Extraterritorial Application of the Writ of Habeas Corpus After *Boumediene*: With Separation of Powers Comes Individual Rights*

For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

- Justice Stevens[1]

I. INTRODUCTION

Lakhdar Boumediene was first arrested on suspicion of plotting to bomb the U.S. Embassy in October of 2001 in Bosnia.[2] More than seven years later, Boumediene is still in custody at Guantanamo Bay. Boumediene was arrested along with five other Algerian men at the request of the U.S. Embassy.[3] The Bosnian Police conducted a three-month investigation of the men, including a search of their homes, computers, and other documents.[4] At the conclusion of the investigation, the Bosnian Supreme Court ordered their release for lack of evidence, at which time the U.S. government stepped in and took custody of the men, Boumediene included.[5] The U.S. government transported the men to the detention facility at Guantanamo Bay on the night of January 17, 2002.[6] Finally, in October of 2008, the U.S. government dropped the charges regarding the embassy bombing, yet kept the Algerian men in custody, claiming the men had intended to go to Afghanistan to wage war against the United States.[7] After nearly seven years of detention at Guantanamo,

* *Tim J. Davis*. J.D. candidate 2010, University of Kansas School of Law. B.A., B.S. 2007, University of Kansas. The Author would like to thank: his family and friends for their support, the Kansas Law Review Staff and Board for all their hard work, and Christina Elmore for her valuable comments on earlier drafts.

1. Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

2. *Profiles: Odah and Boumediene*, BBC NEWS, Dec. 4, 2007, http://news.bbc.co.uk/2/hi/americas/7120713.stm.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, WASH. POST, Dec. 16,

and months after the landmark case bearing his name was handed down, Boumediene's release was finally ordered[8]—yet Boumediene remains at Guantanamo.[9] Three of the five Algerian men were sent back to Bosnia, and even though Boumediene has been "freed," the U.S. government does not yet know where to send him because Bosnia will not readmit him to the country.[10]

Boumediene's story illustrates the danger that Justice Stevens was pointing to in the above-cited quote: without habeas corpus, U.S. detention policy in the war on terror devolves into tyranny, holding prisoners without justification for years on end. The executive branch has detained prisoners at Guantanamo since shortly after 9/11 without meaningful review from the judicial branch of the U.S. government.[11] The landmark Supreme Court case, *Boumediene v. Bush*, decided on June 12, 2008, held that the writ of habeas corpus applied extraterritorially to the detainees held at Guantanamo.[12] Some have called the decision a judicial victory that gives freedom to the enemy in a way that will most certainly cause more American lives to be lost.[13] Judical victory or not, it remains clear that the true "victor"—Boumediene—has yet to receive his spoils.

Considering the holding of *Boumediene* in the narrow context of Lakhdar Boumediene's story, the Court's decision seemed to concern individual rights, in particular a detainee's right to assert the writ of habeas corpus. On the other hand, Justice Stevens's remarks suggest another lens through which the holding might be viewed: one of separation of powers. Justice Stevens properly recognized that our democracy is negatively affected if the Executive has unrestricted power to imprison; therefore, the writ must serve as a check upon that power. The *Boumediene* decision reflected elements of both of these viewpoints,

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2008, at A2; Carol J. Williams, *U.S. Releases 3 Detainees to Bosnia*, L.A. TIMES, Dec. 17, 2008, at A13.

8. Terry Frieden, *Federal Judge Orders Release of 5 Guantanamo Detainees*, CNN.com, Nov. 20, 2008, http://www.cnn.com/2008/POLITICS/11/20/gitmo.detainees/; *Judge Orders Guantanamo Releases*, ALJAZEERA.NET, Nov. 21, 2008, http://english.aljazeera.net/news/americas/2008/11/200811201727332 3533.html.

9. Finn, *supra* note 7. As of the time this article was written—March 14th, 2009—Boumediene was still being held at Guantanamo Bay. David G. Savage, *They Are 'Enemy Combatants' No More; The Administration Abandons the Term and Curbs Executive Power*, L.A. TIMES, March 14, 2009, at A16.

10. Finn, *supra* note 7.

11. Boumediene v. Bush, 128 S. Ct. 2229, 2279 (2008) (Souter, J., concurring).

12. *Id.* at 2262 (majority opinion).

13. *See id.* at 2294 (Scalia, J., dissenting) ("The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.").

as the Court addressed a problem in terms of separation of powers, yet delivered a solution focused on individual rights. The Court recognized the danger of an executive with limitless power to detain, yet delivered a very narrow restraint on that power. The Court held that the detainees at Guantanamo may challenge their detention using the writ of habeas corpus; but the holding was limited specifically to those Guantanamo detainees. The true inadequacy of this opinion remains to be seen as President Obama signed an executive order on January 22, 2009, pledging to close Guantanamo within a year.[14] If transferred to a different location outside the United States, the issue of habeas and this group of detainees may rise again.

This Comment will demonstrate that, given the nature of the writ of habeas corpus, individual rights and separation of powers are intertwined; therefore, a holding based upon the principles of one will inevitably be based on the principles of the other. This intermingling of concepts provides an explanation of why the Court resorted to questionable interpretations of century-old precedent to reach a prescription ill-fitting of the stated problem. The Court is uncomfortable with a holding that rings of extending "fundamental rights" to detainees; therefore, it stopped short of doing so by employing an awkward "practicality" test. It remains to be seen how effectively this decision will aid the detainees in Guantanamo, but it will certainly not aid detainees held by the Executive outside of Guantanamo. This Comment argues that the disfavored idea of extending fundamental rights led the Court to provide a timid and inadequate prescription to the separation of powers problem. Moreover, the proper solution appears when individual-rights concerns do not overshadow the analysis. The Executive's power to detain is necessarily limited by judicial review in the form of habeas corpus, and this separation of power is only truly achieved when the judiciary can review every detention made by the Executive, regardless of time, place, or person. Any solution that falls short of that erodes the principles of democracy.

This Comment begins with background information regarding the legislative reaction to the "war on terror cases," the foundations of the writ of habeas corpus, and the precedent dealing with extraterritorial application of the Constitution. It then analyzes the Court's use of precedent, and offers a theory as to why the Court may have employed questionable interpretation of that precedent. The Comment argues that

14. Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, N.Y. TIMES, Jan. 22, 2009, *available at* http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html.

this flawed interpretation of precedent resulted in an inadequate solution to the problem noted by the Court, and it addresses major counter arguments to this position. Finally, it explains why allowing every executive detention to be challenged using the writ of habeas corpus will restore the proper balance of power between the executive and judicial branches.

II. BACKGROUND

A. Guantanamo Bay: The Battle to Maintain a "Legal Black Hole"

Shortly after the terrorist attacks of September 11, 2001, the Executive rapidly began capturing detainees abroad and transporting them to Guantanamo Bay, Cuba.[15] It has been suggested by many scholars that the Executive chose Guantanamo as a detention location to create a zone where no laws would apply, shielding the detention and related occurrences from any sort of legal review.[16] The Executive derived this particular understanding of the law from *Johnson v. Eisentrager*,[17] as evidenced by its stringent reliance on that case.[18] *Eisentrager* was commonly interpreted as holding that the Constitution only applied in areas where America exercised formal sovereignty.[19] The Executive held prisoners in Guantanamo under the power granted by

15. *See* A. Wallace Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AM. L.J. 245, 248–49 (2008) ("Amidst the subsequent fighting in Afghanistan in late 2001, hundreds of suspected Taliban and al Qaeda associates were captured by U.S. military forces or handed over to U.S. forces by anti-Taliban Afghan allies. By January 2002, twenty such detainees had been transported to Guantanamo Bay Naval Base in Cuba, and by February 2002, 300 were being held at Guantanamo.").

16. *See, e.g.*, *id.* at 262 ("It is now clear that the Administration's placement of its detainee prison at Guantanamo Bay was based on the notion that, in virtue of Cuba's residual sovereignty over that site, the writ of habeas corpus would not apply there."); *see also* Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 642–43 (2006–2007) ("The U.S. government holds non-citizens in overseas prisons and in Guantánamo precisely because it believes that these are places in the world where the government is accountable at law to no person or judge.").

17. 339 U.S. 763 (1950).

18. Marcia Coyle, *High Court Justices to Review Detainees' Rights Under Habeas Corpus: Court to Weigh Whether Military Commissions Act Unconstitutionally Bars Access to the Writ*, THE NAT'L L.J., Dec. 4, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1196676275178.

19. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1049–50 (2008) ("In July 2002, the district court [in *Rasul v. Bush*] dismissed the cases for lack of jurisdiction, relying on the Supreme Court's decision in Johnson v. Eisentrager to conclude that 'aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.'" (quoting Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002), *aff'd sub nom*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466 (2004))).

the Authorization to Use Military Force (AUMF) and began conducting Combatant Status Review Tribunals (CSRTs) to determine whether the persons detained at Guantanamo were "enemy combatants" such that they "could be detained for the duration of the 'war on terror.'"[20]

In 2004, the Supreme Court held in *Rasul v. Bush* that the federal habeas statute, 28 U.S.C. § 2241, provided habeas relief to the Guantanamo detainees,[21] hinting in its opinion that the detainees may have a constitutional habeas right as well.[22] The Supreme Court granted certiorari to hear the first habeas petition filed by a Guantanamo detainee and, in response, Congress passed the Detainee Treatment Act of 2005 (DTA) to remove jurisdiction of federal courts to hear habeas petitions filed by aliens held in Guantanamo.[23] In 2006, the Supreme Court in *Hamdan v. Rumsfeld*[24] interpreted the DTA to be non-retroactive, such that the Supreme Court could hear the habeas petitions made prior to enactment of the statute.[25] In response to *Hamdan*, Congress enacted the Military Commissions Act (MCA), which removed federal jurisdiction over all petitions, pending and future, filed by the Guantanamo detainees.[26] Finally, in *Boumediene*, the Court invalidated the section of the MCA that blocked jurisdiction over the claims of detainees, holding it a violation of their constitutional right to petition for habeas corpus.[27]

This exchange between the three branches of government played out over the course of four years, and displayed the Executive's determination to keep Guantanamo detainees out of federal courts. Months after the *Boumediene* decision, the courts were still determining what rules would govern the habeas process,[28] and the Executive still held prisoners in places outside of Guantanamo, where detainees' rights remained even more uncertain.[29]

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20. MICHAEL JOHN GARCIA, *BOUMEDIENE V. BUSH*: GUANTANAMO DETAINEES' RIGHT TO *HABEAS CORPUS*, CRS REPORT FOR CONGRESS 1 (2008), *available at* http://www.fas.org/sgp/crs/natsec/RL34536.pdf.

21. *Id.* at 2.

22. Rasul v. Bush, 542 U.S. 466, 481 (2004).

23. GARCIA, *supra* note 20, at 2.

24. 548 U.S. 557 (2006).

25. GARCIA, *supra* note 20, at 2.

26. *Id.*

27. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

28. Editorial, *Detainees' Day in Court*, WASH. POST, Sept. 17, 2008, at A18.

29. *See* Knowles & Falkoff, *supra* note 16, at 640 (stating that the United States has detainees "in U.S. detention centers in Afghanistan and Iraq, and even in the CIA 'black sites' where high-value detainees have been kept incommunicado in undisclosed locations").

B. Foundations of the Writ of Habeas Corpus

The writ of habeas corpus is guaranteed in the Constitution at Article 1, Section 9, and states: "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."[30] The fact that this is one of the few individual rights guaranteed in the Constitution, which at the time had no Bill of Rights amended to it, suggests the writ's importance to the idea of a free society.[31]

After reviewing the historical origin of the writ, the Court in *Boumediene* concluded that its original scope was indeterminable and therefore not helpful in deciding whether the writ applied to the detainees of Guantanamo.[32] Although not dispositive in the eyes of the Court, the two historical interpretations of the purpose of the writ are important to note because they still play a role in the current debate over the proper scope of habeas. Also, these two competing purposes help explain the inadequacy of the Court's opinion in *Boumediene* as the focus on individual rights pushed the Court to leave executive power largely unchecked.

On the one hand, there is a great amount of historical support that the writ was intended to confer an individual right. The Court itself noted in *Boumediene* that the writ developed as a means of enforcing the Magna Carta's decree "that no man would be imprisoned contrary to the law of the land."[33] Indeed, Blackstone referred to it as the "stable bulwark of our liberties."[34] A historical account, repeatedly cited by the *Boumediene* Court, noted that the writ provided "'the right of the subject to be so delivered'" before the court to determine the legality of detention.[35]

There is also an equal amount of historical evidence that the writ was focused more upon ensuring a proper separation of governmental powers, rather than conferring an individual right. For instance, the *Boumediene* Court noted that in the 1600s, the writ became a device for

30. U.S. CONST. art. I, § 9, cl. 2.

31. *Boumediene*, 128 S. Ct. at 2244.

32. *Id.* at 2251.

33. *Id.* at 2244 (citing the MAGNA CARTA, Art. 39, *in* SOURCES OF OUR LIBERTIES 17 (Richard Perry & John Cooper eds., 1959)).

34. *Id.* at 2246 (quoting 1 W. BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND *137 (1769)).

35. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 594 (2008) (citation omitted).

restraining the King's power rather than adding to it.[36] This idea was reiterated by Alexander Hamilton in *The Federalist Papers* when he noted "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[37] The Court also noted that the writ has been central to the idea of separation of powers, which in turn is the "surest safeguard" of liberty.[38] Furthermore, it has been argued that the writ in England was a method of correcting any "'manner of misgovernment.'"[39]

It is important to note the dichotomy between the conferral of individual rights and the restraint on the King's power that has existed throughout the history of the writ. The Court's opinion in *Boumediene* is itself an example of the dichotomy between these two ideas, often referring to the separation of powers issue, yet conferring upon the detainees a constitutional right to petition for habeas. As will be addressed later, these two concepts are often offered as separate justifications for either extending or limiting the scope of habeas, but trying to consider the ideas separately is an exercise in futility, as the concept of habeas centers around both.

C. Milestones in Case Law from the Last Century

Case law regarding extraterritorial application of the Constitution bears directly on the scope of the writ, given that the writ is found within the Constitution. The Court addressed the issue of extraterritorial scope at three major times in the last century. In *Boumediene*, the Court relied on turn-of-the-century case law to overrule the bright line test for extraterritorial scope that was largely accepted as good law during the past fifty years. These early twentieth century decisions, known as the "Insular Cases," informed the *Boumediene* Court's decision.[40] Strangely enough, they also influenced the mid-century cases that produced the bright-line-sovereignty test. A careful examination of the evolution of this body of law reveals that neither approach is quite in line with the precedent of the Insular Cases.

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36. *Boumediene*, 128 S. Ct. at 2245 (citing Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 336 (1952)).

37. *Id.* at 2247 (citing THE FEDERALIST NO. 84 (Alexander Hamilton)).

38. *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).

39. Halliday & White, *supra* note 35, at 608 (quoting Sir Edward Coke, 4 INSTITUTES OF THE LAWS OF ENGLAND 71 (1644)).

40. *Boumediene*, 128 S. Ct. at 2255.

1. The Insular Cases: Extraterritorial Application of the Constitution in the Context of American Colonialism

The Insular Cases guided the *Boumediene* Court's opinion, yet their holdings do not seem so clearly in favor of the "practicality" test the Court ultimately formulated. The name coined for these cases is a reference to the early twentieth-century American landscape, when America was left with several remote insular territories and was determined "to become a great colonial power on the European model."[41] Much constitutional case law developed from the fact that imperialists desired to rule over their territories without constitutional constraint, citizenship for the people, or cultural integration with the United States.[42]

a. *Downes v. Bidwell*: The Emergence of Fundamental Rights

Downes was one of the earliest cases that considered extraterritorial application of constitutional rights, and introduced the idea of a fundamental right, but ultimately concluded Congress should decide where constitutional rights extend.[43] In *Downes*, which was the first of the cases to reach the Supreme Court, the Court held that "the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct."[44] The issue in *Downes* was whether the territory of Puerto Rico was part of the United States such that it was not "foreign," and therefore imports would not be subject to taxation.[45] The Court's decision did not rest completely on practical concerns, but did briefly consider the difficulties of applying the constitution and thus taxing the subjects of Puerto Rico.[46] The Court noted that imposing a tax burden so much greater than what the people of Puerto Rico were accustomed to would bring "violations of the law so innumerable as to make prosecutions impossible."[47] The Court ultimately concluded that because territories were often "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and

41. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 8 (2004).
42. *Id.* at 9.
43. Downes v. Bidwell, 182 U.S. 244, 283 (1901).
44. *Id.* at 279.
45. *Id.* at 247–48.
46. *Id.* at 283–84.
47. *Id.* at 284.

justice, according to Anglo-Saxon principles, may for a time be impossible."[48]

The Court began hinting at another one of the themes of the Insular Cases: that there are certain rights that all individuals possess regardless of whether the Constitution might apply to them.[49] However, the Court did not decide this issue, implying that the right to be taxed by a government does not fall within this category of fundamental rights, seemingly because it would not be practical to tax the people of Puerto Rico.[50] The Court ultimately conceded that Congress must be entrusted with the power to make decisions regarding the extension of rights.[51]

b. *Balzac v. Porto Rico*: Practicality as a Method of Statutory Interpretation

In *Balzac*, the Court picked up on the idea that certain rights were fundamental.[52] This case becomes particularly important in analyzing the Court's latest decision in *Boumediene*, because as the *Boumediene* Court stated, this "century-old doctrine informs our analysis in the present matter."[53] In *Balzac*, the defendant was charged with two counts of libel and demanded a jury trial, the issue in the case being whether the Constitution guaranteed the defendant such a jury.[54] The defendant argued that, among other laws, § 5 of the Jones Act, providing Puerto Ricans with the option of becoming a U.S. citizen, implied Congress's intent to incorporate the territory.[55] In deciding the issue, the *Balzac* Court expanded the practical approach briefly touched on in *Downes*, noting the "inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere.'"[56] The Court first made it utterly clear that the majority opinion by Justice White in *Downes v. Bidwell* has "become the settled law of the court," stating:

48. *Id.* at 287.

49. *See id.* at 282 ("We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights . . . .").

50. *See id.* at 283–84 (noting first the difference between natural and remedial rights, then moving into a discussion of the practicality of taxing the subjects of Puerto Rico).

51. *Id.* at 283.

52. Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

53. Boumediene v. Bush, 128 S. Ct. 2229, 2255 (2008).

54. *Balzac*, 258 U.S. at 300, 304.

55. *Id.* at 306–07.

56. *Boumediene*, 128 S. Ct. at 2254–55 (quoting *Balzac*, 258 U.S. at 312).

> We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.[57]

The Court further acknowledged that when Congress makes a law that confers political or civil rights on inhabitants of new lands, this law "may be properly interpreted to mean an incorporation" of the new land into the United States.[58] The Court did proceed through an analysis of whether it would be practical to extend the right to jury trial, citing problems such as training jury members and developing "a conscious duty of participation in the machinery of justice."[59] However, this practical analysis was contingent on the fact there was an underlying statute; it was used essentially as a method of statutory interpretation to determine whether Congress meant to incorporate Puerto Rico.[60] Therefore, the practical analysis was not undertaken of its own accord to decide whether or not the Constitution, and therefore the right to trial by jury, should apply. Without an underlying statute, there could be no incorporation, and therefore the Constitution could not apply to that territory. As the Court put it, "[t]he question before us, therefore, is: Has Congress . . . enacted legislation incorporating Porto Rico [sic] into the Union?"[61] *Balzac* seems more consistent with the bright-line sovereignty test seen later in *Eisentrager*, as opposed to the "practicality" test the *Boumediene* Court somehow gleaned from this case.

Ultimately, the Insular Cases and the doctrine they advocated were heavily criticized as being "frank racism"[62] and "contrary to American territorial practice and experience."[63] Despite the great amount of criticism and the seemingly inevitable invalidation of the line of

57. *Balzac*, 258 U.S. at 305 (quoting Dorr v. United States, 195 U.S. 138, 149 (1904)).

58. *Id.* at 309.

59. *Id.* at 309–10.

60. *See id.* at 309 ("It is true that in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union . . . .").

61. *Id.* at 305.

62. Neuman, *supra* note 41, at 11.

63. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007).

reasoning found within these cases,[64] the doctrine was kept alive, albeit in a skewed manner, by the next milestone cases, occurring nearly 50 years later in *Johnson v. Eisentrager*[65] and *Reid v. Covert*.[66]

2. *Eisentrager*: Sovereignty Versus Practicality

Eisentrager marks the appearance of the bright-line sovereignty test for extraterritorial application of the Constitution. In *Eisentrager*, the Court for the first time had to determine whether constitutional rights applied to a group of individuals who not only are not citizens of the United States, but have been deemed its enemy.[67] Here, twenty-one German nationals filed petitions for writs of habeas corpus in the District Court for the District of Columbia.[68] The prisoners were convicted of violating the laws of war and were being held under the custody of an American army officer in Landsberg Prison in Germany.[69] The proceeding that convicted these prisoners was held "wholly under American auspices and involved no international participation."[70] In an opinion that some have referred to as "opaque,"[71] the Court held that the petitioner enemy-aliens do not have the right to assert the writ of habeas corpus.[72] However, the Court did not explicitly clarify its reasoning behind the holding. In denying the prisoners a constitutional right to assert the writ of habeas, the court focused upon three factors: (1) the prisoners were never on sovereign U.S. territory, (2) it was not practical to allow the prisoners this right, and (3) it was not in the best interest of America or its soldiers to allow the prisoners this right.[73]

The Court found it important that the prisoners were never on sovereign U.S. territory because, in the past, the "privilege of litigation ha[d] been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."[74] The Court stated that no such implication arose for the prisoners in *Eisentrager*

64. Neuman, *supra* note 41, at 11–12.
65. 339 U.S. 763 (1950).
66. 354 U.S. 1 (1957).
67. *Eisentrager*, 339 U.S. at 766.
68. *Id.* at 765.
69. *Id.* at 766.
70. *Id.*
71. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2055 (2007).
72. *Eisentrager*, 339 U.S. at 781.
73. *Id.* at 777–79.
74. *Id.* at 777–78.

because "at no relevant time were [the prisoners] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[75] Because the Court considered other factors in addition to this sovereignty concern, it is difficult to argue that sovereignty is the sole test for whether constitutional rights extend; however, it was clearly important to the *Eisentrager* Court. In his dissent, Justice Black stated that if sovereignty was to be the deciding factor of whether constitutional rights apply extraterritorially, "the Court is adopting a broad and dangerous principle."[76] Black also recognized that the approach would permit the executive branch to deprive courts of their power to stop illegal incarcerations simply by "deciding where its prisoners will be tried and imprisoned."[77]

The Court also discussed the practical impediments to allowing the prisoners to petition for a writ of habeas corpus, such as the difficulty in transporting the prisoners overseas for the hearing, which would require "allocation of shipping space, guarding personnel, billeting and rations."[78] The Court stated the transportation of witnesses and legal counsel would be a hindrance as well.[79] The Court did not cite to any of the Insular Cases—or any other precedent—for the proposition that practical analysis was appropriate even in the absence of a statute that might be interpreted to mean incorporation.[80]

The Court also stated that extending the writ's scope to such prisoners would be a poor strategic choice. The Court reasoned that allowing such habeas trials would aid and comfort the enemy, diminish the prestige of commanders, and divert the attention of officers called to testify in the United States.[81] Lastly, the United States could expect no reciprocity for American soldiers detained by other countries.[82]

Again, the practical analysis factored into the Court's decision; but coupled with the language focusing on sovereignty, one cannot be certain what test comes out of *Eisentrager*.[83] Although the Court this time did

75. *Id.* at 778.

76. *Id.* at 795 (Black, J., dissenting).

77. *Id.*

78. *Id.* at 778–79 (majority opinion).

79. *Id.* at 779.

80. *See id.* (proceeding through the practical analysis without citing to any authority).

81. *Id.*

82. *Id.*

83. *See* Fallon & Meltzer, *supra* note 71, at 2055 (stating that the Court's opinion was "opaque" and suggesting several alternative interpretations).

not cite to any of the Insular Cases as a basis for the practical analysis undertaken, the next time the Court saw this issue, seven years later, a concurrence by Justice Harlan would reaffirm where the practicality concerns originated.

3. *Reid v. Covert*: The Practicality Test Reappears

Reid involved two military wives who had killed their husbands while abroad in England.[84] The military convicted the two by tribunal and the women petitioned for a writ of habeas corpus, which the court ultimately granted.[85] Again, *Reid* addressed whether or not the Constitution applied abroad, specifically in England and Japan, where the respective women were stationed with their husbands.[86] Justice Black, writing for the plurality, overtly expressed his disdain for the practicality test derived from the Insular cases:

> Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.[87]

Justice Black went on, saying "we have no authority, or inclination, to read exceptions into [the Constitution] which are not there."[88] In distinguishing the situation at hand from the Insular Cases, Justice Black determined that here, constitutional protections applied because the women were American citizens, not because of Congress's Article IV power to rule temporarily over "territories with wholly dissimilar traditions and institutions."[89] In fact, the opinion did not rely on practical concerns whatsoever in extending the writ.[90]

84. Reid v. Covert, 354 U.S. 1, 3–4 (1957).

85. *Id.* at 5.

86. *Id.* at 3–5.

87. *Id.* at 14.

88. *Id.*

89. *Id.* Article IV of the Constitution, Section 3, reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2.

90. *See Reid*, 354 U.S. at 5–6 (failing to discuss any practical concerns).

Justice Frankfurter and Justice Harlan each wrote an opinion concurring in the judgment.[91] Justice Frankfurter did not consider practical factors in deciding whether the Constitution should extend; he employed the test in the context of *In re Ross*,[92] to "harmoniz[e]" conflicting constitutional provisions.[93] In summary, although Justice Frankfurter touched on practical analysis, it was not to decide the issue of whether the Constitution applied extraterritorially. However, Justice Harlan suggested that practicality *was* the proper test for deciding whether the Constitution would apply extraterritorially, and marked the first time a Justice took such a position.[94]

Justice Harlan first picked up on the idea touched on by the Court in *Balzac* that some rights apply always and everywhere, regardless of the Constitution. While he did not state it explicitly, Justice Harlan implied such rights exist when he stated "there are provisions in the Constitution which do *not necessarily* apply in all circumstances in every foreign place."[95] This suggests there are other provisions that *do*. Citing the *Balzac* case in particular, Justice Harlan noted that consideration of whether application of a constitutional right would be "impracticable and anomalous," as well as considerations of "the particular local setting, the practical necessities, and the possible alternatives," were all relevant to the question of "*which* guarantees of the Constitution *should* apply."[96] In other words, the particular circumstances determine which rights do not necessarily apply in all circumstances.[97] The issue of extraterritorial scope of rights would not concern the Court again until nearly another half-century, in a post 9/11 America, when the United States began detaining suspected terrorists at the Naval base in Guantanamo Bay, Cuba.

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91. *Id.* at 41 (Frankfurter, J., concurring in the result); *id.* at 65 (Harlan, J., concurring in the result).

92. *See* 140 U.S. 453, 479 (1891) (holding that a prisoner aboard an American vessel in 1891, harbored in a port of Japan, was subject to a consular tribunal there, based on the power of a treaty between the United States and Japan).

93. *See Reid*, 354 U.S. at 54–64 (Frankfurter, J., concurring in the result) (stating that in the context of inferior laws of eastern civilization at the time of the *Ross* case, it was necessary to make treaties employing consular tribunals to guarantee citizens of Christian countries were treated fairly).

94. *Id.* at 75 (Harlan, J., concurring in the result).

95. *Id.* at 74 (emphasis added).

96. *Id.* at 74–75 (emphasis added).

97. *See id.* at 75 ("In other words, what *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas." (emphasis added)).

4. *Rasul v. Bush*: A Foreshadowing of Constitutional Rights

Rasul involved two Australian citizens and twelve Kuwaiti citizens who were captured abroad and taken to Guantanamo Bay in early 2002.[98] The District Court that first heard the petition relied on *Eisentrager* to hold that "'aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.'"[99] The Court of Appeals affirmed the decision, again citing *Eisentrager*, holding that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign.'"[100] The Supreme Court determined there was statutory jurisdiction for the writ of habeas corpus to apply to the prisoners, and that there was no need to reach the constitutional issue.[101]

More importantly, the Court suggested that extending the right of habeas corpus to the prisoners in Guantanamo was "consistent with the historical reach of the writ."[102] The Court noted that the writ of habeas corpus traditionally ran wherever the King's restraint was inflicted, because the King was "[e]ntitled to have an account" of why his subject was restrained.[103] The application of the writ "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'"[104]

5. *Boumediene v. Bush*: The *Reid* "Practicality" Test Finds Support in the Majority

Boumediene again involved prisoners at Guantanamo Bay; however, because the DTA had modified 28 U.S.C. § 2241 to remove statutory jurisdiction,[105] it addressed whether a *constitutional* privilege of habeas corpus extended to the prisoners, "a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2."[106]

98. Rasul v. Bush, 542 U.S. 466, 470–71 (2004).

99. *Id.* at 472 (citing Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002), *aff'd sub nom*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466 (2004)).

100. *Id.* at 473 (quoting *Al Odah*, 321 F.3d at 1144).

101. *Id.* at 483–85.

102. *Id.* at 481.

103. *Id.* at 482 n.13 (citing 3 W. BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 131 (1769)).

104. *Id.* at 482 (quoting *Ex parte* Mwenya, (1960) 1 Q.B. 241, 303).

105. *See* Fallon & Meltzer, *supra* note 71, at 2060.

106. Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

Ultimately, the Court held that the prisoners did have a constitutional right to habeas corpus; therefore, the Court struck down the MCA's provision removing the jurisdiction of federal courts to hear petitions from enemy aliens.[107]

The Court analyzed the historical foundations of the writ, including the traditional common-law scope of its application, citing as examples various cases where the writ was or was not applied to "territories" of Britain.[108] In the end, the Court determined that the historical scope of the writ was not conclusive, and therefore not dispositive of the constitutional issue.[109]

The Court then discussed the American precedent, starting with the Insular Cases. The Court stated that these cases stand for the proposition that "the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[110] The Court cited *Balzac* for the proposition that "certain fundamental personal rights declared in the Constitution" applied to even non-citizen inhabitants of unincorporated territories.[111] More importantly, the Court declared that the 100-year-old doctrine from *Balzac* "informs [the] analysis in the present matter."[112]

The Court highlighted the concurrence from the *Reid* opinion, focusing on the rejection of a "'rigid and abstract rule,'" and noted that the circumstances for each particular case must be taken into account, and enforcement of the Constitution must not be "'impracticable and anomalous.'"[113] The Court also highlighted the portion of *Eisentrager* focusing on the practical concerns of affording the German prisoners the right to petition for habeas relief.[114] The Court described the common thread running through all the relevant precedent as "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[115] It then held inconclusive the portion of

107. *Id.*

108. *See id.* at 2245–51 (outlining the history of the writ, starting with its application in England as to powers of the King, noting historical support for both parties' arguments). Ultimately the Court concluded that a "[d]iligent search by all parties reveals no certain conclusions." *Id.* at 2248. The Court declined "to infer too much, one way or the other, from the lack of historical evidence on point." *Id.* at 2251.

109. *Id.* at 2251.

110. *Id.* at 2254.

111. *Id.* at 2255 (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).

112. *Id.*

113. *Id.* at 2255–56 (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)).

114. *Id.* at 2257.

115. *Id.* at 2258–59.

Eisentrager that suggested the test for determining extension of the writ should be formal sovereignty.[116] The Court stated: "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."[117] The Court then laid down a three-prong test for determining extraterritorial application of the writ: "(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."[118]

In applying the first prong of the test, the Court largely compared the Guantanamo detainees to the prisoners of Landsberg from *Eisentrager*. The Court noted that, like the Landsberg prisoners, the prisoners before it were not American citizens.[119] Contrastingly, the prisoners in *Boumediene* had not accepted their status as enemy-combatants, unlike the prisoners from *Eisentrager*, who conceded their status.[120] However, the crux of this prong of the test focused on the adequacy of the process through which status determinations were made.[121] The Court took great care in noting the inadequacies of the Combat Status Review Tribunals as compared with the system employed to try the Landsberg prisoners, specifically noting the lack of a "rigorous adversarial process" and the limited ability to rebut evidence.[122]

The Court's application of the second prong, the nature of the site of apprehension and detention, again focused on a comparison between Guantanamo and Landsberg. Among the critical differences was the fact that the United States shared control over Landsberg with the other Allied forces whereas Guantanamo was in the "constant jurisdiction of the United States."[123] In that same vein, the United States did not solely conduct the tribunals convicting the prisoners in Landsberg; instead, it was an Allied effort, whereas Guantanamo is the sole effort of the United

116. *Id.*

117. *Id.* at 2259; *see also* Johnson v. Eisentrager, 339 U.S. 763, 795 (1950) (Black, J., dissenting) (stating that such a test for extension of the writ was dangerous).

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

119. *Id.*

120. *Id.*

121. *Id.* at 2259–60.

122. *Id.*

123. *Id.* at 2260–61.

States.[124] The Court disregarded the rigid absolute sovereignty test from *Eisentrager*.[125]

The Court noted that the third prong, the practical obstacles to extending the writ, was not dispositive.[126] Relevant to this conclusion was the fact that "[c]ompliance with any judicial process requires some incremental expenditure of resources," and furthermore, the government presented "no credible arguments that the military mission at Guantanamo would be compromised" if Guantanamo prisoners were allowed to assert the writ.[127] Although not dispositive in this case, the Court did imply that practical concerns were dispositive in *Eisentrager*, noting the large population the military controlled in post-war Germany and the "massive reconstruction" efforts undertaken.[128] The Court also stated that adjudicating a habeas petition would not cause any "friction" with the government of Cuba.[129] Ultimately, the Court concluded that, in the case of Guantanamo, "to the extent [practical] barriers arise, habeas corpus procedures likely can be modified to address them."[130] Based on its application of the three factors, the Court held that the constitutional right to petition for a writ of habeas has "full effect at Guantanamo Bay."[131]

III. ANALYSIS

The Court's decisions in the "war on terror" cases have brought to light two competing viewpoints regarding extraterritorial application of the Constitution. On one hand is the argument that focuses on government action, suggesting that separation of powers related restraints should apply to those actions, always and everywhere.[132] On the other hand is the argument that focuses on individual rights. The usual argument states the Court is not justified in naming itself the

124. *Id.* at 2260.
125. *Id.* at 2260–61.
126. *Id.* at 2261.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 2262.
131. *Id.*
132. *See, e.g.*, Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L. J. 237, 248 (2007) ("If a provision exists to limit the range of permissible government activity, that activity does not become permissible simply because those affected live beyond our borders."); Knowles & Falkoff, *supra* note 16, at 646 (suggesting the proper analysis focuses not on individual rights, but instead "whether the Constitution has granted the government the particular power that it seeks to deploy").

dictator of which fundamental rights shall apply to all civilized people, especially those located outside the United States; however, there are those that believe the Court is justified in taking the fundamental rights approach.[133] The *Boumediene* Court struggled to reconcile this dichotomy, resulting in questionable interpretation of precedent and a failure to restore the separation of power.

This Comment seeks to address two major concerns with the three-prong test laid down in *Boumediene*. First, the Court made a great leap in doctrine by recalling the Insular Cases. The proposition that practical concerns should be controlling in deciding where the writ shall run allowed the Court to provide habeas petitions for Guantanamo detainees without having to decide whether a fundamental right to challenge detention exists. Second, the new test does not solve the principal problem the Court sought to address: the imbalance in the separation of powers resulting from the Executive's manipulation of the application of a judicial function designed to restrain executive power.[134] As the analysis will demonstrate, the "practicality" test leaves the Executive great room to create more detention centers where effectively no law would apply— "legal black holes." This Comment offers a bright line solution to the two aforementioned problems: any person that the Executive branch detains, at any place and at any time, shall be able to assert the writ of habeas corpus, except when Congress has properly suspended the writ.

A. The Insular Cases: A Questionable Interpretation with a Purpose

1. A Different Interpretation of Precedent

The Court in *Boumediene* stated that its analysis relied on the doctrine laid out in *Balzac*.[135] However, a close examination of *Balzac* reveals that the Court borrowed an idea, instead of upholding a precedent. The *Boumediene* Court selectively quoted from *Balzac* to

133. *See, e.g.*, Eric A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 24–25 (2008) (arguing the Court's opinion had "less to do with separation-of-powers theory than with a commitment to protecting noncitizens overseas" and then criticizing this path as "novel[]"). *But cf.* Elizabeth Sepper, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1828–42 (2006) (arguing that the fundamental rights approach is the proper way to address indefinite executive detention, specifically citing the fundamental rights listed in the Fifth and Eighth Amendments).

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

135. *See id.* at 2255 (citing Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)) (noting that *Balzac* informed its analysis).

materialize the proposition that certain rights in the Constitution are not "always and everywhere" applicable, and practical concerns should dictate which rights apply to a given place.[136] However, a closer examination of *Balzac* reveals practical concerns served no such purpose. Before embarking on its practical analysis, the *Balzac* Court clarified that the issue at hand was whether "Congress . . . enacted legislation incorporating Porto Rico [sic] into the Union"[137] and that "incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view."[138] The Court was only attempting to discern whether Congress had passed a law that could be properly interpreted to mean a territory had been incorporated into the Union.[139] Essentially, the Court used practical considerations as a method of statutory interpretation, asking if it made sense for a given statute to incorporate the territory in question and apply all constitutional rights to the people of that territory.[140] Practical concerns were meaningless to the *Balzac* Court unless there was an underlying statute that might possibly be interpreted as providing for incorporation. The practical analysis was not undertaken to see if the right to trial by jury should extend to the territory; rather, it was undertaken to see if there was implicit incorporation, thus extending the right by extending the reach of the Constitution. This is important because under this method of analysis, the power still lies with Congress to extend rights; the Constitution would not extend without an underlying statute interpreted to grant incorporation. Whether intentional or not, Justice Harlan's concurrence in *Reid* usurped that power, implying that practical concerns should be evaluated regardless, with no mention of the necessity of an underlying incorporation statute.

After the *Balzac* Court completed its discussion of implicit incorporation, it discussed the second motif of the Insular Cases:

136. *See id.* (citing *Balzac*, 258 U.S. at 312) (summarizing *Balzac* as "noting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere'").

137. *Balzac*, 258 U.S. at 305.

138. *Id.* at 306.

139. *See id.* at 309 ("It is true, that in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union . . . .").

140. At the time, incorporation of a territory meant that the rights of the Constitution automatically applied. *See* Neuman, *supra* note 41, at 6 ("At the turn of the last century, however, this settled understanding was overthrown by the Insular Cases, which adopted a new distinction between 'incorporated territories' and 'unincorporated territories' for the explicit purpose of facilitating colonial expansion. The doctrine of the Insular Cases decreed that 'nonfundamental' constitutional limitations do not apply in unincorporated territories, although truly 'fundamental' constitutional limitations do apply." (citations omitted)).

fundamental rights. It was in this section of the opinion that the Court noted certain provisions of the Constitution do not apply "always and everywhere," in order to distinguish between constitutional rights and fundamental rights.[141] This was evidenced by the very next sentence when the Court stated, "[t]he guaranties [sic] of certain fundamental personal rights declared in the Constitution . . . had from the beginning full application in the [territories] . . . ."[142] The *Balzac* Court was making the point that certain rights enumerated in the Constitution are fundamental, and apply always and everywhere, while others are not fundamental, and do not apply always and everywhere. Nowhere in this section of *Balzac* did the Court state that practical concerns should determine which constitutional rights apply on a piece-meal basis. One can see that a fundamental right would not be classified as such if its application depended on practicality. Practical concerns were considered in *Balzac only* to determine whether the Constitution applies as a whole, through implicit incorporation, not to determine whether a particular right might extend. When the *Boumediene* Court recanted *Balzac*, it fused these separate sections to come up with the idea that any given right in the Constitution may or may not extend based on practical considerations.

As addressed in the next section, one can see why the Court favored its interpretation of precedent: if the power to extend the Constitution lay with Congress, the Court would have to declare the right to assert habeas using other means, for example, by declaring the right fundamental. However, if the Court focused on the separation of powers element, and the actions of the Executive, rather than the rights of individuals, it would have been justified in extending the writ, and in a manner less open to "judicial activism" criticism that the Court perhaps feared.

The *Boumediene* Court failed to address Justice Black's argument in *Reid* that rights should not be applied based on how practical it is to apply them, and therefore the Insular Cases should be limited to their current state and certainly not expanded.[143] Instead, the Court focused on Justice Harlan's idea that the Insular Cases "teach" that whether a constitutional provision has effect outside U.S. territory depends on the "particular circumstances" and the "practical necessities."[144] Although

141. *Balzac*, 258 U.S. at 312.

142. *Id.* at 312–13. The *Boumediene* Court cited a portion of this quote shortly after it stated that the Constitution applies of its own force. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2253–54 (2008).

143. *See supra* Part II.C.3.

144. *Boumediene*, 128 S. Ct. at 2255 (citing Reid v. Covert, 351 U.S. 1, 47–48 (1956) (Harlan, J., concurring in the result)).

the Court certainly has the power to borrow concepts from prior cases and apply them in ways that fit with modern society, the Court here has slyly, or perhaps unknowingly, shifted the power to extend the extraterritorial scope away from Congress and toward the Court. One could argue that the Court essentially was exerting the same power when interpreting the underlying statute in *Balzac*; however, under that system, the power to extend rights was more balanced because no rights were extended without an underlying statute, except for those rights that were fundamental. Since this shift took place over the course of nearly one hundred years, one might also argue this is a natural change in jurisprudence. However, considering the change was only truly made over the course of two opinions—the concurrence in *Reid* and now *Boumediene*—one could also argue it was abrupt.

Lastly, the practical obstacles explored by the Court in *Balzac* seem to be of a different character than some of the practical obstacles mentioned by the *Boumediene* Court. The *Balzac* opinion, as well as the other Insular Cases, dealt with applying Anglo-Saxon concepts of law to territories that perhaps had not traditionally embraced such concepts. For example, the *Balzac* Court noted the difficulty in teaching the policy behind jury participation to individuals that were not brought up in such a system.[145] On the other hand, the Court in *Boumediene* considered the more procedural difficulties of conducting detention hearings for the writ of habeas corpus.[146] One can see the difference between the more substance-based difficulty in forcing an entire population to learn a new philosophy on judicial participation as compared to such procedural difficulties; the latter certainly seeming more trivial. The Court almost concedes the trivial nature of these practical concerns when it states that "[t]o the extent [such practical] barriers arise, habeas corpus procedures likely can be modified to address them."[147] Furthermore, it is doubtless there are practical obstacles to maintaining a prison anywhere outside of the United States, such as the difficulties in transporting prisoners to locations away from the battlefield; but that does not stop the Executive from doing so. In other words, if the practical obstacles are not too great to detain an individual, it is unlikely they are too great to determine through a hearing if his imprisonment is just, whether it be at the prison

145. *See Balzac*, 258 U.S. at 310 ("The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.").

146. *Boumediene*, 128 S. Ct. at 2260. Although the Court made it clear it did not find such practical obstacles present, nor dispositive of the issue, it did consider them part of the test.

147. *Id.* at 2262.

itself, or somewhere else. Not only did the *Boumediene* Court fail to apply practical concerns in the same context as *Balzac*, it arguably applied them in a less meaningful, more trivialized manner. The next section offers a plausible explanation for the Court's chosen interpretation of precedent.

2. The Practicality Test Allows the Court to Avoid a Highly Criticized Body of Law

Reaching back and glossing the Insular Cases with the principle that the Court's duty is to apply practicality factors and determine whether the Constitution applies allowed the Court to avoid getting into a not-so-favorable area of constitutional law: fundamental rights. The reading of the Insular Cases, laid out in Part III.A.1, *supra*, suggests the power lies with Congress to control extraterritorial application of the Constitution. When the Court took up *Boumediene*, a federal law was in place, the Military Commissions Act, which stated the scope of extraterritorial application of the Constitution. It said the Constitution did not apply to Guantanamo and the detainees kept there.[148] If the Court did not interpret the precedent as it did, it would have been faced with the tough decision of either allowing executive detention to continue to go unchecked or extending the writ of habeas based on some other consideration—namely, that the detainees had a fundamental individual right to habeas corpus that attached whether or not the Constitution extended to Guantanamo.

Many scholars have noted the Court's propensity to avoid reaching the "headache" that comes with deciding cases on these types of fundamental rights arguments.[149] The idea that fundamental rights were guaranteed by "substantive due process" is derived from the Fourteenth Amendment, and first appeared in *Lochner v. New York*.[150] For a period after that decision, the Court expanded the contexts in which the doctrine

148. Military Commissions Act of 2006, § 7(e)(1), Pub. L. No. 109-366, 120 Stat. 2600 (2007) (codified at 10 U.S.C.A. § 948 and 28 U.S.C.A. § 2241) ("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.").

149. *See, e.g.*, Martinez, *supra* note 19, at 1064–65 ("The rights-based arguments in the 'war on terror' cases require resort to the sort of 'fundamental due process' arguments that drive academics back to uneasy contemplation of first philosophical principals. . . . In short, making the rights-based argument is a major academic headache.").

150. 198 U.S. 45 (1905) (holding that citizens have a fundamental liberty interest in the freedom of contract), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

applied.[151] Since then, the idea of substantive due process rights has been continually limited, and "Lochnerizing" has been highly criticized as a version of judicial supremacy.[152] Given the criticism of judicial creation of fundamental rights as applied to U.S. citizens, one can only imagine the judicial supremacy accusations that would ensue from applying this doctrine on the international level. Even if the existence of such fundamental rights was generally accepted, it is possibly an even greater act of arrogance to assume the United States is responsible for declaring and enforcing them.

There is an argument that both the Executive and the Court have used procedure to avoid resolving the merits of "war on terror" cases, to prevent squarely confronting such quandaries.[153] The Court's application of the three-prong test in *Boumediene* was not a procedural resolution in the sense that it reached the merits, as the Court held that Guantanamo detainees had the constitutional right to assert the writ.[154] However, the Court did what many had predicted, failing to address "the broader question" of whether it is possible to deny this right to detainees located elsewhere.[155] Quite possibly it was the Court's hesitancy to extend such an individual right to all persons that led it to apply a practicality test and extend the Constitution only to Guantanamo. Viewing the problem through this individual rights paradigm may have created another procedural step for detainees located in other U.S. prisons outside of Guantanamo, a preliminary hearing to apply the *Boumediene* test. Extending the constitutional right to assert the writ of habeas corpus was the correct outcome, but the Court's method in reaching that conclusion was not properly focused. The individual rights paradigm is what led the Court awry, and the understandably timid approach resulting from such a point of view prevented the Court from adequately addressing the

151. *See, e.g.*, Thomas B. McAffee, *Overcoming* Lochner *in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as We Seek to Secure Equal Citizenship and Promote the Public Good*, 42 U. RICH. L. REV. 597, 599–600 (2008) (noting the consensus that something went wrong during the Lochner era, citing to a variety of sources).

152. *See id.* at 599 n.8.

153. Martinez, *supra* note 19, at 1071–72, 1074. Martinez offers the example of the Government charging Jose Padilla with criminal charges before the Court could rule on the legality of his detention. *Id.* at 1072. Martinez also points out that judges often prefer to resolve on procedural grounds because no judge wants to overstep their bounds and "wake up tomorrow to a nuclear bomb in New York City." *Id.* at 1072.

154. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

155. *See* Martinez, *supra* note 19, at 1075 (predicting "even in *Boumediene* the Court may again manage to dodge the broader question by focusing on the peculiar status of Guantanamo as a territory under complete U.S. control").

problem it set out to solve: an imbalance in the separation of powers that favored the Executive.[156]

B. Manipulation by the Executive: The Boumediene *Test Fails to Solve the Problem*

Questionable interpretation of precedent aside, the central deficiency of the Court's opinion in *Boumediene* is that it failed to truly restrain the Executive—the problem that the opinion itself purported was of serious concern.[157] The unchecked power of the Executive has been evidenced by its manipulation of the holdings of *Eisentrager*, *Rasul*, and *Hamdan*, responding by either holding detainees in a particular place or pressing for passage of new legislation in response to the Court's procedural rulings.[158] The Court sought to address this problem, stating that habeas corpus itself is "an indispensable mechanism for monitoring the separation of powers" and therefore the scope "must not be subject to manipulation by those whose power it is designed to restrain."[159] The danger in abuse by the Executive is particularly magnified in the war on terror, where, among many factors, the unwillingness of the enemy to compromise makes the end of war much more difficult to attain.[160] Justice Black noted the problem of executive abuse in his dissent in *Eisentrager*,[161] a dissent glossed over by the *Boumediene* Court. Justice Scalia too noted the Executive's propensity to manipulate the scope of habeas corpus in his dissent in *Rasul*, although he characterized it as the Executive's right, stating the Executive should be able to rely on the Court's opinions so that it may keep the court systems out of military affairs.[162] After *Eisentrager*, the Executive attempted to take advantage of the bright-line rule regarding sovereignty by holding prisoners outside

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

157. *Id.*

158. *See supra* Part II.A.

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

160. *See* Press Release, The White House, Office of the Press Secretary, President Discusses Global War on Terror (Sept. 5, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060905-4.html ("In pursuit of their imperial aims, these extremists say there can be no compromise or dialogue with those they call 'infidels'—a category that includes America . . . .").

161. Johnson v. Eisentrager, 339 U.S. 763, 795 (Black, J., dissenting).

162. Rasul v. Bush, 542 U.S. 466, 506 (Scalia, J., dissenting) ("The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.").

of U.S. sovereign territory to prevent the writ from extending to such prisoners.

The *Boumediene* Court frequently, and in the author's opinion, correctly, phrases this problem as one of separation of powers.[163] The Court mentioned fundamental rights when discussing some precedent,[164] but did not frame the problem to be solved in terms of a deficiency of individual rights extended to the detainees. Curiously, the Court's solution to its separation of powers problem was focused entirely on the practicality of extending individual rights, rather than the branches of government.[165] It is this turn of analysis, caused by the "taboo" status of fundamental rights, which resulted in an inadequate solution. Although the Court struck down sovereignty as the bright-line test and stated it will now only be a factor in the analysis,[166] in the process it may have left the Executive with just as much room to manipulate because no prong of the test seems at all focused on separation of powers.[167]

The third prong is the most offensive prong of the test, taking into account the practicality of extending the writ. This portion of the test focuses on the individual, considering the "practical obstacles inherent in resolving the *prisoner's* entitlement to the writ."[168] In applying the prong, the Court cited "expenditure of funds" and "divert[ing] the attention of military personnel from other pressing tasks," as important considerations.[169] Even if the Court sought to resolve the individual rights issue, it does not seem a very strong argument to say that someone's rights are lessened because enforcing them is impractical, or inconvenient. There is no doubt that great inconvenience and expense are involved in the administration of justice throughout the United States, but it is generally accepted that the social cost of not having such an arrangement would be much greater.[170] The Court seems to acknowledge this by noting this prong of the test is not dispositive,[171] yet the fact it remains a prong suggests it must carry at least some weight. The Court also suggested that "to the extent [practical] barriers arise,

163. *See Boumediene*, 128 S. Ct. at 2252, 2258 (stating the government's position would be contrary to fundamental separation of powers principles).

164. *See id.* at 2255 (discussing the Insular Cases).

165. *Id.* at 2259.

166. *Id.* at 2258–59.

167. *See id.* (listing the relevant factors).

168. *Id.* (emphasis added).

169. *Id.* at 2261.

170. *See* Erwin Chemerinsky, *When It Matters Most, It is Still the Kennedy Court*, 11 GREEN BAG 2D 427, 434 (2008) (discussing the importance of due process protections).

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

habeas corpus procedures likely can be modified to address them," further suggesting the unimportance of such considerations.[172]

On the other hand, one could argue that this prong of the test becomes much more important in the context of the battlefield, and that this prong ensures that the judicial branch will not interfere with important military efforts. This is no doubt a compelling interest, and some have suggested that if soldiers are to be concerned about the legal repercussions of their actions, such as the proper method of evidence collection, the result will be soldiers acting as crime scene investigators,[173] and soldiers will inevitably be distracted from their duties. However, the extension of the writ would not necessarily create such distractions. The *Boumediene* Court referred to such minimal guarantees in status determinations as a right to counsel, and the right to rebut evidence.[174] These types of guarantees would not require nor encourage soldiers to collect evidence in a manner on par with that of a crime scene investigator. These guarantees only ensure that evidence suggesting the detainee's status exists, rather than being shrouded in secrecy, and that the detainee has the assistance of counsel in understanding that evidence. If no such evidence exists to hold a detainee, and the detainee is released, then it seems the writ has fulfilled its purpose: ensuring the legality of executive detention. In that same vein, one might argue this prong protects against the transportation of detainees and their counsel overseas from impeding the military effort. However, this argument does not seem persuasive considering the military has been able to transport detainees overseas from Afghanistan to Cuba.[175] It does not make sense to argue that moving prisoners across the globe to new detention facilities is *not* a great interference, while at the same time arguing that moving prisoners to provide a court hearing *is* a great interference.

Based on this third prong, an executive branch that desires to keep "the cumbersome machinery of our domestic courts" out of military

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172. *Id.* at 2262.

173. *See* Mary L. Angell, *U.S. Troops Honor Bound to Defend Rights of Guantanamo Bay Detainees*, 31 WYO. LAW. (Aug. 2008) (citing Major Kyndra Rotunda's June 20, 2008 Editorial in the *Chicago Tribune*, stating the *Boumediene* decision "is handicapping U.S. soldiers by 'turning the battlefield into a crime scene investigation'").

174. *See Boumediene*, 128 S. Ct. at 2260 (discussing the inadequacy of the Combatant Status Review Tribunals).

175. *See Names of the Detained in Guantanamo Bay, Cuba*, WASH. POST, http://www.washingtonpost.com/wp-srv/nation/guantanamo_names.html (last visited Jan. 31, 2009) (listing 367 prisoners held at Guantanamo whose names have been made public, most of whom were captured in Afghanistan).

affairs[176] now has an incentive to hold detainees in areas that would make extension of the writ impractical. For instance, the Executive might decide to keep prisoners detained in an area far away, much farther away than ninety miles off the coast of Florida, thus creating too much a practical impediment for the writ to extend. This line of analysis is not meant to suggest that the executive branch is filled with ill motives about how to keep prisoners from seeing federal courts; rather, it is meant to make the point that the implement designed to balance power becomes ineffective when the target of that implement has control over it. When viewed through a separation of powers paradigm, this prong of the test seems to favor an *increase* in executive power by providing precedent that says the Executive need only place detainees in a country on the other side of the globe to control the scope of habeas review.

The first prong of the test is also focused on the individual, taking into account the individual's citizenship, the individual's status, and the process afforded to determine that individual's status.[177] In one sense this prong seems to suggest the Executive has greater power to detain non-citizens, although the Court does not state it when applying the test; the precedent previously discussed by the Court clearly disfavors aliens not held in the United States.[178] When examining this portion of the prong through the individual rights paradigm, the prong makes perfect sense: the protections of the Constitution are less likely to apply to an alien on foreign soil as compared to a citizen. However, when analyzing the prong from the separation of powers viewpoint, it seems strange that the Executive is suddenly granted greater power to detain when acting against a non-citizen. Also, the portion of the prong focused on the process given to the individual seems peculiar and somewhat out of place because the Court seems to be considering adequacy of process to determine whether they will hear a petition to decide adequacy of process.[179] This second portion of the prong does not seem to augment executive power other than that perhaps it provides a double-layer of protection by twice considering adequate process as a substitute for actually allowing detainees access to federal courts.

One could argue that granting the Executive this greater power to detain non-citizens is necessary in the war on terror, and removing such

176. Rasul v. Bush, 542 U.S. 466, 506 (Scalia, J., dissenting).

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

178. *Compare* Eisentrager v. Johnson, 399 U.S. 763 (1950) (failing to extend the writ of habeas to aliens), *with* Reid v. Covert, 354 U.S. 1 (1957) (extending the writ to citizens abroad).

179. *See Boumediene*, 128 S. Ct. at 2273–75 (noting that the nature of the adversarial process to determine status is important, and then, after deciding the writ extends to the detainees, going on to consider whether the Executive had provided adequate adversarial process).

power will "almost certainly cause more Americans to be killed,"[180] presumably because the detainees who have been set free will then have the chance to perform terrorist acts, thus killing more Americans. This argument has no force because (1) habeas petitions do not automatically ensure the release of a detainee,[181] and (2) it assumes the guilt of the prisoners. These assumptions of guilt are the exact danger that habeas petitions were meant to protect against. As constitutional scholar Erwin Chemerinsky has pointed out, the criminal justice system provides a helpful analogy in responding to this argument: the release of suspected criminals or even charged criminals in the U.S. justice system could result in more deaths because criminals often re-offend, but the U.S. justice system does not resort to holding all suspected criminals indefinitely.[182] There is value in providing a system that does not assume the guilt of all those accused of crimes, ensuring the innocent are not punished. This value supersedes the risk of loss of life. Even though there is real danger in released detainees committing terrorist acts,[183] as Justice Stevens stated, the United States must not use tyranny to fight tyranny.[184] The end of upholding the principles of democracy is lost if the United States sacrifices the principles of democracy in striving to achieve that end.

In the second prong of the test, the territorial sovereignty aspect lives on, looking at the nature of the sites where apprehension and detention of the detainees took place.[185] Therefore, the Executive still has the power to manipulate the test by holding detainees in prisons where the United States does not have absolute sovereignty. In applying that prong of the test, the Court found it important that the prisoners from *Eisentrager*, held at Landsberg prison, were under the joint control of the U.S. and Allied Forces.[186] Perhaps this will be an incentive for the Executive to hold prisoners under joint control with another nation. Essentially, this prong of the test provides the Executive a greater power to detain when it acts in league with another nation, because the judiciary will be less likely to find review of that detention appropriate. This synergistic

180. *Id.* at 2294 (Scalia, J., dissenting).

181. *See* BLACK'S LAW DICTIONARY 728 (8th ed. 2004) (explaining that habeas corpus is "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal").

182. Chemerinsky, *supra* note 170, at 434.

183. For example, reports have surfaced that a former Guantanamo detainee, Said Ali al-Shihri, has become the deputy leader of Al Qaeda's Yemeni branch. Robert F. Worth, *Freed by the U.S., Saudi Becomes a Qaeda Chief*, N.Y. TIMES, Jan. 22, 2009, at A1.

184. Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

185. *Boumediene*, 128 S. Ct. at 2260 (majority opinion).

186. *Id.*

concept does not add up; if anything, it seems this should give the Executive less free reign because, as the Court notes, it is answerable to another nation.[187] The *Boumediene* Court also noted that hearing a writ for habeas would not likely upset the Cuban government.[188] Perhaps this consideration will create an incentive to hold detainees in a country where the government would become upset if American laws were employed. This begs the question, why should the Executive suddenly become more powerful when its laws are not favored? Perhaps the Court was making the assumption that the individual would be entitled to the other country's rule of law, and therefore the Executive would be less responsible to ensure justice.

Perhaps this territorial sovereignty element is meant to protect against the fear of a writ that cannot be suspended. There is an argument that if the writ can only be suspended in times of invasion and rebellion, then the writ may only extend to territories of America, because otherwise an invasion or rebellion in those areas would not technically be an invasion of America, and therefore the writ would not be subject to suspension.[189] First, there does not seem to be any language in the Suspension Clause that suggests such a piecemeal restriction to suspension.[190] It seems conceivable that, especially in the case of an invasion of the fifty states, the same public policy reasons would apply for requiring the suspension everywhere; namely, preventing further invasion by detaining individuals suspected of invading. Furthermore, the balance of power element of this argument would support the conclusion of this Comment. This argument suggests that the writ should not extend to areas where Congress could not suspend it, presumably to retain the balance of power between branches. Using that logic, the writ *should* extend to any area where the Executive detains, in order to maintain a balance of power with the judiciary.

There is a recurring theme amongst the three prongs of the test: they are focused on the individual. The absurdity of the outcome of such a test becomes clear when it is framed in terms of the Executive's actions;

187. *Id.*

188. *Id.* at 2261.

189. *See* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 523 (2007) ("Assuming that the writ should not be available anywhere that the political branches could not, if the public safety required, temporarily suspend it, the writ should only be available in territory over which the United States exercises such pervasive and persistent sovereignty that a hostile military incursion could be fairly described as an 'invasion' vis-à-vis the United States, or an armed insurrection could fairly be described as a 'rebellion' vis-à-vis the United States.").

190. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

the Executive somehow becomes more powerful when it is operating against a non-citizen outside the borders of the United States. This conclusion is counterintuitive. Granted, this test does make sense when considering it in terms of the individual, as the Court does—the United States should grant an individual fewer rights when that individual is a non-citizen located outside the United States. The question then becomes, which is the proper paradigm to apply when deciding the scope of the writ of habeas corpus?

It is vital to solve this problem in a manner that adequately restricts executive power. All motives aside, the Executive has shown a great propensity to take advantage of the decisions of the Supreme Court when there is room to do so, thus exploiting the balance of power between the branches of government.[191] In *Boumediene*, the judiciary has again designed an ineffective tool to determine the proper scope of habeas corpus because the Executive may still manipulate the test, just as it did under the old bright-line sovereignty test in *Eisentrager*. Some might argue that the judiciary has done the right thing in not acting with too much haste. As one author has noted, avoiding the true merits of a case might often be good for society, avoiding a clash between branches of government until the issue "might go away or be resolved politically."[192] However, the characteristics of the war on terror make it less likely that the war will ever come to an "end" in the traditional sense—how can the United States make peace with an enemy that has no overt public face, no flag, no borders?[193] For this reason, the issue of executive detention in the war on terror is unlikely to resolve itself anytime soon, making it illogical for the judiciary to employ the "wait and see" technique to avoid a clash with the Executive. In the words of a different author, the proper solution "must be sufficiently robust to ensure that the U.S. government cannot reasonably contend that there is any place on earth entirely beyond the reach of law."[194] The *Boumediene* Court's characterization of the problem as one of separation of powers suggests the proper solution.

191. *See supra* Part II.A.

192. Martinez, *supra* note 19, at 1082.

193. *See* Michael Elliot, *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 27, 30 (noting that the destruction of Al Qaeda camps in Afghanistan had the unintended effect of dispersing terrorists to many different regions such as "Chechnya, Yemen, East Africa and Georgia's Pankisi Gorge").

194. Knowles & Falkoff, *supra* note 16, at 643.

C. A Separation of Powers Problem Demands a Separation of Powers Solution

In approaching the habeas issue from either the individual rights or separation of powers viewpoint, one can see that both make sense. In examining historical studies aimed at determining the scope of the writ, a wealth of language appears suggesting the original purpose was to restrict the King's power, although, an equal amount of language appears referring to the prisoner's right to challenge the legality of his detention.[195] The Court's opinion in *Boumediene* also speaks in terms of both separation of powers and individual rights, and the opinion is itself an indication of this symbiotic relationship, framing the problem at hand in terms of separation of powers and providing a solution in terms of individual rights. Rather than try to argue that one approach is better in determining what action the judiciary should be taking, a better analysis is to simply accept that the concepts are inseparable when it comes to the writ of habeas corpus. There is no way to check executive power using habeas review without extending some sort of individual right to the person being detained. Any sort of habeas review aimed at not extending individual rights would be impossible, because presumably the illegality of any detention would stem from the right of an innocent detainee to be free. In other words, the check on executive power fails without a consideration of the prisoner's individual rights.

Understanding this mutually dependent relationship makes reconciling the value of the separation of powers with the highly criticized approach of dictating international fundamental rights very difficult. One option is for the Court to proceed as it did in *Boumediene* and let the concern of seeming overly "cosmopolitan"[196] reign in its test for extension of the writ, resulting in an empowered executive, out of balance with the judiciary. Alternatively, the Court could strive to ensure the Executive's power is properly checked, and accept that extension of individual rights may be an ancillary consequence of that goal. The pertinent inquiry then must focus on which path will have a more significant impact upon the Nation.

The Court's focus on an imbalance in the separation of powers in *Boumediene* implies the Court had greater concern for the ramifications resulting from such an imbalance than the ramifications resulting from extending individual rights. In other words, the Court did not

195. *See supra* Part II.B.

196. Posner, *supra* note 133, at 23.

characterize the problem as one involving a dilemma over the level of individual rights that should be properly afforded to the detainees. Obviously the separation of powers issue was important to the Court, which makes it all the more curious that it focused on the individual aspect in delivering the resolution of that issue. In doing so, the Court considered all the major drawbacks in extending the writ, but failed to consider the major drawbacks that come with leaving the Executive free reign to detain in certain parts of the world, and under certain circumstances.

Failing to properly balance the power between the executive and judicial branches, one could argue, results in a direct harm to the American people in that it undermines the philosophy of democracy upon which the United States was built. It is a curious thing indeed when a country wages war in the name of upholding democracy, and then sacrifices the balance of power so fundamental to democracy in order to attain that end. This is undoubtedly what Justice Stevens was referring to in his quote from *Rumsfeld v. Padilla*—that we must not fight tyranny with tyranny,[197] because that taints what America represents. Justice Stevens suggests there is some innate value in the American way, symbolized by the flag. In that same vein, there is innate value in the idea of the separation of powers, where even if the Executive is not acting directly against the American people, something is lost because the Executive's actions do not comport with our traditional notions of a checks-and-balances system. As Justice Black stated in *Reid*, "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source."[198] Any time the Executive acts outside what the Constitution allows, it begins to undermine the Constitution itself. When the Court cannot review executive detentions through the writ of habeas corpus, the American system of checks and balances is compromised, and the American people are harmed as the American system of government begins to mean less. The only method of truly assuring a check on executive power is to allow habeas review anytime the Executive detains any person, in any place. Under this method, there is no geographic location and no impractical scenario that the Executive could create that would prevent the judicial branch from ensuring that the innocent are not held captive for years on end.

197. Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

198. Reid v. Covert, 354 U.S. 1, 5–6 (1957).

IV. CONCLUSION

Lahkdar Boumediene's situation has been improved by the Court's holding in the Supreme Court decision that bears his name. The *Boumediene* decision has finally taken a threshold issue off the table—the writ of habeas corpus does indeed extend to Lahkdar. The legal battle became more linear for Guantanamo detainees in the sense that now the only issue is what process habeas corpus requires if the Executive is going to provide a substitute for federal courts. Arguably, this method of substituting military commissions still violates separation of powers, because an arm of the Executive, the military, is reviewing the detentions. However, this is a problem outside the scope of this Comment. Regardless of the outcome on that issue, the legal dilemma of extraterritorial habeas will continue long into the future. Now that the President has ordered Guantanamo closed within one year,[199] it is unclear how the "practicality" factors will apply in another geographic location, not to mention the fate of prisoners in the inevitable conflicts in the future of our Nation.

The Guantanamo Bay scenario has put on display the Executive's propensity to abuse the scope of habeas corpus, nullifying the writ's essential function of putting the power of executive detention in check—a check whose vital purpose is to ensure innocents are not harmed. In *Boumediene*, the Court acknowledged this problem of an imbalance of power.[200] In an attempt to employ stare decisis, the Court recalled the Insular Cases in a questionable manner, allowing the Court to avoid appearing overly cosmopolitan. The result was an outcome that is open to further abuse; perhaps not in the immediate future, but surely at some point. Due to the test laid down in *Boumediene*, an overzealous executive might manipulate the test in the name of protecting democracy, and the next Lakhdar Boumediene again may have to endure a four-year legal battle just to decide a threshold issue—that the writ extends to him. The Court missed its opportunity to ensure that no future executive will employ a method of tyranny in combating tyranny.

Rather than proceed with such an awkward interpretation of precedent to avoid the taboo nature of extending fundamental rights, the Court should have simply focused on restricting the Executive's power. The writ of habeas corpus was designed to restrain the King's power, and not even the King was above the law that provided this right. Our

199. Shane, *supra* note 14.

200. Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008).

modern equivalent of the King is the executive branch, yet the writ's purpose still holds true; therefore, we simply cannot allow the Executive to manipulate its application. The best way to ensure this is to allow every person detained by the executive branch—at any time and in any place—to assert the writ of habeas corpus.