

RIGHTS AND REMEDIES UNDER THE CONSTITUTION: EXTRATERRITORIAL APPLICATION OF THE WRIT OF HABEAS CORPUS

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ABSTRACT

*Some of the most controversial litigation arising out of the War on Terror has involved petitions for writs of habeas corpus. In its 2008 decision, *Boumediene v. Bush*, the Supreme Court established that detainees at Guantánamo Bay, Cuba, had the constitutional right to habeas review. In applying *Boumediene*, however, the Court of Appeals for the D.C. Circuit held in *Al Maqaleh v. Gates* that habeas rights did not extend to detainees at Bagram Air Force Base in Afghanistan.*

This article argues that because certain constitutional rights, namely civil rights, push back against powers granted to the government, these rights should be available to any person who is subject to those powers. Because civil rights counterbalance the use of government force, they must always be made available to individuals who are subject to that force, regardless of their nationality or location.

As applied to the detainees in Afghanistan, this theory requires that access to the habeas writ be available to all military detainees not designated as prisoners of war. The Constitution establishes the habeas writ as the appropriate vehicle for challenges to detention by the Executive. Therefore, this remedy should be available to all military detainees without consideration of nationality or site of detention.

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I. INTRODUCTION

The law abhors a vacuum. Those in positions of governmental authority act according to dictates of the law, and their actions often modify or create legal rights. The government cannot prosecute without thereby giving rights to the accused;¹ it cannot seize property without giving rights to the former owner.² Most importantly, since the time of the Magna Carta, it cannot detain individuals without giving them the right to challenge the basis for their detention.³ The judicial writ of habeas corpus has long provided the basic remedy for those seeking to challenge their detention by the sovereign or the executive.⁴

Although the habeas writ obtains in the detained individual, it originated as a vehicle by which the judiciary checked the power of the executive.⁵ As such, it is an example of the kind of rights this article will term *civil rights*—those that function as counterweights against the exercise of power by the government.⁶ The government cannot act against individuals without civil rights rushing in to fill the void created by that action. This conception of civil rights includes the conventional understanding: for example, the right to equal protection that underlies anti-discrimination laws⁷ arises after government action favors one party over another similarly situated party. It is prior government action that activates rights as varied as equal protection, the right to counsel, and habeas corpus. This not only provides a unifying feature to these rights but also reveals to whom they should be made available. As the products of government power, civil rights should extend as far as the force of that power may be projected.

1. See U.S. CONST. amend. VI (establishing the right to counsel).

2. See *id.* amend. V (precluding the taking of private property without “just compensation”).

3. MAGNA CARTA, June 15, 1215, ¶ 29 (Eng.) (“No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land.”), available at http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

4. 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926).

5. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 586 (2008) (arguing that “conceptually the writ arose from a theory of power rather than a theory of liberty”).

6. See *infra* Part IV.A.

7. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms.” (emphasis added)).

Although the authors of the Magna Carta scarcely could imagine the system of extraterritorial detention that is now available to the President of the United States, contemporary American courts have revisited the history of the habeas writ in light of the defining features of the War on Terror.⁸ Most recently, in *Boumediene v. Bush*, the Supreme Court determined that the privilege of the habeas writ extends to at least some foreign nationals detained abroad⁹—those who arguably are at the farthest reaches of whom the Constitution protects. Lower courts interpreting the *Boumediene* decision in cases like *Al Maqaleh v. Gates*,¹⁰ which involved habeas petitions from foreign nationals detained at the U.S. Air Force Base in Bagram, Afghanistan, have only begun to test exactly how far afield the Court's decision will reach.

To assist in answering that question, this article argues that the writ of habeas corpus acts as a push back against the detention power of the Executive and that, as such, it inheres in any individual subject to detention by the Executive—regardless of their nationality or site of detention. Unlike rights that inhere on the basis of citizenship¹¹ or presence in the nation's territory,¹² the civil rights discussed here—including the right to habeas—are created by the government's decision to take action and nothing more.

This article will develop this conception of civil rights as countervailing forces to constitutional grants of government power using the writ of habeas corpus as a guiding example. Part II will discuss the historical law governing habeas, followed in Part III by a discussion of the *Al Maqaleh* decisions at the District and Circuit Court levels as examples of the application of contemporary law to civil rights questions. Part IV will develop a general theory of civil rights, providing both historical and structural arguments. This part then will apply the framework to the question of the extraterritorial availability of the habeas writ, concluding that the writ should be made available to those who are under the control of the Executive

8. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 739–43 (2008) (discussing the historical development of the habeas writ out of English law).

9. *Id.* at 795–98.

10. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

11. See, e.g., *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 672 (1978) (noting that the protections of the Fourteenth Amendment are “every citizen's federal right”).

12. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (discussing how private international law governs “the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation”).

and who have no alternative means to challenge their detention. Part V will apply this theory to the facts and circumstances of the *Al Maqaleh* decision, discussing how courts should apply this conception of habeas.

II. CONTEMPORARY APPROACHES TO EXTRATERRITORIAL HABEAS RIGHTS

The writ of habeas corpus, formally known as *habeas corpus ad subjiciendum* (which loosely translates to “you should produce the body to be subject to examination”) is one of the most fundamental and powerful checks on the power of the executive.¹³ A petition for a habeas writ is filed by a person who believes he is being wrongly held; if the petition is granted, the court issues a habeas writ directing the detaining official to produce the detainee before the court to challenge the validity of the detention.¹⁴

The writ is specifically mentioned in Article One, Section Nine of the Constitution, which reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵ Because the only mention of the suspension of habeas rights occurs during a discussion of congressional powers, the Supreme Court historically has held that Congress alone may suspend the writ; the President acting alone has no authority to do so.¹⁶

A. *Historical Approaches to the Habeas Writ in U.S. Constitutional Law*

Cases dealing with the right to habeas in America have arisen as far back as the Civil War.¹⁷ The relevant precedent governing the

13. See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1443–45 (2000) (detailing the development of writs as protections for the people against certain actions taken by the sovereign).

14. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970–71 (1998).

15. U.S. CONST. art. I, § 9, cl. 2.

16. See *Ex parte Merryman*, 17 F. Cas. 144 (1861). Writing from a Circuit Court, Chief Justice Taney struck down President Lincoln's unilateral suspension of habeas rights during the Civil War, *id.* at 148, an order that was expressly ignored by Lincoln, see Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 94 (2005). The *Merryman* opinion, which noted that no English king dared claim for himself the power Lincoln was arrogating, closed by arguing that “if the authority which the constitution has confided to the judiciary department . . . [may] be usurped by the military power . . . the people of the United States are no longer living under a government of laws.” *Merryman*, 17 F. Cas. at 152.

17. See, e.g., *id.* at 148 (holding that President Lincoln's unilateral suspension of habeas

application of the writ outside of the territory of the United States did not arise, however, until after World War II. In *Johnson v. Eisentrager*,¹⁸ the Court held that German nationals imprisoned by the United States Army in the aftermath of the war did not have the right to habeas proceedings to challenge the legality of their detention.¹⁹ The decision in *Eisentrager* essentially limited the habeas writ to those who had been present within the “territorial jurisdiction” of a United States district court at some “stage of [their] captivity.”²⁰

Eisentrager remained largely untouched until the attacks of September 11, 2001, and the ensuing War on Terror brought habeas rights once again to the fore. Although the Court made steady progress toward clarifying the reach and force of the right to habeas during the first few years after the attacks,²¹ its decision in *Boumediene v. Bush* concluded—without overturning *Eisentrager*—that the constitutional right to habeas corpus extended outside the sovereign territory of the United States.²² The petitioners in *Boumediene* were non-U.S. nationals held at Guantánamo after being designated enemy combatants by the Executive.²³ They petitioned for habeas in the wake of a back-and-forth over detainees’ rights: the Court would allow a petition for reasons of statutory construction, and then Congress would seek to close the door by enacting new legislation.²⁴ *Boumediene* ended the volleying by establishing a constitutional right that could not be modified by the legislative process.²⁵

corpus during the Civil War was unconstitutional).

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

19. *Id.* at 790.

20. *Id.* at 768.

21. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (holding that the territorial jurisdiction requirement was not “an invariable prerequisite” of a district court’s jurisdiction to hear a habeas petition and allowing habeas proceedings by foreign nationals detained at Guantánamo Bay, Cuba (quoting *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973))).

22. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

23. *Id.* at 732.

24. *See id.* at 734–35. The Court allowed statutory habeas petitions in *Rasul v. Bush*, 542 U.S. 466 (2004), which was followed by Congress’s passage of the jurisdiction-stripping Detainee Treatment Act (DTA), 28 U.S.C.A. § 2241 (West 2005). The DTA was held inapplicable to most Guantánamo detainees in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). This prompted Congress to pass the more thoroughly jurisdiction-stripping Military Commissions Act (MCA), 10 U.S.C.A. § 948(a) (West 2007), thus leaving the Court with no choice but to confront the question of whether the *Boumediene* petitioners had a constitutional right to habeas when they applied for it after the passage of the MCA, *Boumediene*, 553 U.S. at 735.

25. *Id.* at 770.

The Supreme Court’s decision in *Boumediene* established a three-prong test for the extraterritorial application of habeas rights.²⁶ Courts are required to consider and balance: (1) the citizenship and status of the detainee, and the adequacy of the process by which that status was determined; (2) the nature of the sites of detention and apprehension; and (3) the “practical obstacles” that would make granting the writ problematic.²⁷ Inherent in this test is the notion that habeas is not as limited a writ as it may have appeared after *Eisenstrager*; its reach is flexible and will depend on circumstance rather than binary considerations of either citizenship or territoriality. A simple analysis of *de jure* sovereignty—determining which nation exercises technical control over the land in question—is not enough,²⁸ nor will the citizenship of the detainee alone provide an answer.²⁹

III. APPLYING *BOUMEDIENE* BEYOND GUANTÁNAMO: THE *AL MAQALEH* DECISIONS

The flagship case testing whether the doctrine announced in *Boumediene* would apply outside the narrow confines of Guantánamo Bay is a set of four habeas petitions consolidated as *Al Maqaleh v. Gates*.³⁰ Four individuals held at Bagram Air Force Base in Afghanistan petitioned for writs of habeas corpus.³¹ The district court granted three of the four petitions,³² but the D.C. Circuit reversed and dismissed all four cases.³³ Despite coming to opposite conclusions, both courts looked to *Boumediene* as their touchstone when evaluating the petitions.³⁴ Though no petition for certiorari was filed in the Supreme Court, it seems unlikely that *Al Maqaleh* will be the last word on the reach of *Boumediene*.

26. *Id.* at 766.

27. *Id.*

28. *Id.* at 764 (noting that *de jure* sovereignty analysis, while “a factor that bears upon which constitutional guarantees apply . . . has [never] been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus”).

29. *Id.* at 770 (admitting that “before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution,” yet concluding that “Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay”).

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

31. *Id.* at 207.

32. *Id.* at 235–36.

33. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

34. *Al Maqaleh*, 604 F. Supp. 2d at 207–08; *Al Maqaleh*, 605 F.3d at 94.

A. *The District Court Decision in Al Maqaleh: Restraining the Executive*

The district court concluded that non-Afghan nationals detained for a considerable period at Bagram had a constitutional right to habeas review of their detention.³⁵ The court explicitly contrasted *Boumediene* with *Eisentrager*, viewing those decisions as defining the poles of habeas jurisprudence.³⁶ Because Bagram was comparable to Guantánamo in the degree of U.S. control, the court reasoned that non-Afghan nationals detained there should have access to the habeas writ.³⁷

To reach this conclusion, the district court broke down the *Boumediene* three-prong analysis into six factors:

- (1) the citizenship of the detainee; (2) the status of the detainee;
- (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.³⁸

This breakdown was an attempt to bring additional clarity to the three prongs of *Boumediene* by isolating them as completely as possible. Though the resulting six-factor analysis is frequently repetitive because of common underlying concerns, the court did correctly isolate what should be the dispositive questions: whether U.S. control of the detainees is exclusive and whether the detainees had adequate alternative remedies to challenge their detention.³⁹

Turning specifically to the six questions considered by the district court, it is clear that concern for the level of U.S. control and the existence of alternative remedies guided the analysis at each step. The court considered the first three factors in rapid succession: the citizenship of the detainee, the detainee's status, and the site of

35. *Al Maqaleh*, 604 F. Supp. 2d at 231–32 (balancing the *Boumediene* factors with respect to each of the habeas petitioners).

36. *See id.* at 221 (“In assessing the objective degree of control, one question is whether Bagram is more like Guantanamo Bay, the site at issue in *Boumediene*, or like Landsberg Prison in post-World War II Germany, the site at issue in *Eisentrager*.”).

37. *Id.* at 232 (“It is worth repeating that the Bagram detainees in these cases are virtually identical to the Guantanamo detainees in *Boumediene*, and the circumstances of their detention are quite similar as well.”).

38. *Id.* at 215.

39. *See infra* Part IV (discussing the importance of exclusive control and available remedies when considering the reach of the habeas writ).

apprehension.⁴⁰ Here, as in *Boumediene*, the fact that the habeas petitioners were foreign citizens weighed against the availability of the writ.⁴¹ However, they were also classified by the U.S. government as enemy combatants—a category the government defined “broad[ly].”⁴² The district court emphasized that if the Executive is to use such a broad definition, there must be “a meaningful process to ensure that detainees are not improperly classified.”⁴³ Importantly, this emphasis on process was reiterated throughout the opinion—the need for the availability of *some* remedy was a strong motivating factor in the court’s decision.

The court’s consideration of the site of apprehension has nuanced and evinced a respect for the policy considerations underlying *Boumediene*. The court did not focus on the site of apprehension as an important factor for its own sake, but rather for what it represented: the possibility that the Executive could render individuals to various locations specifically to avoid the reach of the Constitution.⁴⁴ The district court’s concern was that the checks and balances of the American system of government remain firmly in place. The worrisome “specter of limitless Executive power” required courts to ensure that the Executive cannot simply move individuals into a theater of war and thereby evade judicial review.⁴⁵ Because the *Al Maqaleh* petitioners were captured outside of Afghanistan,⁴⁶ the decision to bring them to Bagram for detention realized the *Boumediene* Court’s fears⁴⁷—the Executive actively moved these detainees into a theater of war, where the arguments against granting habeas would be at their strongest.⁴⁸ As such, this factor weighed in petitioners’ favor, unlike their foreign nationality and place of

40. *Al Maqaleh*, 604 F. Supp. 2d at 217–18.

41. *Id.* at 219.

42. *Id.*

43. *Id.* at 219–20.

44. *See id.* at 220 (“Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely.”).

45. *Id.*

46. The Government contended that *Al Maqaleh* was captured in Afghanistan, but given the procedural posture of the case (a motion to dismiss for lack of jurisdiction), the district court drew the factual inference in favor of the petitioner. *See id.* at 210, 221.

47. *See Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008) (“The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.”).

48. *Al Maqaleh*, 604 F. Supp. 2d at 221.

apprehension.⁴⁹

The court then turned to one of the more complicated, and ultimately dispositive, questions: the nature of the site of detention.⁵⁰ The relevant precedents offered mutually exclusive outcomes. *Eisentrager* counseled against habeas protection for enemy aliens detained at Landsberg Prison in post-World War II Germany;⁵¹ *Boumediene* held that the constitutional right to habeas extended to Guantánamo Bay, Cuba—without overruling *Eisentrager*.⁵² The district court’s interpretation of the relevant test from *Boumediene*—the “objective degree of control”⁵³ exercised by the United States—took two factors into consideration: the degree and duration of U.S. control over Bagram.⁵⁴

The court concluded that Bagram was more analogous to Guantánamo than Landsberg. For example, the base at Bagram was similar to Guantánamo because the U.S. exercised “practically absolute” control over the Bagram facility, regardless of nominal Afghan sovereignty.⁵⁵ Landsberg Prison, in contrast, was controlled jointly by the Allied Powers.⁵⁶ Yet unlike the nearly indefinite character of the U.S. occupation of Guantánamo Bay, the Bagram leasehold was barely a decade old and there was no indication that the U.S. intended to retain the base well into the future.⁵⁷ Thus, though Bagram did not “align squarely” with the facts of either *Eisentrager* or *Boumediene*, the district court concluded that the latter provided the closer analogy, favoring petitioners’ argument for habeas rights.⁵⁸

The district court concluded that the petitioners did not have adequate process, the next factor required by *Boumediene*.⁵⁹ The Unlawful Enemy Combatant Review Boards used to review the petitioners’ designation as enemy combatants afforded less protection than did the Combatant Status Review Tribunals used in

49. *Id.*

50. *See id.* at 221–26.

51. *Johnson v. Eisentrager*, 339 U.S. 763, 766, 785 (1950).

52. *Boumediene*, 553 U.S. at 767–71.

53. *Id.* at 754.

54. *Al Maqaleh*, 604 F. Supp. 2d at 221–22.

55. *Id.* at 223. The Court in *Boumediene* specifically rejected a test based solely on actual sovereignty. 553 U.S. at 755.

56. *Al Maqaleh*, 604 F. Supp. 2d at 224.

57. *Id.* at 225.

58. *Id.*

59. *Id.* at 226–27.

Guantánamo and considered by the *Boumediene* Court.⁶⁰ As such, this factor also favored petitioners.⁶¹

The court finally turned to a consideration of the practical obstacles that would arise upon a grant of habeas. Though the *Boumediene* Court emphasized that its holding might have been different had the detainees been held in an “active theater of war,”⁶² the district court in *Al Maqaleh* noted that even the *Eisenstrager* prisoners—captured and tried in an active theater of war—received a more substantial opportunity to challenge their detention than did the Bagram petitioners.⁶³ More importantly, however, none of the non-Afghan detainees could possibly challenge their confinement before any other tribunal than the U.S. courts.⁶⁴

The court’s balancing of these factors turned primarily on the differences between the Bagram and Guantánamo petitioners.⁶⁵ The court noted that in Bagram the U.S. had less objective control, petitioners had less adequate process to challenge their status, and potentially greater practical obstacles could be mitigated via technology.⁶⁶ On balance, the court concluded that “the practical obstacles are not so substantial as to defeat [the non-Afghan detainees’] invocation of the Suspension Clause.”⁶⁷

The lack of alternate remedies and the fact that the U.S. exercised *de facto* exclusive control over the detainees’ confinement appeared to guide the court’s decision-making at each step. These concerns remained a primary focus of the analysis throughout and, importantly, provided the legal basis for denying habeas to one detainee, an Afghan national, who may have had an available remedy from his home government.⁶⁸ For the others, detention at a U.S. military base

60. *Id.* at 227.

61. *Id.*

62. *Boumediene*, 553 U.S. at 770 (noting that if the detainees had been held in an “active theater of war,” arguments against issuing the writ would have carried more weight).

63. *Al Maqaleh*, 604 F. Supp. 2d at 228 (citing *Johnson v. Eisenstrager*, 339 U.S. 763, 766 (1950)).

64. *See id.* at 230 (noting that the detainees “are not subject to transfer to Afghan custody, so the United States is ‘answerable to no other sovereign’ for their detention” (quoting *Boumediene*, 553 U.S. at 770)). The court noted that the one Afghan petitioner was affected differently by this practical factor—a difference that would ultimately lead to the denial of the habeas remedy in his particular case. *Id.* at 230–31, 235.

65. *Id.* at 231–32.

66. *Id.* at 231.

67. *Id.*

68. *Id.* at 230, 235 (denying the petition and noting that “[f]or Wazir [the Afghan national] . . . the United States may be answerable to Afghanistan to some degree”).

under exclusive U.S. control was held to be sufficient to establish constitutional access to habeas under *Boumediene*.⁶⁹

B. The D.C. Circuit Reverses: Restraining Boumediene

Following the district court's denial of a motion to dismiss, the government immediately appealed to the D.C. Circuit after certification for interlocutory appeal.⁷⁰ The circuit court applied a different interpretation of *Boumediene* and reversed the district court, dismissing all of the Bagram detainees' habeas petitions.⁷¹

Unlike the district court, the D.C. Circuit's opinion contained an extensive review of the habeas jurisprudence applicable to persons held overseas, starting with *Eisentrager* and continuing through *Boumediene*.⁷² This history was more than a formality: the D.C. Circuit drew extensively on pre-*Boumediene* jurisprudence to justify its conclusion that habeas does not extend to Bagram. Indeed, the majority explained that its interpretive task was to apply "*Eisentrager* as construed and explained in the Court's more recent opinion in *Boumediene*."⁷³ This alternate starting point—assuming that *Eisentrager* states the rule and *Boumediene* provides clarification—is the basis of the different outcomes at the district and circuit court levels.

Despite this changed emphasis, the substance of the D.C. Circuit's opinion still begins with the three *Boumediene* factors.⁷⁴ The court concluded that the first factor, citizenship and status of the detainee, was identical to that of the petitioners in *Boumediene*, and similarly weighed in petitioners' favor.⁷⁵ In addition, because the process by which the Bagram detainees were classified was weaker than the process used in both *Eisentrager* and *Boumediene*, the argument for habeas review was more compelling.⁷⁶

Turning to the second factor, the court concluded that the site of apprehension and detention "weigh[ed] heavily in favor of the United

69. *See id.* at 231 (balancing the *Boumediene* factors).

70. *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

71. *Id.*

72. *Id.* at 88–94.

73. *Id.* at 94.

74. The D.C. Circuit used the standard three-step *Boumediene* formulation, unlike the district court, which applied a six-factor analysis. *Id.* at 95–99. This article therefore uses the numerical terminology applied by each respective court when describing their opinions.

75. *Id.* at 96.

76. *Id.*

States.”⁷⁷ Because the lease for Bagram Air Force Base is considerably more temporary than that of Guantánamo Bay, the degree of U.S. sovereignty, even on a *de facto* basis, is more limited than was the case in *Boumediene*.⁷⁸ The court’s reasoning on the second point is fairly conclusory, though, in part because the D.C. Circuit did not look to the same kind of spectrum analysis used by the district court.⁷⁹

Finally, the D.C. Circuit turned to the third *Boumediene* factor—practical obstacles—and concluded that this also “weigh[ed] overwhelmingly in favor” of the government’s position.⁸⁰ The opinion enumerated two reasons why this is so. First, Afghanistan was an active theater of war.⁸¹ In fact, the court concluded that the situation in Afghanistan provided an even more compelling argument against habeas than the post-World War II Germany at issue in *Eisentrager*.⁸² Second, Bagram is ultimately under Afghan sovereignty. This argument is problematic for a number of reasons, however. It is an attempt to shoehorn *de jure* sovereignty analysis—which was explicitly rejected as a determinative consideration by the *Boumediene* Court—into the third prong of *Boumediene*.⁸³ It also mischaracterizes the district court’s opinion, arguing that the district court dismissed one petition because of Afghan sovereignty over Bagram.⁸⁴ Of course, if that were true, then *all* of the petitions would have been dismissed, because all of the petitioners were held in the same location.

Ultimately, the D.C. Circuit concluded that the petitioners did not have constitutional habeas rights and dismissed the petitions. The opinion leaves open one small door by noting that “manipulation by the Executive” designed to avoid judicial review of detentions might be an argument in favor of granting habeas in a later case.⁸⁵ This, however, is the purest of dicta, and despite petitioners’ arguments that

77. *Id.*

78. *Id.* at 97.

79. *See supra* Part III.A.

80. *Al Maqaleh*, 605 F.3d at 97.

81. *Id.*

82. *Id.* at 98.

83. *See supra* notes 27–28 and accompanying text; *Boumediene v. Bush*, 553 U.S. 723, 762–63 (2008) (“Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.”).

84. *Al Maqaleh*, 605 F.3d at 99.

85. *Id.* at 98–99.

such was the case here, the D.C. Circuit dismissed that concern.⁸⁶

The case ended there; a petition for panel rehearing was denied⁸⁷ and no petition for certiorari or rehearing *en banc* was ever filed. At least for now, the D.C. Circuit's narrow interpretation of the *Boumediene* decision remains controlling law: persons held at Bagram Air Force Base do not have the constitutional right to habeas review. The court's opinion stressed the practical difficulties with granting habeas, emphasizing that the petitioners were held in a war zone at a military base subject to the sovereignty of a foreign nation.⁸⁸

IV. CIVIL RIGHTS AND THE USE OF GOVERNMENT POWER

The writ of habeas corpus is a right⁸⁹ of individuals.⁹⁰ Understanding which individuals should possess this right requires an analysis of the right's nature and form. This part outlines a broad conception of the distinction between natural and civil rights before discussing the habeas right specifically and how it is designed to serve as a counterweight to executive authority.

At the outset, it is worth reiterating what exactly the habeas writ does. In its most basic expression, a writ of *habeas corpus ad subjiciendum* is issued from the courts of law to an officer of the executive who has a particular person in his custody. The writ then requires the production of the detainee for review of the basis of

86. It is unclear whether this reasoning can be squared with the standard under which a motion to dismiss is evaluated—normally, factual questions are resolved against the moving party (e.g., here, in petitioners' favor). See *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) ("The complaint should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. To that end, the complaint is construed liberally in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged.").

87. *Al Maqaleh v. Gates*, No. 09-5625 (D.C. Cir. July 23, 2010) (per curiam) (order denying petition for rehearing).

88. There is some incongruity in the logic here, of course, in that normally there is very little respect for the sovereignty of a nation when it is on the opposing side of a military conflict. This, however, may reveal as much about the difficulties inherent in applying traditional notions of war and sovereignty to the fight against non-state terrorist actors. See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining the Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 796–803 (2008) (explaining why the current test determining the application of the laws of war is insufficient in light of the increasingly common conflicts between states and non-state organizations).

89. For the purposes of this discussion, the noun "right" is taken to mean a legal entitlement of persons.

90. See *Al Maqaleh*, 605 F.3d at 99 ("[T]he jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility." (emphasis added)).

detention.⁹¹ As such, the right to habeas inheres in the *detained individual* and, when exercised, compels state action.

A. *The Distinction between Natural and Civil Rights*

There are two elemental forms of rights: those that inhere in individuals regardless of the existence of civil society (natural rights) and those that are granted to individuals by a particular civil society (civil rights).⁹²

Natural rights arise from the ordinary interactions of persons. They include those rights generally asserted as foundational—such as the right to life, liberty, and property. Each of these is as capable of being asserted by one individual against another (“this land belongs to me and not to you”) as by an individual against the government (“this land belongs to me so you may not build a highway across it”). Further, there are rights elemental to human existence that require the imposition of force to infringe, such as the freedom of speech or of religion. These are similarly natural rights: the behavior protected by the right exists outside civil society, so enforcing the right involves *restricting* government power rather than *enabling* the individual.⁹³

Natural rights in civil society definitionally take the form of limitations on government power. The First Amendment’s guarantee that “Congress shall make no law . . . abridging the freedom of speech”⁹⁴ is an acknowledgement that something called “the freedom of speech” is a preexisting faculty that must be protected from government interference. The form of the amendment, then, is evidence that what is being protected originated in the individual and exists outside the state: the right is defined as a *restriction* on congressional power to act.⁹⁵

91. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1765). The following exemplifies the full, formal text of the writ: “We command you that the body of Charles L. Craig, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, within the circuit and district aforesaid, to do and receive all and singular those things which the said judge shall then and there consider of him in this behalf; and have you then and there this writ.” *Craig v. Hecht*, 263 U.S. 255, 269 (1923).

92. The description of these categories is not intended to convey any normative statement about the rights they do or do not contain, though examples will be given during the discussion.

93. See David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 339 (2003) (defining free speech as a “negative right[] against state interference”).

94. U.S. CONST. amend. I.

95. See *id.* (“Congress shall *make no law . . .*” (emphasis added)).

This distinction is made sharper by comparison with the Constitution's grants of positive rights, such as the right to counsel.⁹⁶ The Sixth Amendment does not prohibit Congress from taking away a person's ability to have counsel present; rather, it provides individuals with a power against their government. If the government is going to prosecute, then the accused must be given the assistance of counsel.⁹⁷ This right is better understood as a *civil* right—it exists only within and *because of* the government action to which the individual is subject.⁹⁸

The specific rights-granting text is not the only relevant inquiry regarding the categorization of rights. A right is almost always a civil right when it requires reference to institutions of the government to be understood or realized. In the Sixth Amendment context, the right to counsel during a prosecution is only cognizable when there is an institutional apparatus of adversarial criminal justice in which the government is one of the opposing parties. Such a system does not exist in a vacuum: it is created by the state as a means of enforcing the criminal law. More importantly, it is specific to the particular state, unlike natural rights such as the freedom of speech. Though one can speak in any place, one cannot be subject to criminal prosecutions in the absence of a state with criminal law, nor have counsel in the absence of a system of legal representation.⁹⁹

B. The Proper Functioning of Civil Rights against Government Action

Natural rights restrain government action and are the preferable vehicle by which a system of limited government can be constructed

96. *Id.* amend. VI (“In all criminal prosecutions, *the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.*” (emphasis added)).

97. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (applying the Sixth Amendment right to counsel to the states through the Fourteenth Amendment).

98. Asserting the right to counsel in the absence of government action (e.g., in civil cases) would only be possible via an expansion of a different provision, like the Fifth Amendment's Due Process Clause. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty or property without due process of law.”). The Supreme Court has suggested that this is not likely a valid conclusion. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (adopting the presumption that the right to counsel does not inhere unless the proceedings may result in a deprivation of liberty); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 662 (1988) (“[T]he Supreme Court has held that there is no absolute due process right to counsel in civil cases . . .”).

99. This argument is not about the extent or type of right at issue: the freedom of speech may be broader or more restrictive in various countries. It is about the individual's capacity to engage in the underlying action that the right protects (here, speech versus acquiring counsel).

and maintained. By contrast, civil rights apply to government actions that are lawful when done—but which have legal consequences. The right to counsel enshrined in the Sixth Amendment does not prevent the government from prosecuting individuals, but sets out a mechanism by which that use of state authority creates a countervailing power in the affected individuals.

Civil rights, then, create in individuals an otherwise-inaccessible power that can be exercised against the government. They push back against government action by limiting the power of the state to act unilaterally and empowering those who are subject to state authority. Much like the right to due process enshrined in the Fifth Amendment,¹⁰⁰ a civil right “gives a private right that authority shall go no farther.”¹⁰¹ These rights act to limit the power of the government by not only drawing a line but by establishing what the government *cannot take away*.

Definitionally, civil rights are not available absent government action. No person has Sixth Amendment rights absent a criminal prosecution by the government;¹⁰² an attempt to demand counsel in a vacuum would be nonsensical. As discussed in the preceding section, civil rights are established by reference to institutions of the government, and so they inhere only when the government acts. But it is insufficient for the purposes of the present argument to establish that civil rights are responsive to government action against *some*; they must be shown to be responsive to government action against *all*.

This task requires an understanding of why civil rights are granted in the first place and why it is important to constrain not only what powers the government may exercise (the function of natural rights), but also *how* the government may exercise the powers it is granted. Civil rights, unlike natural rights, do not circumscribe government power. The right to counsel does not create a substantive limitation on prosecutorial discretion;¹⁰³ the right to receive just compensation in

100. U.S. CONST. amend. V.

101. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

102. *See Coleman v. Balkcom*, 451 U.S. 949, 954 (1981) (Marshall, J., dissenting from denial of certiorari) (“A habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary Sixth Amendment guarantee of compulsory process, which is made applicable to the States by the Fourteenth Amendment, does not apply.” (footnotes omitted)).

103. The existence of a right to counsel does not limit a prosecutor’s ability to bring cases at will; indeed, if anything, the opposite is true. *See* David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1418 (2002) (“The

the event of a governmental taking¹⁰⁴ does not limit what the government may take.¹⁰⁵ These rights instead refer to the responsive powers of the person on whom the government acts: if your property is taken, you obtain a power to act against the government that took from you. This power exists regardless of whether the individual in fact takes action, because the individual's right exists until waived. Though the Supreme Court has never considered the specific question of whether the right to just compensation may be waived,¹⁰⁶ it has certainly accepted the proposition that constitutional rights are subject to waiver.¹⁰⁷

The necessary consequence of the possibility of waiver is that the right inheres in the affected individuals for their knowing, voluntary, and intelligent use.¹⁰⁸ The rules governing waiver are a tacit acknowledgement that the power of the individual stands outside the government action in question: the right presumptively inheres and must be waived to be deactivated.¹⁰⁹ Those who seek to deny the application of a civil right should therefore have the obligation to demonstrate why it should *not* inhere.

C. *Rights without Borders: Normative and Contingent Arguments for the Extraterritorial Application of Civil Rights*

The larger question in *Al Maqaleh* is whether rights should have any application outside the sovereign territory of the nation that acts against the individual in question.¹¹⁰ The natural/civil rights dichotomy is instructive in answering this question to better reflect the underlying purposes of the right to habeas.

Sixth Amendment right to counsel, for example, is undercut if most cases never see a courtroom due to the powers realized under broad grants of prosecutorial discretion.”).

104. U.S. CONST. amend. V.

105. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that the Takings Clause may be used to transfer property from one private individual to another so long as there is a demonstrable “public use”).

106. See *Petition for Writ of Certiorari at 11–12, Carswell v. Dep’t of Land and Natural Res.*, 130 S. Ct. 2136 (2010) (No. 09–1153) (“This court has not directly confronted the question of what standard is required for a person to waive just compensation . . .”).

107. See *Godinez v. Moran*, 509 U.S. 389, 400–01 (1993) (discussing the standard for waiver of the right to counsel).

108. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

109. See *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (noting that “every reasonable presumption should be indulged against” a finding of waiver).

110. See, e.g., Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 60 (2011) (discussing various approaches to the extraterritorial application of domestic rights).

Because natural rights underlie the system of constraints on government action, they are properly applicable only where the government has the authority to act: the sovereign territory of the nation. It would be patently absurd for United States citizens living abroad to bring lawsuits against a foreign government for violating their First Amendment rights. For an American court to hear such a claim would violate the centuries-old premise of state sovereignty.¹¹¹

By contrast, however, civil rights are responsive to government action and so should apply wherever the government acts. In *Reid v. Covert*,¹¹² the Supreme Court held that when the United States “reaches out to punish a citizen who is abroad,” the protections of the Bill of Rights still apply to that citizen.¹¹³ This conception of rights, though limited to citizens, views them as inherently responsive: although the Constitution does not apply in the foreign territory, those affected by the extraterritorial actions of the American government can still call upon the civil rights guaranteed by that government. This illustrates the importance of the distinction between action and inaction: some rights do not inhere absent government action, but do when the government “reaches out” to affect the life or liberty of an individual.¹¹⁴ But because *Reid* covers only those who were already American citizens, the question remains as to whether civil rights can apply to *all* persons affected by extraterritorial government action.

This question must be answered in two ways: normatively and contingently. The normative argument is that civil rights should inhere in any person affected by government action, regardless of their status; the contingent argument is that it is consistent with contemporary jurisprudence that they do.

The normative argument for the extraterritorial application of civil rights begins with the basic conception of these rights described above: they are grants of responsive power to individuals who are affected by government action. When these rights obtain is therefore a function of why they exist. As noted above,¹¹⁵ the primary purpose of creating civil rights cannot be to constrain government action—they

111. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2607 (1997) (discussing the 1648 Treaty of Westphalia and the resulting system of “state autonomy”).

112. *Reid v. Covert*, 354 U.S. 1 (1957).

113. *Id.* at 6.

114. *Id.*

115. See *supra* notes 100–102 and accompanying text.

do not exist until the government has already acted. This leaves two possibilities: either civil rights are another means by which government action is restricted—by the people themselves, *post facto*, rather than by a constitution—or they function as counterweights against the exercise of unchecked government authority. This distinction is fine-grained but important: it is the difference between making it *illegal* for the government to act versus creating *consequences* for a lawful government action.

Unlike natural rights, it cannot be the case that civil rights make it unlawful for the government to act. Compare a restraint on the press with a detention. The former is *presumptively* unlawful, because the First Amendment has stripped away the government’s power to act in the first place.¹¹⁶ The latter, by contrast, is a lawful prerogative of the government—but is subject to certain consequences. Normatively, then, civil rights must be counterweights: they do not make it unlawful for the government to act; rather, they regulate and respond to permissible government action.

The contingent argument requires the analysis of four “boxes” that result from the answers to two overarching questions: *where* the relevant action is taking place (sovereign territory versus abroad), and *against whom* the relevant action is taking place (a citizen versus a non-citizen). Extant case law provides the answer to three of these questions. First, civil rights unquestionably apply to citizens within the sovereign territory of the nation. Second, they apply to citizens who are abroad when the government “reaches out” to affect them.¹¹⁷ Third, they apply to noncitizens present¹¹⁸ in the sovereign territory of the nation.¹¹⁹ With regard to the fourth box, where the case for the

116. U.S. CONST. amend. I (“Congress shall *make no law* . . . abridging the freedom of speech, or of the press.” (emphasis added)).

117. *See Reid*, 354 U.S. at 6 (“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.”).

118. The Supreme Court has interpreted the “presence” test in this context similarly to the test for “presence” with regard to the question of personal jurisdiction: the resident alien must have “come within the territory of the United States and developed substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *cf. McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (using a “substantial connection” test to establish personal jurisdiction of state courts over an out-of-state corporate defendant). As such, the test may be as much a question of the power of the court to exercise jurisdiction over an individual’s claim as it is about whether a particular right has inhered in that person.

119. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (holding that resident but illegal aliens are protected under the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that a resident alien is a “person” within the meaning of the Fifth

application of civil rights is arguably at its nadir, it was not until recently that the Supreme Court held that, under certain conditions, non-citizens may have constitutional rights while on foreign soil.¹²⁰ The *Boumediene* test for the extraterritorial application of constitutional rights¹²¹ is the Court's most recent statement regarding this "fourth box." A complete account of how contemporary jurisprudence protects the civil rights of foreign citizens who are affected by American government action abroad, therefore, requires a dissection of the *Boumediene* holding.

D. *Civil Rights and the Foreign National Living Abroad: The Reach of Boumediene*

The *Boumediene* holding extended the protection of the constitutional right to the writ of habeas corpus to detainees held at Guantánamo Bay, Cuba.¹²² To reach this conclusion, the Court defined a three-prong test to determine whether the Suspension Clause has effect with respect to a particular person in a particular site of detention: first, the detainee's citizenship and status; second, the nature of the sites of apprehension and detention; and, third, the practical obstacles surrounding the entitlement to habeas.¹²³ These prongs can be generalized to all civil rights: first, the citizenship of the affected person; second, the nature of their location when acted upon; finally, practical obstacles to recognizing the right in question. *Boumediene*, therefore, firmly established that constitutional rights—at least the right to habeas—can obtain in a foreign national held outside the territory of the United States.¹²⁴

Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (holding that the Just Compensation Clause of the Fifth Amendment applies to resident aliens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that resident aliens are entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding generally that resident aliens are protected under the Fourteenth Amendment).

120. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that detainees at Guantánamo Bay, Cuba, have a constitutional right to the writ of habeas corpus and that denying them that right constitutes a violation of the Suspension Clause of the Constitution).

121. *See supra* Part II.A.

122. *Boumediene*, 553 U.S. at 771 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.")

123. *Id.* at 766.

124. *Id.* at 771 ("If the privilege of habeas corpus is to be denied to the [non-citizen] detainees [held at Guantánamo] . . . Congress must act in accordance with the requirements of the Suspension Clause.")

However laudable it may be to recognize the application of habeas as a counterweight against Executive detention, *Boumediene* does not go far enough. The central flaw in the holding of *Boumediene* is that it makes certain constitutional rights available only on the basis of flexible, easily manipulated preconditions. Yet rights are far too important and far too fundamental to appear or disappear based on “practical obstacles.”¹²⁵ Indeed, as the *Boumediene* Court recognized, the Constitution has already enshrined in the Suspension Clause the means by which habeas rights may be limited.¹²⁶ Although that clause recognizes the imperatives of exigency,¹²⁷ it leaves it to the people’s representatives in Congress—rather than the unelected Judiciary—to determine what exigencies justify suspending a basic right.¹²⁸

The flaw in *Boumediene*’s holding arose because the Court characterized the right to habeas as “an indispensable mechanism for monitoring the separation of powers.”¹²⁹ This framing misses half the issue: though the *suspension* of the writ implicates the separation of powers, its *application* does not.¹³⁰ Whether and how habeas is suspended involves an interplay between the Executive (as the detaining power), Congress (as the branch authorized to suspend the writ), and the Judiciary (which would hear the detainee’s petition). Yet whether the right to habeas obtains in an individual in the first place such that it could be suspended is a different question, one that does not implicate the separation of powers.¹³¹ Instead, it implicates the nature of the right itself—how far should the availability of

125. *Id.* at 765.

126. *Id.* at 745–46.

127. U.S. CONST. art. I, § 9, cl. 2 (permitting suspension “when in Cases of Rebellion or Invasion the public Safety may require it”).

128. It is widely and commonly understood that the Suspension Clause is a limitation on the powers of Congress. See *Boumediene*, 553 U.S. at 743–44, 771 (“That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the *limited grounds* for its suspension.” (emphasis added)); see also RESOLUTION OF THE NEW YORK RATIFYING CONVENTION (July 26, 1788), in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliot 2d ed. 1876) (noting the understanding that habeas rights obtain “except when, on account of public danger, the Congress shall suspend the privilege of the writ”).

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

130. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM L. REV. 537, 548 (“The *Boumediene* majority attributed to the Suspension Clause a dual character: [i]t confers ‘rights’ on individuals, but also forms an element of the separation of powers.”).

131. *Boumediene*, 553 U.S. at 798 (noting that habeas has been “a right of first importance” since the Framers’ era).

habeas extend?

Habeas is a civil right: it protects detained individuals from the arbitrary use of force against their persons. It limits the Executive's authority by pushing back on the use of that authority through the creation of a remedy in the form of a petition for release. Thus, the remedy inheres because there has been a detention, not because of the qualities of the person being detained or any obstacles inherent in remedying the detention. The right is created in response to the Executive's action, and so should obtain wherever, and in whomever, the Executive chooses to detain.

V. REWRITING *AL MAQALEH*: TOWARD A NEW HABEAS PARADIGM

The analysis in Part IV lays out a new conception of the habeas right that takes into account its fundamental character, rather than merely the jurisprudence that has evolved around particular cases or controversies. This Part turns to the question of how such a habeas writ would operate in practice by returning to *Al Maqaleh*. The American constitutional system does not permit the Executive to imprison an individual in time of war outside one of two systems of law: the constitutional guarantee of habeas or the Geneva Conventions' standards for the treatment of prisoners of war.¹³² By failing to honor at least one of these, the Executive would be acting as a lawmaker in violation of the separation of powers.¹³³

A. The Prisoner-of-War Paradigm and the Habeas Paradigm

The Third Geneva Convention established the customary international legal model for treatment of prisoners of war—those captured during hostilities involving a High Contracting Party to the Convention.¹³⁴ Importantly, even when “one of the Powers in conflict may not be a party to the . . . Convention, the Powers who are parties thereto shall remain bound by it.”¹³⁵ In its conflicts with al Qaeda and the governments of Iraq and Afghanistan, the United States has entered into conflict with an actor not party to the Convention (al

132. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Third Geneva Convention”].

133. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

134. Third Geneva Convention, *supra* note 132, art. 2.

135. *Id.*

Qaeda) and two states party to the Convention.¹³⁶ Thus, the Convention's prisoner-of-war paradigm should govern the treatment of those captured by the United States during those conflicts.¹³⁷

This position, however, was resoundingly rejected by the second Bush Administration.¹³⁸ In place of the Geneva Conventions, the government instituted military commissions to supervise the detention of captured enemy combatants.¹³⁹ Since the decision in *Boumediene*, however, individuals captured and held by the United States—at least those at Guantánamo Bay, Cuba—have had access to the constitutionally guaranteed writ of habeas corpus to challenge their detention.¹⁴⁰ The habeas paradigm, therefore, must be the starting point for any analysis of the rights of enemy combatants held overseas by the U.S. armed forces. Use of the Convention's prisoner-of-war paradigm would have obviated the need for habeas protection because it exists under an alternative body of law that regulates the appropriate length and conditions of detention.¹⁴¹ Absent the protections of the Geneva Conventions, however, the habeas writ is the constitutionally sanctioned alternative to an unacceptable legal vacuum.

B. Restoring Full Habeas Protection to Detainees

Given the analysis in Part IV, the full protections of habeas corpus should not be denied to any person detained by the U.S. government,

136. Afghanistan acceded to the Geneva Conventions on September 26, 1956; Iraq acceded on February 14, 1956. The United States acceded on August 2, 1955. *International Humanitarian Law—State Parties/Signatories*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last updated 2005).

137. Third Geneva Convention, *supra* note 132, art. 2. The War Crimes Act, 18 U.S.C.A. § 2441 (West 2006), directly incorporates the four Geneva Conventions, including the Third Convention (governing treatment of prisoners of war), into U.S. law.

138. The infamous “Yoo Memorandum” provided the most forceful denunciation of the position that the Geneva Conventions apply to the conflict in Afghanistan. See Memorandum from Deputy Assistant Att’y Gen. John Yoo and Special Counsel Robert J. Delahunty, Dep’t of Justice, to William J. Haynes II, Gen. Counsel to Dep’t of Def. (Jan. 9, 2002), available at http://lawofwar.org/Yoo_Delahunty_Memo.htm. But see *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) (“I believe the Convention’s language and structure compel the view that Common Article 3 [of the Geneva Conventions] covers the conflict with al Qaeda.”).

139. *Hamdan*, 548 U.S. at 568–69 (2006).

140. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

141. See Third Geneva Convention, *supra* note 132, art. 4 (defining who can be a prisoner of war); see generally *id.* part II (defining the protections accorded prisoners of war).

regardless of their citizenship or the site of detention. The D.C. Circuit's opinion in *Al Maqaleh v. Gates*,¹⁴² though in many ways a careful parsing of the test from *Boumediene*, was limited by the *Boumediene* Court's own diluted approach to habeas—especially its ill-advised reliance on a “practical obstacles” exception to the application of constitutionally guaranteed rights.¹⁴³ Both opinions fail to appreciate how the habeas writ operates to protect those who have been subjected to government action, rather than only those who happen to be well situated to bring a claim for relief. Access to the habeas writ should inhere automatically whenever any individual is subject to government detention.¹⁴⁴ The Constitution recognizes only a limited mechanism by which habeas may be suspended,¹⁴⁵ but the holding in *Boumediene* opens the door to a judicial suspension of habeas—which effectively occurred in *Al Maqaleh*. That judicial suspension is as unconstitutional as the suspension via military tribunals that was invalidated in *Boumediene*. The habeas writ is one of the foundational protections of liberty against government overreach—its application should not depend on the outcome of a three-prong test.

VI. CONCLUSION

This article has sought to lay out a framework for understanding the nature of rights in a constitutional democracy. It recognizes that not all rights are created equal because not all rights are created in the same way. Some arise naturally, out of the fact of citizenship and the powers inherent in a human being's existence in society. The right to freedom of speech, for example, is a limitation on government power because the individual's ability to speak precedes the existence of the government. Other rights are created in response to the powers granted to the government. The Sixth Amendment right to counsel, for example, obtains when the government chooses to begin a criminal prosecution¹⁴⁶ and does not apply in the absence of government action. Thus, the right it enshrines does not serve as a limitation on government power (prosecutorial discretion survives intact), but as a means of empowering those against whom the

142. 605 F.3d 84 (D.C. Cir. 2010).

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

144. *See supra* Part IV.B.

145. U.S. CONST. art. I, § 9, cl. 2.

146. *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (“[A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him.”).

government acts.

The right to the writ of habeas corpus should be understood as a means by which those who are subject to the will of the Executive are granted the power to contest the government's actions. It is a counterweight against government action, not a limitation on when the government may act. As such, it should inhere on the basis of the use of Executive authority—wherever and against whomever the Executive chooses to act. To hold otherwise—as the Supreme Court did in *Boumediene*, by creating a judicially defined limitation on its own reading of constitutional rights—is to create a vacuum in which Executive action may deprive individuals of their liberty, and possibly even their life, without a corresponding legal remedy. Such an understanding of rights runs counter to one of the cornerstones of the American system of government: that no person shall be deprived of life or liberty without due process of law.¹⁴⁷

147. U.S. CONST. amend. V.