THE HABEAS CORPUS SUSPENSION CLAUSE AFTER  
BOUMEDIENE V. BUSH

Gerald L. Neuman*

In the course of vindicating the right to habeas corpus for military prisoners at Guantanamo Bay Naval Base, the Supreme Court had occasion to resolve a series of previously open questions about the meaning of the Constitution’s Habeas Corpus Suspension Clause. In this Essay, Professor Neuman examines the implications of the Court’s interpretation for habeas corpus law more generally, in civil and criminal contexts within the United States. The Suspension Clause guarantees a permanent minimum content for the judicial remedy against unlawful detention of either citizens or aliens. The constitutionally necessary scope of review is determined partly by historical inquiry, and partly by an instrumental balancing test. Stricter standards apply to review of executive detention, but the Clause may also require some check on judicially ordered detention. The Court’s analysis further suggests that the Suspension Clause is best understood today as affirmatively mandating a federal remedy, and not merely as protecting state remedies from federal interference. This Essay explores the consequences of this account for recent controversies over judicial power to provide effective review of decisions removing aliens from the United States, and thereby illustrates the uncertain operation of the Court’s new balancing approach.

INTRODUCTION .................................................. 538
I. WHAT THE SUPREME COURT DID IN BOUMEDIENE ........... 539
   A. Boumediene’s Confirmations of St. Cyr .................... 540
      1. The Suspension Clause Permanently Guarantees a Certain Minimum Content of Judicial Inquiry into the Lawfulness of Detention (Except when the Privilege of the Writ Is Properly Suspended) ...... 541
      2. The Minimum Content Guaranteed by the Suspension Clause Includes at Least Those Powers Exercised by Habeas Courts in 1789 .................. 543
      3. The Suspension Clause Protects Aliens as Well as Citizens ........................................ 545
      4. The Suspension Clause Requires More Intense Review of Detention by Executive Order than of Detention After Judicial Conviction, Including Review of Erroneous Interpretation or Application of Law .................................................. 546
   B. Boumediene’s Innovations ............................... 548

* J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School. All rights reserved. (I should disclose that I wrote an amicus brief in the Boumediene case, on behalf of Professors of Constitutional Law and Federal Jurisdiction.)
1. The Suspension Clause Protects Both an Individual Right and a Structural Principle of Separation of Powers ........................................... 548
2. The Suspension Clause Applies Extraterritorially—at Least Sometimes .............................. 550
3. The Suspension Clause Guarantees the Power of a Court to Order Release (Which May Include Conditional Release) of a Prisoner .................. 552
4. Historical Guideposts to the Guaranteed Minimum Content of the Writ Are Supplemented by an Instrumental Balancing Test ......................... 553

II. SPECULATIVE IMPLICATIONS OF THE BOUMEDIENE ANALYSIS . . 556
   A. Does the Suspension Clause Specifically Guarantee a Federal Remedy for Unlawful Detention? .................. 557
   B. Does the Suspension Clause Guarantee Any Form of Postconviction Relief for Federal Prisoners? .............................. 559
   C. Does the Suspension Clause Protect Any Remedy for State Detention—or Private Detention? .......................... 561

III. TWO SPECIFIC APPLICATIONS ........................................... 565
   A. The Suspension Clause and the Power to Stay Removal from the United States .................. 567
   B. The Suspension Clause and Expedited Removal ...... 571

CONCLUSION .................................................... 578

INTRODUCTION

If the Habeas Corpus Suspension Clause is “[t]he most important human rights provision in the Constitution,”¹ then the Supreme Court’s decision in Boumediene v. Bush² is a central pillar of constitutional law. Not because of its politically salient features—the rejection of a lawless zone at the Guantanamo Bay Naval Base,³ the interference with counterterrorism policy,⁴ the affirmation that foreign nationals can possess constitutional rights abroad⁵—but because of the technical content of its holding: that Congress had violated the Suspension Clause by denying someone an adequate judicial remedy for unlawful detention.⁶

The Supreme Court had never before found a violation of the Suspension Clause, and the holding of Boumediene gives its reasoning a precedential significance that earlier discussions lack. Prior holdings had

². 128 S. Ct. 2229 (2008).
³. Id. at 2258–59.
⁴. Id. at 2276–77.
⁵. Id. at 2262.
⁶. Id. at 2274.
told us what the Suspension Clause does not protect, or what the Suspension Clause might possibly protect. Boumediene clarifies, in the concrete way that only a holding can in a system that privileges precedent, what the Suspension Clause does protect.

Boumediene is therefore a seminal decision about the constitutional law of habeas corpus, and its ramifications within U.S. borders greatly exceed its effects overseas. The purpose of this Essay is to explore the implications of the decision for ordinary times and places, not for counterterrorism policy.

The precedent is important because the Constitution is ambiguous. The Suspension Clause reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Among other things, it does not define the content of the privilege or what amounts to a suspension, leaving them open to debate. As Professor Monaghan has sagely observed, “[n]either Madison nor anyone else believed that the document set out, once and for all, a clear set of rules. Speaking of the Constitution, [Madison] wrote ‘all new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated.’”

With that lesson in mind, this Essay first examines some of the obscurities of the Clause that the Court has now liquidated. Part I identifies eight basic propositions about the Suspension Clause that emerge from Boumediene, some familiar and some less so. Next, Part II asks whether the decision sheds light on traditional general questions about the Suspension Clause that the Court did not have occasion to resolve: whether the Clause guarantees a federal remedy, whether it guarantees any postconviction relief for federal prisoners, and whether it guarantees any remedy for state prisoners. Finally, Part III attempts to illustrate the generative power of the Boumediene decision by relating it to two quite specific controversies arising in the field of federal immigration law, concerning stays of deportation from the United States and judicial review of the procedure known as “expedited removal.”

I. WHAT THE SUPREME COURT DID IN BOUMEDIENE

The Supreme Court held in Boumediene v. Bush that section 7 of the Military Commissions Act of 2006 violated the Suspension Clause by withdrawing the jurisdiction of the federal courts to entertain habeas

---

corpus petitions from security detainees at Guantanamo Bay Naval Base in Cuba, without giving them an adequate and effective substitute judicial remedy. The military hearing before a Combatant Status Review Tribunal (CSRT) and the limited judicial review available in the D.C. Circuit under the Detainee Treatment Act of 2005, both separately and in combination, did not provide the prisoners with an adequate opportunity to secure release by challenging the lawfulness of their detention, especially with regard to issues of fact. Justice Kennedy wrote the opinion of the Court. Chief Justice Roberts and Justice Scalia wrote dissenting opinions addressing different aspects of the case, each on behalf of all four dissenters.

The analysis of the Suspension Clause in Boumediene grew incrementally out of discussions in earlier decisions that had upheld statutes against Suspension Clause objections or that had rested ultimately on statutory interpretation. Prominent among these sources was INS v. St. Cyr, which used the doctrine of constitutional avoidance to construe statutory provisions precluding judicial review of deportation orders as preserving resort to habeas corpus. Boumediene confirmed and extended the account of the Suspension Clause articulated in St. Cyr.

Part I.A of this Essay discusses four major propositions from St. Cyr that the Court confirmed in Boumediene: the permanent guarantee of the writ; the effect of practice in 1789 as an “absolute minimum”; the inclusion of noncitizens within the protection of the Clause; and the guarantee of judicial review of issues of law relating to executive detention. Then Part I.B discusses four additional propositions added by Boumediene: the hybrid character of the Suspension Clause as a rights provision and a separation of powers provision; the extraterritorial force of the Clause; the constitutionally required power of the judiciary to order release; and, what may be the most significant innovation in Boumediene, the inclusion of an instrumental balancing test in Suspension Clause doctrine.

A. Boumediene’s Confirmations of St. Cyr

The Boumediene decision builds on the Court’s decision a few years earlier in INS v. St. Cyr, which gave a similar account of the Suspension

---

15. Justice Souter filed a short concurring opinion, joined by Justices Ginsburg and Breyer, emphasizing a few points in response to the dissents, but wholly consistent with the majority opinion. Id. at 2277–79 (Souter, J., concurring).
16. The principal argument of the Roberts dissent was that the Suspension Clause had not been violated, even if it applied to the prisoners. Id. at 2279–80 (Roberts, C.J., dissenting). The principal argument of the Scalia dissent was that the prisoners were not protected by the Suspension Clause because of their location and foreign nationality. Id. at 2295–94 (Scalia, J., dissenting).
Clause but ultimately interpreted the relevant statute in a manner that avoided constitutional objections instead of invalidating it. *Boumediene* converts much of the *St. Cyr* analysis from tentative constitutional exegesis to actual constitutional holding.

The Court’s opinion in *St. Cyr* construed statutory limitations on judicial review of deportation proceedings as not precluding the exercise of habeas corpus jurisdiction to determine the lawfulness of the deportation order. The Court expounded the Suspension Clause as guaranteeing the preservation of habeas corpus jurisdiction or an equivalent means of judicial inquiry into the lawfulness of detention. It stated that, “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” It pointed out that, in the eighteenth century, “nonenemy aliens as well as . . . citizens” had received the benefit of the writ. Historically, habeas corpus inquiry had been most intense when reviewing the legality of executive detention; in that context, habeas provided a remedy for “detentions based on errors of law, including the erroneous application or interpretation of statutes.” Finally, the Court found “substantial evidence” that the writ had addressed the unlawful exercise of a discretionary power to detain or release. The *Boumediene* opinion repeated and extended the first four of these five propositions about the constitutional guarantee of the Great Writ. The fifth and last issue, regarding discretionary authority, did not arise in *Boumediene*, and so remains largely where *St. Cyr* left it (though bolstered by the confirmation of the other four propositions).

1. The Suspension Clause Permanently Guarantees a Certain Minimum Content of Judicial Inquiry into the Lawfulness of Detention (Except when the Privilege of the Writ Is Properly Suspended). — The Suspension Clause not only regulates temporary suspension of the privilege of the writ, but permanently requires a right to habeas corpus, with a certain minimum content, when the writ has not been suspended. This foundational proposition about the meaning of the Clause had been called into question in the *St. Cyr* dissent, and its reaffirmation by the holding in *Boumediene* should make us all breathe easier.


21. Id. at 301–02.

22. Id. at 302.

23. Id. at 303–05.

24. That is, the four propositions confirmed in *Boumediene* do not entail the truth of the fifth, but rejection of the first or fourth proposition would have required rejection of the fifth.
Justice Scalia had argued, dissenting in St. Cyr, that the wording of the Suspension Clause addressed only the circumstances in which habeas corpus could be temporarily suspended, and that the Clause provided no guarantee whatsoever that the writ would provide any particular form of protection to anyone while it was in force.25 The permanent content of habeas corpus law, he claimed, was left entirely to the will of Congress.26

The majority rightly rejected this argument in St. Cyr,27 and Scalia himself appeared to abandon it in his separate opinion in Hamdi v. Rumsfeld.28 Both the language and the holding of Boumediene establish the contrary interpretation of the Suspension Clause. The Clause “ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain ‘the delicate balance of governance’ that is itself the surest safeguard of liberty.”29 The holding confirmed this interpretation by invalidating section 7 of the Military Commissions Act despite the fact that it was not a temporary, formal suspension of the writ.30

At the same time, both Boumediene and St. Cyr reiterated that what matters is the substance, not the form, of the Great Writ. Congress can rename or reconfigure the procedure by which courts examine the lawfulness of detention, so long as the new structure provides an “adequate and effective substitute for habeas corpus.”31 The judicial remedy created for Guantanamo prisoners under the Detainee Treatment Act was unconstitutional, not because it proceeded directly in the court of appeals rather than in the district court, but because it conferred insufficient authority on the reviewing court.32 Boumediene provided a partial, expressly nonexhaustive description of the standards for adequacy of a substitute remedy:

26. Id. at 337–38.
30. See id. at 2262 (“The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is.”); id. at 2274 (“[I]t suffices that the Government has not established that the detainees’ access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effectuates an unconstitutiona suspension of the writ.”).
32. See Boumediene, 128 S. Ct. at 2271–74 (finding reviewing authority of court of appeals inadequate substitute for the writ).
We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

The Court then went on to discuss the circumstances in which a habeas court must have the power to receive new evidence and explore the factual basis for the detention, as will be discussed infra Part I.B.

2. The Minimum Content Guaranteed by the Suspension Clause Includes at Least Those Powers Exercised by Habeas Courts in 1789. Both the St. Cyr and Boumediene opinions referred to eighteenth-century practice as an important factor in specifying the scope of judicial authority preserved by the Suspension Clause, although neither of these opinions commits itself to a strict originalism. Justice Stevens wrote in St. Cyr: “[R]egardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”

The Court repeated this notion of the eighteenth-century writ as a floor (but not necessarily a ceiling) for the content of the Suspension Clause in Boumediene:

The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that “at the absolute minimum” the Clause protects the writ as it existed when the Constitution was drafted and ratified.

33. Id. at 2266–67 (citations omitted).

34. Professor Meltzer notes that the year 1789 (date of the First Judiciary Act), rather than 1787 (date of the Philadelphia Convention) or 1788 (date of sufficient ratification), is probably not the appropriate baseline for an originalist account, and that it may have entered the Court’s discourse on the Suspension Clause by inadvertence and then been propagated. Daniel J. Meltzer, Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision, 2008 Sup. Ct. Rev. 1, 15 n.62. I will nonetheless continue to refer loosely to 1789 because the Court does (and refer to Guantánamo without an accent with the same alibi).


36. 128 S. Ct. at 2248 (citing St. Cyr, 533 U.S. at 300–01).
Several overlapping issues are at stake in the tentative character of the 1789 baseline. One concerns the relationship between the Suspension Clause and detention by state rather than federal authority. Another concerns the expanded scope of habeas as a postconviction remedy over the course of two centuries. A third involves the methodological question of whether the Constitution should be understood as freezing a set of practices that can be documented for the 1780s, or as adopting a principle subject to further development. Depending on what the historical evidence shows, other more specific issues may also be implicated.

Ultimately, both *St. Cyr* and *Boumediene* dealt with federal executive detention, and so avoided the need for full exploration of the reach of the Suspension Clause. They declined to endorse the originalist claim—offered by Justice Scalia as a fallback in *St. Cyr* and as an axiom in *Boumediene*—that the Suspension Clause can guarantee no more than what the writ provided in the eighteenth century.37

*Boumediene* also contains some language, however, that may qualify the “absolute” character of the 1789 baseline. For example, the Court characterized the historical evidence regarding the extraterritorial scope of the writ as inconclusive, and simultaneously observed that, “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.”38 That passage might be construed as entertaining the possibility that a seemingly general rule found in eighteenth-century sources could be subject to a new exception responding to previously unforeseen exigencies. The Court later asserted that “the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.”39 These passages suggest the sensible attitude that not every rule of habeas practice or procedure that demonstrably operated in the 1780s has been constitutionally entrenched by the Suspension Clause.40

Moreover, *Boumediene*’s analysis of the failings of the Detainee Treatment Act relied on more than just historical sources to determine the constitutionally required scope of review of the military’s detention decisions. As will be discussed later, *Boumediene* used fragments of eighteenth- and nineteenth-century habeas law to motivate a modern-style bal-

37. See *St. Cyr*, 533 U.S. at 341–42 (Scalia, J., dissenting) (arguing that at most Suspension Clause “guarantees the common-law right of habeas corpus, as it was understood when the Constitution was ratified”); see also *Boumediene*, 128 S. Ct. at 2297 (Scalia, J., dissenting) (“The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written.”).
38. 128 S. Ct. at 2251 (emphasis added).
39. Id. at 2276.
40. Cf. Schenckloth v. Bustamonte, 412 U.S. 218, 256 (1973) (Powell, J., concurring) (“No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries.”).
ancing methodology for evaluating the adequacy of court review on issues of fact. To that degree, at least, the mandate of the Suspension Clause does go beyond the floor of 1789. 41

3. The Suspension Clause Protects Aliens as Well as Citizens. — Habeas corpus is a right of persons, not only a right of citizens. That proposition has a long history in English and U.S. courts and, as St. Cyr observed, provided the basis for judicial elaboration of U.S. immigration law throughout the twentieth century. 42 St. Cyr cautiously mentioned “non-enemy aliens” as being among the beneficiaries of the Suspension Clause, which was adequate for its immigration context. 43 Boumediene confirmed and held that the Suspension Clause constitutionally guarantees habeas corpus to noncitizens, including noncitizens who are suspected of engaging in armed conflict against the United States. 44 The Boumediene opinion did not clarify the extent to which the Suspension Clause guarantees habeas corpus even to noncitizens who are not merely suspected, but have been reliably characterized as “enemies.”

The Court derived from Johnson v. Eisentrager 45 a multi-factor inquiry that structured its determination of the coverage of the Clause:

[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ. 46

The opinion resisted making single factors determinative, and described Eisentrager itself as seeking “to balance the constraints of military occupation with constitutional necessities.” 47 These passages suggest (though they do not hold) that even conceded enemy personnel may

41. The adoption of that balancing methodology clearly refutes the fallacy Justice Scalia promoted in his dissent in St. Cyr, that the only possible interpretations of the Suspension Clause are that it preserves the writ as it existed when the Constitution was ratified, or that it is a “one-way ratchet,” preserving every statutory expansion of the writ that Congress enacts. See 533 U.S. at 341–42 & n.5 (Scalia, J., dissenting).
42. Id. at 301–02 (majority opinion); see Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 987–1020 (1998) (describing history of habeas practice in deportation and analogous contexts).
43. 533 U.S. at 301.
44. 128 S. Ct. at 2262.
45. 339 U.S. 763 (1950). The Eisentrager petitioners were German nationals serving a sentence in an Allied prison in occupied Germany after conviction for war crimes by a U.S. military commission in China. Id. at 765–66. The Court held that they were not entitled to challenge their detention by habeas corpus. Id. at 777–81. The Boumediene majority interpreted this decision as resting on “[p]ractical considerations” rather than solely on the nationality and extraterritorial location of the petitioners. 128 S. Ct. at 2257.
46. Boumediene, 128 S. Ct. at 2259. The Court described these as three factors, but the first two have subcomponents.
47. Id. at 2257.
have Suspension Clause rights under certain circumstances. (For example, enemy soldiers tried for war crimes in U.S. sovereign territory may have a constitutional, and not merely statutory, right to habeas in regard to their trials; 48 the same may be true at Guantanamo.)

4. The Suspension Clause Requires More Intense Review of Detention by Executive Order than of Detention After Judicial Conviction, Including Review of Erroneous Interpretation or Application of Law. — Boumediene recalled the history of the Great Writ as a remedy against monarchial abuse and repeatedly characterized the Suspension Clause as an element of the separation of powers: 49 The “need for collateral review is most pressing” in cases of detention by executive order; 50 “the common-law habeas court’s role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention.” 51 As the Court had said in St. Cyr, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” 52

Part V(B) of the Boumediene opinion described as “uncontroversial” the proposition, repeated from St. Cyr, “that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” 53 That is one of “the easily identified attributes of any constitutionally adequate habeas corpus proceeding.” 54 This passage comes close to elaborating the Suspension Clause as requiring independent judicial review of issues of law determining the legality of executive detention, but there are ambiguities in the Court’s discussion that may make the contours of that construction uncertain. 55 Within the particu-
lar context of the Guantanamo detention, the Court did briefly note the
need for judicial power to resolve legal issues concerning the executive’s
statutory authority to detain.56 But the focus in Parts V(B) and V(C) was
primarily on the factfinding authority of the habeas court, not its correc-
tion of legal error. Thus, the Court’s succeeding analysis did not fully
resolve the ambiguity in its general endorsement of what St. Cyr said
about issues of law.

The responsibility of the habeas court to review issues of law is also
relevant to the dispute between the majority and dissent in Boumediene
concerning the relationship between habeas corpus and due process.
Chief Justice Roberts argued in dissent that if CSRT procedures satisfied
procedural due process, and if an Article III court were available to
enforce those procedures, then there would be no need for habeas
 corpus.57 Unless that argument was inadvertently misphrased, it totally
misconceives the scope of the writ. Adequacy of administrative proce-
dure is no substitute for the independent authority of the judiciary to
resolve legal issues concerning the executive’s authority to detain.58

applicable after conviction by a court of record. Id. at 2268. Subsequently, the Court
leaves open the degree of review that would be required after conviction by a military
commission that afforded adequate adversarial proceedings, id. at 2270–71, despite its
that “full and fair consideration” standard of Burns v. Wilson, 346 U.S. 137 (1953)
(plurality opinion), still controls habeas review of court-martial conviction of
servicemember), cert. denied, 130 S. Ct. 77 (2009).

It is also unclear to what extent the Court’s reference to erroneous “application”
of law requires review of so-called mixed questions of law and fact, involving the application
of a legal standard to undisputed findings of fact, as opposed to “pure” questions of law
like the one actually involved in St. Cyr. The circuits are currently in vigorous conflict on
this point with regard to review of orders of removal of aliens. Compare Viracacha v.
Mukasey, 518 F.3d 511, 515 (7th Cir.) (only “pure” questions of law), cert. denied, 129 S.
 Ct. 451 (2008), with Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir.) (mixed questions
of law and fact), reh’g en banc denied, 504 F.3d 973 (2007) (with dissents), and Jean-
Pierre v. U.S. Att’y Gen., 500 F.3d 1315, 1321 (11th Cir. 2007) (mixed questions of law and
fact). For discussion of the need for review of mixed questions of law in immigration
proceedings, see Neuman, Adequacy of Direct Review, supra note 19, at 141, 154–55;
Aaron G. Leiderman, Note, Preserving the Constitution’s Most Important Human Right:
Judicial Review of Mixed Questions Under the REAL ID Act, 106 Colum. L. Rev. 1367
(2006); cf. Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction,
discussing habeas review of pure and mixed questions of law).


57. Id. at 2281 (Roberts, C.J., dissenting). The majority rejected this argument. Id. at
2270 (majority opinion) (“Even when the procedures authorizing detention are
structurally sound, the Suspension Clause remains applicable and the writ relevant.”).

58. For example, in Zadvydas v. Davis, 533 U.S. 678 (2001), the Court held that
regardless of the procedures offered, the executive lacked the authority to detain
indefinitely a stateless immigrant who could not be successfully deported.
B. Boumediene’s Innovations

The Boumediene decision did more than convert the St. Cyr account of the Suspension Clause from dictum into holding. It extended that account with additional elements derived from the history of habeas corpus and the relation of the Suspension Clause to constitutional structure more generally. Here I discuss four major propositions, concerning the separation of powers, the geographical reach of the Clause, the remedial power of a habeas court, and limited use of a balancing methodology.

1. The Suspension Clause Protects Both an Individual Right and a Structural Principle of Separation of Powers. — The Boumediene majority attributed to the Suspension Clause a dual character: it confers “rights” on individuals, but also forms an element of the separation of powers.

The Court’s peroration described habeas corpus as “a right of first importance” included by the Framers.59 It analyzed the applicability of the Suspension Clause at Guantanamo in terms of the methodology governing the extraterritorial application of the Bill of Rights, and described the location of the detainees as “a factor that weighs against finding they have rights under the Suspension Clause.”60 It prominently quoted a resolution of the New York ratifying convention as expressing the understanding that the Clause guarantees an affirmative right.61 It even speculated that in the phrasing of the Suspension Clause “[t]he word ‘privilege’ was used, perhaps, to avoid mentioning some rights to the exclusion of others.”62

The majority also described the writ of habeas corpus as “an essential mechanism in the separation-of-powers scheme,”63 and “an indispensable mechanism for monitoring the separation of powers.”64 and stressed “[t]he gravity of the separation-of-powers issues raised by these cases.”65 This dimension of the Suspension Clause entered into the Court’s reasoning in several subsidiary ways. One move was rhetorical, defending

59. Boumediene, 128 S. Ct. at 2277 (“The Framers decided that habeas corpus, a right of first importance, must be a part of [the legal] framework [that reconciles liberty and security].”).
60. Id. at 2260; see also id. at 2262 (“B]efore today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. . . . [But under the current] circumstances the lack of a precedent on point is no barrier to our holding.”). The dissenters also characterized the Suspension Clause as conferring a right, though they did so for the purpose of subsuming it under their general view that foreign nationals have no extraterritorial constitutional rights. See, e.g., id. at 2293 (Scalia, J., dissenting) (“[T]he Court confers a constitutional right to habeas corpus on alien enemies . . . .”).
61. Id. at 2246 (majority opinion).
62. Id.
63. Id.
64. Id. at 2259.
65. Id. at 2263. In context, the Court meant the issues raised by denying the petitioners access to habeas, not the issues raised by judicial interference with military detention.
the propriety of an exercise of judicial authority that the dissent characterized as judicial usurpation: “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” 66 A second role was to supplement the Court’s other reasons for not leaving the extraterritorial scope of the Suspension Clause to the judgment of the political branches: “[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.” 67 Third, the Court found that the “dynamics” of executive detention and executive review without a “disinterested” tribunal “committed to procedures designed to ensure its own independence” justified more intense habeas scrutiny of the basis for detention. 68

The characterization of the Suspension Clause as a structural provision had played a different role in the lower court: The dissenting judge on the D.C. Circuit panel had construed the Clause as an objective limitation on the powers of Congress, rather than as conferring an individual right, in order to avoid circuit precedent insisting that foreign nationals have no extraterritorial constitutional rights. 69 The D.C. Circuit had derived this rigid proposition from its overbroad reading of United States v. Verdugo-Urquidez, which held that the Fourth Amendment does not protect the property of nonresident aliens abroad. 70 Some amicus briefs filed in the Supreme Court in Boumediene had also pursued this strategy, maintaining that the Suspension Clause was a separation of powers provision rather than a rights provision. 71 The Boumediene majority, however, repudiated the D.C. Circuit’s interpretation of Verdugo-Urquidez and held that the extraterritorial rights of foreign nationals must be determined by a functional approach. 72 The Court characterized the Suspension Clause

---

66. Id. at 2277. But cf. id. at 2298 (Scalia, J., dissenting) (“‘Manipulation’ of the territorial reach of the writ by the Judiciary poses just as much of a threat to the proper separation of powers as ‘manipulation’ by the Executive.”).
67. Id. at 2259 (majority opinion).
68. Id. at 2269.
71. See Brief for Amici Curiae Coalition of Non-Governmental Organizations in Support of Petitioners at 11, Boumediene, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196), 2007 WL 2428372, at *11 (“Petitioners should prevail regardless of whether they have constitutional rights because . . . the MCA violates separation of powers principles.”); Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 7, Boumediene, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196), 2007 WL 2441584, at *7 (“[I]t is simply incorrect to analyze the issue in this case in terms of the ‘constitutional rights of aliens.’ At its core, habeas is a separation of powers principle.”) (emphasis omitted).
as involving both a structural provision and an individual right, and held that it conferred rights on the Guantanamo detainees despite their extra-territorial location. This hybrid nature of the Suspension Clause should not be troubling, as other constitutional provisions similarly serve both structural and individual rights purposes.73

It remains noteworthy, however, that description of the Suspension Clause as a separation of powers provision focuses predominantly on its role in guaranteeing a remedy for detention by the executive branch. (The historical phenomenon of detention by the legislative branch should also not be forgotten.)74 Nonetheless, the Boumediene opinion also derived insight on the requisites of a constitutionally adequate remedy from precedents involving judicially ordered detention, in either the pretrial or postconviction context.75 Indeed, most of the cases on which the majority relied for its discussion of the right to introduce previously unavailable exculpatory evidence involved the use of habeas to grant bail or discharge from a pretrial commitment.76 As discussed further infra Parts II.B and II.C, the opinion suggests (though of course it does not hold) that the individual right protected by the Suspension Clause extends more broadly than the separation of powers rationale.

2. The Suspension Clause Applies Extraterritorially—at Least Sometimes. —

The Court’s analysis in Boumediene accepted the proposition that the Guantanamo Bay Naval Base lies outside the sovereign territory of the

73. See, e.g., Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848 (1986) (explaining that Article III, Section 1 protects both waivable personal right to independent judge and unwaivable structural principle); Austin v. New Hampshire, 420 U.S. 656, 662 (1975) (explaining that Privileges and Immunities Clause of Article IV “implicates not only the individual’s right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism”); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1132 (1991) (emphasizing structural significance of many provisions of Bill of Rights).

74. See, e.g., Journey v. MacCracken, 294 U.S. 125, 149–50 (1935) (upholding on habeas the arrest of private citizen by sergeant at arms of Senate to punish him for destroying documents in contempt of Senate); McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (upholding on habeas the arrest of reluctant witness by deputy sergeant at arms of Senate); Marshall v. Gordon, 243 U.S. 521, 545–46 (1917) (discharging on habeas a district attorney arrested by sergeant at arms of House for contempt, on grounds that punishing defamatory letter was not within implied congressional contempt power); cf. Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083, 1152–53 (2009) (proposing renewed exercise of direct enforcement of contempt power by House and Senate).

75. See 128 S. Ct. at 2267–68, 2270.

76. See id. at 2267–68 (citing Ex parte Pattison, 56 Miss. 161, 164 (1878); People v. Martin, 7 N.Y. Leg. Obs. 49, 56 (1848); Ex parte Foster, 5 Tex. Ct. App. 625, 644 (1879)). I do not mean to argue that the majority inappropriately generalized from the examples it happened to cite, which were conveniently at hand in William S. Church’s late nineteenth-century treatise on habeas corpus, A Treatise of the Writ of Habeas Corpus (San Francisco, Bancroft-Whitney 1886), noted in Boumediene, 128 S. Ct. at 2268, but simply to show how the Court’s interpretation of the content of the Suspension Clause was influenced by precedents that did not themselves implicate the separation of powers dimension of habeas corpus.
United States, but nonetheless concluded that the Suspension Clause applies to foreign nationals detained there. It first undertook a historical inquiry, which it prefaced as follows:

The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that “at the absolute minimum” the Clause protects the writ as it existed when the Constitution was drafted and ratified.\textsuperscript{77}

After examining the available sources and finding them inconclusive, the Court “decline[d] . . . to infer too much, one way or the other, from the lack of historical evidence on point.”\textsuperscript{78} Next, it utilized Justice Kennedy’s “functional approach” to the general question of the extraterritorial reach of constitutional rights, treating issues of individual status and location and practical obstacles to the implementation of the right as factors relevant to evaluating the practicability of recognizing the right.\textsuperscript{79} (What results will follow from this inquiry in other locations remains uncertain.\textsuperscript{80}) The Court also argued that “troubling separation-of-powers concerns” would arise if the applicability of the right depended entirely on the issue of formal sovereignty over the place of detention, which was subject to the will of the political branches.\textsuperscript{81}

The dissent objected that if the Court found the historical record inconclusive, then it could not justify applying the Suspension Clause at Guantanamo, because “[t]he writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written.”\textsuperscript{82} This originalist objection has logic on its own terms, but it serves to underline the larger lesson of the Boumediene holding. The majority construed the Suspension Clause in light of the Constitution as a whole, and not merely as an isolated clause whose mean-

\textsuperscript{77}. Boumediene, 128 S. Ct. at 2248 (citation omitted).
\textsuperscript{78}. Id. at 2251. The three concurring Justices, however, stated that “no one who reads the Court’s opinion in Rasul [v. Bush, 542 U.S. 466 (2004) (upholding statutory habeas jurisdiction over Guantanamo detainees)], could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court’s reliance on the historical background of habeas generally in answering the statutory question.” Id. at 2278 (Souter, J., concurring).
\textsuperscript{79}. Id. at 2261–62 (majority opinion). Kennedy had first expressed this approach in his concurring opinion in United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring). I discuss the majority’s adoption of the functional approach in Neuman, Extraterritorial, supra note 72, at 261–74.
\textsuperscript{81}. Boumediene, 128 S. Ct. at 2258–59.
\textsuperscript{82}. Id. at 2297 (Scalia, J., dissenting) (citation omitted) ("[T]he Court’s conclusion that ‘the common law [does not] yield[d] a definite answer to the questions before us,’ leaves it no choice but to affirm the Court of Appeals." (citation omitted)).
ing is exhausted by a collection of eighteenth-century rules. Moreover, Justice Scalia’s dissent is internally inconsistent on this methodological point. In a later passage, he entertained the possibility that the Suspension Clause does apply extraterritorially, though only for citizens, and defended this possibility by means of his own holistic interpretive argument: “The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government.”

This is not a historical claim, but a normative claim, and it raises the question: Which is the better account of the content of the Suspension Clause within the constitutional framework? Scalia’s answer, that the citizens would be interested in protecting only their own liberty, and not the liberty of innocent foreigners, did not persuade the Court.

3. The Suspension Clause Guarantees the Power of a Court to Order Release (Which May Include Conditional Release) of a Prisoner. — The *Boumediene* majority described the power of release as one of the “easily identified attributes” that “any constitutionally adequate habeas corpus proceeding” must have. “The habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.” Summing up, the Court repeated:

> We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.

Ultimately this proposition hovers somewhere between dictum and holding, because the Court construed the Detainee Treatment Act as consistent with a release remedy and found it an inadequate substitute for habeas on other grounds. The Court concluded, “for present purposes, we can assume congressional silence permits a constitutionally required remedy.”

Despite variations in the Court’s phrasing, the point it makes is fairly clear. A constitutionally adequate substitute for habeas corpus must provide the court with the traditional power of the habeas court to order release, either unconditionally, or conditioned on the curing of the de-

---

83. Id. at 2306.
84. Id. at 2266–67 (majority opinion).
85. Id. at 2266. The majority characterizes this proposition as “uncontroversial,” id., and the dissenters do not question it, see id. at 2283 (Roberts, C.J., dissenting) (“Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release.”).
86. Id. at 2271 (majority opinion).
87. Id.
fect that rendered the detention unlawful (assuming that defect can be cured in an appropriate timeframe). The wide modern use of the remedy of conditional release reflects the authority granted to the federal courts in the post-Civil War codification of habeas corpus law to dispose of the case “as law and justice require.”


89. See supra Part I.A.2.

90. 424 U.S. 319, 335 (1976).


92. Id. at 2267.

93. See, e.g., Clarke D. Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1094 (1995) (“At common law, the allegations in the ‘return’ were deemed conclusive and could not be controverted by the prisoner.”); Brief for the Respondents at *37 n.15, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724029 (citing Forsythe, supra); see also Motion for Leave to File Supplemental Brief and Supplemental Brief for Respondents at 5, Boumediene, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196), 2007 WL 4547846 (“[T]he common-law rule against controverting the return was not modified until the habeas statute of 1816 . . . .”).
or permitted the introduction of new evidence. Rather than organize the available data into a complicated set of subrules, the Court derived a generalization, analogizing the Suspension Clause inquiry to the quest for factual accuracy in the procedural due process balancing test of *Mathews v. Eldridge*. The Court discussed the risk of erroneous factfinding posed by the incentive structure of executive adjudication, as well as the specific risks arising from truncated adjudicatory procedures. Even full criminal trials may not render altogether redundant the factfinding capacity of a habeas court. (It may be worth recalling that the problem of adequacy at issue in the Suspension Clause decision *United States v. Hayman* was postconviction factfinding regarding ineffective assistance of counsel.)

The other *Mathews v. Eldridge* factors—the private interest at stake and the government’s interest—also make partial appearances in the *Boumediene* Court’s evaluation of the necessary factfinding authority of a habeas corpus court after a CSRT proceeding, even if *Mathews v. Eldridge* is not cited for them. Thus, the Court noted that “[t]he intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry.” Again, “given that the consequence of error may be detention of persons for the duration of hostilities that may last a genera-

---

94. Specifically, the Court stated:

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, “the risk of erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional procedural safeguards”). This principle has an established foundation in habeas corpus jurisprudence as well.

95. Id. at 2270 (citing Swain v. Pressley, 430 U.S. 372 (1977), and United States v. Hayman, 342 U.S. 205 (1952)).

96. 342 U.S. 205. Hayman had argued that his conviction was tainted by ineffective assistance of counsel due to an undisclosed conflict of interest. Id. at 208. The trial court, applying the recently enacted § 2255 motion procedure, see 28 U.S.C. § 2255 (2006), investigated the facts at an ex parte hearing, and concluded that Hayman had consented to his attorney’s representation of a principal witness against him. 342 U.S. at 208–09. The court of appeals held that the ex parte hearing was authorized by § 2255, and that the motion procedure therefore did not provide a constitutionally adequate substitute for habeas corpus. Id. at 209. The Supreme Court then reversed, holding that § 2255 did not permit the trial court to resolve the factual dispute ex parte, and also that the savings clause allowing resort to habeas when the motion procedure was inadequate or ineffective made it unnecessary to reach the Suspension Clause issue. Id. at 220, 223.

The Court observed in Massaro v. United States, 538 U.S. 500, 504–05 (2005), that questions of ineffective assistance of counsel frequently require collateral review rather than direct appeal, because the relevant facts do not appear on the original trial record.

97. More precisely, “the private interest that will be affected by the official action” and “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. at 335.

tion or more, [the risk of error is] too significant to ignore."99 Later, in a separate part of the opinion, the Court moved to the “accommodations [that] can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ,” including consolidation of review in a single district, and measures to prevent the “widespread dissemination of classified information.”100

If the Court’s balancing test is instrumental, then what objective or objectives does it serve? Within its context of factfinding, the purposes seem to be similar to those of Mathews v. Eldridge balancing: decreasing the risk of factually unjustified deprivations of liberty, while attending to the direct and indirect costs of more rigorous procedure. Unlike procedural due process, the output of a Suspension Clause analysis is a required scope of judicial review that compensates for risks in the prior proceeding, not a reform of the prior proceeding.

The introduction of Mathews v. Eldridge-style balancing into Suspension Clause doctrine creates a potential for competition between balancing and other techniques, such as carrying forward historical categories as per se rules, or analogizing from precedent, in the elaboration of doctrine that gives effect to a constitutional norm.101 That phenomenon is familiar in the procedural due process field, where Mathews v. Eldridge competes with older judicial precedents, historical practices, and area-specific deference, and the Justices have debated its proper scope of application.102 Suspension Clause doctrine is less developed, but the

99. Id. at 2270.
100. Id. at 2276. Whether the dissenters agreed with the incorporation of balancing methodology into Suspension Clause doctrine is unclear. In an ambiguous passage, Chief Justice Roberts appeared to go further than the majority in equating Suspension Clause analysis and due process balancing. Id. at 2283 (Roberts, C.J., dissenting). This acceptance of balancing occurred, however, in the context of an argument that the Court’s earlier decision in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), had already identified the constitutionally necessary procedures for conducting the detentions and that the CSRTs provided them. Elsewhere, Roberts entertained other possible standards, including a 1789 baseline that he understood as providing no review at all. Boumediene, 128 S. Ct. at 2287 (Roberts, C.J., dissenting). All four dissenters joined in both dissenting opinions.
101. On the distinction between constitutional norms and the doctrines adopted to implement them, see generally Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1 (2004) (proposing taxonomy of decision rules adopted to give effect in adjudication to constitutional provisions); Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56 (1997) (explaining and illustrating Supreme Court’s adoption of multifactor tests that supplement Constitution’s meaning in order to implement it effectively).
Court has articulated some of it, and there is a large body of habeas corpus practice that may inform its content.

The question arises whether the balancing methodology will remain confined to questions of factfinding authority, or may later be extended to other issues concerning the scope of review required by the Suspension Clause (or to other Suspension Clause issues of a different nature). For example, does balancing offer a means of rationalizing existing or historical variations in the scope of review on issues of constitutional, statutory, and other law, in pretrial, postconviction, extradition, civil administrative, and military contexts? Does it merely illuminate the underlying motivation of existing rules, or can it be used to replace existing rules, either by raising the required intensity of review or lowering the required intensity of review? If so, may the intensity of review be lowered only when sufficient guarantees of “accuracy” in the prior proceeding have been established,\(^\text{103}\) or also when the private interest at stake is viewed as less significant, or when the government interest at stake is particularly important? Articulating these questions clarifies how liberty could be endangered if the balancing methodology adopted in Boumediene later erodes the distinction emphasized in St. Cyr between the traditional review of issues of law concerning executive detention and the more limited review of issues of law concerning judicially ordered detention.\(^\text{104}\)

II. SPECULATIVE IMPLICATIONS OF THE BOUMEDIENE ANALYSIS

There are certain fundamental questions about the Suspension Clause that were not germane to the constitutionality of the Military Commissions Act, and that the Court did not resolve. These include whether the writ protected by the Suspension Clause should be understood as a federal judicial remedy or a state judicial remedy (or some combination of both); what relation the Suspension Clause bears to the modern use of habeas corpus as a remedy for constitutional errors in


\(^{103}\) I put “accuracy” in scare quotes because in the context of review of issues of law, legal validity rather than factual accuracy is the object of the inquiry, and it is not immediately clear what guarantees of correctness could suffice.

\(^{104}\) See supra Part I.A.4 (discussing this distinction).
criminal convictions; and whether the Suspension Clause guarantees a remedy only for federal detainees or also detention by persons not acting under color of federal law. The eight propositions discussed in Part I, and incidental observations in the Court's reasoning, may make some contribution to the proper resolution of these questions. Nonetheless, they remain open after Boumediene.

A. Does the Suspension Clause Specifically Guarantee a Federal Remedy for Unlawful Detention?

The question whether the Suspension Clause preserves a federal writ or a state writ is a standard crux in the federal courts literature. On one theory, the Suspension Clause prohibits federal interference with state habeas relief from federal detention, and does not guarantee that federal courts would be authorized to issue the writ. After all, the “Madisonian compromise” made the creation of lower federal courts optional, and the limited original jurisdiction of the Supreme Court would rarely cover habeas relief from executive detention. This theory encounters an obstacle in the subsequent decisions in Ableman v. Booth and Tarble’s Case, which vindicated federal supremacy by prohibiting state courts from releasing federal prisoners. Adherents of the noninterference theory respond either that those cases were wrongly decided, or that they are better reinterpreted as allowing Congress to impliedly preempt state court relief from federal detention by providing a federal habeas remedy.

An alternative theory maintains that once federal courts have been created, the Suspension Clause imposes an obligation that they be vested with adequate habeas corpus jurisdiction. (Some go even further and argue that habeas jurisdiction vests automatically in such courts by consti-

---

105. These three questions are subject of a vast literature, and were previously discussed against the background of the reasoning of the St. Cyr decision in Neuman, Suspension After St. Cyr, supra note 27, at 595–621. I do not repeat all the legal and historical arguments included in that article here, but rather reexamine the issues in light of Boumediene.


107. As a result of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), the Supreme Court could not exercise original jurisdiction over a writ challenging executive detention unless the detainees were “Ambassadors, other public Ministers [or] Consuls,” see U.S. Const. art. III, § 2.


110. See, e.g., Duker, supra note 106, at 152–55 (describing decisions as erroneous); Amar, Sovereignty and Federalism, supra note 106, at 1510 (arguing for interpretation of decisions as “attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers”).
tutional command independent of statute.)\textsuperscript{111} Chief Justice Marshall articulated the obligation theory of the Suspension Clause in \textit{Ex parte Bollman}.

\textsuperscript{112} At the same time, he asserted that the Clause depended on Congress for its implementation, and that Congress had complied in the First Judiciary Act of 1789.\textsuperscript{113} Perhaps Marshall misconstrued the original purpose of the Clause, but if so, the constitutional text did not express its purpose clearly.

The \textit{Boumediene} opinion did not directly address this controversy, and nothing in the Military Commissions Act required it to do so. The effort by Congress to deny the writ to the Guantanamo detainees was best interpreted as applying to all courts, both state and federal, and there was no evidence in the legislative history suggesting that Congress preferred a state remedy over a federal remedy in the event that the statute was invalidated.\textsuperscript{114} Nonetheless, some aspects of the opinion do lend support to the federal obligation theory.

One supportive feature is the Court’s characterization of the Suspension Clause as an affirmative guarantee of the writ, as entitling the detainees to the privilege of habeas corpus, as ensuring that the judiciary will have the duty and authority to call jailers to account.\textsuperscript{115} A negative restriction on the power of Congress to interfere with state habeas remedies if the states chose to provide them would not amount to such an affirmative guarantee. The Supreme Court has always maintained that the Suspension Clause, located among the restraints on Congress in Article I, Section 9, does not directly bind the states, and therefore it does not limit their discretion to restrict or abolish state habeas corpus.\textsuperscript{116} Thus, an affirmative guarantee of the writ would appear to be a guarantee of a federal writ.

Another, perhaps weaker, supportive feature is the Court’s description of the Suspension Clause as part of “the Constitution’s separation-of-powers structure.”\textsuperscript{117} The federal separation of powers is normally thought to address the distribution of authority among the three federal branches, not the relationship between the federal political branches and

\textsuperscript{111} E.g., Francis Paschal, The Constitution and Habeas Corpus, 1970 Duke L.J. 605, 607–08.
\textsuperscript{112} 8 U.S. (4 Cranch) at 95.
\textsuperscript{113} Id.
\textsuperscript{114} On the other hand, the proponents of the Military Commissions Act might indeed (if they had thought of the question) have preferred giving a state the opportunity to \textit{deny} habeas rights to the Guantanamo detainees over the certainty that a federal court would afford them.
\textsuperscript{116} See Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917) (holding that Suspension Clause does not restrict action of states); Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 248–49 (1833) (explaining that Article I, Section 9 limits federal government and not states). Whether the Fourteenth Amendment should protect some corresponding right may be a harder question, but thus far the Supreme Court has not held that it does.
\textsuperscript{117} \textit{Boumediene}, 128 S. Ct. at 2246.
the state courts. Thus a writ that forms part of the separation of powers would appear to be a federal writ.

A third supportive feature is inherent in the Boumediene holding. The Court found that the Suspension Clause applies extraterritorially, and that the detainees have a right to a habeas corpus proceeding. But even without Tarble’s Case, what state court would have jurisdiction to provide it to them? Possibly Virginia, because of the fortuitous location of the Pentagon, yet this constraint could have been avoided if the federal government had been more careful in locating its offices, or in defining its chains of authority. Once the Suspension Clause applies outside the borders of the states, the noninterference interpretation makes it an ineffective guarantee. This problem is not really novel—it arose almost immediately in Ex parte Bollman, which involved detentions initially in the Louisiana Territory and subsequently in the District of Columbia, both of which were subject to the plenary authority of Congress.\(^{118}\) Thus an extraterritorial writ would appear to be a federal writ.

Boumediene interpreted the Suspension Clause in light of the constitutional framework as it has developed over two centuries, including the Civil War amendments and later territorial expansions and extraterritorial establishments. More than two centuries after Ex parte Bollman, it would be quite reasonable for the Supreme Court to definitively confirm the federal obligation account of the Clause, rather than an interpretation tailored to a hypothetical alternative universe contemplated by the Madisonian compromise.

There is, however, a third alternative worth considering. The Suspension Clause may have both affirmative and negative aspects. For example, it may obligate Congress to vest federal habeas jurisdiction over federal detention, and also prohibit Congress from interfering with state habeas jurisdiction over state and private detention. I explain this alternative in Part II.C, after discussing state and private detention.

B. Does the Suspension Clause Guarantee Any Form of Postconviction Relief for Federal Prisoners?

The late twentieth century witnessed a cycle of expansion and retrenchment in federal postconviction relief. The retrenchment was accompanied by reminders that the modern scope of collateral review exceeded the scope of habeas review of convictions in courts of record at common law. The constitutional implications were sometimes stated in seemingly absolute terms. Chief Justice Burger wrote in a separate opinion, “I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a

---

\(^{118}\) See Neuman, Suspension After St. Cyr, supra note 27, at 597–98 (discussing geographical facts of Bollman, and their implications for obligation theory of Suspension Clause).

---
court of competent jurisdiction." The holding of Boumediene clearly does not address this question, but does the reasoning shed any light upon it?

The emphasis on executive detention and separation of powers in Boumediene might be thought to limit the reach of the Suspension Clause to detention ordered by the political branches. But other passages in the opinion suggest a different answer. Postconviction detention differs from executive detention in the scope of review required by the Clause, but not in the applicability of the Clause:

Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. . . . This is so, as Hayman and Swain make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in Hayman and Swain. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable per se.

Furthermore, common law practice recognizes different categories of judicially ordered detention. A historically informed Suspension Clause may demand more intensive review of convictions by inferior courts than of convictions by courts of record, and more intensive review of pretrial commitments than of convictions. These distinctions illustrate the proposition that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings."

Boumediene also suggests that the interpretation of the Suspension Clause should be informed not only by eighteenth-century practice, but also by integration of the Clause into the broader constitutional framework. That insight has implications for how the Court answers questions that could not have arisen at common law. For example, the question whether conviction under a substantively unconstitutional criminal statute should be characterized as jurisdictional error, or otherwise void and

119. Swain v. Pressley, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring in the judgment). Of course, the significance of this claim would depend upon the meaning of the term "competent jurisdiction," which might be limited by a broad category of jurisdictional error.

120. See supra Parts I.A.4, I.B.1.

121. Boumediene, 128 S. Ct. at 2270 (citation omitted).

122. Consider, for example, convictions for petty offenses or misdemeanors by the current magistrate judges or the former U.S. commissioners. Cf. United States v. Bryson, 981 F.2d 720, 721 (4th Cir. 1992) (holding magistrate judge lacked nonconsensual jurisdiction over § 2255 proceeding challenging his earlier acceptance of guilty plea). United States district judges are not "inferior courts" within the meaning of common law habeas doctrine.

123. Boumediene, 128 S. Ct. at 2267.

124. Id. at 2268.
subject to collateral attack, needed no answer in a system of parliamentary supremacy. The Supreme Court ultimately held that such judgments were void in *Ex parte Siebold.* The degree to which collateral review of constitutional errors in federal convictions could be justified by a holistic interpretation of the Suspension Clause is a legitimate subject for debate.

To say that the Suspension Clause required a remedy for certain kinds of constitutional error in convictions by Article III courts would not, however, end the inquiry. It could still be argued that Congress had provided an adequate and effective substitute remedy, not merely in the § 2255 motion proceeding, but in the criminal appeal itself. Until the late nineteenth century, federal criminal defendants did not have a right of appeal. The further question would then arise whether the scope of review and procedural opportunities available on appeal would be sufficient for determining the issue that the defendant would otherwise have been able to present on habeas. The Court’s reminder in *Boumediene* that collateral factfinding may sometimes be required even after criminal trials suggests that appeal may not always afford an adequate substitute.

Thus, as previously mentioned, the reasoning of the *Boumediene* opinion contemplates a Suspension Clause that extends more broadly than the separation of powers context directly relevant to the case itself. Judicial detention may be monitored more deferentially, or through substitute remedies, but *Boumediene* suggests that the Constitution still guarantees some monitoring.

C. *Does the Suspension Clause Protect Any Remedy for State Detention—or Private Detention?*

What does it actually mean to say, as *Boumediene* does, that “at the absolute minimum” the [Suspension] Clause protects the writ as it existed

---

125. 100 U.S. 371, 376–77 (1879).
126. See, e.g., Lester B. Orfield, Federal Criminal Appeals, 45 Yale L.J. 1223, 1224–25 (1936) (noting first creation of appeal from district courts to circuit courts in 1879 and from circuit courts to Supreme Court in 1889). A right of appeal might be an adequate substitute, but a discretionary remedy such as certiorari would not. Habeas corpus is a “writ of right,” a remedy available by right to those who meet the relevant criteria. *Boumediene,* 128 S. Ct. at 2267 (quoting Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It 222 (Albany, W.C. Little & Co., 2d ed. 1876)); R.J. Sharpe, The Law of Habeas Corpus 58 (2d ed. 1989). The *Boumediene* decision includes an important reminder that discretionary reopening is not an adequate substitute for the writ. 128 S. Ct. at 2273–74.
127. See 128 S. Ct. at 2270. The Court’s citations included Frank v. Mangum, 237 U.S. 309 (1915), which involved the question of mob intimidation of a trial court, shown by evidence outside the trial record, and United States v. Hayman, 342 U.S. 205 (1952), which involved the question of ineffective counsel due to conflicted representation, shown by evidence outside the trial record, cf. supra note 96 and accompanying text (discussing *Hayman*). Assuming that such issues are within the mandatory scope of the writ (which they might or might not be), a criminal appeal limited to the trial record would not provide an adequate substitute.
when the Constitution was drafted and ratified.” The St. Cyr opinion followed its version of that statement with a sampling of historical uses of the writ, including “to challenge Executive and private detention . . . , to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates.” Does the Suspension Clause protect the right to challenge all forms of public and private detention, and if so, in what manner does it protect that right?

Again, the emphasis in Boumediene on habeas corpus as a separation of powers mechanism arguably focuses attention on detention by other federal actors, rather than on detention by state or private actors (at least those not acting under color of federal law). Nonetheless, as with federal judicial detention, the Court’s emphasis does not necessarily imply that the federal detention paradigm exhausts the reach of the Suspension Clause. In fact, the Boumediene opinion also drew freely on precedents involving state detention (not under color of federal law) to inform its analysis. This reasoning does not necessarily mean that the Clause extends to nonfederal detention, but it corroborates the Court’s stated intention “not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”

That expansion could reflect a holistic interpretation of the Suspension Clause that takes into account not only the Bill of Rights, but also the realignment of state and federal authority produced by the Fourteenth Amendment. Some have argued for such an interpretation, possibly under the rubric of “incorporating” the Suspension Clause by means of the Fourteenth Amendment. It might also be called “reverse incorporation” of the Fourteenth Amendment into the Suspension Clause (in emulation of the reinterpretation of the Fifth Amendment’s Due Process Clause in light of the Equal Protection Clause). Ordinary incorporation of the Suspension Clause into the Fourteenth Amendment would more likely entail a federal guarantee against state suspension of the

---

128. 128 S. Ct. at 2248 (quoting INS v. St. Cyr, 533 U.S. 289 (2001)).
129. St. Cyr, 533 U.S. at 302 (footnotes omitted).
131. Id. at 2248.
132. See, e.g., Hertz & Liebman, supra note 88, at § 7.2d (advocating this approach and citing cases that support it); Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 Mich. L. Rev. 802 (1994) (advocating this approach at length).
state’s own writ (absent rebellion or invasion) rather than federal habeas for state detainees. Every state constitution today contains its own analogue of the Suspension Clause, and there has been little clamor for ordinary incorporation. Recognition of an affirmative constitutional guarantee of federal habeas corpus for state detainees would raise a series of questions, including whether the scope of review should be the same as the scope of review for comparable federal detainees (or broader or narrower), and when, if ever, the state’s own remedies can count as adequate substitutes for the federal writ.

Assuming that the Suspension Clause does extend to some forms of postconviction relief for state prisoners, the account of the Clause in Boumediene may illuminate current controversies concerning relief for the factually innocent. In particular, the Boumediene balancing methodology could supply a new doctrinal foundation for a constitutional right to challenge a death sentence based on subsequently obtained evidence of actual innocence. The relevance of innocence to postconviction relief, as a matter of statutory policy or constitutional entitlement, has been debated for decades. The Supreme Court and Congress have adopted several doctrines that make demonstration of a certain probability of innocence a “gateway” criterion for overcoming obstacles to the consideration of constitutional error at trial. But the Court has expressly left open the questions of when due process would require consideration of a “freestanding” claim of actual innocence independent of any procedural error at trial, and when such a claim would justify federal habeas corpus relief. Chief Justice Rehnquist emphasized the lack of historical pedigree for such relief in Herrera v. Collins, while finding it unnecessary to resolve that issue given the weakness of the factual showing. Justice Kennedy has emphasized that the level of probability to support a free-

134. Neuman, Suspension After St. Cyr, supra note 27, at 585.
135. Similar issues can also arise with regard to postconviction relief for a federal prisoner who claims innocence, but they arise more often for state prisoners given the greater frequency of capital sentences in the states.


137. See Garrett, supra note 136, at 1686–92 (describing several ways that innocence is currently taken into account in federal postconviction law).
139. Id. at 417; see also Dist. Att’y’s Office v. Osborne, 129 S. Ct. 2308, 2321 (2009) ("Whether such a federal right exists is an open question.")
standing innocence claim on habeas would need to be “extraordinarily high.” In August 2009, however, the Court issued an unusual mid-recess order, directing a federal district court to adjudicate whether “evidence that could not have been obtained at the time of trial clearly establish[ed]” the innocence of Troy Davis, a state capital defendant. Justice Scalia filed a vehement dissent, insisting that there was “no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction.” The Mathews v. Eldridge-style balancing approach of Boumediene may offer a nontextual, nonoriginalist explanation for how that distinction can be justified.

Even if the Supreme Court did interpret the Suspension Clause as guaranteeing a federal habeas remedy for state detainees, however, that remedy might still not fully preserve the writ as it existed at common law. Federal habeas courts review to ensure compliance with federal law, not to ensure compliance with state law. Under prevailing understandings, some forms of state or private custody that violate state law would raise no federal question justifying federal jurisdiction within the limits of Article III. The Suspension Clause would presumably not impose an affirmative obligation on Congress to provide a federal habeas remedy for cases beyond the reach of Article III.

Yet the Suspension Clause might still be relevant to forms of detention raising only state law issues—it might impose a negative obligation forbidding Congress to interfere with state habeas remedies for state or

140. House v. Bell, 547 U.S. 518, 555 (2006) (internal quotation marks omitted). The Court found that the petitioner had made a sufficiently strong gateway showing of probable innocence (more precisely, “that more likely than not any reasonable juror would have reasonable doubt” of his guilt given the subsequently available evidence, id. at 538) that he should be permitted to raise previously defaulted claims of ineffective assistance of counsel and prosecutorial misconduct. Id. at 534–54. The Court also concluded that the showing was insufficient to support a “hypothetical freestanding innocence claim.” Id. at 555.

141. In re Davis, 130 S. Ct. 1, 1 (2009). The order transferred an original writ of habeas corpus from the Supreme Court to the district court for a hearing and factfinding. Id.

142. Id. at 3 (Scalia, J., dissenting, joined by Thomas, J.). A concurrence rejected the view that courts “must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error.” Id. at 2 (Stevens, J., concurring, joined by Ginsburg and Breyer, J.).


private detainees.\textsuperscript{145} One could hypothesize, for example, a congress-
sional statute purporting to restrict state courts from granting the writ to
persons confined by private vigilantes who suspect them to be terrorists.
A command to preserve “the writ as it existed when the Constitution was
drafted and ratified” could condemn such a congressional statute.

The \textit{Boumediene} opinion affords no specific support for this negative
interpretation of the Suspension Clause, but neither does it preclude the
possibility that the Clause has affirmative and negative aspects with their
own specific scopes of application. If that were the case, then the writ
that was preserved would now amount to a bundle of federal and state law
writs, operating in different but overlapping spheres.

III. Two Specific Applications

The account of the Suspension Clause in \textit{Boumediene} grows incre-
mentally out of established practice, and makes no revolutionary break.
One would not expect the Supreme Court to begin overruling its prior
decisions on habeas corpus law as a result. Nonetheless, the decision may
have immediate practical implications regarding constitutional issues to
which the Supreme Court has not yet spoken.

This Part considers two specific examples of unresolved constitu-
tional questions that are illuminated by \textit{Boumediene}. Both come from the
field of immigration law, which will necessitate some specialized vocabu-
larv. The first concerns the power of the federal courts to stay the re-
moval of an alien from the United States, an issue that the Supreme
Court has recently had occasion to address from a statutory rather than a
constitutional perspective. The second concerns the shadowy regime of
“expedited removal,” which has never reached the Supreme Court, but
which raises starkly the kinds of questions discussed in \textit{Boumediene}.

To introduce these issues, it should be recalled that the Illegal
Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)
adopted the term “removal” to embrace two kinds of procedures by
which aliens are physically taken into custody and transported out of the
United States.\textsuperscript{146} Under prior versions of the Immigration and
Nationality Act (INA),\textsuperscript{147} these procedures were known as “exclusion”
(removal of aliens who had not yet entered the United States, primarily at
border posts or airports), and “deportation” (removal of aliens who had
already entered).\textsuperscript{148}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} For a more detailed argument as of 2002, see Neuman, Suspension After \textit{St. Cyr},
supra note 27, at 600–03.
\item \textsuperscript{146} Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8
\item \textsuperscript{147} Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as
amended in 8 U.S.C.). After numerous amendments, including those made by IIRIRA, the
INA continues to provide the basic structure for regulating migration to the United States.
\item \textsuperscript{148} See Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process
\end{itemize}
\end{footnotesize}
The Suspension Clause is potentially relevant to removal in at least two respects. First, individuals are frequently detained during the pendency of the adjudicatory process, or in contemplation of future removal. \[149\] Second, the physical process of removing an alien involves arrest and confinement. The proposition that habeas corpus lies for such detention has been settled since the first years of federal immigration enforcement. \[150\] Even earlier, federal courts had employed the writ to review detention for the purpose of international extradition and for the return of deserting seamen to their vessels. \[151\]

Congress has mostly replaced habeas corpus as a means of judicial review of removal orders by providing for petition for review directly to the courts of appeals. \[152\] The Supreme Court held in St. Cyr, however, that limitations that IIRIRA placed on the petition for review raised serious constitutional questions about the adequacy of the petition for review as a substitute for habeas corpus. \[153\] Consequently, it interpreted the statute as preserving habeas corpus jurisdiction in the district courts under 28 U.S.C. § 2241 as a backup. \[154\] The resulting bifurcation of judicial authority had disadvantages, and Congress amended the statute in 2005 to consolidate authority over removal orders (with an exception concerning expedited removal, discussed infra Part III.B) in the courts of appeals. \[155\]

149. See, e.g., Demore v. Kim, 538 U.S. 510, 513 (2003) (upholding statutory provisions requiring mandatory detention of certain aliens prior to hearing on their deportability); Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (interpreting statute as imposing limits on how long alien who has been ordered removed can be detained when foreign governments refuse to receive him).

150. See United States v. Jung Ah Lung, 124 U.S. 621, 626 (1888) (holding that detention of an arriving passenger to prevent his entry was subject to habeas corpus challenge). As the district court in that case stated:

If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions.

In re Jung Ah Lung, 25 F. 141, 142 (D. Cal. 1885), aff’d, 124 U.S. 621 (1888).


153. 533 U.S. at 314.

154. Id.

2010] SUSPENSION AFTER BOUMEDIENE

A. The Suspension Clause and the Power to Stay Removal from the United States

The Boumediene Court’s emphasis on the power to order release (conditional or absolute) as one of the “easily identified attributes of any constitutionally adequate habeas corpus proceeding” should have implications for the interlocutory remedial powers of courts reviewing removal orders. The writ (or its statutory substitute, the petition for review) cannot perform its intended function if the custodian can evade judgment by executing the challenged order and placing the prisoner beyond the power of the court. This threat to the efficacy of habeas corpus arises most obviously in cases in which the U.S. authorities deliberately deliver aliens into the hands of a foreign government that seeks to imprison them. Comparable threats arise for refugees denied protection from death at the hands of uncontrollable private forces.

The traditional obstacle to these and other evasions is the interlocutory authority of the habeas court over the custody of the prisoner. Justice Samuel Nelson described this overriding custody in his dissenting opinion in an extradition case, In re Kaine.

[P]ending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of habeas corpus. He may be bailed on the return de die in diem, or be remanded to

156. 128 S. Ct. 2229, 2267 (2008).
159. U.S. law recognizes asylum claims from refugees who have a well-founded fear of persecution on grounds of race, religion, nationality, political opinion, or membership in a particular social group at the hands of private actors whom the state of nationality is unable or unwilling to control. See INS v. Elias-Zacarias, 502 U.S. 478, 483–84 (1992) (finding that asylum applicant had not sufficiently demonstrated motive of rebel group that threatened him). Persons who fear death on other grounds are not eligible for asylum, id. at 483, but they might benefit from a stay of removal if there were other legal objections to their deportation.
the same jail whence he came, or to any other place of safe keeping under the control of the court . . . . The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.160

The habeas court’s control over the place of detention resulted from reforms included in the Habeas Corpus Act of 1679, which sought to suppress evasion of the writ. Section 9 of the Act regulated the transfer of prisoners; section 12 prohibited sending them overseas, and made doing so a literally unpardonable crime.161

The apparatus for preserving the opportunity to order release has included contempt proceedings against custodians who unlawfully transfer prisoners,162 and ancillary criminal sanctions,163 as well as stays. The same policy underlies the Supreme Court’s current Rule 36, which forbids the transfer of a prisoner without judicial authorization pending its review of a decision in a federal habeas proceeding. That Rule traces its lineage back to 1886,164 and ultimately to provisions of the 1867 Habeas Corpus Act that automatically stayed state proceedings pending final

160. In re Kaine, 55 U.S. (14 How.) 103, 133–34 (1853) (Nelson, J., dissenting). Justice Nelson cited a version of Matthew Bacon, A New Abridgement of the Law (originally published in 1736) and several English cases. Id. at 134. Only Justice Curtis expressed a nuanced disagreement with this account, see id. at 122 (Curtis, J., concurring in the judgment) (arguing that custody does not actually change until habeas court so orders), and the Court divided on another issue. Rollin Hurd quoted this passage in his treatise, see Hurd, supra note 126, at 324, and the full Court paraphrased it in Barth v. Clise, 79 U.S. (12 Wall.) 400, 402 (1871) (citing Hurd, Kaine, and their sources).

161. Habeas Corpus Act of 1679, 31 Car. 2, c. 2, §§ 9, 12; see 9 W.S. Holdsworth, A History of English Law 118 (1926) (“No persons are allowed to alter a prisoner’s place of confinement, except in certain specific cases defined by the Act. No prisoners may be sent to Scotland, Ireland, or parts beyond the seas.” (citation omitted)); Dallin H. Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 252–53 (1965) (describing 1679 Act and its influence in the states). The 1679 Act applied only to criminal proceedings, but the reforms were extended to the common law writ by analogy. Id. at 253.

162. See, e.g., United States v. Shipp, 203 U.S. 563, 571–72 (1906) (discussing contempt proceeding against sheriff and others for letting lynching mob take possession of prisoner while his habeas appeal was pending before Supreme Court); United States v. Davis, 25 F. Cas. 775, 775 (C.C.D.C. 1840) (No. 14,926) (holding custodian in contempt for removing alleged slaves from District of Columbia to avoid writ for their freedom); In re Hamilton, 11 F. Cas. 319, 319 (S.D.N.Y. 1867) (No. 3976) (discussing commitment of officer for contempt of writ by transferring petitioner from Philadelphia to New York).


164. See Sup. Ct. R. 34, 117 U.S. 708 (1886). This Rule was adopted to implement the restoration of the Supreme Court’s jurisdiction in appeal over federal habeas corpus decisions, which had been conferred in 1867, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2251 (2006)), repealed in 1868, Act of Mar. 27, 1868, ch.
judgment in a federal habeas proceeding.\textsuperscript{165} Congress later converted this automatic stay into a discretionary power to stay.\textsuperscript{166}

The authority to stay the outcome of challenged proceedings has often been exercised in capital punishment cases, where the petitioner fears death at the hands of the same government that is currently detaining him.\textsuperscript{167} That power is equally necessary when the right being vindicated involves protection against being killed by others.

Thus, both history and reason support the conclusion that the constitutionally required power of the courts to order release of habeas petitioners must sometimes embrace the authority to decide whether the petitioners should remain in the United States pending resolution of their claims. A procedural substitute for the writ that does not include the authority to stay removal in appropriate cases would be constitutionally inadequate, because it would enable the executive to vitiate the proceedings.

This conclusion sheds a constitutional light on a dispute that the Supreme Court recently resolved on statutory interpretation grounds in \textit{Nken v. Holder}.\textsuperscript{168} In 1961, when Congress replaced the writ of habeas corpus with the petition for review in the court of appeals as the usual method for challenging a deportation order, it accompanied this change with an automatic stay of deportation triggered by the filing of the petition for review.\textsuperscript{169} In 1996, as part of IIRIRA’s extensive revisions to the structure of judicial review, Congress repealed the automatic stay and directed that physical removal of the alien would not be a barrier to judicial review.\textsuperscript{170} These revisions also provided, in \textit{8 U.S.C. § 1252(f)(2)}, that “no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” The question then arose whether § 1252(f)(2) supplied a statu-
tory standard governing the grant or denial of stays of removal pending judicial review, or whether instead the provision addressed other forms of injunction, but not stays pending review. Even if it did apply to stays, it would not literally forbid them, but it would impose so high a burden of justification for the grant of a stay that the executive would often have ample opportunity to remove the petitioner before the court could ascertain whether the standard had been met; moreover, the language would appear to require a higher showing for interlocutory relief than for prevailing on the merits. Most circuits held § 1252(f)(2) did not apply to stays pending review, but the Eleventh and Fourth Circuits disagreed.

The Supreme Court agreed that § 1252(f)(2) does not govern stays. Writing for the majority, Chief Justice Roberts relied on traditional distinctions between an interlocutory stay and an injunction, the placement of the provision within the overall structure of § 1252, and the consequences of applying the heightened standard to stays pending review. Doing so “would not fulfill the historic office of such a stay.” It would “requir[e] a definitive merits decision earlier rather than later.” It also would not take into account irreparable harm, “even harm that may deprive the movant of his right to petition for review of the removal order.” Roberts did not mention the doctrine of constitutional avoidance as an additional reason to exclude stays from the reach of the provision.

It could be dangerous, however, to leave the impression that the will of Congress is the only relevant factor determining the courts’ power to stay removal. While the circuit split concerning § 1252(f)(2) remained unresolved, bills were introduced in Congress that would have amended

171. As the Ninth Circuit has observed:
   In any case raising legal issues, INS’s interpretation would require a more substantial showing for a stay of deportation than it would for a reversal on the merits. This would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression.

172. See Nken, 129 S. Ct. at 1755 (citing cases).
173. Id. at 1757–58.
174. Id. at 1759.
175. Id. at 1760.
176. Id.
177. Id. Elaborating how the usual standards for stays would apply in the removal context, the Court observed that the ordinary consequences of removal should not itself count as irreparable injury, emphasizing the Solicitor General’s concession that “[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.” Id. at 1761.
178. Cf. id. at 1768 (Alito, J., dissenting) (“And Congress is free to regulate or eliminate the relief that federal courts may award, within constitutional limits that the Court does not invoke here.” (citing INS v. St. Cyr, 533 U.S. 289, 299–300 (2001))).
the section to apply expressly to stays.\textsuperscript{179} The proponents of those amendments may renew their efforts as part of future measures to speed the departure of aliens from the United States. \textit{St. Cyr} and \textit{Boumediene} should caution us that the structure of judicial review of removal orders has important constitutional dimensions, including the power to preserve the opportunity for release.

\textbf{B. The Suspension Clause and Expedited Removal}

The Supreme Court’s analysis in \textit{Boumediene} also gives further reason to doubt the constitutionality of the current regime of “expedited removal.” Under expedited removal, certain aliens can be removed from the United States by immigration inspectors who afford only the most rudimentary opportunity to be heard, with an accompanying preclusion of judicial review.\textsuperscript{180} As this section explains, this process does not provide a meaningful opportunity to demonstrate unlawful detention, which the Court considered an uncontroversial constitutional requisite in situations to which the Suspension Clause applies.

The term “expedited removal” has more than one meaning, and it is important to observe certain distinctions in order to avoid conceptual slippage. The subject here is expedited removal under INA section 235(b)(1), as adopted by IIRIRA, which comes in two forms. First, section 235(b)(1) requires the expedited removal of aliens who arrive at U.S. borders (including airports) and either are inadmissible due to present or prior misrepresentations, or possess no entry documents or invalid entry documents.\textsuperscript{181} Second, section 235(b)(1) authorizes the executive to extend these procedures to certain categories of (allegedly) undocumented aliens encountered within the United States,\textsuperscript{182} the Bush Administration began partially implementing that authority several years

\textsuperscript{179} E.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 227(c) (as read and placed on calendar Apr. 24, 2006); H.R. 688, 109th Cong. § 530(b) (2005).

\textsuperscript{180} 8 U.S.C. §§ 1225(b)(1), 1252(a)(1), 1252(c) (2006).

\textsuperscript{181} See 8 U.S.C. § 1225(b)(1)(A)(i) (cross-referencing inadmissibility grounds under 8 U.S.C. § 1182(a)(6)(C), 1182(a)(7)). The relevant criteria are colloquially described as having fraudulent documents or no documents, but in fact arriving aliens whose papers are facially in order are nonetheless subject to expedited removal if (1) the inspector believes that the alien is giving false answers to oral questions; (2) the inspector believes that the alien has committed immigration fraud at some time in the past; (3) the inspector believes that the consul issued the wrong kind of documents to the alien. See Am. Immigration Lawyers Ass’n v. Reno, 18 F. Supp. 2d 38, 56–57 (D.D.C. 1998), aff’d, 199 F.3d 1352, 1354 (D.C. Cir. 2000) (upholding application of expedited removal to aliens with facially valid visas); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997) (explaining basis and purpose of expedited removal regulations).

\textsuperscript{182} 8 U.S.C. § 1225(b)(1)(A)(iii)(I). The authority extends to aliens who are inadmissible on the same grounds as at the border, who have not been admitted or paroled into the United States, and who fail to show to the satisfaction of the officer that they have been present within the United States continuously for the preceding two years. Id. § 1225(b)(1)(A)(iii)(II).
later. \(^{183}\) These procedures should not be confused with another statutory procedure, also called “expedited removal” (or “administrative removal”), authorized by section 238(b) of the INA, which allows removal of certain aliens with criminal convictions after an informal hearing conducted by an enforcement official rather than by an independent “immigration judge.” \(^{184}\) Section 238(b) proceedings are subject to judicial review to the same extent as immigration judge proceedings, and will not be discussed here. \(^{185}\)

The opportunity to be heard in expedited removal proceedings is extremely limited. \(^{186}\) The individual is confronted by an immigration officer and held largely incommunicado. \(^{187}\) Contact with relatives, friends, other potential witnesses, and attorneys is forbidden (although notification to the individual’s consulate is permitted). \(^{188}\) The individual can explain her own view of the situation (possibly with the help of an interpreter), and can present any documents that she has with her. \(^{189}\) Reportedly in airport settings she is not even permitted access to her checked luggage for any supportive documentation that it might contain. \(^{190}\) The officer can then draw legal and factual conclusions, and enter a removal

---


184. 8 U.S.C. § 1228(b). The procedure applies to aliens who have not been lawfully admitted to permanent residence (e.g., temporary visitors and illegal entrants) and who have been convicted of an “aggravated felony” (as defined in 8 U.S.C. § 1101(a)(43)). An “immigration judge” is the immigration law equivalent of an administrative law judge.

185. See, e.g., Flores-Ledezma v. Gonzales, 415 F.3d 375, 379, 381–82 (5th Cir. 2005) (contrasting § 238(b) proceedings with normal removal proceedings and holding that executive discretion to choose which method to use does not violate equal protection); Aleinikoff et al., supra note 148, at 1093–94 (describing § 238(b) procedure).


187. Martin, supra note 186, at 695.

188. Pistone & Hoeffner, supra note 186, at 173.

189. Id. at 173, 184.

190. Id. at 173.
order. Before the order is executed, it is supposed to be reviewed—at least cursorily—by a supervisory officer.191

Certain kinds of claims trigger diversion from the immigration officer to a less skeletal hearing. Assertions under oath that the individual already possesses U.S. citizenship, lawful permanent resident status, or admitted refugee status, or has been granted asylum, require additional review.192 Expressions of fear upon return are supposed to lead to referral for “credible fear” screening by an asylum officer.193 Mere claims of lawful nonimmigrant status, as a visitor, student, temporary worker, etc., or of statutory entitlement to enter as a new immigrant, do not.

What justifies a proceeding with so little investment in accuracy? At the border, expedited removal is founded on the doctrine that arriving aliens have no procedural due process rights with respect to their admission or exclusion from the United States, unless they are returning permanent residents. The Supreme Court adopted that doctrine in the 1950 decision United States ex rel. Knauff v. Shaughnessy.194 When expedited removal was first implemented in 1997, the D.C. Circuit upheld it against due process attack on precisely this basis.195 So long as the Supreme Court adheres to Knauff, that conclusion appears to be correct with regard to aliens who are not returning permanent residents and who have been stopped upon arrival—but only with regard to them.

The statute also purports to severely restrict judicial review of expedited removal orders. As to individual orders, it permits them to be challenged on habeas corpus, but only to resolve three particular issues: whether the petitioner is an alien, whether the petitioner was ordered removed under section 235(b)(1), and whether the petitioner is entitled to diversion into a fuller hearing as a lawful permanent resident, admitted refugee, or asylee.196 It does not authorize review of whether the officer’s factual conclusions have any evidentiary support, or whether the officer’s legal conclusions have any statutory basis.197 Bizarrely, the stat-

191. See Martin, supra note 186, at 682 & n.34 (observing that regulations added supervisory review despite seemingly inconsistent statutory language); Pistone & Hoeffner, supra note 186, at 184–88 (describing evidence that supervisory review is lax).
192. See Martin, supra note 186, at 679.
193. Id.
197. See id. § 1252(e)(5) (limiting review to existence of expedited removal order that applies to petitioner and barring review of its merit).
ute does not even permit the habeas court to consider whether the underlying legal regime is constitutional. 198

The consistency of these restrictions with the Suspension Clause is a harder question, and one that the Knauff doctrine does not address. The Supreme Court did not refuse habeas corpus in Knauff and its progeny—its jurisdiction was founded in habeas, 199 and the Court carefully examined and upheld the agency’s statutory authority to detain. 200 The Court’s discussion in St. Cyr did not unequivocally express the view that the Suspension Clause applies in exclusion as well as deportation, but it also did not assert the contrary, and it cited exclusion cases along with deportation cases in support of its reasoning. 201 The Ninth Circuit has nonetheless deduced from Knauff that arriving aliens who lack procedural due process rights in relation to their admission also lack Suspension Clause rights in that context. 202 It is interesting now to compare this conclusion with Boumediene, in which the Supreme Court found that the Guantanamo detainees were protected by the Suspension Clause without first inquiring whether they had rights under the Due Process Clause. 203

---

198. It purports to channel all challenges to the constitutionality of the statute or the regulations into an action in the District Court for the District of Columbia, which must be commenced within sixty days of the first implementation of the statute (i.e., in 1997) or regulation. Id. § 1252(e)(3). The effort to confine all constitutional challenges to this long-closed statutory window would seem clearly unconstitutional with regard to subsequent victims, at least if they have any constitutional rights. See Gerald L. Neuman, Federal Courts Issues in Immigration Law, 78 Tex. L. Rev. 1661, 1676–79 (2000) (explaining provision and arguing against its constitutionality).


200. Id. at 540, 542–47.


202. Li v. Eddy, 259 F.3d 1132, 1136 (9th Cir. 2001), vacated as moot, 324 F.3d 1109 (9th Cir. 2003). The holding in Li v. Eddy was reaffirmed in Garcia de Rincon v. Department of Homeland Security, 539 F.3d 1133, 1141 (9th Cir. 2008); see also Vaupel v. Ortiz, 244 F. App’x 892, 895–96 (10th Cir. 2007) (accepting restriction on habeas corpus jurisdiction and citing Li v. Eddy).

The nonprecedential Vaupel decision goes further than the Ninth Circuit, because it refuses to review the question whether an alien paroled into the United States and then rearrested twenty months later can be subjected to expedited removal as if he were just arriving. It is not self-evident that the statute authorizes expedited removal in this situation, or that it precludes review of whether expedited removal even applies. The Tenth Circuit rejected the view of a district court that the statute does not preclude review of the threshold question whether the agency has extended expedited removal beyond the settings in which it is authorized. Vaupel, 244 F. App’x at 895 (disagreeing with Am.-Arab Anti-Discrimination Comm. v. Ashcroft, 272 F. Supp. 2d 650 (E.D. Mich. 2003) (finding on habeas that section 235(b)(1) does not authorize belated expedited removal of aliens who have been paroled)). The Tenth Circuit’s decision comes close to holding that anything that the agency calls an expedited removal order is an expedited removal order insulated from judicial review. Perhaps the decision is implicitly limited to people whom the Tenth Circuit deems to lack Suspension Clause rights.

203. And also interesting to compare it with the D.C. Circuit’s decision in Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009), which insisted even after Boumediene that the detainees at Guantanamo who had Suspension Clause rights did not have due process...
However that may be, the expedited removal regime is no longer limited to arriving aliens. Immigration officials are actively applying expedited removal to individuals encountered at large anywhere within 100 miles of the U.S.-Mexico border. Current doctrines entitle those individuals to due process rights, and indicates that they have Suspension Clause rights as well. Statistics concerning the operation of expedited removal from the interior are not easily available, because the Department of Homeland Security often aggregates them with expedited removals at the border. In 2005, however, DHS testified to Congress that it had removed over 6,700 aliens from the interior in the first ten months since its August 2004 expansion of expedited removal; it reported that individuals who were not diverted into the credible fear procedure had been detained an average of twenty-six days before removal. It is safe to conclude that large numbers of individuals are be-
brought detained for significant periods of time in the Southwest without legal access to habeas corpus. Many of them suffer no cognizable prejudice from this denial because they have no substantial legal claims to raise, but it is likely that others are wrongly detained.210

Juxtaposing the expedited removal process with the Court’s analysis in Boumediene suggests serious constitutional concerns about precluding review of expedited removal from the interior—both on issues of law and on issues of fact. Indeed, the Court’s account of the minimum scope of review of factual determinations suggests new criticisms of the preclusion. If the “necessary scope of habeas review in part depends upon the rigor of any earlier proceedings,” then the rudimentary character of expedited removal hearings, which give aliens no opportunity to be represented (even at their own expense), no opportunity to present witnesses, and no opportunity to obtain documents that they were not carrying when arrested, would seem to call for more intense review than in ordinary deportation proceedings, not less. In retrospect, Boumediene may suggest that the due process standard of “some evidence” review of factual determinations, traditionally required on habeas in immigration proceedings,211 suffices only because of the other procedural opportunities available in the normal deportation process, and should not be carried over unthinkingly into alternative deportation procedures that give the alien less opportunity to defend.

That may not end the inquiry, however. The rigor of earlier proceedings is not the only factor relevant to the necessary scope of review, and the Boumediene Court analogizes its approach to Mathews v. Eldridge. If the scope of factual review depends upon a balancing test, and if factors such as the court’s evaluation of the individual’s interest in the proceeding and the character of the government’s opposing interest also play a role, then the final outcome of the analysis may uphold the total preclusion. The government can argue for special needs of border security that militate in favor of expedited removal; it can discount the personal interest of aliens who are not permanent residents;212 and, unlike

210. Information about the operation of expedited removal is not easily available, because outsiders (and even relatives and counsel) are generally barred from the proceedings. The most comprehensive study was conducted by the United States Commission on International Religious Freedom under a mandate from Congress, which had access to evaluate the implementation of the credible fear process at the border in 2003–2004. 2 U.S. CIRF, Asylum Seekers, supra note 186, at 3. The Commission found widespread noncompliance with the applicable procedures, including inaccurate documentation by inspectors and idiosyncratic interpretation of relevant legal standards. The Commission has continued to criticize the failure of DHS to adopt its recommended reforms. See, e.g., U.S. Comm’n on Int’l Religious Freedom, Annual Report 241–42 (2009).

211. See, e.g., St. Cyr, 533 U.S. at 306 (discussing traditional “some evidence” review in deportation cases); United States ex rel. Vajtauer v. Comm’r of Immigration, 273 U.S. 103, 106 (1927) (applying “some evidence” standard).

212. Again, the statute does permit habeas review of whether the individual facing expedited removal is a citizen or permanent resident (or an admitted refugee or asylee).
in Boumediene, aliens in expedited removal are not facing detention by the United States “that may last a generation or more.” The courts may conclude that the balance justifies taking away even the minimal review of evidentiary support required in the normal deportation context. Replacing a limited set of traditional doctrinal rules by a flexible balancing test could conceivably produce that result. After Boumediene, it is unclear whether the Suspension Clause would require that aliens facing expedited removal from the interior receive no factual review, “some evidence” review, or fuller factual review than in ordinary deportation proceedings.

Ultimately, the Suspension Clause balance in this context may resemble the due process balance under Mathews v. Eldridge—and both may condemn the current statutory regime. The fact that rudimentary administrative hearings are tolerated at the border where arriving aliens have no procedural due process rights under the Knauff doctrine is no recommendation for their application to individuals who do have procedural due process rights in connection with their removal.

With regard to review of issues of law arising in expedited removal from the interior, the reaffirmation of St. Cyr by Boumediene suggests that the statutory preclusion violates the Suspension Clause. Aliens protected by the Suspension Clause are entitled to judicial evaluation of whether the immigration officials are authorized to impose expedited removal, and whether the removal decision rests on “the erroneous application or interpretation” of relevant law. That should have been clear since St. Cyr.

Defense of the statutory preclusion might be conceivable on either of two strategies. First, a revisionist campaign could persuade the Supreme Court to overrule its prior distinctions and find that some category of aliens subject to expedited removal from the interior lack due process and Suspension Clause rights; then any procedure would be sufficient. Second, the balancing methodology employed by Boumediene for determining the scope of review of factual issues might spill over into Suspension Clause analysis more generally, and undermine the guarantee of judicial review of issues of law. I will not speculate here on what shape that balance would take, but only note that it creates the opportunity to discount the private interests of noncitizens for the sake of decreasing administrative expenditures. Failing either of those two developments, the statutory preclusion of review of issues of law violates the Suspension Clause as applied to expedited removal from the interior.

See 8 U.S.C. § 1252(e)(2)(C) (2006). It does not permit review of whether a lawfully admitted student has been mistaken for an undocumented alien, or whether an asylum seeker has been wrongly denied referral to a credible fear review.

213. Boumediene v. Bush, 128 S. Ct. 2229, 2270 (2008). They may, however, be facing death or imprisonment in another country.

214. Id. at 2266 (quoting St. Cyr, 533 U.S. at 302).
CONCLUSION

The *Boumediene* decision establishes, as definitively as a precedent can, that the Suspension Clause is not merely a technical regulation of the exercise of emergency powers, but a fundamental guarantee of the availability of a judicial remedy for unlawful detention. Habeas corpus is “a right of first importance,”215 and a key component of the constitutional framework.

The decision leaves open as many questions as it settles about the operation of the Clause, but it provides the appropriate methodology for answering them: partly by attention to history, and partly by construing the Suspension Clause in relation to the constitutional framework as a whole. That methodology invites future debate. One crucial, and potentially perilous, element of that debate will concern the proper role for balancing within the elaboration of the principle “‘[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful.’”216

215. Id. at 2277.
216. Id. at 2246–47 (quoting Resolution of the New York Ratifying Convention (July 26, 1788), *in* 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution 328 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co., 2d ed. 1876)).