

**OF SUSPENSION, DUE PROCESS, AND GUANTANAMO:
THE REACH OF THE FIFTH AMENDMENT AFTER *BOUMEDIENE*
AND THE RELATIONSHIP BETWEEN HABEAS CORPUS
AND DUE PROCESS**

*Joshua Alexander Geltzer**

*This Article examines the surprisingly under-explored relationship between habeas corpus and due process, using ongoing detention at Guantanamo Bay as inroads into the broader topic. The Supreme Court's recent decision in *Boumediene v. Bush* held that the Constitution's Suspension Clause applies to detainees at Guantanamo, thus constitutionally protecting their filing of habeas petitions. Since that decision, the Court of Appeals for the D.C. Circuit has affirmed its pre-*Boumediene* conclusion that the Due Process Clause does not apply to Guantanamo detainees. This unusual severing of the typically dual protections of habeas review and due process raises the interesting question of how those two constitutional provisions relate. This Article sets out five conceptions of the relationship between habeas and due process, then shows how each of those conceptions connects to a particular reading of *Boumediene*. The Article concludes that, if and when the issue of the applicability of due process to Guantanamo reaches the Supreme Court, the Court's conclusion may well come down to Justice Kennedy's vote, which is likely to hinge on whether he applies to the issue the same "impracticable and anomalous" test that he utilized when writing the majority opinion in *Boumediene* or whether he approaches the issue from the separation-of-powers perspective that he also emphasized in that decision. Which approach emerges as dominant has implications beyond Guantanamo: it is likely to suggest a broader understanding of the still-uncertain relationship between the Suspension and Due Process Clauses. Hence, the Article reveals that while the opinion in *Boumediene* initially appears susceptible to multiple, complementary readings, digging deeper so as to explore those readings' implications for the underlying issue of the relationship between habeas and due process reveals distinct tensions, as the different readings of *Boumediene* suddenly begin to pull in different directions.*

INTRODUCTION

In June 2008, one small piece of the Constitution traveled to Guantanamo Bay, Cuba. In *Boumediene v. Bush*,¹ the Supreme Court held that the constitutional rights guaranteed under the Suspension Clause² applied extraterritorially to aliens held at Guantanamo. The

* For their help and support with this project, the author thanks Katherine Boone, Sophie Brill, Amy Chua, Travis Crum, Gene Fidell, Bob Geltzer, Linda Greenhouse, Albert Lichy, Sam Rascoff, Steve Vladeck, Matt Waxman, and especially Jed Rubenfeld, whose encouragement and feedback helped me to formulate thoughts on this topic, to put them to paper, and to revise and refine them. The author also thanks the editors of the *Journal of Constitutional Law* for their exceedingly dedicated work on this Article.

¹ 553 U.S. 723 (2008).

² 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."). As others have explained, a major aspect of the outcome in *Boumediene* was the Court's holding that there *are* affirmative rights guaranteed under the Suspension Clause. See

Court's opinion was decidedly narrow in multiple senses: Justice Kennedy wrote on behalf of a five-to-four majority, and he made every effort to confine his opinion just to Guantanamo and, crucially for the discussion here, just to the Suspension Clause.

Since *Boumediene*, uncertainty has reigned as to whether that decision portended other parts of the Constitution accompanying the Suspension Clause to Guantanamo, with the most likely next candidate being the Fifth Amendment's Due Process Clause.³ This Article explains that, while the Court of Appeals for the D.C. Circuit has held both before and after *Boumediene* that the Due Process Clause does not extend to aliens at Guantanamo, the logic of *Boumediene* itself suggests that, eventually, the Supreme Court may reach a different conclusion.

This Article does not reopen the debate over whether *Boumediene* was decided rightly or wrongly. Nor does it make a normative argument about whether, in the abstract, the Due Process Clause *should* apply to aliens detained at Guantanamo. Rather, the Article tackles the narrow question of whether *Boumediene* is best understood to anticipate such a finding or whether its narrowness suggests that extra-territorial extension of the Suspension Clause to aliens was constitutionally unique. That inquiry demands broader consideration of a surprisingly under-explored topic: the relationship between habeas corpus rights and due process protections.

The Article begins by offering some background on *Boumediene's* holding and by suggesting what is at stake in considering whether that holding anticipates a similar extension of the Due Process Clause to Guantanamo. Next, the Article summarizes relevant pre-*Boumediene* case law on due process at Guantanamo, after which the discussion turns to relevant language of *Boumediene* itself. The Article then explores the post-*Boumediene* case law on the applicability of due process to Guantanamo detainees and surveys the scholarship on that subject that has emerged in the wake of the Supreme Court's decision.

The next Part of the Article grapples with the relationship, in the abstract, between the Suspension Clause and the Due Process Clause, offering five conceptions of how the two constitutional clauses relate to each other. Finally, drawing on those different conceptions of the

Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2009 SUP. CT. REV. 1, 16 (discussing *Boumediene's* holding "that the Suspension Clause affirmatively confers a right to habeas corpus review").

3 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

habeas-due process relationship, the Article suggests five understandings of *Boumediene*, ranging from those pointing most strongly against finding the Due Process Clause applicable to Guantanamo detainees to those that point most strongly in favor of such a finding. In the end, the Article concludes that the Supreme Court's determination may well come down to Justice Kennedy's vote, which is likely to hinge on whether he applies to the issue the same "impracticable and anomalous" test that he utilized in *Boumediene* or whether he approaches the issue from the separation-of-powers perspective that he also emphasized in that decision. Which approach emerges as dominant has implications beyond Guantanamo: it is likely to suggest a broader understanding of the still-uncertain relationship between the Suspension and Due Process Clauses. Hence, while the opinion in *Boumediene* initially appears susceptible to multiple, complementary readings, digging deeper so as to explore those readings' implications for the underlying issue of the relationship between habeas and due process reveals distinct tensions, as the different readings of *Boumediene* suddenly begin to pull in different directions.

I. THE BACKGROUND AND THE STAKES

A. *The Background: The Suspension Clause at Guantanamo*

The Constitution's Suspension Clause declares: "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."⁴ While the meaning of those scant words remains much debated,⁵ the

⁴ U.S. CONST. art. I, § 9, cl. 2.

⁵ Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion), *with id.* at 554 (Scalia, J., dissenting), *and id.* at 579 (Thomas, J., dissenting). See generally Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 539 (2010) ("Among other things, [the Suspension Clause] does not define the content of the privilege or what amounts to a suspension, leaving them open to debate."); *id.* at 558 ("[T]he constitutional text did not express its purpose clearly."); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 59 (2006) ("The Suspension Clause . . . is as straightforward as an English sentence can be. And to those familiar with the Great Writ, its meaning, at least at first reading, does not seem obscure. Yet few clauses in the Constitution have proved so elusive." (footnote omitted)); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607 (2009) ("We have come this far with much of the Clause's meaning shrouded in mystery . . ."); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 941 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010)) (noting the recent "unprecedented degree to which courts have had to grapple with the purpose, meaning, and scope of the U.S. Constitution's Suspension Clause" and

basic idea of the writ of habeas corpus is that a prisoner has the right to be brought before a judge in order to challenge the legality of the prisoner's detention (or, less typically, to challenge the conditions of that detention).⁶ In turn, the Suspension Clause both affirms a prisoner's right to challenge his detention and specifies that only in the narrow instances of rebellion and invasion may the writ be suspended.

While habeas cases make their way to the Supreme Court with some regularity, the Suspension Clause itself and the questions that it raises about what habeas and suspension really mean have been the focus of relatively few cases before the Court over the centuries.⁷ In the 1807 case of *Ex parte Bollman*, Chief Justice Marshall suggested that only Congress could constitutionally suspend the writ of habeas corpus.⁸ In 1861, Chief Justice Taney, sitting as a federal circuit court judge, invoked *Bollman* in holding that President Lincoln's suspension of habeas corpus without congressional approval was unconstitutional.⁹ Then, in the famous 1866 case of *Ex parte Milligan*, the Supreme Court found Congress's suspension of the writ of habeas corpus during the Civil War to have been lawful in general, but deemed unconstitutional the use of military tribunals where civilian

the fact that "contemporary judges and scholars have found little settled by prior precedent").

- 6 See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007) ("The mechanics of the writ's administration have changed little over the centuries. A representative of the detainee petitions a court to issue a writ directing the prisoner's custodian (the 'respondent') to appear and to show lawful authority for the detention. If the court finds the detention contrary to law, it can order the prisoner's release." (footnote omitted)); see also WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 6 (1980) ("The writ operates precisely as its English model: the writ is directed to a person detaining another, commanding him to produce the body of the prisoner at a designated time and place, to state the day and cause of his capture and detention, to do, submit to, and receive whatever the court or judge awarding the writ shall consider in that behalf").
- 7 See Vladeck, *supra* note 5, at 963 ("[P]rior to 2008, the U.S. Supreme Court had consistently declined to give meaningful substantive content to the Suspension Clause. The provision was seldom even mentioned in most of the Court's significant nineteenth-century habeas decisions, and even when it was invoked . . . the discussion was, charitably, rather cursory. Even in cases traditionally thought of as significant habeas decisions, the Suspension Clause received short shrift." (footnotes omitted)).
- 8 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93, 94 (1807).
- 9 *Ex parte Merryman*, 17 F. Cas. 144, 149, 152 (1861) (C.C.D. Md. 1861) (No. 9487) (Taney, J.). Note that some scholars contend that, in deciding *Merryman*, Chief Justice Taney was acting not as a circuit judge but as Chief Justice in chambers. See, e.g., Special Event, *The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 366-67 (1998) (showing the "testimony" of Professor Mark E. Neely, Jr. supporting this view in a mock impeachment trial of President Lincoln).

courts were still operating.¹⁰ The Supreme Court's most significant twentieth-century war-time decision relating to the Suspension Clause was 1948's *Hirota v. MacArthur*, in which the Court rejected a Japanese war criminal's attempt to seek a writ of habeas corpus directly from the Supreme Court based on its original jurisdiction.¹¹ However, the Supreme Court's analysis of the Suspension Clause was unclear, as the Court's decision left vague which of two jurisdictional defects proved fatal to the petitioner's claims.¹² Other significant twentieth-century Supreme Court decisions implicating the Suspension Clause consistently avoided grappling with foundational issues regarding the meaning of the Clause itself.¹³

While the Supreme Court's Civil War-era decisions did invalidate certain executive actions, the Court had never struck down a federal statute on the basis of the Suspension Clause until the Court's 2008 decision in *Boumediene*.¹⁴ Two previous Supreme Court decisions concerning Guantanamo, and two legislative responses by the political branches, provided the backdrop for *Boumediene*.¹⁵

In 2004, faced with habeas petitions from detainees held at Guantanamo, the Supreme Court held in *Rasul v. Bush* that federal courts possessed jurisdiction over Guantanamo.¹⁶ Congress and President Bush responded with the 2005 Detainee Treatment Act, which stripped federal courts of jurisdiction over habeas petitions from

¹⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

¹¹ *Hirota v. MacArthur*, 338 U.S. 197 (1948); see Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497 (2007) (discussing recent implications of *Hirota*). Another World War II-era case that implicated the Suspension Clause, *Duncan v. Kahanamoku*, was decided by the Court on statutory grounds, though Justice Murphy's concurrence reached the constitutional issue and invoked *Milligan's* understanding of suspension requirements. 327 U.S. 304, 328 (1946) (Murphy, J., concurring).

¹² See Vladeck, *supra* note 11, at 1518–22 (discussing the questions left unanswered in *Hirota*).

¹³ See *Felker v. Turpin*, 518 U.S. 651 (1996) (denying habeas relief while avoiding core issues surrounding the definition of the Suspension Clause); *Swain v. Pressley*, 430 U.S. 372 (1977) (interpreting a statute to deny habeas relief while avoiding issues central to the meaning of the Suspension Clause); *United States v. Hayman*, 342 U.S. 205 (1952) (ruling on a habeas petition without discussing the meaning of the Suspension Clause).

¹⁴ See Neuman, *supra* note 5, at 538 (“The Supreme Court had never before found a violation of the Suspension Clause, and the holding of *Boumediene* gives its reasoning a precedential significance that earlier discussions lack.”).

¹⁵ Also significant was *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Supreme Court looked to the Suspension Clause in deciding that Congress had not intended to strip federal courts of jurisdiction over habeas petitions from deportable aliens.

¹⁶ *Rasul v. Bush*, 542 U.S. 466, 470, 485 (2004).

Guantanamo.¹⁷ A year later, the Court held in *Hamdan v. Rumsfeld* that the Act did not apply to habeas petitions already pending on the date of the law's enactment.¹⁸ Yet again, Congress and President Bush rebuffed the Court, with the 2006 Military Commissions Act unambiguously stripping federal courts of jurisdiction over any habeas petitions from Guantanamo, pending or otherwise.¹⁹

The stage was set for the constitutional challenge that had been avoided by the Supreme Court through its statutory decisions in *Rasul* and *Hamdan*. Confronted once again by lower courts' dismissal of habeas petitions from Guantanamo, the Supreme Court faced squarely two questions in *Boumediene*: did the Guantanamo petitioners possess a constitutional right to habeas corpus, and, if so, did the Detainee Treatment Act provide an adequate and effective substitute in the form of combatant status review tribunals ("CSRTs")?

Writing for the Court's five-Justice majority, Justice Kennedy held first that the petitioners did indeed possess such a right, and second that the Act offered an inadequate substitute.²⁰ The Court explained that, because the right to habeas review had full effect at Guantanamo, Congress had to comply with the Suspension Clause in order to suspend that right, yet Congress had neither enacted such a suspension nor provided an adequate substitute.²¹ Hence, the Supreme Court ordered lower courts to hear habeas petitions from detainees at Guantanamo, even as Kennedy's opinion explicitly left uncertain the precise parameters of appropriate review.²²

17 Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(e), 119 Stat. 3474, 3477 (codified as amended at 10 U.S.C. § 801 (2006)).

18 *Hamdan v. Rumsfeld*, 548 U.S. 557, 584 (2006).

19 Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 7(a), 7(b), 120 Stat. 2600, 2635, 2636 (codified as amended at 28 U.S.C. § 2241). Unlike the Detainee Treatment Act, which stripped habeas jurisdiction specifically from Guantanamo detainees, *see* Detainee Treatment Act of 2005 § 1405(e) ("[N]o 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 . . . at Guantanamo Bay . . ."), the 2006 Military Commissions Act applied everywhere, *see* Military Commissions Act of 2006, § 950j ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter . . .").

20 *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008).

21 *Id.* at 771, 792.

22 *Id.* at 733 ("We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."); *id.* at 798 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus."); *see* Melt-

After seven years of post-9/11 detentions at Guantanamo and two previous Supreme Court decisions on the matter, *Boumediene* made clear that the Constitution's Suspension Clause applied to non-citizens held at Guantanamo: "We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay."²³ What the decision meant for the rest of the Constitution's applicability to Guantanamo remained an open question.²⁴

B. *The Stakes: The Due Process Clause at Guantanamo*

One could ask many questions about the implications of *Boumediene* for the rest of the Constitution's applicability to Guantanamo—indeed, as many questions as there are other relevant guarantees contained in America's founding document.²⁵ But one such question is particularly pressing: does *Boumediene*'s application of the Suspension Clause to Guantanamo portend the similar application there of the Fifth Amendment's Due Process Clause?²⁶

zer, *supra* note 2, at 3 (noting that *Boumediene* raised "a broad range of questions, left to the future, about how the habeas jurisdiction will operate").

²³ *Boumediene*, 553 U.S. at 771.

²⁴ See Usman Ahmed, Prosecuting Torture Through the Lens of *Boumediene* 3 (Sept. 29, 2010) (unpublished manuscript) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684405 (arguing "that other constitutional provisions can pass the *Boumediene* test and should be extended to alien-detainees in the same way as habeas"). The question of whether other constitutional rights applied to Guantanamo detainees had emerged even before *Boumediene*. See Fallon & Meltzer, *supra* note 6, at 2093 ("Another looming question at the time of the *Hamdan* decision involved the procedural rights, if any, that Guantánamo detainees possess under the Due Process Clause."); *id.* at 2094 ("[T]he question [then] becomes whether an alien seized abroad acquires procedural due process rights as a result of being relocated to Guantánamo Bay.").

²⁵ See Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2108 (2009) (asking, in the wake of *Boumediene*, "do other constitutional provisions 'ha[ve] full effect' at Guantanamo?" (quoting *Boumediene*, 553 U.S. at 771)). One could also ask an important set of questions about the extraterritorial reach of the Suspension Clause beyond Guantanamo in the wake of *Boumediene*, but that is not this Article's topic. See *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (discussing the reach of the Suspension Clause); see also Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 261 (2009) (exploring questions raised in the wake of the "functional approach" adopted in *Boumediene*). *Maqaleh*, in particular, raises the question of whether *Boumediene* is, in fact, geographically limited in its scope as suggested above, or whether its functional approach is decidedly unlimited, as the *Maqaleh* petitioners argue and as the district court initially found. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 214 (D.D.C. 2009).

²⁶ Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL L. REV. (forthcoming 2011) (manuscript at 22), available at http://papers.ssrn.com/abstract_id=1838402 ("*Boumediene*, . . . though not about the Due Process Clause, likely recalibrates the Court's approach to whether *all* individual constitutional rights apply extraterritorially, including

The Fifth Amendment's Due Process Clause guarantees to individuals certain protections against the federal government: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." ²⁷ Because there exists a number of significant ways—explored below—in which the possible applicability of the Clause to Guantanamo detainees affects ongoing litigation, ²⁸ the Due Process Clause appears to be the part of the Constitution whose potential to accompany the Suspension Clause to Guantanamo will confront the Supreme Court soonest. In other words, the stakes already loom large.

First, the D.C. District Court and Court of Appeals have followed *Boumediene's* mandate to hear and decide habeas petitions from Guantanamo. ²⁹ Indeed, much as *Boumediene* anticipated, the lower courts appear to have worked out at least some standards on which to decide such cases, even if significant uncertainty remains. ³⁰ Among

whether the Guantánamo detainees are entitled to due process protections."); see Petition for Writ of Certiorari at i, *Al-Madhwani v. Obama*, No. 11-7020 (U.S. Oct. 24, 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/10/al-Madhwani.pdf> (petitioning the Supreme Court to decide "[w]hether the Court of Appeals' denial of due process protections to Guantánamo Bay detainees is inconsistent with the law and the Court's decision in *Boumediene v. Bush*").

²⁷ U.S. CONST. amend. V.

²⁸ See generally Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) ("Due process doctrine subsists in confusion. The disarray partly reflects the terrain that due process covers." (footnote omitted)).

²⁹ Ironically, the literal meaning of habeas corpus—"may you have the body," or "you should have the body"—has not applied to post-*Boumediene* habeas proceedings concerning Guantanamo: no "body" has actually been brought from Guantanamo into court, though some petitioners have participated in the proceedings via teleconference. (On the literal meaning, see *Johnson v. Eisentrager*, 339 U.S. 763, 779 n.10 (1950).) I appreciate Sophie Brill bringing this linguistic irony to my attention.

³⁰ Cf. Joshua Alexander Geltzer, *Decisions Detained: The Courts' Embrace of Complexity in Guantánamo-Related Litigation*, 29 BERKELEY J. INT'L L. 94, 124 (2011) ("Hence, virtually the entire string of major Guantánamo-related cases has traveled from the D.C. District Court to the D.C. Circuit to the Supreme Court, only to return to the district court with unanswered questions whose resolution by district court judges is inevitably challenged first before the D.C. Circuit and again before the Supreme Court."). Compare HUMAN RIGHTS FIRST, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES 1 (2010), available at <http://www.humanrightsfirst.info/pdf/Habeas-Works-final-web.pdf> ("Habeas is working. The judges of the U.S. District Court for the District of Columbia have ably responded to the Supreme Court's call to review the detention of individuals at Guantánamo Bay, Cuba."), with BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 3 (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf ("So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances.").

those standards appears to be an emerging consensus that statements elicited through coercive interrogation should not be admitted in assessing habeas petitions.

In the process of evaluating habeas petitioners' arguments for suppressing statements alleged to be coerced, the D.C. District Court has underscored one potential impact of the applicability of the Due Process Clause to Guantanamo.³¹ For example, in *Al-Qurashi v. Obama*, Judge Huvelle invoked the two logics for suppressing coerced statements commonly identified in the case law on voluntariness: first, that basic fairness does not permit admission of the fruits of coercion; and second, that involuntary confessions have questionable reliability.³² In discussing the first concept, Judge Huvelle seemed implicitly to be relying on the protections associated with due process, citing a number of Supreme Court cases on the subject.³³ At the same time, Judge Huvelle's acknowledgment that a due process-based approach was in tension with certain D.C. Circuit dicta suggested that such constitutional grounds might, on their own, be insufficient to justify suppression.³⁴ Similarly, in deciding to suppress coerced statements in the course of assessing a Guantanamo detainee's habeas petition, Judge Kessler's opinion in *Mohammed v. Obama* emphasized the same dual foundations for requiring voluntariness of statements.³⁵

In both cases, the invocation of the Due Process Clause's requirement that coerced statements be suppressed suggests one potential consequence of that Clause's extension to Guantanamo: if

³¹ See generally WITTES, CHESNEY & BENHALIM, *supra* note 30, at 51–60 (discussing the approaches of judges on the D.C. District Court to involuntary statements in the context of habeas petitions from Guantanamo detainees).

³² *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69, 78 n.14 (D.D.C. 2010) (“It is also well established that in criminal proceedings, statements of the accused ‘that are extracted by threats or violence violate the Due Process Clause’ because such statements are ‘inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’” (quoting *United States v. Karake*, 443 F. Supp. 2d 8, 50–51 (2006)) (internal quotation marks omitted)).

³³ *Al-Qurashi*, 733 F. Supp. 2d at 78 (citing, among other Supreme Court precedent on the required suppression of coerced statements, *Jackson v. Denno*, 378 U.S. 368 (1964); *Rogers v. Richmond*, 365 U.S. 534 (1961); and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944)).

³⁴ *Al-Qurashi*, 733 F. Supp. 2d at 78 n.14.

³⁵ *Mohammed v. Obama*, 704 F. Supp. 2d 1, 24–25 (D.D.C. 2009) (“In the criminal context, confessions or testimony procured by torture are excluded under the Due Process Clause because such admissions would run contrary to ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’ *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). Also, as a practical matter, resort to coercive tactics by an interrogator renders the information less likely to be true. *Linkletter v. Walker*, 381 U.S. 618, 638 (1965).” (footnote omitted)).

Guantanamo detainees are entitled to due process protections, then the suppression of coerced statements by district courts evaluating habeas petitions from Guantanamo would flow directly from the Supreme Court's constitutional precedent, rather than remaining subject to an evidentiary balancing test involving a mix of semi-constitutional protections and pragmatic concerns about reliability.³⁶ (Whether Supreme Court precedent in this area itself constitutes essentially a balancing test is another matter.) Of course, suppression of coerced statements is just one of many possible ways in which the applicability of due process could affect courts' continuing evaluations of habeas petitions filed by Guantanamo detainees: others might include the standard of proof,³⁷ the ability to present and to

³⁶ By way of contrast, it is worth noting that, in the trial in the Southern District of New York of Ahmed Ghailani, the applicability of the Due Process Clause's prohibition on coerced statements does not seem to have been disputed, presumably because the location of Ghailani's trial—namely, on American soil—resolved the issue. That seems to have been the case even though the conduct at issue—Ghailani's interrogation by American investigators—indisputably occurred abroad. See *United States v. Ghailani*, 743 F. Supp. 2d 261, 264 (S.D.N.Y. 2010) ("The government has elected not to litigate the details of what was done to the defendant. Instead, it has asked the Court to assume for the purposes of the motion that everything the defendant said was coerced in violation of the Fifth Amendment. Accordingly, this decision, at the government's behest, proceeds on that premise."). For an interesting discussion of the suppression of coerced statements in military commission proceedings at Guantanamo, see David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1390–96 (2011).

³⁷ Cf. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (declining to decide whether the Suspension Clause requires use of a preponderance of the evidence standard in reviewing habeas petitions); *Bensayah v. Obama*, 610 F.3d 718, 723 (D.C. Cir. 2010) ("[*Boumediene*] left open . . . the standard of proof the Government must meet in order to defeat a petition for habeas corpus."); Petition for Writ of Certiorari at i, *Al-Odah v. United States*, No. 10-439 (U.S. Sept. 28, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (petitioning the Supreme Court to decide "[w]hether a preponderance of the evidence standard, rather than a clear and convincing evidence standard, is sufficient under the Due Process Clause of the Constitution and 28 U.S.C. § 2241 to support a ruling in favor of indefinite imprisonment, potentially for life," at Guantanamo), cert. denied, 131 S. Ct. 1812 (2011). Note that the *Al-Odah* petitioners appeared to take for granted that the Due Process Clause applies to them, despite the contrary holding of the D.C. Circuit. In contrast, see Petition for a Writ of Certiorari, *Awad v. Obama*, No. 10-736 (U.S. Nov. 30, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/12/Awad-petition-11-30-10.pdf> (challenging the preponderance of the evidence standard based on *Boumediene* alone, without invoking the Due Process Clause), cert. denied, 131 S. Ct. 1814 (2011). Regarding the overall significance of standard-of-proof issues in Guantanamo habeas litigation, see generally Matthew C. Waxman, *Guantánamo, Habeas, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 246–56 (2009). Waxman's analysis suggests that a determination of the applicability of due process to Guantanamo detainees would not in itself decide the appropriate standard of proof, see *id.* at 250–51; nonetheless, such a determination still could play an important role as one factor in-

exclude various types of evidence,³⁸ and the right to cross-examine witnesses. Indeed, to the extent that the Fifth Amendment's Due Process Clause is thought to offer the same protections against the federal government offered against the state governments by the Fourteenth Amendment's Due Process Clause,³⁹ finding the Due Process Clause applicable to Guantanamo would essentially carry with it the rest of the protections contained in the Bill of Rights.

More specifically, a second consequence of the potential applicability of the Due Process Clause to Guantanamo would be the narrowing of the executive branch's discretion in resettling detainees cleared for release. Indeed, as will be discussed below, the D.C. Circuit's post-*Boumediene* statement of the inapplicability of due process to Guantanamo emerged in precisely this context, as Uighur detainees long cleared for release but lacking a viable destination for resettlement sought entry to the United States.⁴⁰ Other detainees also have objected to the destinations in which the United States has intended to resettle them.⁴¹ If due process were found applicable to

fluencing the standard deemed appropriate. For a thorough assessment of the D.C. Circuit's approach to this issue, see Vladeck, *supra* note 26, at 12–17.

38 Cf. Petition for a Writ of Certiorari, *Awad v. Obama*, No. 10-736 (U.S. Nov. 30, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/12/Awad-petition-11-30-10.pdf> (challenging the admission of hearsay in habeas proceedings brought by Guantanamo detainees), *cert. denied*, 131 S. Ct. 1814 (2011); Petition for Writ of Certiorari at 3, *Al-Odah v. United States*, No. 10-349 (U.S. Sept. 28, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (petitioning the Supreme Court to halt “the indiscriminate admission of hearsay” by the lower courts in habeas proceedings brought by Guantanamo detainees), *cert. denied*, 131 S. Ct. 1812 (2011). Neither petition for certiorari invoked the Due Process Clause on this point, but a finding of due process's applicability to Guantanamo surely would have bolstered their shared argument.

39 *But see* *Sanford v. United States*, 586 F.3d 28, 35 (D.C. Cir. 2009) (holding that, despite the incorporation of the Sixth Amendment jury right via the Fourteenth Amendment, “[t]he right to jury trial is not, however, converted into a procedural due process right by incorporation,” meaning that the content of the right as incorporated against the states is not necessarily applicable in identical fashion against the federal government).

40 *Kiyemba v. Obama*, 555 F.3d 1022, 1023 (D.C. Cir. 2009), *vacated by* *Kiyemba v. Obama*, 559 U.S. at 1 (2010), *reinstated by* *Kiyemba v. Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010). For a helpful overview of the *Kiyemba* litigation, see Vladeck, *supra* note 5, at 971–76.

41 *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia at i, *Khadr v. Obama*, No. 10-751 (U.S. Dec. 2, 2010) (petitioning the Supreme Court to decide “[w]hether, in a habeas corpus action brought by an individual held in United States territory, including Guantánamo, . . . *Boumediene v. Bush*, 553 U.S. 723 (2008), the Suspension Clause, and the Due Process Clause permit[] the district court to give conclusive effect to the government's assertion that the individual is unlikely to be tortured if transferred to a particular country”), *cert. denied*, 131 S. Ct. 2900 (2011); *see also* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia at i, *Mohammed v. Obama*, No. 10-746 (U.S. Nov. 5, 2010) (petitioning

such individuals, then their constitutional claims to entry onto American soil, or at least to a voice in their eventual destination, would be strengthened greatly. Moreover, the absence of due process rights also contributed to the D.C. Circuit's subsequent holding that the decision of where to resettle the Uighurs was immune from judicial challenge by the detainees and, instead, remained at the discretion of the political branches.⁴² If due process were to apply to Guantanamo detainees, then their claim to a legally protected voice in their own resettlement would be significantly enhanced. Even short of that result, the applicability of due process could suggest a temporal limit on how long such detainees could be held once cleared for release.⁴³

Third, former Guantanamo detainees have begun filing civil lawsuits seeking compensation from the U.S. government for their alleged treatment while detained at Guantanamo. For example, one representative case filed in the Western District of Washington alleges torture and abuse, and identifies as the basis for its cause of action alleged violations of the Due Process Clause.⁴⁴ These civil suits are so-called *Bivens* actions in that they allege constitutional violations by federal agents, allegations permitted to go forward by the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*.⁴⁵ A *Bivens* ac-

the Supreme Court to decide “[w]hether, in a habeas corpus action brought by an individual held in United States territory, including Guantánamo, . . . *Boumediene v. Bush*, 553 U.S. 723 (2008), the Suspension Clause, and the Due Process Clause permit[] the district court to give conclusive effect to the government’s assertion that the individual is unlikely to be tortured if transferred to a particular country”; *id.* at 16 (“Review is also warranted to establish definitively that Guantánamo detainees have a due process right to challenge their transfers to another country on the ground that they are likely to be tortured there. . . . Due process . . . does not permit the Government to transfer a Guantánamo detainee to feared torture without affording him a meaningful opportunity to challenge his transfer on that ground.”). Note that, like the *Al-Odah* petitioners mentioned above, Mohammed and the *Khadr* petitioners appeared to take for granted that the Due Process Clause applies to them, despite the contrary holding of the D.C. Circuit.

42 *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

43 *Cf. Zadvydas v. Davis*, 533 U.S. 678, 699, 701 (2001) (holding, in the immigration context, that six months constitute a “presumptively reasonable period of detention” for determining whether a deportable alien’s “removal is not reasonably foreseeable”).

44 See Complaint and Jury Demand at 35, *Hamad v. Gates*, No. 2:10-cv-00591-MJP (W.D. Wash. Apr. 7, 2010) (“The acts described herein constitute violations of the life and liberty interests of Mr. Hamad in violation of the Fifth Amendment of the United States Constitution, which prohibits cruel and inhuman treatment constituting punishment.”). The district court dismissed Hamad’s suit, with leave to amend, based on immunity grounds. See Order Granting Defendants’ Motions To Dismiss, *Hamad v. Gates*, No. 2:10-cv-00591-MJP (W.D. Wash. Dec. 8, 2011). Note that the *Hamad* court did not find the Military Commissions Act to pose an obstacle to such suits, *id.* at 3–6, in contrast to a decision handed down two weeks later by the D.C. District Court, see Memorandum Opinion at 11–15, *Al Janko v. Gates*, No. 1:10-cv-01702-RJL (D.D.C. Dec. 22, 2011).

45 403 U.S. 388 (1971).

tion is only as credible as the constitutional right that it alleges to have been violated; in other words, if the former detainees possessed no due process rights at Guantanamo, then they may have no viable *Bivens* actions, either.⁴⁶ While there are numerous other potential obstacles to the detainees prevailing in their suits, including pleading requirements,⁴⁷ immunity claims,⁴⁸ and potential invocations of state secrets,⁴⁹ if there is no fundamental due process protection at Guantanamo, then the suits may lack even rudimentary foundations. In contrast, if due process does apply, then litigation is more likely to move forward, even if the aforementioned obstacles eventually become significant hurdles to plaintiffs prevailing on the merits.

Fourth, the applicability of due process to Guantanamo could alter dramatically the military commissions that continue to be held there. Because military commissions and courts-martial are not Article III trials but, instead, constitute Article I proceedings, the protections of the Bill of Rights, including the Fifth Amendment, do not automatically apply to them. In 1994, the Supreme Court noted the President's authority to regulate military proceedings and explained: "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here."⁵⁰

The same uncertainty about the applicability of constitutional protections to military proceedings persists more broadly.⁵¹ To be

46 See Ahmed, *supra* note 24, at 3 (arguing that the application of due process protections to Guantanamo detainees would give rise to *Bivens* actions).

47 Cf. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (dismissing for insufficiently meeting pleading standards a *Bivens* action against former high-ranking officials alleging mistreatment during detention).

48 Cf. *id.* at 1947 (discussing qualified immunity as a defense against a *Bivens* action against former high-ranking officials alleging mistreatment during detention); Rasul v. Myers, 563 F.3d 527, 528 (D.C. Cir. 2009) (accepting a qualified immunity defense to claims made by former Guantanamo detainees), *cert. denied*, 130 S. Ct. 1013 (2009); Ahmed, *supra* note 24, at 3 (noting that "a damages action would lend itself to the affirmative defense of qualified immunity").

49 Cf. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 54 n.26, Al-Aulaqi v. Obama, No. 1:10-cv-1469-JDB (D.D.C. Sept. 24, 2010) (invoking the state secrets privilege against Fifth Amendment claims).

50 Davis v. United States, 512 U.S. 452, 457 n.1 (1994).

51 See, e.g., Loving v. United States, 517 U.S. 748, 777 (1996) (Thomas, J., concurring) (questioning whether the Eighth Amendment applies to courts-martial); Weiss v. United States, 510 U.S. 163 (1994) (finding the Due Process Clause applicable to courts-martial but in adapted form); Middendorf v. Henry, 425 U.S. 25 (1976) (finding the Sixth Amendment inapplicable to courts-martial and finding Fifth Amendment due process applicable, but, in the context of summary courts-martial, finding it not to provide a right to counsel);

sure, the current rules for military commissions, enacted by Congress and the President precisely to try current detainees at Guantanamo, depart significantly from constitutional guarantees, perhaps most notably in the admissibility of hearsay.⁵² If the Due Process Clause were deemed applicable to Guantanamo, then military commissions might well have to conform to safeguards protected in civilian trials in ways that the commissions currently do not. Moreover, just as due process would require suppression of coerced statements in habeas petitions in civilian court, so, too, might due process require suppression of those statements in military commissions, in contrast to the ruling of at least one military commission admitting such statements.⁵³ In light of the Obama Administration's announcement that, after congressional urging, military commissions will recommence at Guantanamo,⁵⁴ the potential consequences of finding due process applicable to those proceedings are particularly salient and significant.

Other effects on ongoing litigation of an extension of due process rights to Guantanamo are conceivable. Moreover, extending due process to Guantanamo could have an impact outside of courtrooms: the daily treatment of detainees might well have to change, with potentially freer access to counsel and to outside information,⁵⁵ as well as the provision of other measures generally afforded to those held in pre-trial detention on American soil. Simply put, deriving from *Boumediene* an understanding of whether the Due Process Clause accompanies the Suspension Clause to Guantanamo is not just a fascinating question of constitutional law: it is also a pressing issue for which the legal and practical stakes are sizable.⁵⁶

Parker v. Levy, 417 U.S. 733 (1974) (finding the First Amendment applicable to the military but in adapted form).

52 See Military Commissions Act of 2009, Pub. L. No. 111-84, § 949a(b)(3)(d), 123 Stat. 2190, 2582-83 (2009) (permitting in military commission proceedings certain uses of hearsay "not otherwise admissible under the rules of evidence applicable in trial by general courts-martial").

53 See *United States v. Khadr*, D-094, D-111 (Guantanamo Military Commission Aug. 17, 2010), available at <http://www.defense.gov/news/D94-D111.pdf> (denying the defense's motion to suppress statements made by the then-teenage accused after interrogators threatened him with indefinite detention and rape).

54 See Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials To Resume*, N.Y. TIMES, Mar. 8, 2011, at A19.

55 See generally David Cole, *What To Do About Guantanamo?*, N.Y. REV. BOOKS, Oct. 14, 2010, available at <http://www.nybooks.com/articles/archives/2010/oct/14/what-do-about-guantanamo/> (discussing Guantanamo detainees' restrictions on access to counsel and outside information).

56 Petition for Writ of Certiorari at 19, 20, *Al-Madhwani v. Obama*, No. 11-7020 (U.S. Oct. 24, 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/10/al->

This Article's analysis treats the Due Process Clause much as the Supreme Court treated the Suspension Clause in *Boumediene*: as a binary on/off switch. That is, even as the Supreme Court acknowledged that "the Suspension Clause does not resist innovation in the field of habeas corpus,"⁵⁷ the Court's bottom-line holding was that the Suspension Clause was fundamentally "on" for detainees at Guantanamo: as quoted above, the Court held "that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay."⁵⁸ Even more so than habeas relief, due process cannot be reduced to a binary on-or-off: due process is a flexible guarantee, as the type of process that is due differs in different circumstances—a fact that the Court recognized in *Hamdi v. Rumsfeld* as it found due process applicable to wartime detention but then asserted that "the exigencies of the circumstances may demand that, aside from . . . core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."⁵⁹ Hence, nothing in this Article should be taken to suggest that due process, if applicable to Guantanamo, must assume any particular, rigidly predetermined form.⁶⁰ But a threshold question is whether the Due Process Clause applies to Guantanamo at all,⁶¹ just as *Boumediene*

Madhwani.pdf (arguing that the D.C. Circuit's denial of due process protections to Guantanamo detainees "profoundly and fundamentally affects *all* of its analyses" and that "[t]he lower courts badly need guidance on the question of the application and scope of due process entitlements of Guantánamo detainees").

⁵⁷ *Boumediene v. Bush*, 553 U.S. 723, 795 (2008).

⁵⁸ *Id.* at 771.

⁵⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion); *see also id.* at 538 ("[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.").

⁶⁰ One might, for example, distinguish between defensive invocations of due process, such as detainees' arguments against the admissibility of coerced statements during habeas proceedings, *see supra* notes 31–39 and accompanying text, and affirmative invocations of due process, such as the *Kiyemba* petitioners' argument for a right to be released on U.S. soil, *see supra* notes 40–42 and accompanying text. If courts were to find the Due Process Clause applicable to Guantanamo, they still might find more compelling detainees' negative invocations of due process than their positive invocations. Thanks to Steve Vladeck for underscoring this distinction.

⁶¹ Especially in light of the incremental approach adopted in the Supreme Court's Guantanamo-related decisions thus far, it is conceivable that, if due process is understood as a property law-like "bundle of sticks," then the Supreme Court might decide the applicability to Guantanamo of only one "stick" at a time. If so, then the full impact of how the Supreme Court decides the threshold question addressed here—whether due process applies to Guantanamo at all—might not become clear for quite some time. Thanks to Matt Waxman for noting this idea. It is also conceivable that, as a legal realist would be particularly keen to suggest, a court addressing this threshold issue might reason backward from potential implications: that is, a court first would ask what rights *must* flow if due process were found applicable to Guantanamo, and what rights *could* flow, especially in

addressed the threshold question of whether the Suspension Clause applied there in any way. And it is that question on which this Article focuses.

II. PRE-*BOUMEDIENE* CASE LAW

In an earlier era, the issue of whether the Due Process Clause applies to aliens detained at Guantanamo would have been resolved quickly by any court confronted with it: case law preceding *Boumediene* suggested that aliens at Guantanamo would be classified as non-citizens located abroad and, in turn, would not receive due process rights under the Fifth Amendment. In 1936, the Supreme Court stated bluntly: “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”⁶² With Guantanamo presumed to qualify as “foreign territory,” aliens detained there would not have received Fifth Amendment protections.

In 1950, the Supreme Court decided *Johnson v. Eisentrager*, rejecting a lower court’s view that the Fifth Amendment applied to aliens detained in Germany: “The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses, except to quote extensively from a dissenting opinion in *In re Yamashita*. The holding of the Court in that case is, of course, to the contrary.”⁶³ The Supreme Court thus adopted an opposite view from that espoused by the lower court, finding Fifth Amendment protections inapplicable to the alien detainees being held abroad.⁶⁴

Forty years later, in *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply to an alien located abroad.⁶⁵ Writing for a five-Justice majority, Chief Justice Rehnquist thought “it significant to note that [the Fourth Amend-

the hands of future courts, and, based on consideration of those consequences, decide the threshold issue. Thanks to Travis Crum for this point.

⁶² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

⁶³ *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (discussing *In re Yamashita*, 327 U.S. 1, 26 (1946)).

⁶⁴ *See id.* at 784–85. Stephen Vladeck has called into question whether *Eisentrager* in fact found the Fifth Amendment inapplicable to the petitioners, arguing instead that the Court accepted the absence of statutory habeas jurisdiction only because it found that the petitioners’ substantive claims lacked merit. *See* Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 595–600 (2009). As Vladeck acknowledges, the Supreme Court has adopted a more expansive understanding of *Eisentrager*. *See id.* at 600.

⁶⁵ 494 U.S. 259, 274–75 (1990).

ment] operates in a different manner than the Fifth Amendment, which is not at issue in this case.”⁶⁶ Nonetheless, in what presumably qualified as dicta, the Court cited *Eisentrager* in characterizing its precedent thus: “[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”⁶⁷

Significantly, Justice Kennedy concurred in *Verdugo* to explain his decisive fifth vote. His explanation was context-specific: “The conditions and considerations of this case would make adherence to the Fourth Amendment’s warrant requirement impracticable and anomalous.”⁶⁸ Justice Kennedy appeared to suggest that constitutional protections should be presumed to apply to aliens abroad unless their application is, in the particular context at issue, “impracticable and anomalous.” That key phrase emerged from the concurrence written by Justice Harlan in the 1957 case of *Reid v. Covert*, in which Justice Harlan declared that, for American citizens located abroad, constitutional protections might not apply if the context made their application “impracticable and anomalous.”⁶⁹ Justice Kennedy’s concurrence in *Verdugo* suggested that, in his view, this same test could and should apply to *non*-citizens abroad, too.

Subsequent lower court decisions concerning aliens at Guantanamo picked up on this test. In 1992, the Second Circuit applied the “impracticable and anomalous” test in finding that the Fifth Amendment extended to aliens at Guantanamo.⁷⁰ The Second Circuit’s decision was, however, reversed by the Supreme Court, whose opinion in *Sale v. Haitian Centers Council* made no mention of due process, instead resolving the case on other grounds.⁷¹

A few years later, the Eleventh Circuit also faced the question of whether the Fifth Amendment applied to aliens at Guantanamo. Taking an opposite view of that articulated by the Second Circuit, the Eleventh Circuit declared that, at Guantanamo, “the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert.”⁷²

The D.C. Circuit reached a roughly similar conclusion in its decision in 2000 in *Harbury v. Deutch*. There, the court declined to find

66 *Id.* at 264.

67 *Id.* at 269.

68 *Id.* at 278 (Kennedy, J., concurring).

69 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

70 *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992).

71 *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

72 *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995).

an alien in Guatemala to be entitled to Fifth Amendment protections: “[A]liens abroad may be entitled to certain constitutional protections against mistreatment by the U.S. Government But [in *Verdugo*] the Supreme Court’s extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited [to enemy aliens during wartime].”⁷³ In turn, the court rejected Harbury’s invocation of due process rights—but Guatemala, of course, is not Guantanamo, and the basis for claiming that constitutional rights are applicable in Guantanamo seems greater given America’s unique exercise of control there.

As the United States began detaining suspected terrorists at Guantanamo as part of its campaign against al-Qaeda, courts again faced invocations of Fifth Amendment protections by aliens located there. In 2003, the D.C. Circuit repeated that it did not view the Due Process Clause as extending to aliens at Guantanamo. In *Al Odah v. United States*, the court concluded: “If the Constitution does not entitle the detainees to due process, *and it does not*, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.”⁷⁴ The D.C. Circuit’s decision in *Al Odah* was subsequently reversed on other grounds by the Supreme Court in *Rasul v. Bush*.⁷⁵

After *Rasul*, one D.C. district judge held in January 2005 that the Fifth Amendment did not extend to aliens at Guantanamo, explaining that “our Circuit Court has repeatedly held that a ‘foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.’”⁷⁶ That decision was vacated by the D.C. Circuit in its decision in *Boumediene*,⁷⁷ which itself was reversed by the Supreme Court.⁷⁸

Also in January 2005, another D.C. district judge reached the opposite conclusion regarding Guantanamo, finding that “the detainees

73 *Harbury v. Deutch*, 233 F.3d 596, 603–04 (D.C. Cir. 2000), *rev’d on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

74 *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (emphasis added); *see also Rasul v. Myers*, 512 F.3d 644, 665 (D.C. Cir. 2008) (citing *Al Odah* for the “conclu[sion] that detainees were not entitled to due process”), *vacated*, 129 S. Ct. 763 (2008) (remanding “for further consideration in light of *Boumediene v. Bush*”).

75 542 U.S. 466 (2004).

76 *Khalid v. Bush*, 355 F. Supp. 2d 311, 322 (D.D.C. 2005) (citations omitted).

77 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008).

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

have fundamental rights to due process.”⁷⁹ The court applied Justice Kennedy’s “impracticable and anomalous” test and reached the same conclusion regarding Guantanamo that the Second Circuit had reached in 1992: “There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment.”⁸⁰ In turn, “the Court recognizes the detainees’ rights under the Due Process Clause of the Fifth Amendment.”⁸¹ This decision also was vacated by the D.C. Circuit in *Boumediene*.⁸²

In *Boumediene*, the D.C. Circuit found no Fifth Amendment rights applicable to detainees at Guantanamo. The court acknowledged *Rasul* but rested its holding on *Verdugo* and *Eisentrager*. “The detainees cannot rest on due process under the Fifth Amendment. . . . Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, absent an explicit statement by the Court that it intended to overrule *Eisentrager*’s constitutional holding, that holding is binding on this court.”⁸³

The Supreme Court then reversed the D.C. Circuit but did so on the basis of Suspension Clause analysis rather than Due Process Clause analysis.⁸⁴ Additionally, another D.C. Circuit opinion finding constitutional rights inapplicable to Guantanamo detainees that was issued while *Boumediene* was pending before the Supreme Court was vacated and remanded in the wake of that decision.⁸⁵

In sum, pre-*Boumediene* case law generally suggested that the Fifth Amendment did not apply to detainees at Guantanamo, but the Second Circuit and one D.C. district judge held otherwise—with both doing so on the basis of the very test for constitutional rights abroad

79 *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005), *vacated*, 476 F.3d 981, *rev’d*, 553 U.S. 723.

80 *Id.*

81 *Id.* at 464.

82 476 F.3d at 981–82.

83 *Id.* at 1011 (citations omitted).

84 *See Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

85 *See Rasul v. Myers*, 512 F.3d 644, 666 (D.C. Cir. 2008) (“An examination of the law at the time the plaintiffs were detained reveals that even before [the D.C. Circuit’s decision in] *Boumediene*, courts did not bestow constitutional rights on aliens located outside sovereign United States territory. Supreme Court and Circuit precedent, consistent with *Eisentrager*’s rejection of the proposition ‘that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses,’ concluded that non-resident aliens enjoy no constitutional rights.” (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950))), *vacated*, 129 S. Ct. 763 (2008) (remanding “for further consideration in light of *Boumediene v. Bush*”).

that won the approval of a majority of the Supreme Court in *Boumediene*.⁸⁶

III. IMPLICATIONS OF *BOUMEDIENE* FOR DUE PROCESS

The Supreme Court's decision in *Boumediene* unsettled that understanding, though the majority opinion for the Court did not speak directly to the issue of due process rights. *Boumediene* held that the Suspension Clause applied to detainees at Guantanamo; whether other parts of the Constitution applied as well remained, and indeed remains, unclear.

Reaching constitutional issues avoided in *Rasul* and *Hamdan*, *Boumediene* announced the application of the Suspension Clause to detainees at Guantanamo.⁸⁷ Much of the Court's analysis sounded distinctly Suspension Clause-specific, emphasizing the unique importance of the availability of habeas relief in order to keep the judiciary present and active, rather than permitting it to be sidelined by the political branches: "The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."⁸⁸ Moreover, the Court seemed at pains to emphasize the narrowness of its holding:

Our decision today holds only that petitioners before us are entitled to seek the writ; that the DTA [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.⁸⁹

⁸⁶ For comparison to an interesting and complicated line of cases assessing whether the Fifth Amendment applies to takings claims made by aliens regarding property located abroad, see *Atamirzayeva v. United States*, 524 F.3d 1320 (Fed. Cir. 2008) (discussing the ability of an Uzbek citizen to recover under the Takings Clause); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (discussing whether a Sudanese corporation had standing to bring a takings suit against the United States); and *Doe v. United States*, 95 Fed. Cl. 546, 570 (2010) ("Nothing in *Boumediene* suggests that the Court intended its holding to broadly apply to the Bill of Rights or to the takings clause, in particular."). For discussion of these cases, their implications, and their relationship to *Boumediene*, see Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673 (2010); and Steve Vladeck, *Doe, Atamirzayeva, and Fallujah: When Stealth Overruling Produces Incoherent Doctrine*, PRAWFSBLAWG (Dec. 3, 2010), <http://prawfsblawg.blogs.com/prawfsblawg/2010/12/doe-v-united-states-when-stealth-overruling-produces-incoherent-doctrine.html>.

⁸⁷ *Boumediene*, 553 U.S. at 771.

⁸⁸ *Id.* at 772.

⁸⁹ *Id.* at 795.

At the same time, Justice Kennedy's opinion for the Court also emphasized a broader refusal to permit judicially enforced protections to be eliminated by the political branches. This wider logic of upholding the constitutional separation of powers and defending the reach of the judiciary suggested a reading of *Boumediene* that was not Suspension Clause-specific: "To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"⁹⁰ If *Boumediene* stood for the proposition that the courts should not be deliberately shut out by the political branches, then the decision seemed to extend to at least some other parts of the Constitution, especially those frequently associated with judicial enforcement.

Writing in dissent, Chief Justice Roberts criticized the majority for neglecting to engage in any due process analysis.⁹¹ The Chief Justice argued that, if the detention review procedures at issue in the case fulfilled the constitutional requirements of due process, then they could not be unconstitutional under the Suspension Clause; and, moreover, that those procedures must have fulfilled the requirements of due process in that they satisfied the presumably higher standards owed to American citizens located on American soil, as articulated by the Supreme Court four years earlier in *Hamdi v. Rumsfeld*⁹² in a plurality opinion that Justice Kennedy himself joined. Chief Justice Roberts pointed specifically to the majority's lack of due process analysis: "The majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process."⁹³ Then, applying the framework announced in *Hamdi*, he concluded that "the system we have here . . . is adequate to vindicate whatever due process rights petitioners may have."⁹⁴ For Chief Justice Roberts, if the detainees' due process rights had not been violated, then habeas review simply had nothing more to offer. Thus, the Chief Justice's dissent underscored the disconnect between the abundance of

90 *Id.* at 765 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

91 The majority was explicit in this respect. *See id.* at 785 ("[W]e make no judgment whether the CSRTs, as currently constituted, satisfy due process standards . . ."); *see also* Neuman, *supra* note 5, at 574 (noting that in *Boumediene* "the Supreme Court found that the Guantanamo detainees were protected by the Suspension Clause without first inquiring whether they had rights under the Due Process Clause").

92 542 U.S. 507 (2004) (plurality opinion).

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

94 *Id.* at 808.

Suspension Clause analysis and the absence of Due Process Clause analysis found in the majority opinion.

Over the Chief Justice's dissent, the Supreme Court had concluded that at least one constitutional protection—that of habeas relief—extended to detainees at Guantanamo. Whether other constitutional rights also applied remained undetermined, with suggestive language pointing in rather opposite directions.

IV. POST-*BOUMEDIENE* CASE LAW

In the wake of *Boumediene*, the D.C. Circuit faced the question left unresolved by the Supreme Court of whether the Due Process Clause accompanied the Suspension Clause's extension to Guantanamo.⁹⁵ In *Kiyemba v. Obama*, the D.C. Circuit read *Boumediene* as decidedly Suspension Clause-specific, holding that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”⁹⁶ The court explained that the Supreme Court “had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically li-

⁹⁵ Where possible, the D.C. Circuit has avoided the issue. When confronted by the issue in *Rasul v. Myers*, the D.C. Circuit noted the Supreme Court's deliberately narrow holding in *Boumediene*. “[T]he [Supreme] Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.” 563 F.3d 527, 529 (D.C. Cir. 2009). Having thus suggested in passing that the D.C. Circuit did not view any part of the Constitution other than the Suspension Clause as applying to Guantanamo, the court proceeded not to “decide whether *Boumediene* portends application of the Due Process Clause and the Cruel and Unusual Punishment Clause to Guantanamo detainees,” instead resolving the case on other grounds. *Id.* The briefs in *Rasul* presented quite divergent views on the issue. Compare Supplemental Brief on Remand of Appellants/Cross-Appellees Rasul et al. at 7 n.4, *Rasul*, 563 F.3d 527 (No. 06-5209) (“This Court's assertion in *Kiyemba* that ‘the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States’ simply cannot be harmonized with the Supreme Court's ruling in *Boumediene*.” (citation omitted)), and *id.* at 9 (“But even if *Boumediene*'s holding were limited to the Suspension Clause, its functional test compels the same result with respect to the Fifth Amendment due process clause.”), with Supplemental Brief of Appellees/Cross-Appellants at 3, *Rasul*, 563 F.3d 527 (No. 06-5209) (“[T]his Court's recent, post-*Boumediene* decision in *Kiyemba v. Obama* holds that aliens held at Guantanamo do not have due process rights, and is controlling authority here.” (citation omitted)). Similarly, dissenting in part in another case, Judge Griffith pointedly avoided the issue of *Boumediene*'s implications for due process. *Kiyemba v. Obama*, 561 F.3d 509, 525 n.1 (D.C. Cir. 2009) (Griffith, J., dissenting in part) (“[W]hether the Due Process Clause of the Fifth Amendment reaches these detainees is simply not part of the inquiry required in this case.”).

⁹⁶ *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010), *reinstated by* 605 F.3d 1046 (D.C. Cir. 2010).

mitted its holding to the Suspension Clause.”⁹⁷ The D.C. Circuit’s decision in *Kiyemba* was vacated by the Supreme Court⁹⁸ but then was reinstated by the D.C. Circuit.⁹⁹ Thus, the post-*Boumediene* law in the D.C. Circuit remains that Fifth Amendment protections do not extend to aliens detained at Guantanamo.¹⁰⁰

One member of the D.C. Circuit confirmed that position in a subsequent round of *Kiyemba* litigation. When the *Kiyemba* petitioners invoked due process rights as a basis for possessing some authority in determining the location of their own resettlement after release from Guantanamo, the D.C. Circuit firmly rejected their claims.¹⁰¹ Concurring, Judge Kavanaugh affirmed his circuit’s previous explanation that, even after *Boumediene*, the Due Process Clause did not apply to Guantanamo. He noted that, “[i]n *Boumediene v. Bush*, the Supreme Court held that the Guantanamo detainees possess constitutional habeas corpus rights” and then explained that “[t]he detainees argue that they must possess due process rights if they have habeas rights.”¹⁰² Nonetheless, Judge Kavanaugh’s reading of the D.C. Circuit’s position was clear: “This Court has since stated that the detainees possess

97 *Id.* at 1032.

98 *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010); cf. Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 513–14 (2010) (criticizing the D.C. Circuit’s conclusion as improperly applying *Boumediene*, 553 U.S. 723 (2008), and *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

99 *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

100 Interestingly, in the process of the D.C. Circuit’s reinstating its earlier decision, Judge Rogers’s concurrence appeared to suggest implicitly the applicability of the Due Process Clause to detainees at Guantanamo, while rejecting their particular claims based on it. But that concurrence, of course, is not binding law. *Id.* at 1051–52 (Rogers, J., concurring) (“Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States when an offer of resettlement abroad in an ‘appropriate’ country is made in good faith and remains available. In *Boumediene*, the Supreme Court reaffirmed the adaptability of the habeas remedy, regardless of the reason the underlying detention is unlawful. The adaptable nature of the habeas remedy is intrinsic to the writ itself, and petitioners’ current circumstances undermine their claim that the habeas remedy, even accounting for the Fifth Amendment Due Process Clause and the Geneva Conventions, requires their release into the continental United States pending resettlement abroad.” (citation omitted)).

101 *Kiyemba v. Obama*, 561 F.3d 509, 516 (D.C. Cir. 2009) (“The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government’s assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws. In sum, the detainees’ claims do not state grounds for which habeas relief is available.”).

102 *Id.* at 518 n.4 (Kavanaugh, J., concurring).

no constitutional due process rights.”¹⁰³ That remains the position of the D.C. Circuit.¹⁰⁴

While the D.C. Circuit has thus held that, even after *Boumediene*, the Due Process Clause does not extend to aliens at Guantanamo, it is worth noting a passage from the D.C. Circuit’s 2007 opinion in *Boumediene* that might provide grounds for reconsideration of this position should the issue ever be reassessed en banc. In that 2007 opinion, which was subsequently reversed by the Supreme Court’s decision in *Boumediene*, the court of appeals stated: “There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do That cannot be right.”¹⁰⁵ In other words, at least before *Boumediene* was decided by the Supreme Court, the D.C. Circuit contended that application of the Suspension Clause could not be distinguished from application of the Fifth Amendment. Perhaps the court might, in some en banc reconsideration of its understanding of *Boumediene*, return to that conclusion, though now pointing in the direction of recognizing the applicability of the full panoply of constitutional rights.

The D.C. District Court, characterizing the D.C. Circuit’s *Kiyemba* analysis as dicta, generally has been careful to avoid tackling the issue of whether the Due Process Clause follows the Suspension Clause’s extension to Guantanamo.¹⁰⁶ But the law of the circuit currently seems quite clear that it does not.

103 *Id.*

104 One finds relatively little reliance on this holding in the government’s briefs in Guantanamo litigation, perhaps indicating a concern that the holding is a tenuous one. One also finds that courts themselves are reluctant to rest too much on this holding, instead providing alternate grounds for resolving Guantanamo cases “even if” detainees are at some point vindicated in their due process claims. *See id.*

105 *Boumediene v. Bush*, 476 F.3d 981, 993 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008).

106 *See Al-Qurashi v. Obama*, 733 F. Supp. 2d 69, 78 n.14 (D.D.C. 2010) (“[I]t remains uncertain to what extent the Due Process Clause applies to the detainees at Guantanamo Bay.”); *Basardh v. Obama*, 612 F. Supp. 2d 30, 33 (D.D.C. 2009) (“[T]he Court is spared from having to wade into the debate over whether the due process principles recognized by the Supreme Court in *Hamdi v. Rumsfeld* also apply to a non-U.S. citizen held at Guantanamo.”); *see also Mohammed v. Obama*, 704 F. Supp. 2d 1, 24–25 (D.D.C. 2009) (citing Supreme Court precedent on due process rights in the context of evaluating a Guantanamo detainee’s habeas petition).

V. POST-*BOUMEDIENE* SCHOLARSHIP

While the D.C. Circuit has articulated its understanding of *Boumediene*, scholars also have grappled with the decision. Marc Falkoff and Robert Knowles captured much of the scholarly emphasis in suggesting that “*Boumediene* marked the triumph of a particular approach: the ‘impracticable and anomalous’ test . . . which looks to the particular circumstances of the case to determine whether the application of a particular constitutional provision is ‘impracticable and anomalous.’”¹⁰⁷ In turn, they anticipated that the potential application to aliens abroad of other constitutional provisions, including the Due Process Clause, would be determined using the same context-specific analysis.

Other commentators have remarked briefly on the question of whether *Boumediene*’s logic extends to the Due Process Clause. They generally acknowledge the uncertainty of the answer but seem to anticipate its being in the affirmative. For example, Stephen Vladeck deemed it likely but uncertain that the same considerations that led to the outcome in *Boumediene* would point in the direction of finding the Due Process Clause applicable to detainees at Guantanamo: “It is possible—if not likely—that Kennedy’s analysis of the Suspension Clause controls the due process question as well, but the importance of judicial review to protect the separation of powers was a stand-alone justification for treating the Suspension Clause differently.”¹⁰⁸ In other words, while the Suspension Clause could conceivably be seen as unique, the basic logic of *Boumediene* seems to apply similarly to the Due Process Clause. Likewise, Gerald Neuman acknowledged habeas’ distinctive “right to affirmative governmental intervention”¹⁰⁹ but still anticipated that the Due Process Clause would accompany the Suspension Clause: “The characterization of Guantanamo as effectively U.S. territory for constitutional purposes probably means that the Due Process Clause and the Eighth Amendment apply there”¹¹⁰

¹⁰⁷ Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 871 (2010) (citations omitted).

¹⁰⁸ Vladeck, *supra* note 25, at 2143 (footnote omitted).

¹⁰⁹ Neuman, *supra* note 25, at 287; *see also id.* (“[*Boumediene*’s list of relevant factors] was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights. The importance of the habeas right itself was an unlisted factor that apparently argued in favor of broader reach.”).

¹¹⁰ *Id.* at 286.

Benjamin Priester adopted a somewhat different perspective on the issue. He suggested that, if habeas review is to have any substance or meaning, the Due Process Clause would *need* to accompany the Suspension Clause:

Perhaps, like *Munaf v. Geren*, this is a situation where the writ runs to the prisoner but relief is foreclosed on the merits—these aliens, by virtue of their capture abroad and lack of any ties to the United States, may have no rights which can be vindicated under U.S. law. Alternatively, if the [*Boumediene*] majority's primary concern is avoidance of rule-of-law-free zones by assessing de facto sovereignty, then perhaps the Due Process Clause, not just the Suspension Clause, reaches Guantánamo. Into which of the two prior categories the Guantánamo detainees fall, then, depends on whether the rationale of *Rasul* and *Boumediene* is really just about habeas or whether it is really about meaningful judicial review.¹¹¹

For Priester, the habeas access provided by *Boumediene* would seem an empty promise without accompanying due process rights—though perhaps the Supreme Court's holding in *Hamdan* that Common Article 3 of the Geneva Conventions applies to Guantanamo detainees would offer the basis for at least some type of substantive law to be invoked in habeas litigation, even if the Due Process Clause were not available.¹¹²

More boldly, Richard Murphy and Afsheen Radsan argued that the combination of *Hamdi* and *Boumediene* demands the widespread extraterritorial application of the Due Process Clause. They wrote: "Together, *Hamdi* and *Boumediene* give detainees a due process right to judicial review of the government's decision to deprive them of their liberty *after* their imprisonment had started. . . . The logic of *Boumediene's* five-justice majority opinion is that the Due Process Clause binds the executive worldwide—from Alaska to Zimbabwe."¹¹³ Murphy and Radsan avowed that, "[o]n this view, even if there were no constitutional right to habeas corpus, the Guantanamo detainees could have argued that the Due Process Clause by itself required more protections than the government had given them."¹¹⁴

111 Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021, 1036 (2009) (footnotes omitted).

112 *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006); see also Fionnuala Ní Aoláin, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINN. L. REV. 1523, 1524 (2007) (highlighting the "Court's views on the enforceability of the Geneva Conventions and specifically that of Common Article 3").

113 Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410–11 (2009).

114 *Id.* at 436.

Finally, Neal Katyal, who would later become acting solicitor general, offered congressional testimony in July 2008 explaining his understanding of *Boumediene*. He encapsulated the decision thus:

[T]he Constitution applies to Guantanamo Bay. . . . It is incorrect to believe that this principle applies only to the Suspension Clause. After all, habeas corpus exists to protect ‘the rights of the detained by a means consistent with the essential design of the Constitution.’ *Boumediene*’s right to habeas corpus would be meaningless if there were no substantive rights to protect.¹¹⁵

Hence, while demonstrating some variety in understandings of *Boumediene* and while admitting the uncertainty associated with the case’s implications,¹¹⁶ scholars generally anticipate the decision’s logic applying not only to the Suspension Clause but also to the Due Process Clause, contrary to the conclusion of the D.C. Circuit. Yet, those scholars’ treatment of that crucial issue has emerged only in the form of passing comments, without thoroughly assessing the range of possible readings of *Boumediene* or the broader question of how habeas review relates to due process protections.

VI. THE RELATIONSHIP BETWEEN THE SUSPENSION CLAUSE AND THE DUE PROCESS CLAUSE

Neither the courts nor the commentators have offered a clear, comprehensive, and convincing understanding of *Boumediene*’s implications for the applicability of due process protections to Guantanamo. Before the next Part of this Article suggests five such understandings and specifies the most compelling among them, this Part delves into a fundamental underlying question largely neglected by jurists and scholars¹¹⁷: in general, what is the relationship between habeas rights and due process rights?¹¹⁸

115 *Implications of the Supreme Court’s Boumediene Decision for Detainees at Guantanamo Bay, Cuba: Hearing Before the H. Comm. on Armed Services*, 110th Cong. (2008) (statement of Neal K. Katyal, Professor of National Security Law, Georgetown University Law Center), available at <http://scholarship.law.georgetown.edu/cong/73>.

116 *See Ten Questions on National Security*, 34 WM. MITCHELL L. REV. 5007, 5009–17 (2008) (asking, “Does a terrorism suspect who is not a citizen of the United States have due process rights if interrogated outside the territory of the United States?” and suggesting “Yes” from Stephen Vladeck and Tung Yin, and “No, with qualifications” from Geoffrey S. Corn and coauthors Glenn Sulmasy and James D. Carlson).

117 One notable exception is Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361 (2010). Redish and McNamara’s original and provocative article argues that the Fifth Amendment’s Due Process Clause supersedes the Suspension Clause. As they readily admit, “the argument appears never to have been suggested by scholars,

As one recent article aptly recognizes, “the relationship between the Suspension and Due Process Clauses remains completely unsettled.”¹¹⁹ It is a relationship that historical understandings alone cannot illuminate: as important as such inquiries are to keeping faith with the Constitution, historical explorations have not, on their own, been able to settle even the more limited issue of how habeas corpus should be conceived in the context of today’s detentions,¹²⁰ and those explorations reveal an even less determinative historical record as to how habeas relates to due process generally.

This Part begins by discussing jurists’ and scholars’ generally brief thoughts on that relationship, thus revealing how little attention has been paid to it. In large part, that lacuna has persisted because of a sensible presumption that *both* habeas and due process rights typically are available, a presumption that generated little reason to parse which particular protections are associated with each constitutional guarantee. Then, reflecting the need for precisely such analysis in the wake of *Boumediene*, this Part moves past the prior commentary by setting out five overarching ways of understanding the relationship: in the first, habeas rights involve jurisdiction while due process rights relate to substantive claims; in the second, habeas rights involve a certain remedy while due process rights relate to substantive claims; in

much less judicially accepted.” *Id.* at 1391. Regardless of its independent strengths and weaknesses, their argument is decidedly contrary to the understanding of the Supreme Court as presented in *Boumediene*, and addresses an issue that is roughly the converse of the subject of this Article: their work concerns the possible requirements of due process when habeas rights have been *suspended*, whereas this Article assesses the existence of due process rights where habeas rights have been *extended*.

118 Treating this broader question as implicated by *Boumediene* takes seriously the notion that Guantanamo-related decisions are not “exotic” but, instead, tackle manifestations of deep, persistent issues facing federal courts. See generally Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 584 (2010) (contending that “neither the problems nor the case law represented in 9/11 detention are exotic”).

119 Redish & McNamara, *supra* note 117, at 1364.

120 See, e.g., ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 12–19 (2001) (reviewing the “sparse” “history of the Clause at the [Constitutional] Convention”); Meltzer, *supra* note 2, at 26 (“[T]he [*Boumediene*] opinions spilled a great deal of ink about the status of habeas corpus in English and American history leading up to the Founding, and Justice Scalia succeeded in part in inducing Justice Kennedy to address matters on these terms. The difficulty with the resulting debate . . . is the absence of applicable precedents . . .”); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007) (using historical evidence to argue that suspending habeas does not make an otherwise illegal detention legal); Shapiro, *supra* note 5, at 61 (contending that the historical evidence indicates a conclusion contrary to Morrison’s); Tyler, *supra* note 5, at 627 (“The Convention debates over the proposed Suspension Clause were quite limited.”); Vladeck, *supra* note 5, at 942, 959–63 (discussing the origins of the Suspension Clause).

the third, habeas rights inherently carry with them certain minimal due process guarantees while due process rights include minimal protections of the type associated with habeas; in the fourth, the Suspension Clause governs structural constitutional relations among the branches of government while the Due Process Clause provides rights to individuals; and in the fifth, habeas review is an open-ended exercise of judges' equitable discretion to remedy what they deem to be unjust imprisonment.

A. *Others' Reflections on the Relationship Between the Suspension and Due Process Clauses*

While there is no shortage of case law and scholarship on habeas corpus and on due process, surprisingly little has been written directly exploring the nature of the relationship between the two.¹²¹ The basic assumption, and an entirely sensible one at first blush, seems to be that due process applies to any judicial proceeding, meaning that if a habeas action is being adjudicated, then due process—whatever it might mean in that context—remains applicable. In turn, when Amanda Tyler writes that “the origins of the Great Writ link it inextricably to core due process safeguards derived from the Great Charter [the Magna Carta] and enshrined in our Constitution,”¹²² she appears to suggest that when habeas rights apply, so too do due process protections. Major Supreme Court decisions on habeas have pro-

121 The major focus of scholarship on American habeas practice has been on federal courts' review of state court convictions. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 308 (2010) (“Due to the distinctiveness of the Constitution in the United States, the major questions surrounding habeas corpus since 1789 . . . centered on the relationship of federal to state courts in the handling of state convictions for felony.”); see also, e.g., FREEDMAN, *supra* note 120 (discussing habeas relief in the context of federal courts' review of state court convictions); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (same); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 581 (1982) (same); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993) (same). Such scholarship follows the emphases of the case law itself. See Azmy, *supra* note 98, at 514 (noting that “since Reconstruction . . . habeas petitions have almost universally been brought as collateral challenges to prior criminal-court convictions or to immigration proceedings”). It seems ironic that today, federal habeas review is primarily post-conviction review to ensure the fairness of prior proceedings, but, in the Guantanamo context, *Boumediene* imposed federal habeas review because of a distrust of the military proceedings themselves, thus emphasizing habeas as pre-conviction review. Cf. Resnik, *supra* note 118, at 617–18, 675 n.413.

122 Tyler, *supra* note 5, at 691–92; see David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2502 (1998) (“The Constitution's guarantees of the writ of habeas corpus and of due process are closely interconnected.”).

ceeded similarly.¹²³ Because the prevailing assumption has been that habeas and due process generally stand or fall together, the few cases and writings addressing both habeas and due process have explored the nature and extent of judicial protections when both clauses are inapplicable¹²⁴ or, more typically, when both clauses are applicable.¹²⁵

That basic connection has been severed in the wake of *Boumediene*. As explained above, *Kiyemba* announced the D.C. Circuit's understanding that *Boumediene* extended habeas rights to Guantanamo without extending due process protections there.¹²⁶ Thus, the time is ripe for identifying conceptions of the relationship between habeas and due process that can account for what habeas means in the absence of due process. As a practical matter, that is the current state of the law in the D.C. Circuit; even if the D.C. Circuit reverses itself or is

¹²³ See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953) (evaluating a habeas petition alleging due process violations); *Moore v. Dempsey*, 261 U.S. 86 (1923) (same); *Frank v. Magnum*, 237 U.S. 309, 331 (1915) (declaring “that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law”).

¹²⁴ See Tyler, *supra* note 5, at 605 (implicitly equating suspension of habeas corpus with “imprisonment without due process of law”).

¹²⁵ See Cole, *supra* note 122, at 2484 (discussing the requirements of “the Suspension Clause and the Due Process Clause, read together”); *id.* at 2494 (“[W]henver the government detains an individual and bars all judicial review of the legality of her detention, it gives rise to a constitutional violation of both the Due Process Clause and the Suspension Clause.”); *id.* at 2503 (“This is not to say that the Suspension Clause and the Due Process Clause are redundant. . . . But at their core, both habeas corpus and due process require that taking an individual into custody be subject to the rule of law. . . . The two principles work in tandem to require judicial review of the legality of all executive detentions. Barring judicial review of any such detention would violate due process, and any such detention must be redressable on habeas corpus.”); Shapiro, *supra* note 5, at 72–73 (“[T]he Suspension Clause, perhaps coupled with other provisions, especially the guarantee of due process, imposes an obligation on the federal government to make the essence of the Great Writ available in some judicial forum . . .”). While Trevor Morrison acknowledges certain “interests protected in liberty deprivation cases not only by the Due Process Clause but also by the Suspension Clause itself,” Morrison, *supra* note 120, at 1612, he also examines “the status of the separate due process interest in fair process,” which he maintains “need not be displaced by a valid suspension” of habeas corpus. *Id.* at 1610. Hence, Morrison is interested in due process in the absence of habeas, which he views as potentially upheld by branches other than the judiciary and even enforced in courts ex post, whereas this Article examines the possibility of habeas in the absence of due process, which is the D.C. Circuit’s current view of the rights possessed by Guantanamo detainees after *Boumediene*.

¹²⁶ *Kiyemba v. Obama*, 555 F.3d 1022, 1026, 1028 (D.C. Cir. 2009) (noting decisions that “hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States” and stating that “[i]t cannot be that because the court had habeas jurisdiction, it could fashion the sort of remedy petitioners desired” (citation omitted)), *vacated*, 130 S. Ct. 1235 (2010), *reinstated by* 605 F.3d 1046 (D.C. Cir. 2010).

reversed, accepting the circuit's current position for the sake of this Article's discussion opens up the conceptual challenge of understanding how these two core constitutional protections relate to each other.

Simply put, existing case law offers no clarity regarding the relationship between habeas and due process. The Supreme Court's early, landmark pronouncement on habeas emerged, through an opinion by Chief Justice Marshall, in *Ex parte Bollman*.¹²⁷ Yet, *Bollman* involved the Court's jurisdiction to entertain habeas petitions and did not shed much light on the general substantive content of such petitions, instead evaluating the particular requirements for the charge of treason at issue in the case.¹²⁸ The phrase "due process" appeared nowhere in Marshall's opinion for the Court or in Justice Johnson's dissent.

Subsequent centuries of Supreme Court jurisprudence have not resolved how habeas review relates to due process protections or even offered much clarity as to the nature of the relationship. Nor has such analysis seemed necessary: with both habeas and due process rights generally applicable, there has seemed to be little reason to distinguish between the protections associated with each. For example, Justice Brennan stated that "there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office."¹²⁹ While Brennan seemed to suggest that protecting due process is the central role of habeas review, earlier Justice Clark had gone even further in suggesting it to be habeas' *only* role. Clark argued that, "[r]egardless of whether or not the scope of inquiry on habeas corpus has been expanded, the function of the courts has always been limited to the enforcement of due process requirements"¹³⁰—in other words, protecting due process is the sole function of habeas review. Regardless of whether either or both of Clark's or Brennan's statements accurately reflected the law at the time of writing or today,¹³¹ both do little to illuminate exactly how the

127 8 U.S. (4 Cranch) 75 (1807).

128 *Id.* at 125–37.

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

130 *Heikkila v. Barber*, 345 U.S. 229, 236 (1953).

131 Like Justice Brennan, Justice Pitney appeared to adopt a less constrained position than Justice Clark's. See *Frank v. Magnum*, 237 U.S. 309, 345 (1915) (denying a habeas petition after concluding that the prisoner had "not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in

guarantees of habeas review should be understood in the absence of the protections of due process.

In contrast to Clark and Brennan's apparent confidence that habeas review provides, at a minimum, for the protection of due process, Justice Scalia, in a 2001 dissent, suggested that the Suspension Clause provides no substantive guarantee whatsoever in the absence of other protections: "A straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended."¹³² Scalia added, "If one reads the Suspension Clause as a guarantee of habeas relief, the obvious question presented is: *What* habeas relief?"¹³³ Scalia's suggestion as to the Suspension Clause's lack of substantive content emerged in the context of a dispute over habeas jurisdiction and did not command the votes of a majority of the Court, so—regardless of its merits or lack thereof—its helpfulness for resolving the nature of habeas' relation to due process seems limited.¹³⁴

In the end, one must admit that, for all of the courts' lofty invocation of habeas review as central to the Anglo-American legal identity, precisely what that review, on its own, offers is difficult to articulate. Indeed, in the same case from which Scalia dissented, the Court's majority explicitly avoided having "to answer the difficult question of what the Suspension Clause protects."¹³⁵ Perhaps all that can be said with certainty based on the case law is that habeas proceedings "can vary greatly: review can range from de novo judicial decision of all pertinent questions of fact and law to a highly deferential inquiry into only some aspects of prior, nonjudicial determinations."¹³⁶

Indeed, much like jurists, scholars have alluded briefly to various understandings of how habeas relief interacts with due process guarantees but have offered no compelling and coherent vision of that relationship, instead generally operating on the assumption that both

custody, under 'due process of law' within the meaning of the Constitution" (emphasis added)).

132 INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).

133 *Id.* at 341.

134 Note that Scalia treated analysis of the due process claims raised in the same case as a matter entirely discrete from his analysis of the habeas issues raised there. *Id.* at 345–46.

135 *Id.* at 301 n.13 (majority opinion).

136 Fallon & Meltzer, *supra* note 6, at 2049.

habeas and due process apply.¹³⁷ Some commentators have suggested that the Suspension Clause is a functional enabler of due process rights, without clarifying exactly what that means.¹³⁸ One writes: “Habeas corpus functions as a minimal guarantor of due process by requiring, upon issuance of the writ or an order to show cause, an executive detainor to justify the legality of the petitioner’s detention.”¹³⁹ One might suggest that this is a casual rather than formal reference to the notion of due process, and that the basic notion of fair treatment, rather than the actual constitutional guarantee of due process, is being invoked.¹⁴⁰ But others are quite clear that it is the specific due process guarantees of the Fifth Amendment that they view habeas as securing. One scholar writes that “suspension operates as an ‘on/off’ switch for this due process right and possibly other portions of the Constitution as well.”¹⁴¹ Another comments that “the habeas corpus remedy is essential to the full realization of certain other guarantees, most particularly that of due process of law in the Fifth Amendment.”¹⁴² Note the emphasis here on habeas relief as a “remedy”¹⁴³: from this perspective, habeas provides a court with

137 Cf. Tyler, *supra* note 5, at 682 (“Fleshing out the precise contours of how the suspension power intersects with the individual rights enshrined in our Constitution is a daunting task itself worthy of an entire article.”).

138 For a brief discussion of the role of habeas review’s assessment of jurisdiction in ensuring due process, see Woolhandler, *supra* note 121, at 598–601.

139 Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1477 (2005). Ekeland also suggests that the suspension of habeas should not imply the absence of due process because the latter would apply to judicial review of whether suspension is constitutional in the particular instance. *Id.* at 1515. The judicial reviewability of suspension is another debate entirely, see Shapiro, *supra* note 5, at 77–80; Amanda L. Tyler, *Is Suspension a Political Question?*, 59 *STAN. L. REV.* 333, 336 (2006) (arguing in favor of judicial review of suspension), but any process that may be due in that regard would be rather different from the due process claims of individual detainees under examination in this Article, for whom habeas has decidedly not been suspended, as *Boumediene* makes clear.

140 Cf. Cole, *supra* note 122, at 2501–02 (“When the executive takes a person into custody and denies access to a court to determine whether the custody is in violation of applicable law, whether statutory, regulatory, or constitutional, it has deprived that person of liberty without due process in the most basic sense.”).

141 Tyler, *supra* note 139, at 386.

142 Shapiro, *supra* note 5, at 64; see also DUKER, *supra* note 6, at 268 (“Habeas corpus was thereby becoming a means for the articulation of modern-day substantive due process . . .”); *id.* at 312 (“As procedural due process expanded so did habeas corpus.”).

143 See also Shapiro, *supra* note 5, at 64–65 (explaining that “a remedy of this kind is essential to the realization of the due process rights of those in custody”); cf. Cole, *supra* note 122, at 2502 (“Habeas corpus is, of course, the traditional remedy for unlawful custody.”); Fallon & Meltzer, *supra* note 6, at 2038 (“[A] grant of habeas jurisdiction not only authorizes courts to hear cases, but also confers on those who can invoke the jurisdiction a right to the remedy of release unless the custodian can show that detention is lawful.”); Tyler, *supra* note 139, at 338 (referring to habeas review as “the only meaningful judicial remedy

something to *do* in response to a violation, in the detention context,¹⁴⁴ of due process or some other protection, namely to order release of the prisoner. In a sense, approaching habeas this way makes it seem roughly akin to a *Bivens* action¹⁴⁵: habeas is seen as carrying no particular substantive guarantees of its own but, instead, as empowering courts to respond to substantive guarantees contained in other parts of the Constitution and elsewhere, by ordering release (rather than ordering the payment of money found in the *Bivens* context).

Others, in contrast, have suggested the potential for substantive standards to be identified in the habeas context without recourse to notions of due process at all. Baher Azmy argues that *Boumediene's* extension of habeas “to Guantanamo necessarily carries with it an entitlement to substantive adjudication of the petition, even absent an entitlement to individual rights based on the Constitution or international law.”¹⁴⁶ Azmy readily admits that, on this reading, *Boumediene* demanded the construction of habeas standards relatively unknown to previous American jurisprudence: “*Boumediene* issued a largely unlimited invitation to the lower courts to create a whole new corpus of habeas law in the context of military detention—a body of law that, save for several marquee Civil War-era cases, has largely remained undeveloped since Reconstruction.”¹⁴⁷ While *Boumediene* may have “offered little specific guidance to courts on remand for the adjudication of factual disputes or mixed questions,”¹⁴⁸ Azmy points to the “elementary procedural and evidentiary rules” that district courts, in responding to *Boumediene*, have begun to establish in order to resolve habeas petitions from Guantanamo detainees as indications that trial judges are “amply equipped” to formulate substantive legal standards to govern this relatively uncharted type of habeas review.¹⁴⁹ This view of habeas proceedings conceives of them as all-encompassing proceedings rather than as narrower matters that rely upon other consti-

for unconstitutional deprivations of liberty”); Woolhandler, *supra* note 121, at 580 (stating that “habeas is a vehicle for remedying constitutional violations” and discussing “the federal habeas remedy”).

144 See Shapiro, *supra* note 5, at 93 (“The remedial-substantive link . . . does not mean that the function of the writ is to protect all elements of the due process guarantee, either as that guarantee was originally envisioned or as it has evolved over the centuries. Rather, in both its inception and its development (though recent years have seen some significant expansion), the writ was understood as the method of challenging the lawfulness of *detention*.”).

145 See *supra* note 45 and accompanying text.

146 Azmy, *supra* note 98, at 457.

147 *Id.* at 450 (footnotes omitted).

148 *Id.* at 514.

149 *Id.* at 515, 514.

tutional guarantees to supply substantive grounds for a prisoner's complaint. Somewhat similarly, if conversely, Trevor Morrison has argued that suspension of habeas corpus leaves intact "the separate due process interest in fair process," meaning that due process, on its own, offers protections independent of those secured through habeas review but somewhat similar to them in guarding against unlawful imprisonment.¹⁵⁰

Finally, David Cole, writing under the assumption that (and in a time when) habeas relief and due process protections both seemed generally applicable, portrayed the relationship between the two sets of rights as rather malleable. Cole argued: "To hold someone in detention without affording her a judicial forum to test whether the detention is lawful (in any respect) is the very essence of a deprivation of liberty without due process."¹⁵¹ Cole's reference here to "a judicial forum" seems to suggest that due process itself might provide the jurisdiction needed for a court to hear a prisoner's complaint, thus effectively providing protections similar to those associated with habeas. Cole continued by claiming that "a writ of habeas corpus provides a remedy for all executive detentions in violation of law,"¹⁵² thus further suggesting that habeas should be understood as a remedy. But Cole's fundamental point seemed to be that we need not discern the precise guarantees of each constitutional clause because what we really must understand is how they operate when "read together"¹⁵³—a reasonable and widely shared position in 1998 when Cole wrote, but one that leaves unsolved the post-*Boumediene* puzzle of how to parse the discrete constitutional protections offered by the Suspension and Due Process Clauses.

For both jurists and scholars, the basic assumption has been that habeas review aims, at least in part, to uncover and address "imprisonment without due process of law."¹⁵⁴ But does habeas review utterly depend on due process guarantees? And what might it look like in their absence?

150 Morrison, *supra* note 120, at 1610.

151 Cole, *supra* note 122, at 2494.

152 *Id.*

153 *Id.* at 2495.

154 Tyler, *supra* note 5, at 605.

B. *Five Overarching Conceptions of the Relationship Between the Suspension and Due Process Clauses*

1. *Habeas as Jurisdiction, Due Process as Substantive Law*

One promising view of the relationship between the two constitutional clauses is that the Suspension Clause's provision of habeas rights offers jurisdiction while the Due Process Clause provides a basis for substantive claims. This understanding suggests that the Suspension Clause ensures that the courthouse doors are not shut to an individual who has been detained by the executive branch and does so by providing jurisdiction for the court to hear from the detainee. On this conception, the Suspension Clause offers no grounds for the content of the detainee's complaint or for judicial remedies in response: it simply provides a basis for guaranteeing that the detainee can be heard by a judge. The substantive grounds for a detainee to challenge the executive branch's detention and for a judge to authorize a remedy must come from elsewhere, whether the Constitution, the common law, or a statute.¹⁵⁵ The Due Process Clause, of course, would constitute a significant source of such substantive grounds for a habeas petition.

The Supreme Court appeared to tilt toward this jurisdictional understanding of habeas in the Court's unanimous opinion in *Munaf v. Geren*,¹⁵⁶ handed down on the same day as *Boumediene*. In *Munaf*, the Court found that statutory habeas jurisdiction extended to two American citizens held by coalition forces in Iraq but that, on the merits, they were not entitled to the relief sought, namely the blocking of their transfer to Iraqi law enforcement. The Court thus simultaneously concluded that "United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq" and that "[u]nder circumstances such as those presented here, however, habeas corpus provides petitioners with no relief."¹⁵⁷ In a sense, this result seems very simple: the federal

155 In *INS v. St. Cyr*, 533 U.S. 289, 302–03 (2001), the Supreme Court reaffirmed that the violations subject to review in habeas proceedings are not limited to constitutional errors. See also *Davis v. United States*, 417 U.S. 333, 344–46 (1974) (rejecting the government's argument that only constitutional claims are cognizable on habeas review and finding federal law beyond the Constitution to provide grounds for such review).

156 553 U.S. 674 (2008).

157 *Id.* at 680.

habeas jurisdiction statute¹⁵⁸ provided jurisdiction, and yet the petitioners lost on the merits.¹⁵⁹

On further reflection, however, it is worth considering precisely what habeas jurisdiction means in this context. The Court essentially said that the habeas statute had nothing to offer to the petitioners of substance—no release, certainly, but also no prevention of their transfer to Iraqi custody—but it did offer one thing: jurisdiction. In other words, habeas review got these petitioners (or at least their lawyers) into an American courtroom, even if the substance of that review proved fruitless for them.

Hence, for the Court (1) to refer to district courts' "habeas jurisdiction,"¹⁶⁰ (2) to distinguish jurisdictional issues from "the merits of the underlying habeas petition,"¹⁶¹ and ultimately (3) to conclude "that the power of the writ ought not to be exercised"¹⁶² is at least to suggest that habeas has a jurisdictional function discrete from the substantive claims made in a habeas petition. The *Munaf* petitioners grounded their substantive claims in the Due Process Clause and the Foreign Affairs Reform and Restructuring Act, and lost.¹⁶³ The Court's treatment of their jurisdictional claim to habeas review as a threshold matter and of their substantive claims as discrete grounds for analysis points toward a particular understanding of the relationship between habeas and due process: the Suspension Clause provides jurisdiction for a prisoner, while the Due Process Clause acts as an important source of substantive claims that the prisoner can make. To the extent that *Munaf* stands for the Court's approval of this sharp distinction between the jurisdiction and the substance of a habeas petition, *Munaf* may prove a far more consequential decision than was apparent when it was handed down. At the very least, *Munaf*'s treat-

158 28 U.S.C. § 2241 (2006).

159 This result was thus roughly akin to what occurred in *Ex parte Quirin*, 317 U.S. 1, 25 (1942), even though the *Munaf* Court never cited *Quirin*: the Supreme Court found jurisdiction to entertain the habeas petition, but then denied relief on the merits. I am grateful to Sophie Brill for pointing out this similarity.

160 *Munaf*, 553 U.S. at 689.

161 *Id.* at 691.

162 *Id.* at 692.

163 *See id.* ("The habeas petitioners argue that the writ should be granted in their cases because they have 'a legally enforceable right' not to be transferred to Iraqi authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), div. G, 112 Stat. 2681-761, and because they are innocent civilians who have been unlawfully detained by the United States in violation of the Due Process Clause. . . . We accordingly hold that the detainees' claims do not state grounds upon which habeas relief may be granted, that the habeas petitions should have been promptly dismissed, and that no injunction should have been entered.").

ment of habeas and due process as distinctively linked stands in some tension with *Boumediene's* treatment of the Suspension Clause as a discrete and separable constitutional protection.

For habeas to provide “just” jurisdiction is, in fact, for it to provide something quite significant when one considers the rather unusual burden placed on the parties in habeas proceedings from Guantanamo.¹⁶⁴ A habeas petition challenging detention at Guantanamo is a rare form of litigation in which the non-initiating party—in habeas, the government—bears the initial burden of proof.¹⁶⁵ Hence, once jurisdiction has been established, the burden is suddenly on the government to justify continued detention, making jurisdiction in itself consequential. In a sense, habeas jurisdiction acts as something of an order to show cause in which the government must make its case for infringing the petitioner’s liberty. Therefore, for habeas to provide a petitioner with jurisdiction and then for due process to offer that pe-

164 Thanks to Steve Vladeck for calling this important point to my attention and for directing me to Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, which argues that “under traditional habeas principles the government bears the burden of establishing, as a matter of fact and law, that the detainees are enemy combatants and therefore fall within the scope of the government’s detention power.” *Id.* at 1169.

165 See *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241, at *3 (D.D.C. Nov. 6, 2008) (case management order) (“The government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful.”), amended *sub nom.* *Zadran v. Bush*, No. 05-CV-2367, 2009 WL 489083, at *1 (D.D.C. Feb. 25, 2009). Judges of the D.C. District Court have generally followed this instruction from Judge Hogan’s Case Management Order. See, e.g., *Ahmed v. Obama*, 613 F. Supp. 2d 51, 53–54 (D.D.C. 2009); *Al Odah v. United States*, 648 F. Supp. 2d 1, 7–8 (D.D.C. 2009), *aff’d*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011); *Awad v. Obama*, 646 F. Supp. 2d 20, 23–24 (D.D.C. 2009); *Hatim v. Obama*, 677 F. Supp. 2d 1, 4 (D.D.C. 2009). In passing, the D.C. Circuit may have intended to express its doubt as to whether placing the burden on the government is, in fact, necessary, as the court of appeals emphasized that “the burden in some domestic circumstances has been placed on the petitioner to prove his case under a clear and convincing standard.” *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). On another occasion, the D.C. Circuit noted that *Boumediene* may have suggested that Guantanamo petitioners should bear the burden of proof. *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 & n.1 (D.C. Cir. 2010) (noting that “*Boumediene* held only that the ‘extent of the showing required of the Government in these cases is a matter to be determined’” and adding in a footnote that “[e]arlier in the opinion the Court seemed to put the burden on the detainee: the Court stated that ‘the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law.’” (quoting *Boumediene v. Bush*, 553 U.S. 723, 787, 728–29 (2008))). The government has accepted the idea that it should bear the burden of proof in Guantanamo habeas proceedings. See Brief for the Respondents in Opposition at 16, *Al Odah*, 648 F. Supp. 2d 1 (No. 10-439), 2011 WL 119343 (“[I]n the unique circumstances of the proceedings here, it is appropriate for the government to bear the burden of proof by a preponderance of the evidence, and not to apply the general habeas rule that a petitioner bears the burden to demonstrate his entitlement to the writ.”), *cert. denied*, 131 S. Ct. 1812 (2011). For succinct background on this issue, see Waxman, *supra* note 37, at 247–48.

tioner substantive grounds for challenging his detention offers a potent challenge to the government.

2. *Habeas as Remedy, Due Process as Substantive Law*

Second, and in a slight variation on the conception just offered, habeas review might offer not jurisdiction (or not *only* jurisdiction) but a remedy for violations of the substantive guarantees found in protections such as the Due Process Clause. This conception in effect encompasses the idea of habeas providing jurisdiction: by offering a remedy, habeas review implicitly would provide the grounds for jurisdiction to hear the prisoner's cause of action that, if successful, would entitle the prisoner to that remedy.

Justice Scalia presented a variant of this idea in his dissent in *Hamdi*.¹⁶⁶ He distinguished between due process as a substantive right and habeas as what he called "the instrument" for its defense: "The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses."¹⁶⁷ This understanding effectively treated habeas as a remedy for due process violations and one that presumed jurisdiction in order to make the remedy available. As Scalia wrote, detention-related "due process rights have historically been vindicated by the writ of habeas corpus."¹⁶⁸ In turn, habeas might offer a vehicle for remedying violations inflicted on prisoners, including violations of the Due Process Clause, and those violations are identified based on protections external to habeas itself.

3. *Habeas as Containing Minimal Due Process Rights*

A third understanding of the relationship between the Suspension and Due Process Clauses incorporates the understandings of both clauses that have evolved, in practice, over time—understandings that suggest that the Suspension Clause offers more than just bare-bones jurisdiction and that the Due Process Clause provides more than just substantive grounds once jurisdiction has been established. This conception of the relationship views the Suspension Clause as inhe-

166 *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–58 (2004) (Scalia, J., dissenting) (discussing the purposes and historical development of habeas corpus and due process).

167 *Id.* at 555–56 (citation omitted).

168 *Id.* at 557.

rently containing minimal due process protections of its own, short of the full-fledged due process rights that would apply if the Due Process Clause applied as such. Though not logically required by this view, symmetry would suggest a corresponding understanding of the Due Process Clause in which due process itself provides habeas-like opportunities to challenge executive action. That is, one might understand the Suspension Clause to carry with it certain minimal due process guarantees and, as a symmetrical corollary, for the Due Process Clause to point in the direction of baseline quasi-habeas rights.

This view understands habeas review as containing minimal due process protections of its own.¹⁶⁹ Indeed, such an underlying notion might explain the tendency, discussed above in Part IV, of D.C. district judges handling habeas petitions from Guantanamo detainees to invoke Supreme Court jurisprudence on due process protections despite the D.C. Circuit's clear statement that the Due Process Clause does not apply to Guantanamo. The judges' inclination seems to be that some sort of due process guarantees are part and parcel of the habeas review that *Boumediene* instructed those judges to oversee. As Neuman writes, habeas review not only might provide jurisdiction and/or a remedy but also might inherently offer "certain minimum content" in reviewing detention.¹⁷⁰ Overall, just as the right to due process might include a basic right to habeas-like review of imprisonment, so might a right to habeas review include a basic right to due process. Language from the plurality opinion in *Hamdi* certainly pointed in this direction: "[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."¹⁷¹ Then again, *Hamdi* dealt with a U.S. citizen detained on U.S. soil, so it is unclear to what extent the conception of habeas as containing minimal due process rights was predicated on those circumstances.

Though not logically required by it, this view would seem completed by a corresponding conception of due process as guaranteeing quasi-habeas rights to challenge executive detention. The Supreme Court's prodigious due process jurisprudence makes clear that "due

169 *Cf. Abdah v. Obama*, 630 F.3d 1047, 1048 (D.C. Cir. 2011) (denying rehearing en banc) (Griffith, J., dissenting) ("[F]aithful application of *Boumediene* compels us to provide Guantanamo detainees the fundamental *procedural protections* that characterized the Great Writ in 1789." (emphasis added) (citing *Kiyemba v. Obama*, 561 F.3d 509, 522–23 (D.C. Cir. 2009) (Griffith, J., concurring in part and dissenting in part))).

170 Neuman, *supra* note 5, at 541.

171 *Hamdi*, 542 U.S. at 538 (plurality opinion).

process of law' requires, at a minimum, that an individual receive notice and a hearing before a neutral adjudicator to determine the lawfulness of the individual's detention."¹⁷² That would seem to suggest that, at least for a prisoner who has never received such a hearing, due process effectively requires the basic contours of habeas relief: that the prisoner be taken before a judge and permitted to challenge whether sufficient grounds exist to justify imprisonment. In this vein, Tyler writes that "the core due process right to demand that one's custodian justify to a court the legal basis for one's detention . . . is just another means of describing that which is offered in habeas review."¹⁷³ From this perspective, the constitutional guarantee of due process would seem to contain within it the basic right to challenge one's detention that is more expressly found in a right to habeas review, as a corollary to the idea that habeas review involves certain minimal due process guarantees.

4. *Habeas as Structural and Due Process as Individual*

A fourth understanding views the relationship between the Suspension and Due Process Clauses as one between a structural constitutional guarantee and a source of protection for individual rights. The starting place for this conception is the placement of each clause in the Constitution: the Suspension Clause appears in Section 9 of Article I, amidst the limitations on congressional authority; in contrast, the Due Process Clause is found in the Bill of Rights. The limits on Congress, while certainly containing provisions that protect individuals against bills of attainder and ex post facto laws,¹⁷⁴ can be viewed on the whole as ensuring that Congress does not overstep its bounds vis-à-vis the other two branches.¹⁷⁵ In other words, Article I provides a structure for the three branches of government, and the Suspension Clause is one way of ensuring that Congress possesses the

172 Redish & McNamara, *supra* note 117, at 1376, 1379 (surveying the Supreme Court's due process holdings and the requirements they impose); *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (evaluating the administrative review procedures for termination of social security benefits and concluding that those procedures satisfied due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (finding constitutionally deficient a New York welfare program's termination procedures for failing to satisfy due process).

173 Tyler, *supra* note 5, at 682.

174 *See* U.S. CONST. art. I, § 9.

175 *See* BADSHAH K. MIAN, AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS 145 (1984) ("Generally speaking . . . Section 9 disables Congress."). *But see* DUKER, *supra* note 6, at 131–32 (arguing, based on the constitutional location of the Suspension Clause, that it formed part of "a series of limitations on Congressional power *vis à vis* the states and the people" (emphasis added)).

authority to suspend the writ of habeas corpus but only in narrow, defined circumstances.¹⁷⁶ In contrast, the Bill of Rights, as is well known, ensured the protection of individual rights in the face of the new federal government created by the Constitution.¹⁷⁷ Consequently, understanding the Fifth Amendment's Due Process Clause as a bulwark of individual freedoms and liberties is entirely consistent with its location and function in the Constitution.

To be sure, the Suspension Clause has clear implications for protecting individual rights,¹⁷⁸ just as the Due Process Clause has structural importance in ensuring responsible behavior by and among the three branches of government. But implications are different from essences: and the understanding being advanced here is that the essence of the Suspension Clause is structural, whereas the essence of the Due Process Clause concerns individual rights. On this conception, the Suspension Clause is really about restraining the political branches from interfering with judicial review of imprisonment, while at the same time empowering those branches to do just that in cases of rebellion or invasion. Habeas review, in turn, is a pure creation of statutes and the common law and whatever judges might make of them; but it is constitutionally protected from infringement by the political branches except in narrowly specified circumstances.¹⁷⁹ In contrast, the Due Process Clause operates as a constraint against the federal government as a whole (including all three branches), and regulates interactions not among branches but between individuals and the government in all its forms.

This perspective was articulated by Judge Rogers in her dissent from the D.C. Circuit's opinion in *Boumediene*,¹⁸⁰ an opinion that was later reversed by the Supreme Court.¹⁸¹ Rogers made clear her view

176 At the Constitutional Convention, whether to permit any suspension at all was a subject of significant debate. For a brief historical overview, see Part I of Redish & McNamara, *supra* note 117, at 1367–75.

177 See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (undertaking a holistic examination of the Bill of Rights, the intentions of its authors, and its history).

178 The Suspension Clause has even been called “[t]he most important human rights provision in the Constitution.” Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952). See generally Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3 (2010) (“[T]here is no hermetic separation between individual rights and structural or systemic processes of governance.”).

179 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.”).

180 *Boumediene v. Bush*, 476 F.3d 981, 994–95 (D.C. Cir. 2007) (Rogers, J., dissenting), *rev'd*, 553 U.S. 723 (2008).

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

that the Suspension Clause is a structural component of the Constitution governing the relationship among branches. She first noted that “[a] review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress.”¹⁸² Judge Rogers then elaborated: “It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons.”¹⁸³ She then explained at some length why the D.C. Circuit majority was mistaken to neglect the structural focus of the Suspension Clause,¹⁸⁴ and—anticipating Justice Kennedy’s retort to Chief Justice Roberts—emphasized that the constitutional guarantee of habeas was not necessarily satisfied by procedures that met the standards required by due process.¹⁸⁵ On the whole, Judge Rogers, whose basic conclusion in *Boumediene* was vindicated by the Supreme Court, presented a view of habeas that emphasizes its distinctive structural emphasis as governing the separation of powers among branches, making the function of habeas very different from that of the Due Process Clause and its guarantee of the rights of individuals.

5. *Habeas as Equitable Relief, Due Process as Distinct*

Fifth and finally, habeas can be understood as akin to an equitable power on the part of courts, thus empowering judges to review the basis for imprisonment according to a judicial sense of fairness rather than based on any particular substantive guarantees external to habeas itself. Indeed, this understanding comports with habeas’ historical origins, as well as with Justice Brennan’s statement that “habeas corpus has traditionally been regarded as governed by equitable principles,”¹⁸⁶ and one might view post-*Boumediene* habeas review as returning to a past in which habeas review did not seek particular grounds, such as due process, on which to review imprisonment, but instead involved wide-spanning judicial inquiry of the justifications for depriving an individual of his liberty by imprisoning him.¹⁸⁷ In-

182 *Boumediene*, 476 F.3d at 995 (Rogers, J., dissenting).

183 *Id.*; see also *id.* at 996 n.1 (“The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights.”).

184 *See id.* at 997–98.

185 *See id.* at 1005–06.

186 *Fay v. Noia*, 372 U.S. 391, 438 (1963) (citing *United States ex rel Smith v. Baldi*, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting)).

187 *Cf. Goldstein*, *supra* note 164, at 1169 (“[F]or most of the long history of habeas corpus, courts resolved habeas claims without undertaking any inquiry into the petitioner’s rights

deed, *Boumediene* itself embraced the idea that “[h]abeas ‘is, at its core, an equitable remedy.’”¹⁸⁸

A recent, exhaustive historical study of habeas by Paul Halliday provides the context needed to understand the way in which habeas relief can be seen as courts’ exercise of equitable authority. Halliday explains that, in England, “[n]o one called habeas corpus an equitable writ. But this should not keep us from considering the ways in which its use was equitable in everything but name.”¹⁸⁹ In exploring the centuries-old roots of habeas, Halliday finds that particular substantive guarantees external to habeas relief were not necessary for a prisoner to prevail in his petition. To the contrary, what was needed was a compelling tale of the unfairness of the prisoner’s imprisonment:

Habeas corpus is a judicial writ, issued when the justices had been convinced by a story that they should examine more closely the circumstances of a person’s imprisonment. The telling of tales, and the discretion of the judges in deciding to heed the moral of such tales, was quite like the process used in most courts of equity.¹⁹⁰

In turn, Halliday finds that habeas review was traditionally an exceedingly case-specific inquiry, as “justices made an equitable habeas jurisprudence that followed the facts of cases rather than rules.”¹⁹¹ And while, to be sure, statutes could prove relevant in ascertaining

by determining instead whether the jailer had authority to impose the challenged detention.”).

188 *Boumediene*, 553 U.S. at 780 (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)).

189 HALLIDAY, *supra* note 121, at 87; *see also* Vladeck, *supra* note 5, at 978, 992 (reviewing Halliday’s book and emphasizing “the flexibility, adaptability, and vigor of habeas” and habeas’ character as “a flexible, adaptable, and evolving remedy”). *See generally* R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 5 (1976) (“Habeas corpus became one of the principal weapons in the struggle between common law and equity.”).

190 HALLIDAY, *supra* note 121, at 92; *see also id.* at 97 (“Habeas jurisprudence was characterized by principles rather than rules, making it an all-but-equitable instrument in the judges’ hands.”). Halliday’s historical work offers interesting historical analogues for the Guantanamo situation that confronted the *Boumediene* Court, *see id.* at 207–08 (discussing cases concerning “the nationality of an applicant for habeas corpus”), with Halliday ultimately suggesting that habeas proceedings provided English judges with “the means to control all other jurisdictions, wherever, however, and whomever they imprisoned.” *Id.* at 213. *See generally* SHARPE, *supra* note 189, at 182–93 (discussing, historically, the “territorial ambit of habeas corpus”). For background on judicial forms of action in general, *see* F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (A.H. Chaytor & W.J. Whittaker eds., 1963).

191 HALLIDAY, *supra* note 121, at 105; *see also* Eric M. Freedman, *Habeas Corpus in Three Dimensions: Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 595 (2011) (noting that, historically, habeas “decisions are united by a strong impetus towards speedy and pragmatic resolutions based on case-specific facts as revealed by direct investigation and a disinclination to pronounce broad rules of law”).

whether a particular imprisonment was permissible,¹⁹² the basic inquiry was essentially an equitable one revolving around the discretion of judges.

That all-encompassing approach to habeas review is one from which, as Halliday acknowledges, American courts have departed.¹⁹³ Yet, for *Boumediene* to suggest a conception of habeas review as judges' exercise of equitable discretion is in accord with historical precedent, and might even be portrayed as a return to what Halliday regards as the zenith, over two centuries ago, of robust habeas review: he posits that "the writ's vigor may have peaked in the 1780s"¹⁹⁴ and suggests that habeas has historically involved "an ongoing tension . . . between what is in our law and what we would like to be in it."¹⁹⁵ For *Boumediene* to lean toward the latter would seem to return to a conception of habeas review as less rigidly determined by statutes and precedent and more flexibly exercised under the equitable authority of judges.¹⁹⁶

Consistent with such a view, the *Boumediene* Court might have been exercising its equitable discretion in assessing the procedures that Congress offered in lieu of habeas to Guantanamo detainees and, in the end, rejecting them as insufficient. Indeed, this understanding of the majority might provide the best explanation for why it was not deterred by the Chief Justice's complaint that there was no basis for finding a violation of the Suspension Clause without at least

192 See HALLIDAY, *supra* note 121, at 105 ("Certainty, like sufficiency, often turned on statute.").

193 See *id.* at 314. For one particularly indicative example, consider the following critical remarks of Justice Jackson in a draft memorandum: "[T]here are no rules. And habeas corpus has become pretty nearly a judicial plaything in a game without rules." FREEDMAN, *supra* note 120, at 126 (internal quotation marks omitted); see also *Rose v. Mitchell*, 443 U.S. 545, 580–86 (1979) (Powell, J., concurring) ("The history and purpose of the writ of habeas corpus do not support the application of the writ suggested by five Members of the Court today. Originally, this writ was granted only when the criminal trial court had been without jurisdiction to entertain the action. . . . In expanding the scope of habeas corpus, however, the Court seems to have lost sight entirely of the historical purpose of the writ. . . . Habeas corpus is not a *general* writ meant to promote the social good or vindicate all societal interests of even the highest priority. The question rather is whether this ancient writ, developed by the law to serve a precise and particular purpose, properly may be employed for the furthering of the general societal goal of grand jury integrity.").

194 HALLIDAY, *supra* note 121, at 314.

195 *Id.* at 316.

196 If one views the exercise of equitable discretion as a key judicial function, then there is an underlying question of how much this understanding of habeas overlaps with the separation-of-powers perspective. As Travis Crum helpfully put it: precisely what judicial power is being "separated" if not an equitable one?

determining whether due process had been satisfied.¹⁹⁷ On behalf of the majority, Justice Kennedy responded: “Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. . . . This is so . . . even where the prisoner is detained after criminal trial conducted in full accordance with the protections of the Bill of Rights.”¹⁹⁸ For the *Boumediene* majority, habeas review provides something of importance even when all of the constitutional guarantees often invoked in such proceedings, including due process, have been provided to the prisoner. That additional something might well be an opportunity for a court to exercise equitable authority to assess the fairness of the imprisonment as a whole, rather than just in terms of particular, discrete constitutional rights such as due process. So when *Boumediene* declared that “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,”¹⁹⁹ it mattered little that, as noted by Azmy above, there was not much relevant law to be applied in this context. As long as lower court judges could exercise their equitable discretion to assess detention at Guantanamo, this vision of habeas review would be fulfilled. In the words of the Court, “common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.”²⁰⁰ This view suggests that habeas review, while perhaps informed by due process analysis, is not limited to it: to the contrary, the majority’s approach suggests that habeas review always has independent value, even when the requirements of due process have been met.

In sum, the relationship between habeas review and due process can be conceived in five related but distinct ways. Drawing on those five conceptions of the relationship between habeas and due process can help us answer this Article’s fundamental question: should *Boumediene* be read as anticipating that the Due Process Clause will follow the Suspension Clause to Guantanamo?

197 See *Boumediene v. Bush*, 553 U.S. 723, 813–14 (2008) (Roberts, C.J., dissenting) (criticizing the majority’s “position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect”).

198 *Id.* at 785 (majority opinion).

199 *Id.* at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

200 *Id.*

VII. THEORIES OF *BOUMEDIENE* AND IMPLICATIONS FOR DUE PROCESS RIGHTS

Moving from general conceptions of the habeas-due process relationship to more specific readings of *Boumediene*, this Part offers five possible understandings of the analytical logic of *Boumediene*, beginning with those pointing most strongly against finding the Fifth Amendment applicable to Guantanamo detainees and moving to those that point most strongly in favor of such a finding. Each draws on one of the conceptions, explored in the previous Part, of the general terms of the relationship between habeas and due process. As will be seen, echoes and elements of all five of those conceptions can, at least to some degree, probably be identified in all five of the readings of *Boumediene* presented below. Indeed, that overlap is part of why *Boumediene* is such a complex decision and one susceptible to a variety of understandings, and, to be sure, the five general conceptions of the habeas-due process relationship in the last Part and the five narrower understandings of *Boumediene* in this Part do not match up rigidly in a one-to-one fashion. Nonetheless, each of the broader understandings maps most readily onto a particular reading of *Boumediene*, and those linkages are explored in Section VII.A. Then, in Section VII.B, the two most likely candidates for understanding *Boumediene*'s implications for due process are explored in greater detail, along with the underlying conceptions of the habeas-due process relationship that they suggest.

A. Theories of *Boumediene*

1. *Boumediene as Suspension Clause-Specific*

First, *Boumediene* might be a strictly Suspension Clause-specific holding that defends the rights of detainees to challenge their detention. As mentioned above, the Suspension Clause can be seen as unique among constitutional guarantees: habeas access enables those imprisoned to receive at least some form of judicial review, rather than leaving them entirely at the discretion of the political branches.²⁰¹ Phrased differently, habeas access provides basic jurisdiction in a way that keeps detainees from being shut out entirely from access to a forum in which their detention can be reviewed. Hence,

²⁰¹ See Resnik, *supra* note 118, at 632 (describing *Boumediene*'s holding "that courts played a critical role by standing between individuals and the Executive" as the opinion's "core premise").

consistent with the conception of habeas as providing jurisdiction and due process as offering substantive grounds for challenging detention is an understanding of *Boumediene* in which the Supreme Court treated the Suspension Clause as unique among constitutional protections: the decision ensured that Guantanamo detainees would at least be heard by American judges but did not suggest whether those detainees, once heard, would have recourse to argue for substantive constitutional guarantees as providing content for the detainees' petitions.

Indeed, as Priester noted in his analysis quoted above, the Supreme Court's decision in *Munaf v. Geren*²⁰² seems to suggest that recognizing habeas jurisdiction can be significant even in the absence of any viable, substantive grounds for relief.²⁰³ In the wake of *Boumediene*, and even in the absence of any recognition of substantive constitutional protections for Guantanamo detainees, Human Rights First has declared that "Habeas Works,"²⁰⁴ suggesting that extending the Suspension Clause alone to Guantanamo may have sufficed to establish a meaningful opportunity for detainees to be heard by judges. Moreover, much of the Court's opinion in *Boumediene* reads as Suspension Clause-specific,²⁰⁵ and of course the D.C. Circuit has interpreted it as such: that interpretation may well be correct if *Boumediene* rests on the unique role of habeas access in providing some form of judicial access for those detained. If that interpretation is right, then the Due Process Clause might not apply to detainees at Guantanamo: *Boumediene* was, like *Rasul* and *Hamdan* before it, es-

202 553 U.S. 674 (2008).

203 Cf. Vladeck, *supra* note 25, at 2145 ("*Boumediene* may provide an answer to a question that the earlier case law left unresolved: to show an injury, does the plaintiff have to show that he would have prevailed on the merits? The Court in *Boumediene* clearly thought the answer to that question was 'no.' Rather, the relevant issue is whether the plaintiff might possibly be injured by the denial of access to the courts.").

204 HUMAN RIGHTS FIRST, *supra* note 30. But see WITTES, CHESNEY, & BENHALIM, *supra* note 30, at 3 ("So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances."); *id.* at 6 ("[D]etainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges who have articulated different standards heard their cases. And the reverse is also true."); Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 848 (2011) ("The persistence of disagreement and unresolved questions regarding the substantive-scope issue in the habeas litigation is problematic on many levels.").

205 See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) ("Petitioners . . . are entitled to the privilege of habeas corpus to challenge the legality of their detention."); *id.* at 772 ("[T]he fact that these detainees have been denied meaningful access to a judicial forum for a period of years render[s] these cases exceptional.").

sentially a case about jurisdiction, but not more, and due process might not share the lofty and distinctive status possessed by habeas and thus uniquely protected in *Boumediene*.

2. *Boumediene as Judiciary-Defending*

In contrast, a second understanding of *Boumediene* focuses less on the detainees themselves and more on the judiciary as an institution: this reading of the decision emphasizes its insistence that the courts not be silenced or sidelined by the political branches and, instead, that they defend the separation of powers among those branches. Understanding *Boumediene* as a separation-of-powers decision is in accord with a view of the habeas-due process relationship as one distinguishing between structural arrangements among the three branches and guarantees of liberty for individuals. From this perspective, the real constitutional violation identified by the *Boumediene* Court was a structural overstepping by the political branches, not a deprivation of individual detainees' rights to judicial review—and the analysis concerning the separation-of-powers concerns need not dictate the analysis governing individual rights that would become the focus of a due process inquiry.

Understanding *Boumediene* as an affirmation of the role of the judiciary would seem consistent with other jurisprudence of Justice Kennedy.²⁰⁶ As Vladeck wrote, “Reading *Boumediene*, one is left with the distinct impression that for Justice Kennedy, at least, the writ of habeas corpus is in part a means to an end—a structural mechanism protecting individual liberty *by* preserving the ability of the courts to check the political branches.”²⁰⁷ In turn, some of *Boumediene*'s lan-

²⁰⁶ Cf., e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (“By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”); *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) (invoking separation-of-powers concerns in prohibiting the legislative and executive branches from reallocating authority); *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997) (emphasizing that the separation of powers demands that the proper role of the judiciary be to interpret the Constitution and “say what the law is” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

²⁰⁷ Vladeck, *supra* note 25, at 2110; *see id.* at 2109 (noting Justice Kennedy’s “repeated allusions to the relationship between habeas corpus and the separation of powers—a recurring (if surprising) theme”); *id.* at 2111 (“At least where habeas corpus is concerned, the purpose of judicial review, in Kennedy’s view, appears to be as much about preserving the role of the courts as it is about protecting the individual rights of the litigants.”); *id.* at 2112 (discussing “Justice Kennedy’s suggestion that the access to courts protected by the Suspension Clause is (at least largely) about protecting the *courts* as such”); *see also* JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 205 (2011).

guage²⁰⁸ suggests that the decision emerged in significant part from an emphasis on ensuring that the political branches could not deliberately operate in the absence of the judiciary.

The implication of this understanding for due process analysis is less than clear: perhaps the Suspension Clause alone suffices in protecting a “seat at the table” for “judicial power”;²⁰⁹ then again, perhaps more is necessary, and if so the Due Process Clause is the most likely next candidate, with its longstanding invocation by American courts in both procedural and substantive forms. If *Boumediene* was really about protecting separation-of-powers principles and affirming the role of the judiciary,²¹⁰ then it seems possible that the Due Process Clause might not share the Suspension Clause’s reach to Guantanamo, but also possible that it might: this structural perspective is simply not decisive for due process analysis. How the Supreme Court would resolve the issue might well hinge less on abstract legal con-

(“The point at which judicial sympathy with the political regime stopped and judicial institutional independence began occurred [in *Boumediene*] when the Court perceived that its institutional power to issue habeas writs was jeopardized and when bare minimum judicial functions were jettisoned by the regime.”); Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 388 (2010) (“[T]he strong connection between habeas and the separation of powers elaborated by Justice Kennedy is neither obvious nor necessary. To the contrary, it is of recent vintage, and finds roots as much in Justice Kennedy’s views on structural constitutionalism as it does in the storied history of the Great Writ.”); *id.* at 391 (suggesting that *Boumediene* “may be best underst[ood] as part of a more general theory of separation of powers that Justice Kennedy has developed over three decades in cases unrelated to habeas or the Suspension Clause”); Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 51 (2010), available at http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Vladeck.pdf (referring to “the separation-of-powers doctrine’s odd but undeniable centrality to Justice Kennedy’s analysis for the *Boumediene* majority”); Vladeck, *supra* note 5, at 967 (“Invoking the separation of powers in at least ten additional passages, Justice Kennedy’s point appeared to be that the Suspension Clause should be understood, in general, as protecting prisoners *by* protecting the power of courts . . .” (footnote omitted)). A similarly structural understanding of *Boumediene* emphasizes its limitation on the exercise of government power as a whole, including all three branches. See Falkoff & Knowles, *supra* note 107, at 884 (“[W]hat is striking about *Boumediene* is the degree to which the Court’s holding hinges on the nature of the exercise of government power rather than the rights afforded to the detainees as aliens located abroad.”).

208 See, e.g., *Boumediene*, 553 U.S. at 746 (“The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.”); *id.* at 772 (“The gravity of the separation-of-powers issues raised by these cases . . . render[s] these cases exceptional.”).

209 BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 15 (2008).

210 See Azmy, *supra* note 98, at 449 (characterizing the Supreme Court’s ruling in *Boumediene* as deciding “that the indefinite military detentions in Guantanamo violated fundamental separation-of-powers principles enshrined by the Suspension Clause”); *id.* at 466 (“[T]he normative justification that most fully accounts for [Justice Kennedy’s] view is rooted in separation of powers and a concern about executive manipulation of legal rules.”).

ceptions and more on a practical, empirical assessment of whether the post-*Boumediene* habeas litigation has proven sufficient in affirming the role of the judiciary in the government's activities at Guantanamo.

Moreover, a separation-of-powers understanding of *Boumediene* would seem consistent with the *Boumediene* Court's apparent disinclination to get involved in the conduct of warfare beyond the limited area of detention. While the judicial power seems decidedly at home in overseeing detention,²¹¹ it would appear more out of place assessing, for example, the lawfulness of drone strikes launched abroad.²¹² That suggests that the Court might use the separation-of-powers rationale to justify judicial involvement in detention (through habeas) but not due process-based involvement in the wider conduct of warfare.²¹³

3. *Boumediene as Internationalist*

A third approach to making sense of *Boumediene* is to see it as consistent with a number of recent Supreme Court decisions that aim to place American human rights practices in line with those of comparable countries around the world. This understanding of the decision emerges less from its text than from a comparison with other prominent, recent opinions authored or joined by Justice Kennedy. His opinions for the Court in cases such as *Roper v. Simmons*²¹⁴ and *Lawrence v. Texas*,²¹⁵ as well as his votes in cases such as *Atkins v. Virginia*,²¹⁶ indicate a concern with keeping American human rights practices in line with the practices of similarly situated countries. As Neuman noted, "The *Boumediene* opinion said little about interna-

211 Cf. Geltzer, *supra* note 30, at 114 ("In asserting jurisdiction, as in *Rasul*, or in demanding procedural protections for American citizens detained on American soil, as in *Hamdi*, or in rejecting the proposed procedures and charges for a military commission, as in *Hamdan*, the Court plausibly could claim merely to be delineating the scope of the law, rather than circumscribing the scope of the war. After all, it is the judiciary's job to uphold the law, while it is the political branches' responsibility to wage war.")

212 See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010) (dismissing a lawsuit challenging the alleged authorization of a targeted killing of a dual U.S.-Yemeni citizen hiding in Yemen).

213 I am appreciative to Sam Rascoff for this analysis.

214 543 U.S. 551, 575 (2005) (finding it instructive that the "United States is the only country in the world that continues to give official sanction to the juvenile death penalty").

215 539 U.S. 558, 576 (2003) (noting that other countries have recognized the "right of homosexual adults to engage in intimate, consensual conduct").

216 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

tional and comparative law,” yet “[t]he Court may have been reassured . . . by its awareness of the international human right to a judicial remedy for unlawful detention. The institution of habeas has spread globally,” producing what Neuman labeled the “internationalization of habeas corpus.”²¹⁷

If *Boumediene* was grounded, at least in part, in Justice Kennedy’s urge to ensure that the United States would provide the type of judicial relief dictated by global norms, then it seems likely, but far from certain, that due process rights would follow. Much as Article 9(4) of the International Covenant on Civil and Political Rights imposes a human rights law requirement of habeas-style judicial review, Article 9(1) of the Covenant demands what seems to be a rough equivalent of due process: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”²¹⁸ Then again, perhaps habeas access would be seen as achieving sufficient accord with global norms to make the extension of due process rights to Guantanamo unnecessary from this internationalist perspective.

This perspective on *Boumediene* aligns with the broader idea that habeas review inherently offers certain minimal due process protections (and, perhaps, vice versa): hence, providing habeas access complied with global norms not because it offered just bare-bones jurisdiction or rectified a structural constitutional error but because it produced a mechanism for airing detainees’ grievances as demanded by internationally accepted principles. Still, even if the internationalist view on *Boumediene* is properly seen in this light, it remains unclear what the decision anticipates regarding due process at Guantanamo. Perhaps the same logic of meeting international standards applies and points in favor of recognizing due process rights, but perhaps the very fact that habeas review itself offers the basics of due process

²¹⁷ Neuman, *supra* note 25, at 275–77; see David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 51, available at http://www.cato.org/pubs/scr/2008/Boumediene_Cole.pdf (“While *Boumediene* may appear unprecedented from a domestic standpoint, it fits quite comfortably within an important transnational trend of recent years, in which courts of last resort have played an increasingly aggressive role in reviewing (and invalidating) security measures that trench on individual rights.”); Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 46, available at http://www.cato.org/pubs/scr/2008/Boumediene_Posner.pdf (“If the *Boumediene* case is remembered, it will be remembered not as a separation-of-powers case, but as one more step in the march of judicial cosmopolitanism—the emerging view that the interests of nonresident aliens deserve constitutional protection secured by judicial review.”).

²¹⁸ International Covenant on Civil and Political Rights art. 9(1), adopted Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, 175.

makes unnecessary the further, and perhaps bolder, extension of the Due Process Clause to a geographic zone in which the Suspension Clause already has made inroads.

4. *Boumediene as Meaningful Judicial Review*

Fourth, as suggested by Priester, one might question whether *Boumediene* “is really about meaningful judicial review,”²¹⁹ rather than whatever guarantees formally or strictly might be seen as associated with the Suspension Clause alone. If the decision is indeed about meaningful judicial review of detention, then extending the Suspension Clause alone to Guantanamo would seem insufficient for fulfilling the real logic and design of the Court’s decision.²²⁰

Habeas access, as mentioned above, at times seems to be conceived by the Supreme Court as essentially jurisdictional in nature, meaning that—as *Munaf* indicates—a habeas petitioner still needs substantive grounds for relief in order to prevail. In turn, if *Boumediene* aimed to provide judicial oversight of detentions at Guantanamo that was more than a mere formality, then some sort of comprehensive judicial review would seem necessary—and upholding due process protections would be a natural emphasis of that review. As former Guantanamo detainees argued before the D.C. Circuit in *Rasul v. Myers*, “it is difficult to conceive of a right of habeas without a corresponding right to due process. In the absence of due process, by what standard is detention to be judged?”²²¹ There are, as this Article has suggested, conceivable answers to this rhetorical question, but its thrust is compelling: habeas alone might be viewed as allowing detainees into a courtroom, but due process claims—at the very least—might be seen as necessary for giving them a basis, once there, on which to challenge their detention.

On this view, undergirding *Boumediene* was an equitable conception of habeas review in which such proceedings provide opportuni-

219 Priester, *supra* note 111, at 1036.

220 Cf. Petition for Writ of Certiorari at 2–3, *Al-Odah v. United States*, No. 10-439 (U.S. Sept. 28, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (“In *Boumediene v. Bush*, this Court held that prisoners at Guantanamo, no less than any other person imprisoned by the government, are entitled to invoke the writ of habeas corpus to seek their liberty Such judicial review, however, is only as meaningful as the procedures that are adopted to effectuate the Great Writ [T]he District Court and the Court of Appeals have effectively gutted this Court’s holding in *Boumediene* that habeas corpus is a fundamental right to which detainees in Guantanamo are entitled.”), *cert. denied*, 131 S. Ct. 1812 (2011).

221 Supplemental Brief on Remand of Appellants/Cross-Appellees Rasul et al. at 9 n.5, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (No. 06-5209).

ties for judges to assess the overall fairness of imprisonment. That foundation would seem to explain Justice Kennedy's explicit confidence in lower courts working out the details of the habeas litigation enabled by the Court's decision.²²² If the equitable understanding of habeas relief best explains *Boumediene*, as a reading that emphasizes meaningful judicial review would suggest, then further extension of due process protections to Guantanamo detainees might be simply unnecessary: judges would seem already sufficiently equipped to provide relief by operating under the flexible authority of habeas review. But more consistent with this reading of *Boumediene* would be an extension to Guantanamo of due process protections so as to facilitate judges' exercise of their equitable discretion concerning detainees.

5. *Boumediene as the Triumph of the Impracticable and Anomalous Test*

A fifth conception of *Boumediene* seems particularly persuasive and is in accord with the understandings articulated by a number of scholarly commentators. This understanding embraces Falkoff and Knowles' notion of *Boumediene* as "the triumph of . . . the 'impracticable and anomalous' test."²²³ Therefore, in assessing whether the Due Process Clause applies to detainees at Guantanamo, a court would ask whether the Clause's application would be impracticable and anomalous.²²⁴ This understanding of *Boumediene* connects with a conception of the general habeas-due process relationship as one in which habeas provides remedies for violations of the substantive guarantees of due process. Hence, as this reading of *Boumediene* suggests a

²²² *Boumediene*, 553 U.S. 723, 733 (2008) ("We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."); *id.* at 798 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined."). *But see id.* at 806 (Roberts, C.J., dissenting) ("The nature of the habeas remedy the Court instructs lower courts to craft on remand, however, is far more unsettled than the process Congress provided in the DTA."); Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1831 (2009) ("The indeterminate and unrealistic breadth of the Court's analysis [in *Boumediene*] thus comes with substantial perils.")

²²³ Falkoff & Knowles, *supra* note 107, at 871. For a history of the "impracticable and anomalous" test and a critique of its application in *Boumediene* and elsewhere, see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009).

²²⁴ *Cf. Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990) (applying the "impracticable and anomalous" test to determine the applicability to the Northern Mariana Islands of the Constitution's guarantee of equal protection).

pragmatic, clause-by-clause approach to the extraterritorial application of the Constitution that eschews overarching visions of constitutional operation in favor of case-specific and clause-specific analyses, it thus anticipates that the applicability of due process must be gauged on whether its recognition in a certain situation would be impracticable and anomalous: and where recognition would not be impracticable and anomalous, habeas provides the remedy needed to effectuate the process that is due.

Operating under this reading of *Boumediene*, a court might well conclude, in line with earlier applications of that test to Guantanamo by the Second Circuit and by one D.C. district judge, that such application is neither impracticable nor anomalous and thus should be recognized. Indeed, as the former detainees argued in *Rasul*, “[r]ecognition of the right to habeas corpus, which, as the Supreme Court acknowledged in *Boumediene*, may entail cost to the government and require compliance with judicial process, is far more impracticable than recognition of the right at issue here,” namely a due process-based prohibition on torture.²²⁵ If *Boumediene* in fact makes the “impracticable and anomalous” test the basis for all assessments of the applicability of constitutional provisions abroad for citizens and aliens alike, then the Due Process Clause is likely to extend to detainees at Guantanamo²²⁶—not just because courts have come out that way before, but because the very operation of the Suspension Clause at Guantanamo seems to suggest the general practicability of extending constitutional protections there.

B. The Most Likely Candidates: Separation of Powers and the “Impracticable and Anomalous” Test

The understandings of *Boumediene* most likely to be vindicated in future case law are the second and fifth discussed above: the separation-of-powers perspective that affirms the engaged role of the judiciary in overseeing detention, and the understanding that heralds the triumph of the “impracticable and anomalous” test. The former is a

²²⁵ Supplemental Brief on Remand of Appellants/Cross-Appellees *Rasul et al.* at 10, *Rasul*, 563 F.3d 527 (No. 06-5209); see also Ahmed, *supra* note 24, at 32–34 (arguing that the practical concerns of extending due process protections to Guantanamo detainees who already possess habeas rights are minimal).

²²⁶ Cf. Fallon & Meltzer, *supra* note 6, at 2094 (“[C]itizens enjoy due process rights whether their seizures and detentions occur at home or abroad and . . . aliens enjoy such rights when seized or detained within the United States . . . [W]e believe that Guantanamo Bay is sufficiently similar, functionally, to American territory that at least *fundamental* constitutional rights extend to all who are held there.” (citation omitted)).

structural theory of the Suspension Clause that regards it as a defense of judicial turf; it is an understanding consistent with much of the most crucial language in *Boumediene*, as well as with other manifestations of Justice Kennedy's jurisprudence. The latter is an approach grounded in a concern with providing remedies for violations of individual rights; it also coheres with key passages from *Boumediene*, as well as with the inherently cautious, contextual nature of that decision as a whole.

Given that these readings of *Boumediene* appear most compelling, it is worth directly comparing the differing implications of these two readings for the potential applicability of the Due Process Clause to Guantanamo. As mentioned above, if the separation-of-powers understanding of *Boumediene* is correct, then the same concern with defending the judiciary might not portend an accompanying extension of the Due Process Clause to Guantanamo—though it is not entirely clear based on *Boumediene*. If, by contrast, the “impracticable and anomalous” test constitutes the proper understanding of *Boumediene*, then the finding of constitutional applicability appears likely to be extended into the context of due process. In other words, the two most cogent understandings of *Boumediene* are not as complementary as they initially seem. Once one examines the underlying implications of those two understandings for the relationship between habeas and due process, one realizes that the apparent harmony between the two readings of *Boumediene* masks a fundamental tension between their implications for a crucial underlying constitutional issue.

Boumediene's emphasis on upholding the separation of powers would seem to point toward an understanding of the Court's decision that is Suspension Clause-specific and, in turn, that might not anticipate a recognition of due process rights for Guantanamo detainees. *Boumediene's* plethora of Suspension Clause-specific language could square with the decision's separation-of-powers focus through a recognition of the unique nature of habeas access for ensuring the active involvement of the judiciary. First, habeas access can be distinguished from due process protections if one understands habeas as providing jurisdiction and due process as offering grounds for substantive claims: once habeas-provided jurisdiction ensures that courts are no longer shut out entirely by the political branches,²²⁷ then separations-of-powers concerns might well be satisfied. Second, Justice Kennedy's opinion in *Boumediene* spent pages on the multi-century

²²⁷ Cf. *Boumediene*, 553 U.S. at 802 (Roberts, C.J., dissenting) (“Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention.”).

history of habeas corpus, its centrality to the Anglo-American legal tradition, and the role of the judiciary within that tradition²²⁸: while recognizing due process protections certainly has become a fundamental exercise of American judicial power, there is no similarly long and rich history suggesting its absolute centrality in the very nature of our jurisprudential tradition.²²⁹ Third, due process is not generally concerned with structural issues of our constitutional system, such as separation of powers, but instead is usually conceived as pertaining to the rights of individuals; in turn, its application to Guantanamo detainees would not seem to fit entirely with *Boumediene's* separation-of-powers rationale or an implicit view of habeas review as a structural guarantee.

Despite all of those reasons for thinking that a separation-of-powers reading of *Boumediene* does not anticipate an extension of due process protections to Guantanamo, *Boumediene's* emphasis on upholding the separation of powers among the three branches of government could conceivably be seen as pointing toward an applicability of due process to Guantanamo. First, the idea of ensuring that the political branches cannot operate free from the oversight of the judiciary would suggest that due process guarantees should be afforded to those subject to detention: beyond the access to courts provided by the application of the Suspension Clause to Guantanamo, the procedural guarantees associated with due process would seem the most basic protections that courts might intervene to ensure. Second, upholding due process is often seen as the particular province of the courts, meaning that due process provides a natural basis on which the judiciary might exercise further authority after the habeas authority already declared in *Boumediene*. Third, recognizing the applicability of due process in ongoing civil suits might, in a sense, provide a way for the courts to exercise retroactive review of the activities that occurred at Guantanamo before *Boumediene*. that is, to whatever extent the political branches believed themselves to be

²²⁸ *See id.* at 743 (majority opinion) (“Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.”).

²²⁹ *See id.* at 785 (“Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes’ words, to ‘cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.’ Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.” (alterations in original) (citations omitted)).

operating free from the oversight of the judiciary, the judiciary could now assess their behavior by allowing to be heard due process claims based on pre-*Boumediene* detention practices. All three of these reasons for applying due process to Guantanamo would cohere with the separation-of-powers logic that suffuses Justice Kennedy's opinion for the Court in *Boumediene*, as well as with a structural understanding of habeas review as a mechanism for protecting the judiciary's proper sphere.

On the whole, while it remains unclear whether a separation-of-powers understanding of *Boumediene* suggests the recognition of due process protections for Guantanamo detainees and former detainees, the uniqueness of habeas corpus in the American legal system would seem to suggest that, from this structural perspective, due process need not follow habeas access. In contrast, a conception of *Boumediene* as firmly entrenching the "impracticable and anomalous" test to evaluate the applicability to aliens abroad of each constitutional provision does appear to suggest that due process guarantees will follow the Suspension Clause's reach to Guantanamo.

If the Suspension Clause's application to Guantanamo was deemed neither impracticable nor anomalous, then the Due Process Clause would seem similarly situated. First, providing habeas review to detainees who would otherwise have no access to federal courts demanded significant costs and resources from the government,²³⁰ whereas adding due process protections merely obliges the government to raise the bar for the detainees and perhaps to treat them rather more like pre-trial civilian detainees: it thus seems even less impracticable and anomalous. Second, the very fact that, in the context of evaluating suppression motions, D.C. district judges already have been applying what seem like due process protections²³¹ would seem to cut strongly against any argument that due process is impracticable and anomalous in this context. Third, to the extent that recognizing some form of due process is necessary to provide the substantive basis on which habeas petitions can be evaluated, *not* recognizing due process protections might actually be the more anomalous approach—especially given this reading's underlying conception of the

230 See *id.* at 769 (“[W]e recognize, as the Court did in *Eisenstrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources.”).

231 See *supra* notes 31–35 and accompanying text.

habeas-due process relationship as one in which habeas serves as a vital remedy for ensuring that due process protections, once recognized, are upheld.

There are, of course, ways to argue that recognizing due process protections for Guantanamo detainees would, in fact, be impracticable and anomalous. Perhaps most persuasive would be an argument based on the imperatives of intelligence-gathering in confronting “the particular dangers of terrorism in the modern age”²³²: to the extent that diverging from what might otherwise be the practices required by due process could be necessary to gather intelligence and prevent a catastrophic terrorist attack, then recognizing due process protections might indeed be seen as both impracticable and anomalous. A second argument might echo and extend Chief Justice Roberts’ dissent in *Boumediene*: if *Hamdi* suggested that an American citizen detained on American soil was entitled to an apparently limited form of due process, then it could be seen as distinctly anomalous for an alien held at Guantanamo to receive the full panoply of due process protections.²³³ Third, it is conceivable that courts could find the extension of due process to Guantanamo, at least in the context of civil suits against the U.S. government, to be impracticable not in the protections provided to detainees but in the demands that litigating such cases would impose: in other words, while it might not be impracticable for the executive to abide by the guarantees of due process in its treatment of detainees, it might nonetheless be impracticable for evidence to be gathered, discovery to proceed, and claims to be sustained regarding potentially dozens if not hundreds of detainees who might be inclined to sue the U.S. government if such causes of action were allowed to go forward. And, by way of comparison, a military appellate court has held that “extending equal protection guarantees to [alien unlawful enemy combatants] tried before military commissions would be ‘impracticable and anomalous.’”²³⁴

These counter-arguments to a finding of due process’s applicability to Guantanamo are substantial, but they seem generally weaker than arguments that permitting habeas relief at Guantanamo would have been impracticable and anomalous—and the Supreme Court clearly decided otherwise on that issue in *Boumediene*. In turn, and especially given the apparent feasibility of district judges already acting as if certain due process protections applied when evaluating the

²³² *Boumediene*, 553 U.S. at 752.

²³³ *Cf. id.* at 812–13 (Roberts, C.J., dissenting).

²³⁴ *United States v. Hamdan*, No. CMCR 09-002, 2011 WL 2923945, at *46 (C.M.R. June 24, 2011).

admissibility of coerced statements, it seems likely that due process would be found applicable to Guantanamo detainees if the “impracticable and anomalous” test provides the best understanding of *Boumediene*—unlike if the separation-of-powers understanding prevails, in which case a recognition of due process appears less likely.

The opinion in *Boumediene*, when read in the context of the case itself, appears susceptible to multiple, complementary readings. But, once one digs deeper in order to explore those readings’ implications for the underlying issue of the relationship between habeas and due process, tensions emerge, and the different readings of *Boumediene* suddenly begin to tug in opposite directions.

CONCLUSION

Before *Boumediene*, the relevant case law generally suggested that the Fifth Amendment’s due process protections did not apply to aliens at Guantanamo. The D.C. Circuit has made clear its understanding that, even after *Boumediene* extended the Suspension Clause’s reach to such individuals, the Due Process Clause nonetheless still does not apply to aliens detained at Guantanamo. Other circuits have yet to tackle the issue. If and when they do (perhaps in civil suits against the government), or if and when the D.C. Circuit revisits the issue en banc, or indeed if and when the Supreme Court settles the matter, a different outcome may emerge.

If *Boumediene* was a habeas-specific decision protecting the access to courts of those imprisoned, then the Due Process Clause probably does not apply to detainees at Guantanamo. Alternatively, if *Boumediene* was really concerned with protecting separation-of-powers principles and affirming the role of the judiciary, then it seems possible that the Due Process Clause might not share the Suspension Clause’s reach to Guantanamo. In another alternative, if *Boumediene* was grounded in ensuring the type of judicial relief dictated by global norms, then it seems likely, but far from certain, that due process rights would follow. In yet another possibility, if *Boumediene* is correctly understood as providing meaningful judicial review, then detainees are likely to be deemed entitled to the protections of the Due Process Clause. Finally, if *Boumediene* makes *Reid v. Covert*’s “impracticable and anomalous” test the basis for all assessments of the applicability of constitutional provisions abroad, then the Due Process Clause is likely to apply to detainees at Guantanamo.²³⁵

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

Perhaps unsurprisingly, should the issue reach the Supreme Court, the decisive vote is likely to belong to Justice Kennedy, who revived the “impracticable and anomalous” test with his concurrence in *Verdugo* and then saw it command a majority of the Court as the author of *Boumediene*. All four of the Justices who dissented in *Boumediene* remain on the Court and seem likely to oppose the Fifth Amendment’s application at Guantanamo, while Justices Breyer, Ginsburg, Sotomayor, and Kagan seem likely to support its application there. All five of the understandings of *Boumediene* set out above offer plausible characterizations of Justice Kennedy’s fundamental logic in that decision and, in turn, plausible anticipations of his likely approach to the applicability of the Due Process Clause at Guantanamo. The most probable candidates are the separation-of-powers approach and the “impracticable and anomalous” test: the former is an issue of consistent emphasis in Kennedy’s jurisprudence, while the latter is a test that Kennedy personally revived and made the approach of a majority of the Court. If he adopts a separation-of-powers perspective, then he might well find that the Due Process Clause does not accompany the Suspension Clause, which can be seen as constitutionally unique in its protection of judicial involvement. If, however, he applies the “impracticable and anomalous” test, then the Due Process Clause is likely to follow the Suspension Clause to Guantanamo.

If and when this issue reaches the Supreme Court, it will carry with it a broader, deeper constitutional question: what is the relationship between the Suspension Clause and the Due Process Clause? Perhaps the D.C. Circuit will continue to explore that issue in light of the circuit’s current understanding that the former applies to Guantanamo while the latter does not.²³⁶ Regardless of whether the D.C. Circuit has weighed in on this underlying issue, the questions that it raises—of what habeas review means in the absence of due process and how the two sets of protections relate—will present to the Supreme Court a challenging and surprisingly underexplored puzzle about how two vital sets of constitutional guarantees interact.

If the Court leans toward a structural understanding of *Boumediene* as a separation-of-powers decision, then the Justices will have to grapple with the underlying implication that, in general, habeas is a structural guarantee while due process protects individuals’ liberties. If, in contrast, the Court understands *Boumediene* as the triumph of the “impracticable and anomalous” test for assessing constitutional rights

236 Cf. *Omar v. McHugh*, 646 F.3d 13, 18–20 & n.5 (D.C. Cir. 2011).

abroad, then the Justices will have to consider the corresponding suggestion that the emphasis of habeas review is the provision of remedies for violations of substantive guarantees emerging from the Due Process Clause and other sources of affirmative protection for individuals.

As the Supreme Court contemplates whether to leave *Boumediene* as its last word on Guantanamo or to hear further legal challenges mounted by detainees,²³⁷ one consideration for the Court should be that any further decision would implicate the broader question of the relationship between habeas corpus and due process. Perhaps, for the Court, that is itself a reason for letting *Boumediene* stand as the Court's final, albeit confusing, word on Guantanamo, thus avoiding a daunting and difficult issue.²³⁸ Then again, perhaps the rare opportunity for the Supreme Court to tackle such a central and overlooked constitutional puzzle should not be passed up.

²³⁷ See Petition for Writ of Certiorari at i, *Al-Madhwani v. Obama*, No. 11-7020 (U.S. Oct. 24, 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/10/al-Madhwani.pdf> (petitioning the Supreme Court to decide “[w]hether the Court of Appeals’ denial of due process protections to Guantánamo Bay detainees is inconsistent with the law and the Court’s decision in *Boumediene v. Bush*”); see also Petition for Writ of Certiorari at i, *Al-Odah v. United States*, No. 10-439 (U.S. Sept. 28, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (raising due process questions in the context of Guantanamo habeas petitions), cert. denied, 131 S. Ct. 1812 (2011); Petition for a Writ of Certiorari at i, *Awad v. Obama* No. 10-736 (U.S. Nov. 30, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/12/Awad-petition-11-30-10.pdf> (same), cert. denied, 131 S. Ct. 1814 (2011). The Court seems likely to face continuing petitions from Guantanamo detainees, given that detention at Guantanamo appears likely to continue for the foreseeable future. See Charlie Savage, *U.S. Prepares To Lift Ban on Guantanamo Cases*, N.Y. TIMES, Jan. 20, 2011, at A1 (“The Obama administration is preparing to increase the use of military commissions to prosecute Guantanamo detainees, an acknowledgment that the prison in Cuba remains open for business after Congress imposed steep new impediments to closing the facility.”).

²³⁸ See generally Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (discussing the benefits of the Supreme Court declining to decide broader substantive issues when cases can be resolved on narrower grounds).