

DETAINMENT POWER: THE LIMITS OF THE PRESIDENT'S POWER TO SUSPEND HABEAS CORPUS DURING MILITARY CONFLICTS

INTRODUCTION

The September 11, 2001 terrorist attacks and resultant military involvement in the Middle East brought to light several important questions relating to the President's ability to detain individuals during military conflicts and to restrict habeas corpus review of their detention.¹ Beginning in 2004, the Supreme Court of the United States began to address these questions in *Rasul v. Bush*² and *Hamdi v. Rumsfeld*.³ In 2008, the Court further grappled with these issues in *Boumediene v. Bush*.⁴

The vast scholarship since *Boumediene* has examined many questions, but several fundamental aspects of the doctrine have been under-attended. In examining the doctrine, this Note attempts to address two such oversights. First, most articles implicitly suggest that courts will either assign the three *Boumediene* factors bearing on the extension of habeas equal weight or weight them arbitrarily. This Note, in contrast, arranges the factors into a coherent hierarchy that more accurately reflects how courts consider them when deciding cases. Second, based on this conception of the *Boumediene* factors, this Note identifies particular scenarios where the applicability of habeas is still ambiguous. For example, it remains unclear whether habeas will extend to a detainee held in territory over which the United States is sovereign when the detainee is a civilian alien or a non-civilian (American or not) who was not afforded adequate process during his status determination. Fi-

1. Habeas corpus means, literally, "produce the body." A writ (legal action) of habeas corpus is a court order instructing an official to allow the detainee in question to appear in court and contest his detention. When the writ is suspended, courts cannot issue such instructions, and they thus lack jurisdiction to hear detainees' cases. Therefore, to say that "habeas has been suspended" is virtually equivalent to the statement that "the court lacks habeas jurisdiction." These phrases will be used interchangeably throughout this Note.

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

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

4. 553 U.S. 723 (2008).

nally, the Appendix offers a flowchart summarizing this approach and its conclusions.

I. DETAINMENT AND HABEAS CORPUS

Before examining the President's ability to prevent courts from hearing habeas corpus petitions, it is necessary first to determine whether he has the power to detain individuals at all. Absent a military conflict, the answer is likely no, whereas when Congress specifically authorizes detention, the answer is certainly yes. In *Hamdi*, the Court provided a clear answer to the question of whether a more general military authorization from Congress constitutes sufficient justification for detention.

In *Hamdi*, an American citizen was detained in Afghanistan for supposed involvement with a Taliban military unit.⁵ Hamdi's father filed suit on his behalf, alleging, among other charges, that the Executive did not have authority to detain Hamdi.⁶ According to Hamdi, Congress had not authorized the President to detain U.S. citizens when it passed the Authorization for Use of Military Force (AUMF) to allow the President to respond to the September 11, 2001 terrorist attacks.⁷ The AUMF permits the President to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."⁸ The statutory language, however, did not specifically authorize the President to *detain* individuals. Nevertheless, the Court rejected Hamdi's argument, holding that "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."⁹ Moreover,

5. *Hamdi*, 542 U.S. at 510.

6. *Id.* at 511.

7. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

8. *Id.*

9. *Hamdi*, 542 U.S. at 518.

so long as the President believed the individual had aided terrorists, the Court held that the AUMF authorized the detention of both aliens and citizens.¹⁰

But although the President's power to detain may be settled, his ability to prevent courts from hearing detainees' petitions for writs of habeas corpus following detainment stands on shakier ground. Courts' habeas jurisdiction was originally derived from two sources: the Constitution and federal statute. The Constitution asserts that "[t]he 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."¹¹ By recognizing the writ, the Constitution recognizes courts' jurisdiction to hear petitions for habeas. Under 28 U.S.C. § 2241, courts are also authorized "within their respective jurisdictions" to issue writs of habeas corpus for prisoners held "in custody in violation of the Constitution or laws or treaties of the United States."¹²

In *Rasul*, the Court faced petitions for habeas brought on behalf of two Australians and twelve Kuwaitis who were captured abroad and held without charges amidst hostilities between the United States and the Taliban.¹³ The government argued that federal courts did not have jurisdiction to hear petitions for habeas brought by foreign nationals held on foreign soil.¹⁴ The Court found this argument unpersuasive. After distinguishing several of its previous rulings, the Court held that statutory habeas jurisdiction under 28 U.S.C. § 2241 was proper,¹⁵ although it did not address whether the Court had constitutional habeas jurisdiction.

Central to the Court's ruling in *Rasul* was that it did not believe Guantanamo Bay constituted "foreign soil" beyond the jurisdictional reach of federal courts. To prove this conclusion, the Court looked to the lease agreement over the territory that the United States and Cuba signed following the Spanish-American War. Under the agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]" and "the Republic of Cuba consents that during

10. *See id.* at 519.

11. U.S. CONST. art. I, § 9, cl. 2.

12. 28 U.S.C. § 2241(a), (c)(3) (2006).

13. *Rasul v. Bush*, 542 U.S. 466, 470–72 (2004).

14. *Id.* at 475, 480.

15. *Id.* at 484.

the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.”¹⁶ In 1934, the parties signed a treaty providing that the lease would continue “[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo.”¹⁷ Based on this continual exercise of “complete jurisdiction,” the Court found that statutory habeas jurisdiction was appropriated under 28 U.S.C. § 2241.¹⁸ Moreover, because § 2241 made no mention of citizenship, the Court held that both citizens and foreign nationals were entitled to bring petitions for habeas before federal courts.¹⁹ Overall, the Court’s ruling amounted to a substantial restriction on the President’s ability to prevent detainees from petitioning federal courts for statutory habeas corpus.

But the holding was short-lived. In 2006, Congress passed the Military Commissions Act (MCA), which amended 28 U.S.C. § 2241 and provided that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.²⁰

By abolishing statutory habeas jurisdiction, the MCA effectively overruled *Rasul*.

Three years later, in *Boumediene*, the Court was faced with petitions for habeas brought by foreign nationals who were captured abroad, designated enemy combatants, and detained at the U.S. naval station in Guantanamo Bay.²¹ Because the MCA clearly stripped the Court of its statutory habeas jurisdiction, the Court sought to determine whether federal courts had constitutional habeas jurisdiction to hear the case in question.²² If it did have such jurisdiction, then the MCA violated the Con-

16. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418.

17. Treaty Between the United States of America and Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683, T.S. No. 866.

18. *Rasul*, 542 U.S. at 480–81.

19. *Id.* at 481.

20. Military Commissions Act of 2006 § 7(a), 28 U.S.C. § 2241 (2012).

21. *Boumediene v. Bush*, 553 U.S. 723, 732–34 (2008).

22. *Id.*

stitution by denying the writ to detainees. In making this determination, the Court took into account three important factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."²³

In the petitioners' case, these factors militated in favor of extending habeas under the Constitution. First, although the petitioners were not American citizens, no clear evidence had been put forth suggesting that they were enemy combatants and they had not been afforded an adequate opportunity to challenge their classification as such before a military tribunal.²⁴ Second, the Court noted that, although the United States does not exercise *de jure* (legal) sovereignty over Guantanamo Bay, it nevertheless exercises *de facto* (actual) sovereignty.²⁵ As in *Rasul*, the Court felt *de facto* sovereignty justified habeas jurisdiction.²⁶ Third, the Court found that few practical obstacles would prevent the Executive from making accommodations for habeas review.²⁷ Based on this analysis, the Court struck down as unconstitutional the MCA provision suspending habeas and determined that federal courts had constitutional habeas jurisdiction to hear the petitioners' claims.²⁸

Although the particular circumstances in *Boumediene* caused the Court to extend habeas, a different set of circumstances might have led to a different result under the Court's three-part analysis. This is particularly true given the context in which the Court promulgated the factors. The Court seemed to seek a careful balance between the "freedom from arbitrary and unlawful restraint" and "proper deference . . . to the political branches."²⁹ In regard to proper deference, the Court noted that:

Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new

23. *Id.* at 766.

24. *Id.* at 766–67.

25. *See id.* at 768–69.

26. *See id.*

27. *Id.* at 769–70.

28. *See id.* at 771.

29. *Id.* at 796–98.

and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.³⁰

Thus, a federal court, in determining whether it may hear a habeas petition, must consider the three *Boumediene* factors as well as the Court's motivations for promulgating them. The following sections examine each factor in turn.

A. *Boumediene Factor 1: Citizenship, Status, and Adequacy of Process*

The first prong of *Boumediene* is the most expansive, referencing three questions that a court must take into account when determining whether the President may restrict habeas. First, are the detainees in question American citizens? Second, have the detainees been classified as non-civilians (soldiers, enemy combatants, etc.)? Third, were the detainees given an adequate opportunity to rebut their classification before a military tribunal? Each of these questions is important, though they may not all bear equal significance in a court's analysis.

American citizenship is a "key factor" militating in favor of extending habeas.³¹ The Supreme Court made this point clear in 1957 when it decided *Reid v. Covert*.³² That case involved two military wives who had killed their husbands while stationed abroad in England and Japan.³³ The women were tried and convicted of murder by courts-martial under the Uniform Code of Military Justice (UCMJ).³⁴ After their convictions, both women brought suit in federal court, arguing that they were constitutionally entitled to a trial before an Article III court rather than a court-martial.³⁵ The Court agreed, holding that "under our Constitution courts of law alone are given power to try civilians for their offenses against the United States."³⁶ The Court also issued a strong rebuke to the President for acting outside his authority:

[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The

30. *See id.* at 797.

31. *Id.* at 760.

32. 354 U.S. 1 (1957).

33. *Id.* at 3-4.

34. *Id.*

35. *See id.* at 3-5.

36. *Id.* at 40-41.

United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. 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. This is not a novel concept. To the contrary, it is as old as government.³⁷

This passage in *Reid* garnered support from only a plurality of the Court. Therefore, though its strong language regarding the constitutional protections afforded to citizens supports the extension of habeas, it is not dispositive. In fact, prior to *Reid*, the Court had denied habeas to a citizen in *In re Ross*,³⁸ a case decided in 1891. In that case, the Court refused to hear a habeas petition from an American seaman who was convicted by the American consular tribunal in Japan of murdering one of his fellow seamen.³⁹ Although the plurality in *Reid* viewed *Ross* as “a relic from a different era,”⁴⁰ *Ross* nevertheless remains valid law today.

Moreover, the Court has recognized that non-civilian status may prevent courts from entertaining habeas claims, regardless of whether the detainee in question is an American citizen. For example, in the 1942 case *Ex parte Quirin*,⁴¹ the Court had occasion to address whether both citizen and non-citizen soldiers were entitled to habeas. The case dealt with a group of soldiers, composed of Germans and one American, who had been captured after covertly entering the United States in an attempt to destroy American war facilities.⁴² Upon their capture, the President appointed a military commission to try the soldiers.⁴³ But before the commission could reach a verdict, the soldiers brought suit in federal court seeking a writ of habeas corpus.⁴⁴ The Court denied this claim, holding that soldiers being tried for war crimes were not guaranteed access

37. *Id.* at 5–6 (footnotes omitted).

38. 140 U.S. 453 (1891).

39. *Id.* at 454, 480.

40. *Reid v. Covert*, 354 U.S. 1, 12 (1957).

41. 317 U.S. 1 (1942).

42. *Id.* at 20–21.

43. *Id.* at 22.

44. *See id.* at 23–24.

to Article III courts.⁴⁵ This conclusion was evidenced by “a long course of practical administrative construction by [our government’s] military authorities.”⁴⁶ Additionally, the Court did not believe that the Fifth Amendment would deny jury trials to its own armed forces⁴⁷ while affording such trials to enemy soldiers.⁴⁸ Finally, the Court held that the denial of habeas was equally applicable to the German soldiers and the American soldier. According to the Court, “[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”⁴⁹

In 1950, the Court revisited the question of soldiers’ entitlement to habeas in the pivotal case *Johnson v. Eisentrager*.⁵⁰ That case dealt with German nationals who were captured in China and convicted by an American military commission for failing to cease fire after Germany’s surrender in World War II.⁵¹ The German nationals petitioned for habeas, which the Court denied.⁵² In its holding, the Court took into account several factors, including that the detainees:

(a) [are] enemy alien[s]; (b) [have] never been or resided in the United States; (c) [were] captured outside of our territory and there held in military custody as prisoner[s] of war; (d) [were] tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [are] at all times imprisoned outside the United States.⁵³

45. *See id.* at 45–46.

46. *Id.* at 35.

47. U.S. CONST. amend. V. (excepting from the requirement of grand jury indictment “cases arising in the land or naval forces”).

48. *Quirin*, 317 U.S. at 44–45.

49. *Id.* at 37.

50. 339 U.S. 763 (1950).

51. *Id.* at 765–66.

52. *Id.* at 781.

53. *Id.* at 777. In fact, there is some question as to whether these factors were central to *Eisentrager*’s holding. Justice Scalia, in his dissent in *Boumediene*, argues that *Eisentrager* holds only that habeas may not issue to aliens held abroad. *Boumediene v. Bush*, 553 U.S. 723, 836 (2008) (Scalia, J., dissenting). In his view, “the characteristics of the German prisoners were set forth, not in application of some ‘functional’ test, but to show that the case before the Court represented an *a fortiori* application of the ordinary rule.” *Id.* at 837. Nevertheless, the majority in *Boumediene* believed that the *Eisentrager* factors “outline[d] . . . a framework for

Although the case is not as clear as *Quirin* and does not address U.S. citizens who committed crimes while in uniform, it does reaffirm the conclusion that non-citizens need not be afforded habeas corpus when detained abroad.

Given the importance of soldier or enemy combatant status, the President's ability to appropriately classify detainees as such is essential to the question of whether he must extend habeas. In *Eisentrager*, the classification was straightforward because the petitioners did not contest their status as enemy aliens.⁵⁴ According to the Court in *Boumediene*, this fact was "not trivial" to *Eisentrager's* holding.⁵⁵ It was also significant that the petitioners were afforded "a rigorous adversarial process to test the legality of their detention."⁵⁶ Therefore, if detainees seek to challenge their status—as many sought to do following their capture during the "War on Terror," including the petitioners in *Rasul*, *Hamdi*, and *Boumediene*—the President may not be allowed to refuse them habeas corpus based on *Eisentrager* unless he can demonstrate that they were afforded adequate substitute process by a military tribunal when they were determined to be enemy combatants.

Of course, what constitutes adequate process is subject to dispute. In *Eisentrager*, which held that the petitioners were afforded adequate process, the detainees were "charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses."⁵⁷ In *Boumediene*, by contrast, the detainees were afforded a "Personal Representative" but not counsel; the government's evidence was accorded a presumption of validity; the detainees were allowed to put forth only "reasonably available" evidence, which included very little given their confinement and lack of counsel; and the effectiveness of their ability to appeal their status determination was limited by the defects

determining the reach of the Suspension Clause" and ultimately derived its three-part test from these factors. *See id.* at 766.

54. *Boumediene*, 553 U.S. at 766 ("[T]he petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were 'enemy alien[s].'").

55. *Id.* at 767.

56. *Id.*

57. *Id.* (citations omitted).

in the initial review process.⁵⁸ The Court in *Boumediene* noted that these procedural measures were “far more limited” than those in *Eisentrager* and concluded that they “fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”⁵⁹ The Court, however, failed to define the amount of process necessary to eliminate the need for habeas review.⁶⁰ It is thus unclear whether the President must afford detainees process commensurate with that afforded in *Eisentrager*—including counsel, evidentiary privileges, and the right to cross-examine witness—or whether he may afford them safeguards that chart a middle course between the procedures in *Eisentrager* and *Boumediene*.

The preceding discussion leads to several conclusions. First, when deciding habeas cases, the Court will first consider whether the detainee qualifies as a civilian or an enemy combatant. Second, if the detainee is a civilian, the Court will further consider whether the detainee is an American or foreign citizen to determine the applicability of habeas. On the other hand, if the detainee is a soldier or enemy combatant, the Court will generally allow restrictions on the writ regardless of citizenship. Finally, before the Court will accept the Executive’s classification of a detainee as a soldier or enemy combatant, it must be satisfied that the detainee has been afforded an adequate opportunity to contest his classification before a military tribunal. Although it is unclear how much process the President must afford detainees, the Court could require that the detainee be given notification of the particulars of his classification, representation by counsel, the ability to present evidence, and possibly the ability to cross-examine witnesses.

B. *Boumediene* Factor 2: Location of Apprehension and Detention

As discussed above, the first *Boumediene* factor suffices to decide cases involving American civilians (who will receive habeas) and enemy combatants who were afforded adequate process during their status determinations (who will not receive habeas). This factor does not suffice, however, to decide cases involving foreign civilians and enemy combatants who were

58. *Id.*

59. *Id.*

60. *Id.* at 779 (“We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”).

not afforded adequate process during their status determinations. In those cases, the Court will proceed to the second factor in the *Boumediene* analysis, the location of detention.

If detention occurs in the United States, courts will find it difficult to deny habeas to civilians, particularly when they are American citizens. This was the case in *Ex parte Milligan*,⁶¹ an opinion issued in the aftermath of the Civil War. Milligan, a non-military American citizen and resident of Indiana, was detained and sentenced to death by a military commission for supposed crimes committed during the Civil War.⁶² Milligan sought a writ of habeas corpus in federal court to contest his classification as an enemy belligerent, arguing that he was entitled to trial in an Article III court because he was a citizen and a civilian.⁶³ The Court agreed, holding that “no usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in nowise connected with the military service.”⁶⁴ According to the Court, American citizen civilians were entitled to petition the courts for habeas corpus so long as the courts had not been closed entirely due to the imposition of martial law.⁶⁵ Although military belligerents of all nationalities may be denied habeas while held in the United States, as both *Milligan* and *Quirin* affirm, *Milligan* makes clear that the writ must run for American civilians.

As indicated above, *Rasul* and *Boumediene* extended *Milligan*'s logic a step further, affording habeas privileges to even non-citizens held in areas over which the United States is sovereign—whether that sovereignty is de jure or de facto—when those non-citizens have not been adequately classified as soldiers or belligerents. This extension invalidated President Bush's attempt to prevent courts from affording habeas review to detainees captured during the “War on Terror” by locating their detention center in Guantanamo Bay.⁶⁶ That is, the Court

61. 71 U.S. 4 Wall. 2 (1866).

62. *Id.* at 107.

63. *Id.* at 107–08.

64. *Id.* at 121–22.

65. *Id.* at 121.

66. See *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (“The President relied on our settled precedent in *Johnson v. Eisentrager* when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him ‘that the great weight of legal authori-

rejected President Bush's assumption that the Constitution could never extend to foreign nationals held outside territories over which the United States exercised de jure sovereignty.

If, however, individuals are held in locations where the United States does not exercise either de jure or de facto sovereignty, the President may have more leeway to restrict habeas. This was the case in *Eisentrager*, where German prisoners were held in Landsberg Prison, a facility operated by the United States but located on German soil.⁶⁷ As the Court in *Boumediene* noted when discussing *Eisentrager*, the United States' control over Landsburg Prison, unlike its control over the naval station in Guantanamo Bay, was "neither absolute nor indefinite."⁶⁸ That the United States shared authority over the prison with the Allied Forces evidenced this fact, as did the prison's temporary nature.⁶⁹ Thus, if the President detains individuals in areas over which the United States is not sovereign, he may be given leeway to restrict habeas.

This leeway, however, cannot be predicted with certainty. As discussed above, the prisoners in *Eisentrager* were given adequate adversarial procedures in addition to being held abroad, and they did not actually contest their status as soldiers. Had the process been lacking and had the prisoners sought to contest their status, perhaps the Court would have extended habeas even though the prisoners were held outside U.S. sovereign territory. This remains an open question, and Court precedent could support either conclusion.⁷⁰ Furthermore, even if the Court determined that detainment outside U.S. sovereign territory justified the President's suspension of the writ, this concession would likely amount to very little. Practically speaking, the President has only a limited ability to detain prisoners on land

ty indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].'" (citations omitted)).

67. *Id.* at 768 (majority opinion).

68. *Id.*

69. *Id.*

70. Compare *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950) ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.") with *Hirota v. MacArthur*, 338 U.S. 197, 204 (1949) (Douglas, J., concurring) ("If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag.").

over which the United States lacks sovereignty. Excluding the post-war scenario faced in *Eisentrager*, such detainment would likely arise only if the President received permission from another country to detain prisoners on that country's land or if he decided to detain prisoners in the middle of a conflict zone. The former scenario seems unlikely—even if such an arrangement were negotiated, it might cause the United States to gain de facto sovereignty over the area in question. The latter scenario also seems improbable given the danger of establishing prisons in the middle of war zones. Of course, these scenarios are not unfathomable. Indeed, as Justice Scalia noted in his dissenting opinion in *Boumediene*, President Bush may have considered these options if he believed that the Court would eventually extend habeas rights to the detainees at Guantanamo Bay.⁷¹

Finally, it should be noted that, although this discussion has centered on the location of detainment, the location of apprehension is also relevant to the Court's decision whether to extend habeas. If a prisoner is apprehended in the United States but detained outside the country, the Court may nevertheless determine that the second prong of *Boumediene* militates in favor of granting habeas because "[his] presence in the country implied protection."⁷²

Overall, the second prong of *Boumediene* is straightforward in itself, but more difficult to interpret in combination with the first prong. Considered alone, the Court's precedent suggests that presence in territory over which the United States exercises either de jure or de facto sovereignty favors extending habeas, whereas presence elsewhere favors allowing suspension of the writ. The President, however, may still be prevented from suspending habeas for citizens held outside the United States' sovereign domain. Likewise, the President may still be allowed to suspend habeas for non-citizens held in the United States and its territories when he affords adequate process in their status determination hearings, and he may still be prohibited from doing

71. *Boumediene*, 553 U.S. at 828 (Scalia, J., dissenting) ("The President relied on our settled precedent . . . when he established the prison at Guantanamo Bay for enemy aliens Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention.").

72. *Eisentrager*, 339 U.S. at 777–78.

so for individuals held outside the United States when he affords inadequate process.

C. *Boumediene Factor 3: Practical Obstacles*

As indicated above, the Supreme Court will proceed to an analysis of the second *Boumediene* factor when facing cases involving foreign civilian detainees or enemy combatant detainees who were not afforded adequate process during their status determination hearings. In such cases, the detainee's presence in territory over which the United States is sovereign weighs in favor of extending the writ.

The third factor under the *Boumediene* can be seen as a means of reversing this presumption in favor of extending the writ, as evidenced by the Court's requirement that practical obstacles outweigh the detainees' interests in obtaining habeas. Practical obstacles must include more than merely the "incremental expenditure of resources" necessary to comply with judicial process.⁷³ Rather, the writ will be stayed only when its issuance would prove dangerous due to physical hazards, such as when the detention facility is located in an "active theater of war," or when issuing the writ would cause tensions with the host government.⁷⁴

In *Boumediene*, no such hazards were present because the Guantanamo Bay detainees were held in a "secure prison facility located on an isolated and heavily fortified military base."⁷⁵ Additionally, the Court noted that adjudicating habeas claims would not cause serious friction with the Cuban government.⁷⁶ In contrast, the detainees in *Eisentrager* were held in recently surrendered Germany amidst an occupation zone spanning 57,000 square miles with a population of 18 million.⁷⁷ Although the occupation proceeded smoothly, there was concern that the American military might face threats from "enemy elements, guerrilla fighters, and 'were-wolves.'"⁷⁸ Under these circumstances, issuance of the writ simply would be unworkable.

73. See *Boumediene*, 553 U.S. at 769.

74. *Id.* at 770.

75. *Id.*

76. *Id.*

77. *Id.* at 769.

78. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). "Werewolves" were Nazi commandos who operated behind enemy lines as the Allies advanced through

For practical reasons, the President is unlikely to establish detention centers in active or recent war zones when it would otherwise be possible to move the detainees. Doing so would place the detention center personnel in danger, because the facility might become a target for attacks. This would also increase the risk of prisoner escape, which could defeat any perceived gains of suspending habeas, given that the purpose of restricting the writ is to keep prisoners imprisoned. Thus, the third *Boumediene* factor seems most appropriately viewed simply as an acknowledgement that the exigencies of war may sometimes create an environment that is not conducive to providing prisoners with habeas rights.

II. EXTENT OF HABEAS REVIEW

Having determined the circumstances in which the writ will issue, it is necessary next to determine what habeas corpus review actually requires. It certainly entails access to a hearing before a federal court. But must that hearing be before a jury if one was not provided at the initial status determination? Must the detainee be afforded full evidentiary rights? In other words, does habeas review entail the full panoply of rights mentioned under the Constitution, or something less?

On this question, the Court in *Boumediene* promulgated two guidelines. First, habeas review must provide the prisoner with “a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”⁷⁹ Second, the reviewing court must have “the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.”⁸⁰ The Court also noted that habeas corpus is, “above all, an adaptable remedy” and that “depending on the circumstances, more may be required.”⁸¹ According to the Court, the scope of habeas will depend in large part on “the rigor of any earlier proceedings.”⁸²

Germany. See MARK MAZOWER, *HITLER’S EMPIRE: NAZI RULE IN OCCUPIED EUROPE* 546–47 (2008).

79. *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

80. *Id.*

81. *Id.*

82. *Id.* at 781.

As the Court itself admits, these guidelines are not a complete answer.⁸³ Chief Justice Roberts, in his dissenting opinion, went so far as to argue that the habeas prescriptions set forth by the Court amounted to “a set of shapeless procedures.”⁸⁴ Justice Scalia, in his dissent, noted that “we have no idea what those procedural and evidentiary rules [for habeas review] are.”⁸⁵ Although the Court may have helped to explain when the President must allow petitions for habeas, it did little to define the contours of habeas review itself.

III. CONCLUSION

This Note and the Appendix that follows provide a means of organizing the existing habeas doctrine and distinguishing between settled and unsettled aspects of the case law. Numerous questions have been answered by the cases. For example, the President may not prevent detainees from seeking to petition federal courts for habeas if they have not been afforded an adequate opportunity to challenge their classification as a soldier or enemy combatant, are held in a territory over which the United States exercises either de jure or de facto sovereignty, and are not subject to practical obstacles that counsel hesitation in extending the writ. Less clear is whether the President can restrict habeas when one of these factors is lacking. For example, it remains an open question whether the President may refuse habeas to a foreign civilian being held in a territory over which the United States lacks sovereignty. Moreover, some factors in the analysis itself remain hazy. For example, how much process must the President afford detainees during the classification proceeding to avoid extending habeas? Is process falling somewhere between that afforded in *Eisentrager* and that afforded in *Boumediene* sufficient, or do the adversarial proceedings in *Eisentrager* represent the bare minimum? Finally, even if the writ issues, the extent of the procedure that must be afforded during a habeas review is still unclear.

The Court may be forced to address these complicated issues in future cases. The detention of individuals captured during hostilities is sure to continue, and even may increase in the fu-

83. *Id.* at 779.

84. *Id.* at 801 (Roberts, C.J., dissenting).

85. *Id.* at 829 (Scalia, J., dissenting).

ture. Guantanamo Bay remains open. The United States' involvement in Afghanistan, Iran, Libya, and other Middle Eastern countries has increased in recent years, and the nation remains involved in Iraq. If military or terrorist hostilities escalate in any of these countries and the President is forced to detain individuals in response, then the Court may face yet unsettled questions regarding the details of detainment.

It is important that the President understand both the settled and unsettled aspects of habeas review, not merely to exploit the vagaries of the law, but to avoid the problems faced by past administrations that have struggled with the issue. President Bush and his staff expended time, energy, and resources researching habeas and lobbying Congress for favorable legislation relating to detainment. These efforts cost him political capital and often forced him to divert his attention away from military operations. Perhaps his actions were necessary, given the comparatively unsettled state of the law then as compared to now. Whatever the case, it is clear that, by learning from the Court's responses to President Bush's actions in *Rasul*, *Hamdi*, and *Boumediene*, as well as pertinent precedent from previous military struggles, such as *Milligan*, *Quirin*, and *Eisentrager*, a President can more effectively minimize conflicts with the judicial branch and ultimately formulate more effective foreign policy.

Zach Howe

APPENDIX: HABEAS FLOWCHART

