Note

At Writ's End: Using the Law of Nations to Decide the Extraterritorial Reach of the Suspension Clause

Bruce Corey*

Introduction

In 2001, Congress authorized President Bush to "use all necessary and appropriate force against . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ."[1] Acting under this authority, the United States Executive imprisoned thousands of people in detention sites around the world, including Cuba, Afghanistan, Thailand, and so-called "black sites."[2] In *Boumediene v. Bush*[3] the Supreme Court held that noncitizens detained at Guantanamo Bay, Cuba have a right

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1 Joint Resolution for the Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2 Rasul v. Bush, 542 U.S. 466, 471 (2004) (petitioners for habeas corpus detained at Guantanamo Bay); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2538 (2005) (noting that there are detainees held at Bagram Air Base and by the Thai government in Thailand); Elizabeth Sepper, Note, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1807 (2006) (noting that some individuals are detained in "'black sites'—secret detention facilities authorized by the President and operated by the CIA").

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

under the Suspension Clause[4] to challenge their indefinite detention in federal court through a writ of habeas corpus.[5]

Do the noncitizens held at these other detention sites[6] have this same basic opportunity to be heard? The *Boumediene* Court's analysis and recent scholarship suggest they do not.[7]

Although employing a "functional," multi-factor approach, the crux of the Court's analysis in *Boumediene* was the determination that Guantanamo Bay was a de facto sovereign of the United States.[8] The path the Court took to this conclusion suggests that Guantanamo is the only United States de facto sovereign in the world, and thus the only candidate for an extraterritorial application of the Suspension Clause.[9] Indeed, the traditional prerequisites of de facto sovereignty are complete jurisdiction and control—a test that is not met by any other detention site publicly maintained by the United States military.[10]

After exposing the doctrinal and practical problems of using de facto sovereignty to determine the extraterritorial reach of the Suspension Clause, this Note offers a new framework for courts to determine when the Clause reaches a petitioner held abroad. Specifically, it proposes that when the United States detains people in the formal territory of another country, the Clause's reach should depend on whether that country has expressly or impliedly waived its jurisdiction over the person petitioning the court for habeas relief. This approach preserves the original understanding of the Constitution, which, as

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4 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.").

5 *Boumediene*, 128 S. Ct. at 2277.

6 One of the most notorious detention sites besides Guantanamo is on Bagram Airbase—the principal military base for the ongoing military operation in Afghanistan, and currently home to about 600 detainees. *See* Charlie Savage, *Embracing Bush Argument, Obama Upholds Detainee Policy in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6. The lack of public backlash in response to Bagram is surprising, given that two detainees were beaten to death there by American jailers in 2002, insiders' observations that a detainee's life is bleaker at Bagram than even Guantanamo, and the Pentagon's own admission of egregious human rights violations committed inside the detention facility. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1; *see also* Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1.

7 *See infra* Part II.C.

8 *See id*.

9 The *Boumediene* Court set forth three factors to determine the Clause's reach, but this Note focuses on the second and arguably most weighty factor, which examines the nature of the detention site. *See Boumediene*, 128 S. Ct. at 2259.

10 *See* Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1236–37 (2007).

shown below, is a particularly valuable asset of a proposed construal of the Suspension Clause. Equally important, this approach produces logical results—something critically absent from the doctrine articulated in *Boumediene*.

Part I traces the meaning and Founding-era understanding of sovereignty by parsing a symbolic opinion by the Marshall Court and examines the contemporary use of these principles in foreign relations law. Part II provides a brief background of habeas corpus history and jurisprudence and unpacks the meaning of de facto sovereignty. Part III argues that using de facto sovereignty as a factor in determining the writ's reach is inconsistent with the history of the Suspension Clause and produces unacceptable practical implications. Finally, Part IV proposes a new solution to the extraterritorial habeas puzzle that is fleshed out through fictitious and real-life examples involving foreign U.S. military detention.

I. The Meaning and Function of Sovereignty

This Part begins by describing the relationship between sovereignty, territory, and jurisdiction as it was understood by the Framers. It achieves this by surveying the relational model that dominated the era's discourse, and by closely examining the seminal founding-era case that dealt with these issues, *The Schooner Exchange v. McFaddon*.[11] Last, this Part argues that these principles play an unchanging role in contemporary foreign relations law outside the specific context of extraterritorial habeas corpus.

A. The Law of Nations[12]

Most people are familiar with "municipal law," which Blackstone defined as "the rule by which particular districts, communities, or nations are governed."[13] The United States Code and state tort law are thus examples of municipal law. A less familiar body of law—the "law of nations"—appeared in the writings of political scientists of the seventeenth and eighteenth centuries,[14] and came to the fore of En-

11 Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1813).

12 In modern discussion, this body of law is more commonly referred to as "customary international law," *see* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 2 n.1 (2009), but this Note uses "law of nations" due to the emphasis on original understanding.

13 *Id.* at 11 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *44).

14 J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 873–74, 882–94 (2007) (noting that the law of nations was the subject of works by John Locke, Hugo Grotius, Jean Jacques Burlamaqui,

glish and American legal thought during the founding era.[15] Whereas municipal law governed interactions within nations, the law of nations governed interactions *between* nations. It is also important to appreciate the common-law nature of this body of law, which was an accretion not of judicial decisions but of customs practiced by all sovereign nations.[16] As one scholar explains, "To an eighteenth-century lawyer, a major part of the law of nations consisted of '[c]ertain maxims and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law.'"[17]

The law of nations was predicated on the axiom that all sovereign nations enjoy "perfect equality of rights."[18] This equality derived from nature (or natural law), and obliged sovereign nations to respect the "perfect rights" of one another.[19] There is no definitive list of the perfect rights the international community acknowledged, but the rights to "exercise territorial sovereignty, conduct diplomatic relations, exercise neutral[ity], and peaceably enjoy liberty"[20] provide an illustrative set. The final critical feature of this body of law is that when one nation trammeled on the perfect rights of another nation, it was just cause for war.[21]

That the Framers were well versed in the law of nations is undisputed, as evidenced by period documents[22] and the text of the Constitution.[23] Indeed, their own safety required zealous adherence to the law of nations in their capacity as national representatives, as anything

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Thomas Hobbes, Thomas Rutherforth, Montesquieu, William Blackstone, Emmerich de Vattel, and others).

15 Bellia & Clark, *supra* note 12, at 6.

16 In fact, its common-law nature was a defining feature of the law of nations since its formal recognition by the English legal community in the sixteenth century. *See* KEN MACMILLAN, SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD 26 (2006).

17 Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989) (quoting EMMERICH DE VATTEL, THE LAW OF NATIONS lxv (J. Chitty trans., 1863) (1758)).

18 Bellia & Clark, *supra* note 12, at 16.

19 *Id.*; *see* Jay, *supra* note 17, at 833 ("[T]he force of the law of nations stemmed from the conception that it was rooted in natural law.").

20 Bellia & Clark, *supra* note 12, at 6.

21 *Id.* at 17.

22 *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 912 n.67 (2008) (noting that "[t]he work of de Vattel was well known at the time of the Founding and was frequently cited by early constitutional theorists such as St. George Tucker"); *see also* Jay, *supra* note 17, at 826 (noting that in 1795, Hamilton wrote to Madison that the United States was bound by the "customary law of Nations as established in Europe," which Madison conceded as "a truth" in his reply); *infra* text accompanying note 26.

23 U.S. CONST. ART. I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations").

less could have thrust the fragile Republic of the late–eighteenth and early-nineteenth century into war.[24] Accordingly, the solemnity of any case or controversy that involved the law of nations lead the Framers to extend jurisdiction over such cases to the federal judiciary.[25] As John Jay argued in *The Federalist No. 3*,

> It is of high importance to the peace of America that she observe the laws of nations . . . and to me it appears evident that this will be more perfectly and punctually done by one national Government than it could be either by thirteen separate States or by three or four distinct confederacies.[26]

This grant of jurisdiction was not merely one of many items on the agenda at the Philadelphia Convention. The states' habitual violations of the law of nations was a primary reason the Framers convened to draft a new constitution in the first place, before it was even settled that federal jurisdiction was the appropriate solution.[27]

The opinions of this era show that federal courts executed this duty with exceeding scruple and keen awareness of the potential consequences attendant to deciding cases involving the perfect rights of other nations.[28] The cases that dealt with a perfect right often called "territorial jurisdiction" are especially relevant to this Note. Emmer-

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24 *See* Bellia & Clark, *supra* note 12, at 31.

25 *Id.* at 41–42. Some Framers argued that the Constitution should contain an explicit grant of federal jurisdiction over "Questions [that] shall arise . . . on the Law of Nations." *Id.* at 38 n.182 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 136 (Max Farrand ed., rev. ed., 1966)). Instead, the Convention chose to "extend the judicial power to several types of cases in which the law of nations was likely to apply." *Id.* at 38; *see also* U.S. CONST. art. III, § 2.

26 THE FEDERALIST NO. 3, at 14–15 (John Jay) (Jacob Cooke ed., 1961).

27 Jay, *supra* note 17, at 825 ("One of the main reasons for convening the Philadelphia Convention in 1787 was the transgression of [the law of nations] by various states. The failure of states to enforce debts owed to foreigners (British creditors in particular) was a special concern because the law of nations at that time could be interpreted to allow a creditor nation to resort to war for satisfaction."); *see also* Bellia & Clark, *supra* note 12, at 30 (providing a substantially similar description of the history of the Convention).

28 In 1790, Chief Justice Jay informed a grand jury on circuit that the United States had become a nation, and thus was responsible for observing the laws of nations. Jay, *supra* note 17, at 825). Also on circuit, Justice Iredell explained to a jury that because the United States' law derives from the common law of England, which in turn fully recognized the law of nations, the law of nations was to be applied whenever the subject matter of a case required it. *Id.* at 825. In a 1796 case, Justice Wilson asserted: "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796). Finally, consider Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 67 (1999) (noting that cases implicating the law of nations decided during the 1780s and 1790s collectively featured 142 citations to Grotius, Bynkershoek, de Vattel, and Pufendorf for propositions about the law of nations).

ich de Vattel, the preeminent nineteenth century scholar on the law of nations, articulated the concept of territorial jurisdiction this way:

> Sovereignty carries with it a right . . . over all property, public, common, and private; it is the right of sovereign control over all parts of the territory belonging to the Nation. The Supreme power extends to whatever goes on within the State, wherever it takes place, and consequently the sovereign has control over all public places, over rivers, highways, deserts, etc. Whatever takes place there is subject to his authority.[29]

The perfect right of territorial jurisdiction was the right of a nation to exclusively control people or things within its territorial borders.[30] Although under the law of nations territorial jurisdiction was a perfect right, it was not an absolute one. The *exceptions* to territorial jurisdiction concern the next two Sections.

B. Territorial Jurisdiction and Waiver in The Schooner Exchange v. McFaddon

The seminal Founding-era case that dealt with territorial jurisdiction was *The Schooner Exchange v. McFaddon*.[31] The case featured a ship, the *Exchange*, that was owned by two Maryland citizens.[32] In 1810, the *Exchange* was en route from Baltimore to Spain when it was captured by the French Navy pursuant to orders from Napoleon.[33] Less than a year later, the French deployed the Exchange—now the public property of the French military—on a voyage to the Indies.[34] The journey encountered severe weather and the vessel was forced to make port in Philadelphia, at which point it was seized by authorities and attached in a suit by the two former owners.[35]

The Court took up the issue of jurisdiction first.[36] Chief Justice Marshall began by stating the rule of territorial jurisdiction: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[37] Because the *Exchange* was in Philadelphia, presuma-

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29 EMMERICH DE VATTEL, THE LAW OF NATIONS 96 (Charles G. Fenwick trans., The Carnegie Institute of Washington 1916) (1758).

30 *See, e.g.*, SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 7 (1971).

31 Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1813).

32 *Id.* at 117.

33 *Id.*

34 *Id.* at 118.

35 *Id.*

36 *Id.* at 136.

37 *Id.*

bly the next logical step was deciding the rights to the property. However, the *Exchange* was "an armed national vessel,"[38] and the Court found that the "usages and received obligations of the civilized world"[39] required the Court to waive its jurisdiction over warships.[40] Custom had apparently created an exception to territorial jurisdiction in this instance, and so the *Exchange* was immune from suit.[41]

The Schooner Exchange is important in at least two respects. First, it evinces the judiciary's fidelity to the law of nations. Although Chief Justice Marshall never expressly tied his holding to the law of nations, the repeated references to sovereignty, articulation of the rule of territorial jurisdiction, and a citation to de Vattel make clear he was applying this body of law.[42] Moreover, the Chief Justice did not make a single reference to the Constitution.[43] Marshall's application of the law of nations was consistent with "the jurisprudential assumptions and choice of law rules of the day," which "direct[ed] federal courts to decide cases under [the law of nations] whenever it provided the relevant rule of decision."[44]

Second, the case informs us that although a nation has exclusive jurisdiction over people and things within its territory (as per the rule of territorial jurisdiction), the nation can impliedly or expressly waive this jurisdiction.[45] Chief Justice Marshall wrote:

> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the

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38 *Id.* at 135.

39 *Id.* at 136.

40 *Id.* at 146.

41 *See* Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 380 (2001).

42 *See Schooner Exch.*,11 U.S. (7 Cranch) at 138–40, 143; *see also* Caplan, *supra* note 41, at 382 (noting that "the source from which Justice Marshall derived the rule of exclusive territorial jurisdiction . . . quite clearly found its origins in the law of nations").

43 *See Schooner Exch.*, 11 U.S. (7 Cranch) at 116.

44 Jay, *supra* note 17, at 832. Countless other opinions leave no doubt that the law of nations was a source of binding law in the Marshall Court. *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."); The Venus, 12 U.S. (8 Cranch) 253, 289 (1814) ("The whole system of decisions applicable to this subject, rests on the law of nations as its base.").

45 *See* Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1120 n.82 (2003) (noting that "Marshall based his concept of immunity on an implied waiver by the receiving state" (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 374 (5th ed. 1998))); *see also* Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (noting that "[*The Schooner Exchange*] in fact focused on the *exceptions* to exclusive territorial jurisdiction, which stem from a state's explicit or implicit consent to be intruded upon").

> consent of the nation itself. They can flow from no other legitimate source.
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> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory.[46]

Marshall enumerated three situations that customarily implicated a waiver of jurisdiction: (1) the immunity of a person who enters another sovereign with that sovereign's "knowledge and license,"[47] (2) the immunity of ambassadors,[48] and (3) the immunity of foreign armed forces passing through a sovereign with permission.[49] This list could not have been exhaustive given that a foreign war vessel, which had immunity according to the Court, does not fit neatly into any of these three categories. However, Marshall did not create a new category of implied waiver out of whole cloth. Rather, from these three established categories he inferred the policy they served: "interference" with entities sanctioned by another sovereign would affect that sovereign's "power" and "dignity."[50] Granting a foreign war vessel immunity served this same policy, and thus it was analogous to the other well-established categories.[51]

Finally, if there was any doubt that implied waiver was the principle Marshall relied on to dispose of the case, he explicitly spelled it out near the end of the opinion when he distinguished the general jurisdiction of courts to vindicate property rights. He wrote:

> Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which *the sovereign power has impliedly consented to wave* [sic] *its jurisdiction.*[52]

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46 *Schooner Exch.*, 11 U.S. (7 Cranch) at 136.

47 *Id.* at 137.

48 *Id.* at 138.

49 *Id.* at 139.

50 *Id.* at 144.

51 *See, e.g.*, Caplan, *supra* note 41, at 380 ("Reasoning that the status of a war vessel (which the Exchange was found to be) in foreign territory was sufficiently similar to that of a sovereign or of his ambassador while present in the foreign country, Marshall concluded that the United States had waived its jurisdiction with respect to the Exchange and that the ship was, thus, immune from suit.").

52 *Schooner Exch.*, 11 U.S. (7 Cranch) at 146 (emphasis added).

Indeed, waivers of territorial jurisdiction—in both the expressed and implied forms—were universally acknowledged principles of the law of nations by the time *The Schooner Exchange* was decided,[53] providing the rule of decision in English cases as early as 1637 and American cases as early as 1795.[54]

Modern federal courts have failed to apply or even acknowledge this principle of waiver in extraterritorial Suspension Clause analyses. This is especially surprising given that waivers are still frequently used to facilitate smooth foreign relations in the context of peacetime military occupations.

C. SOFAs as Express Jurisdictional Waivers: Contemporary Applications of The Schooner Exchange *Principles*

The principles of sovereignty that framed Marshall's analysis in *The Schooner Exchange* underlie the contemporary legal frameworks governing military personnel in foreign territory.[55] For almost 150 years, the third exception to territorial jurisdiction that Marshall identified, the immunity of armed forces passing through a foreign sovereign with permission,[56] was the presumptive rule in international relations.[57] However, as countries became more sensitive to breaches of their sovereign integrity after World War II, the paradigm began to shift.[58] Today, Marshall's third exception is completely on its head: foreign armed forces are now presumed to be subject to the exclusive jurisdiction of the host nation.[59]

The United States and other nations have adapted to this new model by resorting to Status of Forces Agreements ("SOFAs"), which are agreements between the United States and a host nation that "de-

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53 *See* BENJAMIN MUNN ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 81 (1939).

54 *Id.* at 85 (discussing the English case of *The Victory* from 1637 and *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795)).

55 *See* Caplan, *supra* note 41, at 380 (concluding that "the law of jurisdiction over foreign sovereigns and their property was, during the era of *Schooner Exchange*, and continues to be, a product of international jurisdictional principles as applied by U.S. courts").

56 *See* text accompanying note 49.

57 *See* Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994) (noting that "[c]ustomary international law thus evolved to the point where license to enter foreign territory carried with it an express or implied right to maintain military discipline free from the territorial sovereign's interference").

58 *See id*.

59 *Id.*; *see* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 268 (1998) (observing that although a host nation may grant permission of foreign armed forces to sojourn its territory, this "does not imply a general exemption of the members of these forces from its jurisdiction").

fine the rights, immunities, and duties of the [U.S.] force, its members, and dependents."[60] Although SOFAs address a variety of issues such as taxes and driving licenses, their primary purpose is to define the United States' and the host nation's respective jurisdictional powers over U.S. personnel.[61] To this end, the jurisdictional issue most commonly addressed in a SOFA is whether U.S. personnel can be criminally prosecuted by the host nation for his or her conduct while stationed abroad.[62] The United States is currently party to more than 100 agreements that could be characterized as SOFAs.[63]

The ubiquity of SOFAs and the decline of Marshall's third exception do not undercut the currency of *The Schooner Exchange* principles. Rather, Marshall's understanding of the law of nations allows for—even *explains*—the paradigm shift that international relations has undergone since World War II. Just as Marshall found the customs of international law to provide for an implied immunity of foreign armed forces, he would have found a custom that dictated the opposite—but a custom nonetheless—if he sat on the Court today. Thus, although the customs themselves have changed, they continue to exert a binding effect on state-state relations.[64]

Waiver is another principle at issue in *The Schooner Exchange* that has undeniable salience today. With the advent of SOFAs, waivers are now more elaborately drawn than ever, often resembling multiprovision contracts.[65] Although the presumptive postures regarding certain waivers have changed, waivers are still the preferred tools for carving up jurisdiction when one country allows another to establish a military presence on its soil. The history of American military occupations illustrates the two ways jurisdictional waivers are used: before World War II, the host nation was assumed to have impliedly waived its jurisdiction over the visiting personnel, and after the War, the host nation *expressly* waives its jurisdiction with the use of SOFAs.

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60 Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140 (1994).

61 R. Chuck Mason, Cong. Research Serv., Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? 1 (2008) [hereinafter SOFA Report], *available at* http://opencrs.com/document/RL34531.

62 *Id.*

63 *Id.*

64 *See, e.g.*, Talmon, *supra* note 59, at 268 (observing that "members of the armed forces of the Allied Governments in the United Kingdom during the Second World War were liable to be tried by the British civil courts for any act or omission constituting an offence against its law" and describing a case in 1976 in which a Zambian court rejected the defense of visiting-force immunity).

65 Consider, for example, the NATO SOFA. *See* SOFA Report, *supra* note 61, at 4 n.26.

II. Habeas Corpus and Its Sovereign Limits

We put the law of nations aside for a moment to survey the Anglo-American history of habeas corpus, and explore the meaning of de facto sovereignty. This Part also provides a primer on the practical workings of a habeas petition.

A. The Separation of Jurisdictional and Substantive Issues in a Habeas Petition

A writ of habeas corpus is a petition filed by a prisoner that compels his jailer to justify his detention.[66] Before addressing the arguments bearing on the legality of the detention, a court presented with a habeas petition must decide if the petitioner has a right to the writ in the first place. Just as a foreigner cannot sue his government in an American court for a violation of the First Amendment (unless the United States was somehow complicit in the violation), an American court cannot be expected to address a habeas petition filed by a foreigner imprisoned by his government (unless the detention has some connection with the United States). Thus, the threshold issue of jurisdiction must be resolved before the court can address the prisoner's underlying claim. If the court decides that it does have jurisdiction to decide the legality of the detention, the writ is said to "run" to the place the petitioner is being held.[67]

B. From English Origins to Boumediene v. Bush*: A Brief Background*

From the early seventeenth century, Justices of the King's Bench would issue a writ of *habeas corpus ad subjiciendum*[68] on motion by prisoner's counsel, which ordered the jailer to do two things: produce the prisoner and provide a justification for the imprisonment.[69] With the assistance of the courts—themselves empowered by the writ to correct any "manner of misgovernment"—English subjects were not hesitant to use the writ as a means to challenge the power of the state.[70] The writ "thus acquired an association with the principle of

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66 Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598 (2008).

67 *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2250 (2008) ("In 1759 the writ did not run to Scotland but did run to Ireland . . . .").

68 "That you have the body to submit to." BLACK'S LAW DICTIONARY 772 (9th ed. 2009).

69 Halliday & White, *supra* note 66, at 598.

70 *Id.* at 608 (quoting 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 71 (1644)).

due process of law derived from Magna Charta, that individuals should be imprisoned only in accordance with the law of the land."[71]

The Suspension Clause of the United States Constitution provides, "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."[72] It is clear that the English history of the writ was well known to the Framers, and that this history was incorporated into the Suspension Clause.[73] In *The Federalist No. 84*, Alexander Hamilton invoked Blackstone's celebration of habeas corpus as "the BULWARK of the British constitution," and thought it such a powerful check on tyranny that a separate Bill of Rights was unnecessary.[74] Thus, a guarantee of the writ of habeas corpus in the Constitution does not appear to have been a source of debate. Instead, the more controversial issue was whether and to what extent Congress had the power to suspend the writ.[75] It is here that the Framers supplemented the protections of the English writ[76] by limiting suspension to circumstances when "the public Safety may require it"—namely, in "Cases of Rebellion or Invasion."[77]

As for the writ's geographic scope, preconstitutional history is inconclusive. From the writ's English beginnings, a broad class of people—subject or alien, neutral or enemy—detained within the sovereign of the kingdom of England was entitled to the writ.[78] However, the question of whether the writ ran beyond the formal sover-

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71 Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 971 (1998).

72 U.S. CONST. art. I, § 9, cl. 2.

73 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 555–56 (2004) (Scalia, J., dissenting) ("The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses."); Halliday & White, *supra* note 66, at 630 ("[S]ince the overwhelming majority of Europeans in America at the time of the framing were British, the framers of the Clause would naturally have looked to English history and English practice for the source of their understanding of the writ.").

74 *See* THE FEDERALIST NO. 84, at 577–78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

75 *See* Amanda L. Tyler, *Suspension as Emergency Power*, 118 YALE L.J. 600, 627–30 (2009).

76 Although the writ enjoyed an elevated place in English law as a safeguard of liberty, it was frequently suspended by Parliament or denied by the courts in times of political unrest. *See Boumediene*, 128 S. Ct. at 2245.

77 U.S. CONST. art. I, § 9, cl. 2.

78 *See* Halliday & White, *supra* note 66, at 604–07. One firm exception appeared to be when an enemy alien entered the kingdom in "open hostility," a notion which itself is unclear, however. *See id.* at 606.

eign of England lacks a definitive answer due to an incomplete and inconsistent historical record.[79] Parties in recent litigation have exhumed English habeas cases that support both sides of the argument for the writ's historical reach.[80] Evidently, the Supreme Court is of the opinion that these cases—even assuming they comprise a complete record—do little other than neutralize each other.[81]

Before *Boumediene*, the Supreme Court confronted the extraterritorial reach of the Suspension Clause only once. In *Johnson v. Eisentrager*,[82] the petitioners were a group of German citizens held at Landsberg Prison, an American Army facility in Germany.[83] The Germans had been convicted of war crimes for engaging in hostilities against America after the surrender of Germany in World War II, and they sought a writ of habeas corpus to challenge that conviction in a United States federal court.[84] The *Eisentrager* Court ruled that the petitioners had no right to habeas corpus under the Suspension Clause because Landsberg Prison was outside the sovereign United States.[85]

Thus, in order to apply the Suspension Clause to the noncitizens held at the formally Cuban territory of Guantanamo Bay, the *Boumediene* Court had to either overrule or substantially distinguish *Eisentrager*. Choosing the latter course, the *Boumediene* Court relied on the United States' de facto sovereignty over Guantanamo. While conceding that Cuba had de jure sovereignty over Guantanamo, the Court "[took] notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."[86] Thus, the current law of the land is that the Suspension Clause can apply to a de facto U.S. sovereign, and that de jure sovereignty is not the dispositive factor.

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79 *Boumediene*, 128 S. Ct. at 2251 (expressing doubt that the "historical record is complete and that the common law . . . yields a definite answer to the questions before us"); *see also* Halliday & White, *supra* note 66, at 589–91 (describing the various evidentiary problems with looking to English history to draw conclusions about common law habeas corpus).

80 *Boumediene*, 128 S. Ct. at 2248–51.

81 *Id.* at 2251.

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

83 *Id*. at 765–66.

84 *Id.*; *see* Halliday & White, *supra* note 66, at 702.

85 *Eisentrager*, 339 U.S. at 778.

86 *Boumediene*, 128 S. Ct. at 2253.

C. De Facto Sovereignty: Its Meaning and Its Use in Boumediene

The notion of de facto sovereignty has appeared in both the political and legal contexts. In the political context, de facto sovereignty is a status of government or statehood other nations recognize for the purposes of conducting diplomatic operations.[87] The preconditions of de facto sovereignty in this context are notoriously imprecise.[88] In the legal context, however, a single definition has remained substantially consistent in the precedent of federal courts.[89]

Under the legal definition of de facto sovereignty, the core issue is jurisdiction. The case law and commentary are nearly unanimous that the United States has de facto sovereignty only over places that are subject to *the complete legislative and adjudicative jurisdiction* of the United States.[90] That is, the de facto sovereignty test is met only if U.S. law exclusively applies to the place and claims arising from these laws are heard exclusively in U.S. courts. If one or both are not exclusive, the place cannot be a de facto sovereign of the United States. If both are exclusive, the place *may* be a de facto sovereign of the United States, provided that the other component of de facto sovereignty—complete U.S. "control"—is shown. Thus, "*de facto* sovereignty traditionally has meant . . . not just complete control over a territory but also complete jurisdiction such that the *de facto* sovereign's laws and legal system governs the territory."[91]

Although its use was somewhat covert, this definition of de facto sovereignty was at work in *Boumediene*.[92] The Court gave its strongest indication of this when it said:

> [W]e accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. . . . [H]owever, we take notice of the obvious and uncontested fact that the United States, by virtue of its *com-*

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87 *See* TALMON, *supra* note 59, at 28 ("Recognition used in the context of recognition of a *de facto* government of a recognized State, as a rule, indicates a willingness on the part of the recognizing State to enter into normal official, i.e. diplomatic, relations with the government in question.").

88 SCOTT PEGG, INTERNATIONAL SOCIETY AND THE *DE FACTO* STATE 7 (1998). This is largely because recognition—whether de facto or de jure—is a case-by-case determination that is often informed by the recognizing nation's political objectives. *See* TALMON, *supra* note 59, at 92–93.

89 *See generally* Anthony J. Colangelo, *"De Facto Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 647–56 (2009) (discussing multiple cases that employ one definition of de facto sovereignty).

90 *See infra* note 158.

91 Colangelo, *supra* note 89, at 656.

92 *See id*.

> *plete jurisdiction and control* over the base, maintains *de facto* sovereignty over this territory.[93]

This understanding of de facto sovereignty also allowed the Court to distinguish *Eisentrager*. The Court noted that "there are critical differences" between Landsberg Prison (the detention center at issue in *Eisentrager*) and Guantanamo Bay.[94] As Professor Colangelo explains, "[t]he critical differences, it turns out, were largely jurisdictional."[95] First, the United States lacked complete adjudicative jurisdiction over Landsberg. The Court observed that the "military tribunal set up by [the U.S. military in Landsberg] was not a 'tribunal of the United States,'" but rather a tribunal of the Allied Powers.[96] The Court also stated in more general language the United States' lack of complete jurisdiction over Landsberg, noting that the Allied Powers did not "intend to displace all German institutions . . . during the period of occupation."[97] In support of this proposition, the Court quoted the agreement between the Allied Powers which stipulated "'that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation.'"[98] Notably, that agreement defined self-government as "'full legislative, executive and judicial powers.'"[99] Thus, the lack of complete United States jurisdiction over Landsberg—and the resultant lack of de facto U.S. sovereignty—allowed the *Boumediene* Court to maneuver around the seemingly on-point precedent of *Eisentrager*.

As the above demonstrates, de facto sovereignty requires both complete jurisdiction and complete control. "Control" will almost always logically follow a showing of complete jurisdiction,[100] but the converse is not true. For example, Bagram Air Base, the principal military base in Afghanistan, is under the control of the United States

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93 Boumediene v. Bush, 128 S. Ct. 2229, 2253 (2008) (emphasis added).

94 *Id.* at 2260.

95 Colangelo, *supra* note 89, at 660.

96 *Boumediene*, 128 S. Ct. at 2260 (quoting Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (per curiam)).

97 *Id.*

98 *Id.* (quoting Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, Apr. 8, 1949, U.S.-U.K.-Fr., Art. 1, 63 Stat. 2819, T.I.A.S. No. 2066 [hereinafter Allied Agreement]).

99 Colangelo, *supra* note 89, at 661 (quoting Allied Agreement). However, the *Boumediene* Court neglected to directly quote this part of the agreement.

100 An exception is difficult to imagine, and would most likely appear in a place that was an American colony that had won its practical independence by expelling American officials but had not yet implemented its own legal system.

but is governed by both Afghani and United States law.[101] So while the United States' control over Bagram may be exclusive, United States *jurisdiction* is not. This structure of "concurrent jurisdiction" is typical of foreign U.S. military enclaves.[102] Because the United States generally exercises complete control over its military enclaves, future cases examining the extraterritorial reach of the Suspension Clause will likely turn on the exclusivity of United States jurisdiction.[103]

III. The Problems with Using De Facto Sovereignty to Determine Extraterritorial Habeas Jurisdiction

As Part I demonstrates, during the founding era "sovereignty" primarily connoted an acknowledgment by other nations that the sovereign held certain rights under the law of nations.[104] Critically, some of these rights could be waived by the sovereign as a means of fostering diplomacy. As this Part discusses, using de facto sovereignty to determine the extraterritorial reach of the Suspension Clause (as the Court did in *Boumediene*) is at odds with these principles and thus betrays the Framers' intent. This Part also shows that this method of determining the writ's reach leads to absurd results and creates perverse incentives for the political branches. But first, this Part briefly defends a key premise of this Note: that ascertaining the Framers' intent is the proper method of determining the writ's reach.

A. The Special Importance of Original Intent in a Suspension Clause Analysis

One might fairly ask why we should remain faithful to the Founding-era notions of sovereignty set forth in Part I when determining the extraterritorial reach of the Suspension Clause. The answer is that since at least 2001, the Supreme Court has generally accepted that "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789."[105] Indeed, the nine Justices of the current Court

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101 *See* MASON, *supra* note 61, at 7–10.

102 *See id.*

103 A recent decision handed down by the U.S. District Court for the District of Columbia confirms this in part. The court noted that the lack of complete U.S. jurisdiction over Bagram Air Base counseled against extending the Suspension Clause to three detainees, though it concluded that the other *Boumediene* factors tipped the scales in favor of the detainees. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 222–23 (D.D.C. 2009).

104 *See supra* Part I.A.

105 INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quotation omitted); *see also* Halliday & White, *supra* note 66, at 580–81 ("The Supreme Court, for its part, has consistently maintained that the contemporary constitutional jurisprudence of habeas corpus needs to be informed by the legal

agree that the Framers' understanding of habeas corpus is entitled to great weight when analyzing the Suspension Clause.[106] Thus, to determine how far the Suspension Clause reaches, it would be enough to point to Founding-era documents or cases if any had squarely addressed the question. Unfortunately, no such materials are available.[107] The English historical record, which provides another window into the Framers' understanding, is similarly inconclusive.[108]

The law of nations,[109] however, extensively and conclusively answers the key question of extraterritorial habeas jurisdiction—whether a federal court can adjudicate the rights of a person residing in the territory of another sovereign. The founding generation would have presumed the answer to be no, *unless* the foreign country had waived its jurisdiction over the person. As discussed in the next Section, modern courts do not realize this, and this is precisely where the disconnect between original intent and the current state of Suspension Clause jurisprudence is located.

B. Using De Facto Sovereignty Does Not Allow for Jurisdictional Waivers

The primary doctrinal problem with using de facto sovereignty to determine the reach of the Suspension Clause is that it does not contemplate the founding principle of jurisdictional waiver. *The Schooner Exchange* teaches that a sovereign can carve out exceptions to its territorial jurisdiction for various classes of people or activities.[110] By finding the French ship immune from suit, the Court found that America had carved out a jurisdictional exception for foreign war vessels.[111] This manipulable quality of territorial jurisdiction has allowed for harmonious foreign relations in the context of military occu-

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and constitutional history of the 'Great Writ,' both in England and in the framing period of the Constitution." (footnote omitted)).

106 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2244 (2008) (Kennedy, J., joined by Souter, Ginsburg, Breyer, and Stevens, JJ.) (beginning the Suspension Clause analysis "with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." (quoting *St. Cyr*, 533 U.S. at 301)); *id.* at 2257 (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.) ("We have said that 'at the absolute minimum,' the Suspension Clause protects the writ 'as it existed in 1789.'" (quoting *St. Cyr*, 533 U.S. at 301)).

107 *See supra* Part II.B.

108 *See id.*

109 The law of nations was the dominant model of foreign relations law in England and America during the founding era. *See supra* Part I.A.

110 *See supra* text accompanying notes 46–52.

111 *See supra* text accompanying notes 50–51.

pations ever since *The Schooner Exchange* was decided—first by the pre-World War II presumption of military immunity and now by the ubiquitous use of SOFAs.[112] However, using de facto sovereignty, which requires *complete* jurisdiction, to determine the reach of the Suspension Clause casts sovereignty as an "all-or-nothing proposition": either the host has ceded total sovereignty or none at all.[113] This conception of sovereignty is at odds with the original understanding evinced in *The Schooner Exchange*, and should therefore be abandoned.[114]

Additionally, the concept of jurisdictional waiver has provided the rule of decision in modern cases that pose the issue of a federal court's extraterritorial jurisdiction. The modern era case that is typically credited with using the principle of waiver is *Wilson v. Girard*.[115] In that case the petitioner, a U.S. serviceman who caused the death of a Japanese woman while stationed in Japan, was scheduled to be tried by a Japanese criminal court.[116] The case posed the question of whether an American federal court could intervene and save the serviceman from foreign prosecution.[117] The rule of decision stated by the Court should sound familiar: "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."[118] The Court cited *The Schooner Exchange* for this proposition, and went on to find that Japan had not waived its jurisdiction over the United States citizen.[119]

Equally important is what the *Wilson* Court did not do: it did not examine whether the place of the petitioner's detention was a de facto U.S. sovereign. This inquiry was unnecessary because the relevant

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112 *See supra* text accompanying notes 61–63.

113 *See* Raustiala, *supra* note 2, at 2544.

114 The Framers apparently saw the disutility in all-or-nothing sovereignty at the domestic level as well. Federalism is built on a structure of concurrent sovereignty, with each sovereign exercising jurisdiction depending on the issue. *Id.* at 2543–44.

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

116 *Id.* at 525–26.

117 *See id*. at 529–30. In fact, the serviceman's petition was a habeas petition. *Id.* at 526. But because the Court went straight to the merits of the habeas petition, the case cannot fairly be cited for the reach of habeas *jurisdiction* (not to mention the fact that it dealt with statutory—rather than constitutional—habeas). However, the discussion of the merits themselves pertained to an American court's power to determine the rights of a person residing in foreign territory (a power the Supreme Court did not have because Japan had not waived jurisdiction). Thus, the case has bearing on a *type* of extraterritorial jurisdiction.

118 *Id.* at 529.

119 *Id.* at 529–30.

question, as *The Schooner Exchange* instructed, was whether Japan had waived its territorial jurisdiction over the petitioner.

Wilson is significant because it shows the enduring relevance of law of nations principles when the issue pertains to federal courts' jurisdiction over a person residing outside the United States' borders. Just as the Marshall Court adhered to the "the jurisprudential assumptions and choice of law rules of the day," which "direct[ed] federal courts to decide cases under [the law of nations] whenever it provided the relevant rule of decision,"[120] so did the Court in *Wilson*. Therefore, by relying on the United States' de facto sovereignty over Guantanamo instead of asking whether Cuba had waived jurisdiction over the detainees, the *Boumediene* Court deviated from a precedent established over 200 years ago and emphatically reaffirmed since.[121]

Now that the historical and doctrinal unsoundness of using de facto sovereignty to determine the writ's extraterritorial reach has been exposed, the next Section shows the potential adverse practical consequences.

C. The Consequences: Absurd Results and Perverse Incentives

The principle of waiver is more than doctrinal artifact. Shedding the notion of waiver, as the *Boumediene* Court did, leads to practical implications that standing alone should render de facto sovereignty an unacceptable standard. At least two practical problems arise from courts using de facto sovereignty as the test for the extraterritorial reach of the writ. This standard could lead to absurd results and creates perverse incentives for the political branches.

First, requiring complete jurisdiction before extending the writ, as de facto sovereignty does, leads to absurd results. This can be shown by tweaking the facts of *Boumediene*. As noted, the *Boumediene* Court took notice of the fact that the United States, by virtue of its exclusive legislative and adjudicative jurisdiction over Guantanamo Bay, maintained de facto sovereignty over the island.[122] This in turn allowed the Court to extend the Suspension Clause to Guantanamo Bay.[123] However, imagine that 106 years ago when the United States

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120 *See* Jay, *supra* note 17, at 832.

121 For examples of federal courts relying on *statutory* waiver provisions to assert jurisdiction over a foreigner for acts committed in foreign territory, see United States v. Leuro-Rosas, 952 F.2d 616 (1st Cir. 1991) and United States v. Bustos-Useche, 273 F.3d 622, 627 (5th Cir. 2001) ("The only statutory prerequisite to the district court's jurisdiction . . . is that the flag nation consent to the enforcement of United States law before trial.").

122 *See supra* text accompanying note 93.

123 *See supra* text accompanying notes 93–98.

and Cuba negotiated the lease for Guantanamo, Cuba insisted that Cuban traffic law applied to the island, and that Cuban courts have exclusive jurisdiction over any challenges to speeding tickets. In this hypothetical the *Boumediene* Court's de facto sovereignty test breaks down on its own terms: a remnant of Cuban law over the island, however trivial and unrelated to the detainees, would have upset the complete jurisdiction of the United States, and therefore would have been a bar to the writ.[124] Even if a Cuban law governed the conduct of the detainees *while on the island*, it is still not intuitively apparent why that should bar the writ. If Cuban tort law applied to the detainees, why should this bar them from challenging their designation as *enemy combatants* in a United States federal court?

On the other hand, if Cuba retained adjudicative jurisdiction over cases involving the terrorist activities of detainees, barring the writ becomes more palatable, or at least consistent with the policies underlying the principles of sovereignty. For example, by asserting the right to try the detainees for their crimes in the War on Terror, Cuba would have expressed its intent to leave this thread of its territorial jurisdiction intact. Therefore, according to *The Schooner Exchange* principles, the writ should not run out of respect for the sovereignty of Cuba. This is logical because it is a scenario in which the two sovereigns simultaneously claim the right to try—and presumably punish—the same crime. In this sense, the underlying policy of the law of nations would be served if the writ did not run to Guantanamo. To be sure, the *Boumediene* Court's requirement of complete U.S. jurisdiction accommodates this scenario: if Cuba insisted on trying the detainees for their alleged crimes of terrorism, the United States would lack complete adjudicative jurisdiction and the writ would not run. But as the above shows, a requirement of complete jurisdiction also bars the writ in scenarios where the "noninterference" policy underlying the law of nations is clearly not applicable.

Courts that employ a de facto sovereignty analysis to determine the reach of the Suspension Clause will also create perverse incentives for the political branches. As shown, a minimal amount of jurisdiction

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124 Again, the Court in *Boumediene* listed three factors that it supposedly accounted for in its analysis of whether the Suspension Clause extended to Guantanamo. *See supra* note 9. Therefore, the other factors could potentially outweigh the lack of de facto sovereignty in future cases, especially when United States jurisdiction has only a slight imperfection. But to the extent courts rely on an irrelevant strand of jurisdiction at all, *see supra* note 103, this critique applies. And it of course applies with full force to recent scholarship arguing that barely incomplete United States jurisdiction will bar the writ from running to detainees. *See* Colangelo, *supra* note 89, 647–53, 664.

retained by the host nation will render a federal court powerless to hear a detainee's habeas petition. Therefore, the United States government has a strong incentive to make strategic concessions of jurisdiction to the host nation when negotiating the terms of a military enclave in order to keep the detainees out of the judiciary's reach. As the government stakes out new offshore detention sites in the War on Terror, it is unlikely to insist on complete jurisdiction after *Boumediene*.

Although these strategic concessions may not be as thinly veiled as the Cuban traffic law hypothetical, subtler ruses are conceivable. For example, Cuban criminal jurisdiction over detainees might at first seem like it should have displaced the Suspension Clause's application in *Boumediene*. But if this retained jurisdiction only applied to acts taken on the island, it should not prevent the detainees from challenging the United States' accusations regarding their conduct *prior* to detention. Ironically, the *Boumediene* Court portended its repugnance to such strategies by noting that "[o]ur basic charter cannot be contracted away like this"[125] in rejecting de jure sovereignty as the touchstone of habeas jurisdiction. However, the de facto sovereignty test it endorsed precisely allows for this.

IV. A Proposed Test and Examples of Its Application

A habeas petition filed outside the sovereign United States is, on its face, asking a federal court to violate the rule of territorial jurisdiction. This is because it is asking the court to adjudicate the rights of a person residing in foreign territory. Thus, there must be a presumption against the extraterritorial reach of the writ. However, courts should then examine the relationship between the United States, the host nation, and the petitioner to find whether the host nation has expressly or impliedly waived its jurisdiction over the petitioner. Specifically, the court should first look for an express waiver in treaties, SOFAs, leases, or any other written agreement between the United States and the host nation. The court should then examine evidence bearing on the course of conduct between the three actors to find whether the host has impliedly waived jurisdiction. As Marshall noted, an implied waiver "is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory."[126]

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

126 Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1813).

A. Express Waivers

Express waivers of jurisdiction over U.S. military personnel are typically found in written agreements between the United States and the host nation, such as SOFAs. One current example of an express waiver is Mongolia's waiver of criminal jurisdiction over U.S. military personnel in the Mongolian-U.S. SOFA:

> United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States [p]ersonnel conferred on them by the military laws of the United States. Any criminal offenses against the laws of Mongolia committed by a member of the U.S. forces shall be referred to appropriate United States authorities for investigation and disposition.[127]

Mongolia's waiver over "United States personnel," which does not distinguish between contractors and soldiers, is uniform in nature. That is, it applies uniformly to a broad class of people: people whose presence is sanctioned by the U.S. government. Under this Note's proposal, a court would find an express waiver over *detainees* if the SOFA stated: "the United States shall have the right to exercise within Mongolia jurisdiction over detainees in the custody of the United States military." In other words, an express waiver over detainees similar to the express waiver over soldiers and contractors in the Mongolian-U.S. SOFA can be broad and uniform in nature.

Alternatively, a host nation might choose to specifically delineate the scope of its waiver with regards to citizenship, place of capture, nature of charges, or some other criterion. Indeed, its total discretion in drawing the lines of jurisdiction flows from its perfect right of territorial jurisdiction. In this vein, a SOFA that discriminates with respect to citizenship seems likely and reasonable, given that countries presumably will feel entitled to try their own citizens—especially ones already present in the sovereign.[128]

A third potential type of an express waiver over detainees under this Note's proposal is a written agreement wherein the host nation retains de jure sovereignty but makes a general disclaimer of all juris-

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127 SOFA REPORT, *supra* note 61, at 4.

128 *See* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 72 (2001) ("When the citizens or property of the host nation are not damaged by an act, that nation often has little interest in spending the time and resources of its police, prosecutors, and courts to try [noncitizens] for the crime.").

diction. This is the nature of the lease between Cuba and the United States regarding Guantanamo Bay, and therefore the *Boumediene* Court should have interpreted the lease as Cuba's express waiver of jurisdiction over the detainees. The relevant language of the Guantanamo Bay lease is:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . . .[129]

Although this type of waiver is not express in the sense that it does not specifically address "detainees," it is express in its intent to relinquish all jurisdiction over the enclave, which includes anyone the United States detains there.

Finally, not all express waivers must be in writing. A nation can expressly waive its jurisdiction over a person simply by turning over custody to the United States upon the latter's assurance that it will prosecute. In 1979, the General Accounting Office released a comprehensive report describing this practice of foreign countries relinquishing jurisdiction over American servicemen for prosecution.[130] The report stated that in a twelve month period, "17,946 offenses committed by service members were released by the host country to U.S. authorities for disposition."[131] In the extraterritorial Suspension Clause context, this type of express waiver would be implicated when the host nation arrests a detainee and turns him over to the United States military.

Admittedly, written agreements executed by the United States and a host nation rarely, if ever, address jurisdiction over detainees held in U.S. custody. Further, the United States military is typically the police power in the War on Terror that plucks suspected enemy combatants from various parts of the world and transports them to detention centers. Thus, a waiver—if there has been one at all—is much more likely to be implied.

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129 Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 762 (2002).

130 COMPTROLLER GEN. OF THE UNITED STATES, REPORT TO THE CONGRESS: SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED (1979), *available at* http://archive.gao.gov/f0302/110369.pdf.

131 *Id.* at iii.

B. Implied Waivers

The strongest indication of an implied waiver is the host nation's failure to prosecute. It strains credulity to argue that the host nation retains its territorial jurisdiction over a detainee when it has acquiesced to the United States' total physical control[132] over the detainee and has not indicated an intention to prosecute.

Moreover, this standard has already been employed by the United States in other contexts dealing with extraterritorial jurisdiction. The Military Extraterritorial Jurisdiction Act of 2000 ("Act") extends United States criminal law to anyone acting in a foreign country and employed by the United States Armed Forces.[133] Thus, the Act covers the conduct of private military contractors ("PMCs"), such as Blackwater.[134] Consistent with the rule of territorial jurisdiction, primary jurisdiction to adjudicate crimes committed by PMCs is reserved to the host nation under the Act.[135] However, the Act has an implied waiver provision that kicks in unless the host nation "has prosecuted or is prosecuting" the defendant.[136] That is, PMCs can be tried in the United States for crimes committed overseas if the host nation impliedly waives its territorial jurisdiction by neglecting to prosecute the crime.

Courts should adopt a similar standard in the context of extraterritorial habeas corpus to determine whether the host nation has impliedly waived jurisdiction over the habeas petitioner. Therefore, to determine whether there has been an implied waiver, courts should look to see whether the host nation has begun proceedings against the habeas petitioner.

However, a host nation's failure to initiate prosecution proceedings over each detainee should not immediately suggest an implied waiver. There may be situations where the host nation has chosen to delay prosecution until it acquires the custody of all the detainees or

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132 Because the object of habeas corpus is to compel the jailer to justify the detention, physical control exercised by the United States is taken for granted in this discussion.

133 Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)).

134 *See* Michael Hurst, Note, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1309 (2008).

135 *See* 18 U.S.C. § 3261(b) (2006); *see also* Schmitt, *supra* note 128, at 126 ("The Act acknowledges a host nation's right to prosecute persons who commit crimes in its country, provided it does so in accordance with jurisdiction recognized by the United States.").

136 *See* 18 U.S.C. § 3261(b); *see also* Hurst, *supra* note 134, at 1318 ("In [the Act], waiver by the host nation is implied if the host nation has not prosecuted or is not prosecuting.").

an entire class of detainees (most likely, citizens of the host nation). There may also be times when the host nation chooses to delay prosecution because it lacks the necessary infrastructure or resources. Showing deference in these situations by not finding an implied waiver gives host nations a grace period while the United States redeploys and the host transitions to total control over its territory. Determining a nation's intent to prosecute while taking into account the various circumstances that might cause it to delay prosecution is an extremely fact-specific inquiry. Rather than prescribe a fixed grace period applicable to all extraterritorial habeas cases, this Note describes four scenarios that represent points on an intent-to-prosecute continuum.

Four specific examples of how a host nation could impliedly waive its jurisdiction over a detainee or group of detainees are set forth below. The first example describes a fictitious but historically typical situation in which the host nation retains its jurisdiction over U.S. military personnel in a written agreement, but does not claim or disclaim jurisdiction over the detainees held at the U.S. base. The second example is based loosely on a case arising from the current situation in Iraq, where the United States' custody of the detainees is temporary and thus incidental to the jurisdiction claimed by the host. The third and fourth examples describe the peculiar development of Bagram Airbase in Afghanistan and provide a final illustration of the factual nuances taken into account by this Note's proposed approach to extraterritorial habeas jurisdiction.

1. Alpha Camp, Turkey

Consider "Alpha Camp"—a fictitious United States military base in Istanbul, Turkey. The United States detains hundreds of people at Alpha Camp, and has done so since November 2001. Many of these detainees are Turkish citizens or have been captured within Turkey's borders. Imagine that a SOFA between the United States and Turkey provides for Turkey's "complete jurisdiction over acts taken by U.S. personnel outside the scope of their official duties anywhere in the Republic of Turkey, including Alpha Camp." This imaginary SOFA is silent with respect to the detainees held there.

In the eight years since Alpha Camp was built, Turkey has left the United States to its own devices. The United States has shared the names, nationalities, and grounds for detention of all the detainees with the government of Turkey, but Turkey has not begun prosecuting anyone held at the base.

A court relying on *Boumediene* would ask whether Alpha Camp is a de facto sovereign of the United States. Thus, the court likely would not extend habeas jurisdiction over a detainee's petition filed from Alpha Camp because the SOFA clearly upsets the United States' complete jurisdiction. Under this Note's proposal, however, the court likely would find an implied waiver. This is because in the eight years since Alpha Camp was established, Turkey has not given any indication it intends to prosecute any detainee held at Alpha Camp for his alleged crimes. Turkey's implied waiver of jurisdiction lifts the presumptive bar to the writ and allows the detainees to challenge their detention in a United States federal court.

2. Camp Cropper, Iraq[137]

Camp Cropper is a detention facility in Baghdad maintained by the Multinational Force-Iraq ("MNF-I")—an international coalition sanctioned by the United Nations and headed by the United Sates.[138] Camp Cropper holds thousands of people charged with violating the criminal laws of Iraq.[139] Pursuant to its U.N. mandate, the MNF-I has "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq."[140] The government of Iraq retains the ultimate responsibility for every detainee at Camp Cropper, but because Iraq's criminal justice infrastructure was devastated in the hostilities of the previous six years, the MNF-I lends its assistance by maintaining the detention facility.[141] Thus, Iraq has undivided discretion over the fate of each detainee, but the circumstances do not allow for a speedy disposition of their charges.

In 2004, Shawqi Omar, a citizen of Jordan,[142] was charged with assisting Abu Musab al-Zarqawi (the late leader of al Qaeda) in Iraq and is currently detained at Camp Cropper.[143] Because he is held by an American chain of command, he files a writ of habeas corpus in a United States federal court.[144]

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137 The facts of this example are loosely based on the facts of *Boumediene's* companion case, *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

138 *Id.* at 2213.

139 *Id*.

140 *Id.*

141 *Id.*

142 Omar actually has dual Jordanian-American citizenship, *id.* at 2214, but to make this example's point he is said to have no affiliation with the United States.

143 *Id*.

144 *Id.* at 2216.

Because there is no written agreement between the United States and Iraq regarding the jurisdiction of detainees, Omar's only chance is an implied waiver. Working in his favor is the fact that he has sat in detention for a number of years without a trial, suggesting that Iraq has declined to prosecute him. But as noted, Iraq fully intends to prosecute Omar for violating its laws and would have already begun but for a lack of resources. Thus, because the United States' custody over Omar is incidental to the territorial jurisdiction retained by Iraq, the court should deny the writ.[145]

Omar's example shows that a host nation has not impliedly waived its jurisdiction just because it has failed to begin prosecuting the detainee. It will often be the case that the host nation intends to eventually prosecute a detainee but relies on the aid of the United States to retain physical custody in the interim.

This example also exposes a potential for injustice: Iraq could express its desire to retain jurisdiction over Omar, but may not actually begin prosecution for many years. However, as a sovereign in the international community, a host nation has a right to indefinitely detain a person residing within its territorial borders without interference from the United States, or any nation for that matter. If the United States does not respect this right by deciding the merits of Omar's habeas petition, its actions are tantamount to acts of war.

3. Bagram Air Base, Afghanistan (2005)

Bagram Air Base, the primary United States military base in Afghanistan, has been under United States control since December, 2001.[146] A detention center on the base holds more than 500 people in austere conditions.[147] Like the fictional Alpha Camp, the center is populated by people of varying circumstances, but most are Afghanis captured in Afghanistan by the United States military.[148] The Afghani-U.S. SOFA provides that U.S. personnel are immune from criminal prosecution by Afghan authorities, but not from civil suits

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145 In the actual case, the Supreme Court granted the writ because the petitioner was an American citizen, *id.*, but denied relief on the merits for reasons similar to those discussed in this example. *Id.* at 2221 ("Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar . . . for crimes committed on its soil." (citing Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1813))).

146 *Bagram: US Base in Afghanistan*, BBC NEWS, June 24, 2009, http://news.bbc.co.uk/2/hi/south_asia/4672491.stm.

147 *See* Golden & Schmitt, *supra* note 6.

148 *Id.*

arising from acts outside the scope of their official duties.[149] The SOFA is silent with respect to the detainees held on the base.

After a year of diplomatic negotiations that culminated in 2005, Afghan officials agreed to take custody of the approximately 450 Afghani citizens detained by the United States at Bagram.[150] This was, however, conditioned on the United States' refurbishing a defunct Soviet facility as a high-security prison.[151] The $10 million project was projected to take about a year.[152] In the interim, the United States would retain custody of the detainees at Bagram Air Base.[153]

In this example, the United States custody of the Afghani detainees was only temporary, and thus incidental to the jurisdiction claimed by the Afghani government. Similar to Omar's example, the host nation's crippled infrastructure called for cooperation between the two nations in order to facilitate a smooth restoration of Afghanistan's complete territorial jurisdiction. As a result, a court entertaining a habeas petition from an Afghani citizen detained at Bagram in 2005 should not have found an implied waiver and therefore should have denied the writ.

However, the negotiations apparently did not make provision for non-Afghani citizens. Presumably, this class of detainees (which would have accounted for about fifty people) would remain in U.S. custody at Bagram indefinitely. Therefore, a habeas petition filed by a non-Afghani citizen held at Bagram in 2005 should have been granted. This is because Afghanistan had implied an intention to waive jurisdiction over the noncitizens by excluding them from the transition plan. In other words, while reticent to do so, Afghanistan agreed to take custody over and responsibility for its own citizens so long as the United States built a new prison. But the fifty noncitizens were not part of the bargain struck between the United States and Afghanistan, and so it would have been impossible to argue that Afghanistan wished to exercise its territorial jurisdiction over these people. Thus, Afghanistan had impliedly waived its jurisdiction over these fifty noncitizens in 2005.

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149 *See* SOFA Report, *supra* note 61, at 8.

150 *See* Golden & Schmitt, *supra* note 6.

151 *Id.*

152 *Id.*

153 *Id.*

4. Bagram Air Base, Afghanistan (2009)

The new Afghan-run prison was completed in January 2007.[154] However, the prison can only accommodate about half of the 450 Afghani citizens that the original plans envisioned.[155] By the U.S. military's own admission, the detention center at Bagram will continue to detain hundreds of people indefinitely.[156] The United States does not plan to supplement the new prison's capacity, nor does Afghanistan intend to take measures to receive more of its citizens.

Thus, about 225 of the Afghani citizens detained at Bagram will not be released to their sovereign's custody in the foreseeable future. Although Afghanistan did express its "intention" in 2005 to take all the Afghani citizens imprisoned at Bagram, it has not signaled a similar intent in four years. This is in contrast to Iraq's persistent and firm position that it wishes to try and punish all people who have violated its laws, as described in Omar's example.

This real-life situation of Bagram Airbase raises the question of whether and when a host's stated intentions can become stale. Even though Afghanistan stated its desire to exercise jurisdiction over the Afghani citizens detained at Bagram, should a court give this statement any weight when Afghanistan has failed to actually exercise jurisdiction after four years? A fact relevant in answering that question is that Afghanistan's exercise of custody over its citizens was contingent on the United States furnishing the Afghani government with the resources to do so. Therefore, until the United States expresses an intent to supplement the capacity of the new prison facility, we can assume that Afghanistan has impliedly waived its jurisdiction over the 225 detainees in question. This is because until the United States provides Afghanistan with a place to hold the rest of the detainees, Afghanistan refuses to exercise jurisdiction over them. The moment the United States expresses an intent to fulfill the remainder of its promise, U.S. custody over the detainees changes from indefinite to temporary. As shown above, temporary U.S. custody requires a bar to the writ.

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154 *See* Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1.

155 *See id.*

156 *Id.*

Conclusion

This Note has attempted to show the weaknesses—even the dangers—of using de facto sovereignty to determine the extraterritorial reach of the Suspension Clause. The enshrinement of this approach in the habeas discourse is evident from the paucity of discussion regarding the right of the host nation to be free from interference sanctioned by a United States federal court. There have also apparently been no attempts to explain the result in *Boumediene* as an example of the sovereign of Cuba waiving jurisdiction over the detainees at Guantanamo Bay. However, both points are important ones to make if we truly believe that the Framers' intent has special pertinence when interpreting the Suspension Clause.[157]

More important, however, is that the rule set forth in *Boumediene* threatens to deprive hundreds of people at other detention sites the fundamental right to contest their charges in a forum that has a federal court's promise of fairness and impartiality. Before *Boumediene* was decided, many commentators in favor of extending the Suspension Clause to Guantanamo explained away the de jure sovereignty of Cuba over Guantanamo by pointing to the complete jurisdiction and control exercised by the United States.[158] As shown above, this is how the *Boumediene* Court defined de facto sovereignty in the actual case.[159] Post-*Boumediene*, the government will presumably rely on the fact that this jurisdictional structure is completely unique to Guantanamo in order to distinguish it from other detention sites. Thus, the unique nature of Guantanamo that was used to vindicate the rights of hundreds of people will potentially keep hundreds of others in indefinite detention.[160]

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157 *See supra* Part III.A.

158 *See* Colangelo, *supra* note 89, 647–53, 664 (citing multiple cases that employ this definition of de facto sovereignty and himself arguing that Guantanamo is the only United States de facto sovereign); *see also* Raustiala, *supra* note 2, at 2540–41, 2545 (noting that because of the United States' complete jurisdiction and control, Guantanamo "unequivocally is sovereign in a *de facto* sense" and may even be sovereign in a de jure sense). Without using the precise language of "de facto sovereignty," other scholars have pointed to the completeness of jurisdiction in order to explain away the technical sovereignty of Cuba and argue in favor of extending the writ to Guantanamo. *See, e.g.*, Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 383, 386 (2007) (noting that "[c]ritically, Cuban laws have no force or effect on Guantanamo" which results in its "[u]nique status"); *see also* Alexander, *supra* note 10, at 1237 (observing that "while the United States occupies Guantanamo it exercises complete territorial jurisdiction, and territorial jurisdiction authorizes habeas relief" (quotations omitted)).

159 *See supra* Part II.C.

160 Even counsel for the petitioners in *Boumediene* emphasized that "[Guantanamo] is the only base . . . that isn't the subject of a status-of-forces agreement that very specifically explicates

Courts should not use de facto sovereignty as a factor when determining the extraterritorial reach of the Suspension Clause because it would be historically and doctrinally unsound and produce adverse practical implications. Instead, courts should look to see if the host nation has expressly or impliedly waived its presumptive jurisdiction over the detainee petitioning the court.

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both the judicial and executive authority over acts that occur on the base," which made *Boumediene* a "*uniquely* straightforward case." Transcript of Oral Argument at 30, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195) (emphasis added).