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CONCEPTIONS OF THE VESSEL: ABU ALI, HABEAS CORPUS, AND THE DARK SIDE OF THE “WAR ON TERRORISM”

MICHAEL PAISNER *

INTRODUCTION

On September 16, 2001, Vice President Dick Cheney stated on the television show *Meet the Press* that the United States would need to conduct the “war on terrorism” in part through “the dark side,” and that “[a] lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful.”¹ Whether the judiciary has a role in monitoring and policing the dark side of the “war on terrorism” remains a subject of much contestation. The trio of detainee cases in 2004—*Rasul v. Bush*,² *Hamdi v. Rumsfeld*,³ and *Rumsfeld v. Padilla*⁴—suggested an unwillingness on the part of the Supreme Court to stand completely on the sidelines while the political branches hammer out the rules of engagement.⁵ These cases raised as many questions as they answered regarding the breadth of federal court jurisdiction over habeas corpus petitions brought by overseas detainees and the precise contours of the package of rights that such detainees enjoy.

In signaling that the unique status of Guantanamo Bay as a territory under exclusive United States “jurisdiction and control” was a factor contributing to the outcome in *Rasul*, the Supreme Court may indeed have encouraged the Executive to push the “war on terrorism” even further into the dark side in an effort to escape the purview of American courts.⁶ One of the controversial methods employed by the Bush Administration has been “extraordinary rendition,” whereby suspected terrorists are transferred outside of normal

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1. See Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

2. 542 U.S. 466 (2004).

3. 542 U.S. 507 (2004).

4. 542 U.S. 426 (2004).

5. See also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

6. See *Rasul*, 542 U.S. 466; *id.* at 477 (Kennedy, J., concurring).

extradition procedures to foreign countries for interrogation.⁷ The program was not an innovation of the “war on terrorism,” seventy suspects were rendered prior to the September 11th attacks.⁸ But the Central Intelligence Agency received broad new authorities in the wake of September 11th to render suspects solely for the purpose of detention and interrogation, and with no immediate prospect of criminal proceedings.⁹ Thereafter, the number of terrorism suspects rendered increased dramatically, with an estimated 100 to 150 renditions through March of 2005.¹⁰

In this light, the decision of the District Court for the District of Columbia in the case of *Abu Ali v. Ashcroft*¹¹ raises complex questions generally about the extent to which United States courts will venture into the dark side, and more specifically how they will evaluate Executive assertions that certain decisions regarding the fate of citizens are beyond the realm of judicial inquiry. *Abu Ali* involved a petition for a writ of habeas corpus filed in a United States district court by an American citizen, Omar Abu Ali, who alleged that: (i) the United States government had initiated his arrest by Saudi Arabian officials and was controlling his ongoing detention; (ii) Saudi Arabia would release him immediately to United States officials upon request; (iii) American agents had interrogated him while in Saudi custody; and (iv) the Saudis provided him with no judicial process and tortured him.¹² On December 16, 2004, the district court determined that it could assert jurisdiction over the case as a matter of law, rejected the government’s motion to dismiss on jurisdictional grounds, and issued an order instructing the government and Abu Ali’s attorney to agree upon and submit a proposed order governing jurisdictional discovery.¹³

Such a discovery order likely would have forced the United States to “disclose evidence detailing its role in Abu Ali’s detention and interrogation.”¹⁴ Perhaps in response to this threat, the American government whisked Abu Ali to the United States, where he was indicted in a federal district court in February 2005 on charges of, *inter alia*, providing material support to Al Qaeda and plotting to kill President Bush.¹⁵ Ultimately, in light of these subsequent events, the district court granted the government’s motion to dismiss Abu Ali’s habeas petition, concluding that it had been mooted by

7. See Mayer, *supra* note 1.

8. Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1.

9. *Id.*

10. *Id.*

11. 350 F. Supp. 2d 28 (D.D.C. 2004).

12. *Id.* at 30.

13. *Id.*

14. Spencer Ackerman, *Suspect Policy*, THE NEW REPUBLIC, Mar. 14, 2005, at 14.

15. See *United States v. Abu Ali*, Docket Sheet, No. 05-CR-0053 (E.D. Va. 2005).

the initiation of the criminal trial.¹⁶ However, given the evidence of the proclivity of the United States government to subcontract terrorism-related interrogations to foreign governments, the vexing issues of jurisdiction, separation of powers, and the role of the federal courts that the habeas petition raised remain pressing. Likely as a result of the thoroughness of the court's analysis, the case has become an important precedent, framing the subsequent inquiry conducted by two district courts into whether to assert jurisdiction over habeas petitions brought by American citizens detained by the multi-national force in Iraq.¹⁷

The *Abu Ali* case was salient and difficult because of the extent to which it pushed the outer boundaries of the habeas remedy in the context of allegations that suggested violation of the basic norms of due process and the rule of law. The presumption is that the habeas statute applies (and that its application is perhaps constitutionally compelled) anytime that an American citizen alleges detention in violation of his constitutional rights.¹⁸ Indeed, the trend in the case law has been a clear progression towards relaxed interpretations of the habeas statute that support jurisdiction across a wide range of circumstances.¹⁹ Nevertheless, the procedural conundrums posed by the *Abu Ali* allegations stretched to its breaking point the presumption that any detention of American citizens at the behest of the Executive is within the jurisdictional ambit of the habeas statute.

16. See *Abu Ali v. Gonzales*, 2005 U.S. Dist. LEXIS 20312 (D.D.C. Sept. 19, 2005).

17. See, e.g., *Omar v. Harvey*, 416 F. Supp. 2d 19, 21 (D.D.C. 2006), aff'd 479 F.3d 1 (D.C. Cir. Feb. 9, 2007); *Mohammed v. Harvey*, 2006 U.S. Dist. LEXIS 75717 (D.D.C. 2006), aff'd *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. Apr. 6, 2007). While *Omar* and *Mohammed*, both of which were affirmed by the D.C. Circuit, reached divergent conclusions as to whether there was jurisdiction, neither case, nor the subsequent D.C. Circuit decisions affirming them, challenged the main principle established in *Abu Ali*—"the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen." *Mohammed*, 2006 U.S. Dist. LEXIS 75717, at *30-31 (D.D.C. 2006) (quoting *Abu Ali*, 350 F. Supp. 2d at 41); see also *Omar*, 416 F. Supp. 2d at 26.

18. See *Ex parte McCordle*, 73 U.S. 318, 325-26 (1867) ("[The Act of 1867] is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."); see also *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir.1988) (en banc) ("[M]odern habeas jurisprudence emphasizes the breadth and flexibility of the Great Writ in vindicating the fundamental concern in a democratic society of checking the powers of the state vis-a-vis an individual in custody.").

19. Including the absence of the prisoner from the reviewing court's district, see, e.g., *Burns v. Wilson*, 346 U.S. 137 (1953), and various situations that would not fit under traditional physical definitions of "in custody," see, e.g., *Peyton v. Rowe*, 391 U.S. 54 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968).

In answering the jurisdictional issue, the *Abu Ali* court performed a classic internal limits/external limits analysis.²⁰ In addressing the internal limits, the court inquired if, as a matter of straightforward statutory interpretation, the habeas statute granted jurisdiction over the specific factual setting of a citizen held by a foreign power allegedly at the behest of the United States government.²¹ Concluding that it did, the court in the external portion of the analysis considered whether any one of a number of related, largely constitutionally-rooted doctrines external to the jurisdiction-granting statute—the separation of powers, the political question doctrine, and the act of state doctrine—sufficed to block the exercise of statutory jurisdiction.²² The court analyzed each of the external doctrines as independent bodies of law, and determined that each, in turn, lacked sufficient force to block jurisdiction.

Legal opinions must adhere to doctrinal formalities, but formal doctrine likely did not, in fact, determine the outcome in *Abu Ali*. This likely is because the case brought together three powerful and conflicting legal principles: The due process rights of citizens, the insulation of core Executive foreign policy determinations from judicial intrusion, and the important role of the habeas remedy as a guarantor of individual rights. Further, all three considerations were at their most compelling, since the alleged violation of Abu Ali's due process rights was quite serious, the interest of the Executive in reducing judicial intrusion into the details of its interactions with foreign sovereigns was strong, and the problems attending application of the habeas remedy to the alleged factual situation of a foreign government holding a United States citizen at the behest of the United States government were vexing. When confronted with such powerful contending considerations, judicial mindsets help frame formal legal analysis. In *Abu Ali*, the consistent tenor of the court's analysis reveals that its underlying abhorrence of unreviewable executive detention and willingness to assert judicial authority to prevent such detention drove the final outcome in the case.²³

20. *See generally* Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 COLUM. L. REV. 272, 298-318 (2004) (discussing overlapping Article I, 8 powers and limitations).

21. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 41-51 (D.D.C. 2004).

22. *Id.* at 57—65.

23. This article's use of the term "judicial mindset" should not be taken as an assertion that a court's decision-making is impermissibly ends-oriented or political; rather, it is a claim that in the presence of clashing legal principles in areas of the law that are fraught with complexity, a court will often simplify the analysis, and thus render it manageable, by conceptualizing the problem through the lens of a particular principle that it views as foundational. As the legal realists have long recognized, principles are subject to being interpreted broadly or narrowly, language subject to characterization as dicta or holding, depending on which interpretation or characterization suits the purposes of the opinion writer. The malleability of precedent is revealed with particular clarity in two recent D.C. Circuit decisions attempting to apply the Supreme Court's 1948 decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948)—a model of neither clarity nor

Underneath the formal doctrinal analysis, the *Abu Ali* court conceptualized the case before it in relatively stark terms: whether the textual allocation of the foreign affairs power to the political branches, and in particular the Executive, rendered unreviewable the Executive's violation of a citizen's due process rights by means of a foreign power.²⁴ Once the court framed the choice as one between the Executive's foreign affairs powers and an individual's due process rights, the decision to assert jurisdiction became obvious. Permeating the court's opinion is a sense that, whatever the arguments may be for granting extreme deference to the Executive's foreign policy determinations, they cannot justify the judiciary turning away from an individual who asserts that the Executive has egregiously violated his due process rights.

In framing the case in that way, the *Abu Ali* court chose to ignore a set of powerful opposing considerations that render the assertion of jurisdiction more questionable. Most saliently, the court devoted little attention to the actual possibility that it could provide Abu Ali with a viable, final remedy should the merits turn out in his favor. Indeed, the court's analyses of the separation of powers objections to the assertion of jurisdiction focused almost exclusively on the impediments to any judicial *inquiry* into the circumstances surrounding Abu Ali's detention. The court focused no attention on the separation of powers or judicial capacity obstacles to providing Abu Ali with an effective judicial *remedy*.

This seeming lack of concern with potential remedial obstacles hints at the *Abu Ali* court's underlying vision of the role occupied by the federal judiciary within the constitutional scheme. The *Abu Ali* court was prepared to expound on constitutional questions and engage in intrusive discovery even though there was no effective remediation available. This approach is consistent with the special functions model, which conceptualizes the judiciary—especially the Supreme Court—as an essential safeguard against overreaching by the

comprehensiveness—to the question of whether a United States district court had jurisdiction to hear a petition for habeas corpus brought by an American citizen held in Iraq by the American military operating under the authority of a multinational force. *See Omar*, 479 F.3d at 1; *Munaf*, 482 F.3d at 582; *see also infra* notes 47-59.

24. *See Abu Ali*, 350 F. Supp. 2d at 40 (“[T]he United States is in effect arguing for nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him. . . . This Court simply cannot agree that under our constitutional system of government the executive retains such power free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated.”). By contrast, in evaluating whether it had jurisdiction over a habeas petition brought by an American citizen in the custody of the multinational force in Iraq, the *Mohammed* court adopted the mindset that habeas jurisdiction turns on the identity of the tribunal (i.e., whether of the United States or not), and interpreted potentially problematic precedents through that lens. *Mohammed*, 2006 U.S. Dist. LEXIS 75717.

coordinate branches. Such an approach has much to recommend it in terms of bringing Executive misdeeds to light, but also risks judicial overreach and adventurism. The private rights model, by contrast, counsels that, in the absence of the possibility of effective judicial relief, jurisdiction should not lie, even if it will mean that an individual will be denied judicial review of the wrongs he has suffered. As I will conclude in this article, the decision of a court to adhere to either a special functions approach or a private rights approach, and thus the willingness to refuse to assert jurisdiction when individual rights are at stake, should depend in large part on whether effective mechanisms besides habeas are in place to prevent unconstitutional Executive action.

I. ABU ALI'S JURISDICTIONAL ANALYSIS IN LIGHT OF THE RASUL, HAMDI,
AND PADILLA DECISIONS

A. *The Abu Ali Court's Assessment of the Habeas Statute's "In Custody" and "Immediate Custodian" Requirements*

The threshold analysis for the *Abu Ali* court was the determination as to whether the habeas statute by its own terms authorized federal court jurisdiction over a petition brought by a United States citizen detained by a foreign state, allegedly at the behest of the United States government. The *Abu Ali* court approached this question with a mindset focused on the importance of ensuring, through the mechanism of the habeas remedy, the availability of federal judicial oversight over Executive detentions.²⁵ The *Abu Ali* court addressed two main jurisdictional arguments, both rooted in the language of the habeas statute. First, the court observed that courts have interpreted the language of the statute as requiring habeas petitioners to direct their petitions (i) at their immediate custodian²⁶ and (ii) to courts with jurisdiction over

25. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 39 (D.D.C. 2004) ("There is no principle more sacred to the jurisprudence of our country or more essential to the liberty of its citizens than the right to be free from arbitrary and indefinite detention at the whim of the executive. . . . [The right to be free from arbitrary executive detention] draws its force from and would be meaningless without the ability of the citizen to challenge his detention through a petition for a writ of habeas corpus."). This mindset is common to courts adjudicating in this fraught area. *See, e.g., Omar*, 416 F. Supp. 2d at 28 ("The court's obligations . . . requires [sic] inquiry into the legality of American officials holding American citizens."). Notably, this same mindset in favor of ensuring the reviewability of executive action also suffused the *Abu Ali* court's subsequent analysis of potential external bars to the exercise of habeas jurisdiction. *See infra* Part II.A.

26. 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."); *see Wales v. Whitney*, 114 U.S. 564, 574 (1885) ("[T]hese provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.") (emphasis

custodians in the district of confinement.²⁷ *Rumsfeld v. Padilla* reaffirmed both general principles with respect to “core” habeas challenges to present physical confinement.²⁸

However, as the *Abu Ali* court observed that, according to *Padilla*, the Supreme Court has “long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court.”²⁹ *Padilla* cited two cases challenging the overseas detention of citizens in which the District Court for the District of Columbia had asserted jurisdiction over superior officials located in the United States.³⁰ The *Abu Ali* court summed up the status of the law with respect to the possibility of an exception to the territorial requirement for citizens held overseas:

[T]his Court cannot disregard a rule of law that the Supreme Court described as “recognized” in one recent decision (*Padilla*); that was at the heart of both the reasoning and the outcome in another recent decision (*Rasul*); that it discussed in some detail in an earlier decision (*Braden*); and that was necessary to the holding of one decision involving an American citizen detained overseas (*Ex rel. Toth*, where the Court affirmed the district court’s issuance of the writ), and to the analysis of another (*Burns*, where the Court declined to issue the writ, but nevertheless addressed its jurisdiction over, and then the merits of, the petitioner’s claim).³¹

added); see also *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-495 (1973) (“The writ of habeas corpus” acts upon “the person who holds [the detainee] in what is alleged to be unlawful custody” (citing *Wales*, 114 U.S. at 574)).

27. 28 U.S.C. § 2241(a) (limiting district courts to granting habeas relief “within their respective jurisdictions”); see *Carbo v. United States*, 364 U.S. 611, 618 (1961) (stating that the writ is only issuable “within the district of confinement”).

28. *Rumsfeld v. Padilla*, 542 U.S. 426, 433 (2004) (“[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.”); *id.* at 437 (“The plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement.”).

29. *Padilla*, 542 U.S. at 433 n.9; see also *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 498 (1973) (noting exception to territorial provisions of habeas statute where “American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus”).

30. See *Padilla*, 542 U.S. at 433 n.9. In *Burns v. Wilson*, the Court without discussion asserted jurisdiction over the Secretary of Defense when two servicemen convicted for crimes committed in Guam and detained overseas sought a writ of habeas corpus. 346 U.S. 137 (1953). Similarly, in *United States ex rel. Toth v. Quarles*, the Court asserted jurisdiction over (and granted habeas relief on the merits against) the Secretary of the Air Force in the case of an ex-servicemen arrested in the United States and taken to Korea for military trial. 350 U.S. 11 (1955).

31. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d. 28, 44-45 (D.D.C. 2004).

Thus armed with the premise that the exception for extraterritorial detention by the military was firmly entrenched, the *Abu Ali* court concluded that there was no “broad rule precluding federal court jurisdiction over the habeas petition of a citizen held overseas.”³²

The *Abu Ali* court also addressed the “in custody” requirement of the habeas statute.³³ Under 28 U.S.C. § 2241, a petitioner must be “in custody in violation of the Constitution or laws or treaties of the United States.”³⁴ The *Abu Ali* court’s mindset in interpreting this provision clearly was favorable to expanding the jurisdictional reach of the statute.³⁵ The court certainly rooted its analysis in the statutory language, indicating that while “there must be some involvement of United States officials . . . any attempt to read a requirement that the individual be in the actual physical custody of the United States does not find footing in the text of the statute itself.”³⁶ However, the court also resorted to general principles, averring that “[w]hen determining whether a petition falls within the ‘in custody’ language of the habeas statute, courts must avoid ‘legalistic’ and ‘formalistic’ distinctions and honor the ‘breadth and flexibility of the Great Writ.’”³⁷ Buttressing this approach, the court observed that “courts have universally held that actual physical custody of an individual by the respondent is unnecessary for habeas jurisdiction to exist. . . . Courts instead have read the language of the statute to provide for jurisdiction where the official possesses either actual or ‘constructive’ custody of the petitioner.”³⁸ The court went on to discuss decisions in which habeas jurisdiction was found when “the executive or some other government official was working through the intermediary of a State (*Braden*), a private individual (*Jung Ah Lung*) or a private corporation.” Noting that the statute itself fails to carve out “an exception where the physical custodian is a foreign body,” the court concluded there is no “basis in the habeas statute for denying jurisdiction merely because the executive is allegedly working through a foreign ally.”³⁹

32. *Id.*

33. See 28 U.S.C. § 2241(c) (asserting in relevant part that district courts may only issue a writ of habeas corpus to an individual if he “is in custody,” either “under or by color of the authority of the United States” or “in violation of the Constitution or laws or treaties of the United States”).

34. *Id.*

35. *Abu Ali*, 350 F. Supp. 2d at 47.

36. *Id.*

37. *Id.* at 46.

38. *Id.* at 47.

39. *Id.* at 49.

B. *The Abu Ali Court's Mindset of Preventing Unreviewable Executive Detentions Colors Its Analysis of Keefe and Hirota*

The *Abu Ali* court's analysis of the habeas statute was largely sound, but glossed over the doctrinal complexity and confusion underlying seemingly contradictory reasoning in *Rasul* and *Padilla*. The *Abu Ali* court's narrative of the habeas cases as suggesting a clear trend towards an expanding jurisdictional reach of the habeas statutes demonstrated its overriding concern with protecting individual rights, a concern that comports with one of the crucial background norms of American law: there shall be no unreviewable Executive detentions.⁴⁰ The narrative of a continually expanding ambit for statutory habeas jurisdiction was also *necessary* to the court's extension of that jurisdiction beyond its hitherto recognized limits to encompass the novel predicament of a United States citizen detained by a foreign country, allegedly at the behest of the United States government.⁴¹

The *Abu Ali* court's treatment of *Keefe v. Dulles*⁴² and *Hirota v. MacArthur*⁴³ demonstrates how the court's driving mindset of preventing unreviewable Executive detentions colored its analysis. In *Keefe*, the wife of a United States army private convicted by a French court and imprisoned for assaulting a cab driver brought a habeas petition against a number of United States officials, alleging that "those officials had conspired to deprive her husband of his liberty."⁴⁴ Based on the petitioner's factual assertion that a French court ordered her husband's imprisonment, the D.C. Circuit found that her actual allegation was that the named officials were "indirectly causing her husband's present incarceration by not *preventing* the French from taking, trying, convicting and confining him."⁴⁵ Since the complaint "alleges he is detained by French civil authorities," the court concluded that it lacked statutory habeas jurisdiction because "there is no one within the jurisdiction of

40. See *Rasul*, 542 U.S. 466, 472-73 (2004) (emphasizing deep roots of habeas in English common law and availability of habeas review in a "wide variety of cases involving Executive detention"); *Ex parte Yerger*, 75 U.S. 85, 95 (1869) ("The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom"); see also Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT. SEC. L. & POL'Y 73, 86 (positing that permitting "unreviewable executive detentions 'would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.'" (quoting *U.S. v. Nixon*, 418 U.S. 683, 707 (1974))).

41. *Abu Ali v. Ashcroft*, memorandum opinion 1, 11 (D.D.C. 2004) ("Petitioners' agency formulation of habeas jurisdiction would expand the notion of custody well beyond its traditional meaning, across national borders and up a chain of attribution to the Attorney General of the United States.").

42. *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954).

43. *Hirota v. MacArthur*, 338 U.S. 197 (1948).

44. *Keefe*, 222 F.2d at 391.

45. *Id.*

the court who is responsible for his detention and who would be an appropriate respondent.”⁴⁶

Keefe counsels that habeas petitions seeking orders directing specific diplomatic communications by government officials cannot succeed; a principle that would seem to control the *Abu Ali* situation. Nonetheless, the *Abu Ali* court distinguished *Keefe* on three basic grounds: (i) the *Keefe* court interpreted the petition as alleging a failure on the part of United States officials to properly seek Keefe’s release, while Abu Ali alleged that United States officials were responsible for his detention; (ii) unlike Abu Ali, Keefe had his day in (a French) court; and (iii) *Keefe* was decided at a time when the Supreme Court was interpreting the habeas statute much more formalistically. Of these distinctions, only the third—the observed movement away from strict formalism in the Supreme Court’s approach to the habeas statute—bears strongly on the import of *Keefe*’s holding. The other two grounds for distinguishing the case are indeed (potentially) relevant differences; however, they do not speak to the core conclusion of *Keefe*: habeas is not the appropriate vehicle for a petitioner seeking a remedy consisting of a court order commanding the Executive to direct specific communications to a foreign government.

In *Hirota v. MacArthur*, the Supreme Court declined to grant leave to file habeas petitions to two Japanese citizens held in custody by a General of the United States Army under orders of the Supreme Commander for the Allied Powers, General Douglas MacArthur, pursuant to a judgment of the International Military Tribunal for the Far East.⁴⁷ The *Abu Ali* court dismissed the import of *Hirota* on the ground that the case only applied to non-citizen petitioners. However, a straightforward reading of *Hirota* seems to preclude the taking of habeas jurisdiction over cases in which the person petitioning for the writ, whether citizen or not, is held under the authority of a foreign entity.⁴⁸

Hirota should perhaps be entitled to little weight.⁴⁹ First, the case was decided at a time when notions of territoriality, rather than citizenship, were

46. *Id.* at 391-92 (“It was therefore necessary to dismiss the petition insofar as it sought a writ of habeas corpus, as a court will not issue that writ unless the person who has custody of the petitioner is within reach of its process.”).

47. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948).

48. *Id.* at 198 (“stating tersely that [w]e are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States,” because it was an “agent of the Allied Powers”); *but see Omar*, 479 F.3d at 8 (limiting *Hirota* to circumstances where habeas petitioner has been charged with crime by non-U.S. entity or convicted by non-U.S. tribunal); *Munaf*, 482 F.3d at 583 (acknowledging *Omar* as controlling authority).

49. *See Munaf*, 482 F.3d at 584 (“We do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens.”); *Omar*, 479 F.3d at 7 (observing that *Hirota* “articulates no general legal principle at all” and the Supreme Court “has never cited *Hirota* for any substantive proposition”).

much more dispositive of whether courts would imply rights abroad. Consequently, the *Hirota* Court may not have discerned a need to focus on the citizenship of the petitioners, rather than the foreign status of the sentencing tribunal).⁵⁰ Nevertheless, it was the fact that the sovereignty of the United States did not extend to the tribunal, not the fact that the petitioners were located on foreign soil that seemed to drive the *Hirota* majority. Even if the import of the territoriality principle has since eroded, the Court's holding regarding the relevance of the sovereignty of the authority detaining the habeas petitioner still may be relevant.⁵¹

Second, the *Hirota* majority opinion was conclusive and offered sparse legal analysis. Importantly, the majority never distinguished between two distinct questions: (i) whether the Supreme Court itself had either original or appellate jurisdiction over the habeas petition and (ii) whether any U.S. court could exercise jurisdiction over the petition. Justice Douglas's concurring opinion analyzed these issues in more depth, and concluded that while the Supreme Court itself may lack jurisdiction over the case, the appropriate remedy was to remit the parties to the District Court for the District of Columbia, which he determined did have jurisdiction.⁵² Since the Court went

50. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) ("The Insular Cases"). The Insular cases held that certain constitutional rights did not extend to certain "unincorporated" territories recently acquired by the United States. See *Downes*, 182 U.S. at 270 ("The U.S. Constitution does not apply to foreign countries or to trials therein conducted."). *Reid v. Covert*, in holding that the constitution applies to the trial of a United States citizen by U.S. military authorities in a foreign country for (capital) offenses committed there, shifted the focus of the constitutional inquiry to citizenship status. See *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("When the government reaches out to punish a citizen who is abroad, the shield, which the Bill of Rights and other parts of the Constitution provide, to protect his life and liberty should not be stripped away just because he happens to be in another land."); see also *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection."). Nevertheless, as suggested by *United States v. Verdugo-Urquidez*, territoriality as a determinant of the constitutional protections enjoyed by non-citizens remains relevant today. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.").

51. See *Omar*, 479 F.3d at 7 (acknowledging circuit precedent holding that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal"); see also *Munaf*, 482 F.3d at 584.

52. *Hirota*, 338 U.S. at 200 ("I think it is plain that a District Court of the United States does have jurisdiction to entertain petitions for habeas corpus to examine into the cause of the restraint of liberty of the petitioners.").

directly to the merits, however, Justice Douglas followed suit and objected to the principle seemingly established by the majority that jurisdiction was barred by the mere fact that the committing tribunal was international.⁵³ In Justice Douglas's view, the better course would have been to "ascertain whether, so far as American participation is concerned, there was authority to try the defendants for the precise crimes with which they are charged."⁵⁴ Ultimately, Justice Douglas apparently agreed that no United States court had jurisdiction over the habeas petition on the grounds that "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."⁵⁵ Nevertheless, despite his final acquiescence, Justice Douglas expressed concern at the breadth of the majority's decision and particularly the apparent applicability of the principles therein established to the case of an American citizen.⁵⁶ For Justice Douglas, the jurisdictional hook for the Court's inquiry should have been the involvement of a United States official in the tribunal; it was a particularly strong hook on the facts of *Hirota*, because General MacArthur presumably had the authority to obtain Hirota's release if ordered to do so by a superior officer.⁵⁷

As demonstrated by the recent efforts of the D.C. Circuit to grapple with its significance,⁵⁸ *Hirota* is a more problematic precedent than the *Abu Ali* court acknowledged. Nowhere does *Hirota* distinguish the situation of an alien from that of a citizen, and indeed the focus of the opinion was on the foreign nature of the tribunal, despite the fact that the United States exercised control over the petitioner through General MacArthur.⁵⁹ If anything, the fact that the United States controlled the petitioner in *Hirota* meant that the circumstances of that case were more amenable to the assertion of jurisdiction by a United States court than the circumstances of *Abu Ali*, in which the foreign entity holding the petitioner was a sovereign country subject to no official United States control. Justice Douglas's *Hirota* concurrence is certainly more favorable precedent for the position adopted in *Abu Ali*. Justice Douglas indeed strongly intimated that he would have supported review if the petitioner

53. *Hirota v. MacArthur*, 338 U.S. 197, 205 (1948) ("[W]e sacrifice principle when we stop our inquiry once we ascertain that the tribunal is international.").

54. *Id.* at 205.

55. *Id.* at 215.

56. *See id.* at 205 ("I cannot believe that we would adhere to that formula if these petitioners were American citizens.").

57. *See id.* at 207 ("It is [MacArthur] who has custody of petitioners.").

58. *See Omar*, 479 F.3d at 1; *Munaf*, 482 F.3d 582.

59. *See Munaf*, 482 F.3d at 584 ("*Hirota* did not suggest any distinction between citizens and non-citizens . . ."); *but see Omar*, 479 F.3d at 6 (interpreting *Hirota* as confronting issue of "the availability of habeas to non-citizens convicted abroad by multinational tribunals").

had been a United States citizen. Nevertheless, as previously noted, General MacArthur's official position as Hirota's custodian also rendered *Hirota* a much stronger case for a determination that there was habeas jurisdiction, since, even if United States officials directing the Saudis to hold Abu Ali, these officials would have had no de jure official authority to direct his continued detention.

C. *Implications of Rasul and Padilla for Interpretation of the Habeas Statute*

The manner in which *Abu Ali* distinguished *Keefe* and *Hirota* demonstrated the extent to which it was driven by the mindset of ensuring the triumph of the principle of judicial review in cases of Executive detention—a principle that, as noted above, it deemed strongly supported by what it perceived as the clear narrative of progressively expanding habeas jurisdiction. To the extent that this mindset drove the court's expansive reading of the habeas statute, it problematically trumped the significance of the primary background norm underlying the seemingly rigid formalism that is still evident in the body of law governing jurisdiction under the habeas statute—the importance of Executive discretion to conduct foreign policy, especially during times of war.⁶⁰ *Abu Ali* purported to address this important consideration in the second half of the opinion dealing with external constraints on habeas jurisdiction emanating from the act of state doctrine, separation of powers, and political question doctrine. However, formalism in interpreting text is itself an inherently conservative doctrine, and the abandonment of formalism means an abandonment of important baseline concerns that conservatism helps advance. By adopting an ends-oriented approach and unmooring interpretation of the

60. See THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1982) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."); see also John Yoo, 79 NOTRE DAME L. REV. 1183, 1199 (2004) ("The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and make command decisions affecting operations in the field with a speed and energy that is far superior to any other branch."). The classic statement with respect to habeas jurisdiction is in *Johnson v. Eisentrager*:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. . . . The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

339 U.S. 763, 778-779 (U.S. 1950).

habeas statute from its formalistic roots, the *Abu Ali* court generally undervalued the importance of those considerations of Executive autonomy that have historically shaped and limited the expansion of statutory habeas jurisdiction.

A comparison of the *Rasul* and *Padilla* opinions helps to flesh out the core conflict between ends-oriented and formalistic interpretations of the habeas statute. The *Rasul* majority openly was ends-oriented in its approach, tailoring its reading of the formal statutory rules governing habeas jurisdiction in light of an overarching concern with the background principle of ensuring judicial oversight over Executive detentions. The ends-oriented approach of the opinion is best demonstrated by the majority's willingness to play relatively fast and loose with *Eisentrager*, interpreting its (implicit) statutory holding as cursory and undeserving of stare decisis effect,⁶¹ and focusing almost entirely on its constitutional holding that enemy aliens do not have a constitutional right to bring a habeas petition in United States courts.⁶² Having dispensed with *Eisentrager*'s statutory implications, the majority was able to read *Braden v. 30th Judicial Circuit Court* as establishing a broad exception to the territoriality requirement when the petitioner is not within the territorial jurisdiction of the district court and the custodian can be reached by service of process.⁶³ Since the habeas statute does not on its face distinguish between citizens and aliens,⁶⁴ and the government conceded that a district court would have jurisdiction over a habeas petition brought by a United States citizen detained in Guantanamo⁶⁵ (thus eviscerating the government's own argument that statutes should not be read to apply extra-territorially),⁶⁶ the majority was

61. *See Rasul v. Bush*, 542 U.S. 466, 474 (2004) ("The Court had far less to say on the question of the petitioners' statutory entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: 'Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.'").

62. *See id.* at 474 (observing that in its review of the decision of the court of appeals, the Supreme Court in *Eisentrager* "proceeded from the premise that 'nothing in our statutes' conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to 'fundamentals' on its own terms").

63. *See id.* at 475 ("*Braden* thus established that *Ahrens* can no longer be viewed as establishing 'an inflexible jurisdictional rule,' and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.>").

64. *See id.* at 476 ("there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship").

65. *See id.* at 476 ("Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base.") (citing Transcript of Oral Arguments at 27).

66. As discussed in the majority opinion, during oral argument, the government observed that *Eisentrager* had much high-flown language about citizenship suggesting that the court's analysis as applied to a citizen would likely reach a different result. *See* Transcript of Oral Argument 28, *Rasul*, 542 U.S. 466; *see also Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)

free to conclude that the habeas statute conferred jurisdiction over the Guantanamo detainees.⁶⁷

Furthermore, the majority's willingness to highlight every possible distinction between the *Eisentrager* and *Rasul* petitioners, despite resting its holding on a relatively straightforward statutory interpretation and dismissing *Eisentrager's* constitutional holding, further demonstrated the extent to which the majority was willing to eschew strict doctrine in favor of an ends-oriented approach.⁶⁸ In the initial stages of the opinion, the majority seemed almost to be explaining why these petitioners deserved habeas review, while the petitioners in *Eisentrager* did not, despite the fact that *Rasul's* formal holding seemingly would have accorded no relevance to the *Eisentrager* factors.⁶⁹

Justice Scalia's dissent took forceful issue both with the majority's interpretation of *Eisentrager*, observing that *Eisentrager* clearly rested on a determination that Section 2241 conferred no jurisdiction over the petitioners, and its broad reading of *Braden*.⁷⁰ More generally, Justice Scalia pointedly criticized the majority's abandonment of doctrine and adoption of an ends-oriented analysis.⁷¹

("It is neither sentimentality nor chauvinism to repeat that 'Citizenship is a high privilege.'"). Despite the *Eisentrager* Court's implication that this is an obvious proposition as a matter of pure statutory interpretation, see *Eisentrager*, 339 U.S. at 770 (observing in discussion of 8 U. S. C. § 903 that "[b]ecause the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad."), 28 U.S.C. § 2254 does not admit to such an easy distinction between citizens and aliens as a matter of straightforward statutory interpretation; nevertheless, federal court jurisdiction over a citizen is perhaps constitutionally-compelled. See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

67. *Rasul*, 545 U.S. at 478 ("We therefore hold that § 2241 confers on the district court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

68. See *id.* at 473 (discussing ways in which *Rasul* petitioners differ from the *Eisentrager* detainees).

69. Justice Kennedy's constitutionally-grounded concurring opinion, by contrast, rests squarely on these distinctions between the *Rasul* and *Eisentrager* petitioners. *Rasul*, 542 U.S. at 4481 (Kennedy, J., concurring) ("In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the (constitutional?) reasoning of *Eisentrager*." (parentheses added)).

70. See *id.* at 484-85 (Scalia, J., dissenting) ("[O]utside that class of cases [in which petitioner is in custody in multiple jurisdictions] *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*).").

71. See *id.* at 486 (Scalia, J., dissenting) ("[T]he possibility of one a textual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.").

By contrast with *Rasul*'s focus on the end of ensuring the reviewability of Executive detentions, the majority opinion in *Padilla* was of a much more formalist bent, refusing to continue in the context of Padilla's detention and subsequent removal to South Carolina, the trend established by *Braden*,⁷² *Strait*,⁷³ *Endo*,⁷⁴ *Toth*,⁷⁵ and *Burns*⁷⁶ of gradually eroding the applicability of the "immediate custodian" rule.⁷⁷ The dissent criticized this formalism. It stressed that the "the Court is forced to acknowledge the numerous exceptions we have made to the immediate custodian rule," and that in light of the "far from bright" nature of that rule, the Court should recognize another exception since Padilla's detention was "singular [in creating] . . . a unique and unprecedented threat to the freedom of every American citizen."⁷⁸

The oscillation between *Rasul*'s ends-orientation and *Padilla*'s formalism suggests that the Court is still unsettled with respect to how broadly to expand current categories to permit habeas petitioners alleging novel factual situations to come under the jurisdiction of federal courts. In light of this uncertainty, the *Abu Ali* court was perhaps too quick to conclude that, in light of existing case law and statutory construction, the mere fact that Abu Ali was held in foreign custody did not preclude habeas as the appropriate remedy.

It is nevertheless worth observing that one final factor supporting the *Abu Ali* court's approach is that, at least when a citizen is detained, constitutional considerations apply, albeit with unclear scope, to buttress the reading of the habeas statute as establishing jurisdiction. The opaque case law suggests that there is some constitutional right to habeas review that Congress cannot withdraw via a jurisdictional statute.⁷⁹ The *Abu Ali* opinion noted that "*Eisentrager* and *Rasul* counsel at the very least that the habeas statute should be interpreted expansively to avoid the constitutional question whether a citizen of the United States would be deprived of his constitutional rights if he were denied any opportunity whatsoever to challenge the legality of a

72. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

73. *Strait v. Laird*, 406 U.S. 341 (1972).

74. *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

75. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

76. *Burns v. Wilson*, 346 U.S. 137 (1953).

77. *Rumsfeld v. Padilla*, 542 U.S. 426, 441-442 (2004) ("While Padilla's detention is undeniably unique in many respects, it is at bottom a simple challenge to physical custody imposed by the Executive—the traditional core of the Great Writ . . . His detention is thus not unique in any way that would provide arguable basis for a departure from the immediate custodian rule.").

78. *Id.*

79. *See INS v. St. Cyr*, 533 U.S. 289, 298-301 (2001) (construing statute at issue narrowly to avoid potential constitutional issues posed by "answer[ing] the difficult question of what the Suspension Clause protects"); *see also Felker v. Turpin*, 518 U.S. 651 (construing jurisdiction stripping statute narrowly to avoid constitutional issues; *Ex parte Yenger*, 75 U.S. 85 (1869) (same)).

detention alleged to be at the behest of the executive.”⁸⁰ *Eisentrager* itself addressed the constitutional problem, stating that “[w]ith the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens.”⁸¹ In *Rasul*, Justice Scalia’s dissent picked up on this dicta from *Eisentrager*, acknowledging that “[t]he constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.”⁸²

II. EXTERNAL BARS TO HABEAS JURISDICTION

A. *Discussion of the Abu Ali Court’s Treatment of Act of State, Separation of Powers, and Political Question Doctrine Impediments to the Exercise of Habeas Jurisdiction*

1. Act of state

With the habeas statute interpreted as conferring jurisdiction, the *Abu Ali* court nonetheless had to confront three intertwined, yet analytically distinct, external bars to the assertion of jurisdiction: the act of state doctrine, the separation of powers, and the political question doctrine. While these analyses follow three distinct pathways in the case law, they are all ultimately rooted in conceptions of the separation of powers and the contours of the judiciary’s proper relationship with the Executive in the foreign affairs realm. Again, the court’s mindset of preventing unreviewable Executive detention ultimately predetermined the outcome of these analyses.

The *Abu Ali* court rejected the government’s act of state objections to the assertion of jurisdiction over *Abu Ali*’s petition, relying largely on the narrowing of the doctrine’s reach signaled by *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int’l.*⁸³ In *W.S. Kirkpatrick*, the Supreme Court rejected application of the act of state doctrine to the actions of an American contractor sued in tort by its competitor for allegedly offering bribes to Nigerian government officials.⁸⁴ Based on *W.S. Kirkpatrick*, the *Abu Ali* court concluded that the act of state doctrine can bar judicial inquiry only when the “validity” or “legality” of the foreign act is in question, and therefore

80. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 54 (2004).

81. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

82. *Rasul v. Bush*, 542 U.S. 466, 486 (2004).

83. 493 U.S. 400 (1990).

84. *Id.*

dismissed the government's argument that the inquiry and relief requested by *Abu Ali* would "embarrass" the Saudis.⁸⁵

While the *Abu Ali* court's act of state doctrine analysis constituted a defensible, mechanical application of *W.S. Kirkpatrick*, it is nonetheless problematic. Specifically, the *Abu Ali* court equated the question of whether the United States "obtain[ed]" *Abu Ali*'s detention with the much simpler question of whether it *demand*ed his detention, thus permitting it to analogize the inquiry in *Abu Ali* to that in *W.S. Kirkpatrick* of whether the Nigerian officials "demand*ed* and accepted a bribe."⁸⁶ But the inquiries are in fact very different: resolution of the *W.S. Kirkpatrick* issue required determination of a straightforward factual issue, whether the bribe was demanded and accepted; whereas, resolution of the *Abu Ali* issue would require determination of whether a sovereign government possessed *any* independent motivation for the decision to detain an individual. Demonstrating a negative answer, that the Saudis had no independent motivation is inherently problematic because a finding that American officials played a major role in prodding the Saudis to detain *Abu Ali* would presumably not be dispositive in the absence of an additional finding that the Saudis had no other legitimate reason to detain him. The Saudis likely had multiple motives for detaining *Abu Ali*, *inter alia*, their own suspicions regarding his possible involvement in Saudi criminal activity related to the 2003 Riyadh bombings and the desire to placate a powerful patron state.⁸⁷

Adjudication of *Abu Ali*'s habeas petition and an ultimate decision on the merits in his favor would have to eviscerate completely the possibility of any independent Saudi motive for *Abu Ali*'s detention; such a determination would verge on one regarding the "validity" of the actions of a sovereign government, thus bringing it within the ambit of core act of state concerns.⁸⁸ Thus, the *Abu*

85. See *Abu Ali*, 350 F. Supp. 2d at 59 ("The 'validity' or 'legality' of the Saudi detention is not at issue; rather, the issue is whether the United States ran afoul of its constitutional obligations to *Abu Ali* in 'obtaining' the detention from the Saudis."); see also *W.S. Kirkpatrick*, 493 U.S. at 407-408. The court notes further that invocation of the act of state doctrine is particularly suspect when employed by the United States to shield itself from inquiry into "its own allegedly unconstitutional acts against one of its citizens." See *Abu Ali*, 350 F. Supp. 2d at 60 ("Whatever limited bearing the act of state doctrine has on this case in light of the above analysis is only diminished further by the fact that the doctrine is being invoked here by the United States in an attempt to shield itself from judicial inquiry for its own allegedly unconstitutional acts against one of its citizens.").

86. *Abu Ali*, 350 F. Supp. 2d 59-60 (quoting *W.S. Kirkpatrick*, 493 U.S. at 408).

87. See Caryle Murphy & John Mintz, *Virginia Man's Months in Saudi Prison Go Unexplained*, WASH. POST, Nov. 22, 2003, at A01.

88. Thus perhaps rendering the inquiry here analogous to that in *Underhill v. Hernandez*, where the Supreme Court held the act of state doctrine barred inquiry into the actions of the Venezuelan revolutionary government, which refused to allow an America contractor to leave the city of Bolivar. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is

Ali court's analysis surely downplayed the extent to which further judicial proceedings would require a highly intrusive inquiry into official Saudi policy and the motivations of Saudi officials. Tellingly, the *Abu Ali* court recognized that the resolution of *Abu Ali*'s petition in his favor *would* likely raise act of state concerns, but it deemed such concerns sufficiently distant to be ignored at the motion to dismiss stage.⁸⁹

2. Political question and separation of powers

The *Abu Ali* court's determination that neither the political question doctrine nor the separation of powers barred the assertion of jurisdiction over *Abu Ali*'s habeas petition followed two main lines of argument. First, while the court observed generally that Executive decision-making in the foreign affairs arena enjoys wide insulation from judicial review, it distinguished between suits challenging the Executive's exercise of foreign affairs powers and those alleging that the Executive violated the constitutional rights of a citizen in the making of a foreign affairs decision.⁹⁰ The *Abu Ali* court also asserted broadly that neither separation of powers considerations nor the political question doctrine could bar judicial review of allegations that Executive action in the foreign affairs realm resulted in the violation of a citizen's constitutional rights, particularly the right to freedom from unlawful detention.⁹¹

Second, in its separation of powers discussion, the *Abu Ali* court focused specifically on judicial competence to conduct the type of inquiry necessary to resolve the legality of *Abu Ali*'s detention. As the court noted, the simple fact

bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”).

89. See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d at 59 (D.C. Cir. 2004) (“The closer the case drifts to instructions the United States government - either the judiciary or the executive must provide to the Saudi government about a legal act of the Saudi government (arrest or otherwise), the more that act of state concerns will build.”).

90. See *Abu Ali*, 350 F. Supp. 2d at 61 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“The Supreme Court has instructed that matters ‘vital and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’”)).

91. See *id.* at 61-62 (“There is simply no authority or precedent, however, for respondents’ suggestion that the executive's prerogative over foreign affairs can overwhelm to the point of extinction the basic constitutional rights of citizens of the United States to freedom from unlawful detention by the executive. The competing interests of the executive to manage foreign affairs and the judiciary to protect the due process rights of citizens has never been resolved wholly in the executive's favor.”); *id.* at 64 (“Here, petitioners challenge not the failure of the United States to act on behalf of a citizen in accordance with certain claimed statutory duties, but the United States’ alleged actions against a citizen in violation of certain constitutional duties. In this setting, even these cases hold, the political question doctrine wanes.”).

of foreign participation in allegedly unconstitutional conduct does not, in and of itself, insulate that conduct from judicial review.⁹² The court rested this proposition on the line of cases under the Fourth and Fifth Amendments permitting judicial review of allegations that foreign agents acting at the behest of the United States government unconstitutionally obtained evidence for use in a subsequent criminal trial.⁹³

At this point, it is worthwhile to step back from the individual act of state, separation of powers, and political question doctrine analyses, and consider the extent to which they really constitute the same analysis under different guises. As Professor Tribe has observed, constitutional,⁹⁴ prudential,⁹⁵ and functional⁹⁶ rationales underlie the political question doctrine.⁹⁷ Consequently, considerations of the separation of powers, desirable judicial restraint, and relative institutional capacity motivate its invocation.⁹⁸ More generally, the political question doctrine inquiry, for Professor Tribe, is primarily concerned with “whether particular constitutional provisions yield judicially enforceable rights.”⁹⁹ This definition is useful because it permits focus on the “rights” and the “judicially enforceable” portions of the analysis, both of which are necessary for a court appropriately to assert jurisdiction. In cases, such as *Abu Ali*, that raise the question of the extent courts can review Executive action in the foreign affairs realm when that action clearly impinges on individual rights, the inquiry is simplified in Professor Tribe’s framework to the question of judicial enforceability. And this judicial enforceability analysis is really primarily a species of the separation of powers inquiry, since concerns about the desirability of judicial restraint and judicial competence become substantially less acute when individual rights are involved, thus leaving solely the constitutional, i.e., separation of powers, rationale for invocation of the political question doctrine.¹⁰⁰ In such circumstances, the political question

92. *See id.* at 63-64 (quoting Resp. Order to Show Cause at 19-20 (asserting that inquiries involving the courts “in matters of the most delicate diplomacy” are not unusual for the courts)).

93. *See id.* at 63 (citing to *United States v. Karake*, 281 F. Supp. 2d 302, 308 (D.D.C. 2003)); *see also* *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003).

94. The separation of powers generally, and more specifically, textual commitment to a coordinate branch.

95. The desirability of avoiding unnecessary inter-branch conflict

96. The lack of judicially-manageable standards.

97. *See* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-16, at 366 (2000).

98. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 14 (4th ed. 1983).

99. TRIBE, *supra* note 97, at 366.

100. Considerations of judicial restraint are very relevant, however, when individual rights are not directly threatened, as in situations of inter-branch conflict. The outcome of the separation of powers and political question doctrine inquiries can diverge in cases presenting such conflict, if political question doctrine considerations counsel judicial abstention but separation of powers considerations counsel resolution of the conflict on the merits in favor of one of the coordinate branches. *See, e.g.,* *Goldwater v. Carter*, 444 U.S. 996 (1979) (with plurality opinion refusing to

doctrine becomes the judicial response to cases that pose separation of powers impediments of such import as to compel the conclusion that individual rights are not judicially enforceable because resolution of the matter is textually committed to one of the political branches.¹⁰¹ As for the act of state doctrine, it is really just a manifestation of the political question doctrine in one particular setting.¹⁰² Indeed, the markedly similar approaches adopted by the *Abu Ali* court in its formal consideration of these three doctrines suggests their closely intertwined nature, as well the impact of the *Abu Ali* court's own overarching mindset in approaching them.

B. Evaluation of the Abu Ali Court's Analysis of Separation of Powers Barriers to Jurisdiction

Assessment of the soundness of the *Abu Ali* court's analyses of the separation of powers and political question doctrine impediments to its exercise of jurisdiction is complicated by the vagueness and indeterminacy of Supreme Court case law assessing when foreign affairs issues are too political

adjudicate role of Senate in treaty abrogation process on political question grounds while dissent favors merits determination holding that power to abrogate treaty is within sole control of Executive).

101. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (stressing importance of the Senate's "sole" power to try impeachments in holding that political question doctrine barred judicial resolution of challenge by federal judge to Senate's use of committee to hear testimony and gather evidence in his impeachment trial); *Gilligan v. Morgan*, 413 U.S. 1, 4, 10 (1973) (concluding that political question doctrine barred inquiry into whether there was "a pattern of training, weaponry and orders in the Ohio National Guard which [made] inevitable the unnecessary use of fatal force in suppressing civilian disorders," on basis that "it would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches"); *O'Brien v. Brown*, 409 U.S. 1, 5 (1972) (staying court of appeals' judgment holding that recommendations of Credentials Committee of Democratic National Convention regarding seating of delegates violated constitution, "in light of the availability of the Convention as a forum to review the recommendations of the Credentials Committee . . . the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political process to function free from judicial supervision"); *see also* Erwin Chemerinsky, *Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 858, 866 n.67 (1994) (critiquing *Morgan* because "[b]y deeming the case to be a political question, the Court left a constitutional violation would be left entirely ignored and unremedied," noting that *O'Brien* is a case pertaining to an individual delegate's constitutional right to be seated, and observing that *Nixon*, while ostensibly about structural distribution of governmental power, was also fundamentally about an individual's right to be impeached in conformity with the Constitution).

102. *See* *TRIBE*, *supra* note 97, at 373 n.44 (arguing that Justice Harlan's opinion in *Sabbatino* paralleled Tribe's own political question doctrine approach of asking whether "a federal court could formulate standards of law appropriate for judicial application," and reading *W.S. Kirkpatrick* as merely affirming that the political question doctrine is not free form and impressionistic, but "a narrowly cabined legal principal").

for judicial resolution.¹⁰³ Certainly, a baseline of significant Executive autonomy in this area is well established.¹⁰⁴ The case for Executive autonomy is especially strong with respect to potential judicial intrusions, since on both formal constitutional and policy grounds, Congress has a much stronger claim than the judiciary to authority in the foreign affairs realm.¹⁰⁵ Nevertheless, it is

103. The Supreme Court has only decided two foreign affairs cases on political question grounds since the enumeration of the modern Political Question doctrine in *Baker v. Carr*. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (refusing to adjudicate the question of whether the Executive possessed sole authority to abrogate an extant treaty); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (refusing to adjudicate the comportment of the training of the Ohio National Guard with the Fourteenth Amendment on the grounds that “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essential professional military judgments, subject always to civilian control of the Legislative and Executive branches”). Professor Rachel Barkow attributes the doctrine’s decline to the Supreme Court’s having become “increasingly blind to its limitations as an institution.” Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 268 n.158 (2002). Lower courts, however, have continued to apply the doctrine “with some frequency” in cases involving foreign affairs. *Id.* at 301.

104. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“[P]articipation in the exercise of the [foreign affairs] power is significantly limited. In this vast external realm, with its important, complicated, delicate, and manifold problems, the president alone has the power to speak or listen as a representative of the nation.”); see also *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility . . .”).

105. See *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (“Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary executive.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (“matters vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); *United States v. Pink*, 315 U.S. 203, 222-23 (1942) (reading *United States v. Belmont*, 301 U.S. 324 (1937), as holding that “the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government” and “the propriety of the exercise of that power is not open to judicial inquiry”); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (“[T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative departments—the political departments—of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decisions.”) (internal quotations omitted).

inherent in the American constitutional system that constitutional strictures necessarily dictate the freedom of action of any branch, and the federal judiciary may not engage in a “free form, impressionistic version of abstention.”¹⁰⁶ The role of the federal judiciary is particularly important when the Executive threatens individual rights.¹⁰⁷

In light of these principles, the *Abu Ali* court properly distinguished between its own inquiry and those political question doctrine cases refusing to adjudicate the alleged failure of the Executive to comport with statutory provisions constraining its discretion.¹⁰⁸ The *Abu Ali* court was surely correct in asserting that courts have a responsibility to probe Executive rationales and if necessary intervene to protect individual rights. However, courts may not abdicate the judicial oversight function merely because the Executive asserts that its actions fall within the foreign affairs power.

In its dual focus on the importance of judicial review for foreign affairs issues that touch directly on individual rights and the relative competence of the judiciary to conduct such inquiries, the *Abu Ali* court’s orientation displays strong elements of what Professor Nzelibe has called the “balance of institutional competencies” approach to assertions of unreviewability by the Executive in the area of foreign affairs.¹⁰⁹ In the context of cases alleging that Executive foreign affairs decisions have infringed on individual rights, the

106. TRIBE, *supra* note 97, at 637 (§ 4-3); see *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 (2006) (declining to defer to president’s claim of “military necessity”).

107. See *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (“The Executive’s power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive carte blanche to trample the most fundamental liberty and property rights of this country’s citizenry.”); see also Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 *Yale J. Int’l L.* 310, 313 (2000) (“The constitutionally protected entitlements of citizens, in liberty and property, may sharply limit the domain of presidential foreign affairs powers.”).

108. See *Abu Ali*, 350 F. Supp. 2d at 64 (distinguishing *Smith v. Reagan*, 844 F.2d 195, 197 (4th Cir. 1988), a case brought against the Executive to force him per terms of Hostage Act, 22 U.S.C. § 1732 (1982), to “obtain an accounting from Vietnam of the status of United States veterans of the Vietnam War,” which was dismissed on political question grounds).

109. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 *IOWA L. REV.* 941, 975 (2004) (“[A] balance of institutional competencies model envisions that when faced with a foreign affairs controversy, the courts weigh their institutional advantage in resolving certain kinds of disputes against that of the political branches before deciding on the appropriate amount of deference to accord the political branches’ judgments.”); see also TRIBE, *supra* note 97, at 366 (§ 3-13) (citing Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 566-82 (1966) (describing “functional” approach to political question doctrine as concerned with factors that include “difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government”)).

institutional competencies approach dictates that courts are to (i) take jurisdiction over such cases and (ii) balance the particular foreign policy against the individual rights asserted, with an appropriate level of deference accorded the judgment of the political branches in light of their “comparative institutional competence over foreign affairs issues.”¹¹⁰ Professor Nzelibe observes that in the wake of September 11th, courts have implicitly adopted such an approach of “jurisdiction plus deference.”¹¹¹ As seemingly did the *Abu Ali* court, which in addition to its strong pronouncements regarding the necessity of asserting jurisdiction, also made clear that the Executive would be accorded substantial deference as the inquiry progressed.¹¹²

However, an approach rooted in relative institutional competencies is only appropriate, even when individual rights are involved, if the Constitution does not clearly commit authority to a coordinate branch. Certainly, courts should be very reticent to find such a textual commitment when individual rights are at stake; nevertheless, despite the presumption of reviewability, courts cannot assert jurisdiction over those cases that turn on foreign affairs decisions that are clearly and necessarily within the un-reviewable purview of the Executive.

C. *The Abu Ali Court Does Not Sufficiently Consider Separation of Powers Concerns Related to the Remedy*

The *Abu Ali* court erred in analyzing at too broad a level of generalization the potential obstacles to judicial review posed by Abu Ali’s detention; specifically, the court only addressed (and dismissed) the threshold obstacles to judicial review, and never engaged with the more vexing separation of powers problems posed by the fact of foreign control over Abu Ali. The crucial distinction complicating the analysis is that between the president as foreign policy-maker and *communicator*. Then-congressman John Marshall observed that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations;” this statement implied at a minimum that the President constitutes the sole “instrument of communication with other governments.”¹¹³ As Professor Tribe observed, the sum of the Executive’s enumerated foreign policy powers in Article II, combined with the Take Care Clause, “have come to be regarded as explicit textual manifestations

110. Nzelibe, *supra* note 109, at 1005.

111. *Id.* at 1006.

112. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 63 (2004) (“The deference due the executive in the management of foreign relations will limit any discovery that will occur and will narrow the Court’s inquiry.”).

113. EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, 177-78 (1957); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“In th[e] vast external realm [of foreign affairs] . . . the President alone has the power to speak or listen as a representative of the nation.”).

of the inherent presidential power to administer, if not necessarily to formulate in any autonomous sense, the foreign policy of the United States.”¹¹⁴ More specifically, the Article II, Section 3 power to receive Ambassadors,¹¹⁵ interpreted by most commentators as conferring upon the Executive a recognition power that is effectively immune from congressional regulation,¹¹⁶ *a fortiori* commits to sole Executive discretion the power to merely *communicate* with foreign nations. Thus, one seeming implication of the Executive as sole foreign policy communicator is an absolute rule that courts cannot direct the Executive to direct specific communications at foreign governments.¹¹⁷

Although it considered the extent to which inquiry into Abu Ali’s detention would impinge on the Executive’s role as foreign policy-maker, the *Abu Ali* court failed to address adequately the extent to which any remedy that would follow an on the merits determination in Abu Ali’s favor would intrude on the Executive’s role as foreign policy communicator.¹¹⁸ This constituted an undervaluation of the justiciability impediments posed by the case. As analysis of *Gilligan v. Morgan*,¹¹⁹ one of only two post-*Baker* Supreme Court cases holding the political question to bar adjudication on the merits, reveals courts must be attuned to whether the remedial phase of judicial intervention raises justiciability concerns distinct from those raised by mere judicial inquiry.

The plaintiffs in *Gilligan* alleged that Ohio National Guard troops violated their rights of speech and assembly during the Kent State demonstrations, and that these violations were in part due to the training of, arming of, and orders

114. See *TRIBE*, *supra* note 97, § 4-3, at 638; see also *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (“In our dealings with the outside world, the United States speaks with one voice and acts as one.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803) (“[T]he commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or direction in such matters.”).

115. U.S. CONST. art. II, § 3.

116. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 42-43, 88 (2d ed. 1996).

117. See *Adams v. Vance*, 570 F.2d 950, 955 (D.C. Cir. 1978) (“This country’s interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters”). However, the *Adams* court is reluctant to state the rule in absolute terms, speculating that, “while we do not determine the justiciability of a request for relief of this kind, we think it clear that if such a request is justiciable, the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed.” *Id.*

118. The court’s attitude was that the problem could be addressed as the case took its course. See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.D.C. 2004) (“[B]earing respondents’ concerns founded in the principles of the political question, separation of powers, and act of state doctrines firmly in mind, the Court will carefully construct the future course of this proceeding.”).

119. 413 U.S. 1 (1973).

issued to the National Guard.¹²⁰ Once the case reached the Supreme Court, the plaintiffs did not contest the procedures currently in place, which had been changed in the wake of Kent State, but requested a remedy of “continuing judicial surveillance . . . to assure compliance with [the changed standards].”¹²¹ The *Gilligan* Court, noting that Art. I, § 8, cl. 16 of the Constitution vests responsibility for the “militia” in Congress,¹²² concluded that “[t]he relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.”¹²³ The Court reserved the question of whether inquiry into the National Guard’s training, weaponry, and orders would ever be acceptable.¹²⁴ Revealingly, however, in the Court’s review of potential official immunity barriers to subsequent lawsuits seeking *damages* for the same set of events, it did not mention any separation of powers impediments to such a remedy.¹²⁵

As a case involving an asserted violation of individual rights, *Gilligan* falls within the category of cases impinging on the Executive’s foreign affairs power that should receive the most searching judicial review. It nonetheless demonstrates the point that at least in the military, and by analogy, foreign affairs arena, even if a constitutional provision delegating authority to a specific coordinate branch does not preclude judicial *inquiry* into the manner in which that branch exercises its delegated authority, such a clear delegation may preclude judicial remediation in which a court *directs* the branch to act in a certain manner.¹²⁶

120. *Id.* at 3.

121. *Id.* at 6.

122. The Constitution Art. I, § 8, cl. 16 “vests in Congress the power to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States.” *Id.* (internal quotations omitted).

123. *Id.* at 7.

124. *Id.* at 11-12.

125. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974).

126. The Seventh Circuit adopted a similar rule in *Flynn v. Schultz*, a case in which the relatives of a man imprisoned in Mexico sought to compel pursuant to the Hostage Act, 22 U.S.C.S. § 1732, testimony by a State Department official who had attended a number of meetings between Mexican officials and the imprisoned individual—holding that “[w]ith regard to an order directing the [United States] to request reasons for a [] citizen’s detention abroad or an order directing that a particular act be undertaken as necessary and proper to obtain the release of a United States citizen (here the authorization of testimony), such relief would impermissibly interfere with the Executive’s discretion to conduct foreign affairs and would, consequently, be inconsistent with the political question doctrine.” *Flynn v. Schultz*, 748 F.2d 1186, 1994 (7th Cir. 1986). The *Flynn* court did, however, further hold that “enforcement of a duty of *inquiry* [into the detention] does not interfere with the President’s conduct of foreign relations, nor does . . . review of the extent of the inquiry implicate standards that are beyond judicial management or

While the *Abu Ali* court was not oblivious to the significant remedial impediments imposed by foreign control over Abu Ali, it accorded them little weight except to note that they would of necessity impact the course of further proceedings.¹²⁷ For example, in discussing potential separation of powers objections to the assertion of jurisdiction, the court favorably cited to *Ramirez de Arellano v. Weinberger*, a case in which a United States citizen residing in Honduras sued the United States government for its continuing role in the destruction and ongoing occupation and utilization of his cattle ranch as a military base.¹²⁸ The *Abu Ali* court focused on two aspects of the *Ramirez de Arellano* opinion: the *Ramirez de Arellano* court's reasoning that joint operations with foreign militaries could not "exculpate officials of the United States from liability to United States citizens for the United States officials' unlawful acts," and its focus on the increasing willingness of the judiciary to scrutinize Executive conduct in the realm of foreign affairs when "United States citizens assert constitutional violations by United States officials."¹²⁹

discovery." *Id.* at 1195. Judge Tamm's dissent in *Ramirez de Arellano v. Weinberger*, a case in which the plaintiff, a United States citizen who owned a cattle ranch in Honduras, sought, *inter alia*, injunctive relief preventing the United States Government from using his land as a military training facility for Salvadoran soldiers, also makes the point. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (vacated and remanded because of subsequent legislation, 471 U.S. 1113 (1985)) (Tamm, J., dissenting). As Judge Tamm observes, "[i]mpermissible judicial encroachment upon the power of the political branches can occur not only from the act of resolving a question whose nature is political, but also from the consequences that flow from judicial action. . . . Just as a court must refrain from resolving a question whose nature is political, so must it refrain from adjudicating a claim where the relief sought would intrude on the independence of the political branches." *Id.* In other words, "[t]o focus only on the narrow issue immediately presented for review . . . overlooks the serious intrusion on the conduct of foreign policy that will result from granting the requested relief." *Id.* at 1547-48; see also *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (referring to "the possible consequences of judicial action" as one factor informing the political question doctrine analysis); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 JOHN MARSHALL L. REV. 481, 493 (2004) (asserting that "whether the court has a realistic way to enforce any judgment it would render" is one consideration informing the political question doctrine analysis).

127. See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64 n.36, 65 (2004) ("Act of state and separation of powers considerations may bear strongly on the nature of the relief that petitioners will be able to obtain in this action. . . . [A]lthough this case will proceed in the shadow of the political question doctrine, the right of Abu Ali to challenge his alleged detention at the behest of the executive will not be eliminated altogether by the doctrine."). This willingness to defer consideration of potentially vexing justiciability obstacles is particularly notable given the clear concerns regarding such issues that the same judge intimated in issuing a memorandum opinion denying Abu Ali's request for a preliminary injunction. See *Abu Ali*, Memorandum opinion at 13 (D.D.C. 2004) ("The court declines to tell the Executive what it may and may not 'pressure' its ally to do in this case.").

128. See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 50, 62 (D.C. Cir. 2004).

129. *Id.* at 50, 62.

The *Abu Ali* court then concluded, “[o]f course, the alleged ‘excesses’ are even greater here than they were in *Ramirez de Arellano*.”¹³⁰

Because of its overall mindset, the *Abu Ali* court focused on the overarching principle expounded by *Ramirez de Arellano*: the United States cannot insulate itself from judicial review merely by teaming up with foreign agents or claiming that it is acting in its foreign affairs capacity.¹³¹ In so doing, the *Abu Ali* court downplayed the two crucial differences between its circumstances and those in *Ramirez de Arellano*, even assuming acceptance of the soundness of the *Ramirez de Arellano* majority’s reasoning: (i) According to the allegations in *Ramirez de Arellano*, United States officials were directly responsible for the unconstitutional land occupation; by contrast, according to *Abu Ali*’s allegations, it was the Saudis who were actually holding him, whatever the ultimate control exercised by United States officials; and (ii) the relief prayed for in *Ramirez de Arellano* was injunctive and declaratory relief that, however it might incidentally impinge on United States foreign policy interests, was both clear in nature and in effect and presumably relatively easily administered by the court.¹³² The provision of injunctive relief for the ongoing violations allegedly committed by United States officials in such a situation poses few problems for a court and is within the core judicial competence: The court simply tells the American officials to get off the land and observes if they comply.¹³³ As discussed below, the habeas remedy for a U.S. citizen detained by a foreign power poses much more vexing problems largely unacknowledged by the *Abu Ali* court.¹³⁴

130. *Id.* at 62.

131. Indeed, the Supreme Court’s decision in *Hamdan* forcefully reiterated the proposition that the Executive cannot employ the foreign affairs power without limit. *See Hamdan*, 126 S.Ct. 2749 (2006).

132. The majority asserts that: “The case does not raise the specter of judicial control and management of United States foreign policy.” *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1513 (1984). That the majority felt the need to assert this is instructive, even if the claim itself is dubious. *Id.* As Judge Tamm observed in his dissent, while the plaintiffs aver—and the majority opinion agrees—that they are not challenging United States military operations in Honduras, but rather simply the occupation of the land in question, any relief granted would of necessity “halt[] the operation of a United States military facility in Central America, at least for a time.” *Id.* at 1548 (Tamm, J., dissenting). Judge Tamm concludes that “[i]n this case, the injunctive relief sought would directly limit the Executive’s discretion in conducting military affairs and diplomatic relations in Honduras.” *Id.* at 1549. The lesson may be that courts will constrain to interpret cases implicating individual rights as not calling into question core Executive competencies in the realm of foreign affairs, but such avoidance must have limits.

133. *See Ramirez de Arellano*, 745 F.2d at 1512 (terming the resolution of a land dispute a “paradigmatic issue for resolution by the Judiciary”).

134. *See infra* Part III.A. The *Ramirez de Arellano* case is particularly instructive because its procedural history highlights how subtle remedial differences can determine whether a case is justiciable. After a Supreme Court vacatur and remand, the case reappeared before the D.C. Court of Appeals; in the interim, United States troops and structures had been withdrawn from the

The implications of the inquiry/remedy distinction are further highlighted by the *Abu Ali* court's discussion of those cases in which courts ruling upon motions to exclude evidence under the Fourth and Fifth Amendments have inquired into whether United States officials are exercising control over foreign agents engaging in behaviors that would be unconstitutional if undertaken by United States government officials.¹³⁵ Whatever the similarities between the inquiries in those cases and the inquiry in *Abu Ali*, the remedial ends are different. Violations of the privilege against self-incrimination guaranteed by the Fifth Amendment are remedied by exclusion of the evidence at trial.¹³⁶ Violations of Fourth Amendment protections against unreasonable search and seizure are also remedied by exclusion of the evidence at trial, and may further establish a cause of action for damages against the officers who conducted the unlawful search.¹³⁷ Unlike the case with any prospective habeas relief, the remedies—particularly the exclusion of evidence—in the Fourth and

military base. In dismissing the case on the ground that equitable relief would no longer be effective, the court observes that “the continued presence of U.S.-constructed facilities . . . provides no grounds for injunctive relief, and that [p]laintiffs never sought, nor could we issue, an injunction against the Honduran Government or its agents to remove Honduran military structures from Honduran land.” *Ramirez de Arellano v. Weinberger*, 788 F.2d 762, 764 n.2 (D.C. Cir. 1986) (on remand) (emphasis added). The remedy of removal of Honduran military structures—the presence of which, to the extent that they were placed there at the behest of the United States, constituted an ongoing due process violation traceable to United States conduct—is arguably more akin to the habeas remedy for a United States citizen detained by a foreign power than the original *Ramirez de Arellano* remedy that the *Abu Ali* court found compellingly analogous, namely, injunctive relief for ongoing violations committed by United States officials actively running a military training camp on a United States citizen's private land.

135. See *Abu Ali*, 350 F. Supp. 2d at 51 (citing to *United States v. Karake*, 281 F. Supp. 2d 302, 308 (D.D.C. 2003); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976)).

136. See *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003) (explaining that under the “joint venture doctrine,” “statements elicited during overseas interrogation by foreign police in the absence of Miranda warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities”).

137. See *United States v. Calandra*, 414 U.S. 338, 355 n.10 (1974). However, it is unclear whether a United States citizen could bring a suit for damages (“*Bivens* action”) alleging violation of his Fourth Amendment rights by foreign agents acting at the behest of the United States. Compare *Di Lorenzo v. United States*, 496 F. Supp. 79 (S.D.N.Y. 1980) (recognizing Fourth Amendment *Bivens* claim for an escaped federal prisoner kidnapped by Panamanian authorities and shipped back to the United States at the behest of the United States government), with *United States v. Verdugo-Urquidez*, 494 U.S. 259, 292 (Brennan, J., dissenting) (noting that *Bivens* itself precluded damages suits for violations of the Fourth Amendment where there are “special factors counseling hesitation,” and arguing that a court will only be able to determine the constitutionality of an overseas search or seizure in cases implicating United States foreign policy if the Executive decides to bring a criminal prosecution and introduce the evidence seized abroad).

Fifth Amendment contexts do not require further judicial interference with the foreign affairs power of the Executive.¹³⁸

III. THE HABEAS REMEDY AND CONCEPTIONS OF THE JUDICIARY

A. *Separation of Powers, Political Question Doctrine, and Standing Concerns Posed by the Habeas Remedy*

Since any order directing the release of a habeas petitioner in a predicament such as that faced by Abu Ali would have to issue in habeas,¹³⁹ the potential justiciability impediments to intervention on such a petitioner's behalf require analysis of the unique aspects of the habeas remedy. In his dissent in *Hamdi v. Rumsfeld*, Justice Scalia observed that "due process rights have historically been vindicated by the writ of habeas corpus";¹⁴⁰ this observation suggests that Justice Scalia conceives of the intersection of habeas with due process protections as creating a system in which "detention, to be lawful, must comport with due process (or with the Constitution generally), and habeas corpus provides a judicial remedy through which inquiry into constitutionality can be made."¹⁴¹

The distinction between rights, the contents of which the due process clause supplies, and remedies, which the "vessel" of habeas supplies, is a useful framework for analyzing the problems posed by the habeas remedy in the *Abu Ali* context. Habeas has traditionally been available "only to effect petitioner's discharge from custody," a limitation that "is inferred from the statutory requirement that the habeas petitioner be in custody in violation of

138. Cf. *Abu Ali*, memorandum opinion at 10 (D.D.C. 2004) ("[G]iven the alleged involvement of FBI officials in Abu Ali's interrogation, or petitioner's hypothesized subservience of Saudi authorities to the United States regarding his prosecution, it is arguable that, under these cases, the exclusionary rule might be invoked.").

139. In cursorily confronting the above problem, see *supra* notes 35-38, the *Keefe* court concluded that since the petitioner had "alleged that the Secretary of State can, 'by representations to the Government of France,' obtain Keefe's release," and had requested "such other and further relief as to the Court may seem just and proper," what he was really requesting was a writ of mandamus. *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392 (D.C. Cir. 1954). The *Abu Ali* court explicitly (and correctly) rejected Abu Ali's petition for a writ of mandamus. See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65-67 (D.D.C. 2004).

140. *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting).

141. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 68 (5th ed. Supp. 2005) [hereinafter FALLON, JR. ET AL., *HART & WECHSLER'S*]; but see *Fay v. Noia*, 372 U.S. 391 (1963) (stating that "[a]lthough 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," and thus suggesting that habeas *corpus* has a substantive component that goes beyond its function as a remedial vehicle).

federal law.”¹⁴² If the court’s inquiry determines that the custody is unlawful, “[the custody] must be invalidated and the petitioner must consequently be released from its restraints.”¹⁴³ The writ is not directed to the petitioner, but rather to his jailer, who is then obliged to release the petitioner.¹⁴⁴

An order commanding the release of a habeas petitioner detained by an overseas government obviously could not go to his immediate custodian or that custodian’s superior, since the immediate custodian and his de facto superiors would be foreign.¹⁴⁵ The prospect of “invalidating” the custody and ensuring the petitioner’s discharge would thus have to surmount the problem of eliciting action from a foreign sovereign state merely because a United States court has commanded it. The most likely plausible judicial relief would be an order commanding the Secretary of State to take some action to elicit the petitioner’s release.

Such relief raises serious questions as to whether a petitioner held by a foreign government has constitutional standing to bring suit in a United States court. It is well-established that “a plaintiff must demonstrate standing separately for each form of relief sought.”¹⁴⁶ A plaintiff does not enjoy standing merely because he has intense interest in the subject of litigation;¹⁴⁷ rather, he must “personally . . . benefit in a tangible way from the court’s

142. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970); see also *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.”); *Wales v. Whitney*, 114 U.S. 564 (1885) (“There must be actual confinement or the present means of enforcing it.”). Recent case law has somewhat eroded the presumption that immediate release constitutes the only remedy available to habeas petitioners by permitting attack on a conviction even though: 1) the petitioner has yet to begin serving the sentence on that conviction, *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989); and 2) the petitioner has already fully served the sentence, as long as the defendant is “in custody” on a different conviction and granting relief on the expired sentence could advance the anticipated release date, *Garlotte v. Fordice*, 515 U.S. 39, 45-46 (1995). Both exceptions do not erode the core requirement that a court that finds that a habeas petitioner is being held in illegal present confinement must direct his release.

143. *Developments in the Law—Federal Habeas Corpus*, *supra* note 142.

144. *In re Jackson*, 15 Mich. 417, 439, 440 (Mich. 1867) (“The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.”).

145. *Wilson v. Girard*, 354 U.S. 524, 530 (1957) (“A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.”).

146. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

147. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

intervention.”¹⁴⁸ The redressability prong of standing doctrine bars litigants from access to the courts when the “hoped for” judicial relief is only speculatively connected to the injury suffered,¹⁴⁹ particularly when “the relief require[s] action by a party not before the Court.”¹⁵⁰ The Supreme Court has suggested that the constitutional standing requirement is rooted in separation of powers considerations,¹⁵¹ most relevantly the limited scope of Article III and a sense of “the proper, and properly limited, role of the courts in a democratic society.”¹⁵² In *Lujan v. Defenders of Wildlife*,¹⁵³ the Court further suggested an Article II basis for the standing doctrine, preserving the Executive’s responsibility to ensure that the laws are faithfully executed, at least when the challenge is to the actions of Executive officials.¹⁵⁴

Even were complete United States control over a detainee held by a foreign entity demonstrated as a factual matter, there would still be no guarantee that the foreign entity would actually obey the Executive’s instruction to release the petitioner. The responsible foreign officials might decide not to release the petitioner for any of a number of reasons, including their own desire to prosecute him, or an assessment that what the Secretary of State is officially communicating to them in compliance with a court order is

148. *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

149. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (holding on redressability ground that mother of illegitimate child lacked standing to sue attorney general for injunction prohibiting him from declining to prosecute father of her child, since “requested relief . . . would result only in the jailing of the child’s father;” thus, “prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative”).

150. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998). The causation requirement of standing also addresses the third-party issue, asking: “[W]hether the injury is ‘fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.’” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The causation and redressability components of standing analysis are closely related and “often prompt identical inquiries.” *See also Linda Sandstrom Simard, Standing Alone: Do We Still Need the Political Question Doctrine*, 100 DICK. L. REV. 303, 328 n.146 (1996). However, as I will demonstrate, the inquiries diverge in Abu Ali’s circumstances, because even assuming that Abu Ali could demonstrate that the United States government caused his injury by ordering his detention, judicial redress might prove unavailable.

151. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (announcing that standing doctrine is “built on a single basic idea—the idea of separation of powers”); *see also Steel Co.*, 523 U.S. at 101-02 (“For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”); *see generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983).

152. *Warth*, 422 U.S. at 498; *see also* Simard, *supra* note 150, at 306 (“[T]he separation of powers concerns, which have historically led the Court to declare an issue to be a nonjusticiable political question, could lead the Court today to find a lack of standing.”).

153. 504 U.S. 555, 577 (1992).

154. *Id.* at 576; *see also* Mark Tushnet, *The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1219 (2002).

not what the United States government *really* wants them to do. Therefore, *Lujan* provides some *tenuous* support for the proposition that the mere fact of foreign control over a habeas petitioner is sufficient as a matter of law to preclude federal court jurisdiction on standing (specifically, redressability) grounds.¹⁵⁵ However, the better reading of *Lujan* is that, given that the redressability standard is that the relief must be “likely,” but not “certain,” to redress the petitioner’s injuries, a factual demonstration of total United States control over the foreign entity doing the detaining would probably satisfy that standard, so long as the court order that issued was sufficiently specific in requiring the Secretary of State to direct the foreign entity to release the petitioner.¹⁵⁶ In such circumstances, there is a high probability that a direct command from the Secretary of State would secure the petitioner’s release.¹⁵⁷

However, even assuming that a sufficiently specific court order would be likely to redress the injuries of a habeas petitioner wrongly detained by a foreign power at the behest of the United States, it is unlikely that a court could craft such a remedy consistent with the dictates of the separation of powers. A court cannot direct the Executive to make specific foreign policy representations.¹⁵⁸ Beyond the commitment of this authority to the Executive by the Constitution, even the least intrusive forms of an order directing the Secretary of State in respect to diplomatic communications could have a highly

155. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (plurality opinion) (observing that since challenged funding provided by the United States government constituted only ten percent of total funding for project allegedly creating harm to plaintiffs, “it is entirely conjectural whether the non-agency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.”); cf. *Franklin v. Massachusetts*, 505 U.S. 788, 824-825 (1992) (Scalia, J., dissenting) (“I do not think that for purposes of the Article III redressability requirement we are ever entitled to assume, no matter how objectively reasonable the assumption may be, that the President (or, for that matter, any official of the Executive or Legislative Branches), in performing a function that is not wholly ministerial, will follow the advice of a subordinate official.”); but see *Lujan*, 504 U.S. at 599 (Blackmun, J., dissenting) (“Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.”). The *Lujan* plurality opinion thus constitutes an implicit rejection of Professor Cass Sunstein’s proposition that artful characterization may resolve redressability concerns by, for example, presenting the redress sought as a reduction in the increased risk of harm rather than an end to the actual harm inflicted on the individual plaintiff. See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 207 (1992).

156. See *Petition for Writ of Habeas Corpus at 24-25, Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004).

157. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000).

158. See *Omar*, 479 F.3d at 18 (“Any judicial order barring this sort of information sharing in a military zone would clearly constitute judicial interference in a matter left solely to Executive discretion . . .”) (Brown, J., dissenting).

corrosive effect on United States foreign policy interests. Such an order would at minimum multiply the number of voices with which the United States speaks.¹⁵⁹ For example, the Executive was likely making certain representations to the Saudis about the American position on the status of Abu Ali. If a court issued an order instructing the State Department to direct the Saudis to release him, such an order would garner significant publicity. The Executive would likely lose crucial bargaining leverage if perceived as not in autonomous control of United States foreign policy. The Saudis might bristle at a U.S. court purporting to evaluate the legitimacy or independence of their decision to detain a prisoner.

It is worth inquiring more specifically into the actual risks posed by such an order in the context of Saudi Arabia, and potentially other countries that remain tenuous allies of the United States in the “war on terrorism.”¹⁶⁰ The risks posed by an American court dictating the appropriate diplomacy in such a context are higher in both the probability and magnitude of potentially adverse outcomes than in almost any other foreign affairs situation imaginable.¹⁶¹ Saudi Arabia cooperates with the United States intermittently and only with great difficulty; the fragile relationship of mercenary co-existence between the two countries is in constant danger of rupture, with unforeseeable and potentially drastic consequences.¹⁶² Particularly with popular sentiment against the United States riding high in the wake of the Iraqi invasion, the Saudis must walk a thin line. They cannot appear to be playing the role of American puppet, while at the same time they must do just enough not to incur the wrath of the United States.¹⁶³ Further, in the wake of the wake of the May,

159. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting “the potentiality of embarrassment from multifarious pronouncements by various departments on one question” as constituting one circumstance justifying application of the political question doctrine).

160. Of course, it is questionable whether courts have the capacity in adjudicating particular cases to determine country-by-country which relationships are the most fragile and subject to rupture due to judicial intervention. If not, then prudence counsels abstention in a much wider range of cases than a case-by-case assessment would suggest is warranted.

161. See *Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954); *Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221 (1986); see also *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977); *Smith v. Reagan*, 844 F.2d 195, 197 (4th Cir. 1988).

162. See generally Michael Levi, *Royal Pain*, THE NEW REPUBLIC, June 2, 2003 (raising the possibility of the Saudis developing their own nuclear arsenal should the relationship with the United States fray to the point that the Saudis feel that they can no longer depend on an American security guarantee).

163. See, e.g., NATIONAL COMMISSION ON TERRORISTS ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 371-74 (2004); Rachel Bronson, *Rethinking Religion: The Legacy of the U.S.-Saudi Relationship*, THE WASHINGTON MONTHLY, Autumn 2005, at 124-28; *After-affects: The Bombing*, N.Y. TIMES, May 18, 2003, at A20 (describing efforts of Saudis to distance themselves from American investigation in wake of 2003 Riyadh bombings, and presenting viewpoint that such efforts are due to conservative nature of domestic audience and

2003, attacks on three housing complexes in Riyadh, the Saudi regime has entered survival mode and initiated an internally-driven domestic “war on terrorism” of its own.¹⁶⁴ In this context, American engagement with the Saudis is a delicate diplomatic dance of pushing and prodding Saudi government officials into reluctant action, while supplementing the Saudis’ own fears of internal disorder with carefully-calibrated levels of diplomatic pressure. For an American court to determine that Saudi Arabia arrested a prisoner at the behest of the United States, and for that court to order publicly the Executive to obtain his release, and then for Saudi Arabia to then publicly comply with such an order, would clearly risk destabilizing the American-Saudi relationship.

In order to mitigate these separation of powers concerns, a court could presumably simply direct the Secretary of State to release the prisoner, without even mentioning the fact of foreign detention.¹⁶⁵ Even assuming that such an order would be consistent with the separation of powers, the prospect of judicial policing of Executive adherence to such a vague order poses overwhelming challenges of judicial administrability.¹⁶⁶ In most habeas cases, compliance is easily monitored because the order commanding the release of the prisoner is directed at either the officials with actual custody over the prisoner or their direct superiors. Under such circumstances, whether or not the prisoner is released is a direct result of whether the relevant officials have complied with an order issued by a court exercising structural command authority over them. Therefore, the fact of the prisoner’s actual release means that there has been compliance with the court’s order, while ongoing detention means that the court’s order has been defied. The situation is somewhat trickier where the actual custodian is a private entity. But even where a private entity is involved, a court confronted with the fact of ongoing detention in defiance of a release order would have plentiful and sufficient tools at its

desire to avoid appearance that Saudi governing elite is too solicitous of American interests). This is especially true in light of the deep domestic conflict roiling Saudi society and politics. See Michael Dolan, *The Saudi Paradox*, FOREIGN AFFAIRS, Jan.-Feb. 2004, at 35 (describing split in Saudi Arabia between “a Westernized elite that looks to Europe and the United States as models of political development, and a Wahhabi religious establishment that holds up its interpretation of Islam’s golden age as a guide,” and contending that while the former seeks rapprochement with the United States and his a higher profile abroad, the latter shares goals with Al Qaeda and is more powerful domestically).

164. Bronson, *supra* note 163, at 124.

165. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973) (observing that habeas writ can require prisoner’s outright release from custody).

166. Cf. Richard A. Epstein, *Standing and Spending – the Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 57-58 (2001) (noting that “concerns of redressability, rightly isolated, could lead to a decision to refuse to grant equitable relief” where administrative agency’s “budget allocations and the administrative determinations will be shot through with the types of discretion that no court of equity can sensibly second guess”).

disposal to inquire fully into the circumstances of that defiance and issue the further orders necessary to ensure the actual release of the prisoner.

Such would not be the case in the foreign detention scenario, since in the event that the foreign entity did not release the petitioner, it would be nearly impossible for a court to inquire into whether or not the responsible United States officials had made the requisite good-faith effort to obtain his release.¹⁶⁷ Indeed, a court would be helpless to redress the fact of continued detention by the foreign power.¹⁶⁸ Diplomacy is a specialized language spoken in the context of complex and fluid ongoing relationships, and courts are surely not competent to assess the intricacies and nuances of diplomatic exchanges.¹⁶⁹ Further, while a direct command from the Secretary of State to a foreign official of sufficient rank might suffice to obtain the petitioner's release, communications among lower level officials might not. Just as a reviewing court would lack the expertise and capability to specify itself what the Secretary of State should do, it would be incapable of evaluating the Secretary's compliance with a very general order commanding the petitioner's production. Further, any hearing that inquired into whether United States officials had made a good faith effort would presumably necessitate an examination of the minutes of diplomatic communications between the United States and Saudi Arabia, and would itself pose substantial separation of powers concerns.¹⁷⁰

167. Cf. *Omar*, 479 F.3d at 18 (Brown, J., dissenting) (noting that bar on transfer of detainee to foreign sovereign could be circumvented by possibility that detainee, if released pursuant to habeas relief, would be immediately arrested by foreign sovereign—"[t]his possibility becomes an inevitability if United States military officials notify authorities [of foreign sovereign] as to the exact time and place of [detainee's] release, thereby effectively ensuring his immediate recapture and detention").

168. Cf. *id.* ("[T]he courts are powerless to enjoin the United States from informing Iraqi officials about the planned release of [detainee], and under these circumstances, an injunction against outright transfer is an empty gesture that cannot be sustained.").

169. See *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973) (warning courts against "ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict"); *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 844 (D.C. Cir. 1970) ("An important, if not the dominant, star for guiding national actions and reactions is the desire to build future areas of settlement and good will between nations to replace present areas of tension. . . . Negotiation may be deferred while relationships are left to simmer without stirring, in order to strengthen any possible threads of international accord or reconciliation.").

170. Another consideration is that even assuming the existence of a constitutionally appropriate remedy, it is unclear to what extent the executive branch would feel compelled to obey in good faith a judicial order commanding the Secretary of State to request or direct the release of a prisoner held by the Saudis. Notions of constitutionalism and rule of law, firmly entrenched since *Marbury v. Madison*, would counsel that a court with appropriate jurisdiction has the last word on a concrete dispute, and other government actors must obey at least with respect to the individual litigants. See *Omar*, 479 F.3d at 13 ("[W]e think it exceedingly unlikely that American military officers, sworn to uphold the law and represented by the Justice

Thus, in essence, the court that issued an order commanding the Secretary of State to produce the petitioner would have no ability to ensure compliance. While the assumption is that United States officials will obey court orders in good faith, that principle has limits. Judicial inability to police Executive action in this area—combined with the uncertainties resulting from the fact of foreign control—would render a redress of injuries unlikely and speculative. Such a conclusion is not an “invitation of executive lawlessness,”¹⁷¹ but rather an acknowledgment of limited judicial competence.

B. Conceptions of the Rights/Remedies Distinction in the Habeas Context

The separation of powers and standing obstacles to the assertion of jurisdiction posed by the habeas remedy in the context of foreign control over a petitioner pose the significant quandary of reconciling a potentially clear violation of constitutional rights with the absence of a judicial remedy. This conflict between the rights-focused and the remedies-focused inquiries raises the larger question of what role the judiciary should play vis-à-vis the political branches in the ongoing jurisprudential battles that will surely characterize the “war on terrorism.”

Viewpoints on the relationship between rights and remedies, particularly, whether a remedy must attend every violation of a constitutional right, have undergone substantial evolution since *Marbury v. Madison*'s declaration that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁷² In the typical case, “there is a ‘presumption that for every right there should be a remedy.’”¹⁷³ However, as Professors Richard Fallon and Daniel Meltzer have observed, “*Marbury*'s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.”¹⁷⁴ From *Marbury*'s seemingly

Department, would evade an order of a United States district court.”). However, the assurance of good faith adherence is highly questionable in a context such as *Abu Ali* where neither the courts nor the public are likely to have good information, the activity subject to judicial order is within the core competence of the Executive, and manifold legitimate reasons can plausibly coexist with a result indicative of noncompliance. As Friedman notes, “there is a continuum of non-enforcement of judicial decrees,” with one end of the spectrum constituting open defiance of clear judicial orders such as in *Ex parte Merryman*, extending through the “foot-dragging that accompanied federal court school desegregation decrees,” and ending with legitimate non-enforcement, exemplified by the pardon power. See Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 645 (1993).

171. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601 (1992) (Blackmun, J., dissenting).

172. 5 U.S. (1 Cranch) 137, 163 (1803).

173. TRIBE, *supra* note 97, § 3-31, at 601 (citing *United States v. Dalm*, 494 U.S. 596, 616 (1990)).

174. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1770-71 (1991).

unequivocal stance mandating the availability of a remedy for every violation of a right, the Supreme Court has carved out a number of doctrinal exceptions. Pointing to the political question, sovereign immunity, and equitable discretion doctrines, as well as the Constitution's own exclusion of judicial review over certain claims, Justice Scalia trenchantly observed in dissent in *Webster v. Doe* that "it is simply untenable that there must be a judicial remedy for every constitutional violation."¹⁷⁵

Further complicating the rights-remedies question is the deep-rooted habeas remedy. Along with the Just Compensation Clause of the Fifth Amendment, habeas is the only specific remedy explicitly referenced in the Constitution.¹⁷⁶ In *INS v. St. Cyr*, the Supreme Court suggested (by straining to avoid the question) that the Suspension Clause guarantees a constitutionally-mandated core of federal habeas jurisdiction, at least in the context of judicial review of the legality of executive detention, that Congress cannot strip.¹⁷⁷

Hamdi and the Guantanamo cases have highlighted various rights-remedies permutations in the context of habeas. One position is that adopted by Justice Thomas's dissent in *Hamdi*, and the district court opinion in *Khalid v. Bush*,¹⁷⁸ both of which suggested that while the Guantanamo detainees have access to the remedial habeas "vessel," they have no substantive rights. Justice Thomas in *Hamdi* does suggest that the Court has an independent, if highly deferential, role in evaluating the legality of Hamdi's detention.¹⁷⁹ However, Justice Thomas also makes clear that Hamdi has essentially no substantive rights capable of judicial enforcement, since (i) his detention is lawful if he is an enemy combatant, and (ii) the determination as to whether he is an enemy

175. *Webster v. Doe*, 486 U.S. 592, 609-613 (1988) (Scalia, J., dissenting) ("Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are."); see also Fallon & Meltzer, *supra* note 174, at 1784 ("[M]odern doctrines, beyond any peradventure, depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations.").

176. Moreover, the "availability of the writ under the new Constitution . . . was [Hamilton's] basis for arguing that additional, explicit procedural protections were unnecessary." See FALLON, JR. ET AL., HART AND WECHSLER, *supra* note 141, at 68.

177. See *INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001). The Supreme Court construed the statute at issue in *St. Cyr*, which appeared to preclude any appellate review of an order of deportation issued against a resident alien for the commission of an enumerated offense, so as to permit habeas review over pure matters of law.

178. *Rasul v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

179. *Hamdi v. Rumsfeld*, 542 U.S. 507, 585 (2004) (Thomas, J., dissenting) ("I acknowledge that the question of whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, although the question comes to the Court with the strongest presumptions in favor of the Government.").

combatant is within the sole discretion of the Executive.¹⁸⁰ According to Justice Thomas, federal courts should dismiss any habeas petition, at least one brought by a citizen caught and held outside the United States or presumably by any alien held outside the United States, in which the government simply alleges that the individual detained is an enemy combatant; once these words are spoken, the Court has no capacity to delve into the government's process or the substance supporting that determination.

The District Court for the District of Columbia expressed an even starker view in *Khalid*, concluding that nonresident aliens detained in Guantanamo—whom *Rasul* held enjoyed the statutory right to judicial review of the legality of their detention—“lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo” because they “possess no cognizable constitutional rights.”¹⁸¹ Despite dicta in *Rasul* to the contrary,¹⁸² the *Khalid* Court relied heavily on language in that opinion limiting the holding to the question of “whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”¹⁸³

The *Abu Ali* case is the mirror image of *Hamdi* and *Khalid*. As an American citizen, Abu Ali possessed substantive constitutional rights to due process that clearly would be violated by the government conduct described in his allegations. What is unclear, however, is whether the habeas remedy is the appropriate vehicle for the vindication of these rights, and more pointedly and accurately—since petition for a writ of habeas corpus was Abu Ali's only judicial option—whether he had any judicial remedy at all.

180. *See id.* (“[I]t is appropriate for the Court to determine the judicial question whether the President has the asserted authority . . . [but] we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.”). Justice Thomas would find a violation only under the most egregious circumstances. *See id.* (citing *Ex parte Endo*, 323 U.S. 283 (1944) (“[T]he Government could not detain a loyal citizen pursuant to executive and congressional authorities that could not conceivably be implicated given the Government's factual allegations.”)).

181. *Rasul*, 355 F. Supp. 2d at 321. The court relied heavily on precedent indicating that nonresident aliens enjoy no constitutional protections under the Fifth Amendment. *See id.* at 321-22 (citing to *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

182. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (citing to 28 U.S.C. § 2241(c)(3) (“Petitioners' allegations . . . unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”)).

183. *Id.* at 485; *see Khalid*, 355 F. Supp. 2d at 323 (“[T]he Supreme Court chose to only answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims.”).

C. *Conceptions of the Judiciary*

Broad conceptions of the judicial function guide the inquiry into the proper judicial role when clear violations of constitutional rights coincide with the absence of realistic remedial options. Professor Fallon proposed three broad conceptions of the judiciary, all foreshadowed by *Marbury*.

First, the traditional “private rights” model emerged from consideration of the anomalous status of judicial review under a democratic constitution and the historically narrow restriction of the definition of justiciable cases.¹⁸⁴ Several clear rules emerge from this conception: (i) a federal court must determine every valid claim of constitutional right in a case properly before it;¹⁸⁵ (ii) as a corollary proposition, “courts are justified in pronouncing on constitutional issues only insofar as they must do so to resolve concrete disputes”;¹⁸⁶ and (iii) courts should avoid “any role as a general overseer of government conduct, and should especially avoid the award of remedies that invade traditional legislative and executive prerogatives.”¹⁸⁷ Thus, the judiciary violates the separation of powers when it reviews actions of the coordinate branches that do not give rise to a “case” or “controversy,” a concept that encompasses the requirement, encapsulated in the Supreme Court’s standing doctrine, that the wrong suffered by the complaining party be capable of judicial redress.¹⁸⁸ Limiting judicial review to concrete disputes prevents the type of unmoored

184. See FALLON, JR. ET AL., HART AND WECHSLER, *supra* note 141, at 67.

185. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 291 (1821) (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.”); *Marbury*, 5 U.S. at 170 (“The province of the court is, solely, to decide on the rights of individuals.”); see also Richard H. Fallon, *Marbury and the Constitutional Mind*, 91 CAL. L. REV. 1, 13-14 (2003) (private rights model mandates that “[w]hen a constitutional issue arises within a traditionally framed case and is necessary to the determination of private rights, courts have no discretion to avoid the issue or to decline to enforce constitutional rights.”) [hereinafter Fallon, *Marbury and the Constitutional Mind*].

186. Fallon, *Marbury and the Constitutional Mind*, *supra* note 185, at 33.

187. FALLON, JR. ET AL., HART AND WECHSLER’S, *supra* note 141, at 67.

188. See *Raines v. Byrd*, 521 U.S. 811, 818-20 (1997) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies’ . . . [O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”); TRIBE, *supra* note 97, at 392 (§ 3-14) (“The Court’s current formulation [of the standing doctrine] presents one aspect of the continuing debate over whether federal courts exist primarily to resolve concrete disputes among individual litigants, with the power to make constitutional decisions only a necessary incident to this role, or whether federal courts have a special responsibility, as the branch of government best able to develop a coherent interpretation of the Constitution, to engage in the exposition of constitutional norms, limited primarily by the requirement that they do so in the context of reasonably concrete disputes presented to them for review”).

constitutional interpretation that risks bringing the federal courts into “unnecessary conflict with coordinate branches.”¹⁸⁹

By contrast, the “special functions” model conceptualized the judiciary, especially the Supreme Court, as an essential safeguard against overreaching by the coordinate branches. *Marbury* foreshadowed the “special functions” model by positing the necessary coincidence between rights and remedies and establishing the judiciary’s legal authority to “compel the performance of legal duties by high governmental officials,” even though the enumeration of these principles was not necessary to the resolution of *Marbury* itself.¹⁹⁰ The key premise of the special functions model is that the articulation of constitutional norms by courts constitutes a general public good, independent (in part) of the imperative to remedy a particular wrongdoing.¹⁹¹

Lastly, the “prudential” model counsels the avoidance of rulings that would provoke threatening confrontations with the political branches.¹⁹² This prudential strand is in many cases not recognized explicitly, but operates at a subterranean level, pushing courts away from logically sound holdings that could generate significant inter-branch conflict.¹⁹³ Its influence extends back to *Marbury*, where according to Professor Fallon, “the Court reached the only prudent conclusion: It could not, indeed must not, issue a quixotic order to Madison to deliver *Marbury*’s commission.”¹⁹⁴

The circumstances in *Abu Ali* supply an example of constitutional conflict of the highest order, an alleged egregious violation of an individual’s due process rights meeting core separation of powers and standing concerns that at the remedial stage appear unavoidable and severe. The private rights, special functions, and prudential models offer distinctive frameworks for determining justiciability. The private rights model would normally push hard towards

189. TRIBE, *supra* note 97, at 388 (§ 3-14); see *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (“[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.”).

190. Fallon, *Marbury and the Constitutional Mind*, *supra* note 185, at 16; see also Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-66 (1973) (positing that *Marbury* established the groundwork for the special functions model).

191. See Fallon, *Marbury and the Constitutional Mind*, *supra* note 185, at 15 (“[T]here is a public interest, appropriately enforced through public-rights litigation, in ensuring official conformity to legal and especially constitutional norms.”).

192. See *id.* at 17 (“[T]he Court must sometimes recede from conflict with the political branches or with aroused public opinion in order to maintain its prestige and thus its power.”).

193. See *id.* at 29 (identifying “cases in which the Supreme Court has shaped particular rulings (rather than entire doctrines) to avert public hostility but has not expressly acknowledged this motivation as a basis for decision”).

194. *Id.* at 18.

requiring that a reviewing court permit a case alleging executive detention in derogation of constitutional rights to go forward on the merits. However, due to the unique circumstances present in *Abu Ali*, separation of powers considerations that foreclose the possibility of effective remediation at the back end, the redressability requirement of standing doctrine likely serves to bar jurisdiction.¹⁹⁵

A court following the “special functions” model, by contrast, might adopt a broad interpretation of the redressability requirement of standing to allow the judicial inquiry to move forward and shine public light on any constitutional violations, even if the court would be unable to actually remedy these violations.¹⁹⁶ Additional considerations would apply were the Supreme Court to hear the case, even in the absence of a viable remedy for the individual detained, any holding by the Supreme Court that the government’s scheme for detaining American citizens through the agency of foreign governments is unconstitutional would presumably bind the Executive in future instances under the principle established in *Cooper v. Aaron* (a decision itself motivated by special functions considerations).¹⁹⁷ The pronouncements of a lower federal court would not have such a binding effect over federal government officials (absent a specific remedy),¹⁹⁸ but they could have a powerful persuasive effect.¹⁹⁹ Perhaps more importantly, any such holding would stand, and be perceived, as a public rebuke by a judicial actor of official government action.²⁰⁰

195. See *supra* Part II.C.

196. See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terrorism*, 91 CORNELL L. REV. 497, 523-24 (2006) (noting, in course of expressing approval of assertion of jurisdiction in *Abu Ali*, that “[r]elaxation of the custody requirement to permit challenges in constructive-custody cases enables the habeas petitioner to probe the extent of the U.S. government’s responsibility for his detention and to secure relief for any improper government conduct,” even if “a federal court would have no role in overseeing” certain further decisions by the foreign government”); cf. Fallon, *Marbury and the Constitutional Mind*, *supra* note 185, at 26-27 (noting how Supreme Court was apparently motivated by special functions concerns in adopting broad interpretation of injury-in-fact requirement of standing doctrine in voting rights and Establishment Clause cases).

197. 358 U.S. 1, 18 (1958) (holding that government actors have a responsibility to obey the Supreme Court’s pronouncements as to what the Constitution requires); see Fallon, *Marbury and the Constitutional Mind*, *supra* note 185, at 24 & n.105.

198. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (“[I]t is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party.”).

199. See *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (“[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the district court, even though they would not be directly bound by such a determination.”).

200. See Richard H. Fallon, *The Constitution and Legitimacy*, 118 HARV. L. REV. 1787 (2005) (discussing relationship between legal, sociological, and moral factors and the perceived

The prudential model mainly functions in the intersection of the other two models, providing impetus for courts to disclaim jurisdiction when conflict with the political branches looms. Prudential factors in the context of a case like *Abu Ali* might motivate a court, particularly a lower court, to accord heightened deference to the Executive's separation of power arguments. However, the deep constitutional roots of habeas relief strongly counter the force of separation of power arguments for heightened deference, since a court's refusal to intervene, on institutional comity grounds that do not clearly rise to the constitutional level, to free a citizen imprisoned unconstitutionally would seem itself to raise grave constitutional concerns.²⁰¹

The reasoning of the *Abu Ali* court itself appears strongly motivated by the "special functions" model, in particular, the court does not even address the standing and separation of powers difficulties posed by the remedial back-end of the litigation. The *Abu Ali* court's approach bears strong similarity to that adopted by the Supreme Court in *Rasul*, permitting the assertion of habeas jurisdiction while deferring to a later stage resolution of problems posed by the required depth of the substantive inquiry or the possibility of a viable final remedy.²⁰²

Supreme Court pronouncements on the merits of habeas petitions under conditions where judicial redress is unlikely have played a storied role as a platform for the Court to speak about pressing questions of executive power and individual rights. During the Civil War, the case of *Ex parte Merryman* presented Chief Justice Taney with the question of whether the President could unilaterally order suspension of the writ of habeas *corpus* without congressional authorization.²⁰³ President Lincoln had granted military authorities along the military line between Philadelphia and Washington authorization to suspend the privilege of the writ for the "public" safety in cases of civil resistance, mainly to address widespread secessionist sentiment in Baltimore.²⁰⁴ Chief Justice Taney issued the writ, but the commanding general at Fort McHenry who was Merryman's immediate custodian did not show up on the appointed day, and did not produce Merryman.²⁰⁵ Nevertheless, the Chief Justice subsequently held that President Lincoln lacked the power to suspend the writ, that Merryman had to be released, and that the

legitimacy of constitutional rulings). As Fallon observes, "public officials . . . take oaths to enforce the law. The resulting obligations to uphold the law, whatever it might be, carry moral weight. If an action would be legally illegitimate, then an official presumptively ought not to take it, for it would be contrary to her oath and, accordingly, most often morally illegitimate as well under our minimally legitimate Constitution." *Id.* at 1849.

201. See *supra* note 177 and accompanying text.

202. See *supra* notes 118 & 182.

203. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

204. See Paulsen, *The Most Dangerous Branch*, 83 GEO. L.J. 217, 278 (1994).

205. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

general who had refused to appear was in contempt. The Chief Justice realized that his task was largely fruitless: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."²⁰⁶ He nevertheless directed that the order go directly to the President, "call[ing] upon him to perform his constitutional duty to enforce the laws. In other words, to enforce the process of this court."²⁰⁷

Chief Justice Taney knew with near certainty that Merryman's custodian would not obey the order commanding Merryman's release. However, Taney's hope was that in expounding on the governing constitutional principles, and in declaring judicial supremacy in establishing those principles, he could exhort the Executive to comply with them. In directly confronting the Executive and demanding obedience to the Court's dictates, Taney was breaking new ground. As Paulsen has pointed out, "*Merryman* was probably the first genuine assertion of judicial supremacy over the executive to appear in a federal court opinion. Taney was emphatic that the President was constitutionally bound to do what the courts ordered him to do and that he did *not* have independent interpretive authority."²⁰⁸ For Taney because the Executive would be bound by the Supreme Court's interpretation of the Constitution, a change in executive policy in response to his holding would be both obliged by the constitutional structure and presumably just as effective as direct adherence to the order commanding Merryman's release. Moreover, Taney hoped to rely on general principles of structural government, rather than any particular rule of law principles directly related to the specific circumstances of Merryman's detention, to spur executive compliance.

The situation today is obviously differently than the one confronting Chief Justice Taney in 1861. The broad conception of judicial supremacy is now firmly entrenched after *Cooper*.²⁰⁹ And, of course, whatever the obligation of the Executive to craft a response consistent with the constitutional pronouncements of the Supreme Court, the Executive would have no such obligation to comply with the pronouncements of a district court. Nonetheless,

206. *Id.*

207. This quote is not from the opinion; Taney was reported by a local newspaper to have said it from the bench. See CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64 847 (1974); see also Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Decision-making*, 15 CARDOZO L. REV. 81, 91 (1993).

208. Paulson, *supra* note 204, at 278-79.

209. See *supra* note 197 and accompanying text. Although the case is not without its critics, see, e.g., Edwin Meese, *The Law of the Constitution*, 61 TUL. L.J. 979, 982-83 (1987); see also Paulson, *supra* note 204, at 223 (observing that since the structure of the government is one of coordinate branches, the executive has the option "to execute or decline to execute judgments rendered by courts").

from the perspective of the “special functions” model, the factors supporting discovery and judicial evaluation of the issues involved in cases such as *Abu Ali* are strong, even in the absence of prospective judicial remediation. Judicial review can shine a bright light on troublesome executive action. Apart from the narrow issue of its legality, the broader implications of the United States government instructing the Saudis to have their way with an American citizen are potentially enormous, and deserve public airing.²¹⁰ Disinfection is also particularly valuable given the nature of the questionable practices engaged in by the Bush Administration, which apparently views rendition and similar practices as means to avoiding constitutional scrutiny in American courts of lengthy and judicially-unexamined detentions, perhaps involving torture. Such executive gamesmanship when it comes to individual liberties is uniquely troubling during a time of war because the potential political checks on the Executive disregard for the principles of constitutionalism, due process, and individual autonomy are likely to be least powerful during periods of national crisis.

The moral and public relations impact of a judicial declaration that a government scheme is violating a citizen’s rights is also substantial.²¹¹ *Rasul* led to the establishment of “Combatant Status Review Tribunals,” modeled closely on Justice O’Connor’s recommendation in *Hamdi* regarding the procedures due American citizens, to determine the “enemy combatant” status of Guantanamo detainees.²¹² And, the *Abu Ali* court’s assertion of jurisdiction prodded the Executive into bringing *Abu Ali* to the United States and charging him.²¹³ By asserting jurisdiction, the respective courts in these cases shed light on troublesome executive action, and through some combination of moral persuasion and public relations pressure, generated rights-protecting changes in government behavior.

Nevertheless, clearly one reason why we want courts to observe principles of standing generally, and the principle of redressability in particular, is to avoid relatively unmoored judicial inquiries by judges who are not in position to consider the multifaceted implications of those inquiries. A judge will likely feel freer to paint with broad strokes if he is aware that he can say what he likes because he will never have to confront the direct implications of ordering the release of a prisoner such as *Abu Ali*, with all the potentially explosive

210. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (discussing traumatic effects of loosening of prohibition against torture on legal system, and in particular its general commitment to human dignity and non-brutality).

211. See *supra* note 200 and accompanying text.

212. See Defense Link Website, http://www.defenselink.mil/news/Jul2004/d20040730_comb.pdf (last visited April 13, 2007); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004).

213. See *supra* notes 14-16.

ramifications such an order could entail. This is problematic, because judges confronting the vexing conflict between individual liberties and security during wartime must be exquisitely attuned to practical considerations and the necessity of allowing the Executive to function flexibly and decisively.²¹⁴

Another more foundational question raised by the special functions model is whether courts should be in the business of seeking to generate political change. While the prospect of the government directing foreign countries to detain American citizens without even the pretense of procedure is profoundly troubling, it seems problematic for courts to assert jurisdiction over cases that do not meet redressability requirements so as to generate political change in line with personal preferences.²¹⁵ If the Executive has decided that its course is the proper one (and Congress has not intervened), and if the separation of powers and lack of manageable judicial standards considerations are truly significant enough impediments to preclude effective review on the merits, then courts should probably cede the field to the political branches.

IV. CONCLUSION

Ultimately, there may be a means to achieving the broader goals of the special functions approach while still adhering to the requirements of standing doctrine. Professors Fallon and Meltzer provide a framework for addressing the problem, positing two considerations in assessing whether particular remedies may be denied for constitutional violations. The first is the *Marbury* principle that “calls for individually effective remediation.” As we have seen, other considerations can sometimes outweigh this principle.²¹⁶ Another principle, emerging from constitutional structure “demands a system of constitutional remedies adequate to keep government generally within the bounds of law,” in particular the values expressed by notions of separation of

214. A consideration expounded upon at length in *Eisentrager*:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. . . . [T]rials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950).

215. See Barkow, *supra* note 103, at 301 (observing that “the judiciary’s independence and isolation from popular pressures and sentiment make it a poor policymaker”).

216. See *supra* notes 173-175.

powers and the rule of law.²¹⁷ This larger requirement of an overall system of remedies “effective in maintaining a regime of lawful government—is more unyielding in its own terms,” but can still hold even if individual redress is denied entirely.²¹⁸ According to Professors Fallon and Meltzer, it “would be intolerable” to have “a regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective.”²¹⁹

Applied to the circumstances in *Abu Ali*, this framework suggests that while the importance of Abu Ali obtaining individual redress through the remedy of habeas corpus may be outweighed by the dictates of the separation of powers and related considerations, the requirement that some legal framework sufficient to prevent the deprivation of due process rights effectively restrain the Executive may have more bite. In deciding how to approach the difficult cases, courts should take cognizance of the institutional restraints binding the Executive, and in particular, Congress’s willingness to pass appropriate legislation, oversee its implementation, and if necessary employ the political tools at its disposal, such as the appropriations power, to ensure the President’s acquiescence. As a historical example of such legislative action, Professor Pfander relates how the British Parliament adopted the Habeas Corpus Act of 1679, which prohibited “the practice of removing prisoners from the jurisdiction to deprive them of habeas,” in part to counter the Crown’s efforts to evade habeas remedies by transferring prisoners to Scotland for detention.²²⁰ The post-9/11 Congresses have proven more quiescent, if not completely so.²²¹ If Congress has demonstrated a willingness

217. See Fallon & Meltzer, *supra* note 174, at 1778-79, 1788-89 (“an important role of the judiciary is to represent the people's continuing interest in the protection of long-term values, of which popular majorities, no less than their elected representatives, might sometimes lose sight”).

218. *Id.* at 1779.

219. *Id.*

220. James E. Pfander, *supra* note 196, at n.178 (citing R.J. SHARPE, THE LAW OF HABEAS CORPUS 18, 199 (2d ed. 1989)).

221. The most prominent recent example of congressional action to reign in the Executive in this area is the amendment to the 2006 Defense Appropriations Act sponsored by Senator John McCain, which states in relevant part that “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” See National Defense Authorization Act of Fiscal Year 2006, H.R. 1815, 109th Cong. 1403 (2006); Department of Defense Appropriations Act, Pub. L. No. 109-148, 1003, 119 Stat. 2680, 2739 (2005). Senator McCain’s language was ultimately included in the 2006 National Defense Authorization and Department of Defense Appropriations Acts. *Id.* In signing the Defense Appropriations Act, President Bush indicated (i) his intention to construe it in line with his view of Executive power and (ii) his interpretation that it did not create a private right of action. See President’s Statement on Signing of H.R. 2863, *Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006* (Dec. 30, 2005),

to act forcefully to restrain unconstitutional practices, courts should hew more closely to the “private rights” approach, thus permitting the political process to operate and adjust for any imperfections. If Congress has not demonstrated such a will, courts must fill the breach and adopt an approach more in line with “special functions” considerations.

<http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html>. Whether Congress will enforce the provision in light of the President’s clear opposition remains an open question. See Senator John W. Warner, R-Va. & Senator John McCain, R-Ariz., *Statements on Presidential Signing Detainee Provisions* (Jan. 4, 2006), http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1634 (“Our Committee intends through strict oversight to monitor the Administration’s implementation of the new law.”); see generally David Abramowitz, *Taking the Bull by the Horns: Congress and International Humanitarian Law*, 38 GEO. WASH. INT’L L. REV. 599 (2006).