"*De facto* Sovereignty": *Boumediene* and Beyond

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Introduction

The Supreme Court's recent decision in *Boumediene v. Bush*,[1] which extends constitutional habeas corpus rights to noncitizens detained at Guantanamo Bay, Cuba, promises to be one of the most talked about and scrutinized decisions in domestic and foreign policy circles, courthouses, and law school classrooms for many years to come. Whether one agrees with it or not, the Court's multifaceted "functional approach"[2] to the extraterritorial application of the writ raises important questions about the geographic scope of habeas in the war on terror[3] while leaving vague precisely when the writ extends to other situations of extraterritorial detention. Major considerations in the functional approach include the citizenship and status of the persons detained; the process through which that status determination was made; the nature of the locations where apprehension and detention occur; and practical obstacles to extending the writ there.[4] Among the most controversial and urgent questions left in *Boumediene*'s wake concern the detention of noncitizens abroad similarly situated to detainees at Guantanamo but for their detention location[5]: for example, does habeas extend to noncitizen government-designated enemy combatants detained at Bagram Air Base in Af-

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

2 *Id.* at 2258.

3 I use this term as a convenience without entering the debate on whether "war" is an accurate legal description of the struggle against transnational terrorist groups generally.

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

5 The government limited its argument in briefing to noncitizens. There is good reason to believe that the Court would find U.S. citizens detained abroad to have far stronger access to habeas than noncitizens. *See* Munaf v. Geren, 128 S. Ct. 2207, 2216–17 (2008) (holding that habeas corpus jurisdiction extends to U.S. citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition).

ghanistan or U.S. military prisons in Iraq? Government and detainee lawyers are right now trying to figure out answers to these very questions.[6]

This Article interrogates a particular aspect of the Court's opinion and, until now, largely unexamined piece of the habeas puzzle: the concept of "*de facto* sovereignty."[7] I will examine what it is, explain how the Court used it in *Boumediene*, and suggest ways in which it may hold a key to unlocking some of the mystery behind whether the Court will find habeas to extend to noncitizens in other situations of extraterritorial detention.

By way of general introduction,[8] the Court used de facto sovereignty to address what could be thought of as a "concurrent sovereignty" problem. While the 1903 lease governing Guantanamo's relationship with the United States gives "complete jurisdiction and control" to the United States, it expressly recognizes "the ultimate sovereignty of the Republic of Cuba" over the territory.[9] The government argued that common law history, which everyone agrees informs the constitutional scope of the writ,[10] as well as relevant Supreme Court precedent, indicate that habeas runs in favor of noncitizens only to territories over which the United States is sovereign.[11] Further, Supreme Court precedent holds that the existence of sovereignty over a territory is a political question immune from judicial review.[12] Accordingly, the argument goes, the sovereignty language in the lease, which is a political branch instrument, would foreclose not only habeas rights for noncitizens detained at Guantanamo, but also any judicial inquiry into the single dispositive question of whether the United States is sovereign over that territory.

In response, the Court disaggregated the concept of sovereignty into a series of partial, overlapping sovereignties, each with a different

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6 *See* Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14.

7 *See Boumediene*, 128 S. Ct. at 2253.

8 I address the government's arguments and the Court's analysis in more detail *infra* Part I.A–B.

9 Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16–23, 1903, T.S. No. 418 [hereinafter Lease Between United States and Cuba (Feb. 23, 1903)], *available at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

10 *See Boumediene*, 128 S. Ct. at 2248; INS v. St. Cyr, 533 U.S. 289, 301 (2001).

11 *See* Brief for the Respondents at 9–10, 14–25, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196) [hereinafter Brief for the Respondents].

12 *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 309 (1918)); Jones v. United States, 137 U.S. 202, 212 (1890).

name and character. It used these different sovereignties to devise what is basically a doctrine of concurrent sovereignty: multiple sovereignties simultaneously exist over Guantanamo.[13] Cuba's sovereignty in the lease the Court labeled "formal" or "*de jure* sovereignty,"[14] and, the Court acknowledged, is a political question.[15] But the Court then defined an alternative type of sovereignty that is not a political question, and that is properly subject to judicial inquiry.[16] This alternative type of sovereignty, the Court explained, is a "practical sovereignty," to be measured by the "objective degree of control the Nation asserts over foreign territory."[17] After distinguishing these two types of sovereignty, and explaining its competence to inquire into the practical type, the Court accepted the government's determination that Cuba "retains *de jure* sovereignty over Guantanamo," but "t[ook] notice" that the United States "maintains *de facto* sovereignty" over that territory.[18] The Court then rejected "*de jure* sovereignty" as the proper marker for the geographic scope of habeas and anchored its conclusion to each part of the opinion's argument about why habeas constitutionally extends to noncitizens at Guantanamo: common law history, precedent, and separation of powers principles.[19] In short, the Court avoided the government's political question challenge by finding concurrent sovereignties over Guantanamo and holding that the more important sovereignty for habeas purposes was the kind that belonged to the United States, not Cuba.

This Article evaluates the Court's discussion against prior Supreme Court precedent on de facto sovereignty to distinguish, and define, three types of sovereignty at play in *Boumediene*: *(i)* de jure sovereignty; *(ii)* practical sovereignty; and *(iii)* de facto sovereignty. And the Article offers a reading of *Boumediene* in which each type of sovereignty means something different both for the opinion, and for

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13 This idea should not be unfamiliar to U.S. lawyers. As Kal Raustiala points out:

> Sovereignty is . . . not an all-or-nothing proposition. Consequently, there is no necessary conceptual, constitutional, or practical reason to believe that whatever sovereignty Cuba enjoys in Guantanamo necessarily strips the United States of sovereignty. . . . Both states may be sovereign concurrently, with the particular sovereignty of each dependent on the precise issue at hand. This view tracks our own theories of sovereignty as embodied in federalism . . . .

Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2544 (2005).

14 *Boumediene*, 128 S. Ct. at 2252.

15 *Id.*

16 *Id.* at 2252–53.

17 *See id.* at 2252.

18 *Id.* at 2253.

19 *Id.*

future cases addressing the extraterritorial application of the writ. Under the Article's analysis:

(i) "*de jure* sovereignty" means "formal" or "technical" sovereignty in the sense of formal recognition of sovereignty by the government vis-à-vis other governments, and is a political question immune from judicial inquiry. We will be able to put this type of sovereignty aside fairly quickly in our search for answers about the geographic scope of habeas since the Court made clear that the writ's availability does not turn on it.[20] The analysis becomes more complicated, however, with respect to the other two types of sovereignty.

(ii) "practical sovereignty" means practical control over a territory and is not a political question, but is instead fully the subject of judicial inquiry.

(iii) "*de facto* sovereignty" means *both* practical control *and* jurisdiction over a territory, such that the de facto sovereign's laws and legal system govern the territory. Like de jure sovereignty, de facto sovereignty is a type of political question. However, while the Court may not answer the political question of de facto sovereignty all on its own, it may look to political branch determinations establishing jurisdiction and control over a territory to conclude that de facto sovereignty exists.

In a sense, the concept of de facto sovereignty I advance for *Boumediene* strikes a middle path between a full-blown political question into which the Court cannot inquire at all (de jure sovereignty), and a question fully open to judicial inquiry (practical sovereignty). De facto sovereignty is a political question in that it depends upon the political branches for its definition and existence. But while the Court cannot define de facto sovereignty however it likes, it may inquire into whether a territory falls under the recognized definition of de facto sovereignty; that is, whether the United States exercises complete jurisdiction and control over the territory. To do so, the Court must rely on political branch action establishing not just raw control but also jurisdiction, such that U.S. law and the U.S. legal system govern the territory. It is here that the Court takes notice of political branch determinations since they establish such jurisdiction: whether through treaty, legislation, or other mechanism—like a lease. In sum, the existence of de facto sovereignty depends upon the political branches establishing complete jurisdiction and control over a territory; but once the political branches decide to do that, their decision triggers judi-

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[20] *Id.*

cially enforceable legal consequences for the scope of habeas under the Constitution.

The three "sovereignties" outlined above emerge from a couple of wrinkles in the Court's analysis that I want to take some room here to introduce to frame my argument, and that I will iron out in the rest of the Article. First, and most strikingly given the whole point of the Court's concurrent sovereignty discussion apparently was to remove the habeas inquiry from the political question realm, there is a long line of Supreme Court precedent holding that de facto sovereignty, like de jure sovereignty, is a political question.[21] The Court in *Boumediene* failed to cite any of this precedent in arriving at its de facto sovereignty holding. Instead, it cited only one case: its 2004 decision in *Rasul v. Bush*.[22] But *Rasul* nowhere even mentioned the term "*de facto* sovereignty,"[23] and held only that, as the lease itself states, the United States has "complete jurisdiction and control" over Guantanamo.[24] Adding to the mystery is that instead of judicially inquiring into U.S. "practical sovereignty" over Guantanamo—as the Court just established it could do—the Court chose to "take notice" of the "fact" of U.S. de facto sovereignty, which is precisely what courts do when faced with political questions of sovereignty: they take notice of political branch determinations.[25] Hence, not only is there a strange disconnect between the Court's notion of a judicially reviewable "practical sovereignty" on the one hand, and its explicit choice to take notice of what has always been a political question, i.e., "*de facto* sovereignty," on the other; but the Court also failed to justify how it could take notice of U.S. de facto sovereignty apart from citing a case that merely repeats the language in the lease, which, as we know, only uses the word "sovereignty" in relation to Cuba. Thus it seems the Court stepped around one political question problem (de jure sovereignty) and right into another (de facto sovereignty).

The second wrinkle is definitional. The Court defined U.S. de facto sovereignty over Guantanamo by reference to the lease's terms "complete jurisdiction and control."[26] On its face, this definition differs from the Court's own notion of "practical sovereignty," which the opinion defined exclusively as "control."[27] Indeed, the lone U.S. case

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21 *See infra* Part II.B.

22 *Boumediene*, 128 S. Ct. at 2253 (citing Rasul v. Bush, 542 U.S. 466, 480, 487 (2004)).

23 *See generally* Rasul v. Bush, 542 U.S. 466 (2004).

24 *Id.* at 480.

25 *See infra* notes 122–57 and accompanying text.

26 *Boumediene*, 128 S. Ct. at 2253; *see infra* Part I.C.2.

27 *Boumediene*, 128 S. Ct. at 2252.

the Court cited in support of its "practical sovereignty" notion is one in which the United States physically occupied a Mexican port, but—as that case explains—the United States did *not* extend U.S. laws and jurisdiction there.[28] By contrast, as I will show through an examination of Founding-era materials and a long line of Supreme Court jurisprudence, de facto sovereignty has a well-established pedigree which embraces the existence of territorial jurisdiction as a crucial factor for determining whether de facto sovereignty exists over a given location.[29] Accordingly, "practical sovereignty" and "*de facto* sovereignty" represent two quite different concepts: "practical sovereignty" means only control, and is fully subject to judicial inquiry; while "*de facto* sovereignty" means both control and jurisdiction, such that the de facto sovereign's laws and legal system apply within the territory, and is, at least in part, a political question.

The difference between practical sovereignty and de facto sovereignty is not just academic hairsplitting. Rather, it does at least three things for *Boumediene*, and beyond. First, it offers a way to read *Boumediene*'s statement that the United States "maintains *de facto* sovereignty" over Guantanamo fairly consistently with a line of precedent holding unequivocally that de facto sovereignty is a political question, while updating the concept for the habeas context to allow some degree of judicial review in the form of the Court's capacity to conclude that political branch determinations establishing jurisdiction and control have, in fact, created U.S. de facto sovereignty.

Second, it helps clarify how the Court distinguished the government's arguments under *Boumediene*'s functional approach. A close look at the Court's discussion of both common law history and precedent reveals that the jurisdiction component of the de facto sovereignty formula—and not simply control, which alone would resolve a "practical sovereignty" inquiry—played an important, and sometimes even critical, role in casting Guantanamo as a location where habeas constitutionally runs. To be sure, if control were the only criterion, much of the Court's analysis breaks down on its own terms.

For example, the Court had to make sense of the fact that common law habeas ran to Ireland, which was a different kingdom from England, and to Canada, an ocean away, but did not run to geographically contiguous Scotland—a territory *the Court itself* described as part of the Crown's kingdom and "*controlled* by the English mon-

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28 *See* Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850).

29 *See infra* Part II.C.

arch."[30] How the Court distinguished these places had nothing to do with control (clearly), but emphasized the fact that unlike Ireland and Canada, which followed English law, Scotland had its own laws and legal system, and this gave rise to functional reasons why habeas did not extend there.[31] By contrast, the Court explained that at Guantanamo "[n]o Cuban court has jurisdiction to hear . . . petitioners' claims, and no law other than the laws of the United States applies at the naval station."[32]

Similarly, to distinguish the government's chief argument from precedent, the Court had to explain why, under a functional approach, a post-World War II occupation zone in Germany, where habeas did not run for noncitizens, was different from Guantanamo. In doing so, the Court did not use practical control alone but also emphasized the differences in terms of jurisdiction. The Court explained the shared jurisdiction among the Allies over the occupation zone and the nascent but increasingly extensive jurisdiction of the newly formed German government.[33] By contrast, the Court concluded that Guantanamo "is within the constant jurisdiction of the United States."[34]

Third, the concept of de facto sovereignty offers strong predictive value for future cases involving the detention of noncitizens abroad in places like Afghanistan and Iraq if the Court continues to use jurisdiction as a factor for measuring the scope of the writ under its functional approach.

The Article proceeds as follows. Part I explains the government's political question challenge to extending habeas to noncitizens at Guantanamo and breaks down the enigmatic concurrent sovereignty analysis devised by the Court to address that challenge. It then identifies wrinkles in the Court's analysis; namely, that "*de facto* sovereignty" is a type of political question and that it differs from the Court's notion of "practical sovereignty." Part II consults Founding views and longstanding Supreme Court precedent to demonstrate that de facto sovereignty has been considered a political question throughout our constitutional history, and that it means not only practical control but also the exercise of territorial jurisdiction. Part III demon-

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30 *Boumediene*, 128 S. Ct. at 2249 (emphasis added).

31 *Id.* at 2250–51.

32 *Id.* at 2251.

33 *Id.* at 2260–61.

34 *Id.* at 2261. There is a ready analogy here, missed by the Court, to a case involving U.S. occupation of a Cuban territory, the Isle of Pines, following the Spanish-American War. *See* Pearcy v. Stranahan, 205 U.S. 257 (1907), discussed *infra* Parts II.B.2, III.B.

strates that the Court in *Boumediene* actually relied more on this jurisdiction aspect than practical control in its discussion of common law history and precedent in order to cast Guantanamo as a place where habeas constitutionally runs.

Part IV looks beyond *Boumediene* to evaluate other possible locations involving extraterritorial detention of noncitizens under a de facto sovereignty approach; in particular, Afghanistan and Iraq. It discusses U.S. jurisdiction over those locations under Status of Forces Agreements ("SOFAs") and concludes that in neither location does the United States maintain territorial jurisdiction necessary to establish de facto sovereignty, at least as that concept traditionally has been understood. Thus, if the Court uses a de facto sovereignty approach incorporating jurisdiction going forward, habeas likely will not extend to noncitizen government-designated enemy combatants in those places.

Finally, Part V offers concluding thoughts on whether a de facto sovereignty approach is normatively superior to the Court's practical sovereignty notion as a measure for the constitutional scope of noncitizen habeas rights abroad in the war on terror. It initially notes that a de facto sovereignty approach is probably more predictable than a practical sovereignty approach. It then addresses a separation of powers tension inherent in using de facto sovereignty as a guide in the habeas context. Here I articulate a "middle path" for de facto sovereignty in the habeas context between a full-blown political question and a question fully open to judicial review. The path is founded on a principled distinction from de facto sovereignty precedent and proposes a more nuanced analysis than modern accounts of the political question doctrine as a binary choice between full judicial review and full deference to the political branches. I argue that while full deference to the political branches on de facto sovereignty questions makes sense in the contexts presented by precedent—recognition of foreign sovereigns—it does not in the habeas context, which involves protection of individual rights against government. The middle path accordingly seeks to balance judicial- and political-branch competences under the Constitution in the new context of habeas rights in the war on terror. It does so by predicating the existence of de facto sovereignty directly on political branch determinations: the establishment of not just control but also territorial jurisdiction, which occurs through political branch mechanisms. But once the political branches establish such control and jurisdiction, the Court may take notice of it and, hence, of U.S. de facto sovereignty. I suggest that the Court's

treatment of the political question doctrine in the field of foreign relations in *Baker v. Carr*,[35] the reigning Supreme Court statement on the doctrine, can be read to leave room for just this type of approach.

A brief word on scope of argument. I am not engaging questions of whether the Court was right or wrong as a matter of common law history, habeas precedent, or separation of powers in extending the writ to noncitizen detainees at Guantanamo. Those questions to a large degree already have been, and likely will continue to be, addressed far more effectively and comprehensively than what I could hope to accomplish in this concentrated piece. The questions also to a large degree are, in the wake of the decision, moot. I also do not pretend to tackle *Boumediene*'s entire "functional approach," which again, includes a variety of factors, such as the status of the individual detained and the process that individual has been afforded.[36] I focus instead on a single, highly charged and underexplored concept that at points appeared a lodestar in the constellation of factors the Court considered in extending habeas to noncitizen detainees at Guantanamo. I examine whether the Court used that concept correctly in light of precedent, whether it might tell us something about the circumstances in which the Court will find habeas to extend to other noncitizens detained abroad, and whether it supplies a normatively good measure. The Article, in brief, aims to expose and analyze a largely untreated piece of the habeas puzzle, which the Court has now placed front and center in the ongoing debate about the proper role of the Constitution in the war on terror, and to extract some predictive and normative payoff from that analysis.

I. Boumediene*'s Concurrent Sovereignty Analysis*

A. The Government's Sovereignty Arguments

A major argument advanced by the government against extending habeas rights to detainees at Guantanamo was that the writ extends in favor of noncitizens only to territory over which the United States is sovereign.[37] This argument was subdivided into two lines of attack. First was precedent. The government argued that *Johnson v. Eisentrager*,[38] a World War II-era Supreme Court decision which denied constitutional habeas rights to German nationals held at an Al-

35 Baker v. Carr, 369 U.S. 186, 211–12 (1962).

36 *See Boumediene*, 128 S. Ct. at 2259.

37 Brief for the Respondents, *supra* note 11, at 14.

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

lied prison in then-occupied Germany,[39] foreclosed the availability of habeas to noncitizen detainees at Guantanamo. The government hung its hat on *Eisentrager*'s statement, made in the course of the Court's refusal to recognize constitutional habeas rights, that "at no relevant time were" the petitioners "within any territory over which the United States is sovereign."[40] Because, like Landsberg Prison in Germany where the *Eisentrager* petitioners were held, Guantanamo "is not a sovereign territory of the United States,"[41] the government argued, noncitizens detained there have no constitutional right to habeas.[42]

The second line of attack involved the history of common law habeas. The Supreme Court has held that the Constitution's Suspension Clause, which allows suspension of habeas only in certain circumstances[43] and is generally considered to contain the constitutional right to the writ,[44] at a minimum protects the writ "as it existed in 1789."[45] The government argued that, at common law, the writ was unavailable outside the sovereign territory of the Crown.[46] And therefore, because Guantanamo is not a sovereign territory of the United States, the writ is not constitutionally available there—at least for noncitizens.[47]

Both arguments consequently depend upon the meaning of the term "sovereign" and how it attaches to the United States' relationship with Guantanamo. The government argued that the lease between the United States and Cuba, which states that Cuba has "ultimate sovereignty" over Guantanamo,[48] definitively supplies the answer. The D.C. Circuit agreed.[49] But there was more to the government's argument. For the Supreme Court to hold to the contrary, it

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39 *See generally id.*

40 *See id.* at 778.

41 Brief for the Respondents, *supra* note 11, at 21.

42 *Id.*

43 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.").

44 Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 339–43 (2006).

45 *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) (citing Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).

46 Brief for the Respondents, *supra* note 11, at 26–33.

47 *Id.* Again, the argument in favor of habeas for U.S. citizens detained abroad is stronger, *see supra* note 5, and the government appeared to limit its argument in briefing to noncitizens. See Brief for the Respondents, *supra* note 11, at 32–33.

48 Lease Between United States and Cuba (Feb. 23, 1903), *supra* note 9, art. III.

49 *See* Boumediene v. Bush, 476 F.3d 981, 992 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

could not simply undertake an independent judicial evaluation of who is sovereign over Guantanamo, disagree with the sovereignty designation in the lease, and conclude that the United States, not Cuba, is sovereign. Even apart from the lease's express language giving Cuba sovereignty, the very *character* of the lease itself presented a powerful argument that Cuba, not the United States, is sovereign over Guantanamo as a matter of law. The reason is that the lease is a political branch instrument. It was authorized by Congress and entered into by the President.[50] And a long line of Supreme Court cases holds that "the determination of sovereignty over an area is for the legislative and executive departments."[51] The sovereignty question is "not a judicial, but a political question, the determination of which by the legislative and executive departments . . . conclusively binds the judges, as well as all other officers, citizens and subjects of that government."[52]

Recent scholarship has challenged, quite persuasively, conventional wisdom that suspension of the Great Writ is a nonjusticiable political question when Congress in fact chooses to suspend it.[53] The even more pressing question in *Boumediene* was whether the political branches can, without any judicial check, *effectively* suspend the habeas writ for certain groups of individuals—not by actually suspending it,[54] but by defining those individuals out of the writ's coverage through a "political" sovereignty determination.

The Court thus faced two distinct but related sovereignty arguments against extending habeas rights to noncitizens at Guantanamo. One was that the lease provided Cuba, not the United States, with "sovereignty" over the territory. The other was that the lease's sovereignty designation was a political determination not subject to judicial review. The combination of these two arguments placed a substantial political question obstacle in the path of running habeas to noncitizens

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50 Lease Between United States and Cuba (Feb. 23, 1903), *supra* note 9, art. III. The recent Detainee Treatment Act of 2005, which provides that the "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba," further confirms this political branch determination that Cuba, not the United States, is sovereign when it comes to Guantanamo. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(g), 119 Stat. 2680, 2743.

51 Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948).

52 Jones v. United States, 137 U.S. 202, 212 (1890) (citation omitted).

53 Tyler, *supra* note 44, at 336 (arguing that viewing suspension as a political question is "at odds with the Great Writ's heritage and place in our constitutional structure and . . . would have troubling ramifications for the separation of powers and the institution of judicial review").

54 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008) ("The MCA [Military Commissions Act of 2006] does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is.").

at Guantanamo. One way around this obstacle might have been to reject the concept of sovereignty altogether as the relevant marker for habeas. That is, to conclude that habeas simply does not depend upon sovereignty. The Court did not do this. Instead, the Court proposed another type of sovereignty, under which the United States *is* sovereign over Guantanamo Bay. That is, it found concurrent sovereignty. I am going to refer to the Court's discussion in this regard as its "concurrent sovereignty analysis."

B. The Court's Concurrent Sovereignty Analysis

The Court's concurrent sovereignty analysis proceeded in three principal steps. *Step 1*: the Court distinguished Cuba's sovereignty in the lease, which the Court labeled "*de jure* sovereignty,"[55] from an alternative type of sovereignty, which the Court referred to as "practical sovereignty."[56] Cuba's de jure sovereignty, according to the Court, is "formal" sovereignty, or "sovereignty [ ] in the legal and technical sense of the term."[57] The alternative, "practical sovereignty," on the other hand, is measured by the degree of "plenary control" the United States asserts over a territory.[58] While de jure sovereignty is a political question, "practical sovereignty," in the Court's view, is not. The Court explained: "When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, but sovereignty in the narrow, legal sense of the term, meaning claim of right."[59] The Court may, it observed, "inquire into the objective degree of control the Nation asserts over a foreign territory."[60] Thus, if the sovereignty inquiry involves "*de jure* sovereignty," it is a political question; but if it involves "practical sovereignty," it is open to judicial inquiry.

Step 2: right after distinguishing de jure sovereignty from practical sovereignty, the Court "[a]ccordingly . . . accept[ed] the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay."[61] But the Court then "t[ook] notice of the obvious and uncontested fact that that the United States, by

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55 *Id.* at 2253.

56 *Id.* at 2252.

57 *Id.* at 2235–36.

58 *Id.* at 2252.

59 *Id.* (citation omitted).

60 *Id.*

61 *Id.* at 2253.

virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."[62]

Step 3: right after taking notice of the United States' de facto sovereignty over Guantanamo, the Court rejected de jure sovereignty as the definitive marker for the constitutional scope of habeas, thus taking the inquiry out of the political question realm. In the same breath, the Court connected its sovereignty analysis to each stage of the opinion's overall argument about why habeas extends to Guantanamo: history, precedent, and separation of powers. Here's the key paragraph:

> Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law [sic] habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.[63]

One might be tempted to read the Court as saying that sovereignty is not the touchstone of habeas. But that is not what the Court said; rather, it said specifically "*de jure* sovereignty" is not the touchstone. This specific choice of terms is difficult to ignore given the entire section is devoted to distinguishing Cuba's de jure sovereignty in the lease from other types of sovereignty—in particular, the sovereignty the United States maintains over Guantanamo. If sovereignty were not important, it would be strange for the Court to go out of its way to develop and distinguish another type of sovereignty from the sovereignty in the lease. The Court, in other words, did not respond to the government by saying sovereignty is not important; instead, it responded by saying the *specific type of sovereignty* you're talking about is not pivotal, because there is another type of sovereignty that is relevant.[64]

The point is confirmed by the Court's deployment of its concurrent sovereignty analysis in other parts of the opinion to conclude that

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62 *Id.*

63 *Id.*

64 *See also id.* at 2299 n.3 (Scalia, J., dissenting) ("In its failed attempt to distinguish *Eisentrager*, the Court comes up with the notion that '*de jure* sovereignty' is simply an additional factor that can be added to (presumably) '*de facto* sovereignty' (*i.e.*, practical control) to determine the availability of habeas for aliens, but that it is not a necessary factor, whereas *de facto* sovereignty is. It is perhaps in this *de facto* sense, the Court speculates, that *Eisentrager* found 'sovereignty' lacking.").

habeas extends to the detainees at Guantanamo. For one prominent example to which I'll return later, the Court specifically relied on the different types of sovereignty it had laid out to distinguish the Allied prison in *Eisentrager* from the detention center at Guantanamo.[65] It began by explaining that "because the United States lacked both de jure sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility."[66] Indeed, the Court continued, instead of viewing sovereignty as a strict "bright-line test" as the government argued, "[t]he Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept,"[67] which included not only "the formal legal status of Landsberg prison but also the objective degree of control the United States asserted over it."[68]

I will return to how the Court used concurrent sovereignty in the rest of the opinion in Part III. But first I want to scrutinize more closely the Court's analysis, and measure its use of de facto sovereignty against Supreme Court precedent and even some of the Founders' understandings of that concept. If de facto sovereignty does hold a key to figuring out when the Court will find habeas to extend to other situations of noncitizen detention abroad, it will be necessary to appreciate fully what it is and how it works before applying it to the facts in *Boumediene*, and beyond.

C. Wrinkles in the Concurrent Sovereignty Analysis

As outlined above, the Court's concurrent sovereignty analysis proceeds in three steps: *Step 1*, Cuba's sovereignty in the lease is de jure, and is thus a political question immune from judicial inquiry—but there exists another type of sovereignty based on practical control, which is open to judicial inquiry; *Step 2*, the United States has de facto sovereignty over Guantanamo; *Step 3*, de jure sovereignty is not the definitive marker for the scope of habeas, and consequently the scope of habeas is not a political question immune from judicial review.

A close look at the analysis reveals what looks like a skipped step between *Steps 1* and *2*; that is, the step from "practical sovereignty" to "*de facto* sovereignty." Are they the same? This becomes a fairly important question since the defining feature of practical sovereignty (at

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65 *See infra* Part III.B.

66 *Boumediene*, 128 S. Ct. at 2257 (citations omitted).

67 *Id.*

68 *Id.* at 2258.

least as it is defined by the Court), and what critically differentiates it from de jure sovereignty for purposes of the opinion's argument, is that practical sovereignty is properly the subject of judicial inquiry while de jure sovereignty, because it is a political question, is not. Thus, if de facto sovereignty is the same as practical sovereignty, it too should be subject to judicial inquiry.

Yet the Court did not inquire into the U.S. de facto sovereignty over Guantanamo. In fact, it did just the opposite. Rather than undertaking a judicial finding of fact that the United States has de facto sovereignty over Guantanamo, the Court chose to "take notice" of this fact, given the United States' "complete jurisdiction and control" over the territory.[69] The only support cited for attaching the "*de facto* sovereignty" label to the United States was the Court's 2004 opinion in *Rasul v. Bush*.[70] Now *Rasul*, which extended habeas to Guantanamo as a matter of statutory law,[71] certainly found the United States to have complete jurisdiction and control over the territory—indeed, this is uncontroversial since the lease itself says so.[72] But *Rasul* never said that this meant the United States has "*de facto* sovereignty," let alone even so much as mentioned that term. The Court in *Boumediene* thus glossed over a necessary step in its concurrent sovereignty analysis: namely, that "complete jurisdiction and control" confers de facto sovereignty as a matter of judicially noticeable fact. The jump becomes more pronounced since the D.C. Circuit had expressly rejected the detainees' de facto sovereignty claims below.[73]

None of this would matter much if the Court could determine the existence of de facto sovereignty on its own, just like it told us it can determine the existence of practical sovereignty. If that were the case, perhaps we could say that when the Court "took notice" of U.S. de facto sovereignty, it really just found, as it has the competence to do, that because the United States has complete jurisdiction and control over Guantanamo it is de facto sovereign over that territory. Practical sovereignty and de facto sovereignty would then be essentially synonymous, and the Court could inquire into the existence of both. There are at least two problems with bridging the analytical gap in this way: first, de facto sovereignty is a political question, and second, it in-

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69 *Id.* at 2253.

70 *Id.* (citing Rasul v. Bush, 542 U.S. 466, 480, 487 (2004)).

71 Rasul v. Bush, 542 U.S. 466, 484 (2004).

72 *Id.* at 480, 487; *see also* Lease Between United States and Cuba (Feb. 23, 1903), *supra* note 9, art. III.

73 Boumediene v. Bush, 476 F.3d 981, 992 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

cludes an additional element not part of the Court's definition of practical sovereignty: complete jurisdiction.

1. The Political Question Wrinkle

As the next Part illustrates through precedent, "[w]ho is sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments . . . conclusively binds the judges."[74] This presents a wrinkle for the *Boumediene* Court's concurrent sovereignty analysis since the Court would have no independent judicial competence to determine de facto sovereignty, and therefore could not have judicially defined it as complete jurisdiction and control—which again, the Court did not actually do. Rather, the Court explicitly chose to "take notice" of the "fact" of U.S. de facto sovereignty—which is precisely what courts do when faced with political questions of sovereignty: they take notice of political branch determinations.[75] Unfortunately, the Court failed to explain what political branch determination had labeled the United States "*de facto* sovereign" over Guantanamo. The lease certainly does not say so (indeed, the only "sovereignty" in that instrument belongs to Cuba). Hence the Court may have stepped around a de jure sovereignty political question problem, but in doing so it stepped right into a de facto sovereignty political question problem.

There might, however, be a way around this de facto sovereignty problem. If de facto sovereignty—as determined by the political branches—means complete jurisdiction and control, the Court may be able to take notice of this fact, based on the political branch agreement contained in the lease, that the United States "maintains complete jurisdiction and control" over Guantanamo.[76] In other words, while the Court cannot inquire *on its own* into the question of de facto sovereignty, maybe it can inquire into what the political branches have said about the United States' relationship to a territory in order to conclude that de facto sovereignty exists. The leading Supreme Court case on the political question doctrine seems to make room for this kind of judicial maneuver. *Baker v. Carr* explained that in foreign relations, although certain questions are political in nature, if political branch proclamations "fall short of an explicit answer, a court may

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74 Jones v. United States, 137 U.S. 202, 212 (1890).

75 *See infra* Part II.B; *see also* Charles T. McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 312–13 (1952).

76 *See* Lease Between United States and Cuba (Feb. 23, 1903), *supra* note 9, art. III.

construe them seeking . . . to determine" the answer; and that such "judicial action in the absence of a recognizably authoritative [political] declaration occurs" in various areas of foreign relations.[77] The next Part shows that precedent can be read fairly consistently with this use of de facto sovereignty in *Boumediene*. That is, the political branches do in fact seem to view complete jurisdiction and control as constitutive of de facto sovereignty, and the Court has looked to such views in order to take notice of de facto sovereignty in the past.

2. The Definitional Wrinkle

This brings us to the next wrinkle in the Court's concurrent sovereignty analysis. If complete jurisdiction and control over a territory can enable the Court to take notice of U.S. de facto sovereignty, then de facto sovereignty does not match up with the Court's notion of "practical sovereignty," which the opinion defined exclusively as control. As the next Part also shows, when the Court has looked to political branch determinations in the past to take notice of de facto sovereignty, it has relied upon jurisdiction—not just control. The jurisdiction component takes the form of administration of the de facto sovereign's laws and legal system within the territory; that is, a de facto sovereign has what is called *territorial* jurisdiction.[78] Thus the "*de facto* sovereignty" test, which relies upon political branch determinations establishing complete jurisdiction and control, presents a different and somewhat higher threshold than the Court's "practical sovereignty" test, which relies solely on control.

In fact, this definitional difference appears right on the face of the Court's concurrent sovereignty analysis. In defining "practical sovereignty," the Court used the phrases "plenary control" and "objective degree of control,"[79] never mentioning the term jurisdiction. In addition, the only U.S. case cited by the Court in support of this practical sovereignty notion was *Fleming v. Page*,[80] in which Chief Justice Taney

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77 Baker v. Carr, 369 U.S. 186, 212–13 (1962).

78 As the name suggests, a country with territorial jurisdiction has legislative and judicial jurisdiction over a territory. Other countries occasionally may extend their laws into that territory. For example, countries sometimes extend their domestic laws to their own citizens located in other countries, or hale individuals abroad into domestic courts. But those exercises of jurisdiction would be *extra*-territorial over certain persons, as opposed to the de facto sovereign's exercise of territorial jurisdiction over a specific geographic location. *See* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 126–30 (2007).

79 Boumediene v. Bush, 128 S. Ct. 2229, 2252, 2258 (2008).

80 *Id.* at 2252 (citing Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850)).

noted that a Mexican port conquered by the United States during the war with Mexico was at the same time "subject to the sovereignty and dominion of the United States" but not formally "part of the United States."[81] This lone "practical sovereignty" precedent (to the extent it stands for such a notion and was not just an instance of loose language by the Court) must have relied exclusively on practical control, and not jurisdiction, to figure its conception of sovereignty, since the opinion also states that the United States did not "give to [the port] any form of civil government, nor [ ] extend to it our laws."[82]

By sharp contrast and as the Guantanamo lease itself shows, in defining "*de facto* sovereignty" the political branches include not only "complete control" but also "complete *jurisdiction*," such that the de facto sovereign's law and legal system govern the territory. The next Part demonstrates this through both the Founders' conceptions and uses of de facto sovereignty in relation to our own Revolutionary War, as well as a line of Supreme Court cases stretching back almost to the time of the Founding addressed specifically to issues of de facto sovereignty. Interestingly, the Court in *Boumediene* did not cite any of these de facto sovereignty cases in its "practical sovereignty" discussion, indicating that the Court did not consider practical sovereignty to be synonymous with de facto sovereignty.

In short, practical sovereignty and de facto sovereignty are different in both character and definition: "practical sovereignty" is fully subject to judicial inquiry and means only practical control; while "*de facto* sovereignty" is a political question and means control *and* jurisdiction. The foregoing analysis may seem technical, but there is both a clarifying and a predictive payoff. Part III uses it to clarify the Court's reading of common law history and its own precedent to reveal that jurisdiction, and not just control, played an important and sometimes critical role in casting Guantanamo as a location where habeas constitutionally runs in favor of noncitizens. Part IV uses it to predict whether the Court will find habeas constitutionally to extend to other places where noncitizens are being detained abroad. But first, Part II shows that de facto sovereignty is a political question and that it means both control *and* jurisdiction.

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81 Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850).

82 *Id.* at 618.

II. De Facto Sovereignty: Founding Conceptions and Precedent

A review of Supreme Court jurisprudence relating to de facto sovereignty reveals a couple of characteristics relevant to how the concept was used in *Boumediene*. First, de facto sovereignty, like de jure sovereignty, is a political question of which the courts take notice. Second, in taking notice of de facto sovereignty, courts look to political branch action establishing not only practical control but also jurisdiction over a territory, such that the de facto sovereign's laws and legal system govern the territory. As we shall see in Parts IV and V, this latter characteristic plays an important role in distinguishing Guantanamo from other sites of extraterritorial detention under the Court's functional approach.

Before diving into the cases, some background will be useful to understanding why de facto sovereignty traditionally has been a political question and has meant not just control but also jurisdiction. The background reveals that issues of de facto sovereignty traditionally involved recognition of foreign sovereigns. For this, we can go back to the American Revolution and the founding of the nation.

A. Founding Conceptions

The concept of de facto sovereignty has a particular meaning in international law and relations—a meaning that historically has been taken seriously by the United States and that bears a relationship to the concept of de jure sovereignty. De facto sovereignty is a recognized condition of government, often a government in transition, which carries with it certain rights and responsibilities.[83] It is, moreover, often a stop on the way to de jure sovereignty.[84] This not only appears in the cases discussed below, especially in relation to Caribbean and Latin American colonial revolutions in the nineteenth century, but it also was how the Founders seem to have understood the concept in relation to our own colonial revolution against England.

John Adams, writing in 1780 to a Dutch supporter of U.S. independence, explained that although the King of Great Britain would look upon Americans as "his subjects in rebellion, . . . they were at the time as completely in possession of an independence and a sovereignty de facto as England and Holland were."[85] Similarly, in a 1782 letter regarding Vermont's split from New Hampshire, Continental

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83 *See* United States v. The Three Friends, 166 U.S. 1, 63 (1897); *infra* notes 87–97 and accompanying text.

84 *See infra* notes 93–97 and accompanying text.

85 Letter from John Adams to Joan van der Capellen (Nov. 22, 1780), *in* 4 THE REVOLU-

Congress President Elias Boudinot asked William Livingston whether Congress "ought to determine, any part of a former Colony (who have separated from the same, at the beginning of the revolution, and are in the actual Exercise of an independent Sovereignty de facto) to be independent de Jure and receive them into the union as a Fourteenth State?"[86] Both Adams and Boudinot used de facto sovereignty to describe a government in transition, with actual and independent power inside its territory, but missing formal outside recognition as a de jure sovereign.

Early Supreme Court cases involving the status of the United States during the Revolutionary War support this view as well. In what was probably the first de facto sovereignty case (though it does not expressly use the term), the Court in *McIlvaine v. Coxe's Lessee*,[87] observed that "the several states which composed this union, so far at least as regarded their municipal regulations became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king."[88] Because of this principle, the Court continued, "[t]he treaty of peace [with England] contains a *recognition* of their independence, not a grant of it."[89] The Court concluded that because the several states were sovereign in fact from the time of the Declaration of Independence, New Jersey's laws applied from that time to Coxe even though England did not formally recognize U.S. de jure sovereignty until the peace treaty ending the war.[90] In this vein, early American international lawyer and statesman, Henry Wheaton, in his influential *Elements of International Law* (which the Supreme Court would later cite in the first case to state explicitly that de facto sovereignty is a political question),[91] used *McIlvaine* as an example of what he termed "internal sovereignty" based on "[t]he existence of the State de facto," explaining "the internal sovereignty of the United States of America was complete from the time

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TIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 157, 157 (Francis Wharton ed., 1889).

86 Letter from Elias Boudinot to William Livingston (Oct. 23, 1782), *in* 19 LETTERS OF DELEGATES TO CONGRESS 1782–1783, at 296–97 (Paul H. Smith ed., 1992).

87 McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808).

88 *Id.* at 212.

89 *Id.* (emphasis added).

90 *Id.* at 212–15.

91 *See* Jones v. United States, 137 U.S. 202, 212 (1890).

they declared themselves 'free, sovereign, and independent States,' on the 4th of July, 1776."[92]

The cases below bear out the arguments in more detail, but these early sources supply context for why de facto sovereignty traditionally has been considered a political question, and why it means not just control but also jurisdiction. De facto sovereignty is a political question because, like sovereignty determinations generally, de facto sovereignty determinations involve sensitive foreign affairs functions of the federal government; specifically, issues of sovereign recognition. De facto sovereignty included jurisdiction as well as control because it signified, to borrow Wheaton's helpful phrase, the "internal sovereignty" of a state.[93] In contrast to the state's "external sovereignty" in relation to other states, "internal sovereignty" referred to the exercise of sovereignty in relation to the state's own citizens, part of which was lawmaking and governing power within its territory.[94] Describing the de facto sovereign, Wheaton explained that "in its highest degree [it] assumes a character very closely resembling that of a lawful government."[95] It is where "the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country."[96] Indeed, because de facto sovereigns exercise such jurisdiction, the Supreme Court in *McIlvaine* concluded that, even before formal recognition of U.S. sovereignty by England, "the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted."[97]

B. De Facto Sovereignty Is a Political Question

This Section demonstrates that the Court traditionally has treated de facto sovereignty as a political question. Drawing on early deci-

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92 1 A. Berriedale Keith, Wheaton's Elements of International Law 43 (Sixth English ed. 1929) (revising throughout, considerably enlarging, and rewriting Wheaton's *Elements of International Law*).

93 *See id.*

94 *See id.* at 42–43.

95 *Id.* at 44.

96 *Id.* Even de facto sovereigns of lesser degrees exercise jurisdiction within a territory. Wheaton identifies a lower "species" of de facto sovereign "maintained by active military power," which "must necessarily be obeyed in civil matters by private citizens who . . . do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government." *Id*. The de facto sovereign, and not the law of the "rightful government," therefore rules within the territory.

97 McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808).

sions by Chief Justice Marshall and Justice Story, it briefly discusses why sovereignty determinations generally have been considered political questions by the Court and then turns to an in-depth examination of de facto sovereignty cases in specific throughout Supreme Court history.

1. Early Sovereignty Cases

The doctrine that sovereignty determinations are political questions appeared early in Supreme Court history. As Justice Story and Chief Justice Marshall explained "[n]o doctrine is better established,"[98] and when it comes to sovereignty questions, "the court will only observe, that such questions are generally rather political than legal in their character."[99]

A major reason such determinations traditionally were deemed political was that the federal government, acting mainly through the President, needed exclusive and unified power to recognize or not to recognize new nations. Citing early sovereignty cases, the Court in *Baker* noted that "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing,' and [therefore] the judiciary ordinarily follows the executive as to which nation has sovereignty over [a] disputed territory."[100] Recognition of foreign sovereigns was, to be sure, an extremely sensitive and important function for the fledgling republic in its relations with far more powerful imperial European nations in a world that was often freckled with colonial revolts in the Caribbean and Central and South America. One diplomatic wrong move could embroil the young nation in conflict with a military giant like Spain or France. And in fact, just this type of diplomatic minefield arose with some frequency in the courts, particularly in cases of forfeiture and piracy.

To take one example, early forfeiture statutes authorized domestic revenue officers to seize any ship in breach of U.S. law.[101] A 1794 statute prohibited, and thus provided for the forfeiture of, any ship

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98 Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 324 (1818) (Story, J.).

99 United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818) (Marshall, C.J.); *see also* The Divina Pastora, 17 U.S. (4 Wheat.) 52, 64 (1819) (discussing jurisdiction to decide a ship capture case).

100 Baker v. Carr, 369 U.S. 186, 212 (1962) (citing United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149 (1820) and *Palmer*, 16 U.S. (3 Wheat.) at 634–35).

101 *Gelston*, 16 U.S. (3 Wheat.) at 323.

> fitted out and armed, or attempted or procured to be fitted out and armed, with the intent to be employed "in the service of *any foreign prince or state*, to cruise or commit hostilities upon the subjects, citizens or property of *another foreign prince or state* with whom the United States are at peace."[102]

In other words, the statute forbade U.S. ships from cruising against foreign sovereigns with which the United States was at peace. The purpose of the law was to maintain U.S. neutrality, and it was at the time a much-celebrated piece of legislation (it had been recommended to Congress by President Washington, drafted by Hamilton, and "passed the Senate by the casting vote of Vice President Adams").[103]

The neutrality act, however, applied only to new states acknowledged as such by the U.S. government or "by the government of the country to which such new state belonged."[104] Thus, in *Gelston v. Hoyt*, where a forfeited ship was alleged to have been employed in the service of the government of one part of the French-controlled island of St. Domingo (Haiti) against the government of the other part of the island, Justice Story held the forfeiture improper because "[n]either of these governments was recognised by the government of the United States, or of France, 'as a foreign prince or state.'"[105] Justice Story explained that "it belongs exclusively to governments to recognise new states in the revolutions which may occur in the world; and until such recognition . . . courts of justice are bound to consider the ancient state of things as remaining unaltered."[106]

If the United States recognized portions of a French colonial holding as "new states," such recognition could prove quite offensive to France. The only branches capable of making that call were the political branches of government, not the courts.[107] Further, if courts could make these determinations, situations might arise in which the courts differed from the political branches, or even from each other, defying the common mantra that when the United States speaks in the field of foreign relations, it must speak with "one voice."[108] Other-

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102 *Id*. (emphasis in original).

103 *See* United States v. The Three Friends, 166 U.S. 1, 52–53 (1890) (discussing the history of the Neutrality Act of 1794).

104 *Gelston*, 16 U.S. (3 Wheat.) at 247.

105 *Id.* at 324.

106 *Id.*

107 The statute was later amended to include "any colony, district or people" such that the law would prohibit aiding colonial revolts against powers with which the United States was at peace. *See The Three Friends*, 166 U.S. at 53.

108 *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–14 (2003); Baker v. Carr, 369 U.S.

wise, the government, and indeed the nation as a whole, would be impaired in its sovereign ability to interact with other sovereigns equally on the world stage.[109]

Sovereignty issues likewise came quickly to the fore in piracy cases. The reason was that revolting colonies and newly self-declared states commonly engaged in warfare by outfitting their own "privateers" with what were called letters of marque and reprisal, or licenses to private ships to attack and plunder enemy vessels on behalf of the state.[110] As Eugene Kontorovich has shown, often the only difference between privateers, licensed warriors under international law, and pirates, the criminal scourge of the seas whom all states could—and indeed, had an obligation to—prosecute, was the letter of marque and reprisal carried by a ship authorizing it to act on behalf of a sovereign nation.[111] Of course, whether a letter of marque and reprisal placed a crew into the "privateer," as opposed to the "pirate," column depended entirely upon whether the entity issuing the letter was recognized as an authentic foreign sovereign.[112] Hence the courts were treading in potentially dangerous diplomatic waters every time they confronted a question whether a vessel's crew was acting legitimately on behalf of a foreign sovereign or was, as the pirate famously has been called, "*hostis humani generis*, an enemy of all mankind."[113] Nor could the courts dodge the question: international law—which was taken very seriously at the time in order not to offend more powerful foreign nations[114]—forced the courts to choose, because if the vessel was a pirate vessel the United States had an international obligation to prosecute (and if found guilty, execute) its crew.[115]

Accordingly, as Chief Justice Marshall wrote in an early piracy case, questions concerning the rights of persons "brought before the tribunals of this country" from a ship cruising on behalf of "a part of a foreign empire, which asserts, and is contending for its indepen-

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186, 211 (1962) (explaining foreign relations questions "uniquely demand [a] single-voiced statement of the Government's views").

109 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320–22 (1936).

110 Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 210 n.148, 211 n.152 (2004).

111 *Id.* at 210, 214 nn.171–72.

112 *See id.* at 211 n.150, 212 n.158 (providing examples of when a sovereign's legitimacy determined whether a ship belonged to pirates or privateers).

113 Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

114 *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations*," 42 WM. & MARY L. REV. 447, 465 (2000).

115 *See* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 142–44 (2004).

dence," are "delicate and difficult."[116] As a result, determining whether such a ship was acting on behalf of a foreign sovereign

> belong[s] more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.[117]

In sum, sovereignty determinations were considered political questions in early Supreme Court history. These questions involved sensitive foreign relations issues of sovereign recognition reserved exclusively to the political branches.[118]

2. De Facto Sovereignty Cases

The same reasons Justice Story and Chief Justice Marshall articulated for considering sovereignty questions generally to be political rather than judicial in nature apply to de facto sovereignty questions as well. As noted, de facto sovereignty was often a stop on the road to formal, or de jure, sovereignty in cases of colonial revolt or military conquest.[119] And thus, like recognition of de jure sovereignty, recognition of de facto sovereignty carries with it strong foreign relations implications. For instance, recognition of a revolutionary de facto sovereign in a state of "belligerency" against a colonial power could create certain rights and obligations for both the belligerents and the United States.[120] The Court's precedent in this area demonstrates that it traditionally has considered itself bound to take notice of political branch determinations establishing de facto sovereignty. Moreover,

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116 United States v. Palmer, 16 U.S. 610, 634 (1818).

117 *Id.*

118 *See, e.g.*, United States v. Lynde, 78 U.S. (11 Wall.) 632, 638–39 (1870) (quoting Foster & Elam v. Neilson, 26 U.S. (2 Pet.) 253, 309 (1829)). The Court stated:

> If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession . . . it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the legislature.

Id.

119 *See infra* notes 137–65 and accompanying text.

120 United States v. The Three Friends, 166 U.S. 1, 63 (1897).

the Court followed this rule in cases involving questions of U.S. sovereignty over foreign territory—and in one case, territory in Cuba.[121]

The first opinion specifically to state that de facto sovereignty is a political question was *Jones v. United States*, in 1890.[122] Jones had been convicted of axing to death a superior on Navassa Island in the Caribbean.[123] The island was home to guano deposits which U.S. citizens were extracting pursuant to the Guano Islands Act of 1856.[124] The Act gave the Executive discretion to deem the islands "as appertaining to the United States."[125] The Act provided further that "all acts done, and offenses or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, 'shall be . . . punished according to the laws of the United States.'"[126]

A question arose whether the Executive had deemed Navassa Island as "appertaining to the United States" and thus subject to U.S. law and the jurisdiction of U.S. courts, especially since Haiti also claimed sovereignty over the island.[127] The Court needed to hold that the Executive had done so in order to apply U.S. law to Jones and subject him to jurisdiction by U.S. courts since at the time, criminal law was strictly territorial in nature.[128] Jones argued that because the Guano Islands Act provided for only temporary possession until the guano had been removed ("nothing in this act contained shall be construed obligatory on the United States to retain possession of the islands . . . after the guano shall have been removed from the same"[129]), Congress did not have authority "to exercise jurisdiction" over the islands.[130] To resolve the question, the Court announced in strong language the general rule that:

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121 *See supra* notes 158–67.

122 Jones v. United States, 137 U.S. 202 (1890).

123 *Id.* at 203–04.

124 *Id.*

125 An Act to authorize Protection to be given to Citizens of the United States who may discover Deposits of Guano, 11 Stat. 119 (1856) [hereinafter Guano Islands Act of 1856] (codified with some differences in language at 48 U.S.C. §§ 1411–1419 (2000)).

126 *Jones*, 137 U.S. at 211.

127 *See id.* at 216, 219–20.

128 *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

129 Guano Islands Act of 1856, 48 U.S.C. § 1419 (2000).

130 Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, *in* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 187, 198–99 (Mary L. Dudziak & Leti Volpp eds., 2006) (quoting Brief for Plaintiffs-in-Error, *Jones*, 137 U.S. 209 (Nos. 1142–44)).

"Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."[131] This rule, the Court confirmed, was longstanding in both the United States and England.[132]

Moreover, what the political branches said on the sovereignty question was a matter of judicial notice. The Court observed that "[a]ll courts of justice are bound to take judicial notice of" their own government's "recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive."[133] Thus if the President, in his "strictly executive power, affecting foreign relations"[134] considered the island as appertaining to the United States and not Haiti, "the fact must be taken and acted on by this court as thus asserted and maintained."[135] Indeed, the Court stated, "it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that . . . he has decided the question."[136]

The Court then examined Executive documents and communications to find the President had determined that Haiti did not have sovereignty over the island "and that it should be considered as appertaining to the United States."[137] *Jones* therefore stands for the rule that sovereignty determinations, whether "de jure or de facto," are exclusively political and that the courts take notice of those determinations as made by the political branches.

Next, in the complicated but significant case of *United States v. The Three Friends*,[138] the Court considered an amended version of the 1794 neutrality act at issue in *Gelston v. Hoyt*.[139] The act had been revised to include within its prohibition outfitting of vessels not only

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131 *Jones*, 137 U.S. at 212.

132 *Id.* ("This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. It is equally well settled in England." (citation omitted)).

133 *Id.* at 214.

134 *Id.* at 217.

135 *Id.* at 221.

136 *Id.*

137 *Id.* at 223. Christina Duffy Burnett carefully explains that whether the United States had any form of "sovereignty" over the island is left unresolved by the opinion. She points out, however, that the Court at least "suggested that the United States had extended 'sovereignty' over Navassa (when it deferred to the political branches' determination of 'who is the sovereign, de jure or de facto, of a territory')." Burnett, *supra* note 130, at 201.

138 United States v. The Three Friends, 166 U.S. 1 (1897).

139 *Id.* at 56; *see also* Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 323 (1818).

"in the service of any foreign prince or state," but also "in the service of . . . any colony, district *or people*" for the purpose of committing hostile acts against "any foreign prince or state, or of any colony, district *or people*" with which the United States was at peace.[140]

The facts involved a ship, the "Three Friends," outfitted in the service of Cuban revolutionaries rebelling against Spanish colonial control.[141] The Court had to determine whether the revolutionaries fell within the meaning of the amended neutrality act; in particular, whether the added language "in the service of . . . any . . . people" took the new version's proscription beyond foreign sovereigns to include groups like the Cuban revolutionaries. This was tricky because of the parallel language in the revised version of the act prohibiting not just outfitting of vessels "in the service of any . . . people" but also "commit[ing] hostilities against . . . any . . . people."[142] The second "people" (against whom hostilities were directed), the Court acknowledged, contemplated the people of a foreign sovereign with whom the United States was at peace.[143] And if that were so, the argument the Court needed to confront was that the "people" referred to in the first part of the act (in whose service the ship was outfitted) should have the same sovereign status as the "people" in the second part of the act because of the identical phrase used.[144] The problem with this reading was that the revolutionaries—or "people" in whose service the ship was outfitted—then would have attained some type of sovereign status by virtue of their inclusion as "people" within the act's coverage. But this the Court could not confer.[145] Instead, to bring the revolutionary forces within the meaning of the neutrality act, but not give them sovereign status, the Court gave the term "people" a different meaning in the first part of the act than in the second.[146]

The sovereign status the Court rejected for the Cuban revolutionaries was not de jure sovereignty but another form of sovereign recognition resulting from a determination of "belligerency."[147] The Court announced that "it belongs to the political department to determine when belligerency shall be recognized,"[148] because by so doing, the

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140 *The Three Friends*, 166 U.S. at 53–54 (emphasis added).

141 *Id.* at 3.

142 *See id.* at 53.

143 *Id.* at 63.

144 *Id.*

145 *Id.*

146 *See id.* at 62–63.

147 *Id.* at 63.

148 *Id.*

government recognized a state of war between two foreign powers and, under international law, consequently recognized certain rights and obligations in respect of the foreign powers, such as "obligations to a friendly power," as well as the belligerent "rights of blockade, visitation, search, and seizure . . . and [the] abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare."[149]

The Court explained that the political branches had not recognized belligerency because "here the political department has not recognized the existence of a de facto belligerent power engaged in hostility with Spain."[150] By de facto belligerent power, the Court meant a de facto sovereign.[151] President Cleveland's message to Congress regarding the Cuban revolutionaries stated: "The machinery for exercising the legitimate rights and powers of sovereignty and responding to the obligations which de facto sovereignty entails . . . is conspicuously lacking."[152] What exactly the "rights and obligations de facto sovereignty entails" is the question to which we squarely will turn in the next Section. What is important here is that a designation of de facto sovereignty was a political determination involving sovereign recognition made by the President to which the Court deferred.

Early twentieth-century cases offer more straightforward holdings that de facto sovereignty is a political determination of which the courts take judicial notice. For example, on the doctrine that the courts of one sovereign will not sit in judgment on the validity of acts of another sovereign in its own territory, the Supreme Court denied a U.S. citizen's right to recover lead bullion seized in Mexico by Mexican revolutionary forces that the U.S. government had considered "first as the de facto, and later as the de jure Government of Mexico."[153] The Court explained that this determination by "the political department of our Government . . . binds the judges as well as other officers and citizens of the Government"[154] and that "[i]t is settled that the courts will take judicial notice of such recognition . . . by the politi-

149 *Id.*

150 *Id.* at 64.

151 *Id.* at 57 (noting that unlike the case before it, in *Gelston* "the question [of] whether the recognition of the belligerency of a de facto sovereignty would bring it within [the neutrality act], did not arise").

152 *Id.* at 70.

153 Ricaud v. Am. Metal Co., 246 U.S. 304, 307 (1918).

154 *Id.* at 308–09.

cal department of our Government."[155] Other cases have repeated the rule in similarly strong language.[156]

Perhaps most relevant is *Pearcy v. Stranahan*,[157] which addressed whether the Isle of Pines, a former Spanish holding in Cuba, was a "foreign country" or U.S. territory under the Dingley Tariff Act after the Spanish-American War.[158] The Court explained that it "takes judicial cognizance [of] whether or not a given territory is within the boundaries of the United States,"[159] and quoted extensively *Jones*'s language that sovereignty determinations, whether "de jure or de facto," are political not judicial questions, the resolution of which by the political branches binds the courts.[160]

By the terms of the peace treaty with the United States following the war, Spain "relinquish[ed] all claim of sovereignty to Cuba," placing it under "occup[ation] by the United States" with the United States to "assume and discharge the obligations . . . under international law result[ing] from . . . its occupation."[161] Further, the United States in fact had occupied the Isle of Pines.[162] The Court nonetheless held the Isle of Pines was not U.S. territory. The reason: "The legislative and executive branches of the Government, by [ ] joint resolution . . . expressly disclaimed any purpose to exercise sovereignty . . . over Cuba 'except for the pacification thereof,'" and instead indicated a desire to turn the territory over to local self-government.[163] Based on executive statements that the Isle of Pines subsequently "was transferred as a de facto government to the Cuban Republic,"[164] the Court

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155 *Id.* at 309.

156 *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)). The Court stated:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. . . . It has been specifically decided that 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. . . .'

Id.

157 Pearcy v. Stranahan, 205 U.S. 257 (1907).

158 *Id.* at 262.

159 *Id.* at 263.

160 *Id.* at 265.

161 *Id.* at 263.

162 *See id.* at 263–65.

163 *Id.* at 264.

164 *Id.* at 269.

concluded that "the Cuban government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a de facto government until otherwise provided."[165] Consequently, "[i]t must be treated as foreign, for this Government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic."[166] Thus, the Court took notice of Cuba's de facto sovereignty over the Isle of Pines because the political branches had determined Cuba to be de facto sovereign. And, the Court applied this political question doctrine to issues of de facto sovereignty involving U.S. sovereignty—and over Cuban territory to boot.[167]

What is important in these cases is that the Court did not independently inquire into the facts in order to make judicial findings of sovereignty. Rather, the Court announced, usually in strong language, that such fact finding was not within its competence, and that instead, sovereignty questions were political determinations of which the Court was bound to take notice. In turn, what the political branches determined about sovereignty, whether "de jure or de facto" and whether involving foreign states or the United States, the Court felt bound to accept as judicially noticed fact.

C. Defining De Facto Sovereignty: Jurisdiction Too

The next de facto sovereignty characteristic relevant to *Boumediene* that emerges from the cases is that de facto sovereignty comprises both complete practical control and complete jurisdiction over a territory such that the de facto sovereign's laws and legal system govern the territory. This characteristic necessarily emerges not from the Court's own assessment of what de facto sovereignty entails—an assessment we know courts cannot make—but rather from political determinations of when de facto sovereignty exists.

As mentioned, the Founding generation conceived of de facto sovereignty not just as practical control but also as the administration of independent government.[168] This view informed the Court's decision in *McIlvaine*, which held that the laws of the several states ap-

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165 *Id.* at 272.

166 *Id.*

167 *See* United States v. Spelar, 338 U.S. 217, 218–19 (1949) (observing that a U.S. air base in Newfoundland, leased for ninety-nine years from Great Britain, was not a "foreign country" within the meaning of the Federal Tort Claims Act because "[t]he arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States"); *see also infra* notes 183–88 and accompanying text.

168 *See supra* notes 83–90 and accompanying text.

plied in full force as "the laws of sovereign states" even before U.S. de jure sovereignty was recognized externally by England after the American Revolution.[169] The inscrutable *Jones* case seems to comport with this view as well. Although it is not clear that the Court actually held the United States to be de facto sovereign over Navassa Island,[170] the sovereignty issue clearly was intertwined with both the exercise of Congress's legislative jurisdiction over the territory and whether Jones was subject to prosecution in U.S. courts. Further, in response to Haiti's claims of sovereignty, the Court took notice "that, upon the Haytian [sic] government renewing its claim to the Island of Navassa, the [political branches of the] United States utterly and finally denied the validity of the claim, and reasserted and maintained their *exclusive jurisdiction* of that island."[171]

Conversely, lack of such jurisdictional capacities appeared an important factor in the Executive's *rejection* of de facto sovereign status for the Cuban revolutionaries in *The Three Friends*. Recall the Court in that case considered itself bound by the fact that "the political department [had] not recognized the existence of a de facto belligerent power engaged in hostility with Spain."[172] Justice Harlan's dissent (which did not disagree with the majority on this point, but only with the majority's construction of the term "people" in the neutrality act),[173] quoted President Cleveland's message to Congress concerning "the so-called Cuban government."[174] The President stated that the revolutionary forces could not be considered de facto sovereign of Cuba because "[t]here nowhere appears the nucleus of statehood. The machinery for exercising the legitimate rights and powers of sovereignty and responding to the obligations which de facto sovereignty entails . . . is conspicuously lacking."[175] Among those rights and obligations were "possessing and exercising the functions of administration and [being] capable, if left to itself, of maintaining orderly government in its own territory."[176] De facto sovereignty in the Executive's view therefore was not just raw power over a territory, but also

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169 McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808).

170 *See* Burnett, *supra* note 130, at 201.

171 Jones v. United States, 137 U.S. 202, 224 (1890) (emphasis added).

172 United States v. The Three Friends, 166 U.S. 1, 63–64 (1897).

173 *Id.* at 69 (Harlan, J., dissenting) ("I am unable to concur in the views expressed by the court in the opinion just delivered. In my judgment a very strained construction has been put on the statute under which this case arises . . . .").

174 *Id.* at 69–70.

175 *Id.* at 70.

176 *Id.*

administering and enforcing law and order—or exercising jurisdiction—within that territory.

This comports with *Pearcy v. Stranahan*'s conclusion that the political branches considered Cuba de facto sovereign over the Isle of Pines, since by joint resolution they "expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba" except to pacify it, and instead were determined "to leave the government and control of Cuba to its own people."[177] The Court quoted an Executive order aimed at assisting "the people of Cuba" to establish "an effective system of self-government,"[178] as well as Reports from the Senate Foreign Relations Committee that local elections had taken place, a constitutional convention was held, and a President and Vice President had been elected.[179] Moreover, after "[t]he government was transferred to Cuba," the President explicitly recognized Cuba's "de facto government" over the isle.[180] As we will see in the next Part, *Pearcy* offers a snug analogy to the United States' relationship with Landsberg Prison in occupied post-World War II Germany, where the habeas petitioners were being held in *Eisentrager*.[181] In both cases, the United States as occupying power encouraged the local legislation and administration of law and disclaimed any intent to exercise sovereignty over the territory except for the limited purpose of pacification.

Jurisdiction similarly played a critical role in *United States v. Spelar*,[182] where the Court found a U.S. air base in Newfoundland, leased for ninety-nine years from Great Britain, was a "foreign country" within the meaning of the Federal Tort Claims Act.[183] Because sovereignty is a political question, and the term "foreign country" "denote[s] territory subject to the sovereignty of another nation,"[184] the Secretary of State's view that the lease agreements "did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States"[185] led the Court to conclude that the base "remained subject to the sovereignty of Great Britain and lay within a 'foreign country.'"[186] The Court confirmed this view by look-

177 Pearcy v. Stranahan, 205 U.S. 257, 264 (1907).

178 *Id.* at 266.

179 *Id.* at 267–68.

180 *Id.* at 268–69.

181 *See infra* notes 182–87 and accompanying text.

182 United States v. Spelar, 338 U.S. 217 (1949).

183 *Id.* at 218–19.

184 *Id.* at 219.

185 *Id.*

186 *Id.*

ing to the legislative history of the Act, particularly to statements explaining the Attorney General's interpretation of the "foreign country" language to Congress. The Court stressed that the reason "foreign country" was chosen was "to identif[y] the coverage of the Act with the scope of United States sovereignty."[187] And what exactly sovereignty meant according to this legislative history was: a place governed by U.S. law. After quoting extensively a colloquy between the Assistant Attorney General and the House Judiciary Committee on this point, the Court explained that Congress "was unwilling to subject the United States to liabilities depending on the laws of a foreign power" and, because Newfoundland law governed the leased air base, "the present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that will."[188]

The cases demonstrate that de facto sovereignty traditionally has meant to the political branches not just complete control over a territory but also complete jurisdiction such that the de facto sovereign's laws and legal system govern the territory. Territorial jurisdiction was an important factor in both designating de facto sovereignty and rejecting it, both for foreign countries and for the United States. *Boumediene*'s statement regarding U.S. de facto sovereignty thus can be read consistently with the precedent in the sense that the Court took notice of a political branch agreement that the United States has complete jurisdiction and control over Guantanamo. As noted earlier, *Baker* leaves room for this type of judicial plug in order to answer political questions regarding foreign relations.[189] And, as we will see now, the jurisdiction aspect of de facto sovereignty also played an important role in *Boumediene*'s own discussion of common law history and precedent under the Court's functional approach.

III. Complete Jurisdiction in Boumediene

This Part demonstrates that the Court in *Boumediene* used jurisdiction in reading both common law history and its own precedent to determine the constitutional scope of habeas for noncitizens abroad. Absent the foregoing de facto sovereignty discussion, the Court's use of jurisdiction easily might be overlooked since the sovereignty notion the Court announced for habeas purposes—"practical sovereignty"—is defined exclusively in terms of control. Yet a close reading of

187 *Id.*

188 *Id.* at 221.

189 *See supra* note 77 and accompanying text.

Boumediene shows that the Court did not rely on control as much as it relied on jurisdiction, or which law and legal system applied in the territory, to make sense of common law history and prior precedent under its functional approach.

In addition, acknowledging the role jurisdiction plays in the opinion counters some objections to the Court's concurrent sovereignty analysis. In his dissent, Justice Scalia rejected the Court's entire approach as a misreading of common law history and precedent. But he also had a number of sharp objections to the majority's approach on its own terms. With respect to common law history, Justice Scalia noted that although habeas did not run to Scotland, the English Crown had practical control over that territory and therefore the Court's "control" test failed on its own terms to explain the historic scope of the writ. The objection becomes stronger still when one considers that habeas did run to Ireland and even Canada, leaving the Court in the uncomfortable position that the Crown did not have the requisite practical control over a geographically contiguous territory that was part of its sovereign kingdom (Scotland), but somehow did have the requisite practical control over both a different kingdom (Ireland) and a territory on the other side of the Atlantic Ocean (Canada). Focusing on jurisdiction instead of simply control counters this objection. It also counters Justice Scalia's observation that the Court in *Eisentrager* probably could not have explained why the United States did not have practical control over the Allied occupation zone where the German prisoners in that case were being held. As we shall see, in both of these situations the distinguishing work under a functional approach is performed not by control, but by jurisdiction.

A. Common Law History

In *Boumediene*, the government argued that according to common law history, habeas was only available for noncitizens in territories over which the Crown was sovereign. In making this argument, the government analogized the status of Guantanamo to the status of Scotland and Hanover, where the writ did not run at common law, but which were under the Crown's control. Indeed the Court itself described Scotland and Hanover as "territories that were not part of England but nonetheless *controlled* by the English monarch,"[190] and recounted further that "after the Act of Union in 1707, through which the kingdoms of England and Scotland were merged politically,

190 Boumediene v. Bush, 128 S. Ct. 2229, 2249–50 (2008) (emphasis added).

Queen Anne and her successors, in their new capacity as sovereign of Great Britain, ruled the entire island as one kingdom."[191]

These statements seem impossible to square with a functional idea of sovereignty defined exclusively by practical control. If practical control alone were really the test, then by the Court's very own statements England would have been practical sovereign over—and habeas should have run to—Scotland and Hanover. Yet habeas did not run to those territories, and hence Justice Scalia's objection. The objection becomes stronger still when one considers that, as again the Court itself noted, "British courts could issue the writ to Canada . . . [and] to Ireland," even though Canada is an ocean away, and "even though, at that point, Scotland and England had merged under the rule of a single sovereign, whereas the Crowns of Great Britain and Ireland remained separate (at least in theory)."[192]

How did the Court get around the fact that the writ ran to Ireland and Canada but not to Scotland, which was indisputably part of the Crown's kingdom and subject to the Crown's complete practical control? The answer is jurisdiction. The Court latched onto the fact that while Ireland and Canada followed English law, "Scotland [ ] continued to maintain its own laws and court system."[193] The Court explained:

> [T]here was at least one major difference between Scotland's and Ireland's relationship with England during this period that might explain why the writ ran to Ireland but not to Scotland. English law did not generally apply in Scotland (even after the Act of Union) but it did apply in Ireland. . . . This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.[194]

The Court then observed that, with respect to the detainees at Guantanamo, "[n]o Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station."[195]

Thus, practical control could not explain why the writ ran to Ireland and Canada but not to Scotland. Jurisdiction, on the other hand, could. While the majority did not, as the quote indicates, use jurisdic-

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191 *Id.* at 2250.

192 *Id.*

193 *Id.*

194 *Id.* at 2250–51.

195 *Id.* at 2251.

tion as a "formal" test for sovereignty, it tied its functional analysis to the fact that Scotland and Hanover had different laws and legal systems. The Court speculated that there might have been "prudential" reasons for not extending the writ to those places.[196] Because of their separate laws and legal systems, withholding the writ would avoid "conflict with the judgments of another court of competent jurisdiction."[197] Finally, just as English law applied in Ireland and Canada, United States law applies in Guantanamo. The critical factor for the Court's reading of common law history therefore was jurisdiction, not a control-based practical sovereignty notion which, if applied honestly to the common law history, cuts directly against the Court's holding.

B. Supreme Court Precedent: Eisentrager

Jurisdiction likewise played an important role in the Court's reading of its own precedent on the extraterritorial application of the Constitution. Again, the government's principal precedent-based argument against extending the writ to Guantanamo was *Eisentrager*'s language that the noncitizen petitioners in that case, like the detainees at Guantanamo, were not entitled to the writ because they were never in U.S. "sovereign" territory. In response to this argument, the Court determined that the "sovereignty" *Eisentrager* spoke of was not just de jure sovereignty but also practical sovereignty.[198] According to *Boumediene*, the *Eisentrager* "Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it."[199]

The Court in *Boumediene* conceded that, like the prisoners in *Eisentrager*, the detainees at Guantanamo "are technically outside the sovereign territory of the United States."[200] But because technical sovereignty wasn't the test, this fact alone was not decisive. Indeed, under a practical sovereignty test, *Eisentrager* could be read perfectly consistently with extending habeas rights to noncitizens at Guanta-

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196 *Id.* at 2250–51.

197 *Id.* at 2250.

198 *See id.* at 2252.

199 *Id.* at 2258. The Court seemed to backtrack a little in an alternative reading of *Eisentrager*, stating that

> even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg prison as the decisive factor in that case, its holding is not inconsistent with a functional approach because [*d*]*e jure* sovereignty is a factor that bears upon which constitutional guarantees apply [extraterritorially].

Id.

200 *Id.* at 2260.

namo. The key was to distinguish the control the United States asserted over Landsberg Prison from the control the United States asserts over Guantanamo, and to find that the control over Landsberg Prison fell short of practical sovereignty while the control over Guantanamo establishes practical sovereignty. This is just what the Court did.

The Court in *Boumediene* began by explaining that "there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008."[201] The critical differences, it turns out, were largely jurisdictional. The Court stated that, "[l]ike all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces."[202] As a result, "[t]he United States was . . . answerable to its Allies for all activities occurring there."[203] Lest it appear that the Court was merely using the term jurisdiction to describe what was really just practical control, the Court noted that because the "military tribunal set up by [U.S. forces] [was] acting as 'the agent of the Allied Powers,' [it] was not a 'tribunal of the United States.'"[204]

Also important to the Court was the jurisdictional structure contemplated by the occupation authorities in relation to the newly estab-

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201 *Id.*

202 *Id.*

203 *Id.*

204 *Id*. Also, the Agreement the Court cited between the United States, Great Britain, and France regarding occupational authority over the territory provided that the Allied High Commission, the "supreme Allied agency of control" was "composed of one High Commissioner of each occupying power" and "shall require unanimous agreement" for its decisionmaking. Agreement Respecting Basic Principles for the Merger of the Three Western German Zones of Occupation and Other Matters, Agreement to Tripartite Controls, U.S.-U.K.-Fr., arts. 1 & 4, Apr. 8, 1949, 63 Stat. 2817 [hereinafter Occupation Agreement]; *see also* Gherebi v. Bush, 352 F.3d 1278, 1287 n.10 (9th Cir. 2003). The Court in *Gherebi* stated:

> There was no lease or treaty conveying total and exclusive U.S. jurisdiction and control over Landsberg. In fact, after Landsberg was taken over by U.S. forces following World War II, three flags flew over the town: the American, British, and French flags. Although the *Johnson* petitioners were held pursuant to conviction by proceedings conducted under U.S. auspices, the Landsberg criminal facility was formally designated with the purpose of serving as a prison where executions of war criminals convicted during the *Allied* trials at Nuremberg, Dachau and Shanghi would be carried out, and the arrangement was dissolved a little more than a decade thereafter, in May 1958. That the named respondents in *Johnson*—the Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff—denied that petitioner's immediate custodian, the Commanding General of the European Command, "was subject to their direction," is telling of the less-than-exclusive nature of U.S. control over the prison.

Gherebi, 352 F.3d at 1287 n.10 (citations omitted).

lished German Federal Republic. The Allies did not plan a long term occupation, "nor did they intend to displace all German institutions during the period of occupation."[205] According to the Allied occupation agreement among the United States, Great Britain, and France quoted by the Court, "[d]uring the period in which it is necessary that the occupation continue," the Allied Powers "desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation."[206] Such self-government included, subject to Allied oversight, "full legislative, executive and judicial powers," such that "[t]he German Federal Government" had the power "to legislate and act" within the territory, and the Allies would continually reevaluate the occupation "with a view to extending the jurisdiction of the German authorities in the legislative, executive and judicial fields."[207] By contrast, the Court concluded, Guantanamo "is within the constant jurisdiction of the United States."[208]

The Court in *Boumediene* found the situation in occupied Germany analogous to the circumstances in the Insular Cases,[209] in which full constitutional protections did not extend to territories that the United States did not intend to govern indefinitely.[210] But, as Justice Scalia noted in dissent, any analogy to the Insular Cases is necessarily inexact because, unlike Guantanamo (or occupied Germany), those cases all involved territories over which the United States was formally sovereign.[211]

The better analogy, coincidentally, is to Cuba—right after the Spanish-American War—as illustrated by the facts of *Pearcy v. Stranahan*.[212] Recall *Pearcy* involved the question whether the Isle of Pines, a former Spanish holding in Cuba under U.S. occupation after the war, was U.S. territory.[213] The Court held it was not, principally because the political branches had, through a joint agreement, "expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba" except to pacify it, and instead were determined

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205 *Boumediene*, 128 S. Ct. at 2260.

206 *Id.* (citing Occupation Agreement, *supra* note 204).

207 Occupation Agreement, *supra* note 204, at 834–36.

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

209 The Insular Cases are several U.S. Supreme Court cases decided in the early 1900s.

210 *Boumediene*, 128 S. Ct. at 2260–61.

211 *Id.* at 2300–01 (Scalia, J., dissenting).

212 Pearcy v. Stranahan, 205 U.S. 257, 262–63 (1907).

213 *Id.*

"to leave the government and control of Cuba to its own people."[214] Similarly, the Allies, through a joint agreement, expressed their intent to establish the maximum amount of German self-government consistent with an occupation designed to pacify, not annex, the occupied German territory at issue in *Eisentrager*. And, like the Allied Agreement concerning the occupation of Germany, the U.S. Executive order issued in relation to occupied Cuba after the Spanish-American War aimed to assist "'the people of Cuba' to establish 'an effective system of self-government,'"[215] which Cuba achieved.[216] In both circumstances, the fact that there were local governments with legislative and judicial jurisdiction over the territory was important to determining the territory's status as not within U.S. sovereignty.

IV. And Beyond

What does all of this mean for future habeas cases involving the extraterritorial detention of noncitizens? The Court did not, and did not intend to, lock itself into a "*de facto* sovereignty" rule that remains, at least to some degree, a political question and that formally requires both control and jurisdiction. Rather the Court created and left in place the idea of a "practical sovereignty," subject to judicial inquiry and based solely on practical control, as a measuring stick for the constitutional reach of the writ.

Yet a close look at what the Court actually did, as opposed to what it said, reveals the Court did not in fact employ this practical sovereignty concept in *Boumediene* to determine as a matter of judicial inquiry U.S. sovereignty over Guantanamo for purposes of habeas. Instead, the Court took notice of a political agreement contained in the lease establishing de facto sovereignty that includes not only control but also jurisdiction as a benchmark.[217] Furthermore, the Court's analysis of common law history and its own precedent suggests that, under its functional approach, the jurisdiction component of the de facto sovereignty formula—and not simply the control component which alone would resolve a "practical sovereignty" inquiry—played an important and sometimes even critical role in casting Guantanamo as a location where habeas constitutionally runs.

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214 *Id.* at 264.

215 *Id*. at 266 (citation omitted).

216 *Id*. at 269.

217 Either that or the Court overruled without any citation or discussion whatsoever the line of cases stretching back into the nineteenth century providing emphatically that de facto sovereignty is a political question.

If this is right, then all we really know in the wake of *Boumediene* is that where the United States has de facto sovereignty over a territory, i.e., both complete control *and* complete jurisdiction such that U.S. law and the U.S. legal system govern the territory, the location will qualify as one where habeas extends in favor of noncitizens similarly situated to the Guantanamo detainees. So what other places (at least that we know of) currently housing such noncitizen detainees abroad meet these criteria? The answer is, outside of Guantanamo, probably none.

A. Exceptionally Complete Jurisdiction over Guantanamo

Unlike other U.S. military bases abroad, the United States has "complete jurisdiction" over Guantanamo. We know already that the lease says so.[218] In addition, a supplemental agreement confirms the United States' exclusive legislative and judicial jurisdiction over the territory by granting the United States the exclusive right to try citizens and noncitizens for criminal activity committed on the base.[219] The agreement provides that any "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within [Guantanamo,] taking refuge in Cuban territory, shall on demand be delivered up to duly authorized United States authorities."[220] And, in fact, the United States subjects individuals who commit crimes at Guantanamo to prosecution under U.S. law in U.S. courts.[221] The only law at Guantanamo is U.S. law; no Cuban law governs the territory.[222] Thus, "[u]nlike other United States bases abroad, Cuba does not exercise concurrent jurisdiction over the base."[223] For instance, "[b]ase personnel visitors do not go through Cuban customs or

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218 *See* Lease Between United States and Cuba (Feb. 23, 1903), *supra* note 9, art. III.

219 *See* Lease of Certain Areas for Naval or Coaling Stations, U.S.-Cuba, art. IV, July 2, 1903, T.S. No. 426 [hereinafter Lease Between United States and Cuba (Jul. 2, 1903)]; *see also* Gherebi v. Bush, 352 F.3d 1278, 1286 (9th Cir. 2003).

220 Lease Between United States and Cuba (Jul. 2, 1903), *supra* note 219, art. IV.

221 *Gherebi*, 352 F.3d at 1289; *see, e.g.*, United States v. Lee, 906 F.2d 117, 117 n.1 (4th Cir. 1990) (per curiam) (Jamaican national charged and tried in U.S. courts for sexual abuse that allegedly occurred on Guantanamo); United States v. Rogers, 388 F. Supp. 298, 299 (E.D. Va. 1975) (U.S. civilian employee working at Guantanamo prosecuted for drug offenses under 21 U.S.C. §§ 841, 846); *see also* Haitian Ctrs. Council Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council Inc., 509 U.S. 918 (1993).

222 *See* Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1236 (2007); Baher Azmy, *Constitutional Implications of the War on Terror:* Rasul v. Bush *and the Intra-territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 386 (2007).

223 Alexander, *supra* note 222, at 1236.

immigration, and nationals of other foreign countries do not have to receive permission from Cuba to visit the base."[224]

In this sense Guantanamo is quite exceptional. It is a striking exception, for example, to the "long recognized" rule reiterated in *Munaf v. Geren*[225]—a case decided the same day as *Boumediene*—that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders."[226] In *Munaf*, the Court used this rule to deny two U.S. citizens alleged to have committed crimes in Iraq their habeas requests not to be transferred from Multinational Force custody into Iraqi custody.[227] The Court explained that such requests, if granted, "would interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders."[228] If Cuba is truly sovereign over Guantanamo, it too should have the same right under this general rule to punish offenses against its laws committed within its borders. Yet Cuba clearly has no such right.[229]

B. Status of Forces Agreements: Incomplete Jurisdiction

Where the United States has a military presence abroad—for example, at a base within another country's territory—the United States typically uses SOFAs to contract around the general rule that the territorial government has exclusive jurisdiction. These agreements can be either bilateral or multilateral agreements, and can either stand alone or be part of larger international instruments.[230] They regulate how a foreign country's laws and legal system will be applied to U.S. personnel operating in the country.[231] Notably, "the only U.S. military bases that do not employ such agreements are the base at Guantanamo Bay and those bases in Iraq which remain from the U.S. occupation."[232] The United States is presently in the process of considering a SOFA with the Iraqi government.[233] At Guantanamo, of course, there is simply no need for one since Cuba's laws and courts do not have

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224 *Id.*

225 Munaf v. Geren, 128 S. Ct. 2207 (2008).

226 *Id.* at 2221–22 (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)).

227 *Id.*

228 *Id.* at 2215 (citation omitted).

229 *See supra* notes 216–20 and accompanying text.

230 R. Chuck Mason, Cong. Research Serv., Status of Forces Agreement (SOFA): What Is It, and How Might One Be Utilized in Iraq? 1 (2008) [hereinafter CRS Report for Congress], *available at* http://opencrs.com/document/RL34531.

231 *Id.*

232 Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2512 (2005).

233 *See infra* note 257.

jurisdiction inside the territory. Indeed, pursuant to the supplemental agreement mentioned above, not only U.S. citizens but *all* persons at Guantanamo—including Cubans—are subject exclusively to U.S. law and U.S. courts.

By contrast, SOFAs do not establish complete U.S. jurisdiction over a territory. At least four reasons lead to this conclusion. First, as a sort of preliminary matter, SOFAs are contractual agreements which, unlike the U.S. agreements with Cuba over Guantanamo, can be cancelled at any time at the will of either party.[234] The host state therefore always retains the right to reassert at any point any jurisdiction it gives up through the agreement, which tends to defeat the idea of a truly complete jurisdiction by the United States.

Second, and more concretely, SOFAs do not apply their jurisdictional framework to a "territory" as such, but rather to a limited class of "U.S. personnel" within a territory.[235] In other words, the jurisdictional frameworks established by the agreements are *personal* to the particular individuals covered by the agreement, as opposed to *territorial* over a particular geographic area. According to the Congressional Research Service, "U.S. personnel" covered by the agreements "may include U.S. armed forces personnel, Department of Defense civilian employees, and/or contractors working for the Department of Defense,"[236] although the coverage is not always this wide (for example, the SOFA with Afghanistan does not cover contract personnel).[237] Hence the agreements merely carve out narrow exceptions to the territorial jurisdiction of the host state based on the status of particular *people*—namely, "U.S. personnel" as defined by the agreement—and not the status of the territory. This is further confirmed by the fact that SOFAs are "not solely limited" to when U.S. personnel are on a military installation; the agreements "may cover individuals off the installation as well."[238] And conversely, the agreements do not provide for U.S. jurisdiction over the nationals or residents of the foreign country, unless they are members of U.S. forces operating there.[239]

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234 *Id.* at 2.

235 *Id.*

236 *Id.* at 2 n.5.

237 *See id.* at 9.

238 *Id.* at 5.

239 *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. 6, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter NATO SOFA] (the agreement "shall not imply any right for . . . the sending State [i.e., the United States] to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State [a foreign country], unless they are members of force of the sending State [i.e.,

Because the jurisdictional framework is strictly personal and not territorial, the United States does not assert complete jurisdiction over a territory through the agreements.

Third, SOFAs do not purport to displace the host country's legislative jurisdiction but only its adjudicative jurisdiction, or the jurisdiction of its courts to try U.S. personnel.[240] Put another way, the foreign country's laws always govern, but the judicial forum in which cases are brought against U.S. personnel may, as a result of the SOFA, be U.S. tribunals as opposed to foreign courts. The "concurrent jurisdiction" created by the agreements, accordingly, refers to concurrent sets of laws to which U.S. personnel are subject while operating in the foreign territory: U.S. military law, which follows them into the foreign country, and the law of the country where they are stationed, which applies inside its own territory.[241] The United States can hardly be said to have complete jurisdiction over a territory if another sovereign's laws govern that territory generally, and indeed continue to govern even in respect of the very class of people covered by the SOFA.

In this connection, even in cases where the United States enjoys adjudicative jurisdiction under a SOFA in respect of U.S. personnel, the majority of SOFAs provide that such jurisdiction is "shared" with the foreign country.[242] Under this jurisdictional framework, "each of the respective countries is provided exclusive jurisdiction in specific circumstances, generally when an offense is only punishable by one of the country's laws."[243] In that situation, the country whose laws govern has exclusive jurisdiction to prosecute.[244] However, "[w]hen the offense violates the laws of both countries, concurrent jurisdiction is present and additional qualifications are used to determine which country will be allowed to assert jurisdiction over the offender."[245] For example, one situation in which the United States would have "the primary right to exercise jurisdiction" over U.S. personnel for a violation of both U.S. and foreign law under a SOFA would be for

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the United States]"). The NATO SOFA "account[s] for roughly half of the SOFAs to which the United States is party." CRS Report for Congress, *supra* note 230, at 3.

240 CRS Report for Congress, *supra* note 230, at 5 (observing that the SOFA provides "when the United States retains the right to exercise criminal and disciplinary jurisdiction *for violations of the laws of the foreign nation* while the individual is present in that country" and "establishes how the domestic civil and criminal laws are applied to U.S. personnel while serving in a foreign country" (emphasis added)).

241 *Id.* at 7.

242 *Id.* at 2.

243 *Id.* at 7.

244 *Id.*

245 *Id.*

"offenses arising out of any act or omission in the performance of official duty."[246]

Last, where the United States clearly does have jurisdiction over U.S. personnel, whether because the SOFA grants it exclusive jurisdiction or because the circumstances entitle it to exercise primary jurisdiction under a "shared" jurisdiction framework, the United States may always choose not to exercise such jurisdiction, and leave it to the territorial state to prosecute. This is what happened in *Wilson v. Girard*,[247] a case relied upon heavily by the Court in *Munaf*.[248] Although the United States maintained that Girard, a U.S. Army Specialist, had killed a Japanese civilian at Camp Weir in Japan in the performance of his official duty, thus entitling the United States to exercise primary jurisdiction over his crime under the relevant SOFA, the United States decided to waive its jurisdiction and let Japan prosecute.[249] Thus, even when the United States enjoys the greatest jurisdiction possible under a SOFA, some jurisdiction still remains in the territorial state.

For all of these reasons, SOFAs do not establish complete jurisdiction on behalf of the United States over foreign territories. The agreements are voluntary and revocable at any time by the foreign country; they do not establish jurisdiction over territory, but only over certain U.S. persons operating there; they do not displace the foreign country's legislative jurisdiction with U.S. law; and, even where the United States enjoys full adjudicative jurisdiction over U.S. personnel, jurisdiction still remains in the foreign sovereign, ready to step in should the U.S. waive its own jurisdiction.

C. Incomplete Jurisdiction over Afghanistan and Iraq

Based on the foregoing evaluation of U.S. jurisdiction over Guantanamo and the jurisdictional frameworks created by SOFAs covering other military installations abroad, the United States does not have complete jurisdiction over either Afghanistan or Iraq. Consequently, the United States does not have de facto sovereignty over territory in either of these countries, including military bases. Thus, if the Court continues to use the jurisdictional aspect of de facto sovereignty to inform the constitutional scope of habeas, as it did in *Boumediene*, noncitizen government-designated enemy combatants detained in Af-

246 NATO SOFA, *supra* note 239, art. 7.

247 Wilson v. Girard, 354 U.S. 524, 530 (1957).

248 *See* Munaf v. Geren, 128 S. Ct. 2207, 2224 (2008); *supra* notes 226–29.

249 *Wilson*, 354 U.S. at 529.

ghanistan and Iraq likely will not constitutionally have access to the writ.

1. Afghanistan

U.S. jurisdiction in Afghanistan is governed by a U.S.-Afghanistan SOFA, entered into force in 2003, covering "U.S. military and civilian personnel of the U.S. Department of Defense" operating in Afghanistan.[250] As noted, the agreement does not cover private contractors (even U.S. citizens).[251] Under the SOFA, the United States has exclusive criminal jurisdiction over this limited class of U.S. personnel, who are granted immunity from Afghani criminal prosecution.[252] U.S. personnel are still, however, subject to Afghani civil and administrative jurisdiction, but only for activity committed outside the course of official duty.[253] As the previous Section explained, because the SOFA may be revoked by the Afghani government, does not purport to create territorial jurisdiction but only applies to a limited class of U.S. persons, does not otherwise displace Afghanistan's legislative jurisdiction over its territory, and indeed even preserves Afghani judicial jurisdiction over U.S. personnel covered by the agreement for civil and administrative actions concerning activity outside of their official duties, the SOFA does not establish "complete jurisdiction" of the United States over Afghani territory.

2. Iraq

The United States currently does not have a SOFA with Iraq, although it intends to enter into one very soon.[254] According to testimony by the Senior Advisor to the Secretary of State and Coordinator for Iraq before the Senate Foreign Relations Committee, the intended SOFA will be "similar to the many [SOFAs] . . . we have across the world, which address such matters as jurisdiction over *U.S. forces* . . . ."[255] Whatever the SOFA looks like then, it will relate only

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250 CRS Report for Congress, *supra* note 230, at 9.

251 *Id.*

252 *Id.*

253 *Id.* at 9.

254 *Id.* at 16.

255 *Id.* at 16–17 (quoting *Negotiating a Long Term Relationship with Iraq: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008) (statement of Ambassador David M. Satterfield) (emphasis added) [hereinafter *Hearing on Relationship with Iraq*]). The agreement is intended to be unique "by providing for consent by the Government of Iraq to the conduct of military operations," though this aspect of the agreement is intended to be temporary. *Id.* at 16–17 (quoting *Hearing on Relationship with Iraq*).

to U.S. forces and therefore will not purport to create complete U.S. jurisdiction. Until the SOFA is entered into, the general rule, given direct application to Iraq by *Munaf*, that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders,"[256] governs. Accordingly, whether the situation is viewed at the present moment or in the near future under a SOFA, the United States will not have complete jurisdiction over Iraqi territory.[257]

V. Conclusion: Is De Facto Sovereignty a Good Guide?

Acknowledging that the availability of habeas for noncitizens detained outside the United States in the war on terror is an exceedingly charged political and social issue, I offer here only some tentative thoughts on the normative pull of a de facto sovereignty approach as compared with a practical sovereignty approach. In the future, the Court may seize upon its practical sovereignty language in order to draw the lines for noncitizen habeas rights abroad as part of its func-

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256 Munaf v. Geren, 128 S. Ct. 2207, 2221–22 (2008).

257 After this Article went into production, the United States and Iraq entered into a SOFA. *See* Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter U.S.-Iraq SOFA], *available at* http://www.whitehouse.gov/infocus/iraq/SE_SOFA.pdf. The U.S.-Iraq SOFA entered into force on January 1, 2009, after an exchange of diplomatic notes between the United States and Iraq. *Id*. art. 30(4). As predicted, the U.S.-Iraq SOFA does not purport to create U.S. territorial jurisdiction in Iraq. Article 12 expressly "[r]ecogniz[es] Iraq's sovereign right to determine and enforce the rules of criminal and civil law in its territory" and affirms "the duty of the members of the United States Forces and the civilian component to respect Iraqi laws . . . ." *Id*. art. 12; *see also id*. arts. 3(1), 4(3), & 10. Indeed, with respect to U.S. personnel, Article 12 provides that while the United States has primary jurisdiction over United States Forces and the civilian component thereof in most situations, "Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies . . . committed outside agreed facilities and outside duty status," *id*. art. 12(1), and "Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees," *id*. art. 12(2). Either party also may waive its primary jurisdiction. *See id*. art. 12(6). Among other provisions indicating an absence of U.S. territorial jurisdiction, the U.S.-Iraq SOFA further provides that "[n]o detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law." *Id*. art. 22(1). The U.S.-Iraq SOFA additionally states that "[t]he United States recognizes the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time." *Id*. art. 24(4). The U.S.-Iraq SOFA raises a host of interesting issues. Unfortunately, space and publication scheduling constraints do not permit a more comprehensive treatment of it here. Nonetheless, it is clear from the portions quoted above that the U.S.-Iraq SOFA does not create the U.S. territorial jurisdiction necessary to establish de facto sovereignty in Iraq under this Article's analysis.

tional approach. In that event, it will be anyone's guess what amount of control will qualify the United States as "practical sovereign" over a given territory. But as I've shown, that is not what the Court did in *Boumediene*. In *Boumediene*, the Court took notice of U.S. "*de facto* sovereignty" over Guantanamo, and used this concept not only to avoid the government's political question challenge but also to distinguish its arguments from common law history and precedent. As I've also shown, the concept of de facto sovereignty, in contrast to "practical sovereignty," comprises both control *and* jurisdiction. So, should the Court stick to it?

There are a couple of upsides to a de facto sovereignty approach over a practical sovereignty approach. While the first upside is probably just an upside, the second upside has a corresponding downside. The first upside is that de facto sovereignty is a more predictable measure than practical sovereignty.[258] The second upside is that, as a matter of separation of powers, a de facto sovereignty approach affords a larger degree of deference to the political branches on national security issues than a practical sovereignty approach.[259] The corresponding downside is that it reduces the degree of judicial review of habeas. I address predictability first, and separation of powers second.[260] As to separation of powers, I update the concept of de facto sovereignty for the habeas context to enable the Court to take notice of political branch action establishing de facto sovereignty, even in the face of political branch statements to the contrary.[261] This places de facto sovereignty in between a full-blown political question into which the Court cannot inquire at all (de jure sovereignty), and a question fully open to judicial inquiry (practical sovereignty). That is, de facto sovereignty is a political question in that it depends upon political branch determinations establishing complete jurisdiction and control over a territory, but once the political branches decide to do that, the decision triggers judicially enforceable legal consequences for the scope of habeas under the Constitution.

A. Predictability

A main objection voiced in dissent to the *Boumediene* majority opinion is that the functional approach "does not (and never will) pro-

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258 *See infra* Part V.A.

259 *See infra* Part V.B.

260 *See id.*

261 *See id.*

vide clear guidance for the future."[262] The objection extends to the Court's notion of "practical sovereignty" as well. Who knows what degree of U.S. control over a territory will be enough to meet the practical sovereignty threshold? We know that the degree of control over Guantanamo is enough, but that the degree of control over occupied Germany was not. Beyond that, it is hard to determine with much certainty what amount of control will suffice. This is one of the major issues government and detainee lawyers are right now debating.[263] On the other hand, complete jurisdiction presents a clearer line: either U.S. law and the U.S. legal system govern the territory, or they do not. To the extent we value predictability in the law, de facto sovereignty seems to be the better approach.

B. Separation of Powers: A Middle Path?

The second upside is that by sticking with a de facto sovereignty approach, the Court defers more to the political branches on sensitive national security issues than it does under a practical sovereignty approach. Justice Scalia's reply to the Court's separation of powers argument—the argument that the Court must, as the judicial branch, have power to check executive and legislative action under the Constitution—was precisely this: the Court, as "the branch that knows least about national security concerns," had overstepped *its own* separation of powers bounds by "blunder[ing] in" to the largely political question of "how to handle enemy prisoners in this war."[264] Yet, as we have seen, whether the United States is de facto sovereign over a territory, that is, whether it has complete control and complete jurisdiction such that U.S. law and the U.S. legal system govern the territory, is determined by the political branches, not the courts. In this sense at least, the Court would be using a political branch determination, instead of its own untethered views on practical sovereignty, to strike the individual rights/national security balance.[265]

For those who favor total judicial review of the constitutional scope of habeas in all circumstances, the downside of this latter approach is clear: the de facto sovereignty determination always will depend, at least in part, on the political branches. Unless the Court decides to overturn the doctrine that de facto sovereignty is a political

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262 Boumediene v. Bush, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting).

263 *See* Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, WASH. POST, June 29, 2008, at A14.

264 *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).

265 *See id.* at 2252–53 (majority opinion).

question—something it seemed unwilling to do in *Boumediene* given that it chose to take notice of U.S. de facto sovereignty and failed to mention any de facto sovereignty precedent in defining its notion of judicially-reviewable practical sovereignty—whether the United States maintains de facto sovereignty over a territory always will be a matter for Congress and the President, not the courts. The argument against sticking to a de facto sovereignty approach going forward, therefore, is the same separation of powers argument the Court advanced for rejecting de jure sovereignty as the marker for habeas: when it comes to individual rights, especially a right as important as habeas corpus, the Court is the final arbiter, not the political branches against whom the right guarantees protection.[266]

This separation of powers tension throws into relief an inconsistency that could arise between the concept of de facto sovereignty I have advanced so far for *Boumediene*, and the precedent holding that de facto sovereignty is a political question. The potential inconsistency would involve situations where political branch action and statements are themselves in conflict; in particular, where the political branches have *dis*claimed de facto sovereignty but, as a matter of fact, have established complete U.S. jurisdiction and control over a territory. Although precedent does not squarely address this situation, it is reasonable to conclude that if, as the cases hold, de facto sovereignty is truly a political question, then once the political branches have spoken disclaiming de facto sovereignty, that statement binds the courts even if the political branches have acted contrary to their stated position.

Yet it seems incompatible with *Boumediene* to resolve such a conflict in favor of the political branches given the majority's holding and its insistence on separation of powers and judicial review of habeas.[267] For instance, it would be irreconcilable with the Court's opinion to say that if the President declares tomorrow that, despite complete jurisdiction and control, the United States is not de facto sovereign over Guantanamo, the Court would accept at face value the declaration as conclusive of the de facto sovereignty question for purposes of habeas review under its functional approach. The better reading of *Boumediene*'s use of de facto sovereignty is that once the political branches establish complete jurisdiction and control over a territory, that empowers the Court to take notice of U.S. de facto sovereignty as

266 *Id.* at 2258–59.

267 *See id.* at 2253.

a matter of legislative fact[268] and triggers judicially enforceable legal consequences under the Suspension Clause. Such a reading of *Boumediene* can be distinguished cleanly from the precedent; fits with *Baker v. Carr*'s discussion of political questions in the field of foreign affairs; and seeks openly to balance political and judicial competences under the Constitution in the factually and legally unprecedented context of noncitizen habeas rights abroad in the war on terror.

To the extent a limited power of judicial review allowing the Court to take notice of political branch instruments over political branch statements departs from precedent holding de facto sovereignty to be a political question, updating the concept in this way can be made to rest on a principled distinction that comes through in the precedent: the cases holding that de facto sovereignty is a political question deal virtually exclusively with issues of recognition of foreign sovereigns, the same reason de jure sovereignty is a political question.[269] This is a matter reserved exclusively to the political branches.[270] Habeas corpus, on the other hand, deals with a quintessentially judicial power to *review* political branch action that potentially infringes upon individual rights.[271] The result is a concept of de facto sovereignty fitted to the habeas context that strikes a middle path between a full-blown political question and a question fully open to judicial inquiry.

Baker is not to the contrary. There, the Supreme Court acknowledged that "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions."[272] But the

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268 As opposed to adjudicative facts, which are "simply the facts of the particular case," "[l]egislative facts . . . are those which have relevance to legal reasoning and the lawmaking process." FED. R. EVID. 201 advisory committee's note. "Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take." Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955); *see also* Landell v. Sorrell, 382 F.3d 91, 203 (2d Cir. 2004) (Winter, J., dissenting), *rev'd sub nom.* Randall v. Sorrell, 548 U.S. 230 (2006) ("Legislative facts are factual assumptions or conclusions that cause a court to choose one rule of law rather than another or to hold that certain circumstances meet a particular legal test."); Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, C.J.) (finding adjudicative facts are "'facts about the parties and their activities, businesses, and properties,' as distinguished from 'general facts which help the tribunal decide questions of law and policy and discretion'" (citation omitted)).

269 *See supra* Part II.A–C.

270 *See supra* Part II; *see also* United States v. Belmont, 301 U.S. 324, 330 (1937) (holding "the Executive had authority to speak as the sole organ of [the national] government" with respect to recognition of foreign sovereigns).

271 *See* Tyler, *supra* note 44, at 336; Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. REV. 1031, 1058 (1985).

272 Baker v. Carr, 369 U.S. 186, 211 (1962).

Court dismissed such a broad barrier to judicial review, explaining that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[273] Rather,

> [o]ur cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[274]

The particular question posed in *Boumediene* was not merely who has sovereignty over a territory, but whether habeas corpus is constitutionally available to individuals detained there. It was thus a combination of an issue historically managed by the political branches, recognition of sovereignty, and one managed by the judicial branch, the scope of habeas review. Because of this connection to habeas "in the light of its nature and posture in the specific case," the sovereignty question—on which courts traditionally had deferred to the political branches[275]—could not simply be uncoupled and considered in isolation as strictly political. The Court long ago made clear that while the federal government enjoys a broad foreign affairs power, "of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution."[276]

The middle path then openly confronts the remainder of the analysis *Baker* prescribes: whether habeas rights for noncitizens detained abroad in the military struggle against transnational terrorism is "susceptib[le] to judicial handling" and "the possible consequences of judicial action."[277] And *that* particular question presents competing constitutional competence claims under the political question doctrine's initial separation of powers inquiry—an inquiry which asks "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed."[278] The

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273 *Id.*

274 *Id.* at 211–12.

275 *Id.* at 212.

276 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). For a discussion of the political question doctrine's place in foreign affairs and tension with individual rights, see LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 81–91 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 216–24 (1990).

277 *Baker*, 369 U.S. at 211–12.

278 *Id.* at 211. *Baker* provided the following formula for determining political questions:

Boumediene majority cast the issue as one of habeas review, and therefore a judicial question.[279] The dissent cast the issue as one of waging war, and therefore a political question.[280] The middle path of de facto sovereignty seeks to accommodate both. The Court must rely on political branch determinations establishing complete jurisdiction and control over a territory; but once the political branches do that, the Court can take notice of U.S. de facto sovereignty for purposes of its functional approach to habeas.

Taking this middle path, the relevant separation of powers question then becomes: how different is a de facto sovereignty approach that incorporates jurisdiction from a test based on only practical control? True, the Court would have more leeway in finding "control" over a territory than in finding that U.S. law governs that territory. But even under a practical sovereignty approach, the Court would need to rely to some degree on political branch action establishing control over the territory. As Justice Scalia noted in response to the Court's separation of powers analysis, "so long as there are *some*

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

279 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2247, 2258–59 (2008). The Court stated:

> The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.

Id. at 2247 (citation omitted).

280 *See id.* at 2296 (Scalia, J., dissenting). Justice Scalia asked:

> What competence does the Court have to second-guess the judgment of Congress and the President . . . ? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

Id.

places to which habeas does not run—so long as the Court's new 'functional' test will not be satisfied *in every case*—then there will be circumstances in which 'it would be possible for the political branches to govern without legal constraint.'"[281]

In sum, whether the Court uses a practical sovereignty approach or the de facto sovereignty approach I have articulated in this Article, the scope of habeas for any given noncitizen outside the United States will depend to some degree on the political branches. De facto sovereignty raises the bar, for sure, but it also adds predictability and a larger degree of deference to the political branches on national security matters. After having unpacked the Court's concurrent sovereignty analysis in light of precedent and defined and distinguished the concepts of practical sovereignty and de facto sovereignty for *Boumediene* and beyond, I leave it to readers to decide for themselves which concept is preferable for measuring the habeas rights of noncitizens abroad in the war on terror.

281 *Id.* at 2303.