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Detaining ISIS: Habeas and the Phantom Menace

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DETAINING ISIS: HABEAS AND THE PHANTOM MENACE

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Abstract

The United States detained "John Doe," an American citizen, in Iraq without charges for over a year. He was released in October of 2018. Challenging this detention, Doe filed a habeas petition. He argued that the detention was illegal because statutory authority is needed to detain citizens, and military detention depends upon Congress formally authorizing the anti-ISIS conflict. Doe contended that these conditions did not exist. The United States argued that the detention was legal because Doe was an enemy combatant that supported ISIS in Syria. This case, Doe v. Mattis*, raised significant constitutional questions about citizens, executive detention, and deference in national-security and foreign-relations matters. But much more remains at stake in terms of overseas power and military force.*

This Article argues that Doe's prolonged detention is the expected result of legal ambiguities of American authority overseas. Extraterritoriality questions force courts to determine what law applies outside domestic borders. Doe v. Mattis *continued inquiries from Guantánamo detentions. A decade ago, the focus was on Al-Qaeda, the Taliban, and alien detainees in territory under American control.* Doe v. Mattis *posed subsequent issues regarding executive power, citizen detention, overseas habeas rights, and whether Congress authorized the ISIS conflict. This Article uses post-colonial and TWAIL (Third World Approaches to International Law) perspectives to examine military detention. These perspectives identify how prior legal reasoning shapes overseas authority. With* Doe v. Mattis's *rulings on executive power*, *military detention can adapt for new conflicts with changing enemies and no envisioned end.*

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Table of Contents

On or around September 12, 2017, an American citizen surrendered himself to the Syrian Democratic Forces ("SDF") somewhere near the Syria-Turkey border.[1] His actual name was not disclosed officially, so he is known as "John Doe." The New York Times, however, identified him.[2] The SDF transferred him to American forces, who, along with the SDF, are part of an allied coalition fighting the Islamic State of Iraq and Syria ("ISIS"). Doe remained in American military detention from September 2017 to

1. ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 55 (D.D.C. 2017); *see also* Betsy Woodruff & Spencer Ackerman, *U.S. Military: American Fighting for ISIS 'Surrenders*,' DAILY BEAST (Sept. 14, 2017, 10:30 AM ET), https://www.thedailybeast.com/us-military-american-isis-fighter-reportedly-surrenders.

2. This Article utilizes the name John Doe because court records and opinions use this name. Comparing ISIS and American police records, the New York Times reports that "his real name is Abdulrahman Ahmad Alsheikh." Charlie Savage, Rukmini Callimachi & Eric Schmitt, *American ISIS Suspect Is Freed After Being Held More Than a Year*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html.

October 2018, over a year, without actually being charged with a crime.[3] Soon after news of his detention, the American Civil Liberties Union filed a petition of habeas corpus on his behalf challenging the legality of his detention.[4] In this dispute, *Doe v. Mattis*, the appellate court affirmed[5] district-court orders[6] barring Doe's forced transfer to another country. As Doe waited for proceedings to determine if his detention was legal, on June 6, 2018, the Government notified the district court that it intended to return Doe to Syria, where he was captured, even though it was still mired in civil war.[7] Meanwhile, his custody passed the one-year mark without any proceedings or rulings on the legality of his detention. On October 28, pursuant to a settlement, Doe was transferred to Bahrain, where he would be free and able to keep his American citizenship but would have his American passport revoked.[8]

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3. *See* Press Release, ACLU, ACLU Secures Release of American Citizen Unlawfully Detained by Trump Administration (Oct. 29, 2018), https://www.aclu.org/news/aclu-secures-release-american-citizen-unlawfully-detained-trump-administration-0 [hereinafter ACLU Press Release]; *see cf.* Bobby Chesney, *What Will America Do with the U.S. Citizen It Is Holding as an Enemy Combatant?*, FOREIGN POL'Y (Sept. 15, 2017, 4:49 PM), https://foreignpolicy.com/2017/09/15/what-will-america-do-with-the-u-s-citizen-it-is-holding-as-an-enemy-combatant/.

4. *ACLU Found.*, 286 F. Supp. 3d at 55.

5. The U.S. Court of Appeals for the D.C. Circuit issued its decision on May 7, 2018. Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018).

6. On January 23, 2018, the U.S. District Court for the District of Columbia required that the Government provide seventy-two hours' notice before transferring Doe. Doe v. Mattis, 288 F. Supp. 3d 195, 197 (D.D.C. 2018); *see also* Charlie Savage, *Military Ordered to Notify A.C.L.U. Before Transferring American ISIS Suspect*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/us/politics/american-isis-suspect-transfer-ruling-aclu.html.

7. No court entertained the merits of claims that Doe is an enemy combatant and that the Executive Branch has military authority to detain ISIS combatants. *See Doe*, 889 F.3d at 747–49. For description, by Doe's lead attorney, of the Government's suggested release, see Jonathan Hafetz, *The Trump Administration Wants to Dump a Detained American into One of the Most Dangerous Places on Earth*, ACLU: SPEAK FREELY (June 7, 2018, 3:45 PM), https://www.aclu.org/blog/national-security/detention/trump-administration-wants-dump-detained-american-one-most. For an analysis of what a "proposal to release him in Syria" means, see Alexia Ramirez & Sara Robinson, *United States Attempts to Abandon Citizen in War Zone*, BRENNAN CTR. FOR JUST. (July 27, 2018), https://www.brennancenter.org/blog/united-states-attempts-abandon-citizen-war-zone.

8. Doe's attorney explains that Doe has not been officially identified and that his release comes after the Government had no options when it could not justify the legality of his detention in court. *See* Jonathan Hafetz, *U.S. Citizen, Detained Without Charge by Trump Administration for a Year, Is Finally Free*, ACLU BLOG: SPEAK FREELY (Oct. 29,

This Article describes *Doe v. Mattis's* basic legal rulings, their constitutional significance, and their role in continuing flexible approaches to overseas American authority. In habeas filings for this case, the Government argued that it could detain Doe legally because the military determined that he: was an enemy combatant; had supported or was a member of ISIS; and had traveled voluntarily to Syria to participate in the conflict.[9] Before the settlement, the United States attempted to transfer Doe out of Iraq. It is presumed that this attempted move was to Saudi Arabia where Doe is also a citizen.[10] Like his identity, any identification of the countries that could receive him remains under sealed court records.[11]

Doe contended, however, that he was a reporter who traveled to Syria to cover the conflict and that ISIS members forced him to support them.[12] In habeas filings, Doe argued that his detention was illegal because he was not an enemy combatant and that citizen detention requires express authorization from Congress. [13] Doe then asked to be released, charged, or brought to the United States for trial.[14]

2018, 11:15 AM), https://www.aclu.org/blog/national-security/detention/us-citizen-detained-without-charge-trump-administration-year; *see also* Savage, Callimachi & Schmitt, *supra* note 2.

9. Respondent's Factual Return at 3, Doe v. Mattis, No. 1:17-cv-02069 (TSC) (D.D.C. Feb. 14, 2018). For a concise description of Doe's travel history including to Turkey and Syria and his experience with ISIS, see Deb Riechman, *US Citizen Held 13 Months for Suspected Ties to ISIS Is Freed*, MIL. TIMES (Oct. 29, 2018), https://www.militarytimes.com/flashpoints/2018/10/29/us-citizen-held-13-months-for-suspected-ties-to-isis-is-freed/.

10. Charlie Savage, Eric Schmitt & Adam Goldman, *Officials Weigh Sending American Detainee to Saudi Arabia*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/us/politics/american-detainee-saudi-arabia.html.

11. ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 54 (D.D.C. 2017) (stating that "the detainee remains unnamed"); *see also Doe*, 889 F.3d at 751 (explaining transfers are suggested for two countries).

12. Mattathias Schwartz, *The Case Against John Doe, American Jihadist*, NEW REPUBLIC (Apr. 19, 2018), https://newrepublic.com/article/147806/case-john-doe-american-jihadist.

13. Petitioner's Response to Respondent's Factual Return at 2, Doe v. Mattis, No. 1:17-cv-02069 (TSC) (D.D.C. Feb. 9, 2018) (arguing the Non-Detention Act, 18 U.S.C. § 4001(a) requires "express and deliberative legislative action"); *id.* at 3 (arguing detention is not authorized since ISIS is not covered by the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224); *id.* at 4 (arguing ISIS detention is not covered by Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498).

14. Petition for a Writ of Habeas Corpus at 2, ACLU Found. v. Mattis, No. 17-cv-02069 (D.D.C. Oct. 5, 2017); Petitioner's Reply to Respondent's Response to Petitioner's Response

Developments in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit in this case raised significant constitutional-law issues.[15] These developments regard habeas remedies and judicial power in national security and foreign relations, executive detention during a conflict, and Congress's legal authorization for war. These are traditional legal issues for detention, which have been seen in the War on Terror and in prior wars.[16] But *Doe v. Mattis* is far different from other cases. As described below, it serves to shape the role courts and the Constitution play in the ISIS conflict, which continues over seventeen years after Congress authorized a military response to the September 11, 2001, attacks.

Three circumstances from *Doe v. Mattis* questioned American law's assumptions on military detention. First, because Doe is an American citizen, he is entitled to heightened legal protections. Most habeas litigation in the War on Terror has focused on alien detainees.[17] With foreign nationals, courts more readily defer to decisions of Congress or the Executive Branch.[18] Second, Congress has not expressly authorized a military campaign against ISIS.[19] Previously, in *Hamdi v. Rumsfeld*, the

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to Factual Return at 1, Doe v. Mattis, No. 1:17-cv-02069 (TSC) (D.D.C. Mar. 14, 2018); Respondent's Response to Petitioner's Response to Factual Return, Doe v. Mattis, No. 1:17-cv-02069 (TSC) (D.D.C Feb. 28, 2018).

15. For good descriptions of the relevant doctrine and potential impacts of this case, see Stephen I. Vladeck, *Testing the Legal Limits of the War on Terrorism: The Case of an American Held in Iraq*, FOREIGN AFF.: SNAPSHOT (Feb. 12, 2018), https://www.foreignaffairs.com/articles/united-states/2018-02-12/testing-legal-limits-war-terrorism; Patricia Stottlemyer, *Doe v. Mattis: Is the War on ISIS Legal?*, JUST SECURITY (Feb. 23, 2018), https://www.justsecurity.org/52896/doe-v-mattis-war-isis-legal/.

16. For examples of past and recent legal analysis on Guantánamo detention, see BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2010), https://www.brookings.edu/wp-content/uploads/2016/06/0122_guantanamo_wittes_chesney.pdf; BENJAMIN WITTES, ROBERT CHESNEY & LARKIN REYNOLDS, THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2012), https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update\32913.pdf; Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499 (2017).

17. *See cf.* Ernesto Hernández-López, Kiyemba*, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193, 210-25 (2012) (explaining that, after initial habeas victories for detainees, immigration law has been used to justify keeping many detainees on the base) [hereinafter Hernández-López, Kiyemba*, Guantánamo, and Immigration Law*].

18. *See generally id.*

19. For a description of the legislative and legal complexities of AUMFs and ISIS, see

Supreme Court determined that when Congress authorizes a military conflict, it approves military detention for the duration of the conflict.[20] Congress issued Authorizations for Use of Military Force ("AUMFs") in 2001 against Al-Qaeda, the Taliban, and their supporters in response to the September 11 attacks and in 2002 to end Saddam Hussein's rule in Iraq.[21] It is still debated whether ISIS, and thereby military detention for its members and supporters, is covered by these AUMFs.[22] Doe was detained as part of a military campaign that is not expressly authorized by Congress in terms of location—Syria—or in terms of its enemy—ISIS. The third complication involves time, both because of the length of Doe's detention and because Congress's last approval for military conflicts occurred over a decade ago. The longer Doe was detained, the harder it was to justify deference to the Executive Branch's military authority. Similarly, deference to congressional authorization became problematic because the conflict deviated from the circumstances Congress contemplated in 2001 and 2002. Claims of military urgency seem unrealistic, and wartime appears to be indefinite. Thus, these three circumstances created significant doctrinal questions about military conflict and habeas powers. Citizenship, doubts about congressional authorization, and time all confounded any application of War on Terror precedents to *Doe v. Mattis*.

Ryan Goodman, *The Perils of a Congressional Authorization to Fight ISIS*, JUST SECURITY (Apr. 27, 2017), https://www.justsecurity.org/40346/perils-congressional-authorization-fight-isis/.

20. 542 U.S. 507, 521 (2004) (plurality opinion). Only three other justices joined Justice O'Connor's opinion, but it is treated as controlling for the authority to detain since Justice Thomas agreed that the Executive Branch had detention authority. *See id.* at 579 (Thomas, J., dissenting) (finding broad sources for the authority to detain).

21. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

22. There has been much scholarly discussion and some legislative efforts to have a new congressional authorization for force against ISIS. *See generally* MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS (2017) (describing recent proposals, efforts under President Obama, and arguments for why ISIS fits within existing force authorization); Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 636–38 (2016) (detailing why the AUMF-authorized war has not ended and how it has been interpreted to fight ISIS); Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31 (2012) (arguing a military approach to fighting terrorism, in terms of detention and prosecution, has normalized "emergency-type" powers).

This Article argues that there are three lessons from the habeas battle in *Doe v. Mattis* concerning who can be detained militarily and how, where they may be detained, and when detention occurs.[23] The lessons regard undefined terrain for habeas, overseas habeas for American citizens, and the post-colonial aspects of military detention. After presenting its approach, the Article proceeds in three parts. Part I presents how Guantánamo habeas jurisprudence resulted in some doctrinal clarity regarding overseas habeas, while it also left significant legal issues unanswered. American political realities added to these ambivalences and effectively continue base detentions to the present day. These realities include refusal to bring detainees to the United States, diplomatic challenges in transferring them to their home countries or third countries, and ongoing conflicts against Al-Qaeda and the Taliban. Part II examines how *Doe v. Mattis* posed questions about ISIS and who, how, when, and where to detain. This picks up where habeas and Guantánamo policy left off. *Doe v. Mattis* asked if citizens can be detained, if they can be transferred without notice, if Congress previously authorized the conflict, and if ISIS is an enemy per prior AUMFs. Part III identifies the doctrinal clarity that *Doe v. Mattis* provides for habeas and overseas military detention. This section charts who, where, and when to detain captives. *Star Wars's* allegory describes these developments, either as "The Force Awakens," stressing transparency for detainee treatment and influence by multiple government branches, or as "The Phantom Menace," with long-term detention, minimal information, and executive deference.

The first habeas lesson is that Doe's citizenship and the conflict's circumstances forced a habeas court into undefined legal terrain. Courts had to examine if the Executive Branch could detain Doe legally. A lack of political authorization for the ISIS conflict created the issue. An AUMF specific to Syria or expressly including ISIS as an enemy would have made it easier for courts to review the legality of detention in the ISIS conflict.[24]

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23. The focus here is on the role of habeas in reviewing overseas military detention, to begin charting how courts will influence detention policy as the War on Terror moves away from Al Qaeda and the Taliban and from prior conflicts. This lens is historic, current, and looks to the future. This Article does not examine relevant legal issues involving: the settlement terms of Doe's release, likely involving any rights to have a passport; law's role in shaping ISIS detentions by other states; Executive Branch reliance on the 2001 AUMF or 2001 AUMF for other military efforts; and habeas developments and congressional measures that impact current Guantánamo detentions.

24. See *supra* note 22.

Otherwise, who was subject to detention and how, where, and when detention takes place remained less certain. *Doe v. Mattis* illustrates the cloudy path courts face when reviewing military detention overseas and when congressional authorization is unclear. Doe was released in October of 2018, with no district court proceeding or ruling regarding whether the Executive Branch had the authority to detain him.[25] A series of pleadings for these issues was submitted. The briefs addressed citizen detention, the Non Detention Act (NDA), two AUMFs and ISIS, Congress's authorization of the ISIS conflict, and the Executive Branch's inherent authority.[26] Following Doe's release, the Government stopped pursuing these arguments, and the district court did not have to rule on these issues, leaving much of the cloudy path still unclear.[27]

Second, the dispute confronted habeas anomalies raised by Guantánamo detainees since 2002. The questions were as follows: if habeas powers include court orders to stop detainee transfers,[28] does detention become indefinite and illegal when a conflict lacks any envisioned end,[29] and is citizen detention legal without any charge or opportunity to contest custody?[30] These issues for ongoing Guantánamo detentions remain

25. *See* ACLU Press Release, *supra* note 3; Jonathan Hafetz, *U.S. Citizen, Detained Without Charge by Trump Administration for a Year, Is Finally Free*, ACLU BLOG: SPEAK FREELY, https://www.aclu.org/blog/national-security/detention/us-citizen-detained-without-charge-trump-administration-year (Oct. 29, 2018, 11:15 AM); *see also* Savage, Callimachi & Schmitt, *supra* note 2.

26. *See infra Section* II.C.

27. *See cf*. Robert Chesney, *Doe v. Mattis Ends with a Transfer and a Cancelled Passport: Lessons Learned*, LAWFARE (Oct. 29, 2018, 11:14 AM), https://www.lawfareblog.com/doe-v-mattis-ends-transfer-and-cancelled-passport-lessons-learned(describing how the case left significant legal issues unanswered, including if the AUMFs cover ISIS).

28. *See* Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010) (mem.); *see also* Khadr v. Obama, 563 U.S. 1016 (2011); Petition for a Writ of Certiorari at 12, Mohammed v. Obama, 561 U.S. 1042 (2010) (mem.) (No. 10-A52); Hernández-López, Kiyemba*, Guantánamo, and Immigration Law*, *supra* note 17, at 225.

29. *See generally* Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326 (2014) (examining the legal problems with indefinite detention on the base). For a recent denial of habeas for a Guantánamo detainee arguing the conflict from fifteen years ago ended, see Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018).

30. For examples of issues raised by citizen detention in the War on Terror not in overseas facilities, see Rumsfeld v. Padilla, 542 U.S. 426 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004). For a description of how the Executive Branch does not have inherent

unclear, and prior jurisprudence is inconclusive at best. In a statement agreeing with certiorari denial in 2014, Justice Breyer explained that it is uncertain if detention is authorized for persons "not engaged in an armed conflict against the United States" and if the 2001 AUMF or the Constitution "limits the duration of [base] detention."[31] For Justice Breyer, these doubts exist despite the "limited category" of AUMF detention approved in *Hamdi*.[32]

These legal questions from Guantánamo reappeared in Iraq during the fight against ISIS. On its face, *Doe v. Mattis* focused on questions about executive detention of an alleged combatant, but these issues are part of a larger and far less clear context. For Doe, there was no ruling on whether the Executive Branch had the authority to detain him, even after habeas jurisdiction was affirmed in December of 2017.[33] Doe remained in custody for ten more months. In May of 2018, an appellate court asked the district court to determine if Congress authorized this executive detention for an ISIS combatant and if Doe was an enemy combatant.[34] The district court never made these findings.[35] In July, Doe and the Government began settlement negotiations. He was released in October. These rulings and corresponding filings all focus on executive-detention authority. The complication is that this authority is not precisely delineated with new military conflicts, detentions occurring overseas, and doubts about congressional authorization. These complexities explain why Doe was detained for over a year and points to critical ambiguities in how courts, Congress, and the Executive Branch shape detention policy. Even with Doe's release, executive custody for a year confirms that legal anomalies persisted. These ambiguities will inform future military detention policy.

Third, Doe's detention illustrates the moral and legal questions created when American authority extends outside domestic borders. This extraterritorial context reflects a recurring pattern in American history. Over a decade ago, the habeas inquiry surrounding Guantánamo examined American sovereignty and if the Constitution's Suspension Clause and

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authority to detain citizens why and this detention requires congressional support, see Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004).

31. Hussain v. Obama, 572 U.S. 1079 (2014) (mem.).

32. *Id.*

33. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 54-55 (D.D.C. 2017).

34. Doe v. Mattis, 889 F.3d 745, 763-64 (D.C. Cir. 2018).

35. For description of this and other events in a timeline, see ACLU Press Release, *supra* note 3.

habeas corpus rights applied overseas.[36] For Guantánamo detainees, courts looked to historic examples of American authority over Puerto Rico and in wartime Germany, England, and Japan.[37] *Doe v. Mattis* sparked an additional set of questions regarding citizen detention, constitutional war powers, and judicial checks on detainee transfers and releases.

Habeas recourse, when applied to the ISIS conflict, like Guantánamo a decade ago, points to a post-colonial legal predicament. Post-colonialism is a scholarly perspective examining how international forms of influence remain after formal control by an imperial state ends.[38] It identifies how former colonies are subject to international influence, despite formal independence or decolonization.[39] Law exerts a post-colonial influence with legal ordering in treaties, international borders, constitutions, and sovereignty demarcations.[40]

In historic terms, Guantánamo exemplifies a post-colonial legacy. The military base reflects an anomaly-by-design with the United States evading sovereign authority there. It is a vestige of American empire over Cuba, beginning with the Spanish-American War in 1898 and formally ceasing with a U.S.-Cuba treaty in 1934.[41] Per this international agreement, the

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36. *See* Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117, 188-95 (2009) [hereinafter Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*].

37. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 756–60 (2008); *id.* at 839 (Scalia, J., dissenting) (referring to the *Insular Cases* and Puerto Rico); *id.* at 762 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950) (regarding detention in Germany)); *id.* at 758-61 (citing Reid v. Covert, 354 U.S. 1, 74–75 (Harlan, J., concurring in the result) (regarding disputes in Japan and England)).

38. BILL ASHCROFT ET AL., POST-COLONIAL STUDIES: THE KEY CONCEPTS 186 (2000); Geeta Chowdhry & Sheila Nair, *Introduction: Power in a Postcolonial World*, *in* POWER, POSTCOLONIALISM AND INTERNATIONAL RELATIONS: READING RACE, GENDER AND CLASS 1, 11 (Geeta Chowdhry & Sheila Nair eds., 2002).

39. Post-colonialism argues that prior events frame how present circumstances develop and they frame what options presently exist to confront current predicaments. *See generally* DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000); Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 891–92 (2000).

40. *See generally* Peter Fitzpatrick & Eve Darian-Smith, *Laws of the Postcolonial: An Insistent Introduction*, *in* LAWS OF THE POSTCOLONIAL 1 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

41. The United States has occupied Guantánamo since 1898, pursuant to a series of treaties and international agreements. In the Treaty of Paris, Spain relinquished all sovereign claims over Cuba. *See* Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, 1755-56. In 1903, Cuba agreed

United States occupies Guantánamo without sovereignty over the base and will continue to do so indefinitely.[42] This lack of sovereignty fueled legal assumptions that the U.S. Constitution had no force on the base.[43] It motivated detentions for Haitian and Cuban asylum seekers from 1991 to 1995,[44] and has shaped War on Terror detention policy since 2002.[45] Questions about American jurisdiction outside domestic borders have framed how courts determine if, where, and how habeas applies to military detentions.

Prior imperial arrangements shaped the contours of these doctrinal inquiries. Military detentions depend on legal mechanisms that have been devised since 1898 to ensure American control over Cuba. This process continues to this day. For Guantánamo detainees, law's post-colonial impact concerns territorial occupation, sovereignty demarcations, and international agreements.

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to lease the base to the United States. *See* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16–23, 1903, T.S. No. 418. With a 1934 treaty, the United States relinquished formal control over Cuba, including a claimed right of military intervention, but its base occupation was effectively made indefinite. *See* Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, 48 Stat. 1682. For descriptions of how international legal reasoning adapted from 1898 to the present day to secure American base control without international sovereignty, see Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36, at 132 n.68. *See also* Joseph Lazar, *International Legal Status of Guantánamo Bay*, 62 AM. J. INT'L L. 730, 730-40 (1968).

42. *See* Ryan Faith, *Here's Why the US Is Still Using Guantanamo to Squat in Cuba*, VICE NEWS (Mar. 24, 2016), https://news.vice.com/article/heres-why-the-us-is-still-using-guantanamo-to-squat-in-cuba; Liz Ševčenko, *Guantánamo Bay's Other Anniversary: 110 Years of a Legal Black Hole*, GUARDIAN (Dec. 28, 2012, 8:30 AM EST), https://www.theguardian.com/commentisfree/2012/dec/28/guantanamo-bay-usa.

43. *See* Ševčenko, *supra* note 42.

44. *See e.g.*, Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 32, 34–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). Asylum seeker detention on the base resulted in a series of lawsuits, *see* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158–59 (1993), Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1506 (11th Cir. 1995), Cuban-Am. Bar. Ass'n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1326–29 n.19 (2nd Cir. 1992), Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y 1993) (vacated by order to a settlement agreement).

45. *See generally* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36.

The legal school of Third World Approaches to International Law ("TWAIL") takes insights from post-colonialism to examine international law in terms of the doctrine's historical development and proposals for its change in the future.[46] Accordingly, TWAIL authors have analyzed the War on Terror, including James Gathii,[47] Antony Anghie,[48] and Usha Natarajan.[49] My writings examine how Guantánamo represents the law of the informal American empire and how this concept adapts for wartime detention,[50] to detain aliens indefinitely,[51] and to exert global influence for the United States.[52] TWAIL examinations of the War on Terror continue as military campaigns likely enter their second decade.[53]

Specific to detaining ISIS, this Article's TWAIL approach is twofold. It identifies how the United States uses prior legal determinations to support overseas power, and it draws from analogies in the *Star Wars* movie saga. The former identifies how occupation of a Cuba base after 1898, military detentions at the base since 2002, and Doe's detention in Iraq reflect similar legal questions. They concern executive authority and the Constitution's overseas reach or lack thereof. References to *Star Wars* movie themes help illustrate abstract concepts like empire and unchecked executive power.

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46. For descriptions of TWAIL, see Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 L. & POL. AFR., ASIA & LATIN AM. 195, 195 (2012); James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 26 (2011); Makau Mutua & Antony Anghie, *What Is TWAIL?*, AM. SOC. INT'L L. PROC., Apr. 2000, at 31, 31-32.

47. *See* James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 335 (2003).

48. *See* Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 45, 45-46 (2005).

49. *See* Usha Natarajan, *Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty*, 24 LEIDEN J. INT'L L. 799, 799-801 (2011).

50. *See* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36, at 121-22.

51. *See* Hernández-López, Kiyemba, *Guantánamo, and Immigration Law*, *supra* note 17, at 210-11.

52. *See* Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 149-50 (2010).

53. *See generally* James T. Gathii & Henry J. Richardson III, *Introduction to Symposium on TWAIL Perspectives on ICL, IHL, and Intervention*, 109 AJIL UNBOUND 252 (2016) (describing TWAIL approaches to military force and essays by Asad Kiyani, Parvathi Menon, Ntina Tzouvala, and Corri Zoli).

In 2009, I described the post-colonial aspects of the Supreme Court finding that habeas jurisdiction extends to alien detainees on Guantánamo.[54] *Boumediene v. Bush* reflected the "Empire Strikes Back," directing habeas courts's focus on functional control over territory overseas.[55] The phrase "Empire Strikes Back" refers to a *Star Wars* movie. The legacy of American empire set a course for deciding if the Constitution has extraterritorial application in the present day.[56] The Supreme Court rejected a finding that a lack of American sovereignty over Guantánamo justifies excluding detainees from habeas privileges. The Court instead used a functional approach to determine if habeas applies overseas.[57] In later proceedings for hundreds of detainees, lower courts interpreted habeas as a flexible means to support extraterritorial authority.[58] Detainees secured this privilege and a decade later, they still use habeas to challenge detention.[59] However, a minimal number of detainees actually have secured a court order for their release from the base.[60] The Supreme Court has agreed with

54. *See generally* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36.

55. *See id.* at 182. "Empire Strikes Back" is a reference to both a movie and the post-colonial perspective of looking at empire. *See, e.g.*, BILL ASHCROFT ET AL., THE EMPIRE WRITES BACK: THEORY AND PRACTICE IN POST-COLONIAL LITERATURES (1989) (taking its title from Salman Rushdie, *The Empire Writes Back with a Vengeance*, TIMES (London), Jul. 3, 1982, at 8); STAR WARS EPISODE V: THE EMPIRE STRIKES BACK (20th Century Fox & Lucasfilm, 1980).

56. Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36, at 121-22.

57. *Id.* at 182.

58. *Boumediene*, 553 U.S. at 813 (Roberts, C.J., concurring) (presenting habeas as a "flexible" device). For a description of the evolution of habeas as flexible, since Boumediene and recently, see Shawn E. Fields, *From Guantánamo To Syria: The Extraterritorial Constitution In The Age Of "Extreme Vetting*," 39 CARDOZO L. REV. 1123, 1158, 1174 (2018).

59. For a brief description of the current legal status of the forty-one detainees, see Editorial Board, *Donald Trump vs. Guantánamo's Forever Prisoners*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/opinion/trump-guantanamo-prisoners.html [hereinafter *N.Y. Times Editorial*]. Eleven detainees filed a habeas petition contesting detention conditions and a failure to be released and arguing current detention does not fall within the AUMF. Motion for Order Granting Writ of Habeas Corpus, Al Bihani v. Trump at 2, No. 1:09-cv-00745-RCL (D.D.C. Jan. 11, 2018).

60. A district court order to release the Uighur detainees in 2008 was not enforced. *See* Hernández-López, Kiyemba, *Guantánamo, and Immigration Law*, *supra* note 17, at 212. Two years after *Boumediene* was decided, the D.C. Circuit developed habeas reasoning that critics claim denies detainees meaningful review. *See generally* Mark Denbeaux et al., *No*

lower-court reasoning that courts cannot order base detainees to be released from Guantánamo, even when habeas courts have found that their detention was unlawful.[61] Then, the constitutional inquiry is whether judicial power extends to overseas territory, i.e., a base under uncontested American control.

Doe v. Mattis reflects later post-colonial inquiries about ISIS regarding detainees and the type of conflict. In this habeas episode, courts no longer focus on territory under American control. For Doe, a habeas petition raised questions about detainee status and Congress's conflict authorization. Specifically, this challenge asked whether a citizen can be detained as part of a military conflict if Congress authorized the conflict over a decade and a half ago with prior AUMFs and if ISIS can be classified as an enemy pursuant to these AUMFs. Over a decade ago, ISIS did not exist, and there was no civil war in Syria. On its doctrinal face, the dispute asked if the United States could detain Doe without charge for conflict duration and if courts must defer to military choices to transfer or release Doe. Seen as creating national-security and separation-of-powers issues, *Doe v. Mattis* posed fundamental questions about deference, citizen detention, and Congress's war powers.

The challenges posed by detainees in the ISIS conflict are much larger than *Doe*. Already, these detentions pose complex legal problems for the United Kingdom, Australia, Iraq, and Kurdish authorities, with detainee citizenships revoked, fast trials in Iraq, and strains on Kurdish resources.[62]

Hearing Habeas: D.C. Circuit Restricts Meaningful Review (*Seton Hall Pub. Law Research Paper No. 2145554, 2012)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554. For a basic description of detainee transfers numbers during Bush and Obama administrations, see John Bellinger, *Guantanamo Redux: Why It Was Opened and Why It Should Be Closed (and Not Enlarged)*, LAWFARE (Mar. 12, 2017, 5:12 PM), https://www.lawfareblog.com/
guantanamo-redux-why-it-was-opened-and-why-it-should-be-closed-and-not-enlarged.

61. *See cf.* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 585-606 (describing how appellate court precedent and legislation nullify habeas for Guantánamo detainees).

62. Since ISIS began losing significant territory, a large number of detainees are in SDF or Iraqi facilities. Keeping them, conducting legal proceedings, and returning foreign fighters home pose significant legal problems. This is similar to early Guantánamo detentions with legal processes and foreign state responsibility that remains undefined. The ISIS detainee population is far larger, from over forty-five countries, and is more dispersed than with Guantánamo detentions. *See generally* Qassim Abdul-Zahra & Susannah George, *Iraq Holding More than 19,000 Because of IS Militant Ties*, AP NEWS (Mar. 22, 2018), https://www.apnews.com/aeece6571de54f5dba3543d91deed381 (reporting over 19,000

The longer these detainees remain in custody, the more difficult the legal issues become, including allegations that the United States transfers foreign detainees to Iraq[63] and prevents children and women captives from leaving custody.[64] Moreover, reports indicate that Kurdish authorities will not conduct any trials for detainees and they complain that very few home countries accept detainees.[65] The United States has recently called on allies to take their citizens detained in Syria or Iraq from the ISIS conflict.[66] Recently, Senators requested that ISIS detainees should be relocated from Iraq and Syria to Guantánamo, which only has detainees from the Al Qaeda and Taliban conflicts.[67]

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detainees held and 3000 sentenced to death in Iraq); Jenna Consigli, *Prosecuting the Islamic State Fighters Left Behind*, LAWFARE (Aug. 1, 2018, 11:34 AM), https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind (describing reluctance for countries to receive their national detainees and efforts by United Kingdom and Australia to revoke detainee citizenship); Jonathan Horowitz, *Kurdish-Held Detainees in Syria Are Not in a "Legal Gray Area,"* JUST SECURITY (Apr. 13, 2018), https://www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/ (arguing detentions are part of a non-international armed conflict and subject to international humanitarian law); Gordon Lubold, *U.S. Weighs Destinations for Islamic State Detainees in Syria*, WALL ST. J. (July 18, 2018, 5:58 PM ET), https://www.wsj.com/articles/u-s-weighs-destinations-for-islamic-state-detainees-in-syria-1531951090 (describing American support for SDF detention operations without guarding and monitoring detentions); Eric Schmitt, *Pentagon Wades Deeper Into Detainee Operations in Syria*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html (stating detentions are in a "legal gray area").

63. *See* Human Rights Watch, *US: Detainees Transferred from Syria to Iraq*, (Oct. 31, 2018, 12:00 AM EDT), https://www.hrw.org/news/2018/10/31/us-detainees-transferred-syria-iraq.

64. *See* Anne Speckhard & Ardian Shajkovci, *PERSPECTIVE: In Legal Wrangling over ISIS Families, Should Anyone Be Allowed Home?*, GTSC: HOMELAND SECURITY TODAY.US (Oct. 31, 2018), https://www.hstoday.us/subject-matter-areas/terrorism-study/perspective-in-legal-wrangling-over-isis-babies-parents-should-anyone-be-allowed-to-return-home/.

65. *See* Agence France-Press, *The 'Heavy Burden' of ISIS Detainees in Kurdish Jails*, ARAB WEEKLY (Oct. 23, 2018), https://thearabweekly.com/heavy-burden-isis-detainees-kurdish-jails.

66. Press Release, Robert Palladino, U.S. Department of State, Foreign Terrorist Fighters in Syria (Feb. 4, 2019), https://www.state.gov/r/pa/prs/ps/2019/02/288735.htm; *see also* Sarah el Deeb & Matthew Lee, *U.S. Calls for Repatriation of Foreign Fighters Held in Syria*, AP NEWS (Feb. 4, 2019), https://www.apnews.com/377a62fbd303407e8b7ad9cfc59d62fe.

67. Carol Rosenburg, *U.S.: Guantánamo Still an Option for ISIS Captives in Syria Who Can't Go Home*, MCCLATCHY: DC BUREAU (Feb. 6, 2019, 6:37 PM), https://www.mcclatchydc.com/news/nation-world/national/national-

But looking beyond questions about executive power—i.e., "if detention is legal" or "if a court must defer"—*Doe v. Mattis* faced undetermined aspects about overseas American power. In this Article, I describe this as a debate about the uncertainty regarding how military detention is checked. It is clear is that the United States will continue with military conflicts against ISIS, in Syria, Iraq, and in locations across the globe.[68] Tropes from the Star Wars movies help explain this debate. They are the Phantom Menace and the Force Awakens.

In the *Star Wars* saga, the Phantom Menace refers to the creeping and hidden political forces that change a republic into an empire.[69] For our present story—that of habeas extended to a hemisphere far, far away—the Phantom Menace refers to the lack of clarity regarding whether courts review or take a hands-off approach to overseas military detention. In doctrinal terms, "The Phantom Menace" represents the debate regarding whether rights protections or deference applies to military detention of a citizen in the ISIS conflict in Iraq. Also from the *Star Wars* saga, "The Force Awakens" refers to the military effort to destroy the First Order, which re-imposes imperial order and ends a Republic.[70] For the recent habeas story, "The Force Awakens" operates as a symbol of transparent detention policies, checks on executive power, and judicial or congressional oversight of detention operations.

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security/guantanamo/article225544185.html.

68. For descriptions of how the conflict could expand to its many affiliates beyond Iraq and Syria, see Daniel Byman, *ISIS Goes Global: Fight the Islamic State by Targeting Its Affiliates*, FOREIGN AFF., Mar./Apr. 2016, at 76; Lisa Monaco, Opinion, *The Next Front in the U.S. Fight Against ISIS*, N.Y. TIMES (May 11, 2017), https://www.nytimes.com/2017/05/11/opinion/the-next-front-in-the-us-fight-against-isis.html. For analysis of how the ISIS conflict changes after it loses its territorial control in Iraq and Syria, see Jason Burke, *Rise and Fall of ISIS: Its Dream of a Caliphate Is Over, so What Now?*, GUARDIAN (Oct. 21, 2017), https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist; Zachary Laub, *What to Watch For in Post-ISIS and Syria*, COUNCIL FOREIGN REL.: BACKGROUNDER (Oct. 19, 2017), https://www.cfr.org/backgrounder/what-watch-post-isis-iraq-and-syria. For years, the United States fight against ISIS has been slower than prior conflicts because it has sought to empower local forces and takes place in many locations outside ISIS territory. *See* Kevin Baron & Defense One, *How the U.S. Military Sees the Anti-ISIS fight: A Dispatch from Iraq*, ATLANTIC (Jan. 18, 2017), https://www.theatlantic.com/international/archive/2017/01/obama-doctrine-military-trump/513470/.

69. STAR WARS EPISODE I: THE PHANTOM MENACE (20th Century Fox & Lucasfilm 1999).

70. STAR WARS EPISODE VII: THE FORCE AWAKENS (Lucasfilm 2015).

For the legal battles over habeas, the issues regarding the detained subject are whether the conflict is legally authorized, and how non-state actors are classified as enemies. These issues point to potential "phantoms" or "force awakenings." They framed Doe's detention and eventual disposition and reflected an evolution since the initial habeas battles on Guantánamo. In those episodes, courts focused on alien detainees, the Constitution's exterritorial reach, and territorial control without sovereignty. As explained below, extraterritorial doctrine adapted similarly in the past, after base possession from 1898 to 1991, to civilian alien detention from 1991 to 1995, and to military detention since 2002.

I. Habeas Reaches Detainees on a Secluded American Base (The Empire Strikes Back[71])

A long time ago (long before ISIS) in a hemisphere far, far away (from Iraq or Syria), the seed for habeas's phantom menace was planted near Guantánamo, a city on the eastern end of Cuba. Since the late nineteenth century, the United States has occupied territory for a military base at the mouth of Guantánamo Bay.[72] This U.S. Naval Station is usually called Guantánamo or "GTMO." American troops initially arrived there to fight Spanish forces during the Spanish-American War of 1898.[73] The United States points to legal support from various international agreements to remain there indefinitely, even though Cuba contests the agreements' terms.[74] The United States has used the base to monitor Cuba and the Caribbean, launch military interventions in the region, support Allied forces in World War II, and detain asylum seekers from Cuba and Haiti (1991-95).[75]

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71. *See supra* note 55.

72. *See generally* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36.

73. *See Today in History: June 10*, LIBR. CONGRESS, https://www.loc.gov/item/today-in-history/june-10 (last visited Aug. 24, 2018); M.E. Murphy, *The History of Guantanamo Bay 1494-1964*, U.S. NAVAL STATION: GUANTANAMO BAY, CUBA, http://web.archive.org/web/20060710215035/http://www.nsgtmo.navy.mil/history/gtmohistorymurphyvol1ch2.htm (last visited Feb. 27, 2019) (chapter 2, "How the Spanish lost Guantanamo Bay").

74. *See supra* notes 41, 42.

75. *See* JANA K. LIPMAN, GUANTÁNAMO: A WORKING CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION 6 (2009); *see* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36, at 128-29 n.51.

The legal needs of the American empire created Guantánamo. A TWAIL reading of sovereignty on the base shows how law has facilitated War on Terror detention. Base functions have adapted from geopolitical and strategic needs to detention because Guantánamo was crafted as an anomalous zone. Gerald Neuman defines "anomalous zones" as geographic locations where legal norms are suspended due to perceived political need.[76] War-on-Terror detainees were brought to Guantánamo in 2002.[77] Then, norm suspension was evidenced by legal interpretations that specific rights protections in American law do not have force on Guantánamo, even if they would apply domestically in the United States. At that time, the perceived political need was intelligence for the conflict against Al-Qaeda and the Taliban.

These past episodes in legal anomaly chart a doctrinal and policy course for how American citizen John Doe was detained without any charge in an undisclosed facility in Iraq. Specifically, three Supreme Court cases on Guantánamo between 2004 and 2008—*Rasul v. Bush* (2004),[78] *Hamdi v. Bush* (2004),[79] and *Boumediene v. Bush* (2008)[80]—approved military detention at an overseas American location with limited but important judicial oversight. This Article refers to these as the "Guantánamo Cases" to illustrate that issues left unresolved by them and their lower-court progeny reappear a decade later in *Doe v. Mattis*. For earlier anomaly, detention took place in Cuba during the conflict against Al-Qaeda and the Taliban, while current uncertainties exist regarding detention in Iraq with respect to the ISIS conflict. The Guantánamo Cases set legal parameters for who may be detained and under what circumstances. But a decade ago, courts avoided significant legal determinations regarding detention of a citizen overseas, restrictions on detainee transfers, and when detention authority expires (if ever). Now, these legal ambivalences set a policy course for ISIS detentions.

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76. This is adapted from Gerald L. Neuman's definition for "anomalous zones." *See* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996).

77. Faith, *supra* note 42.

78. 542 U.S. 466, 485 (2004) (finding base detainees have access to statutory habeas corpus rights).

79. 542 U.S. 507, 539 (2004) (holding the Executive Branch may detain persons engaged in conflict for the conflict's duration and setting the parameters for detention authority used on and off the base).

80. 553 U.S. 723, 798 (2008) (holding base detainees have access to habeas provided in the Constitution's Suspension clause).

In doctrinal terms, the Guantánamo Cases focused on executive authority applied to military detentions overseas. They used separation-of-powers reasoning to check detention policies. Generally, the Supreme Court has held that a constitutional form of government, made up of three different branches, requires ruling against the Government's position. The Bush Administration claimed unilateral authority over detentions and argued for deference from the courts.[81] With these decisions, the judiciary exerted its influence in shaping Guantánamo detention policies. This preserved a role for courts when they were urged to defer to the political authority of the President, given national-security emergencies and ongoing military conflicts. In each case, significant dissenting opinions supported this deference. Most decisions for the Court were reached only by a slim majority. Yet, in three cases, the majority of the Court's justices affirmed that important limits apply to the President's detention authority on the base.

The Supreme Court reviewed the legal impacts of controversial detentions early in the War on Terror. Decisions in *Rasul*,[82] *Hamdi*,[83] and *Boumediene*[84] were landmark judicial pronouncements on executive authority pursued in the name of national security. The Court found that detention policies were limited by acts of Congress, international and domestic laws of war, and the Constitution. The foci were the federal habeas statute in *Rasul*; Fifth Amendment Due Process rights, the laws of war, and the Geneva Conventions in *Hamdi*; and the Constitution's Suspension Clause in *Boumediene*. These decisions applied legal norms that previously were interpreted as suspended on the base. These decisions shaped wartime detentions with rulings on habeas, detention in an ongoing conflict, and constitutional habeas extended to alien detainees on an overseas base, respectively. This Article section describes initial base detentions, how they sparked the Guantánamo Cases, this doctrine's role in military detentions, and the resulting changes in the law to support overseas authority. From a TWAIL perspective, it shows how the base changed from

81. For a brief description on how claims of unilateral authority fit within the War on Terror legal strategy, see Warren Richey, *Bush Pushed the Limits of Presidential Power*, CHRISTIAN SCI. MONITOR (Jan. 14, 2009), https://www.csmonitor.com/USA/2009/0114/p11s01-usgn.html.

82. *Rasul*, 542 U.S. at 485.

83. *Hamdi*, 542 U.S. at 539.

84. *Boumeiene*, 553 U.S. at 798.

serving geopolitical necessities to detention functions to then providing constitutional support for extraterritorial authority.

A. Captives Taken Clear Across the Globe to Cuba

Four months after the attacks of September 11, on January 11, 2002, twenty men were brought from Afghanistan to Guantánamo.[85] They were the first War on Terror detainees taken to the base. The overseas military campaign against Al-Qaeda and the Taliban was in its third month. Quick victories dislodged Taliban rule in Kabul and spurred Al-Qaeda members, often foreigners, to flee from bases in Afghanistan. The United States and its allies captured a significant number of men in Afghanistan or Pakistan. Many were taken clear across the world to Guantánamo.[86]

Unlike a location in the United States with more accessible and existing facilities, Guantánamo was perceived to be beyond the jurisdiction of American courts. By the end of 2002, it had over 600 detainees, all brought from across the globe.[87] They were not charged with crimes or subject to any proceedings, including those required by the Geneva Conventions.[88] The Bush Administration claimed that the Executive Branch had sole discretion to decide if detention was warranted. The detainee population peaked at 680 men on May 9, 2003.[89] Nearly 800 total have been detained on Guantánamo.[90]

Detentions made this quiet and forgotten American outpost in the Caribbean the subject of enormous legal controversies. Guantánamo has been characterized as a "rights-free zone," "law's exception," "anomalous zone," the "gulag of our time," and a "legal black hole."[91] "Anomaly" does

85. Andrei Scheinkman et al., *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, http://projects.nytimes.com/guantanamo (last visited Mar. 15, 2019).

86. CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 34 (2003), https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment_0.pdf.

87. By December 2002, the base had 624 detainees, see the "Overview" and "History of the Detainee Population" for December 2002, Scheinkman et al., *supra* note 85.

88. *Id.* at 36.

89. *Id.* at 38.

90. Scheinkman et al., *supra* note 85.

91. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1509 (2003); Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 CRITICAL INQUIRY 734 (2007); Neuman, *supra* note 76, at 1197, 1201; Amnesty International Report 2005: Speech by Irene Khan at Foreign Press Association (May 26, 2005), https://www.amnesty.org/download/Documents/88000/pol100142005en.pdf; Henry

not mean that Guantánamo is something unique or isolated. Instead, "anomaly" refers to how extraterritorial authority on the base evades legal obligations due to perceived political necessities. The notion of anomaly focuses on this separation between legal norms and extraterritorial rule, evident in the framework used to govern overseas. The concept of anomaly allows for examining this separation, where it occurs, when it is used, to whom it applies, and how it evolves.

Legal anomaly has been a permanent fixture of American presence on the base. The United States secured overseas territorial occupation, with Cuban sovereignty checked on the base. In 2002, Guantánamo appeared as a "legal black hole," but in reality, its legal ambiguities reflected historic practices. Legal anomaly facilitates extraterritorial authority. Relying on legal anomaly implicit in overseas presence, countries exert political authority beyond their domestic borders. Historically, these ambivalences provided control over territory. Lauren Benton illustrates how European empires capitalized on legal anomalies to control land beyond their domestic borders and to span across continents, colonize populations, and exert military and commercial influence.[92]

Guantánamo represents a long-term, dedicated, and sizable American presence overseas. The base covers nearly forty-five square miles on both the leeward and windward sides of the bay entrance but does not fully surround the bay.[93] It is located on the island's south coast and near its eastern edge, close to the easiest entryway into the Gulf of Mexico from the Atlantic Ocean between Cuba and Haiti. In November of 1991, the United States detained Haitian refugees who were interdicted at sea while fleeing a military coup.[94] The number of refugee detainees quickly grew to 34,090 within six months.[95] In 1994, Cuban refugees were detained at the base. Their number eventually grew to 33,000.[96] Before the War on Terror, most

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Weinstein, *Prisoners May Face 'Legal Black Hole*,*'* L.A. TIMES, Dec. 1, 2002, at A1; Johan Steyn, Guantanamo Bay: The Legal Black Hole (Twenty-Seventh F.A. Mann Lecture, Nov. 25, 2003), http://www.statewatch.org/news/2003/nov/guantanamo.pdf.

92. LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900, at 8 (2010).

93. Carol Rosenberg, *Guantánamo: By the Numbers*, MIAMI HERALD (Oct. 25, 2018, 11:26 AM), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html.

94. JONATHAN M. HANSEN, GUANTÁNAMO: AN AMERICAN HISTORY 284 (2011).

95. *Id.* at 292.

96. Christina M. Frohock, *"Brisas Del Mar": Judicial and Political Outcomes of the Cuban Rafter Crisis in Guantánamo*, 15 HARV. LATINO L. REV. 39, 45 (2012) (citing U.S.

Americans were unaware that the United States had a base in Cuba. Even fewer knew that the United States occupies it indefinitely, over Cuba's protest for more than half a century.

Guantánamo's current legal ambiguities are a product of its past. History demonstrates that it is not an aberration that the military operates in a location lacking defined limits for American authority. Guantánamo is not a "quirky outpost" with a "unique and unusual" jurisdiction, as Supreme Court opinions state.[97] Instead, legal ambiguities have been vital to base functions for a century. This anomaly-by-design has supported American objectives overseas, setting the stage for refugee and War on Terror detainees.

B. Enemy Combatants, Laws of War, and Habeas (Who, When, and How to Detain)

Two and a half years after Guantánamo detentions began, on June 28, 2004, the Supreme Court found that courts could review the legality of detentions and that, because of Congress's use-of-force authorization, the laws of war applied to base detentions. The Court issued its first two detention decisions: *Rasul*, regarding base detainee access to courts, and *Hamdi*, focusing on executive detention authority. Both affirmed that courts can review detention policies and that courts can help formulate detention procedures.[98] *Rasul* provided an early statement on habeas court jurisdiction at this extraterritorial location and on the relief sought by aliens detained there.[99] *Hamdi* determined what kind of detentions could be conducted, who could be detained, under what process, and what limits were imposed on the duration of detentions.[100] Fifteen years later, these two issues—extraterritorial habeas powers and the limits of executive detention—framed the uncertainty regarding Doe.

In 2004, the base had approximately 640 detainees. They had not been charged with any wrongdoing, allowed to talk to an attorney, or subject to

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GEN. ACCOUNTING OFFICE, GAO/NSAIAD 95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS 3, 9 (1995); United States Navy Fact File: Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011)).

97. *See* Boumediene v. Bush, 553 U.S. 723, 826, 801 (Roberts, C.J., dissenting).

98. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); Rasul v. Bush, 542 U.S. 466, 470 (2004).

99. *Rasul*, 542 U.S. at 470–73.

100. *See generally Hamdi*, 542 U.S. 507.

any court or tribunal.[101] These cases were the product of claims raised since 2002. A significant result of these legal disputes was that base detentions came under greater public and political scrutiny. Before then, detainee numbers and identities were unknown. After *Rasul* and *Hamdi*, the Pentagon released these numbers and identities. This release was the result of detainee habeas litigation, media reports, and Freedom of Information Act (FOIA) requests made by the Associated Press.[102] On March 3, 2006, the Pentagon first disclosed the names of the detainees.[103]

Focused on a role for courts, *Rasul* began carving judicial review of base detentions in the form of habeas proceedings.[104] Its holdings focused on courts having the ability to review detentions at the base, with alien detainees entitled to file habeas petitions for their release.[105] The Supreme Court held that the federal habeas corpus statute "confers on the District Court jurisdiction to hear [detainees'] habeas corpus challenges to the legality of their detention" on the base.[106] This was permitted even though the detainees were aliens in military custody.[107]

Rasul began to examine the location of detention and address the legal uncertainty of Guantánamo's status—outside American sovereignty but within exclusive American control. The opinion of the Court initially noted that the lease agreement with Cuba from February 1903 affirms that the United States has "complete jurisdiction and control" over the base.[108] The habeas statute confers jurisdiction to persons detained "within 'the territorial jurisdiction' of the United States."[109] These, read together, negate the presumption in American law that statutes do not operate extraterritorially. The lease and the statute both refer to jurisdiction, the former at the base and the latter to persons. In oral argument, the Government conceded that a federal court would have jurisdiction over

101. *Rasul*, 542 U.S. at 471–72.

102. *See* Associated Press v. U.S. Dep't of Def., No. 05-cv-03941-JSR (S.D.N.Y. Apr. 19, 2005); Associated Press v. U.S. Dep't of Def., No. 05-cv-05468-JSR (S.D.N.Y. June 9, 2005); Associated Press v. U.S. Dep't of Def., No. 06-cv-01939-JSR (S.D.N.Y. Mar. 13, 2006).

103. *See* Associated Press, *U.S. Reveals Identities of Detainees*, N.Y. TIMES, Mar. 4, 2006.

104. *Rasul*, 542 U.S. at 470.

105. *See id.* at 484-85.

106. *Id.* at 484.

107. *Id.* at 484–86.

108. *Id.* at 480.

109. *Id.* (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

claims raised by American citizens at the base.[110] The *Rasul* court emphasized control and occupation of the base as motivations for checking executive detention authority.[111]

With prudential reasoning, Justice Kennedy's concurring opinion suggested how American base occupation is subject to significant legal norms. It highlighted the long-term aspects of American presence, stating that the base "is in every practical respect a United States territory."[112] This reasoning runs contrary to claims that a lack of sovereignty, as indicated in the 1903 base lease agreement, required denying habeas on the base. Justice Kennedy noted that, in a formal sense, the United States lacks sovereignty, but that this "is no ordinary lease" and "[w]hat matters is the unchallenged and indefinite control."[113] The likelihood of indefinite detention on Guantánamo without any trial or proceedings weakened the Executive Branch's need for deference. Deference was justified if these detentions were closer, physically and temporally, to military hostilities.[114]

A dissenting opinion emphasizes formal versus prudential legal reasoning. Justice Scalia argued that, because the United States lacked sovereignty over Guantánamo, habeas cannot be extended to alien detainees.[115] This formal approach to determining habeas jurisdiction emphasized sovereignty in order to find that courts cannot review detentions. A functional or prudential perspective finds that there can be court review, and it stresses the practical means the military has to administer habeas.

The same day as *Rasul*, the Supreme Court announced its decision in *Hamdi*, which focused on military detention authority. This case resulted in two important holdings: one regarding executive detention authority and the other regarding procedural rights for detainees.[116] A plurality of the court upheld the President's authority for military detention in the conflict.[117] It explained that detention is legal for enemy combatants as authorized by Congress in the AUMF from September 14, 2001. The Court nonetheless

110. *Id.* at 481 (citing Transcript of Oral Argument at 27, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334)).

111. *Id.*

112. *Id.* at 487 (Kennedy, J., concurring).

113. *Id.*

114. *See id.* at 488.

115. *Id.* at 488-89 (Scalia, J., dissenting).

116. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

117. *Id.* at 509.

required that the detained should "be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[118] The opinion is presented as preventing one branch of government from having too much power, even during military conflict, and assuring these roles when individual liberties are at stake.[119] The plurality opinion—plus Justice Thomas's dissent—held that the Executive Branch had detention authority, while the plurality opinion was joined by two justices to hold that detainees were entitled to due process and could challenge their combatant classification.[120] As such, five justices held that the Executive Branch had detention authority, and six held that detainees possessed procedural rights. Aside from this, the opinions were quite fractured. These doctrinal fissures reappeared in *Doe v. Mattis* over a decade later, regarding citizen detention overseas, the Non Detention Act, whether the AUMF satisfies this Act, and laws of war as applied to American citizens.[121] Likewise, these multiple opinions raise broader issues such as inherent executive authority to detain and the suspension of habeas.

The case involved Yaser Esam Hamdi, an American citizen by birth, who had been captured in Afghanistan and initially detained on Guantánamo.[122] Upon confirming that Hamdi was a citizen born in Louisiana, the military transferred him to a naval brig off Norfolk, Virginia. There, he was put into solitary confinement without access to an attorney. The Government argued that this detention was legal because he was an "enemy combatant."[123] It claimed that the Executive Branch alone could classify who was an "enemy combatant" and that this classification did not require any determination by a court or tribunal.[124]

In reference to the detention authority, Justice O'Connor's plurality opinion pronounced a series of significant limitations on the Executive Branch's discretion to detain. Four justices supported this opinion. First, the opinion affirmed that combatants could be subject to military detentions. It stated that "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and

118. *Id.*
119. *See id.* at 536.
120. *Id.* at 525, 579.
121. *See infra* Section II.C.
122. *Hamdi*, 542 U.S. at 509-11.
123. *Id.* at 510.
124. *Id.* at 516–17.

practice,' are 'important incident[s] of war.'"[125] This power was "clearly and unmistakably" authorized by Congress in the AUMF, passed in response to September 11 attacks.[126] Second, it provided a limited, but working, classification of who could be detained. It left for future courts the task of determining the full scope of the term "enemy combatants."[127] For the time, it explained that those who could be detained included persons "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict [there] against the United States."[128] Importantly, Hamdi was caught in Afghanistan supporting the Taliban. The *Hamdi* decision did not specify if detention was legal for those more removed from actual hostilities, the battlefield, or enemy membership. Third, the Court reasoned that detention was illegal if it was indefinite. Referring to multilateral treaties, including the Third Geneva Convention, the Court explained that "it is a clearly established principle of the law of war that detention may last no longer than active hostilities."[129] It added that the United States was "not authorized" to conduct indefinite detention for interrogation.[130] Fourth, it clarified that detention of combatants with the aim of preventing a return to battle was authorized so long as "United States troops are still involved in active combat in Afghanistan."[131]

These findings from the plurality opinion in *Hamdi* laid down important restrictions on executive power by affirming the source of detention authority, who may be detained, and how long they could be detained. The Court confirmed that judicial oversight, laws of war, and international law limited detention policies, despite the Government's view. The Government had argued that its authority to detain evaded judicial oversight and was sourced in the President's military authority and not in congressional authorization.[132]

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125. *Id.* at 518 (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30, 63 (1942)).

126. *Id.* at 519.

127. *Id.* at 516.

128. *Id.* at 526. Chief Justice Rehnquist, and Justices Kennedy and Breyer joined this part. *Id.* at 509.

129. *Id.* at 520 (citing Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817; Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2301).

130. *Id.* at 521.

131. *Id.*

132. *Id.* at 516-17 (stating Government argues no congressional authorization is needed to detain because "the Executive [Branch] possesses plenary authority to detain pursuant to

In reference to how detentions could be conducted, the plurality of the Court rebuked the idea that "enemy combatants" had no rights to hearings to challenge their status. Referring to the Fifth Amendment, the plurality found that a due process balancing test applied. Under this test, the detainee's "elemental" interest in physical liberty would be weighed against the Government's "weighty and sensitive" interest in conducting war.[133] The detainee's interest includes notice of "the factual basis for his classification" that mandates detention and a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[134] The process also includes detainee access to counsel, procedures "tailored" to meet the Executive Branch's needs during "ongoing military conflict," admission of hearsay evidence, and a rebuttable "presumption in favor of the Government's evidence."[135] The opinion added that military tribunals could meet these standards. This process is not required for those initially captured on the battlefield, but "only when the determination is made to *continue* to hold those who have been seized."[136] The opinion suggested that there was a legal impact to detentions distanced from the site of military conflict and emphasized that physical distance and the duration of detention limit what deference courts would afford military detentions by the Executive Branch.

Aside from the Court's two central rulings, the divided opinions did not agree on various factors. Justice Thomas's dissent authorized detention reaching a similar conclusion as the majority, to reach sufficient votes to reach a plurality of the court.[137] But, Thomas found a far broader source of this power—the President's unitary authority as Commander-in-Chief and head of foreign relations.[138] Justice Thomas argued that the AUMF authorizes military conflict, which includes military detention.[139] The opinion noted that courts should defer to this executive authority and not

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Article II of the Constitution"); *id.* at 510–11 (stating Government further argues that "enemy combatant" status justifies indefinite detention without formal charges or proceedings until the executive determines access to an attorney or further process is warranted).

133. *Id.* at 529, 531.
134. *Id.* at 533.
135. *Id.* at 533-34.
136. *Id.*
137. *Id.* at 579 (Thomas, J., dissenting).
138. *Id.*
139. *Id.* at 579-80.

limit detention by the Geneva Conventions or by balancing procedural challenges with compelling security interests.[140]

Justice Souter's opinion concurred in judgment, while dissenting in part and concurring in part.[141] It observed many of the detention-authority questions, raised by Doe's habeas in 2018 and identified by the court of appeals, as necessitating more fact-finding.[142] Justice Souter noted that the Non Detention Act prohibits detention for citizens without a clear statement from Congress.[143] The AUMF is not such a statement because it does not mention detention but merely authorizes military conflict in response to the September 11 attacks.[144] Moreover, because Hamdi's detention does not comply with the Third Geneva Convention, it does not meet laws-of-war requirements.[145] In sum, Justice Souter argued that the Executive Branch does not have this authority to detain enemy combatants, based on the requirement for clear congressional statements, citizen rights, and protections in international law.

Justice Scalia's dissenting opinion also stressed the rights of citizens but did so by noting the constitutional harms of indefinite detention.[146] It argued that the detainee should be charged or released and, if not, then Congress was required to suspend habeas in order to keep Hamdi detained.[147] The opinion commented that detention that conforms to the laws of war does not necessarily make detention of a citizen legal.[148] The opinion prioritizes the protections afforded to citizens, noting that laws of war are not applicable to Americans.[149] While Justice Souter emphasized Congress's detention authorization and international laws-of-war protections, Justice Scalia noted that the Constitution does not authorize indefinite detention or detention without charge and that a habeas suspension is needed to continue such detention.

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140. *Id.* at 579, 587.

141. *Hamdi*, 542 U.S. at 542 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

142. *See infra* Sections II.A, II.B.

143. *Hamdi*, 542 U.S. at 542 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

144. *Id.* at 547, 549-51.

145. *Id.* at 549, 553.

146. *Id.* at 554-55 (Scalia, J., dissenting).

147. *Id.* at 554.

148. *Id.* at 564.

149. *See id.* at 554.

C. The Constitution Extends Habeas Overseas to Alien Detainees (More Answers for Where and How to Detain)

On June 10, 2008, in *Boumediene*, the Supreme Court issued its most important decision on Guantánamo detentions, ruling that the Constitution's Suspension Clause extends to the base.[150] By doing this, the Court made major judicial pronouncements regarding the extraterritorial reach of the Constitution and the rights afforded to alien detainees captured during military conflict. The Court's decision directly answered questions about whether norms in constitutional law could continue to be suspended at Guantánamo. For habeas privileges, the answer was "no." Specifically, *Boumediene* asked whether base detainees benefit from the writ of habeas, which is guaranteed in the Constitution's Suspension Clause.[151] The Court found that the writ of habeas did apply to the base.[152]

The Court acknowledged the novelty of its holding, with Guantánamo outside American sovereignty and noncitizens entitled to constitutional protections overseas.[153] Circumstances at the base motivated this reasoning, including detainees being held by Executive Branch Order during one of "the longest wars in American history" on territory technically not part of, but "under complete and total control" of the United States.[154] The Court found that extending habeas to the base did not pose an "impracticable or anomalous" problem.[155] It used this standard, regarding what could not be achieved in practical terms, to determine when legal protections were required overseas. The Court held that constitutional norms such as habeas did extend to Guantánamo. It also found that deference to the political branches is not justified by a lack of sovereignty on the base, executive military-detention choices, or the alienage of detainees. The *Boumediene* decision was seen as finally guaranteeing detainees their day in court to challenge detention and to ask for release. For many observers, it confirmed that the Constitution followed the American flag that flew over an American base at Guantánamo.

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150. Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (referring to the Suspension Clause in the U.S. Constitution, Article I, Section 9, Clause 2).

151. *Id.*

152. *Id.* at 732.

153. *Id.* at 770–71.

154. *Id.* at 771.

155. *Id.* at 769–70 (referring to the test in Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)).

Boumediene's reasoning focused on broader constitutional law themes. The opinion of the Court essentially justified the rulings by arguing that constitutional values were implicit in individual-right protections and that each governmental branch, including the judiciary, has an influential role when national security is threatened. The opinion explained that "[t]he laws and Constitution are designed to . . . remain in force in extraordinary times" and that "[l]iberty and security can be reconciled" with habeas corpus, which is "a right of first importance."[156] The Court directly addressed the suspension of the Constitution at Guantánamo. It stated that the Constitution cannot be turned off at this location, by the President or Congress, especially since detentions were in their sixth year. *Boumediene* emphasized separation-of-power concepts to include Guantánamo within the protections provided by American law, specifically in the form of the Constitution's habeas guarantees.[157]

The opinion noted that the Constitution "cannot be contracted away"[158] on Guantánamo, referencing the Government's argument that the Constitution has no effect on noncitizens on the base. The Court argued that the President and Congress have the power to "acquire, dispose of, and govern territory" but not "to decide when and where [the Constitution's] terms apply." The political branches cannot have the power "to switch the Constitution on or off at will." If they did, it would be a "striking anomaly" in a government made up of three branches. It would mean that Congress and the President, and not the Supreme Court, decide "what the law is."

The Court's reasoning for why habeas is required on the base focused on how the suspension of habeas impacts the separation of power between the judiciary, Congress, and the Executive Branch. Detentions, an overseas base, and habeas challenges became questions about the different roles for the branches of government. The Court did not view this extraterritorial issue as a question about legal obligations required because of territory or an individual's alienage or citizenship. Instead, it saw habeas issues on the base as a separation-of-power matter.[159] This inquiry squarely asked about the political justification for suspending a legal norm. The Government argued that suspension was required because courts must defer to the military detention authority, especially in extraterritorial matters. The

156. *Id.* at 798.

157. *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 966–68 (2011).

158. *Boumediene*, 553 U.S. at 765.

159. *Id.* at 746.

Court's inquiry essentially asked why legal anomaly may continue. Legal anomalies require the suspension of legal norms at a location due to political need. Referring to separation of powers, the Court emphasized that the application of a norm is required. In this case, it was habeas.

Separation-of-powers inquiry has specific implications for habeas review. The Court in *Boumediene* stated that habeas is "an indispensable mechanism for monitoring separation of powers."[160] Deciding when to apply it should not be "subject to manipulation by those whose power it is designed to restrain."[161] In other words, Congress and the President should not determine when habeas applies to the base detentions because habeas is meant to restrain their detention power. The Court noted that deference should be afforded to the political branches so they can respond to national-security threats, such as by utilizing the power to detain in military conflict.[162] The Court explained the importance of habeas, describing the "freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[163] The power to challenge detention by the Executive Branch is not "undermine[d]," but "vindicated," when confirmed by the judicial branch.[164]

The Court also prioritized pragmatic concerns to decide when constitutional norms apply overseas. It focused on practical issues, asking what kind of control the government exercises. Legal observers have called this a "prudential," "pragmatic," and "functionalist approach."[165] The Court contrasted a formalist interpretation, which focuses on how overseas authority is defined and disregards how authority is actually exercised. A formalist perspective, which the Government and dissenting opinions argued for, would suggest that constitutional checks do not apply because

160. *Id.* at 765.
161. *Id.* at 766.
162. *Id.* at 796-97.
163. *Id.* at 797.
164. *Id.*
165. See Al Bahlul v. United States, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part); (describing Boumediene as a functional versus formalistic test); Kiyemba v Obama, 561 F.3d 524 (emphasizing prudential concerns and referring to Boumediene, 128 S. Ct. at 2267); Hernandez Lopez, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* 36 at 175; Saurav Ghosh, *Boumediene Applied Badly: The Extraterritorial Constitution After Al Maqaleh v. Gates*, 64 STAN. L. REV. 510 (2012); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 287 (2009).

Guantánamo is not within American sovereignty.[166] Cuba has sovereignty, and the United States is leasing the territory without sovereign authority. This formalist perspective thus emphasizes that these legal checks would interfere with Cuban sovereignty.[167]

Focusing on control versus formal sovereignty became highly significant for *Boumediene*. Examining practical control, the Court was able to relate American authority over the base with concerns relevant to extending habeas. The Court explained that the United States has exercised "plenary control" over base territory since 1898[168] without any foreseeable change or limitation, and Cuba exercises no influence over the territory.[169] Under the February 1903 lease agreement, "the United States is, for all practical purpose, answerable to no other sovereign for its acts on the base."[170] The Court emphasized how practical concerns determined when habeas did or did not apply overseas.[171] These concerns include the desire to avoid conflicting judgments by courts and the practical inability to enforce a judgment because of distance.[172] At Guantánamo, these factors did not exist. There was no reason to disobey a federal court order on the base.[173] The Court stated "no Cuban court has jurisdiction" over these issues.[174] Ultimately, no laws, other than those of the United States, apply to the base.[175]

These prudential concerns reflect how past Supreme Court decisions resolved ambiguities about the Constitution's extraterritorial reach. In reaching its decision in Boumediene, the Court applied analysis from *Reid v. Covert*.[176] The standard developed in *Reid* was whether a court's

166. *Boumediene*, 553 U.S. at 765. The government argued "that the Constitution had no effect [on the base], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term." *Id.*

167. *Id.* at 834–35, 835 n.3 (Scalia, J., dissenting); *see also* Rasul v. Bush, 542 U.S. 466, 500–01 (2004) (Scalia, J., dissenting).

168. *Boumediene*, 553 U.S. at 765.

169. *Id.* at 770 (explaining that "[n]o Cuban court has jurisdiction over" the base).

170. *Id.*

171. *Id.* at 748–52 (describing "prudential concerns" in applying the writ in historic Scotland or Hanover).

172. *Id.* at 750 (referring to concerns of "comity and the orderly administration" in habeas jurisdiction from *Munaf v. Geren*, 553 U.S. 674, 693 (2008)).

173. *Id.* at 751.

174. *Id.*

175. *Id.*

176. *Id.* at 759–62 (citing Reid v. Covert, 354 U.S. 1, 74, 77 (1957)) (describing how *Reid* rejected a "rigid and abstract rule" when determining where constitutional protections

enforcement of a constitutional provision would be "impracticable and anomalous."[177] These "practical considerations" permitted the Court to distinguish *Johnson v. Eisentrager*, precedent viewed by the Government and the dissenting opinions as prohibiting habeas application in non-sovereign territory.[178] The Court also explained that a formalist interpretation would require "a complete repudiation of the *Insular Cases*' . . . functional approach" to legal questions about the extraterritorial reach of the Constitution.[179]

Building on this practical reading, the Court offered three factors to determine whether Guantánamo detainees benefit from the writ of habeas in the Constitution's Suspension Clause: (1) the detainee's citizenship and status, coupled with the "adequacy of the process" regarding how this status was determined; (2) the nature of the apprehension and detention sites; and (3) "practical obstacles inherent" in the detainee benefiting from the writ.[180] This three-point test devised in *Boumediene* has guided American courts since then to decide when habeas extends to places where the United States has exercised overseas authority, such as in Afghanistan.[181]

For "practical obstacles," the Court stated there are few such barriers to applying habeas on Guantánamo. The Court acknowledged that additional expenditures and resources would be needed to comply with habeas proceedings on Guantánamo, but military forces and civil courts have functioned simultaneously. Likewise, the base has served functions beyond military operations, such as housing migrants, refugees, long-term residents, and workers.[182] By emphasizing these prudential aspects, the Court identified factual elements specific to base detention and American authority to begin requiring the application of legal norms on the base.

The decision offered significant illumination regarding the Constitution's role at a location characterized by legal ambiguities. It substantially

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extend).

177. *Id.* at 759–60 (citing *Reid*, 354 U.S. at 74-75) (Harlan, J., concurring in the result).

178. *Id.* at 762 (citing Johnson v. Eisentrager, 339 U.S. 763, 776 (1950)). In *Eisentrager*, the Court determined enemy aliens detained in Germany had no access to habeas because they were never within "territory over which the United States is sovereign." *Eisentrager*, 339 U.S. at 778.

179. *Boumediene*, 553 U.S. at 764.

180. *Id.* at 766.

181. *See, e.g.*, Al Maqaleh v. Gates, 605 F.3d 84, 97-98 (D.C. Cir. 2010) (finding habeas does not extend to detention in Afghanistan but also finding that the citizenship and status factor did side with non-Afghan detainees held in Afghanistan).

182. *Boumediene*, 553 U.S. at 770.

impacted the law and policy of detentions. District courts secured the ability to review detainee habeas petitions. Detainees could challenge their detention before an independent judge. Congress and the President were required to guarantee court access. On the base, military officials have had to protect the habeas rights of the detainees, in the form of attorney access and the ability to file habeas petitions.

D. Anomaly Adapts to Block Habeas and Facilitate Detentions

Despite repeated constitutional holdings in the Guantánamo Cases, American law adapted to encourage overseas detentions. Extraterritorial anomalies adapted even after the Supreme Court confirmed that constitutional habeas extends to the base. They evolved to shield the actions of the President and Congress on Guantánamo from judicial intervention, over a decade and a half after detentions began. This process modified legal ambivalences on the base to the constitutional holdings. The Supreme Court, in the Guantánamo Cases, took great strides to clarify that the legal protections in the Constitution, laws of war, and procedural due process apply to military detentions on the base. Since then, the judiciary has determined that the political branches possess almost unfettered authority at this overseas location.[183] The subsequent decisions have permitted continued detentions, fueling new forms of legal anomaly on the base. Three observations stand out regarding how legal norms continue to be suspended at Guantánamo: (1) judicial habeas powers have been weakened; (2) congressional and presidential politics keep detainees there, fueling a need for anomaly; and (3) these trends support American authority overseas separated from the Constitution.

First, the overseas habeas powers have been restricted despite the broad pronouncements in *Boumediene*. After that, courts have been unable to enforce habeas release orders to bring base detainees into the United States and have similarly been unable to stop their transfer from the base.[184] Instead, habeas courts deferred to executive detention justifications. The deferential nature of this jurisprudence grows out of the ambivalent findings of the court in *Boumediene*. There, the Supreme Court preserved the judiciary's jurisdiction on the base with habeas review, but not much more

183. *See generally* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551 (2013).

184. These limited judicial powers are evident in *Kiyemba I*, *II*, and *III* decisions, see generally Ernesto Hernández-López, Kiyemba*, Guantánamo, and Immigration Law, supra* note 17.

was protected for detainees.[185] The substantive content of this law, used in habeas proceedings, was left explicitly undecided. The Supreme Court stated that it "does not address the content of the law that governs" detention.[186] In other words, detainees and the base benefit from the Constitution's protections and access to courts, but the court explicitly avoided commenting on what law governs these detentions or habeas proceedings.

The ambiguous underpinning of *Boumediene*'s holding became apparent when habeas courts addressed what to do about detainees who were found not to be enemy combatants and their detentions no longer were legally justified. The issue developed after seventeen Uighur detainees had their habeas petitions approved, and a district court ordered them released into the United States, in August of 2008.[187]

In July of 2002, twenty-two Uighur detainees were brought to Guantánamo.[188] Uighurs are a Turkic population who practice Islam in the Xianging region of China. Uighur separatists have violently resisted Chinese rule, with some receiving training Afghanistan before September 2011. The Uighur detainees were captured in Pakistan and suspected of receiving terrorism training in Afghanistan.[189] The United States paid a bounty to have them turned over.[190] Before *Boumediene*, courts had found that they were not enemy combatants and their detention was unlawful.[191]

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185. *Boumediene*, 553 U.S. at 795.

186. Id. at 798.

187. *In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 34, 43 (D.D.C. 2008), *rev'd sub nom.* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2010), *vacated*, 559 U.S. 131 (2010).

188. For this history of how these detainees arrived at Guantánamo, see Linda Greenhouse, *Saved by the Swiss*, N.Y. TIMES: OPINIONATOR (Feb. 11, 2010), http://opinionator.blogs.nytimes.com/2010/02/11/saved-by-the-swiss/; Caprice L. Roberts, *Rights, Remedies, & Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1 (2009); *Citizens of China*, N.Y. TIMES: GUANTÁNAMO DOCKET, https://www.nytimes.com/interactive/projects/guantanamo/country/china (last visited Mar. 20, 2019).

189. Before *Boumediene*, the Government had conceded that all of the Uighur detainees were not unlawful enemy combatants. *See In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d at 35. For the most developed discussion of their reasons for leaving China, stay and training at a Uighur camp in Afghanistan, flight from Afghanistan after the U.S. military campaign, and capture in Pakistan in December 2008, see Parhat v. Gates, 532 F.3d 834, 837–38, 843–44 (D.C. Cir. 2008).

190. *See* Greenhouse, *supra* note 188.

191. *See Parhat*, 532 F.3d at 850-51.

Courts confirmed that they did not take up arms or have any plans to attack the United States or its allies.[192] Between 2008 and 2010, seventeen of these Uighur detainees accepted resettlement options in Albania, Bermuda, Palau, or Switzerland.[193] In 2010, the remaining five received offers to relocate in Palau or Switzerland, but they chose not to accept these offers. Many of these legal issues remain confidential and under seal due to their diplomatic sensitivity. Foreign countries were resistant to receive these detainees because China has exerted strong diplomatic pressure to deny them resettlement offers.[194] These facts resulted in three sets of cases, named *Kiyemba v. Obama*,[195] addressing aspects of how to effectuate a habeas release order on Guantánamo.

The issue of releasing base detainees through habeas court order initially developed in the cases *Kiyemba v. Obama I* and *Kiyemba v. Obama III*. These decisions held that courts have limited, almost non-existent, powers to order the remedy of release on the base.[196] In 2009, *Kiyemba I* considered whether courts may order release into the United States for base detainees when they cannot be relocated home or to a third country.[197] *Kiyemba I* held that the detainees could not be ordered into the United States because immigration law doctrine bars their entry and courts do not have this power at an extraterritorial location.[198] After the Supreme Court granted and then denied certiorari review in 2009 and 2010 respectively, this decision was reinstated in *Kiyemba III*.

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192. *See id.*

193. *See* Letter from Elena Kagan, U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States (Feb. 19, 2010), https://www.pegc.us/Kiyemba_Merits/08-1234_gov_letter_brief_20100219.pdf.

194. China wanted the Uighurs returned to China. For descriptions of China's position, see generally Clifford Coonan, *Beijing Says 17 Released Guantánamo Uighurs Are Terrorists Who US Should Hand Back to China*, IRISH TIMES (June 12, 2009, 1:00 AM), https://www.irishtimes.com/news/beijing-says-17-released-guantánamo-uighurs-are-terrorists-who-us-should-hand-back-to-china-1.782316; Ritt Goldstein, *Is China Spying on Uighurs Abroad?*, CHRISTIAN SCI. MONITOR (July 14, 2009), https://www.csmonitor.com/World/Asia-Pacific/2009/0714/p06s12-woap.html.

195. *See generally* Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1023 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009); Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046 (D.C. Cir. 2010).

196. *Kiyemba I*, 555 F.3d at 1029; *Kiyemba II*, 561 F.3d at 516.

197. *Kiyemba I*, 555 F.3d at 1023.

198. *Id.* at 1029.

These cases show how habeas doctrine requires courts to defer to the executive and continue the detention because the political branches have plenary authority over immigration authority. *Kiyemba I* held that the judiciary cannot second-guess or review political questions regarding detainees' entry into the United States.[199] Deference is a product of a nation's right to exclude or admit foreigners. The opinion highlighted how constitutional norms can be avoided on the base. The *Kiyemba I* court stated that aliens do not possess due process rights, contained in the Constitution's Fifth Amendment, without property or presence in the United States.[200] For aliens, entering the United States is a privilege and not a right.[201] The terms of this privilege are political and thus cannot be reviewed by the judiciary.[202]

In 2010, in *Kiyemba III*, the court of appeals reinstated its judgment and opinion from *Kiyemba I*.[203] The court emphasized that Congress had spoken on the matter by prohibiting expenditures to relocate detainees into the United States. At this point, the court referred to early legislative efforts to prohibit detainee entry into the United States by barring the use of military funds for this purpose.[204] Setting an example for later, more expansive, and restrictive congressional legislation, the court interpreted military spending bills as effectively barring detainee relocation in the United States.[205] The doctrinal lesson from *Kiyemba I* and *III* is that, despite access to habeas proceedings, the base and detainees may be excluded from constitutional rights protections due to required deference, congressional legislation, and a location outside the United States. From this, habeas doctrine adapted to emphasize deference to the political branches, with court review approved for overseas petitioners but limited court powers. From a TWAIL perspective, this system allows for overseas imperial authority to function without judicial checks.

Another example of checked habeas developed simultaneously in *Kiyemba II* regarding the same detainees. The court in that case held that

199. *Id.* at 1028-29 (holding that the Judiciary does not have the power to intervene when the Executive Branch is continuing efforts to resettle the detainees).

200. *Id.* at 1026 (holding that district court language "suggest[s] that the court may have had . . . due process . . . in mind").

201. *Id.* at 1027.

202. *Id.* at 1026.

203. *Kiyemba III*, 605 F.3d 1046, 1047 (2010).

204. *Id.* at 1047-48.

205. *Id.* at 1048.

habeas did not entitle detainees to notice of their transfer to contest their relocation to countries that may torture or persecute them.[206] The detainees argued that notice was necessary because they would be tortured or persecuted if they were returned to China. The court held that habeas does not require this notice and that concerns for judicial deference precluded court inquiry into the Executive Branch's relocation efforts.

The reasoning behind the court's holding in *Kiyemba II*, that the judiciary cannot review issues involving torture to stop relocation, was that the issues are political. It noted that when the Executive Branch has declared a policy to refuse to transfer detainees to a country that likely will torture them, a "court may not second-guess [this] assessment."[207] These issues belong to the political branches and not to the judiciary.[208] The detainees argued that their claims derived from the Convention Against Torture, which prohibits their removal to a country where they may be tortured.[209] The court explained that it could review these claims only when there is a challenge to a final immigration removal order.[210] Because detainees were not in immigration proceedings, they could not use Convention claims to challenge a removal order.

The Supreme Court did not review the *Kiyemba II* issues. On a few opportunities, more than one justice dissented in the Court's denial of certiorari in these matters, when a Guantánamo detainee argued that habeas court powers could stop their transfer to other countries that would torture them. Three justices provided a dissenting opinion in the denial of certiorari in 2010 regarding a transfer bar for a detainee resettled in Algeria who feared torture there.[211] The next year, two Justices dissented on a similar denial of certiorari.[212]

The *Kiyemba* cases illustrate the pervasive legal ambiguity on the base—detainees are found to be illegally detained but have few constitutional

206. *Kiyemba II*, 561 F.3d 509, 516 (D.C. Cir. 2009).

207. *Id.* at 516.

208. *See id.* at 514.

209. *Id.* at 514–15 (referring to the G.A. Res. 40/128, at 2, Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 13, 1985), as implemented in 8 U.S.C. § 1231).

210. *Id.*

211. Mohammed v. Obama, 561 U.S. 1042 (2010) (mem.) (Breyer, J., Ginsburg, J., and Sotomayor, J., dissenting) (denying the detainee's petition to stay his transfer explaining the petition raises "important questions . . . not resolved" by *Munaf*).

212. Khadr v. Obama, 563 U.S. 1016 (2011) (mem.) (Breyer, J., and Sotomayor, J., dissenting).

rights thereafter. *Kiyemba I* and *III* generally held that the detainees are overseas and thus American law has limited effect. *Kiyemba II* held that the detainees have limited rights because they are not in the United States. In essence, their current location on a base, under neither American nor Cuban sovereignty, justified so much about detention for over a decade. At the end of 2013, the last three Uighur detainees left the base and were sent to Slovakia after earlier attempts to settle them in the United States and Costa Rica had failed due to political pressures, domestically and from China. A TWAIL reading of *Kiyemba* II finds that extraterritorial habeas is powerless to allow courts to stop detainee transfers. *Kiyemba II* effectively stops courts from enjoining detainees' release from the base, and *Kiyemba I* keeps them on the base. In TWAIL terms, after the Guantánamo Cases reinterpreted sovereignty in functional terms to affirm habeas on the base, courts later reasoned that detainees could not count on court powers to release them or to limit their transfer.

The D.C. Circuit also held that detainees in Afghanistan did not benefit from habeas court powers.[213] For Bagram detentions in Afghanistan, non-Afghan detainees were at one point found to benefit from habeas.[214] Finding that habeas did extend, the district court reasoned that the foreign detainees were taken to Afghanistan to avoid any rights protections, but eventually these foreign detainees were released.[215]

The second way legal norms are excluded on the American base is through political choices—from four Presidents and Congress.[216] Political efforts by multiple administrations and foreign governments to relocate detainees have failed to end the legal limbo. These controversies are typically presented as "the failure to close Guantánamo," by detention critics, or as needed policies in the War on Terror, by the Government and detention supporters. This Article argues that these challenges are the

213. Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010) (finding habeas does not extend to detention in Afghanistan but also finding that the citizenship and status factor did side with non-Afghan detainees held in Afghanistan).

214. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

215. *Id.* at 235.

216. The Trump administration has argued in court that detainees should remain on the base and that existing restrictions to their transfer are legal, see Presidential Executive Order on Protecting America Through Lawful Detention of Terrorists, January 30, 2018 https://www.whitehouse.gov/presidential-actions/presidential-executive-order-protecting-america-lawful-detention-terrorists/, see e.g. Brief for the Respondents in Opposition to Writ of Certiorari, Paracha v. Trump, No. 17-6853 (June 2018).

consequence of an anomalous presence on Guantánamo for over a century. After habeas courts were confirmed to have jurisdiction over the base, detainees there could not point to court powers to release them or stop their transfer. This policy effectively keeps the base and detainees mostly under the purview of the political branches and excluded from court powers. As such, the policy choices by Presidents and Congress became the most significant determinations keeping detainees on the base.

These ambivalences are negotiated between perceived political need and avoiding legal obligations. The apparent need is to continue detentions, while legal exclusions focus on limited judicial oversight and rights protections for detainees. Specifically, the President has restricted abilities to take detainees off the base, and Congress effectively requires detainees to stay on the base.[217] These developments all support an overarching decision to continue detentions on the base. Detainees remain prisoners of the law's unclear role on Guantánamo and the political choice to keep them detained. Legislation, executive action, and court rulings shield these choices and continue to separate Guantánamo from important legal norms. These include judicial power to order detainee release and similarly to stop their transfer despite concerns for torture overseas. But there is a lack of political will to close the detention center or move the detainees. This context paints a picture on how anomaly has adapted at Guantánamo.

As detentions continue with legal approval, the base symbolizes a state of permanent war and emergency, with judicial deference and political choices overshadowing the constitutional checks affirmed in the Guantánamo Cases. Since 2008, American law's role on the base reflects what Mary Dudziak describes as "wartime."[218] Contrasted with the notion of peacetime, wartime is the permanence of war in the United States and how it endures, not just as an exception to peace.[219] Dudziak describes how, since the Cold War, the United States has been in a perpetual state of military conflict, which lacks any official declaration of war or formal surrender by an enemy.[220] This wartime is important because for most Americans their domestic lives are not as impacted by military conflicts as

217. *See generally* David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179 (2012); *Donald Trump Says Guantanamo Bay Releases Must End*, BBC NEWS: U.S. & CANADA (Jan. 3, 2017), https://www.bbc.com/news/world-us-canada-38502539.

218. MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 3 (2012).

219. *See id.* at 4.

220. *Id.* at 6.

they were before. This separation weakens the "democratic vigilance" Americans have on their leaders in Congress and in the White House to initiate, maintain, and end military conflict.[221] Dudziak explains how the War on Terror became the military response to the September 11 attacks,[222] and consequently war has become unbound in terms of time and space. This conflict is not against a precise enemy, nor does it transpire in a specific location. Guantánamo detentions reflect one extension of this reality. There, habeas powers are checked by deference to military or foreign relations need, detention pursuant to the 2001 AUMF with no determined end, and the choices of Congress and the President to keep detainees in custody. This Article asks if the legal justifications for wartime on Guantánamo, employed by courts and political leaders, will also frame detentions in the ISIS conflict.

The third lasting attribute of the Guantánamo Cases and their progeny is that they support extraterritorial authority separated from the Constitution. They directly examined legal anomalies overseas and effectively transformed them into questions about separation of powers and judicial deference. Courts addressed how detention policies suspended legal norms by taking advantage of control overseas and mitigated sovereignty on the base. In detention policies since 2002, the President and Congress decided to suspend legal norms on the base, the most important being detainees' access to court powers.[223] Between 2004 and 2008, the Supreme Court addressed these suspensions in a recurrent manner. Review of law on the base appears more incremental and repeated when this permissive doctrine includes appellate court decisions for hundreds of detainees since 2008 and certiorari denials by the Supreme Court. As recently as 2014 in the certiorari denials, Supreme Court justices suggested that the legality of base detentions should be questioned.

This result reflects a historic process of how anomaly, empires, and legal doctrine evolve. Accordingly, courts review extraterritorial controversies. Their decisions establish the legal contours of overseas authority in the form of empire. As defined by Michael Doyle, empires exert political authority overseas and limit local sovereignty at these locations.[224] Empires rely on legal ambiguities to govern overseas. These anomalies operate when legal norms are suspended at a location due to perceived political need, a

221. *See id.* at 136.
222. *See id.* at 100.
223. *See* Frakt, *supra* note 217, at 183-205.
224. *See* MICHAEL W. DOYLE, EMPIRES 45 (1986).

process defined by Gerald Neuman.[225] By repeatedly addressing these ambiguities in court disputes, empires justify their overseas authority. Historian Lauren Benton describes how, for centuries, European empires relied on these ambiguities and litigation about them.[226] Over time, the ambiguities justified extraterritorial governance. Litigation regarding these locations played a crucial role in extending geographic control. As doctrine developed in recurrent litigation, empires acquired political legitimacy to govern abroad. In this manner, law supports imperial authority beyond its domestic borders.

The Guantánamo Cases followed the ambivalent trend set by American law and policy on overseas territories. The historic question of "does the Constitution follow the flag?" was made current by asking how American law applies to base detentions. These cases did not fully exclude the base from constitutional protections, nor did they fully include it. Only certain provisions of the Constitution apply. This policy reflected places like Puerto Rico, where only parts of the Constitution apply. It is most evident in *Boumediene*, with its confirmation that only limited legal protections in the Constitution extend overseas. In *Boumediene*, the court referred to the *Insular Cases*, devised a century prior to retain overseas possessions, as justification for its reasoning. With rulings in the Guantánamo Cases, the political branches can later continue with detentions as long as detention policies conform to specific limits suggested in the opinions of the court. The political branches and subsequent litigation have had the task to determine which provisions of the Constitution apply overseas. But they benefit from the ambivalent legal doctrine facilitating detentions on the base.

In TWAIL terms, Guantánamo's contribution to the law of empire is that extraterritorial sovereignty is re-conceived. With this, habeas is approved overseas and detainees enjoy laws of war protections, while political determinations keep them on the base. As sovereignty no longer bars extending these privileges, the power of politics keeps detainees there indefinitely. *Kiyemba I* and *II* shackle habeas court powers. Congress bars detainee release, limiting the use of funds and the President's options. As such, three Presidents decided to keep them on the base and argued that conflicts pursuant to the 2001 AUMF justified military custody without any

225. Gerald Neuman refers to this as an anomalous zone, see *supra* note 76.

226. *See* BENTON, *supra* note 92, at 29–31, 33; LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900, at 2, 10 (2002).

conceivable end. In this light, base detentions—blessed with deference and political inaction—illustrate how wartime shapes the role courts play. This doctrine adapted an overseas base, acquired in an imperial war in 1898, to the law needed to conduct the War on Terror, which lacks any limits in terms of time, location, or enemies. For detainees brought to Cuba in 2002, captured mostly in Afghanistan or Pakistan, wartime is quite evident, even if usually forgotten in the United States. In sum, the empire's overseas territory supported the legal means to conduct an endless war.

II. An American Is Captured on the Outer Rims of Syria (A Disturbance Is Felt)

In September of 2017, the SDF encountered Doe at a screening point on an active battlefield in Syrian territory controlled by ISIS. He surrendered to the SDF, told them "that he was an American citizen, and asked to speak to [American] officials."[227] The SDF transferred him to U.S. military forces in the region.[228] They determined that Doe was an enemy combatant and detained him at a U.S. facility in Iraq from September 2017 to October 2018.[229] In litigation, the U.S. Government explained that this determination was based on evidence that Doe was a member or supporter of ISIS, specifically regarding the circumstances of his surrender, his statements, and proof of ISIS membership.[230] It added that the military "had not set out to capture [Doe]."[231] In court papers, the Government explained that it was deciding the appropriate course of action for Doe, either to criminally prosecute him, to continue detaining him as an enemy combatant, or to relinquish custody "to another sovereign with its own legitimate interest in him."[232] On June 6, 2018, the Government suggested a different course when it notified the district court that it intended to release Doe and return him to Syria where he had been captured over nine months prior.[233] For months, the Government and Doe negotiated a settlement. This would avoid releasing him in a warzone and stop his detention. On October 29, Doe was transferred to Bahrain where he could be free and keep his

227. Doe v. Mattis, 889 F.3d 745, 749 (D.C. Cir. 2018).

228. *Id.*

229. *Id.* at 747; Doe v. Mattis, 288 F. Supp. 3d 195, 197 (D.D.C. 2018).

230. *Doe*, 889 F.3d at 747; *Doe*, 288 F. Supp. 3d at 197-98.

231. Respondent's Factual Return, *supra* note 9, at 2.

232. *Id.*

233. For a description by Doe's lead attorney, see Hafetz, *supra* note 7. For an analysis of what the release proposal entails, see Ramirez & Robinson, *supra* note 7.

American citizenship, while pursuant to the settlement his American passport was canceled.[234]

Soon after Doe's capture, American courts became the vehicle to determine whether legal norms protect Doe or support deference to the Executive Branch's detention authority.[235] This issue is centrally concerned with the age-old question, "Does the Constitution follow the flag?"[236] In Doe's case, it was about whether a citizen is entitled to constitutional habeas protections in Iraq and whether constitutional norms check military activity in the ISIS conflict in Syria and Iraq. After October of 2017 the Government and Doe, represented by the ACLU, litigated a writ of habeas corpus petition to potentially release Doe or to determine that his detention is lawful. A year later, he was released without any court ruling on the legality of his detention.

At first, and for months, the military tried to deny Doe any access to an attorney.[237] This followed a similar pattern to when the military had tried to foreclose counsel access to asylum seekers and detainees on Guantanamo after 1991 and 2002, respectively.[238] For Doe, the Government argued in court that habeas privileges did not apply to military detention in Iraq. The

234. *See* ACLU Press Release, *supra* note 3; Savage, Callimachi & Schmitt, *supra* note 2.

235. For a description of the timeline involving the case's litigation, see ACLU Press Release, *supra* note 3.

236. The reference to the Constitution following the flag comes from 1901 popular commentary on the Supreme Court and politics, but is often applied to the legal relationship between the United States and overseas possessions. It serves a conceptual and doctrinal link between questions about Puerto Rico after 1898, the American military in World War II, and the War on Terror. *See generally* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); *see also* Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 36, at 175-76; Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 198-204 (2010); Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* 8-9 (UCLA Sch. of Law Pub. Law & Legal Theory Res. Paper Series, Research Paper No. 08-34, 2009).

237. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 54 (D.D.C. 2017) (stating that for "over three months" Doe remained "without access to counsel"); *see id.* at 60 (summarizing Government arguments that Doe does "not have the immediate right to meet with counsel").

238. For descriptions of litigation seeking attorney access to base detainees, see Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 197–98 (1998); Benjamin Wittes & Hannah Neprash, *The Story of the Guantánamo Cases: Habeas Corpus, the Reach of the Court, and the War on Terror*, *in* CONSTITUTIONAL LAW STORIES 513–54 (Michael C. Dorf ed., 2d ed. 2009).

Government effectively claimed that, in the allied fight against ISIS, the Constitution did not follow the flag. On December 23, 2017, the U.S. District Court for the District of Columbia found that the ACLU had standing to bring a habeas action on Doe's behalf.[239] One month later, the same court issued a preliminary injunction requiring that the Government provide seventy-two hours' notice before transferring Doe to another country.[240] The Government appealed this order in the U.S. Court of Appeals for the D.C. Circuit. Meanwhile the district court accepted brief submissions to review the merits regarding whether this detention was unlawful.[241]

The court's decision created two paths for Doe's habeas case. One path regarded whether a court can require the Government to provide notice before transferring him. This path mostly asked if courts have to defer to the diplomacy and military powers of the Executive Branch. It focused on procedural aspects of notice and the normative terrain of political versus judicial authority. This *Doe v. Mattis* path resulted in a few court decisions. On May 5, the court of appeals sided with Doe and affirmed the district court's orders.[242] Specifically the court affirmed the January 23 order that the Government provide seventy-two hours' notice before transferring Doe to any other country.[243] It also affirmed a second order from April 19 that barred the government from transferring Doe from U.S. custody.[244] The January 23 order mentioned two countries as potential transfer options, while the April 19 order was specific to only one country.[245] This country has been unnamed publicly but is widely believed to be Saudi Arabia.

Meanwhile, another litigation path was set to review whether the military could legally detain Doe. For these issues, this Article describes only the pleadings the parties submitted between January and March of 2018. The district court never convened any hearings regarding the merits of Doe's detention. The argumentation focused on several issues: (1) whether citizens can be detained without express congressional authorization, (2)

239. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 55 (D.D.C. 2017).

240. Doe v. Mattis, 288 F. Supp. 3d 195, 197 (D.D.C. 2018).

241. *See* Petitioner's Response to Respondent's Factual Return, *supra* note 13; Respondent's Factual Return, *supra* note 9.

242. Doe v. Mattis, 889 F.3d 745, 768 (D.C. Cir. 2018).

243. *Id.*

244. *Id.* at 747–49.

245. *Id.*

whether the ISIS conflict is included within the AUMFs from 2001 or 2002, and (3) whether Doe is an enemy combatant.[246]

A. Habeas Prudently Reaches an Armed Conflict Zone Overseas

Three months after detention, Doe's doctrinal saga began with confirmation that he was entitled to habeas court review by a district court.[247] Affirming that habeas privileges extend to a military detainee in Iraq, this court decision serves as the doctrinal link between Doe and the Guantánamo Cases. The most important aspect of the court's opinion is that it affirms that habeas applies overseas without emphasizing sovereignty. It does not examine whether the location is American territory or whether it occurs within American sovereignty.[248] Instead, habeas extends to what the court described as a "restricted U.S. military zone" and an "armed conflict zone."[249] Arguably, the court could have emphasized that this was not American territory, that there was no international agreement requiring that American forces answer to a court, or that deference is necessary to military and wartime need.

Like with *Boumediene*, the district court's prudential reasoning affirmed that a military detainee can use habeas proceedings to contest detention.[250] For Doe, the court began setting a legal course focused on where, when, and how habeas applies. For this court order, "when" regarded three months after detention began.[251] The court dismissed the Government's argument that three months fell within its "reasonable amount of time" to hold a detainee to determine their status before a court can begin habeas review.[252] The military had already determined that Doe was an enemy combatant during the three months of custody.[253] "Where" referred to Iraq, a "restricted U.S. military zone" where the ISIS conflict is ongoing.[254] For

246. *See infra* Section II.C.

247. ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 60 (D.D.C. 2017).

248. *Id.* at 60 (citing Boumediene v. Bush, 553 U.S. 723, 733-34 (2008)) (suggesting *Boumediene* only permits habeas relief after a "reasonable amount of time" to determine whether a detainee is an enemy combatant, stating that nothing in *Boumediene* "restrains" granting immediate access to the detainee, and finding habeas relief cannot be denied because of the Government argues it is "no easy matter").

249. *Id.* at 60, 55.

250. For a description of the prudential approach, see *supra* note 165.

251. *Id.* at 59.

252. *Id.* at 60.

253. *Id.*

254. *Id.*

"how" detention takes place, the court emphasized the military's experience with administering habeas.[255] The court balanced the detainee's interests and military need. It noted that the military "cannot strip the detainee of this right to habeas relief simply because . . . access 'would be no easy matter.'"[256] It added that the military is skilled in these difficulties and that the Government has provided no reason why "such inconvenience should outweigh the necessity of providing the detainee with the access to counsel he requested months ago."[257] This first habeas decision for Doe upheld that the writ does in fact apply overseas in a warzone and emphasized that prudential concerns outweigh arguments that habeas does not extend to overseas military detention.

In TWAIL terms, courts began to ask how American authority to conduct military detention overseas was impacted by detention of a citizen in a conflict that was not expressly authorized by Congress. This question could be answered from one of two general perspectives: (1) a role of habeas courts is to check unlawful detention, or (2) national security justifies deference to military and foreign relations choices. Compared to Guantánamo fifteen years earlier, these TWAIL questions no longer focused on aliens, territory under American control, or bars to extraterritorial habeas.

B. For Citizen Detainees, Transfers Require Prior Notice

A month later, legal wrangling over Doe's detention shifted to focus on citizen privileges and limits on court deference to military and foreign relations powers. News observers reported that the United States was trying to transfer Doe to another country.[258] Public records, however, had not named any specific country, but Saudi Arabia was the expected location as Doe is also a Saudi Arabian citizen.[259] The district court's next decision from January 23 set the course for the *Doe v. Mattis* path over issues about notice provided by the Government. This resulted in one court of appeals decision, emphasizing citizenship and the laws of war, to affirm that courts can require notice from the military before transferring a detainee.[260]

255. *Id.*
256. *Id.*
257. *Id.*
258. Savage, Schmitt & Goldman, *supra* note 10.
259. *Id.*
260. *See* Doe v. Mattis, 889 F.3d 745, 768 (D.C. Cir. 2018).

In its January 23 decision, the district court made two important holdings: (1) a positive statement, such as a treaty or statute, was required to legally transfer an American citizen to another state's custody, and (2) the government had to provide seventy-two hours' notice before transferring Doe.[261] These holdings effectively placed the burden on the Government and highlighted that Doe's American citizenship warranted increased protections. Similar to *Boumediene's* extraterritorial framework and the district court's prior perspective, its reasoning emphasized a prudential means to regulate military detention.[262]

Additionally, the district court noted a positive statement from Congress is needed in order to legally transfer citizens.[263] Here, a treaty or statute would meet these requirements. This rule comes from the Supreme Court case *Valentine v. United States ex rel. Neidecker*, which addressed the extradition of American citizens without a treaty.[264] In that case, the Supreme Court found that the Executive Branch lacks authority to transfer an American without a "treaty or legislative provision."[265] Referring to *Valentine*, the district court effectively looked to congressional support for the military's transfer plan. It also noted that the Executive Branch cannot easily transfer a citizen to a foreign country. For Doe, this reasoning was particularly significant because Saudi Arabia is arguably not foreign to him—he is a citizen of both Saudi Arabia and the United States.[266] The court could have emphasized his nexus to Saudi Arabia to distinguish *Valentine* requirements.

Importantly, noting factual aspects about Doe's status and his capture, the court distinguished Guantánamo-era precedents that defer to Executive Branch choices on detainee transfers.[267] Decided the same day as *Boumediene*, *Munaf v. Geren* found that habeas does extend to citizens in overseas military detention, but that if a foreign sovereign requested them

261. Doe v. Mattis, 288 F. Supp. 3d 195, 198, 201 (D.D.C. 2018).

262. *Id.* at 200.

263. *Id.* at 198.

264. 299 U.S. 5, 8 (1936).

265. *Id.*

266. For why Saudi Arabia is thought to be one of the countries where the United States intended to transfer Doe, see Robert Chesney, *Enjoining the Transfer of a US-Saudi Citizen to Saudi Arabia: A* Doe v. Mattis *Update and Initial Preview*, LAWFARE (Apr. 23, 2018, 7:00 AM), https://www.lawfareblog.com/enjoining-transfer-us-saudi-citizen-saudi-arabia-doe-v-mattis-update-and-initial-preview.

267. *Doe*, 288 F. Supp. 3d at 198–99.

for criminal prosecution, American courts could not block their transfer.[268] Specifically, the district court reasoned that Doe was not in any criminal prosecution by another country, so deference to the Executive Branch did not preclude blocking Doe's transfer.[269] It also reasoned[270] that since Doe was a citizen, it did not need to follow a similar ruling in *Kiyemba II*,[271] involving Guantánamo detainees who tried to challenge a transfer to China. For Doe, the district court emphasized *Valentine* reasoning rather than a *Munaf* perspective. Both cases speak to the issue of transferring citizens from American control, but neither case exactly addresses an alleged citizen enemy combatant held overseas. These two battling precedents characterized the *Doe v. Mattis* saga, with *Munaf* requiring deference to the executive and *Valentine* emphasizing citizen rights and congressional authorization.

The district court noted that prudential limits on the military justify a role for courts in national security matters.[272] Here, these functional checks were balancing citizen rights versus military need and requiring the Government to provide notice after negotiating any potential transfer. It did this to limit the need to defer to claims of military necessity, conflict zone, or diplomatic sensitivities. The Government argued for deference because the military was detaining Doe, detention was in an undisclosed location in Iraq, and it continued to negotiate with foreign states to potentially receive Doe.

Lastly, this decision framed a role for courts in national security by referring to War on Terror cases, which emphasize the significance of checks by the three branches. It quoted *Hamdi*, which held that the right to "contest the factual basis for . . . detention" is not outweighed by diplomatic interests evident in effectuating a transfer.[273] For the issue at hand, notice did not prevent the Government from conducting transfer negotiations; accordingly the equities did not balance with the Government's deference. Moreover, the court identified a public interest in a citizen's right to "freedom from arbitrary and unlawful restraint."[274]

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268. *See* Munaf v. Geren, 553 U.S. 674 (2008).
269. *Doe*, 288 F. Supp. 3d at 199.
270. *Id.*
271. *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009).
272. *Doe*, 288 F. Supp. 3d at 199-200.
273. *Id.* at 200 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004)).
274. *Id.* (quoting Boumediene v. Bush, 553 U.S. 723, 797 (2008)).

After the district court, these matters were placed squarely within legal debates about whether Congress authorized the ISIS conflict and consequently this detention. Even though Doe just sought to be released or prevent a transfer after months of detention, the appellate opinions emphasized separation of powers and executive deference. On May 7, 2018, the Court of Appeals for the D.C. Circuit affirmed the district court's decision and its two orders, siding with the detainee.[275] The court of appeals affirmed the order from January 23 requiring that the Government provide notice before transferring Doe and another order from April 19 stopping the Government from transferring him to a specific country.[276] In April, the Government provided the district court seventy-two hours' notice after it reached an agreement with an undisclosed country to accept Doe.[277] In simple doctrinal terms, the opinion of the court extended the *Valentine* rule to overseas military detention and highlighted protecting citizen rights. The dissenting judge emphasized *Munaf* and the need for executive deference for foreign relations and military matters.[278]

To adapt prior precedent to the case, the opinion relied on three significant judicial maneuvers, citizenship, contesting detention, and a prudential approach. Specifically, it noted that citizens cannot be forcibly transferred without prior positive authorization,[279] detainee transfers must comply with laws of wars and *Hamdi* protections for enemy combatants,[280] and prudential reasoning limits deference in foreign relations and military matters.[281] Accordingly, the court made important legal findings regarding who could be detained and how military detention was conducted. Put simply, a citizen cannot be transferred forcibly without a statute or treaty. But if the detention is pursuant to laws of wars, enemy-combatant detainees can be transferred in such a manner. In this military conflict, it was unclear if Doe was an enemy combatant under the AUMF from 2001 or 2002. Applying this reasoning, the court voiced skepticism as to whether the ISIS conflict was legally authorized.[282] Consequently, it directed the district

275. *Doe*, 889 F.3d at 748.
276. *Id.*
277. *Id.* at 749.
278. *Id.* at 768-69 (Henderson, J., dissenting).
279. *Id.* at 748.
280. *Id.* at 748-49.
281. *Id.* at 758.
282. *Id.*

court to review these issues. The court then questioned if Doe was an enemy combatant and could be detained without any charge.

First, citizen rights framed the court's ruling. The court approached the question of who can be transferred as a balance between a foreign state's interest in the transfer and the detainee citizen's rights.[283] The Government argued that the foreign state had an interest in Doe's relocation.[284] Like with Doe's name and any identification of the country, the specific interest was not publicly disclosed but was presented in closed-chamber proceedings.[285] Siding with Doe, the court found a citizen's rights more convincing than another state's interest in the transfer.[286] In this case, the detainee's status—a dual United States-Saudi Arabia citizen—was used to counter the need for deference because of the foreign state's interest. Such arguments would typically defer to notions of comity between states, sovereignty, foreign relations, or military need.[287] But the court explained that it knows of "no instance" in which "an American citizen [was] found in one foreign country and forcibly transferred . . . to the custody of another foreign country."[288]

The court reasoned that American citizenship guarantees significant rights for military detention and detainee transfers.[289] It noted that deference "[is] different" when an alleged enemy combatant is a citizen, "even [for] one seized on a foreign battlefield."[290] It held that citizens have a fundamental right to return to the United States.[291] This triggers the *Valentine* requirement that a transfer must be pursuant to a statute or treaty, which the United States does not have with the country that agreed to receive Doe.[292] Moreover, it found that dual citizens are entitled to these rights.[293] Arguably, the court could have concluded that Doe's Saudi Arabian citizenship provides a legal means to relocate him. But this would

283. *Id.* at 749.
284. *Id.* at 751.
285. *Id.* at 764–65, 768.
286. *Id.* at 749.
287. *Id.* at 748 (citing Munaf v. Geren, 553 U.S. 674 (2008); Wilson v. Girard, 354 U.S. 524 (1957)).
288. *Id.* at 748, 756.
289. *Id.* at 749.
290. *Id.*
291. *Id.* at 757 (quoting Mandoli v. Acheson, 344 U.S. 133, 139 (1952)).
292. *Id.* at 755, 757.
293. *Id.* at 757 (quoting Perkins v. Elg, 307 U.S. 325, 349 (1939) ("[A] dual citizen 'is entitled to all the rights and privileges of . . . citizenship.'")).

have effectively diluted the privileges of American citizenship for dual citizens.

Additionally, the court found that such rights are not lost when a citizen leaves the United States.[294] If that were the case, then citizens would be subject to forcible transfers when they are overseas. For Doe, the Government argued that his rights as a citizen were diminished since he voluntarily traveled to the Syrian conflict.[295] The court rejected this argument. It noted that a citizen's voluntary travel plus any foreign state's interest in the citizen would amount to a forcible transfer. At length, the judges in the court of appeals proceedings posed hypothetical questions about Americans who voluntarily traveled overseas and were then forcibly removed.[296] The Government noted that *Munaf* focused on deference to a foreign state's interest and a detainee's voluntary travel to Syria, both of which diminished protections for a citizen.[297] The court, however, rejected applying *Munaf's* reasoning because Doe was detained under the law of war and *Munaf* involved a criminal prosecution.[298] Doe, on the other hand, had not been charged with any crime and instead was detained pursuant to executive authority. To rely on *Munaf*'s bar to habeas, the court explained, would be to give the Executive Branch with unilateral authority to "dispose of a [citizen's] liberty," and this cannot be done "unless . . . [a] statute or treaty confers the power."[299] The precedents the Government referred to did not support such an "expansive vision of unilateral Executive power over . . . citizen[s]."[300] Importantly, the Executive Branch's power to detain Doe comes from the law of war.

Second, the laws of war provided a means to stop detainee transfer—siding with Doe. A significant doctrinal move in *Doe v. Mattis* was to place the dispute clearly within the law-of-war framework, also called the laws of armed conflict.[301] With this doctrine, the court began to chart a course for how military detention can be legally conducted when fighting ISIS. It referred to established War-on-Terror habeas doctrine and effectively

294. *Id.* at 755-56.
295. *See id.* at 752.
296. *Id.* at 756-57.
297. *Id.* at 755-56
298. *Id.* at 753, 757.
299. *Id.* at 755 (quoting Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936)).
300. *Id.* at 755–56.
301. *Id.* at 758-59.

required proof of conflict authorization by Congress.[302] If the court did not impose this requirement, it would be affording the Executive Branch greater deference and sanctioning a way to avoid a series of checks on how detainees are treated.

Specifically, the court found that, because it was not known whether Doe was an enemy combatant under the existing AUMF, which does not expressly refer to ISIS, the Government could not transfer him without meeting the *Valentine* requirements.[303] This forced the court to examine if the AUMF and enemy combatant status applied to Doe. Since he was a citizen, these two factors were needed to detain him absent statutory authority. Accordingly, the court of appeals noted this unsettled doctrinal terrain. The court notes that without any inquiries yet into the executive's war authority and enemy combatant classification, it sees "no basis to set aside" the injunctions baring Doe's forcible transfer.[304]

The court's concern for Congressional authorization addressed the Government's claim that it can transfer Doe to an ally in the ISIS conflict because he is an enemy combatant. Specifically, the court made two holdings regarding military detainee transfers: (1) proof is required that there is a legal authorization to use force against ISIS, and (2) Doe is afforded "an adequate opportunity to challenge the Executive[] [Branch] determination that he is an [ISIS] combatant."[305]Regarding these two points, *Hamdi* previously established that citizens could be detained, that detention could be for the conflict's duration, and that "due process demands some system for a citizen-detainee to refute his classification."[306] For *Hamdi* in 2004, the power to detain flowed from the 2001 AUMF.[307] This detention power was not so clear for a citizen detained in Iraq for the ISIS conflict over a decade later.

The court of appeals effectively withheld from deciding whether Doe's transfer as a military detainee was legal, because the legality of Doe's detention had not yet been addressed. It found that because two conditions had not been met, the Government could not transfer Doe under the laws of

302. *See id.*

303. *Id.* at 748-49 (finding no basis to set aside district court orders in the absence of inquiries on "legal authority for the Executive [Branch] to wage war" and an "opportunity for the citizen to contest" an enemy combatant determination).

304. *Id.* at 748-49.

305. *Id.* at 758.

306. *Id.* at 759 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004)).

307. *Id.* at 758.

war.[308] These conditions were congressional authorization for the ISIS conflict and a chance to rebut enemy combatant determination. At the time of the appeals court proceedings, the district court had not yet had hearings on the issue of the AUMF from 2001 or 2002 or on whether implied executive authority ensured that Doe's detention was legal. Referring to whether an AUMF authorized the conflict, and consequently permitted military detention, the court essentially sought a confirmation that Congress has authorized the conflict.[309]

The court made another doctrinal clarification specific to military detainee transfers. It held that the power to transfer a detainee stems from the Executive Branch's power to detain.[310] Highlighting the potential harms of any transfer, the court explained that any transfer of Doe would be irrevocable.[311] Transfer is different than the determination of whether detention is legal, since detention can be revoked but a transfer to another state cannot. The involuntary nature of Doe's proposed transfer distinguished it from *Kiyemba I* precedent. In that case, Guantánamo alien detainees had no right to request transfer to the United States and thus asked to be transferred to another country.[312]

Third, the court emphasized that practical factors minimize the need to defer to executive authority.[313] In this light, the court stepped away from the wide deference the government requested. This prudential reasoning effectively minimizes a line between court review and those circumstances requiring deference because they involve military or foreign relations matters. Executive Branch justifications for greater deference because of military need were rejected. The court quoted *Hamdi*'s refusal to exercise deference, reiterating that the military has "limited institutional capabilities" to administer detainee challenges.[314] Also citing *Hamdi*, it refuted that a good-faith determination by the military is enough. For citizen detainees, more is needed.[315] Similarly, the court noted that the military determination to transfer Doe was not a battlefield judgment since he had been held for months before the Government decided to transfer

308. *Id.* at 765.
309. *See id.* at 758-59.
310. *Id.* at 758.
311. *Id.* at 761.
312. *Id.* at 761–62.
313. *See id.* at 768.
314. *Id.* at 759 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004)).
315. *Id.* at 763 (citing *Hamdi*, 542 U.S. at 537).

him.[316] Moreover, Executive Branch arguments opposing the need to provide notice before the transfer were described as "blanket preapprovals" or "sort of carte[ ]blanche."[317] Notice was needed because the Government had made late requests and provided no information on where a citizen would end up.[318]

The court then emphasized the significance of *Hamdi's* prudential analysis and how it does not diminish military or war powers.[319] Here, the issue was not about battlefield concerns; instead, the focus was on transferring a detainee.[320] Executive Branch authority to wage war was "cabined" by *Hamdi*.[321] Accordingly, "warmaking" was "unlikely" to suffer any "dire impact."[322] This reasoning was justified by noting that it is "vital" not to "short shrift . . . the values" America holds dear or the privileges of citizenship.[323] For citizens, "'interest in being free from physical detention' is the 'most elemental of liberty interests.'"[324]

In TWAIL terms, *Doe v. Mattis* suggested important limits on overseas detention authority following the Guantánamo battles regarding territory and aliens. These restrictions include mandating that classifying a detainee as an enemy combatant requires force authorization from Congress and the opportunity for the detainee to contest the classification. *Hamdi*-based limits were significant and took a big step away from any finding that the executive can detain without statutory authority or with inherent powers. Similarly, such limits shaped how or when a transfer can happen. Citizenship and, perhaps more important, dual-citizenship, motivated much of the district court and court of appeals reasoning. Lastly, courts held that three months was far beyond a reasonable time to hold a military captive without charging him or providing any process to contest enemy-combatant status.[325] In sum, doctrinal clarifications for detainee treatment, transfer limitations, privileges for dual citizens, and time limits for battle captives should help guide detention operations in the future. Ultimately, they will likely help avoid legal black holes, as seen for the three months with Doe

316. *Id.* at 764.
317. *Id.* at 767–68.
318. *Id.* at 767.
319. *Id.* at 763-64.
320. *Id.* at 764.
321. *Id.* at 749.
322. *Id.* at 768.
323. *Id.*
324. *Id.* at 766 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004)).
325. *See, e.g.*, ACLU Found. v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017).

after September 2017 and for years on Guantánamo between 2002 and the *Hamdi* and *Rasul* decisions.

C. Avoiding Debates on if ISIS Detention is Legal (a.k.a. is ISIS the Same Enemy from 2001?)

Doe v. Mattis avoided a finding regarding whether an AUMF provided legal authority for the conflict against ISIS. This case never resulted in a ruling on whether the Executive Branch had the authority to detain Doe. And that was the most significant issue in the year-long ordeal—it could have imposed judicial checks on the ISIS conflict. There have also been congressional efforts and failed litigation attempts to limit this conflict.[326] The issues Doe raised—regarding ISIS, the AUMFs, and congressional authorization—motivated prior litigation, inspired congressional proposals, and will do the same in the future. With Doe, though, like with Guantánamo, the fact that there was an individual in military detention meant that litigation could potentially overcome bars posed by political question, standing, and mootness issues. A habeas petitioner argued that executive choices to detain resulted in someone suffering harms, that this harm would persist, and that a habeas court could stop them. The most significant aspect of this concerned whether military detention was a political choice blessed with deference or whether a habeas court could determine this custody's lawfulness. After 2004, the Guantánamo Cases confirmed habeas roles for courts over military detention, then for a large set of detainees, captured in an explicitly authorized conflict, and held on American controlled territory.[327] For Doe, he was the only detainee, and he was not on territory under American control. Accordingly, the detention debate focused on judicial roles and whether deference was due.

In the end, the district court never had merits proceedings, so there was no decision. One way to view the case is that the threat of a legal ruling motivated the Executive Branch to end detention by political means, with a

326. For a description of a recent AUMF proposal in Congress, see Goodman, *supra* note 19. Since the United States began its military campaign against ISIS in 2014, President Obama and members of Congress have proposed new AUMFs to authorize the conflict. For a discussion of authority claimed by President Obama for the conflict and the distinct proposals for new AUMFs, see WEED, *supra* note 22. A district court found that a government agent's claim that the conflict against ISIS was unconstitutional posed a political question. *See* Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016), *vacated sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018).

327. *See supra* Section I.A.

negotiated settlement and diplomacy. Importantly, during the pleadings stage, the Government stipulated many facts about Doe's capture, and his past confirmed links to ISIS. But Doe's filings only contested the authority to detain him.[328] The pleadings were limited to the law and did not address the facts from his past or capture. Doe's lawyers chose to focus only on the authority to detain and not how Doe specifically fit within any enemy combatant classification.

This Article describes these arguments about detention authority to map out the evolution of habeas doctrine after Guantánamo, Al Qaeda, and the Taliban.[329] Four general issues framed these questions in *Doe v. Mattis*: if Congress authorized detention, if deference is due to executive choices, if citizenship limits detention, and if detention authority is implied. Specifically, congressional authorization debates determine whether the AUMFs from 2001 or 2002 encompass ISIS as an enemy and thereby authorize detention of captives in this fight. Deference debates focus on whether military choices to detain or to classify enemies preclude any court involvement or whether habeas jurisdiction can review this detention. Debates on citizen detention examine if the Non Detention Act (NDA) prohibits detention without a congressional statute, if the AUMFs satisfy NDA requirements, and if citizens can be subjected to military detention. Issues of implied authority examine if inherent powers of the executive as Commander in Chief of the military provide detention authority and if congressional approval of spending on this conflict confirms executive detention authority.

First, debates about congressional authorization were shaped by the Government's functional reading of the AUMFs and by Doe's arguments that they referred to different circumstances and that their texts did not include ISIS. Put simply, a functional approach would favor the Government, while a focus on the AUMFs' text or circumstances would help Doe. The Government argued that the 2001 AUMF covered groups that were part of or substantially supported the September 11 attacks, and that this included associated forces.[330] ISIS fit within this description since

328. *See* Hafetz, *supra* note 8; Chesney, *supra* note 27.

329. This focuses on arguments presented by Doe. *See, e.g.*, Petitioner's Response to Respondent's Factual Return, *supra* note 13; Petitioner's Reply to Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14. It also focuses on the Government arguments. *See, e.g.*, Respondent's Factual Return, *supra* note 9; Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14.

330. *See* Respondent's Factual Return, *supra* note 9, at 12.

it originated from Al Qaeda in Iraq (AQI), a chain of continuity was uninterrupted, and ISIS continued the objectives of Al Qaeda.[331] This approach urged a functional reading of what the 2001 AUMF encompassed and how enemy classifications adapted over time.[332] For this reason, Congress authorized the use of force in 2001 and 2002, and habeas courts have supported this reading with detentions in Iraq, Guantánamo, and Afghanistan.[333] The Government similarly contended that Congress authorized a conflict in 2002 in Iraq to establish security and that this included fighting insurgents like ISIS in the region.[334] In other words, Congress authorized these conflicts with few limits. Even those few limits did not specify time for either AUMF or location for the 2001 AUMF, as such detention of those determined to be enemy combatants by the military is legal.

Focusing on the AUMF's duration and textual limits, Doe contended that ISIS was distinct from who Congress designated as enemies in 2001.[335] The time elapsed since the authorization and text of the resolution confirms this reading. ISIS is a wholly different group.[336] It did not exist in 2001 or in 2002. As such, Congress could not have designated it as an enemy or contemplated detention for its members a decade before its birth. ISIS's formation in 2014 represented a rupture from AQI,[337] breaking the link with any AUMF's scope from 2001 or 2002.

Specific to the 2002 AUMF, Doe argued that it was focused on ending Saddam Hussein's rule and maintaining security in Iraq and the region.[338] Congress did not contemplate enemy designation in the Syrian Civil War, which started in 2011, or ISIS formation, which started in 2014. An interesting argument not raised is that ISIS is often regarded as an offshoot of the Baathist political party, which held the most important positions in the Hussein dictatorship in Iraq.[339] In sum, Doe's contention that there was

331. *See id.* at 5-12 (describing ISIS history and its connections to Al Qaeda).

332. *See id.* at 17.

333. *See id.* at 12-17.

334. *See id.* at 20.

335. *See* Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 9, 13-28.

336. *See id.* at 14.

337. *See id.* at 14-15.

338. *See id.* at 29.

339. *See* Myriam Benraad, *How Saddam Hussein's Old Ideology May Have Contributed to the Modern Islamic State*, THE CONVERSATION (Feb. 18, 2018 1:12 PM EST), https://theconversation.com/how-saddam-husseins-old-ideology-may-have-contributed-to-

no detention authority argued that Congress's prior AUMFs did not mention ISIS and did not contemplate these detention circumstances (a fifteen-year time lapse since the last AUMF, new insurgent groups, and a Syrian Civil War).

Second, a contest between the executive's political authority and habeas court roles over military detention frames the deference debate. Here, the Government requested wide deference regarding its choices to: detain Doe; classify him as an enemy combatant; and decide what process, if any, was due to inform him of these designations and contest them.[340] Deference is not a clear switch, with courts entirely precluded or entitled to full scope of review. Instead, it is a spectrum. The most obvious need for greater deference would be for battlefield, military strategy, or diplomatic choices, such as if the day Doe was captured the military had to worry about habeas review. The longer detention lasts after capture, or when the Government does not identify its detention authority, deference becomes less likely. As the *Rasul* and *Hamdi* cases showed, over two years of detentions for hundreds of men, courts are less willing to provide wide deference. For Doe, four months into his custody, when he filed court papers on the merits of detention, the district court had already ordered attorney access and found that, for those purposes, there were no functional reasons to preclude habeas in an "armed conflict zone" or a "restricted U.S. military zone."[341] It is doubtful that the district court would months later provide greater deference in merits issues because of urgency or combat necessity.

The result of the deference debate would have depended on a court choosing between one of two viewpoints—either that this detention is solely a military choice or that courts have a role in reviewing this detention. Deference would be seen as focusing on military choices that include detaining enemies. In contrast, affirming habeas review over military detention emphasizes judicial roles in preventing arbitrary detention and in ensuring separation of powers. The Government argued that deference was due for military detentions.[342] These were political

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the-modern-islamic-state-84937.

340. Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14, at 4.

341. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d. 53, 55, 60 (D.D.C. 2017).

342. *See* Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14, at 5-6 (arguing the use of "military force against [ISIS] . . . implicates concerns that" are "constitutionally committed to the political branches," this deference extends to the legality of AUMF detention); *id.* at 8-9 (arguing deference is due for war powers and for determining

questions specific to choices such as that ISIS is an enemy and that Doe falls within this classification. The Government referred to precedent on military issues, including detention.[343] This focus suggested that these powers were all committed to the executive. Specific to the ISIS conflict, it cited a court decision that the Executive Branch solely determined who was an enemy per the 2001 AUMF.[344] The decision denied challenges that ISIS was not covered by an AUMF and that the conflict was unconstitutional.[345] Thus, the justification for deference looks to structural reasons why executive choices, in particular from the military, were beyond the scope of court review.

To the contrary, Doe argued that broad deference was not required by structural commitment to the executive and instead emphasized that habeas courts possess confirmed roles over military detention matters.[346] As mentioned above, Doe argued that the AUMFs do not expressly or clearly encompass ISIS. Moreover, deference is not due when military detention occurs away from the battlefield.[347] Here, Doe was captured and, only months later, received attorney access as required by the court.[348] It is conceivable, however, that habeas review of detention authority could have followed months after attorney access. *Hamdi* is thus presented as rejecting the idea that military detention is outside the review of courts.[349] Specifically, the Supreme Court rejected the argument that detention is unilaterally committed to one branch. Likewise, *Boumediene* and the many habeas detention cases since then show how courts can review who is or is not an enemy combatant.[350] Doe's justification for review points to significant constitutional harms with arbitrary detention and disrupting

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if the AUMF covers ISIS).

343. *See id.* at 8-10.

344. *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016), *vacated sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018).

345. *See id.* at 298, 303.

346. Petitioner's Reply to Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14, at 2, 5-6 (referring to examples of habeas review and denial of wide deference for detention, including Boumediene v. Bush, 553 U.S. 723, 798 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004); and Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010)).

347. *See id.* at 2.

348. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 55 (D.D.C. 2018).

349. *Hamdi*, 542 U.S. at 516-21.

350. *See Boumediene*, 553 U.S. at 740-46.

separations of powers. This line of reasoning emphasizes a functional means to determine how courts have conducted this review in the past.

The third important debate focused on which protections from military detention extended to citizens. Here, court precedent on citizens detained pursuant to an AUMF did not squarely extend to Doe. *Hamdi* found that military detention was legal for a citizen who was an enemy combatant and caught during battle in Afghanistan.[351] It emphasized its reasoning applied to "narrow circumstances."[352] Doe was different. When captured at an SDF checkpoint, Doe was fleeing Syria and was not part of any combat. Court rulings have never entirely settled the question if citizens in other scenarios can be legally detained overseas pursuant to the AUMF. Supreme Court and appellate-level cases decided early in the War on Terror also did not neatly apply to Doe. *Rumsfeld v. Padilla* focused on detention for a citizen caught while returning to the United States and found that there was no jurisdiction in this matter.[353] Four justices agreed that there was jurisdiction and agreed with the lower-court finding in these circumstances that the NDA prohibited citizen detention.[354] Congress confirmed this undetermined detention scope for citizens in the 2012 National Defense Authorization Act (NDAA).[355] In section 1021(e), it essentially stated that it did not add to nor did it eliminate any basis to detain citizens pursuant to the 2001 AUMF.[356] The NDAA did this in addition to section 1021(d), which codified habeas court rulings on military detention and explicitly stated it did not add to the scope of detention authority.[357] In *Hedges v. Obama*, a court of appeals explained that in section 1021(d) Congress "express[ed] resolution of a previously debated question about the scope of AUMF authority" and in 1021(e) it "simply says nothing at all" regarding the detention of citizens.[358]

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351. *Hamdi*, 542 U.S. at 516 (stating it "answer[s] only the narrow question" regarding detention of a citizens involved in combat and caught in Afghanistan).

352. *See id.* at 519.

353. *See generally* 542 U.S. 426 (2004).

354. *Id.* at 546 (Stevens, J., dissenting). For an elaborate discussion on the NDA prohibiting this detention, see Padilla v. Rumsfeld, 352 F.3d 695 (2003), *overruled by* Padilla v. Hanft, 423 F.3d 386 (2005).

355. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat 1298.

356. *See id.* § 1021(e), 125 Stat at 1562 ("Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens . . . .").

357. *See id.* § 1021(d), 125 Stat at 1562 ("Nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF].").

358. 724 F.3d 170, 191-92 (2nd Cir. 2013).

Doe argued that his detention violated the NDA, which requires statutory authority to detain a citizen. Congress passed the NDA in reaction to the internment of Japanese and Japanese-Americans during World War II.[359] The Act simply states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[360] Contending that it made his detention illegal, Doe emphasized that the NDA's purpose was to avoid these kind of executive detentions carried out in World War II.[361] Because of this, Congress sought to ensure that its input was required to imprison or detain citizens. Doe referred to court rulings and the finding of four justices in *Hamdi* that the NDA was not limited to civil detention.[362] Furthermore, the AUMFs did not satisfy the NDA's statutory requirement, since it did not expressly refer to detention.[363] In sum, Doe's argument that military detention for citizens was illegal focused on the purpose of the NDA, the textual limits it imposed, and the inapplicability of the 2001 AUMF.

The Government contended that the NDA did not prohibit Doe's detention and that courts have found military detention of citizens legal.[364] Two reasons limited the NDA's application. One, it is silent on military detention and was intended to apply only to civil detention, which was the type of detention used in Japanese and Japanese-Americans' internment.[365] Those detentions were not conducted by the military. Second, the AUMFs satisfied the NDA's congressional requirements.[366] The AUMFs were passed by Congress and supported repeatedly in appropriations ever since.[367] Moreover, *Hamdi* affirmed that the 2001 AUMF's authorizations included legal military detention for a citizen. To support this argument, the Government cited cases before the AUMFs approving military detention for citizens. These cases, however, did not rule on overseas detention of a

359. See Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 6-7.

360. 18 U.S.C. § 4001(a) (2018).

361. *See* Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 6.

362. *See id.* at 7 (citing Howe v. Smith, 452 U.S. 473, 479 n.3 (1981) and Hamdi v. Rumsfeld, 542 U.S. 507, 545-47 (2004) (plurality opinion) (Souter, J., concurring in part and dissenting in part)).

363. *See id.* at 9 (describing the argument that the 2001 AUMF satisfies the NDA as making "a mockery of the clear-statement requirement").

364. *See id.* at 7.

365. *See* Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14, at 12 n.14.

366. *See id.* at 14.

367. *See id.* at 8.

citizen.[368] As such, Doe's detention in Iraq and capture in Syria could be argued as distinct from precedents. In sum, the Government's arguments focused on a different purpose for the NDA and precedent on citizen detention but not in entirely analogous circumstances.

Fourth, questions about implied powers or implied approval shaped the arguments about Doe's detention. The Government argued that Commander-in-Chief powers, in Article II of the Constitution, provided the military authority to conduct this kind of detention.[369] Here, the justification is that the executive has the clear power to command military forces overseas. Detention is part of this effort. In court papers, the Government referred to past use of military force. As an example, it noted that recent use of force in Libya, the Government cited military campaigns without congressional authorization, including Libya in 1986, Panama in 1989, Somalia in 1992, Bosnia in 1995, Haiti in 1994 and 2004, and Yugoslavia in 1999.[370] Doe contended that no court had approved this reading of the executive's "inherent" authority for detention.[371] In fact, with Congress not authorizing this detention, even prohibiting it, the executive's authority was limited.[372] The court's opinion noted that the Government provides not a "single decision" that upholds citizen detention indefinitely.[373] It added that references to inherent or unilateral authority for the executive's military powers are in terms of defense from attacks, not detention of a citizen—and this power does not include indefinite detention after capture on a battlefield.[374] The Government also contended that Congress's funding of the ISIS conflict repeatedly since 2014 was a ratification of the conflict and that this action was sufficient to authorize detention in the conflict.[375] Doe responded that funding the military is not the same as expressly authorizing a conflict, much less providing approval for detention of a citizen.[376] The

368. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 37 (1942); *In re* Territo, 156 F.2d 142, 144 (9th Cir. 1946).

369. Respondent's Factual Return, *supra* note 9, at 25.

370. *See id.* at 26 (quoting Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General 7 (Apr. 1, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf).

371. Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 36.

372. *See id.* at 37.

373. Petitioner's Reply to Respondent's Response to Petitioner's Response to Factual Return, *supra* note 14, at 10.

374. *Id.*

375. Respondent's Factual Return, *supra* note 9, at 22.

376. Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 33.

opinion in *Doe v. Mattis* added that the plurality of the court in *Hamdi* refuted such funding arguments.[377]

In sum, *Doe v. Mattis* resulted in one American citizen, alleged to be a member or supporter of ISIS, released from military confinement and transferred to Bahrain. From a doctrinal light, the case confirmed that habeas courts do have a role reviewing executive detention policies, while it also clarified significant aspects involving detainee transfers. In military policy terms, the dispute illustrated how detention questions depend on confirmed executive war authority and enemy designations made pursuant to this authority. While *Doe v. Mattis* only involved one person versus hundreds of detainees, as in Guantánamo and Bagram, the case shines light on how future legal debates on military detentions will transpire. As the War on Terror likely enters its second decade, its enemies are not clearly defined states, terrorist organizations change, and combat operations move to new locations, these debates on the law of detention are likely imminent.

III. Habeas Overseas: The Force Awakens or a Phantom Menace?

Doe v. Mattis illustrates how overseas military detention has entered a new episode, not just because it regards an undisclosed location, an unnamed citizen, and an alleged ISIS combatant. More importantly, the case raised legal questions that have been brewing for years about when the Executive Branch has military detention authority. This case implicated issues on citizen rights, the role of courts, and enemy classification—significant constitutional and national security matters. They will appear again in detentions as the ISIS conflict enters a new phase with its global reach and as the Al Qaeda and Taliban conflicts approach their second decade.

This section identifies what John Doe's one year of confinement demonstrated about who can be detained and how, where, and when military detention is checked by habeas. Describing this issue, it refers to simple *Star Wars* titles of "The Force Awakens" and "The Phantom Menace." The Force Awakens points to military confinement that stresses transparency for detainee treatment and for the sources of detention authority. In recent *Star Wars* movies, "The Force Awakens" tells the story of how the orphan Rey strengthens the New Republic, with a big push in the fight against the empire. Alternatively, a Phantom Menace points to

377. *Id.* at 34 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 547 n.3 (2004) (Souter, J., concurring in part and dissenting in part)).

long-term confinement with minimal information. With a Phantom Menace, courts agree that the Executive Branch determines detention authority. In the movies, the Phantom Menace presents how the Emperor uses claims of emergency and security to eliminate the Republic and its institutions to form an Empire.

A. Who Can Be Militarily Detained, Transferred, or Released

Doe v. Mattis provides some new clarity for "who" can be detained, transferred, or released. There is added clarity when addressing citizen detainees, specifically regarding their transfers. This is an example of when the "Force Awakens." The court of appeals stated that even for alleged enemy combatants "seized on a foreign battlefield," when they are American citizens, less deference is owed to the Executive Branch.[378] Evidenced in year-long proceedings, courts emphasized that John Doe was an American citizen and that this fact mandated different legal treatment than for alien detainees.[379] Importantly, Doe is a dual citizen of the United States and Saudi Arabia, with limited connections to or history living in the United States. Arguably, courts could deemphasize his citizenship by entertaining calls not to recognize birthright citizenship, even though this would go contrary to Supreme Court precedent since 1898.[380] Likewise, Doe's dual citizenship could have been the basis for treating him as an alien or at least to identify a strong connection with another state's interest.[381]

The limits for citizens in military detention remain undefined by courts.[382] So far, courts have affirmed that habeas jurisdiction extends to detention in Iraq and that the United States cannot forcibly transfer a citizen detainee. But the legal authority to keep Doe in military detention remains unresolved. Before *Hamdi*, lower courts reviewed this issue, while in 2012 Congress determined it would not make change to what courts have

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378. Doe v. Mattis, 889 F.3d 745, 749 (D.D.C. 2018).

379. *See id.* at 748-49.

380. *See generally* John C. Eastman, *Born In The U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007) (suggesting Fourteenth Amendment interpretations denying birthright citizenship); Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 280 (2008) (describing how birthright citizenship is settled by *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

381. Judge Henderson highlights these points in her dissent and suggests that Doe's transfer is legal. *See Doe*, 889 F.3d at 776-77 (Henderson, J., dissenting).

382. *See* Vladeck, *supra* note 30.

authorized or not regarding military detention for citizens.[383] For the question, "can the military detain citizens in overseas conflict," the answers are less clear. In practical and factual terms, Doe was in military detention for over a year without a release ordered by a court or carried out by the military. No court ruled whether this detention was legal, despite the fact habeas jurisdiction had been affirmed for eight months. The Government never took Doe out of military custody; rather, it tried to transfer him early in 2018 and then after settlement negotiations from July to October. Doe and the Government submitted relevant briefs on the merits of detention three months after the district court affirmed that habeas applied.[384] In these briefs, Doe conceded the facts, which contended that he was an ISIS member or supporter. Instead, he primarily contested that the AUMFs and the Constitution provide detention authority for the military.[385]

More precisely, the court of appeals found that citizen detention requires congressional authorization and that it is not clear, as of May 2018, whether the AUMFs satisfy this requirement.[386] Arguably, the 2001 and 2002 AUMFs do not cover ISIS, which did not exist when Congress authorized military force, and they refer to different conflicts in terms of location and circumstances. Alternatively, ISIS is likely an offshoot of AQI and thus falls within the 2001 AUMF's contemplation. Moreover, the 2002 AUMF authorizes restoring security in Iraq and the region, which could include military detention of ISIS combatants and supporters. No court has found that the executive has inherent authority to keep an American citizen in overseas military detention indefinitely.[387] It is similarly undetermined whether either of the AUMFs encompass ISIS, whether ISIS members qualify as enemy combatants for detention, and whether supporters of ISIS fall within this classification.

What is clear per the court of appeals is that a citizen cannot be forcibly transferred to another country if the citizen is not classified as an enemy combatant. Here, Doe challenged two relocation options.[388] The

383. For a discussion about the NDAA 2012 confirming this lack of clarity and the limited nature of rulings on citizens in military detention in *Hamdi*, *Padilla*, and World War II era cases, see discussion *supra* notes 358-61.

384. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017); Respondent's Factual Return, *supra* note 9; Petitioner's Response to Respondent's Factual Return, *supra* note 13.

385. Petitioner's Response to Respondent's Factual Return, *supra* note 13, at 2-4.

386. *See* Doe v. Mattis, 889 F.3d 745, 759 (D.D.C. 2018).

387. *See supra* Section II.C.

388. *Doe*, 889 F.3d at 756.

Government argued that a foreign state's interest in him was more important than his consent for transfer.[389] But the court of appeals refuted that the Executive Branch had this transfer power. It explained that such a power would effectively allow citizen repatriation to another country when a citizen traveled outside the United States.[390] These findings emphasized that, for detainee transfers, citizenship is important. The appellate court's holding in *Doe v. Mattis* extended prior *Valentine* reasoning, for civil extradition, to military detention.[391] Similarly, even though this transfer power and deference to foreign relations support alien detainee relocations, for citizens, such *Kiyemba II* reasoning does not apply.[392]

Highlighting the significance of this ruling, the Government decided to pursue Doe's release soon after the court of appeals affirmed two things.[393] Accordingly, the Court denied this transfer power and it asked for district-court proceedings on the AUMF, detention authority, and enemy combatants.[394] Releasing Doe was a better option for the Government than continuing with habeas litigation and gambling on its shaky detention authority. It can be assumed that for litigation purposes, the Government did not want to risk numerous potential problematic findings by a court. These may have included potential findings that: the AUMFs had expired, they did not apply to Syria or Iraq, ISIS was not an enemy covered by an AUMF, or the facts did not support that Doe was an enemy combatant as a member or a supporter of ISIS. After seven months of detention, the government stopped asserting that Doe was an enemy combatant.

The court of appeals noted that Doe's transfer could take place without his consent if he was an enemy combatant and detained pursuant to the AUMF and the laws of war.[395] This classification, however, was never confirmed by a court. Accordingly, the transfer power is interrelated with potential findings on enemy combatants and more broadly with what Congress authorized and what it contemplated as an enemy.

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389. *See id.*

390. *See id.*

391. *See id.* at 755.

392. *Id.* at 753, 761.

393. *See* Hafetz, *supra* note 8; Chesney, *supra* note 27.

394. *See* Robert Chesney & Steve Vladeck, *The Latest – and Perhaps Last – Twist in* Doe v. Mattis, LAWFARE (June 6, 2018 10:21 PM), https://www.lawfareblog.com/latest-and-perhaps-last-twist-doe-v-mattis.

395. *See Doe*, 889 F.3d at 759.

Since it cannot yet be confirmed whether ISIS qualifies for military detentions under either AUMF and the laws of war, a Phantom exists. The Menace part is less clear. Doe's unclear designation as an enemy combatant is isolated to this one individual. Commentators often state that overseas military detention of American citizen members or supporters of Islamic insurgents has been quite limited. So far, *Hamdi* was one for the Taliban over sixteen years ago, and *Doe* is another for ISIS in Iraq in 2017.[396] Were John Doe one of many other military detainees in American custody, then a Phantom Menace could be more easily envisioned. In that scenario, unclear legal norms would govern many military detentions in secret and outside the purview of court or Congress's authorization, like with Guantanamo between 2002 and 2004. For the United States, "who" can be detained is not clearly a Phantom Menace.

Recent developments point to the possibility of changed policy for citizen detainees in the ISIS conflict. For instance, the United States has brought similar ISIS captive citizens from Iraq and Syria to criminal proceedings in American courts.[397] Because these disputes are more open to public observation, this appears to be less of a Phantom and less of a Menace.

Things become murkier when looking at ongoing detention of ISIS captives who are not American citizens. If Doe is placed in the context of thousands of ISIS detainees of many nationalities since 2014 in Iraq, Syria, and Kurdish areas,[398] then *Doe v. Mattis* reflects a more global Phantom Menace. These detentions strain resources for Iraqi, Syrian, and Kurdish authorities, where conflicts are ongoing, cease-fires are liminal, and reconstruction has begun. The fear is that ISIS detainees will recruit members while in detention. Likewise, the speed of Iraqi criminal proceedings and rampant death penalty punishments catch the eye of

396. *Id.* at 768; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 571 n.3 (Scalia, J., dissenting) (citing two World War II cases as the only two court of appeals cases supporting detention without trial, both of which were members of enemy forces, *In re* Territo, 156 F.2d 142, 143-45 (9th Cir. 1946); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956)).

397. Two citizens have been transferred to federal courts for the Northern District of Indiana and Eastern District of Michigan charged with providing material support to ISIS or making false statements to the FBI, respectively. *See* Ellen Nakashima & Missy Ryan, *Two Americans, Transferred to U.S. from Syria, Will Be Tried in Federal Courts*, WASH. POST (July 24, 2018), https://www.washingtonpost.com/world/national-security/two-americans-transferred-to-us-from-syria-will-be-tried-in-federal-courts/2018/07/24/c474b72e-8f99-11e8-8322-b5482bf5e0f5_story.html?noredirect=on&utm_term=.cc69e8daf28f.

398. *See supra* note 62.

human-rights groups and foreign powers.[399] Many such detainees are in Kurdish-controlled areas, which lack international recognition as an independent sovereign state.[400] Many detainees are foreigners from neighboring states and Western states. Many of their home countries have been reluctant to accept them. Already, some states have renounced their citizenship.[401]

The American stance on ISIS detainees and citizenship is evolving. After a year of detention, the United States did not try to revoke Doe's citizenship in court or administrative proceedings. This position may change. The United States has refused to recognize the citizenship of a woman detainee. Her name is Hoda Muthana, She was born in the United States, lived in the country her whole life, previously had American passports, and then relocated to Syria to support ISIS.[402] The United States State Department and President Trump have stated that Hoda Muthana is not a citizen, despite being born in the United States, and she will not be allowed to return to the country.[403] Muthana has expressed a desire to return to the United States undergo any criminal proceeding.[404] Her parents in the United States

399. *See supra* note 62.

400. *See supra* note 62.

401. *See supra* note 62.

402. For descriptions of the factual circumstance and legal issues at play, see Dara Lind, *The Fight over Whether ISIS Recruit Hoda Muthana Is a US Citizen, Explained*, VOX (Feb. 22, 2019), https://www.vox.com/world/2019/2/22/18236309/hoda-muthana-isis-citizen-trump-pompeo; Jonathan Shaub, *Hoda Muthana and Shamima Begum: Citizenship and Expatriation in the U.S. and U.K.*, LAWFARE (Feb. 25, 2019), https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk, Steve Vladeck, *Unpacking (Some of) the Legal Issues Surrounding Hoda Muthana*, JUST SECURITY (Feb. 20, 2019), https://www.justsecurity.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana/.

403. Press Release, Michael R. Pompeo, Sec'y of State, Statement on Hoda Muthana (Feb. 20, 2019), https://www.state.gov/secretary/remarks/2019/02/289558.htm; *see also* Rukmini Callimachi & Alan Yuhas, *Alabama Woman Who Joined ISIS Can't Return Home, U.S. Says*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/world/middleeast/isis-bride-hoda-muthana.html?module=inline; Peter Zampa, *One-on-One with Secretary of State Mike Pompeo: Trade with China, the ISIS Bride, and Otto Warmbier's Death*, FOX: WEST DAKOTA (Mar. 03, 2019, 9:08 PM), https://www.kfyrtv.com/content/news/One-on-one-with-Secretary-of-State-Mike-Pompeo-Trade-with-China-the-ISIS-bride-and-Otto-Warmbiers-death-506635611.html.

404. *See* Rukmini Callimachi & Catherine Porter, *2 American Wives of ISIS Militants Want to Return Home*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/islamic-state-american-women.html.

recently filed a lawsuit challenging the State Department's position.[405] Nevertheless, a Phantom Menace is forming in the region, especially when looking at military detentions since ISIS began losing territorial control. The United States position on citizen detainees and their return may be changing as well.

B. How Military Detention is Legally Authorized and Subject to Challenges

As for "how" habeas challenges detentions, *Doe v. Mattis* continues a trend that began with *Hamdi* in 2004 for enemy combatants, and it further clarifies judicial power over citizen detention and citizen transfers. As such, it reflects a "Force Awakens" by confirming review and input by Congress and the courts. Although Doe was released after a year with no charges, courts pushed legal questions about the ISIS conflict and detentions pursuant to this military force.[406] The courts essentially asked how detention was consistent with Congress's express objectives. Likewise, as multiple rounds of court proceedings transpired, information about the detainee, his treatment, and detention policy came to public light.[407]

The significance of the judicial role stands out in the facts described by the first court opinion from December of 2017. It ordered the military to provide "immediate and unmonitored access to the detainee" and barred his transfer.[408] This decision came after noting how the military had treated the detainee, which included: over three months of detention; no criminal charge; unknown identity; lack of attorney contact; and limited contact with anyone.[409] For months, Doe was only able to speak with law enforcement, military, and Red Cross officials.[410] The district court cited *Boumediene* to justify court power to issue its order.[411] More importantly, it explained that courts may entertain habeas petitions after a reasonable time to determine

405. A district court judge recently ruled that the lawsuit will not be expedited, leaving Muthana overseas for now. Charlie Savage, *Judge Declines to Speed Up Case of Alabama Woman Who Joined ISIS*, N.Y. TIMES (Mar. 4. 2019), https://www.nytimes.com/2019/03/04/us/politics/hoda-muthana-hearing.html. For the complaint filed by Ahmed Ali Muthana, see Expedited Complaint for Declaratory Judgment, Injunctive Relief and Petition for Writ of Mandamus, Muthana v. Pompeo, No. 1:19-cv-00445 (D.C. Cir. Feb. 21, 2019), https://www.politico.com/f/?id=00000169-133a-d847-abe9-b3fa54f60001.

406. *See, e.g.*, Savage, *supra* note 405.

407. *See, e.g., id.*

408. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 60 (D.D.C. 2018).

409. *Id.* at 55, 59.

410. *Id.* at 55, 59.

411. *Id.* at 60.

whether the detainee is an enemy combatant.[412] Here, over three months of detention permit habeas review, with a court able to issue an order and examine whether the detention is legal.

Specifically, *Doe v. Mattis* describes how habeas applies in two ways. First, it confirmed that habeas powers can stop the transfer of citizen detainees. It reached this conclusion by affirming that a statute or treaty is needed to transfer an American citizen.[413] This effectively adapted precedent on civil extradition to the military context. It looked to what Congress has approved in a statute or treaty to specifically authorize when an American can be taken to another country. For Doe, this positive authority did not exist, as there was no statute, and no treaty with the countries open to accept him. Thus, the government asked for deference to transfer based on foreign relations and military need. *Munaf* confirms that transfers are legal if the detainee citizen is transferred for criminal prosecution.[414] But there was no evidence that a foreign state sought Doe for this purpose. Similarly, the Government's justification that Doe travelled to a battlefield in Syria did not give it the power to transfer a citizen.[415] An alternative for these kinds of transfers would be if the detainee, even a citizen, were held pursuant to the laws of war as an enemy combatant. The court of appeals noted that this finding had not been clearly shown, so the transfer could not occur. It refuted the notion that a good faith determination of an enemy combatant was sufficient for Doe. On this issue, eight justices in *Hamdi* denied that such determinations could keep citizens detained for the conflict.[416]

Second, *Doe v. Mattis* places military detentions, including transfers, clearly within the ambit of *Hamdi* checks, which open the door to step away from wide executive deference.[417] It explained that "Executive[] authority to wage war as it sees fit is cabined by the Supreme Court's decision in *Hamdi*."[418] Moreover, it discounted an "expansive vision of unilateral Executive power over a U.S. citizen who ventures abroad."[419] The opinion of the court explained there is an "absence of even a single known example

412. *Id.*
413. *See* Doe v. Mattis, 889 F.3d 745, 748 (D.C. Cir. 2018).
414. *Id.* (citing Munaf v. Geren, 553 U.S. 674 (2008)).
415. *Id.* at 757.
416. *Id.* at 758-59.
417. *See id.* at 748.
418. *Id.* at 749.
419. *Id.* at 755.

of [this] unilateral power."[420] Because such a transfer would implicate fundamental liberty interests, it must comply with *Hamdi* conditions, which Congress codified in the 2012 National Defense Authorization Act.[421]

For *Hamdi* conditions, detentions must conform to Congress's force authorization, laws of war, process requirements, and definitions of an enemy combatant. The court of appeals held that transfer powers come from detention powers, which permit greater review by a court.[422] In this case, it required legal authority to wage war against an enemy and "opportunity to challenge the factual basis for his designation as an enemy combatant."[423] Detainees are entitled to "receive notice of the factual basis for [their] classification" and to challenge it.[424] Due process requires more than "some evidence" to justify detention.[425] In sum, for "how" detentions are challenged, *Doe v. Mattis* continues a path of Force Awaken set by *Hamdi*. It specifically affirms habeas powers to stop transfers, and it reinforces the need for legal findings that detainees are enemy combatants, that detention authority flows from the AUMF, and that detainees can challenge their classification.

C. Where Habeas Restricts Military Detention

For questions of "where" detention is subject to habeas checks, *Doe v. Mattis* provides some clarity, while continuing trends from prior War on Terror cases. In its first order affirming that the ACLU had standing to pursue Doe's habeas petition, the district court found that habeas did in fact extend to detention in an undisclosed location in Iraq.[426] It described the location as "an armed conflict zone with restricted civilian access" and as a "restricted U.S. military zone."[427] It was unconvinced that habeas did not apply in such locations. Replying to the Government's claim that military areas were not subject to habeas, the court reasoned the military was "experienced in managing such difficulties" and the military gave "no reason why such inconvenience should outweigh . . . access to counsel []

420. *Id.* at 756.
421. *Id.* at 762.
422. *Id.*
423. *Id.* at 759.
424. *Id.*
425. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004)).
426. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017).
427. *Id.* at 55.

requested months ago."[428] As such, courts identify practical factors—here, the military's experience—to support habeas extension to an extraterritorial location.

The distinction between the location of the detention and the battlefield is extremely important. Doe's case was no different. And the distinction warrants extending habeas and limiting deference to military authority. The court of appeals goes so far as to say that its affirmation of transfer notice does not affect "enemy combatants captured overseas in a zone of active hostilities."[429] Doe was detained in Iraq, not at the battlefield. The court highlighted that its ruling on detainee transfers is not a battlefield judgment.[430]

Specific to habeas and transfers of detainees from an overseas location, *Doe v. Mattis* provides new clarity and affirms older rules. It notes that a citizen cannot be transferred from one overseas location to another sovereign merely because the citizen voluntarily traveled outside the United States.[431] The Government pointed to Doe freely moving to Syria and argued that this movement limits his protections from forcible transfer by the United States.

Importantly, citizenship qualifies *Doe v. Mattis's* location-based checks. As such, future detentions of alien captives will have to look to prior examples from Guantanamo and Afghanistan detentions. For those cases, courts extended habeas to detentions on American-controlled territory in Cuba,[432] but did not do so for detentions on a leased base in Afghanistan.[433] For Bagram detentions in Afghanistan, non-Afghan detainees were at one point found to benefit from habeas.[434] The reasoning was that the detainees were taken to Afghanistan to avoid any rights protections, but eventually these foreign detainees were released. The detainee's status, whether as a national of the detention's location, an alien, or American citizen, is highly relevant for determining "where" habeas applies.

In sum, for "where" habeas applies to military detentions, a few elements of the doctrine have become clearer. A Force Awakens appears for citizens, with courts using functional reasoning to extend review and courts applying

428. *Id.* at 60.
429. *Doe*, 889 F.3d at 749.
430. *Id.* at 764.
431. *Id.* at 748.
432. *See supra* Section I.C.
433. *See* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).
434. *Id.*

habeas powers to require notice for detainee transfers. Here, courts appear disposed to defer to the Executive Branch's detention authority when there is congressional authorization for the conflict or when the custody is closer to the battlefield. A Phantom Menace appears likely to continue for similarly situated alien detainees. Habeas review does not extend to detentions outside territory under long-term American control. Likewise, American forces can transfer these detainees without habeas checks by courts. This appears to be a Phantom since courts easily defer to the Executive Branch's military or diplomatic power.

D. When Military Detention Is Subject to Habeas Checks

Of all the factors in *Doe v. Mattis*, "when" habeas applies overseas is the most clear. The first district court opinion began by mentioning Doe had been in U.S. military custody "for over three months" and that the military provided no "indication of how long it expect[ed] to hold" Doe.[435] A month later, the government was still unable to provide a timeline on when it would transfer Doe.[436] The court proceeded to require seventy-two hours' notice before the government could transfer the detainee from military custody to a foreign state. Within three days, a court could stop the transfer of a citizen detainee held overseas to another country.

In extending habeas overseas, three months is not a bright-line test; instead, it is used to counter the military's "reasonable" time to determine the detainee's status. *Boumediene*[437] and *Hamdi*[438] both indicated that, on the battlefield or at initial capture, the military had a reasonable amount of time to determine if a captive was an enemy combatant. Stopping a citizen detainee's transfer, the *Doe v. Mattis* court of appeals noted that seven months of detention had already transpired.[439] The dissenting opinion looked more closely at the dates and revisited the claim that courts require habeas access within twenty-three days of detention, noting Doe's first date in American custody and the date he filed a habeas petition.[440] Twenty-three days is shorter than three months, but habeas was affirmed only in late December, over three months after the United States had detained him. These discrepancies do not explain why seven months later the Government

435. ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 54, 56 (D.D.C. 2017).
436. Doe v. Mattis, 288 F. Supp. 3d 195, 197 (D.D.C. 2018).
437. Boumediene v. Bush, 553 U.S. 723 (2008).
438. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
439. Doe v. Mattis, 889 F.3d 745, 749 (D.C. Cir. 2018).
440. *Id.* at 771 (Henderson, J., dissenting).

had not yet decided to charge, transfer, or keep him in military detention. In practical terms, habeas affirmed over Doe in Iraq in late December motivated the military and Government to examine the justification for detention. For "when" habeas challenges detentions, *Doe v. Mattis* continues the trend of placing prudential limits by respective battlefield decisions and then affording the military reasonable time to determine who is an enemy combatant.

Conclusion

This Article argues that prolonged detention in *Doe v. Mattis* illustrates: (1) the legal ambivalences of overseas authority, specifically regarding citizen detainees and congressional authorization for the ISIS conflict; (2) that legal ambiguities from Guantánamo persist and facilitate this detention; and (3) that law has a post-colonial influence on military detentions. The normative impact of prior colonialism appears when looking at ISIS detention in light of Guantánamo detentions since 2002. Important legal ambiguities stand out when analyzing habeas at an undisclosed location in Iraq (September 2017 to October 2018), habeas on an American base in Cuba (since 2002), and the Constitution's ambivalent role overseas ever since addressing the spoils of a war from 1898.

On its face, *Doe v. Mattis* extended judicial powers—namely, habeas review—to detention of an American citizen in Iraq.[441] This gave rise to a series of questions about court and Executive Branch power. With over a year of detention, a court of appeals affirmed that habeas courts can stop the transfer of a citizen in military detention,[442] that such transfers are legal if detention is pursuant to the laws of war,[443] and that the Executive Branch is not due broad deference regarding the legality of detention.[444] To that end, the Court indicated that a district court must examine issues that reach far beyond one man's custody.[445] One such issue was whether Congress authorized military force in 2001 or 2002 against ISIS, which did not yet exist. Another was whether ISIS members or supporters could be classified as enemy combatants pursuant to prior military force authorizations. Notably, it is unknown if the facts of Doe's capture or his past made him an

441. *See id.* at 768.
442. *See generally id.*
443. *Id.* at 748-49.
444. *Id.* at 758.
445. *See id.*

enemy combatant. For Doe's detention to be lawful, a district court needed to make these findings. In December of 2017, a district court affirmed that habeas jurisdiction applied in Iraq, three months after detention began.[446] Since then, broader legal issues developed regarding judicial review, Congress's war powers, and Executive Branch deference in military and foreign relations. At each stage, the Government asked for deference and limited roles for courts. A dissenting judge from the Court Appeals agreed, holding that Doe's transfer was legal.[447] They would most likely support deference on a variety of other detention matters.

The post-colonial aspects of *Doe v. Mattis* become apparent by identifying the doctrinal links to Guantánamo detentions. After military responses to the September 11 attacks, the United States brought hundreds of captives to Guantánamo. Now, seventeen years later, forty detainees remain there in indefinite detention.[448] The Guantánamo Cases generally affirmed that military detainees could be held for the duration of the conflict as enemy combatants and that they could benefit from the Constitution's habeas guarantees.[449] Importantly, this rule applied to aliens on territory the United States controlled without sovereignty. With slim Supreme Court majorities, these cases shirked calls for executive deference. The length of detentions then, at least two and half years for *Hamdi* and six years for *Boumediene*, motivated the Supreme Court to craft a judicial role to review overseas military detention.

In 2017, *Doe v. Mattis* picked up where these cases left off, focusing specifically on the issue of judicial power to enjoin detainee transfers for citizens.[450] Moreover, it forced contemplation of broader issues: habeas on non-U.S. territory, conflicts potentially distinct from prior conflicts, ISIS connections to Al Qaeda, and Congress's role in authorizing detention. Similar to the Guantánamo Cases, *Doe v. Mattis* emphasized practical factors and the duration of detention to affirm that courts could review habeas petitions from overseas military detainees.[451]

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446. *See* ACLU Found. v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017).

447. *See Doe*, 889 F.3d at 770 (Henderson, J., dissenting).

448. As of March 2019, forty detainees remain on the base. *See A History of the Detainee Population*, N.Y. TIMES: THE GUANTÁNAMO DOCKET, https://www.nytimes.com/interactive/projects/guantanamo (last visited Mar. 14, 2019). Regarding indefinite detention, see *N.Y. Times Editorial*, *supra* note 59.

449. *See supra* Part I.

450. *See Doe*, 889 F.3d 745.

451. *See id.* at 751.

Deconstructing the history of detentions, this Article begins to chart a doctrinal path, not yet fully developed, for habeas as War on Terror detentions approach a second decade. It identifies a spectrum of future detention options after Doe's release. On one end are long-term detainees without any judicial or congressional transparency, i.e., a Phantom Menace. At the other end is transparency of detainee treatment and the incorporation of Congress and courts in forming detention policy, i.e., the Force Awakens.

Like with Guantánamo before 2004, a Phantom Menace would shield detentions from habeas courts and emphasize executive deference. *Doe v. Mattis* contributes to this option in three potential ways. First, the biggest worry from *Doe v. Mattis* is that a citizen was in detention without any charge or merits proceedings for over a year. A court did not rule on this issue specifically, but Doe's experience will serve as an example in the future when the military wants to confine an American. Second, this detention could lead to expansive interpretations of the AUMF. If courts, the Executive Branch, or Congress interpret the AUMF from 2001 or 2002 without geographical or temporal limits, military detentions would face far less judicial scrutiny. In 2017, Doe, allegedly an ISIS member, was captured in Syria and detained in Iraq. These facts could support a liberal reading of the AUMF and point to the legality of Doe's detention. This interpretation would implicitly authorize executive military detention anywhere and without any endpoint. Already, the United States's involvement in the ISIS conflict is global and far beyond Syria or Iraq, including Yemen, Niger, and Somalia.[452] Third, these disputes could lead to similarly expansive definitions for the scope of detention for enemy combatants. *Hamdi* and Guantánamo habeas cases defined these parameters, but mostly in situations different from Doe. Then, Al Qaeda and the Taliban were legally recognized as enemies—ISIS did not yet exist

452. The United States has recently used or is currently using military forces in Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, and Niger. This is based on disclosed versions of the 2018 "War Powers Report" that the Administration provides, which reports on the legal and policy frameworks guiding the use of the military. *See* Matthew Kahn, *Document: White House Legal and Policy Frameworks for Use of Military Force*, LAWFARE (Mar. 14, 2018, 9:01 PM), https://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force. While parts of the report are not disclosed, it has been reported that it mentioned a previously undisclosed ISIS and United States encounter in Niger on or about December 6, 2017. *See* Allison Murphy & Scott R. Anderson, *We Read the New War Powers Report So You Don't Have To*, LAWFARE (Mar. 14, 2018 5:37 PM), https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have.

and lacked enemy status. Further, courts reviewed the facts about detainee combatant roles in *Hamdi*, and the conflicts it addressed were closer in time to the 2001 AUMF.

If courts interpret past force authorization as encompassing ISIS and Syria, then the legal means to authorize indefinite detention seem more certain. This approach tracks traditional justifications from past empires. Historically, empires would legally justify war, occupation, and colonialism with an open-ended classification of savages, who consequently received fewer legal protections.[453] Arguably, the enemy-combatant classification could serve this purpose, especially if the 2001 AUMF has no limits in terms of enemies, time, or place.

The clearest example of detention's Phantom Menace appears when comparing Doe to the thousands of other ISIS detainees in the region. Enemy-combatant classification and the AUMF are now a grey area with mounting concerns that detentions actually fuel ISIS recruitment.[454] Similarly, allies in the ISIS campaign and the United States are not accepting detainees who are or have been recognized as their citizens.

From a different perspective, *Doe v. Mattis* exemplifies the Force Awakens with increased legal process for detainees. Aside from Doe, the most transparent developments are that the United States has brought some citizen detainees, alleged to be ISIS supporters or members, to domestic courts for criminal proceedings.[455] In terms of the detention authority and legal process, this is far less ambiguous than Doe's predicament.

Otherwise, Doe's legal fight resulted in three positive judicial results regarding citizenship, time, and the laws-of-war framework. First, habeas powers were clearly extended to an American citizen and this included the ability to enjoin their transfer to another country.[456] Second, the length of detention without attorney access and without the opportunity to contest

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453. For a description of how *Hamdi's* use of the term "enemy combatants" lacked much prior use or definition, see Jenny S. Martinez, *Hamdi v. Rumsfeld, 124 S.Ct. 2633*, 98 AM. J. INT'L L. 782, 785–87 (2004). International law historically and in the War on Terror has employed terms like combatants and "savages" to justify detention and force. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3–4 (2005); Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'*, *in* INTERNATIONAL LAW AND ITS OTHERS 265, 298–301 (Anne Orford ed., 2006); *See* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L LAW J. 201 (2001).

454. *See supra* note 62.

455. *See* Nakashima & Ryan, *supra* note 397.

456. *See Doe*, 889 F.3d 745.

combatant classification encouraged the application of extraterritorial habeas.[457] This holding is consistent with similar justifications in the Guantánamo Cases. And the military's means to administer proceedings bolster these jurisdictional findings. Accordingly, habeas would not apply in battlefield settings or when an individual is detained for only a short period. This reflects increased transparency and the likelihood that future courts will review detention.

Third, and most importantly, was the court's categorical reasoning that Doe's detention had to comply with the laws-of-war framework.[458] For the detainee, this provides a process to challenge enemy-combatant classifications. It makes detention legal only if the conflict persists—not indefinitely. For this reason, how courts determine the scope and duration of any AUMF is crucial, potentially risking endless detention. This framework also diminishes when the Executive Branch receives deference in its determination for any habeas requirements. Similarly, the framework requires finding whether Congress envisioned actors like ISIS to be enemy combatants per an AUMF. By looking to congressional intent, this approach prevents the Executive Branch from unilaterally deciding the parameters of extended military detention.

Doe v. Mattis does not provide a conclusion for how the law of military detention changes with ISIS or with conflicts in Syria and beyond. Even if courts made broad doctrinal findings on the legality of detention, transfer, or release, the facts at hand preclude any extensive legal confirmation. The United States's limited role in ISIS detentions so far and John Doe's purported involvement with ISIS, in Syria, and in other locations likely make this scenario somewhat isolated.

In TWAIL terms, *Doe v. Mattis* shows how overseas authority re-adapts to suit the strategic needs of empire. With Guantánamo, territorial occupation suited the needs of detentions distanced from legal protections that would apply on domestic territory. The demands of American national security modified an anomalous legal zone, which was created in 1898. After the Guantánamo Cases, detention law supported wartime,[459] with judicial deference and congressional and executive choices keeping detainees there. Many still remain in Cuba, seventeen years after detentions began, despite constitutional privileges affirmed in *Hamdi* and *Boumediene*.

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457. *Id.* at 749; ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 54, 56 (D.D.C. 2017).
458. *See Doe*, 889 F.3d at 759.
459. *See* DUDZIAK, *supra* note 218.

In *Doe v. Mattis*, which scrutinized detention in Iraq, overseas habeas inquiries did not focus on territory and aliens like they did for Guantánamo. The dispute reflected later debates about military detentions in the ISIS conflict. It remains to be seen if the ISIS conflict is legally authorized by the 2001 or 2002 AUMFs. With Doe released in Bahrain, *Doe v. Mattis* dodged this larger legal issue and the *Hamdi* protections that would be afforded to an enemy combatant detainee.

Regardless, significant legal findings in *Doe v. Mattis* help chart the parameters for how American detentions adapt to new locations, different enemies, and conflicts without an end. Already, American involvement in the ISIS conflict is extensive in Central Asia, the Middle East, Arabian Peninsula, North Africa, and Eastern Africa.[460] The means for American constitutional law to adapt overseas becomes more apparent when comparing Doe's experience with trends on Guantánamo. One course this path may take—when the Force Awakens—emphasizes transparency and participation from multiple government branches in crafting how law regulates detentions. For this path, the three branches of government look to habeas and citizen protections, reviews for prolonged detentions, and a law-of-war framework that requires detainee challenges and that prohibits indefinite detention. The court of appeals bolstered this force by rejecting broad deference to the executive and requiring that detentions conform to an AUMF. Taking the form of a Phantom Menace, another path might prioritize unilateral Executive Branch authority. This path could draw inspiration for future detentions from Doe's confinement for over a year without any release, charge, or proceeding on the merits of his detention. Further, it would define detention authority broadly, relying on interpretations of the 2001 AUMF as inclusive of later conflicts with no effective limits for classifying enemies. Habeas courts that side with national security or foreign relations deference would fuel this path. In conclusion, as the War on Terror approaches its second decade, habeas courts will confront a Phantom Menace and a Force Awaken when deciding who can be detained and how, where, and when this detention can be checked.

460. *See* Respondent's Factual Return, *supra* note 9, at 26 (quoting Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General, *supra* note 370).