boumediene*, 553 U.S. at 804 (Roberts, C.J., dissenting).

296 *Id.* (Roberts, C.J., dissenting).

297 *Id.* at 802 (Roberts, C.J., dissenting).

298 *Id.* at 784.

299 *Id.*

300 *Id.*

301 *Id.* ("The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to prohibit the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic 'no.'" (citing Hamdi v. Rumsfeld, 542 U.S. 507, 527, 535–36 (2004))).

ing review in the D.C. Circuit of CSRT "standards and procedures" and whether they are "lawful."[302] Roberts argued that this administrative process, followed by judicial review, should be pursued before entertaining a habeas petition.[303] Roberts deemed CSRTs "the first tier of collateral review."[304]

Roberts's argument has faced the criticism that "[u]nless [it] was inadvertently misphrased, it totally misconceives the scope of the writ."[305] Indeed, postconviction habeas was an inapposite analogy in the detention context. CSRTs are not collateral; they do not follow a final judgment that receives deference. The *Boumediene* Court properly considered the executive decision to detain and ongoing administrative reassessment in CSRTs as perhaps relevant to due process analysis but irrelevant to habeas process, where the question is whether detentions are legally authorized. The Court suggested that CSRTs were error prone,[306] perhaps influenced by a report describing shoddy CSRT process, which noted that "[t]he Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases."[307]

For the majority, the question was not whether the DTA scheme satisfied due process. Instead, the Court asked whether the scheme was an effective substitute for habeas corpus. The Court held that DTA review of CSRT "standards and procedures" was not an effective substitute where the courts of appeals had no clear ability to: (i) develop facts, (ii) consider evidence outside the record, (iii) examine authorization for detention, or (iv) provide the remedy of release.[308]

All Justices agreed that the scope of habeas corpus review may be sensitive to prior process, and all Justices also agreed that the Suspension Clause either guarantees a right to habeas process or an adequate substitute. The Court took the view that the adequate-substitute analysis is a habeas analysis—asking whether federal judges retain indepen-

---

302 *See id.* at 788 (describing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2742–43).

303 *Id.* at 805 (Roberts, C.J., dissenting) ("[I]t is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect the detainees' rights.").

304 *Id.* at 810 (Roberts, C.J., dissenting).

305 Neuman, *supra* note 30, at 547.

306 *Boumediene*, 553 U.S. at 785 ("[T]here is considerable risk of error in [CSRT'] findings of fact.").

307 Denbeaux & Denbeaux, *supra* note 232, at 2; *see also* Boumediene v. Bush, 476 F.3d 981, 1006–07 (D.C. Cir. 2007) (Rogers, J., dissenting) (citing Denbeaux & Denbeaux, *supra* note 232, at 37–39) (mentioning the study in the course of determining that CSRT process "is not an adequate substitute for the habeas writ"); Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. CITY L. REV. 393, 394 (2007) (describing Guantánamo detainees as "denied absolutely their day in court").

308 *See Boumediene*, 553 U.S. at 788–90.

dent ability to fully examine the authorization for a detention—and not a due process analysis, which would simply ask whether at any stage some actor provides some minimally adequate process. The Court, in my view, had the analysis right.

The only nonpostconviction decision in which the Court has suggested there could be an adequate substitute for habeas is *INS v. St. Cyr*, which Roberts relied upon in his *Boumediene* dissent.[309] The *St. Cyr* decision supports, in fact, the *Boumediene* majority. The Court, in *St. Cyr*, suggested that Congress could provide an "adequate substitute" to habeas review of immigration detention, but also that "serious constitutional questions" would be raised under the Suspension Clause should statutes be interpreted to bar review of constitutional or legal questions.[310] Indeed, the Court's *St. Cyr* decision emphasized that the scope of habeas review must remain at its broadest in the detention context.[311] The Court's *Boumediene* decision also highlighted how the Suspension Clause ensures adequate and effective review of not just constitutional and legal questions but also of factual questions.

Most important, though, was the distinction brought out by the dialogue with Roberts's dissent, emphasizing that prior executive process, while relevant to a due process analysis, does not absolve the judiciary of its Suspension Clause obligation to conduct a habeas process asking whether a detention is authorized.[312] This distinction strengthens the view that judges should treat habeas corpus as independent of due process.

D. Process and Jurisdiction

The *Boumediene* Court drew from due process in a second, less supported way. The Court incorporated a due process–type analysis into the question of whether a court has what it termed "jurisdiction" to entertain a habeas petition by an alien detained abroad. Due process may not limit process under the Suspension Clause, but it informs the geographic scope of the writ. The issue of extraterritorial jurisdiction is complex and has been carefully analyzed elsewhere.[313] For

309 *Id.* at 814 (Roberts, C.J., dissenting) (citing INS v. St. Cyr, 533 U.S. 289, 306 (2001)).

310 *See* 533 U.S. at 301 n.13, 304–05, 314 & n.38.

311 *Id.* at 301.

312 *See supra* note 250 and accompanying text.

313 *See generally* Anthony J. Colangelo, "De Facto *Sovereignty*": Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623 (2009) (describing "*de facto* sovereignty" and its relationship to habeas in the extraterritorial detention context); Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117, 167–88 (2009) (discussing the "legal anomaly" of the United States' extraterritorial reach into Guantánamo); Neuman, *supra* note 38 (examining *Boumediene*'s "functional approach" to extraterritorial application of U.S. constitutional limitations).

these purposes, I note that the Court distilled the extraterritorial reach of the Suspension Clause into a three-factor "framework": "(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."[314] The first factor includes three subfactors, and the sites of apprehension and detention might be different, creating six subparts in total.

Of particular interest here is the last subfactor within the first factor. In requiring an examination of the adequacy of prior process to establish jurisdiction to hear a habeas petition, the Court focused on due process once again. The Court contrasted adequacy of the process provided in *Johnson v. Eisentrager*[315] with informal CSRT process. In *Eisentrager*, German operatives initially captured in China and then detained in Germany after World War II received a detailed charge and military trial, at which the court convicted them of violating the law of war (although military trials were rather summary at the time, they were at least adversary and the defendants received counsel).[316] One of the crucial differences between *Boumediene* and *Eisentrager* was that the Guantánamo detainees disputed that they were detainable enemies, whereas the *Eisentrager* operatives did not contest their status.[317]

This portion of the *Boumediene* opinion is inconsistent with the thrust of the habeas process outlined, designed to inquire into the cause of a detention. The Court's prior ruling in *Rasul v. Bush* that Guantánamo detainees have jurisdiction to file habeas petitions adopted a different approach, viewing "jurisdiction" as concerned primarily with the ability of the court to command the jailer.[318] The *Boumediene* Court instead viewed jurisdiction as flexible and connected with the detainee's identity and citizenship, together with other practical considerations.[319] Where the Court otherwise held that habeas

---

314 *Boumediene*, 553 U.S. at 766.

315 339 U.S. 763 (1950).

316 *Id.* at 765–66, 780–81.

317 *See Boumediene*, 553 U.S. at 766–67.

318 *See* 542 U.S. 466, 478–79 (2004).

319 Justice Kennedy advanced the same *Eisentrager* "framework" in his concurring opinion in *Rasul*. *See id.* at 485–88 (Kennedy, J., concurring). Prior to *Rasul*, the issue of the extraterritorial reach of constitutional rights and habeas corpus jurisdiction had arisen in several contexts, each discussed in *Boumediene* and extensively analyzed in the scholarly literature. For example, immigration decisions adopt a territorial view that an alien, until admitted into the United States, does not possess due process rights. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–44 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892), and Ludecke v. Watkins, 335 U.S. 160 (1948))); David A. Martin, *Graduated Application of Constitutional Protections for Aliens:*

process reaches further than due process, the jurisdictional holding recognizes that practicalities may limit the reach of habeas process.

III
Process in the Shadow of *Boumediene*

In *Boumediene*, the Court established that the Suspension Clause is a source of habeas process for detainees; to give that process contours, however, the Court turned to due process sources.[320] The Court did not answer the "key question" whether enemy alien detainees "have any due process rights."[321] Chief Justice Roberts, in dissent, argued that the result would lead to "a set of shapeless procedures."[322] Roberts may have predicted correctly, but perhaps only because lower courts have adopted reasoning mirroring his dissent by focusing on due process, not habeas process. The Court left it to the lower courts to fill in the details,[323] and in response, they drew broadly from due process and habeas jurisprudence.[324] The D.C. Circuit has noted that *Boumediene* did not provide "a detailed procedural regime" but rather "a spare but momentous guarantee that a 'judicial officer must have adequate authority to make a determination in light of the relevant law and facts.'"[325] The result provides process "in the shadow of *Boumediene*."[326]

The Real Meaning of Zadvydas v. Davis, 2001 Sup. Ct. Rev. 47, 53–54 (describing the development of the Court's doctrine holding Congress's power to exclude aliens as plenary). Yet even in the Court's rulings addressing nonadmitted noncitizens, the Court permitted review (as in *Eisentrager*) of whether the detention was authorized. *Knauff*, 338 U.S. at 542–47; *see Boumediene*, 553 U.S. at 764 ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism."); Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DePaul L. Rev. 851, 879–87 (2010) (arguing for a "limited government" interpretation of the rulings); Fallon, Jr. & Meltzer, *supra* note 22, at 2097 (arguing that courts "traditionally pursued a pragmatically adaptive approach").

320 Baher Azmy termed this a "largely unlimited invitation" to create a "new common law of habeas." Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 Iowa L. Rev. 445, 450 (2010).

321 Yin, *supra* note 199, at 414.

322 *Boumediene*, 553 U.S. at 801 (Roberts, C.J., dissenting) (arguing that the decision replaced statutes "with a set of shapeless procedures to be defined by federal courts at some future date").

323 *Id.* at 796 ("[T]he other remaining questions are within the expertise and competence of the District Court to address in the first instance.").

324 *See generally* Benjamin Wittes et al., Brookings Inst., The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking 1–3 (2010) (describing the lower courts' initial work in carrying out the task delegated to them); Nathaniel H. Nesbitt, Note, *Meeting* Boumediene*'s Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 Minn. L. Rev. 244, 247 (2010) (arguing that the lower courts' habeas litigation should be allowed to proceed and develop, and that Congress should not legislatively intervene).

325 Al-Bihani v. Obama, 590 F.3d 866, 880 (D.C. Cir. 2010) (quoting *Boumediene*, 553 U.S. at 787).

326 *Id.* at 877.

If due process is to influence habeas, one can imagine opening the door either too broadly or too narrowly. The D.C. Circuit maintains that no due process or other constitutional rights run to detainees at Guantánamo Bay, aside from Suspension Clause rights.[327] One could argue that if no due process right exists, then no habeas remedy exists. That view is wrong and it is untenable after *Boumediene*. One could try to define the absolute constitutional minimum that the Suspension Clause guarantees. *Boumediene*, however, did not define a constitutional floor. Finally, one could supplement the core habeas process outlined in federal statutes to craft a process that is sensible under the circumstances—an approach faithful to *Hamdi* and *Boumediene*. However, lower courts have often attempted to hew, as closely as possible, to some constitutional minimum rather than attempt to carefully give content to the *Boumediene*-outlined habeas process.[328]

The *Boumediene* Court clarified that federal courts must remain available to review questions of law and mixed questions of law and fact raised in detention cases. The *Boumediene* Court left unresolved "the content of the law that governs petitioners' detention" and the legal bounds of the government's detention authority.[329] Since, the D.C. Circuit has grappled with that complex question and subsequently interpreted the authority to detain as fairly broad, which includes the authority to detain all individuals who were "part of" al-Qaeda.[330] Following the *Hamdi* plurality, the adopted standard asks whether a detention is authorized by the Authorization for Use of Military Force (AUMF), which Congress enacted just after September 11, 2001.[331] I do not address whether that detention standard is appropri-

---

327 *See* Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009).

328 *See* Huq, *supra* note 236, at 421, 428 (noting that "[t]he black-letter law of detention, and the implementation of that law by the government, is no clearer, no more stable, and no more coherent than it was before *Boumediene*," but "[d]etention policy thus largely unspools in the shadow of the Suspension Clause").

329 *Boumediene*, 553 U.S. at 798.

330 *See, e.g.*, Awad v. Obama, 608 F.3d 1, 11–12 (D.C. Cir. 2010) ("Once Awad was part of al Qaeda by joining the al Qaeda fighters . . . the requirements of the AUMF were satisfied." (internal quotation marks omitted)); *Al-Bihani*, 590 F.3d at 872–73 (reasoning that the scope of the government's detention authority "includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces").

331 Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); *see* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 948a(7), 948b(a), 948c, 123 Stat. 2574, 2575–76 (defining "unprivileged enemy belligerent" to include a person who "was a part of al Qaeda"); Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(1), 120 Stat. 2600, 2601 (defining "unlawful enemy combatant" to include a person "who is part of the Taliban, al Qaeda, or associated

ate, a much-debated question.[332] Federal legislation has now adopted an AUMF (and law of war) standard in the National Defense Authorization Act for Fiscal Year 2012.[333]

A crucial step toward elaborating the habeas process outlined in *Boumediene* would be to apply the law to the facts and develop factual questions. Indeed, the district court on remand ordered the release of Lakhdar Boumediene and the four others, finding that the government lacked factual support for its contentions.[334] The inquiry is a traditional one, based not on due process rights of detainees but on whether the detainees fall within the legal category of people who may lawfully be detained. However, due process jurisprudence would certainly be relevant to elaborate that process, even if the ultimate question is one of whether a detention is authorized. The Court left the particulars of the process open in *Boumediene*, stating, for example, as to the standard of proof, that "[t]he extent of the showing required of the Government in these cases is a matter to be determined."[335] The Court held that a detainee must have a meaningful opportunity to access exculpatory evidence and contest facts and the possibility of release. How would factual review proceed?

A. Burden of Proof and Immigration Habeas Analogies

After *Boumediene*, federal district Judge Thomas F. Hogan in the District of Columbia developed a case management order (CMO) designed to handle a set of consolidated Guantánamo petitions; other district court judges have tended to follow the order.[336] In its first

---

forces"); Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) (plurality opinion) ("Congress has in fact authorized Hamdi's detention, through the AUMF."); *Al-Bihani*, 590 F.3d at 872–73.

332 *See* Bradley & Goldsmith, *supra* note 37, at 2131 (approving of the *Hamdi* plurality's conclusion that the AUMF provides an independent source of authority for establishing military commissions); Huq, *supra* note 236, at 416 ("If ongoing detentions can be defended by a detention power that is redefined by statute four years into the detention, there is little to prevent an amendment of the law so as to justify post hoc propter hoc detentions that otherwise would be illegal."). Robert Chesney has argued that in practice, questions of the scope of authorization have largely not come up, but rather cases have turned on the sufficiency of the government's evidence. *See* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 772–73 (2011).

333 *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (affirming the position that the AUMF authorizes the government to detain a "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces").

334 Boumediene v. Bush, 579 F. Supp. 2d 191, 197–98 (D.D.C. 2008) ("[B]ecause the Government has failed to establish . . . that Messrs. Boumediene, Nechla, Boudella, Ait Idir, and Lahmar are enemy combatants, the Court must, and will, grant their petitions and order their release.").

335 Boumediene v. Bush, 553 U.S. 723, 787 (2008).

336 *See In re* Guantanamo Bay Detainee Litig., No. 08-0442 (TFH), 2008 WL 4858241, at *1–4 (D.D.C. Nov. 6, 2008) (case management order). The CMO provides that district court judges "may alter the framework based on the particular facts and circumstances of [the] individual cases." *Id.* at *1 n.1; *see, e.g.*, Mohammed v. Obama, 704 F. Supp. 2d 1, 3

sentence, the CMO cites to *Hamdi* and *Boumediene*.[337] The CMO crucially "placed upon the Government the burden of establishing, by a preponderance of the evidence, the lawfulness of the petitioner's detention,"[338] though the government could also benefit from "a rebuttable presumption of accuracy and authenticity" if there were a showing of great need in a case.[339] When detainees challenged the CMO as inadequate, the D.C. Circuit approved the procedures, reasoning backward from *Hamdi*'s due process analysis rather than reasoning forward from *Boumediene*.[340] The *Al-Bihani v. Obama* panel reasoned that the *Hamdi* plurality "described as constitutionally adequate—even for the detention of U.S. citizens—a 'burden-shifting scheme' in which the government need only present 'credible evidence that the habeas petitioner meets the enemy-combatant criteria' before 'the onus could shift to the petitioner to rebut that evidence.'"[341] The D.C. Circuit concluded that such a process "mirrors a preponderance standard" like that in the CMO.[342]

The choice of standard of proof goes to the heart of the habeas process developed in *Boumediene*. Recall that the CSRT process, which the *Boumediene* Court found lacking, used a preponderance-of-the-evidence standard, while the *Hamdi* plurality rejected a "some-evidence" standard.[343] The D.C. Circuit did not reach the question of what process the Suspension Clause or the Due Process Clause mandated and suggested that even a "some evidence, reasonable suspicion, or probable cause standard of proof could constitutionally suffice."[344] A subsequent D.C. Circuit panel in *Al-Adahi* "assume[d] *arguendo*" that the government must meet a preponderance-of-the-evidence standard.[345] The panel urged the government to pursue a "some-evidence" standard, citing to immigration removal decisions prior to the 1952 Immigration and Nationality Act.[346] Chief Justice Roberts cited similar

(D.D.C. 2009) ("This Court adopted, in large part, the provisions of [the CMO], while modifying it somewhat . . . .").

337 *Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *1 (case management order).

338 Bensayah v. Obama, 610 F.3d 718, 721 (D.C. Cir. 2010).

339 *Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *3 (case management order).

340 Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010).

341 *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (plurality opinion)).

342 *Id.* at 878 & n.4.

343 Boumediene v. Bush, 553 U.S. 723, 788 (2008); *Hamdi*, 542 U.S. at 537.

344 *Al-Bihani*, 590 F.3d at 878 n.4. Similarly, other courts often rely on the Court's *Hamdi* language describing a burden-shifting framework. *See, e.g.*, Sulayman v. Obama, 729 F. Supp. 2d 26, 34 (D.D.C. 2010) (citing *Hamdi*, 542 U.S. at 534).

345 Al-Adahi v. Obama, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010). The panel chiefly relied upon *INS v. St. Cyr*, 533 U.S. 289, 306 (2001), and *Ekiu v. United States*, 142 U.S. 651, 659 (1892).

346 *Al-Adahi*, 613 F.3d at 1104–05; *see St. Cyr*, 533 U.S. at 306 ("In [pre-1952 deportation] cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive." (footnote omitted) (citing *Ekiu*, 142 U.S. at 659)). *See generally* Gerald L. Neuman, *The*

cases in his *Boumediene* dissent—a passage the D.C. Circuit mimicked—and noted that factual review "is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert."[347]

Citing to immigration habeas rulings was an ironic choice, as discussed, since those rulings particularly highlight the availability of habeas corpus despite a lack of due process.[348] Indeed, the argument for a some-evidence standard confuses due process with habeas corpus. The some-evidence standard arises from the earliest procedural due process rulings, predating "sufficiency-of-the-evidence" review under the Administrative Procedure Act that later became the model for judicial review of immigration decisions.[349] The some-evidence standard has few vestiges left. A some-evidence standard is still used in challenges in extradition proceedings,[350] a context in which treaty obligations and the fact that criminal process will take place abroad may explain the degree of deference.[351] A second place where a some-evidence standard may still persist is in challenges to expedited removal; however in that context, full habeas review remains as to status questions.[352]

The some-evidence standard is an outlier in immigration habeas and judicial review. Somewhat more searching "substantial-evidence" or sufficiency-of-the-evidence review is used by courts of appeals when considering petitions for review of removal and asylum decisions.[353]

Constitutional Requirement of "Some Evidence," 25 SAN DIEGO L. REV. 631, 631–35 (1988) (surveying the history, nature, justifications, and applications of the some-evidence standard).

347 *Boumediene*, 553 U.S. at 814 (Roberts, C.J., dissenting).

348 *See supra* note 171 and accompanying text.

349 *See* 5 U.S.C. § 706(2)(E) (2006) (providing for substantial evidence test for on the record administrative adjudication); Neuman, *supra* note 346, at 643–46, 731–32. Similarly, in postconviction law, some-evidence review has been replaced by sufficiency-of-the-evidence review under the standard in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See* Neuman, *supra* note 346, at 656. Such some-evidence review is distinct from *Mathews* review, since it relates to review of fact-finding and not procedure. *Id.* at 697–98.

350 *See* Brauch v. Raiche, 618 F.2d 843, 854 (1st Cir. 1980) ("Our review . . . is limited to determining whether in fact there was 'any' evidence providing . . . a 'reasonable ground to believe the accused guilty.'" (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925))); Neuman, *supra* note 346, at 736.

351 *See Fernandez*, 268 U.S. at 312 (noting, in the context of an extradition treaty with Mexico, that "every technical detail" need not "be proved beyond a reasonable doubt" and that "[f]orm is not to be insisted upon beyond the requirements of safety and justice").

352 The Immigration and Nationality Act preserves habeas review of status-related questions in expedited removal proceedings. 8 U.S.C. § 1252(e)(2) (2006); s*ee* Neuman, *supra* note 30, at 577.

353 *See* 8 U.S.C. § 1252(b)(4)(B) ("[A]dministrative findings of fact [in specified contexts] are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary . . . ."); *id.* § 1252(b)(4)(D) (judicial review of asylum). The Immigration and Nationality Act, amended by the 2005 REAL ID Act, bars habeas review of an order of removal of criminal aliens, but permits petitions for review to be filed in a court of appeals regarding "constitutional claims or questions of law." *See id.* § 1252(a)(2)(A)–(B), (D).

Moreover, federal courts of appeals have preserved their independent ability to assure adequate factual support for a detention by occasionally remanding cases to the immigration agency for additional fact-finding.[354] As developed in Part IV, still broader de novo review exists over factual questions related to status, such as whether the person is a U.S. citizen.[355] Habeas review also remains unaltered for immigration challenges related to length of detention, which share similarities to challenges to indefinite military detention.[356] The Court in *Zadvydas v. Davis* insisted on careful judicial review of noncitizens indefinitely detained pending removal, even where statutes already provided procedures requiring periodic evaluations of detentions, noting that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[357]

This judicial review exists despite the fact that generally in the immigration context, underlying power to define who may be admitted or removed falls within a very broad congressional "plenary power," and as a result, "the substantive criteria for entry to or removal from the United States became immunized from judicial review."[358] The limited contexts in which some-evidence review is still used are a poor analogy when considering the detention of enemy aliens "for the duration of hostilities that may last a generation or more."[359] Nor are those contexts even representative of how immigration law handles judicial review of detention.

Moreover, distinctions between questions of law, mixed questions of law and fact, and factual questions are notoriously blurry. In immigration cases, courts have sometimes generously interpreted de novo review of legal and constitutional questions to include mixed and heavily factual questions.[360] Still, other federal courts do not take that

---

354 *See, e.g.*, Rafaelano v. Wilson, 471 F.3d 1091, 1098 (9th Cir. 2006); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 481–82 (2006).

355 *See* 8 U.S.C. § 1252(b)(5)(B).

356 The relevant statutes do not explicitly exempt detention-related habeas challenges; rather, the statutory provisions limiting judicial review refer only to removal orders. *See* 8 U.S.C. § 1252(b)(9); Gerald L. Neuman, *On the Adequacy of Direct Review After the Real ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 138, 141 (2006–2007). The legislative history stated as much. H.R. REP. NO. 109-72, at 175–76 (2005) (Conf. Rep.) (stating section 106 of the Immigration and Nationality Act would "not preclude habeas review over challenges to detention that are independent of challenges to removal orders").

357 533 U.S. 678, 687, 690, 699–702 (2001); *see* 8 U.S.C. § 1231(a)(6).

358 Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 618 (2006).

359 Boumediene v. Bush, 553 U.S. 723, 785 (2008).

360 *See, e.g.*, Ramadan v. Gonzales, 479 F.3d 646, 654 (9th Cir. 2007) (per curiam) ("[T]he phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts." (footnote omitted)); Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 329 (2d Cir. 2006) (rejecting a strict rule, but explaining that "[t]he court would need to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual

approach, restricting review largely to "pure" questions of law.[361] Questions remain about whether such an interpretation of the 2005 REAL ID Act, which consolidated and altered judicial review of removal and other immigration decisions, violates the Suspension Clause by unduly constraining federal courts.

A focus on habeas process suggests a reason for why the some-evidence standard is marginalized in immigration law—and why judicial review is at its height in the detention context. The habeas statutes have long allowed, just as at common law, a detainee to rebut the government's allegations, including by introducing new factual evidence.[362] While habeas process does not specify a standard of proof, it fundamentally permits a meaningful challenge to the legality of a detention. A some-evidence standard does not permit a meaningful assessment of the legality of a detention; it would permit a detention to stand regardless of the evidence the detainee presents, perhaps restricting relief to only the extreme cases in which the government's claims are themselves highly implausible on their face. For that reason, the *Hamdi* plurality rejected the government's proposed some-evidence standard.[363] Similarly, the *Boumediene* Court emphasized that habeas corpus must include "some authority to assess the sufficiency of the Government's evidence against the detainee."[364] After all, even postconviction habeas considers some new evidence—judges may conduct hearings where a petitioner "failed" to develop facts in state court.[365]

A preponderance standard is used in habeas, typically postconviction and after a criminal trial. In that context, a sufficiency-of-the-evidence standard is the constitutional standard for evaluating whether a jury had sufficient evidence to find guilt under the more

---

findings or justification for the discretionary choices, in which case the court would lack jurisdiction, or whether it instead raises a 'constitutional claim' or 'question of law'"); *see also* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1296 (7th ed. 2012) ("Those courts that are inclined to preserve as much review as possible tend to find ways to subdivide the questions presented and locate a separately identifiable question of law, or possibly a due process issue. Other courts are more resistant to such arguments by the petitioner.").

361 *See* Viracacha v. Mukasey, 518 F.3d 511, 515–16 (7th Cir. 2008), *cert. denied*, 555 U.S. 969 (2008) (contending that "[b]ecause no administrative case can be decided without applying some law to some facts," the Ninth Circuit approach misread the statute, and only pure questions of law should be examined).

362 28 U.S.C. § 2243 (2006). In response, the petitioner may "deny any of the facts set forth in the return or allege any other material facts." *Id.* Then "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*

363 Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (plurality opinion) ("Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed 'some evidence' standard is inadequate.").

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

365 *See* 28 U.S.C. § 2254(e)(2); Williams v. Taylor, 529 U.S. 420, 429–30 (2000).

demanding beyond-a-reasonable-doubt standard at trial.[366] The *Al-Adahi* panel noted that the habeas standard may differ depending on whether a detention is based on an arrest, selective services decision, immigration detention, or a court martial.[367] Unsurprisingly, deferential factual review might follow a military trial.[368]

Habeas process may be sensitive to prior process, but only where there was *judicial* process and where federal judges retain an adequate and effective ability to exercise their independent role in examining the authorization for the detention. As the Court developed in *Boumediene*, the government faces a higher burden when attempting to justify an indefinite detention.[369] In *Al-Bihani*, the D.C. Circuit claimed that "traditional habeas review did not entail review of factual findings," which, as developed in Parts I and II, is incorrect as a matter of historical practice, federal statutes, and Supreme Court law in the detention context.[370] With this sort of confused understanding of review, it is no wonder that the D.C. Circuit adopted the wrong standard. As in civil detentions,[371] a "clear-and-convincing" standard may be appropriate.[372] An even more demanding standard would still pro-

366 *See* Jackson v. Virginia, 443 U.S. 307, 321, 326 (1979).

367 *See* Al-Adahi v. Obama, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010) ("Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case.").

368 Chief Justice Roberts cited three cases involving military trials and the some-evidence standard when arguing that habeas may be "traditionally more limited in some contexts than in others." *Boumediene*, 553 U.S. at 814 (Roberts, C.J., dissenting).

369 *Id.* at 785–86 (contrasting a habeas petition after "the most rigorous proceedings imaginable, a full criminal trial," with the "closed and accusatorial" CSRTs, and concluding that the latter situation justifies more searching scrutiny).

370 Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010). The court cited to *In re Yamashita*, 327 U.S. 1, 8 (1946), in which the petitioner received a full military commission trial.

371 *See* Addington v. Texas, 441 U.S. 418, 433 (1979).

372 The D.C. Circuit's approach has attracted criticism and lacks strong defenders. *See* Azmy, *supra* note 320, at 521–22 ("[I]t makes no more sense to ask if there was sufficient evidence in the prior CSRT record—so one-sided as it was—to support the military's judgment than it would to ask if there was sufficient evidence to support a criminal conviction in a criminal trial in which the defendant was prohibited from calling witnesses or confronting the Government's evidence."); Falkoff, *supra* note 95, at 1017–20 (arguing that civil commitment cases provide an appropriate standard of proof); *see also* Fallon, Jr. & Meltzer, *supra* note 22, at 2092–93, 2104 (arguing that the preponderance standard is "the minimum necessary" for citizen-detainees although "not untroubling"); Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221, 242 (2011) (calling it "politically impossible" to adopt a standard lower than preponderance); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1410–11 (2008) (proposing preponderance standard for initial detention decisions, but "substantially stricter review" after appropriate duration). In two cases, petitioners sought certiorari from the U.S. Supreme Court arguing that a "clear and convincing evidence" standard of proof should be adopted. Petition for Writ of Certiorari at 20, Al Odah v. United States, No. 10-439 (U.S. filed Sept. 28, 2010); Petition for Writ of Certiorari at 28, Awad v. Obama, No. 10-736 (U.S. filed Nov. 30, 2010). To date, the Court has not granted certiorari on this question. *See*

vide judges with a great deal of discretion on how they weigh the evidence.[373]

B. Postconviction Analogies: Discovery and Fact-Finding

In several areas, judges draw on postconviction habeas rules regarding discovery and fact-finding. This practice is troublesome, given that in the postconviction context, habeas rules presume that fact-finding occurred at criminal trial, on appeal, or during the state postconviction process. Indeed, as additional support for a preponderance standard of proof, the D.C. Circuit noted in federal habeas challenges to state convictions that the petitioner must rebut factual findings by clear and convincing evidence.[374] Yet that rule applies after a state criminal trial and any state posttrial fact-finding.

The district court's CMO provides a sensible procedure, mirroring the statutory procedure under the habeas statute, 28 U.S.C. § 2243, requiring that the government submit a return that "stat[es] the factual and legal bases for detaining that prisoner," who then "file[s] a traverse stating the relevant facts in support of his petition and a rebuttal of the Government's legal justification for his detention."[375] Perhaps modeled on Federal Rule of Civil Procedure Rule 26(a), the CMO permits automatic disclosure where if requested,

> the government shall disclose to the petitioner: (1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.[376]

Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied sub nom.* Al Odah v. United States, 131 S. Ct. 1812 (2011); Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

373 *See* Nesbitt, *supra* note 324, at 268–72 (describing variation between judges in applying standards).

374 *Al-Bihani*, 590 F.3d at 878 ("If it is constitutionally permissible to place that higher burden on a citizen petitioner in a routine case, it follows a priori that placing a lower burden on the government defending a wartime detention—where national security interests are at their zenith and the rights of the alien petitioner at their nadir—is also permissible.").

375 Bensayah v. Obama, 610 F.3d 718, 721 (D.C. Cir. 2010); *see In re* Guantanamo Bay Detainee Litig., No. 08-0442 (TFH), 2008 WL 4858241, at *1–3 (D.D.C. Nov. 6, 2008) (case management order).

376 *Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *2 (case management order); Colin C. Pogge, Note, *A Dissentious "Debate": Shaping Habeas Procedures Post-*Boumediene, 88 TEX. L. REV. 1073, 1090–91 (2010).

The CMO rules were later revised to refer solely to evidence relied upon "to justify detention," not to all evidence relied upon in the return.[377]

Further discovery beyond those categories is provided by leave of the Court "for good cause" shown.[378] The CMO quotes verbatim the discovery standard in federal habeas corpus cases, but adds that such requests must (1) "be narrowly tailored," (2) "specify the discovery sought," (3) explain why the request is "likely to produce evidence that demonstrates that the petitioner's detention is unlawful," and (4) explain why the request is not "unfairly disrupting or unduly burdening the government."[379] The CMO requirements appear adapted from the Federal Rules of Civil Procedure.[380] Detainees may face difficulties in making itemized requests if they cannot know what the government possesses. Automatic disclosures are better suited to the habeas process.

As discussed, *Boumediene* emphasized that traditionally a detainee can supplement the record and introduce exculpatory evidence in response to the government's return.[381] The CMO required the government to produce "all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner."[382] The standard refers to information the government chooses to present. It is not as broad as *Brady* requires at a criminal trial, since it does not hold the government responsible for disclosing all material exculpatory evidence.[383] To be sure, the D.C. Circuit later clarified that the government must supply "information that has been strategically filtered out" when preparing the return, even if the "individual doing the filtering" works for a different agency than the Department of Justice (DOJ).[384] In contrast, another judge adopted a modified

---

377 *See In re* Guantanamo Bay Detainee Litig., No. 08-0442 (TFH), 2008 WL 5245890, at *1 (D.D.C. Dec. 16, 2008) (order amending case management order).

378 *Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *2 (case management order).

379 *Id.*

380 *See* FED. R. CIV. P. 26(b)–(c) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

381 *See supra* note 290 and accompanying text.

382 *Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *1 (case management order) (citing Boumediene v. Bush, 553 U.S. 723, 786 (2008)). One judge modified the standard to state that the government must supply exculpatory evidence "contained in the material reviewed in developing the return for the petitioner, and in preparation for the hearing for the petitioner." Al Shurfa v. Bush, 588 F. Supp. 2d 12, 14 (D.D.C. 2008).

383 *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

384 Bensayah v. Obama, 610 F.3d 718, 724 (D.C. Cir. 2010). Similarly, the revised CMO notes the Government must supply "evidence contained in any information reviewed by attorneys preparing factual returns for all detainees." *See In re* Guantanamo Bay De-

CMO ordering production of exculpatory evidence that "the Government can obtain through reasonable diligence."[385] Interestingly, one judge required DOJ lawyers familiar with the *Brady* standard to search for exculpatory evidence, not Department of Defense lawyers.[386] Federal judges have ordered discovery over government objection in detainee cases.[387]

On balance, the D.C. Circuit appropriately interpreted language in *Boumediene* highlighting the importance of access to the government's evidence. Yet, unlike in the criminal procedure context, where the *Brady* duty exists regardless of whether the detainee requests evidence, courts in habeas proceedings require itemized requests, although they carve out some exceptions for evidence presumptively subject to disclosure. In addition, judges focus on evidence the government relies upon, implying that the government may determine whether evidence is material. Any other requests must be specific, narrow, and not unduly burdensome, and a detainee must show that requested evidence is "specific and exculpatory on its face,"[388] which is unrealistic in the context. While district judges cite to *Brady*, they do not apply the *Brady* due process standard.[389] And for habeas cases, the remedy for a violation is not a new criminal trial, as *Brady* provides.[390] In several decisions where judges found that the government failed to turn over exculpatory evidence, the result was not a new trial, since trials are not part of the habeas context. Instead, uncovering violations might bring to light evidence undercutting the case for detention.[391]

Perhaps a higher standard of proof would create stronger incentives for the government to justify a detention with more complete evidence, which would then make discovery more rigorous. Discovery occurs, however, against a backdrop of secrecy—but this is not necessarily problematic. The *Boumediene* Court emphasized that federal courts could and should accommodate "to the greatest extent possible" the interest "in protecting sources and methods of intelligence gathering."[392] Thus, the CMO provides for review of classified infor-

---

tainee Litig., No. 08-0442 (TFH), 2008 WL 5245890, at *1 (D.D.C. Dec. 16, 2008) (order amending case management order).

385 Al-Adahi v. Bush, 585 F. Supp. 2d 78, 78–80 (D.D.C. 2008).

386 Batarfi v. Bush, 602 F. Supp. 2d 118, 119–20 (D.D.C. 2009).

387 Zaid v. Bush, 596 F. Supp. 2d 11, 12–13 (D.D.C. 2009).

388 Bin Attash v. Obama, 628 F. Supp. 2d 24, 31 (D.D.C. 2009).

389 *See id.*; Bismullah v. Gates, 503 F.3d 137, 140 (D.C. Cir. 2007) (addressing a claim that the DTA requires broader discovery than *Brady v. Maryland*, 373 U.S. 83 (1963)).

390 *See Brady*, 373 U.S. at 88–89.

391 *See* Parhat v. Gates, 532 F.3d 834, 845 (D.C. Cir. 2008) (noting that "the CSRT was not provided with exculpatory evidence on the same point," which emerged from a different detainee's CSRT).

392 Boumediene v. Bush, 553 U.S. 723, 796 (2008).

mation by counsel or in camera.[393] On the other hand, judges have expressed frustration with government reliance on undocumented sources, making it difficult to assess the reliability of intelligence reports.[394]

In one final respect, the D.C. Circuit also relied, incorrectly in my view, on procedures in the habeas statute when making an extreme claim that there is no entitlement to an evidentiary hearing "as of right."[395] In *Al-Bihani*, the D.C. Circuit found denial of an evidentiary hearing appropriate by citing 28 U.S.C. § 2254(e)(2), which limits judges' discretion to conduct hearings in postconviction cases.[396] The D.C. Circuit reasoned that the lower court "did hear the facts of Al-Bihani's case and provided ample opportunity in conference and in a hearing for the parties to air concerns over evidence."[397] 28 U.S.C. § 2254, which governs postconviction review of state convictions, was not good support for the court's conclusion. The Supreme Court cited to that statute in *Boumediene* to emphasize how judges conduct a factual inquiry even "in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims."[398] Regardless of the merits of Al-Bihani's claim, to say that there is no entitlement to a hearing "as of right" is erroneous after *Boumediene* if there has been no prior judicial hearing.

Proceeding by analogy has its perils. Courts conducting executive detention habeas review cannot simply rely on discovery standards developed for postconviction or civil litigation because these standards draw from inapposite sources. To ensure meaningful review, judges should presumptively conduct evidentiary hearings where there has been no prior judicial fact-finding. Most importantly, *Boumediene* calls into question the standard of proof that courts have adopted. Although guidance for handling difficult fact-development issues is unclear, *Boumediene* and longstanding executive detention decisions suggest a broader and more flexible process.

C. Criminal Procedure Analogies

In fascinating ways, lower courts draw on constitutional criminal procedure as a source for guidance, largely in ways compatible with the goals of a habeas process. Courts import concepts devised to regu-

---

393 *See In re* Guantanamo Bay Detainee Litig., No. 08-0442 (TFH), 2008 WL 4858241, at *2–3 (D.D.C. Nov. 6, 2008) (case management order).

394 *See* WITTES ET AL., *supra* note 324, at 40–41 ("[I]t would be unwise for the government to expect a court to admit or give weight to any statement in an intelligence report when the source is entirely anonymous . . . .").

395 Al-Bihani v. Obama, 590 F.3d 866, 881 (D.C. Cir. 2010).

396 *Id.*

397 *Id.*

398 Boumediene v. Bush, 553 U.S. 723, 790 (2008).

late presentation of evidence at criminal trials into a context without a jury or a criminal charge. Yet due process protections developed in criminal cases may suggest fair and accurate process that courts cannot justly deny to any person in custody. Judges generally find ways, however, to avoid indicating to what degree they rely on criminal procedure analogies.[399]

1. *Hearsay*

Take the issue of hearsay evidence, for example. The D.C. Circuit has called it "always admissible," but with a catch.[400] Al-Bihani argued that the lower court relied mostly upon "government reports of his interrogation answers," which, he argued, were "hearsay improperly admitted absent an examination of reliability and necessity."[401] The D.C. Circuit noted that the Sixth Amendment Confrontation Clause applies only in trials.[402] Since a habeas proceeding does not involve a trial, but rather a judge who must weigh the reliability of the evidence, the Federal Rules of Evidence apply instead.[403]

With no trial, there is no formal occasion to consider admissibility. The D.C. Circuit noted: "In *Hamdi*, the Supreme Court said hearsay 'may need to be accepted as the most reliable available evidence' as long as the petitioner is given the opportunity to rebut that evidence."[404] Nevertheless, the D.C. Circuit has said that absent other evidence corroborating the sources, hearsay alone cannot reliably support a detention.[405] Judges have also insisted, without recognizing a formal confrontation right, that detainees' lawyers have an opportu-

399 *See, e.g.*, Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (noting that the court need not rule on al-Madhwani's constitutional due process claim that the lower court relied on evidence outside the record in violation of *Garner v. Louisiana*, 368 U.S. 157 (1961), because even if a violation occurred, such error would be harmless).

400 *Al-Bihani*, 590 F.3d at 879.

401 *Id.*

402 *Id.*

403 FED. R. EVID. 1101(e). For a discussion of the argument that hearsay should be excluded in such proceedings unless falling into an applicable exception under the Federal Rules of Evidence, see Azmy, *supra* note 320, at 531.

404 *Al-Bihani*, 590 F.3d at 879 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (plurality opinion)); *see also* Al-Adahi v. Obama, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010) ("*Al-Bihani* also forecloses Al-Adahi's argument that admitting hearsay violated his Sixth Amendment right of confrontation.").

405 Parhat v. Gates, 532 F.3d 834, 846–47 (D.C. Cir. 2008) (describing, in a nonhabeas DTA case, how "the principal evidence" consisted of documents that "do not say who 'reported' or 'said' or 'suspected'" the statements at issue, "[n]or do they provide any of the underlying reporting upon which" the assertions were made, "nor any assessment of the reliability of that reporting"); *see also* WITTES ET AL., *supra* note 324, at 41–50 (discussing corroboration requirements for evaluating the reliability of detainee statements obtained during interrogations).

nity to examine key adverse evidence.[406] Thus, although judges have not imported constitutional tests, they properly place less value on hearsay when assessing support for a detention.

2. *Self-Incrimination*

Other criminal procedure protections apply in a different sense. Although the Fifth Amendment privilege against self-incrimination does not apply absent a jury trial,[407] federal judges have "drawn no inference[s] based on [a detainee's] decision not to testify in [a] case."[408] Indeed, judges reviewing a record for the purpose of conducting a habeas review operate using some of the same evidentiary principles as they would at a trial. Applying an effective privilege against self-incrimination is consistent with a habeas process in which it is the government's burden to defend the detention and where the detainee traditionally was not obligated to testify.

3. *Voluntariness of Confessions*

Confession statements produced using physical coercion have fortunately largely disappeared from U.S. courtrooms since the Supreme Court ruled that the Due Process Clauses of the Fifth and Fourteenth Amendments forbade such statements[409] and as professional police turned to use of psychological techniques during interrogations.[410] However, government use of harsh interrogation techniques post-9/11 created difficult problems in relying on the resulting statements to support indefinite detentions. Criminal procedure scholars have criticized the Court's focus on "voluntariness" as the touchstone for admissibility of confessions, arguing that the Court should rather

406 *See, e.g.*, Sadkhan v. Obama, 608 F. Supp. 2d 33, 36–42 (D.D.C. 2009) (granting some discovery requests while denying other discovery requests that petitioner claimed the government must comply with pursuant to the CMO disclosure requirements).

407 *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

408 Al Rabiah v. United States, 658 F. Supp. 2d 11, 20–21 (D.D.C. 2009); *see also* Kandari v. United States, 744 F. Supp. 2d 11, 22 (D.D.C. 2010) ("The Court has drawn no inference based on Al Kandari's decision not to testify in this case."); Al Odah v. United States, 648 F. Supp. 2d 1, 7 (D.D.C. 2009) ("The Court has drawn no inference based on Al Odah's decision not to testify or submit a declaration in this case."); Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) ("No inference was drawn from Awad's decision not to testify or from his failure to sign or swear to his affidavit.").

409 *See* Brown v. Mississippi, 297 U.S. 278, 286–87 (1936) (holding confessions extracted through torture inadmissible in state proceedings under the Fourteenth Amendment); Bram v. United States, 168 U.S. 532, 542 (1897) (holding involuntary confessions inadmissible in federal proceedings under the Fifth Amendment).

410 *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966) (surveying police interrogation techniques and concluding that "[e]ven without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals").

assess whether a statement may be false or contaminated.[411] Precisely because of their different role when reviewing habeas petitions, judges have developed a remarkable body of case law assessing the reliability of detainee confessions, which uses criminal procedure only by analogy.[412]

For example, in *Al Rabiah v. United States*, the petitioner argued that interrogators tortured him and fed him facts to confess.[413] The court found "substantial evidence in the record" supporting Al Rabiah's claims that he was told he could not return to Kuwait unless he confessed:[414] "Interrogators told Al Rabiah the 'evidence' they had in their possession (whether it really existed or not), Al Rabiah would request time to pray or otherwise ask for a break, and then he would provide a full confession through an elaborate or incredible story."[415] When these spoon-fed accounts designed to "please interrogators" were inconsistent, the interrogators threatened Al Rabiah with rendition and imposed sleep deprivation.[416] Al Rabiah, an ill forty-three-year-old man with no prior military experience, confessed to taking over all supply operations in Tora Bora, "a six square mile mountain complex."[417] Ultimately, the court held that the confession was not believable. The court noted that since the government had disavowed all but the most inculpatory portions of its version of the facts "*in order for the evidence in this case to even make sense*," the confessions lacked "reliability and credibility."[418] The government countered by arguing that Al Rabiah had repeated his confessions at his CSRT, but the court found that the effects of abuse and torture had not dissipated by that time, citing to Fifth Amendment and Due Process decisions concerning voluntariness of a confession under the "totality of the circumstances."[419] However, those references were by way of analogy only. The court concluded, by a preponderance of the evidence, that the

411 *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1109–13 (2010).

412 Al-Qurashi v. Obama, 733 F. Supp. 2d 69, 78 n.14 (D.D.C. 2010) ("It is also well established that in criminal proceedings, statements of the accused 'that are extracted by threats or violence violate the Due Process Clause.'" (quoting United States v. Karake, 443 F. Supp. 2d 8, 51 (D.D.C. 2006)) (internal quotation marks omitted)); Bostan v. Obama, 674 F. Supp. 2d 9, 30 (D.D.C. 2009) (discussing why coerced evidence might be less reliable, but refusing, where the Government has not produced a witness or supported the reliability of alleged statements, to conduct "a virtual trial over the efficacy of torture itself—a prospect . . . both distasteful and distracting").

413 *Al Rabiah*, 658 F. Supp. 2d at 32–33.

414 *Id.* at 38.

415 *Id.* at 39.

416 *Id.* at 27, 39 (noting the threats and Al Rabiah's placement in the "frequent flier program," which prevented a detainee from resting due to frequent cell transfers).

417 *Id.* at 34.

418 *Id.*

419 *Id.* at 36 ("[T]he Court must consider the 'totality of the circumstances' in order to determine whether there exists evidence from which to find that there was a 'clean break'

statements were not reliable evidence supporting Al Rabiah's detention.[420]

Similarly, in a case challenging evidence of Farhi Saeed Bin Mohammed's confession, the judge concluded that Mohammed's statements should not be credited because interrogators had tortured him.[421] The court described Mohammed's diary of torture, which included accounts of brutal treatment and sleep deprivation by Moroccan captors.[422] The court further detailed accounts of Mohammed's captors feeding him information and asking him to repeat it, as well as transfers to the "Dark Prison" in Kabul, the Bagram base in Afghanistan, and then finally Guantánamo Bay.[423] The government did not "challenge or deny the accuracy of Binyam Moham[m]ed's story of brutal treatment."[424] The court described how confessions "procured by torture are excluded under the Due Process Clause" since they run counter to "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[425] "[C]oercive interrogation techniques" can cause "confabulation" and "false memories," and, despite Mohammed's detailed statements, his "lengthy prior torture" rendered them unreliable.[426] Therefore, the court granted the writ and ordered his release.[427]

On balance, courts have it right. They do not apply voluntariness analysis in cases of detainees. Lower courts rule on motions to suppress confession evidence, not from a trial, but rather from an assessment of whether evidence is reliable to support a determination that the detainee was "part of" al-Qaeda.[428] In at least one case, the government conceded that it coerced statements, which resulted in the

---

between the coercion and the later confessions." (quoting United States v. Karake, 443 F. Supp. 2d 8, 87–88 (D.D.C. 2006))).

420 *Id.*

421 Mohammed v. Obama, 704 F. Supp. 2d 1, 28 (D.D.C. 2009).

422 *Id.* at 21–23.

423 *Id.*

424 *Id.* at 24.

425 *Id.* (quoting Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

426 *Id.* at 27, 29 (quoting Shane O'Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating "Enhanced and Coercive Interrogation Techniques,"* 13 TRENDS COGNITIVE SCI. 497, 498 (2009)).

427 *Id.* at 32. For a decision finding that the effects of torture had dissipated by the time of confession, see Anam v. Obama, 696 F. Supp. 2d 1, 7, 10 (D.D.C. 2010).

428 *See* Sulayman v. Obama, 729 F. Supp. 2d 26, 33, 40 (D.D.C. 2010) (noting that despite detainees' lack of due process rights, "statements resulting from coercion may nonetheless be disregarded due to the 'likelihood that the [statements are] untrue'" (alteration in original) (quoting United States v. Karake, 443 F. Supp. 2d 8, 50–51 (D.D.C. 2006))). One court emphasized an inapposite concern, finding that because a detainee's "will was not overborne . . . , it [would] not disregard the statements [the detainee] made during his interrogations at Bagram, Kandahar, or Guantanamo Bay." Abdah v. Obama, 709 F. Supp. 2d 25, 36–37 (D.D.C. 2010).

court granting a habeas petition.[429] Lower courts have ordered discovery on whether "coercion, abuse, or torture" occurred to assess confession statements.[430] In the context of detainee confession statements, or detainee statements inculpating others, judges draw on due process law only by way of analogy, as part of the reliability inquiry that they conduct.

4. *Harmless Error*

The D.C. Circuit imported another doctrine from appellate and postconviction law: harmless error analysis. The court ruled, for example, that denying Al-Bihani's discovery requests was harmless error because "discovery would not have changed the outcome of the case."[431] More recently, the D.C. Circuit cited a "harmless beyond a reasonable doubt" standard, quoting the *Chapman v. California* standard governing state criminal appeals.[432] Harmless error rules were designed to avoid unnecessary trial do-overs. A *Chapman* harmless error standard requires the government to show error harmless beyond a reasonable doubt, and, while not unduly onerous, the standard is somewhat incongruous where there has been no jury conviction finding guilt beyond a reasonable doubt. Moreover, unlike after a criminal trial in which a state cannot appeal an acquittal, the D.C. Circuit has applied a harmless error rule for the government, finding harmful errors that supported reversal of an order *granting* habeas corpus.[433] The role of harmless error may need to be reconsidered; regardless, it will necessarily play a reduced role in the context where there is no trial and only a judge examines authorization for a detention.

Most recently, the D.C. Circuit in *Latif v. Obama* held, with no precedent in habeas case law, that courts should afford the accuracy of government reports, including intelligence, a "presumption of regularity."[434] The court cited to habeas decisions presuming state court opinions were accurately transcribed.[435] As Judge David S. Tatel argued in dissent, such a rule makes sense in the context of court or business records, but has no place in a habeas inquiry, where the purpose is to evaluate reliability of evidence produced under uncertain, nontransparent, and nonroutine conditions.[436] The result places an-

429 *See* Bacha v. Obama, No. 05-2385 (ESH), 2009 WL 2365846, at *1 (D.D.C. July 30, 2009) (order granting habeas petition); Bacha v. Obama, No. 05-2385 (ESH) (Jawad, ISN 900), 2009 WL 2149949, at *1 (D.D.C. July 17, 2009) (order granting motion to suppress).

430 *See* Rabbani v. Obama, 656 F. Supp. 2d 45, 54 (D.D.C. 2009).

431 Al-Bihani v. Obama, 590 F.3d 866, 881 (D.C. Cir. 2010).

432 Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (quoting Chapman v. California, 386 U.S. 18, 23–24 (1967)).

433 Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011).

434 666 F.3d 746, 749 (D.C. Cir. 2011), *reissued*, 677 F.3d 1175 (D.C. Cir. 2012).

435 *See id.* at 751 n.2.

436 *Id.* at 772.

other important thumb on the scale in favor of the government's evidence in a manner that is inconsistent with *Boumediene*'s Suspension Clause mandate and the role of a habeas judge. Although intelligence reports might be properly presumed accurate in many situations, adopting an across-the-board rule to this effect is unjustified when some such reports may be of less convincing provenance.

The Supreme Court has not taken up challenges to these procedures. In the meantime, the government has released much of the Guantánamo population, with comparatively more of the remaining detainees either difficult to transfer or "[h]igh[ ]value."[437] I have suggested that several procedures, particularly the standard of proof, raise Suspension Clause problems under *Boumediene*. To preserve the independent ability of federal judges to review the authorization of detention, courts must ensure that the entire set of procedures is adequate and effective. Whether the Supreme Court will ultimately address those questions is another matter.

D. Remedies and Jurisdiction

One additional feature of the adequacy and effectiveness of post-*Boumediene* remedies deserves mention. The *Boumediene* Court criticized the DTA as not clearly stating that the courts of appeals could provide the remedy of release, leading the Court to the assumption that "congressional silence permits a constitutionally required remedy" and that "a remedy of release is impliedly provided for."[438] Yet, even as to the remedy of release, the *Boumediene* decision did not greatly change matters. Releases continue as before, occurring only when the government arranges the release, even where a court has granted the writ.[439] In *Kiyemba v. Obama*, the D.C. Circuit ruled that despite the finding that seventeen detained Uighur Muslims were nonenemy combatants, the court could not immediately order their release but must instead await government efforts to find countries willing to resettle them.[440] In a subsequent ruling, the court refused a remedy, noting twelve accepted resettlement offers (and five rejected offers) and referring to legislation barring expenditures to bring Guantánamo detainees to the United States.[441]

---

437 *See* Andrei Scheinkman et al., *The Guantánamo Docket: A History of the Detainee Population*, N.Y. Times, http://projects.nytimes.com/guantanamo?hp (last updated Sept. 11, 2012) (stating that 603 detainees at Guantánamo have been transferred, with 167 remaining).

438 Boumediene v. Bush, 553 U.S. 723, 788 (2008).

439 *See* Huq, *supra* note 236, at 410–11, 421.

440 Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1029 (D.C. Cir. 2009).

441 Kiyemba v. Obama (*Kiyemba II*), 605 F.3d 1046, 1051–52 & n.6 (D.C. Cir. 2010) (per curiam); *see generally* Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 Geo. Immigr. L.J. 1 (2009) (discussing the detention of Uighurs at Guantánamo Bay). Three Uighur detainees remain at Guantá-

A careful examination of the *Boumediene* Court's multifactor test defining the extraterritorial reach of the Suspension Clause is beyond the scope of this Article. As noted, that standard incorporates due process in a manner inconsistent with the traditional habeas focus on whether there is jurisdiction over the jailer.[442] The malleability of the Court's jurisdictional test was all too clear when, in *Al Maqaleh v. Gates*, the D.C. Circuit grappled with habeas petitions filed by persons captured outside Afghanistan but detained at the Bagram Air Force Base in Afghanistan.[443] The D.C. Circuit rejected any "bright-line" jurisdictional rule, choosing instead to follow the factor-based *Boumediene* analysis.[444] In analyzing the first factor, the court acknowledged that the process by which the detainees' status had been determined was even less protective—and therefore less adequate—than CSRT process at Guantánamo.[445] The "due process" factor weighed heavily in favor of extending the writ, but the court gave it little weight.[446] Instead, the court found that the place of detention and practical factors weighed conclusively against the writ, emphasizing that "Bagram, indeed the entire nation of Afghanistan, remains a theater of war."[447] With the number of detainees currently at Bagram greater than the dwindling number of detainees at Guantánamo (though authority over the base has been transferred to Afghan authorities),[448] the ruling undercuts *Boumediene*.[449] Still, habeas influences the Executive, which has resulted in modestly enhanced CSRT-type review procedures at Bagram, perhaps in anticipation of a future Supreme Court ruling on the detentions.[450]

---

namo Bay as of this writing. Jane Sutton, *Two Uighur Detainees Sent to El Salvador*, WASH. POST, Apr. 20, 2012, at A9.

442 *See supra* Part II.D.

443 *See* 605 F.3d 84, 99 (D.C. Cir. 2010).

444 *Id.* at 95.

445 *Id.* at 96.

446 *Id.* at 97.

447 *Id.*

448 *See* Falkoff & Knowles, *supra* note 319, at 851–54; Huq, *supra* note 236, at 403–07; *see also* Rod Nordland, *Detainees Are Handed over to Afghans, but Not out of Americans' Reach*, N.Y. TIMES, May 31, 2012, at A4 (discussing the change of control over detainees in Afghanistan).

449 The government may have strategically chosen places of detention, such as Bagram, in an attempt to avoid the *Boumediene* analysis. *Cf. Al Maqaleh*, 605 F.3d at 98–99 (dismissing such an argument but noting that the "manipulation by the Executive" in deliberately confining detainees in a theater of war was a potential additional factor in the analysis).

450 *See* Michael J. Buxton, Note, *No Habeas for You!* Al Maqaleh v. Gates, *the Bagram Detainees, and the Global Insurgency*, 60 AM. U. L. REV. 519, 523–33 (2010).

IV
The Suspension Clause and Judicial Review

A. Habeas Process as an Organizing Principle

The Suspension Clause casts a broad shadow over the regulation of all forms of detention. It has exerted direct and indirect influence even in contexts where statutes largely supplant habeas corpus as the primary vehicle for judicial review. The Executive, courts, and Congress have long been concerned with avoiding Suspension Clause problems, and the Supreme Court's own sometimes-carried-out warnings that it will narrowly interpret efforts to restrict judicial review to avoid potential Suspension Clause problems have, many years before *Boumediene*, helped to structure judicial review of detention. I have argued that the Suspension Clause explains why, as the Court put it in *INS v. St. Cyr*, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[451] Post-*Boumediene*, judges may rely on the Suspension Clause more directly, and not just as a principle of constitutional avoidance. Understanding the Suspension Clause as affirmatively guaranteeing a right to habeas process to independently examine the authorization for a detention helps to explain habeas and constitutional doctrine across a range of areas.

Why does habeas corpus sometimes provide access to process unavailable under the Due Process Clause, while sometimes due process provides more process than habeas would? At its core, habeas corpus provides judges with process in situations where the need for review of legal and factual questions surrounding detention is most pressing. This view of habeas process can be seen as related to the Court's long line of decisions that guarantee a "right of access" to courts without clarifying the source of that "[s]ubstantive [r]ight."[452] In *Boumediene*, the Court grounded that right in the Suspension Clause.

This basis for the right makes some sense of the varied nature of habeas review in which statutes and case law differ depending on the type of detention. Judicial review does not vary categorically; for example, immigration does not receive less review than postconviction or military detention habeas. Instead, judicial review varies within each category. This is the product of evolving executive detention policies, varying postconviction practice, and changes over time in federal statutes, some poorly conceived and some sensible. No one actor provides coherence to habeas practice at any time, and some of the statutes are notoriously Byzantine, poorly drafted, and illogical.

---

451 533 U.S. 289, 301 (2001).

452 *See* Vladeck, *supra* note 30, at 2125–26.

Judges have long played, however, an important role in interpreting the writ (and the underlying constitutional rights). Indeed, for some time, the Supreme Court's interventions have reinforced the role habeas plays, particularly in the executive detention context. In response to the Court's habeas rulings, which generally avoid defining the precise reach of the Suspension Clause, Congress has drafted statutes to preserve judicial review of detentions in an effort to steer clear of Suspension Clause problems, with mixed results.

As developed in Part I, despite changes over time, federal habeas review of executive detentions has been broad and flexible since its inception. The federal habeas statute, 28 U.S.C. § 2241, has remained largely unchanged. Courts provide more process where the Executive detains a person, particularly indefinitely, and where legal or factual questions remain unexplored.[453] In important respects, immigration habeas, postconviction habeas, and civil detention avoid Suspension Clause problems by preserving traditional habeas process where there has been no prior judicial review.[454] I discuss each type of habeas in turn.

Immigration habeas is terribly complex, with judicial review shifting based on detailed statutes, case law, the type of noncitizen, and the type of removal proceeding. Congress has haphazardly intervened and created sometimes-arbitrary distinctions, with dramatic consequences for noncitizens. However, a focus on habeas process can shed some light on this thorny area. As noted, courts substantially defer to the government in decisions regarding removal at the border, where the substantive law falls within the congressional plenary power and due process offers little protection.[455] Yet, even in the immigration context, statutes have provided that habeas ensure judicial review of key disputed questions of law and certain factual questions, in part because Congress has sought to avoid Suspension Clause problems.[456]

An "innocence of deportation" claim, in which the detainee claims that he or she is a U.S. citizen and immune to deportation, is perhaps most prominent, even if such claims are infrequent. Immigration statutes provide that such claims must receive de novo review (now in petitions for review filed in courts of appeals).[457] Of course,

---

453 *See supra* notes 357–59, 369 and accompanying text.

454 *See infra* Table 1.

455 *See supra* note 171 and accompanying text. Extradition is also a special case where deference to foreign policy and treaty obligations justify narrow judicial review. Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

456 *See supra* note 171 and accompanying text.

457 8 U.S.C. § 1252(b)(5)(B) (2006) (permitting "a new hearing on the nationality claim" if the court of appeals concludes that there is a "genuine issue of material fact"). Federal courts describe transfers as requiring a "de novo" hearing, akin to summary judgment review. *See, e.g.*, Ramirez-Garcia v. Holder, 358 F. App'x 873, 874 (9th Cir. 2009).

nondeportability of citizens is a substantive due process issue. In 1922, the Court held, in *Ng Fung Ho v. White*, that to deport a detainee claiming to be a U.S. citizen "obviously deprives him of liberty," and that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."[458] As the Court explained in *Agosto v. INS* in 1978, "In carving out this class of cases, Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings."[459] Similar concerns animated other standards associated with citizenship. In *Woodby v. INS*, dealing with deportation, the Court held that "clear, unequivocal, and convincing evidence" was the agency-level standard of proof regarding citizenship claims; the Court held this without clearly citing to the Due Process Clause as the authority for that requirement, but by connecting it to the criminal case constitutional standard and citing to the great hardships deportations cause.[460]

The 2005 REAL ID Act centers judicial review in petitions of review at the courts of appeals.[461] In enacting the REAL ID Act, Congress was aware of Supreme Court rulings, and it responded most directly to the Court's *St. Cyr* ruling striking down prior restrictions on habeas litigation by certain categories of noncitizens.[462] Accordingly, the Act preserved judicial review of questions of law and constitutional questions (for which, as noted, courts may also reach mixed questions).[463] The Act contained an exception to permit habeas review of claims related to the status of the person in expedited removal proceedings, for which very little process is supplied.[464] These may include claims that the person is not a noncitizen ordered removed at all but actually a citizen, a lawful permanent resident, a refugee, a person not ordered removed, or a person granted asylum.[465] Perhaps courts may interpret those exceptions broadly over time. After all, in

458 259 U.S. 276, 284 (1922). For an earlier decision taking an inconsistent approach, see United States v. Ju Toy, 198 U.S. 253, 261–64 (1905) (dismissing a petition alleging citizenship that "disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary").

459 436 U.S. 748, 753 (1978).

460 385 U.S. 276, 285–86 (1966); *see also* 8 U.S.C. § 1229a(c)(3)(A) ("In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."); 8 C.F.R. § 1240.8(c) (2012) ("[T]he Service must first establish the alienage of the respondent."). In contrast, the statute places the burden on a noncitizen contesting inadmissibility grounds. 8 U.S.C. § 1229a(c)(2).

461 *See supra* note 360 and accompanying text.

462 *See supra* note 360 and accompanying text.

463 *See supra* note 360 and accompanying text.

464 8 U.S.C. § 1252(e)(2).

465 *Id.*

earlier immigration rulings like *Heikkila v. Barber*, the Court found that despite the existence of statutes precluding judicial review "to the maximum extent possible under the Constitution," habeas corpus was still available.[466] The *Heikkila* Court did not explain why habeas corpus was still available—it simply noted the "nature of the writ" and "the scope of inquiry on habeas corpus" that differentiated habeas corpus from purely statutory judicial review—but the Suspension Clause provides a sensible explanation.[467]

This explanation makes still more sense when examining the Court's *Ludecke v. Watkins* decision, affirming the district court's denial of the habeas petition and upholding authority to deport under the Alien Enemy Act of 1798.[468] The Court noted that judges entertaining such habeas petitions could examine legal questions and jurisdictional facts, that is, "the construction and validity of the statute" and whether "the person restrained is in fact an alien enemy."[469] Again, the Court did not cite to the Suspension Clause, but it provides the plausible source for that judicial authority.

The Suspension Clause may cast its shadow over other areas as well. Lengthy or indefinite detention may be of even greater Suspension Clause concern. For example, in *Zadvydas v. Davis* the Court held, to avoid reaching constitutional questions, that where a noncitizen is in indefinite detention, its interpretation of specific statutes required the government to make a detailed and "sufficient" showing at the immigration hearing.[470] Federal courts have carefully scrutinized detention pending removal even in cases involving "mandatory" detentions of criminal aliens (which the Court approved in *Demore v. Kim*).[471] These rulings in habeas challenges to mandatory detention do not cite to the Suspension Clause, and instead rely upon the Due Process Clause. However, sometimes the relationship between the Due Process and Suspension Clauses is overdetermined. Substantive due process may overlap with the Suspension Clause in its concern for broader judicial scrutiny where there is lengthy or indefinite detention.

In contrast to those situations requiring elevated judicial review, much of immigration decision making relates to discretionary agency decisions. The REAL ID Act eliminates judicial review over such deci-

---

466 INS v. St. Cyr, 533 U.S. 289, 311–12 (2001) (citing Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

467 *Heikkila*, 345 U.S. at 235–36.

468 335 U.S. 160, 163–73 (1948).

469 *Id.*

470 533 U.S. 678, 699–702 (2001).

471 *See* 538 U.S. 510, 529–31 (2003); ALEINIKOFF ET AL., *supra* note 360, at 1257 ("Somewhat surprisingly, the lower courts have found significant constraints on lengthy detention . . . despite the Supreme Court's apparent endorsement of that provision in *Demore*.").

sions as to factual challenges but preserves review of questions of law and constitutional questions.[472] Congress created an alternative to habeas corpus, providing for limited "substantial-evidence" or sufficiency-of-the-evidence review in the courts of appeals regarding factual questions and de novo review of "questions of law" and constitutional claims.[473] As noted, courts range in their interpretation of what is a "question of law." Tellingly, the Second Circuit Court of Appeals, when explaining the need to flexibly interpret that language, cited *INS v. St. Cyr* and the demands of the Suspension Clause: "The Conference Report makes clear that Congress, in enacting the REAL ID Act, sought to avoid the constitutional concerns outlined by the Supreme Court in *St. Cyr*, which stated that as a result of the Suspension Clause, '*some* judicial intervention in deportation cases is unquestionably required by the Constitution . . . .'"[474]

The REAL ID Act not only eliminates judicial review of factual questions regarding discretionary decisions, but it also eliminates judicial review for criminal aliens, perhaps because they received process when convicted of an enumerated crime at trial (or when pleading guilty).[475] As to criminal convicts, review remains over legal questions, including the question of whether a court convicted the defendant of one of the (excessively broad and ill-defined) array of crimes qualifying as grounds for removal. Courts have expanded mixed-question review of facts relevant to that legal question as well.[476] The Court in *St. Cyr* cited to the Suspension Clause when it narrowly construed statutes stripping judicial review of detention.[477]

Extradition also provides an example of highly limited review of noncitizen removal. In 1925, the Supreme Court set out a standard in which the reviewing court asks "whether the magistrate had jurisdic-

---

472 8 U.S.C. § 1252(a)(2)(B), (D) (2006) (stating that no court has the authority to review listed waivers and matters committed to official discretion, excepting asylum, and preserving judicial review of constitutional claims and questions of law).

473 *See id.*; *id.* § 1252(b)(4)(B).

474 Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 326 (2d Cir. 2006) (footnote omitted) (quoting INS v. St. Cyr, 533 U.S. 289, 300 (2001)).

475 Noncitizens may also waive judicial review. *See, e.g.*, 8 U.S.C. § 1187(b)(2).

476 Judges (and the Executive) have increasingly reached further to examine facts, including facts not part of the criminal record, to decide whether a court convicted a noncitizen of a deportable offense. *See* Nijhawan v. Holder, 557 U.S. 29, 36–37 (2009) (holding that the question of loss to the victim "calls for a 'circumstance-specific,' not a 'categorical,' interpretation"); Silva-Trevino, 24 I. & N. Dec. 687, 708 (Att'y Gen. 2008) (adopting an approach permitting the judge in an immigration case to consider "any additional evidence or factfinding" to decide if the crime was one "involving moral turpitude"). *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (criticizing the disarray caused by departures from the traditional categorical approach); Jeremiah J. Farrelly, Note, *Denying Formalism's Apologists: Reforming Immigration Law's CIMT Analysis*, 82 U. COLO. L. REV. 877 (2011) (same).

477 533 U.S. at 304–05.

tion, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[478] Extradition is treaty based and involves diplomatic issues, but there is another explanation for the traditionally limited judicial review: although extradition may not involve much in the way of prior judicial process, the process that does exist takes the form of a magistrate finding probable cause. Following the magistrate's determination, however, there is the anticipation of future judicial process: the individual will receive full criminal process in a foreign court. This explains, perhaps, the very limited judicial review prior to extradition.[479]

Summarizing the procedures in each area of habeas corpus discussed, Table 1 below illustrates the inverse relationship between habeas corpus and due process. In key areas, the broadest habeas process is provided where process lacked in prior proceedings, while more deferential review occurs where there was more substantial prior process, in part due to the influence of the Suspension Clause.

---

478 Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

479 Habeas jurisdiction remains over petitions challenging the legality of the extradition proceedings and the Secretary of State's compliance with domestic law, despite the REAL ID Act's consolidation of many immigration challenges in the courts of appeals, since such petitions do not challenge final orders of removal. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (per curiam).

TABLE 1: THE INVERSE SCOPE OF HABEAS CORPUS AND DUE PROCESS

Type of Review	Full Habeas Process	Habeas Review of Prior Process	Due Process at Prior Proceeding
Military Detention	Broad review under 28 U.S.C. § 2241 and *Boumediene v. Bush*, 553 U.S. 723 (2008).	*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), language on due process standard for review. Deferential review of prior military commission trial.	Possibly prior CSRT; *Boumediene* did not address whether CSRTs comply with due process. Prior military commission trial (Johnson v. Eisentrager, 339 U.S. 763 (1950)).
Postconviction	Evidentiary hearings and discovery where new, undeveloped facts or new and retroactive legal rules (e.g., 28 U.S.C. § 2254(e)) are at issue.	Deferential review of legal rulings, nonretroactivity, and deference to prior trial, appeal, or postconviction fact-finding (e.g., 28 U.S.C. §§ 2254(b), (d), (e)(1)).	Prior criminal trial or waiver by guilty plea; a final conviction receives deference, but due process requires "beyond-a-reasonable-doubt" proof at trial and an array of procedural protections.
Immigration Detention	De novo review of citizenship claims under 8 U.S.C. § 1252(b)(5)(B). Habeas review of status for expedited removal under 8 U.S.C. § 1252(e)(2).	"Substantial-evidence" or sufficiency-of-the-evidence nonhabeas review of noncriminal removal and asylum (8 U.S.C. § 1252(b)(4)(B)). "Some-evidence" due process review of extradition, removal of criminal aliens.	Plenary power permits broad bases for removal. At agency hearing, clear-and-convincing-evidence standard for deportation (8 U.S.C. § 1229a(c)(3)(A); Woodby v. INS, 385 U.S. 276, (1966)). Searching review of length of detention (Zadvydas v. Davis, 533 U.S. 678 (2001)).

As depicted above, where due process rulings or statutes already provide for substantial prior process, habeas process may do less work to supplement process provided, and statutes and case law may restrict judicial review. Prior administrative process may receive comparatively more deference in situations in which there has been prior *judicial* process (i.e., criminal aliens provisions) or where the detention standard is not very fact sensitive; in contrast, key jurisdictional facts and questions of status may receive de novo review despite prior administrative process. Even in the enemy combatant context, review may be more limited where the government conducted a full-fledged military trial; as discussed, the Court's *Boumediene* decision distinguished *Eisentrager* for that reason.[480]

480 *See supra* notes 314–17 and accompanying text.

In contrast, in the postconviction setting, as developed in Part I, habeas corpus has long required less demanding review. This is particularly so where criminal procedure offered due process at trial. Yet even in postconviction review, as discussed next, new facts and evidence of innocence alter judicial review. Complex constitutional and statutory rules concerning evidentiary hearings, *Brady* disclosures of exculpatory evidence, innocence and other "gateway" claims all facilitate access to new evidence and preserve some role for a federal judge (although, in my view, not an adequate ability to review new evidence of innocence).

One additional category of detention not included in Table 1 is civil detention, such as commitment of the mentally ill, for which, as noted, the Court requires "clear and convincing evidence" supporting the detention at a trial-like adversary proceeding.[481] Those substantive due process standards relate to the initial detention. Given the role substantive due process plays in such cases, habeas plays a limited role. As the Court has noted, because the ongoing basis for a civil commitment or the conditions of confinement may be revisited and challenged in civil rights actions, such civil suits provide far more useful tools for civil detainees than habeas challenges.[482]

Viewing habeas corpus as an institution reveals both an important common structure—despite changing case law, practice, and statutes over time—and certain inadequacies and potential constitutional flaws in statutes in some areas. The "full habeas process" column of Table 1 is particularly telling. While military detention, immigration detention, and postconviction habeas involve review of different types of detention following different process, statutes and case law preserve full habeas process in some places when it is most needed. Habeas retains its greatest force in contexts in which there has been less prior process and where factual and legal issues have not received adequate judicial review.

A substantive view of the Suspension Clause has implications for understanding habeas corpus across its range of applications and for answering unsettled questions surrounding habeas review. For example, judicial interpretation of the REAL ID Act in immigration habeas cases could hinge on whether the agency conducts adequate factual review, or on whether the applicable statutes preserve sufficient judi-

---

481 Addington v. Texas, 441 U.S. 418, 433 (1979).

482 *See* Seling v. Young, 531 U.S. 250, 263 (2001) (noting the availability of appeals and injunctive remedies and explaining that "confinement is not a fixed event"); Martin v. Bartow, 628 F.3d 871, 877 (7th Cir. 2010) (explaining that a determination that a person is a sexual offender is "constantly and forever disputable as a matter of constitutional law").

cial review of mixed factual and legal questions.[483] The foregoing analysis suggests that where a statute is silent on review of mixed questions and factual questions, courts should maximize judicial review where prior fact development is inadequate, and habeas corpus should supply the standard.[484] As discussed next, this view of the Suspension Clause has implications for postconviction habeas, in which scope of factual review is contested, particularly for claims of innocence.

B. Three Hypotheticals

How much of a difference does it make whether judges examine the authorization for a detention under a habeas corpus process or whether they determine if procedures comport with due process? To press the role of the distinction in *Boumediene* and Chief Justice Roberts's concern that CSRT procedures supplied adequate process,[485] suppose Congress legislates a set of enhanced CSRTs. Perhaps these CSRTs include the D.C. Circuit's adopted standards for habeas hearings: discovery of potentially exculpatory evidence, a preponderance standard of review, a right to retain counsel, and the ability to rebut the government's case.[486] A due process approach would simply ask whether that set of procedures comports with the minimal *Mathews* standards following the *Hamdi* analysis.[487] Under the Suspension Clause, a judge would question whether the scheme provided an adequate and effective alternative to full habeas review by an Article III judge.[488] Even though these hypothetical procedures are more robust, they do not resemble the alternatives to habeas the Court has previously approved, which streamlined, but maintained the equivalent of, full habeas review with federal judges. Further, a preliminary administrative procedure to screen detainees' status does not absolve federal judges of their independent obligation to review the authorization for each detention. On the other hand, a statute could require federal judges to defer, in some respects, to the record or findings of an enhanced set of CSRTs.

---

483 Motomura, *supra* note 354, at 486–91 (discussing the REAL ID Act and advocating a "direct review" model, arguing that the "collateral review" model is insufficient without a prior formal process in which the facts are laid bare).

484 Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1368 (2006) (urging courts to "defer to agency findings of historical facts, but to engage in de novo review of . . . determinations that a given set of facts do or do not rise to the relevant legal standard").

485 *See supra* notes 293–96 and accompanying text.

486 *See supra* Part III.

487 *See supra* Part II.A.1.

488 *See supra* Part II.B.2.

Take a second hypothetical: Imagine that in a future conflict the military detains many tens of thousands of prisoners of war (POWs).[489] Each detainee receives the privileges of POW status, including, if his or her status is unclear, military hearings under Article 5 of the Geneva Conventions. Such hearings may, however, be quite rudimentary, involving a "competent tribunal" that has no required procedures (implementing Army Regulations describe the U.S. procedures).[490] Suppose many thousands of POWs demand access to habeas, claiming they were not combatants for an enemy state, but were private mercenaries or noncombatants that the government should release.[491]

One could imagine strong practical incentives for federal courts to postpone resolution of such difficult questions, particularly if thousands held as POWs raised such claims. A court might rely on jurisdictional grounds to refuse to hear petitions, citing to practical impediments, just as the D.C. Circuit did in *Al Maqaleh*.[492] The *Boumediene* Court's jurisdictional test left open that possibility for future conventional or unconventional conflicts.

Now, assume the POWs are detained at a military base in the territorial United States or at Guantánamo Bay. *Boumediene* would be squarely on point. Military hearings may provide limited screening to ascertain POW status, but they are not an adequate substitute for habeas corpus. Judges considering habeas petitions would examine the authorization for detention in each individual case. One could easily imagine federal courts developing reasons to abstain. However, a due process approach would make deference far simpler, although a lengthy detention, perhaps after hostilities were over and without process beyond the initial "competent tribunal," might raise real due process concerns. In contrast, the Suspension Clause approach would, at

---

489 For a discussion of advantages and disadvantages of treating al-Qaeda operatives as combatants and affording them prisoner-of-war status, despite al-Qaeda's lack of a "state" or "army," see David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1001–02 (2009).

490 *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; U.S. DEP'T OF THE ARMY, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997) [hereinafter ARMY REGULATION 190-8], *available at* http://www.apd.army.mil/pdffiles/r190_8.pdf; *see also* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1091 (2008) (describing past and present U.S. procedures and comparing said procedures with several allied nations' procedures).

491 Army Regulation 190-8 provides that the tribunal may recommend such release of an "innocent civilian." *See* ARMY REGULATION 190-8, *supra* note 490, § 1-6e(10). Perhaps few combatants would contest their status though, as "the desire to obtain the benefits of POW status ordinarily would encourage captured soldiers to concede their associational status, not deny it." Chesney & Goldsmith, *supra* note 490, at 1089.

492 *See supra* notes 443–47 and accompanying text.

a minimum, force judges to acknowledge that they were avoiding a responsibility to examine whether individuals were in fact properly held as POWs, perhaps in deference to military concerns.

Third, suppose Congress created a national security court with Article III judges that used highly streamlined procedures (much like the CSRTs) and provided detainees with advisers, but not lawyers, and little access to discovery.[493] In this hypothetical, the due process analysis would largely overlap with the habeas analysis. There might be questions under *Hamdi* as to whether these procedures are minimally adequate. There might also be questions as to whether the procedures provide an adequate and effective substitute for habeas, since, though an Article III judge sits on the case, it is unclear if this type of judge would have the traditional authority to examine authorization for the detention and provide relief. The *Boumediene* Court emphasized that "deference" can be appropriate to sufficient prior judicial process; however the Court also emphasized that access to exculpatory evidence was "constitutionally required."[494] The Court added that military courts might be sufficient, but only if they had a sufficiently "adversarial structure" that included providing counsel.[495]

Thus, judges examining habeas corpus and due process ask different questions and do not always provide the same answer. A judge examining a due process claim asks whether general procedures are adequate; a federal judge examining habeas process asks whether there is an adequate opportunity to review the authorization of the detention for each detainee. There may be reasons for judges to abstain or defer to Congress and the Executive, but if judges squarely face the question, the Suspension Clause requires that the judge retain full power to meaningfully review the factual and legal authorization for the detention.

C. Innocence and the Suspension Clause

Habeas process involves a sort of innocence claim. Detainees argue that the government illegally detained them or that factually they are not the type of person the government can legally detain. I have developed how judges conducting a habeas process, grounded in the Suspension Clause, must be intimately concerned with factual error

493 Commentators have proposed that such courts be created. *See generally* Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617 (2009) (exploring potential processes and complications for such a court); Stuart Taylor, Jr., *The Case for a National Security Court*, ATLANTIC, Feb. 2007, http://www.theatlantic.com/magazine/archive/2007/02/the-case-for-a-national-security-court/305717/ (arguing in favor of these courts).

494 Boumediene v. Bush, 553 U.S. 723, 781–82, 786 (2008).

495 *Id.* at 786–87.

and not just review of questions of law. Such a view has important implications for domestic habeas.[496]

Since its 1993 *Herrera v. Collins*[497] decision, the Supreme Court has failed to recognize, except for the sake of argument, that innocence alone could be a basis for a constitutional entitlement to postconviction relief. The *Herrera* Court noted that such a claim would be "disruptive of our federal system" and "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[498] The Court assumed that any such claim of innocence would require a "truly persuasive" showing.[499] Federal courts have yet to release a convict on the basis of a hypothetical "truly persuasive" *Herrera* claim (and I have developed how even innocent convicts, including those later exonerated by DNA, tried and failed to assert such claims).[500] The Court does, however, permit a showing of innocence to excuse procedural barriers that would otherwise bar review of claims, and the Court has indicated that this hypothetical innocence claim may be asserted in noncapital cases.[501]

What *Boumediene* and executive detention jurisprudence highlight is that habeas at its core is centrally preoccupied with examining facts or questions of innocence. Justice Lewis Powell wrote, "[H]istory reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt."[502] That is incorrect. In detention cases, judges must examine innocence or guilt absent any "constitutional claim" at all when performing the core of their habeas function. As Gerald Neuman has suggested, following *Boumediene*, the Court's failure to recognize a freestanding claim of innocence may stand on weaker constitutional ground.[503] A claim of innocence could be grounded in the Due Process Clause, its "natural foundation,"[504] whether a court uses a *Mathews* balancing approach concerned with risk of error, or a fundamental fairness approach under which an innocent prisoner has a "powerful and legitimate interest in

---

496 Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 837 (2009) (suggesting that the "proposed cutback" of habeas may be unconstitutional if states "fail to maintain robust postconviction review").

497 506 U.S. 390 (1993).

498 *Id.* at 400–01.

499 *Id.* at 417.

500 Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1691–92 (2008).

501 *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72 (2009); Schlup v. Delo, 513 U.S. 298, 321 (1995).

502 Schneckloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring).

503 Neuman, *supra* note 30, at 563–64 (noting that "the *Boumediene* balancing methodology could supply a new doctrinal foundation" for a *Herrera*-type innocence claim).

504 Garrett, *supra* note 500, at 1704.

obtaining his release from custody."[505] *Boumediene* suggests that a claim of innocence could be grounded in the Suspension Clause (perhaps informing a due process claim, if a federal question claim could not be premised directly on the Suspension Clause). If no prior court adequately examined new evidence of innocence, perhaps courts should mandate federal habeas review.[506]

Jurisprudence emerging from *Boumediene*, with its focus on factual reliability, may also indirectly influence constitutional criminal procedure. Judges may use similar rules to assess hearsay or confession evidence in other contexts in which the reliability of such evidence is important, perhaps including in posttrial cases raising claims of innocence. As scholars and courts try to improve accuracy and reliability of evidentiary rules, that case law may become salient.[507]

Conclusion

The Suspension Clause has long cast a shadow over the regulation of detention. Now the Supreme Court has brought the Clause out of the shadows, giving it substance. It does not merely describe when the government may suspend the writ, nor does it solely reflect an important principle of constitutional avoidance in interpreting statutes that restrict judicial review of detention. Instead, the Clause affirmatively offers a simple but powerful form of process to detainees. Moreover, the Court emphasized a Suspension Clause concern with both legal and factual error. This Article has explored this new understanding of the Suspension Clause in light of the changing and unsettled relationship between two complex areas of law: due process and habeas corpus. Both "due process and habeas corpus are quite general, amorphous, and capacious" in their content.[508] Despite ring-

---

505 *Id.* at 1705 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

506 Currently, a federal court may grant an evidentiary hearing to develop facts a state court failed to develop, but it may not necessarily rely on facts undeveloped in state proceedings when ruling on the merits. *See* 28 U.S.C. § 2254(e)(2) (2006); Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (holding that review under § 2254(d)(1) is limited to the record presented to the state court that adjudicated the claim on the merits); Williams v. Taylor, 529 U.S. 420, 437 (2000) (noting that 28 U.S.C. § 2254(e)(2) does not bar an evidentiary hearing where a prisoner "was unable to develop his claim in state court despite diligent effort"). The Court also suggested a claim of innocence could be pursued in federal habeas discovery despite failure to recognize such a claim. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72–73 (2009).

507 *See, e.g.*, Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 265–74 (2011) (advocating for criminal procedure reforms to improve accuracy); Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 486 (advocating reliability review of confessions). *See generally* State v. Henderson, 27 A.3d 872 (N.J. 2011) (adopting social science framework to regulate eyewitness evidence).

508 Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. Rev. 1687, 1720 (2007).

ing language uniting habeas and due process in a tradition dating back to Magna Carta, habeas and due process cover importantly different terrain. The Suspension Clause supplies process in circumstances where the Due Process Clause does not apply, while due process has varied applications outside areas covered by habeas corpus. In executive detentions, however, the Suspension Clause plays an outsized role.

Taken seriously, the Court in *Hamdi* and *Boumediene* forged a relationship between the Suspension Clause and the Due Process Clause. Nelson Tebbe and Robert Tsai examined what circumstances justify "constitutional borrowing" and noted concerns where there is a lack of fit, a lack of transparency, and incomplete application from one area of constitutional law to another.[509] In *Boumediene*, the Court was careful not to explicitly borrow due process standards. The Court's caution was justified. While due process analysis focuses on adequacy of procedures, habeas process provides the authority for judges to examine the factual and legal authorization for detention. Though habeas process may be "skeletal" in its outlines, both at common law and in modern federal statutes, it provides judges a powerful tool. In significant ways, complex and sometimes poorly conceived distinctions in statutes nevertheless respect core habeas process, in part due to the judicial interventions. I have argued that *Boumediene* was no innovation, but rather it followed the longstanding view that habeas is at its most expansive concerning detention without a trial.

The Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process, particularly in the context of indefinite detentions. This places the judiciary in the uncomfortable position of reviewing broad congressional authorizations for detentions and changing executive procedures in factually and legally contested detainee petitions. Thrust into that difficult role, lower courts have often relied upon inapposite sources, hewing to some vision of a bare constitutional minimum rather than providing a meaningful habeas process. The D.C. Circuit approves a standard of proof that is too lenient as defined, if not also in application. Its approach unduly limits discovery and uses an odd harmless error rule. In other respects, rulings have done a better job harmonizing evidentiary and criminal procedure rules with habeas process. Careful application could avoid unfortunate rulings, with an exception: the decision not to extend habeas to Bagram was partially due to *Boumediene*'s misstep in adopting a multifactored jurisdictional test.[510]

---

509 Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 494–507 (2010).

510 *See supra* notes 442–47 and accompanying text.

Congress has preserved the central role of the judiciary in the contest over what procedures should govern review of national security detention. Although the National Defense Authorization Act for Fiscal Year 2012 contains broad authorization for detention, it does not alter or address procedural aspects of judicial review, despite calls to do so.[511] Perhaps Congress has reached a stable equilibrium. Judges' approaches to future detentions and detention legislation in future conflicts will focus on the Suspension Clause question. If Congress centers review in an enhanced version of CSRTs, if POWs receive military hearings and demand access to habeas, or if Congress creates a national security court with Article III judges but streamlined procedure, courts will ask whether each is an adequate and effective substitute for habeas, and not simply whether general procedures satisfy due process. In some cases, the answer might be the same under a habeas or due process approach, but only if judges retain the power to adequately review authorization for detentions. Moreover, *Boumediene* will continue to impact all of habeas corpus, ranging from judicial review under immigration statutes to central questions in postconviction law, including actual-innocence claims.

The connection between habeas corpus and due process has been long celebrated. Daniel Meador heralded how "[f]lexibility to meet new problems is one of the characteristics of both due process and habeas corpus, and the value of the habeas corpus—due process combination as protection against arbitrary imprisonment—can hardly be exaggerated."[512] Yet the virtues of flexibility include the vices of malleability. The Suspension Clause jurisprudence forged in the wake of *Hamdi* and *Boumediene* suggests that connecting habeas corpus and due process requires great care.

The structural role of the Suspension Clause is now firmly established. Contrary to expectations, after exerting its influence in the shadows for so long, the Clause anchors a process animating the operation of far-flung aspects of habeas corpus, ranging from military detention, to immigration detention, to postconviction review. While due process and habeas corpus overlap in some of the protections they provide, a judge asks different questions when examining a due process claim versus a habeas challenge to custody. A judge examining a due process claim will focus on the general adequacy of the procedures employed. A judge examining a habeas challenge will focus on the legal and factual authorization of an individual detention, and

511 *See* WITTES ET AL., *supra* note 324, at 83 (arguing that courts "desperately need guidance" but "prospects of legislative intervention are . . . exceedingly remote"); Kuhn, *supra* note 372, at 242 (describing congressional deference to current judicial process); *supra* note 333 and accompanying text.

512 MEADOR, *supra* note 4, at 82–83.

in more troubling cases, on the larger Suspension Clause question of whether federal judges have an adequate and effective ability to examine that question of authorization. The roles of habeas and due process are distinct and in important respects they share an inverse relationship—habeas corpus can fill the breach when due process is inadequate. The Suspension Clause ensures that habeas corpus serves a powerful, independent, and unappreciated role standing alone.