Syracuse University

SURFACE

Syracuse University Honors Program Capstone Projects

Syracuse University Honors Program Capstone Projects

Spring 5-1-2015

Operation Judicial Review: A Comparative Analysis of the Role of the Judiciary in Domestic and Foreign Detention and Material Support Cases During the War on Terror

Tyler Mitchell

Follow this and additional works at: https://surface.syr.edu/honors_capstone

 Part of the American Politics Commons

Recommended Citation

Mitchell, Tyler, "Operation Judicial Review: A Comparative Analysis of the Role of the Judiciary in Domestic and Foreign Detention and Material Support Cases During the War on Terror" (2015). *Syracuse University Honors Program Capstone Projects*. 852.
https://surface.syr.edu/honors_capstone/852

This Honors Capstone Project is brought to you for free and open access by the Syracuse University Honors Program Capstone Projects at SURFACE. It has been accepted for inclusion in Syracuse University Honors Program Capstone Projects by an authorized administrator of SURFACE. For more information, please contact surface@syr.edu.

Operation Judicial Review: A Comparative Analysis of the Role of the Judiciary in Domestic and Foreign Detention and Material Support Cases During the War on Terror

A Capstone Project Submitted in Partial Fulfillment of the Requirements of the Renée Crown University Honors Program at Syracuse University

Tyler Mitchell
Candidate for B.A. Degree
and Renée Crown University Honors
May 2015

Honors Capstone Project in Political Science

Capstone Project Advisor: _____
Thomas Keck,
Professor of Political Science

Capstone Project Reader: _____
Keith Bybee,
Professor of Political Science

Honors Director: _____
Stephen Kuusisto, Director

Date: April 22, 2015

© (Tyler Mitchell and April 22, 2015)

Abstract

The Bush and Obama administrations have pursued a military campaign during the War on Terror in which "the world is a battlefield." The globalized nature of contemporary warfare has tested the limits of constitutional protections for individuals under the control of the United States government. My distinction thesis focuses on the extension of constitutional rights and, in turn, the maintenance of the separation of powers during the War on Terror. I provide a comparative analysis of the role of the judiciary to reconcile constitutional First Amendment free speech & association and habeus corpus rights with federal executive & legislative counterterrorism policies. I compare the Supreme Court's perspectives of balancing proper enforcement of international counterterrorism objectives with the preservation of constitutional rights in *Boumediene v. Bush* and *Holder v. Humanitarian Law Project*. I also utilize cases from the federal circuit courts to examine how *Boumediene* and *Holder* have been applied in subsequent issues. My thesis aims to differentiate the political, diplomatic, and legal considerations by the judiciary between cases that involve actors associated with Foreign Terrorist Organizations and detainees in Bagram, Afghanistan compared to non-foreign terrorist organizations and detainees in Guantánamo Bay, Cuba. I argue that the particular characteristics of American counterterrorism operations during the War on Terror have emphasized the legal distinction of domestic versus foreign individuals and organizations, territories, and jurisdiction. This distinction also intervenes upon the extent to which the courts seek to protect the separation of powers by constraining the actions of the executive, in addition to invoking certain rights and protections of the Constitution. I conclude that the federal courts have demonstrated greater deference to the federal government in foreign material support and detention cases since the Supreme Court rulings in *Boumediene v. Bush* and *Holder v. Humanitarian Law Project*.

Executive Summary

Throughout the history of the United States, the courts have deliberated whether the individual rights and government authorities vested in the Constitution apply solely to American citizens, or to both citizens and non-citizens under the subjugation of the federal government. In addition, the courts have debated whether the Constitution may apply extraterritorially to activities conducted outside of the continental United States. These two concerns are especially pertinent to the developments in contemporary warfare and national security measures instituted by the United States during the War on Terror. For example, tactics by non-state transnational terrorist networks, adapting notions of state sovereignty, and the use of military counterinsurgency strategies by the United States in the Iraq and Afghanistan wars have tested the conventional applications of laws of war and domestic case law established during World War II.

The federal government has conducted its counterterrorism strategies with the mentality that "the world is a battlefield." Furthermore, the securitization of terrorism by the United States government since 2001 has permitted the government to expand its counterterrorism legislative framework to the extent at which traditionally protected constitutional liberties have been restrained. In particular, the Military Commissions Act of 2006 and the Intelligence Reform and Terrorism Prevention Act of 2004 have conflicted with essential constitutional rights, free speech and association in the First Amendment and habeas corpus in the Suspension Clause. These two counterterrorism measures associate with vital tactics in detention of suspected terrorist "enemy combatants" and prohibitions on material support to Foreign Terrorist Organizations. In the case of detention, the United States has utilized Guantánamo Bay detention camp and Parwan

Detention Facility in Bagram Afghanistan. The Supreme Court and lower federal courts have decided cases that consider both the international security objectives of the government for detainment and regulating material support with the traditional constitutional doctrines to uphold First Amendment and Suspension Clause claims.

Given the globalized nature of the United States' military campaign during the War on Terror, this thesis intends to ask one critical question: how has the distinction between domestic and foreign circumstances during the War on Terror influenced the courts to assess First Amendment and Suspension Clause claims in material support and detention cases? I argue that the particular characteristics of American counterterrorism operations during the War on Terror have emphasized the legal distinction of domestic versus foreign individuals and organizations, territories, and jurisdiction. This distinction also intervenes upon the extent to which the courts seek to protect the separation of powers by constraining the actions of the executive, in addition to invoking certain rights and protections of the Constitution. I conclude that the federal courts have demonstrated greater deference to the federal government in foreign material support and detention cases since the Supreme Court rulings in *Boumediene v. Bush* and *Holder v. Humanitarian Law Project*. Although the federal courts have also deferred to the government in domestic detention cases, the courts have intervened to protect constitutional rights in domestic material support cases.

This thesis compares the judicial developments based on this distinction, beginning with the two Supreme Court cases of *Boumediene v. Bush* and *Holder v. Humanitarian Law Project* and subsequent cases decided by the United States Circuit Courts of Appeals. In 2008, the Supreme Court ruled that the right to habeas corpus applies to non-citizen detainees located in

Guantánamo Bay detention camp. The Court determined that in all practical senses, Guantánamo Bay is a domestic area under the complete control and jurisdiction of the United States. Thus, the extension of habeas corpus to detainees is vital to maintain the separation of powers. The Supreme Court compared Guantánamo Bay to Landsberg Prison in Germany during World War II, the subject of *Johnson v. Eisentrager*. In addition, the Court determined the extension of habeas corpus to non-citizens based on the notion of *de facto* sovereignty, which is sovereignty based on the exercise of power over a territory. Although the Supreme Court demonstrated activism to uphold the Constitution in *Boumediene*, the D.C. Circuit Court of Appeals has ultimately deferred to the federal government in habeas corpus cases for Bagram detainees and alternative cases for Guantánamo Bay detainees. Concerning Bagram detainees, the court has determined that Parwan Detention Facility is a foreign site in comparison to Guantánamo Bay detention camp mainly because it is located in an active theater of war. For subsequent Guantánamo Bay cases, the court has ruled that it lacks proper jurisdiction to hear cases that involve extradition of detainees or Fifth Amendment claims on conditions of confinement or recovery from damages.

The Supreme Court decided *Holder v. Humanitarian Law Project* in 2010, in which the court ruled that speech-related activities constituted as material support are not protected by the First Amendment. Since such activity is coordinated with Foreign Terrorist Organizations, the Court justified its deference to the government based on the need to maintain collective international counterterrorism strategies and diplomatic relations with allies. The subsequent cases decided by the Circuit Courts of Appeals that involve Foreign Terrorist Organizations have maintained the ruling in *Holder*. These cases illustrate the consequences of the Foreign Terrorist

Organization List administered by the Department of State on the strength of the First Amendment. However, the courts have demonstrated greater prioritization to uphold the First Amendment in cases that involve organizations that act in coordination with terrorist organizations located within the United States.

These cases have illustrated the unconventional circumstances of the War on Terror. The courts have been forced to compare contemporary circumstances with the circumstances in World War II in detention cases. Likewise, the courts have been especially influenced by the international security efforts against Foreign Terrorist Organizations. The conclusions in this thesis further illustrate the fundamental distinction between the national security threats of permitting dissent during wartime and judicial review of "enemy combatants." In essence, while the right to habeas corpus maintains the institutional role of the judiciary, it also presents potential threats if detainees are allowed to return to the battlefield.

Table of Contents

Acknowledgements

I would like to gratefully and sincerely thank Professor Thomas Keck for his persistent guidance, constructive criticism, and patience given to me as my advisor throughout the academic year in order to development my thesis. In addition, I would like to thank my readers, Professor Keith Bybee and Michael Newell, for their own constructive feedback and support. Each member played an integral to both the improvements in the substance of my thesis, its research design, and my academic interests in my thesis topic. I would also like to acknowledge the additional support and feedback from my classmates and Professor Seth Jolly in the undergraduate political science distinction program. Lastly, I would like to thank both the Renée Crown University Honors Program and Department of Political Science at Syracuse University for providing distinguished undergraduates the opportunities to produce original academic scholarship pertinent to their respective academic disciplines.

Chapter 1

Introduction

Judicial discourse has asked whether the Constitution provides rights and guarantees of protections only to American citizens and government authority solely within the territory of the United States, or whether these rights and guarantees should be extended to foreign territories and non-citizens. Since the founding of the United States, the judiciary has deliberated the applicability of constitutional protections to aliens under the control of the government and citizens based on conduct outside of the territories of the United States. Concerning whether the Constitution applies to foreign nationals, the Supreme Court has established that constitutional questions considered in cases "are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."[1] From the perspective that the Constitution restrains government powers on its subjects, the courts have determined that limits must be imposed on overreaching government authority over any individual within the United States. Yet, the courts have been less absolute about which authorities of the federal government are restrained outside of the territories of the United States.

The Supreme Court has suggested that the "proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."[2] Although the courts have not been as absolute concerning the application of constitutional liberties outside of the American territories, the judiciary has considered certain protections against unchecked governmental

[1] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[2] *Reid v. Covert*, 354 U.S. 1 (1957).

powers so critical as to be applicable beyond the boundaries of the United States' borders. These developments are especially pertinent to counterterrorism campaigns in which the federal government has instituted military operations and national security measures that apply internationally.

Considering the Supreme Court has deliberated the geographic scope of constitutional rights to citizens and non-citizens, the underlying factor is state sovereignty as globalized activities have expanded throughout the last century. In this context, the actors and foreign policy objectives in the War on Terror are especially relevant to the international extension of the Constitution. During the outset of the War on Terror, an anonymous source affiliated with the Bush Administration known as "Hunter" admitted that the mindset of the Bush Administration was that "the world is a battlefield and we are at war. Therefore, the military can go wherever they please and do whatever it is that they want to do, in order to achieve the national security objectives of whichever administration happens to be in power."[3] Deriving from a consequentialist military ideology, these objectives by the Bush and Obama administrations during this period have featured tactics that aim to degrade and ultimately destroy the existent global terrorist network, most urgently al-Qaeda and its affiliate forces.

The United States has executed military campaigns and national security measures to combat terrorism since 2001. The War on Terror has developed into an unconventional, globalized military campaign against sub-state terrorist organizations and regimes. Military actions have consisted of wars in Iraq and Afghanistan as well as covert military operations in various states throughout the Middle East, North Africa, and South East Asia. Since the

[3] Scahill, J. (2013). *Dirty Wars: The World is a Battlefield*, 1-1. New York: Nation Books.

proliferation of terrorist networks' conduct has been transnational in nature, individuals under the subjugation of the Untied States government who have acted in association with terrorist organizations have tested the courts' willingness to safeguard certain activities by upholding constitutional rights. During the War on Terror, the courts have balanced the collective aims of international states that justify federal counterterrorism legislation with traditional constitutional doctrine. Consequently, the courts' rationale in case rulings have essentially been contingent upon the location of activities and characteristics of the subjects in counterterrorism cases. In other words, the domestic or foreign nature of terrorist organizations and detention facilities has influenced the prioritization of the courts to maintain the protection of constitutional liberties or defer to the federal government.

Contemporary characteristics of warfare in the War on Terror, such as counterinsurgency operations and decentralized support for terrorist organizations, have tested the bounds of constitutional protections in an era of globalization. In turn, these have also affected the maintenance of the separation of powers in terms of legislation and executive orders that apply outside the territorial borders of the United States. Two core constitutional civil liberties, the freedom of speech and association in the First Amendment as well as the writ of habeas corpus prescribed in the Suspension Clause, have been strained by vital counterterrorism measures. The Military Commissions Act of 2006 (MCA) granted the president the ability to detain "enemy combatants" while disallowing the courts from having jurisdiction to hear habeas corpus petitions questioning the status of such detainees. Former Navy defense lawyer Charles Swift admitted that "Guantánamo Bay was the legal equivalent of outer space - a place with no law." Until the Supreme Court's intervention, activities taking place at Guantánamo Bay detention

camp circumvented the rule of law. The federal district and appellate courts have provided conflicting perspectives on the proper reach of habeas corpus for detainees held in Parwan Detention Center located in Bagram, Afghanistan during Operation Enduring Freedom. In addition to the MCA, the Intelligence Reform and Terrorism Prevention Act of 2004 amended 18 U.S.C. § 2339B, the existing material support statute associated with aiding Foreign Terrorist Organizations. The diverse applications of 18 U.S.C. § 2339B have presented threats to free speech and association protections traditionally afforded by the First Amendment.

The cases during the War on Terror pertinent to these two particular liberties have caused the courts to reevaluate the extension of constitutional rights beyond the territories of the United States. Additionally, these cases have stressed how international counterterrorism objectives impact the courts' preservations of constitutional rights. This thesis provides a comparative analysis of this quandary, revolving around two Supreme Court cases, *Boumediene v. Bush* and *Holder v. Humanitarian Law Project*. It should be noted that there are some limitations on the substance of the thesis. Broadly, the thesis considers the evolution in counterterrorism measures and court cases from the origin of the War on Terror in 2001 to their developments in 2014. Policies analyzed have been enforced by the Bush and Obama administrations. Certain aspects of detention policies, like the labeling of suspected terrorists as "enemy combatants," were terminated by President Obama in 2009.

The thesis will examine how the federal courts, specifically the United States circuit courts, have applied the aforementioned Supreme Court cases in subsequent cases dealing with domestic and foreign matters associated with the First Amendment and Suspension Clause liberties. This thesis intends to ask one critical question: how has the distinction between

domestic and foreign circumstances during the War on Terror influenced the courts to assess First Amendment and Suspension Clause claims in material support and detention cases? I argue that the particular characteristics of American counterterrorism operations during the War on Terror have emphasized the legal distinction of domestic versus foreign individuals and organizations, territories, and jurisdiction. This distinction also intervenes upon the extent to which the courts seek to protect the separation of powers by constraining the actions of the executive, in addition to invoking certain rights and protections of the Constitution. I conclude that the federal courts have demonstrated greater deference to the federal government in foreign material support and detention cases since the Supreme Court rulings in *Boumediene v. Bush* and *Holder v. Humanitarian Law Project*. Although the federal courts have also deferred to the government in domestic detention cases, the courts have intervened to protect constitutional rights in domestic material support cases.

Chapter 2 reviews existing literature that discusses the approaches the courts have taken to assess constitutional liberties in *Holder*, *Boumediene* and related precedent, in particular to maintain the separation of powers constitutional framework. Chapter 3 discusses the research design of the thesis, including the types of cases and definitions of primary keywords. Chapter 4 focuses on the ruling in *Boumediene v. Bush*, particularly on how the courts perceived Guantánamo Bay as a domestic area compared to Landsberg Prison in Germany during World War II. This is followed by an examination in D.C. Circuit Court of Appeals cases that discuss whether the Suspension Clause extends to detainees in Bagram, Afghanistan and other matters for detainees in Guantánamo Bay. Chapter 5 examines the rationale by the Supreme Court in *Holder v. Humanitarian Law Project*, emphasizing the priority to maintain proper diplomatic

relations to fulfill counterterrorism objectives. This chapter also examines federal lower court cases that involve subsequent material support cases featuring Foreign Terrorist Organizations and branches of terrorist organizations established within the United States. Chapter 6 discusses the implications of the relationship between contemporary military strategies, notions of sovereignty, and the role of the judiciary in future material support and detention cases.

Chapter 2

Literature Review

The developments of globalization and the disintegration of states in the former Yugoslavia, the Middle East, and Sub-Saharan Africa have altered the strategic characteristics, conventional distinctions, and ultimate aims of warfare. Kaldor describes these conditions of warfare as New Wars. New wars are conflicts "where the distinctions between combatant and non-combatant, legitimate violence and criminality are all breaking down." Kaldor argues that the primary objectives of new wars are based on sectarian identity politics within illegitimate, unstable states compared to old wars in which one state aimed to further its territorial and ideological gains. In other words, new wars are fought "in the name of identity (ethnic, religious or tribal). The aim is to gain access to the state for particular groups (that may be both local and transnational) rather than to carry out particular policies or programmes in the broader public interest." Instead of a combatant-non-combatant or friend-enemy distinction based on uniform, as in Old Wars, the main distinction in New Wars relies more on nationalist and ethnic identities. This is also caused by the increase in networks of state and non-state actors, including terrorist organizations and private military contractors, that have fought during the War on Terror. The

ultimate aims of foreign terrorist organizations and insurgents that have persisted during the War on Terror are based on religious, such as overthrowing a constitutive government to established a self-recognized Caliphate, and nationalist grounds, including the establishment of an independent nation-state based on the principle of self determination.

Although Kaldor generally classifies the security conception of the War on Terror as an Old War using new technology, she argues that the United States has engaged with elements of New Wars. Kaldor notes that "because of shortages of troops, more private contractors are drawn into the war so it is fought by a network of state and non-state actors. Because it is so difficult to distinguish insurgents from combatants, the main victims are civilians."[4] Ackerman presents a similar argument by stating that it is categorically different to designate an American citizen serving in the German army as an "enemy combatant" compared to a suspected member of al-Qaeda because "only a vey small percentage of the human race is composed of recognized members of the Germany military, but anybody can be suspected of complicity with al-Qaeda. This means that all of us are, in principle, subject to executive detention once we treat the 'war on terrorism' as if it were the legal equivalent of the war against Germany."[5] Specifically, this implies that the developments in the War on Terror are particularly disruptive of the traditional ability to label individuals as "enemy combatants" compared to traditional, symmetric wars between two states. Furthermore, designating the present conflict against terrorism as indeed a "war" calls for the courts to analogize legal issues with precedent that arose from conventional periods of warfare in American history.

---

[4] Kaldor. M. (2007). *Human Security*. Cambridge: Polity.

[5] Ackerman, B. (2004). The Emergency Constitution. *Faculty Scholarship Series*. Paper 121, 1032-1032.

Ackerman further discusses the role of judges during a state of national emergency: the courts "will eventually require the termination of the emergency regime, but the Executive may refuse to give up his emergency powers...[The judges'] opposition to the continuation of the emergency regime will transform the nature of the political battle."[6] In this context of macro-adjudication, the courts may intervene on Executive national security powers to maintain the separation of powers or incite legislative reforms. However, the courts have exhibited times of excessive deference during periods of state emergency. Ackerman further points out that "judges are conservative folk who are likely to interpret their legal mandate very cautiously during the immediate aftermath of a massive terrorist strike...Most judges will bend over backwards to give the government the benefit of the doubt, leading to lots of hearings without much in the way of effective relief."[7]

Geoffrey Stone also argues that "the United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then - later - regretted their actions."[8] One the one hand, the courts intend to intervene on Executive policy-making in order to preserve the integrity of the separation of powers. However, the courts have historically deferred to the political branches during states of emergency, especially during the immediate period after a conflict. The securitization of terrorism by the United States' government has allowed the War on Terror to persist since 2001. Considering that the United States has established a legislative counterterrorism framework, continually justified by the perceived exceptional threats of

[6] *Id* at 10667.

[7] *Id*. at 1069, 1071.

[8] Stone, G. (2009, July 1). Free Speech and National Security. *Indiana Law Journal*, 939-939.

transnational terrorism, and the extensive duration of two wars, the War on Terror has presented unconventional circumstances in cases heard by the courts even after the immediacy of the terrorist attacks in 2001.

One aspect of New Wars that is pertinent to the examination of prohibiting the material support to terrorist organizations is the decentralized forms of finance and the utilization of policing to combat enemies. Kaldor describes that the distinction of forms of finance is a necessary factor to differentiate Old and New Wars. She states that "new wars are part of an open globalised decentralised economy in which participation is low and revenue depends on continued violence."[9] Instead of conventional military financing through state taxation, some essential sources of revenues in New Wars include "loot and pillage, 'taxation' of humanitarian aid, *diaspora support*, kidnapping, or smuggling in oil, diamonds, drugs, people, etc."[10] Although many of these sources like kidnapping and loot and pillage may be conducted by non-state actors within weak states, financing through diaspora support represents the transnational element of aid that actors can rely on in contemporary warfare. One critical means of diaspora support is the Internet, which allows for individuals of a nationalist community, such as Muslims, to converse and provide charity donations to their local communities. The intentions of the material support statutes are to disrupt suspected lethal means of gaining aid, which may coincide with diaspora communities that provide support to terrorist organizations listed by the Department of State.

Miller and Slater argue that the Internet allows for "an expansion of communication, but in this case it is used to repair a discrepancy, thereby helping communities and people come closer to a realization of who they already feel the "really" are. The mechanics involved require a

[9] Kaldor, M. (2013). In Defence of New Wars. *Stability*, 2(1), 3-3.

[10] *Id*.

sense of geography that defies the usual separation of the local and the global."[11] Since the Internet has facilitated this type of interaction among diaspora communities, the willingness to actively integrate into local societies is disrupted. In particular, this development is susceptible to the radicalization of diaspora communities. For instance, "individuals that fail to bond with a broader community may be forced to seek out relationships with more radical groups, thus becoming radicalized themselves, not by choice, but because of the group dynamic."[12] Marginalized immigrants in host communities may be attracted to aid a terrorist organization that associates with their respective diaspora. Increased governmental oversight of non-profit organizations and charities that are linked to terrorist organizations has developed as an international counterterrorism policy. Recommendation 8 of the Financial Action Task Force requires that "the laws and regulations that govern non-profit organizations be reviewed so that these organizations cannot be abused for the financing of terrorism."[13] This indicates the importance and active utilization of material support statutes to combat the proliferation of transnational aid to terrorist organizations.

The United States has also utilized this phenomenon as an objective to prevent the proliferation of radical terrorist ideologies in local communities. President Obama argued that "we will continue to assist, engage, and connect communities to increase their collective resilience abroad and at home. These efforts strengthen bulwarks against radicalization, recruitment, and mobilization to violence in the name of al-Qa'ida and will focus in particular on

---

[11] Miller, Daniel and Don Slater (2000) *The Internet: An Ethnographic Approach*. Oxford: Berg.

[12] Hoffman, B., Rosenau, W., Curiel, A., & Zimmermann, D. (2007). The Radicalization of Diasporas and Terrorism. *RAND Corporation*, 33-33.

[13] (2012). Best Practices: Combating the Abuse of Non-Profit Organizations (Recommendation 8). *FAFT*. Retrieved from http://www.fatf-gafi.org/topics/fatfrecommendations/documents/bpp-npo-2013.html.

those drivers that we know al-Qa'ida exploits."[14] This relationship emphasizes the role of certain individuals and organizations that have been of particular focus for counterterrorism measures during the War on Terror. Federal legislation such as the Intelligence Reform and Terrorism Prevention Act that prevents material support to Foreign Terrorist Organizations aims to isolate and delegitimize FTOs by cutting off all forms of aid by outside actors. With this in mind, some prohibitions like providing services or expert advice and assistance may infringe on traditional protections of the First Amendment. These non-military tactics indicate a more holistic counterterrorist approach by the United States and its international allies that has developed during the War on Terror.

Kaldor suggests that "it is quite a good idea to see [terrorists] as outlaws, disturbers of the peace, and to use the methods of policing and intelligence rather than 'old war.'"[15] Critics have furthered this emphasis on policing threats in contemporary warfare by applying Kaldor's New War thesis to present international policies. "Relevance of Mary Kaldor's 'New Wars' Thesis in the 21st Century" by Williams focuses on how governments and non-governmental organizations have aimed to criminalize the proliferation of arms trafficking, reform of migration and refugee conditions, and administer international norms like the Responsibility to Protect that protects civilian targets as part of their security agendas.[16] Considering this, it is important to analyze how similar policies, such as prohibitions of material support, have been implemented in the United States in relation to constitutional rights.

---

[14] White House. (2011). *National Strategy for Counterterrorism*, 10-10. Retrieved from https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

[15] Kaldor, M. (2005). Old Wars, Cold Wars, New Wars, and the War on Terror. *Cold War Studies Centre, London School of Economics*, 10-10.

[16] Williams, D. (2014). Relevance of Mary Kaldor's 'New Wars' Thesis in the 21st Century. *Journal of Law and Conflict Resolution*, 6(5), 86-87.

One of the primary strategies that the United States has conducted during the War on Terror is counterinsurgency operations in Iraq and Afghanistan. However, these operations have disrupted the applicability of traditional laws of war. Sitaraman argues that the laws of war have been premised on a kill-capture strategy that is not compatible with contemporary counterinsurgencies, which implement win-the-population strategies. The laws of war were created during an era of warfare based on a kill-capture strategy, a model that "focuses its attention on the destruction of the enemy - on killing and capturing enemy forces, and in the age of total war, on destroying the population's will to support the national war machine."[17] These laws have aimed to both limit violence for humanitarian purposes and enable states to legitimately conduct certain forms of violence. Yet, the objectives of contemporary counterinsurgencies are to build a stable and legitimate political order. The broader political and societal ambitions of counterinsurgencies are not directly applicable to regulations against uses of violence. Oberschall furthers this by arguing that "there is a fundamental clash between respect for human rights and counterinsurgency."[18] One key aspect is that "counterinsurgency is the opposite [of the peace time justice system]: suspects are caught in a wide net for the sake of finding a few who are insurgents or terrorists. Unless surveillance is targeted on high probability suspects, many false positives are generated."[19]

Sitaraman suggests that laws of war "appear disconnected from counterinsurgency in three ways. In some cases, the laws of war have not gone far enough in enabling humanitarian operations...[T]he laws of war render necessary and beneficial operations illegal: occupation law

---

[17] Sitaraman, G. (2009). Counterinsurgency, The War on Terror, and The Laws of War. *Virginia Law Review*, 1753-1753.

[18] Oberschall, A. (2008). How Democracies Fight Insurgents and Terrorists. *Dynamics of Asymmetric Conflict*, 8-8.

[19] *Id*. at 9.

prohibits political and social reform, but such reform may be indispensable to counterinsurgency...[T]he principle of distinction looks very different when counterinsurgents are determining targets to attack." Focusing on the third factor, the principle of distinction between civilian and combatant individuals and objects is especially pertinent to the issues of detention during the War on Terror. Sitaraman notes that "it is often difficult to tell whether a person is a civilian or combatant and whether an object is civil or military: Is the civilian that takes up arms each day only to return home each night a civilian or combatant? Is a television station spreading enemy propaganda a military object?"[20] Since the laws of war have been increasingly disconnected with contemporary military strategies like counterinsurgencies, existing American case law that was established in the twentieth century must be adapted to these same strategies that raise constitutional questions.

Oberschall mentioned the incompatibility of the discrimination principle in humanitarian law during counterinsurgency operations. He noted that "the insurgents contravene the laws of war by using civilians as shields to bloc enemy fire and escape capture. Bystanders either support the insurgency or are more afraid of the insurgents than of the security forces who don't protect them from later reprisals."[21] As indicated earlier, the binary distinction between civilians and combatants is increasingly eroding as non-state actors who are not in uniform are the primary targets. Since the Military Commissions Act gave the military discretion to capture and detain suspected "enemy combatants," these deteriorating distinction suggests inconsistencies in the accuracy of labeling suspects as in fact "enemy combatants." Detention during the War on Terror may then be conceptualized as "as a global response to a global problem [to move detainees to

[20] Sitaraman, G. (2012). *The Counterinsurgent's Constitution: Law in the Age of Small Wars*. Oxford: Oxford University Press.

[21] Oberschall, A. (2008). How Democracies Fight Insurgents and Terrorists. *Dynamics of Asymmetric Conflict*, 10-10.

Guantánamo Bay from other countries]: if terrorism exists across boundaries and terrorists are independent entities, detention of terrorists could also be a borderless, global enterprise."[22] Thus, contemporary detention measures have circumvented traditional geographic constraints and local legal regimes that had originally limited opportunities to detain combatants.

The courts' perspectives on the extraterritorial application of the Constitution have especially evolved since the post-World War II era. Piret indicates that "the applicability of constitutional rights thus expands in accordance with the widening sphere of American municipal law, as from the second part of the twentieth century onwards the United States has subjected more and more people outside of its borders to obligations ensuing from American law in areas such as anti-trust, anti-drugs law, *counterterrorism* etc."[23] The extraterritorial applicability of the Constitution may be interpreted from varying perspectives. The courts originally interpreted the proper reach of the Constitution through the lens of citizenship, in which the constitutional protection were not relevant to non-citizens. However, others have perceived the Constitution's appropriate application to those subject to the controlling state. In other words, the conception of subjection in a case like *Hawaii v. Mankichi*, "in which obedience to the laws is concomitant to the entitlement to fundamental rights is in accordance with the common law tradition in which citizenship was not a notion. Only subjection under the Crown (although in itself also an imprecise notion) was relevant to the question whether a person had a right to habeas corpus for example."[24] This aligns with the principle of mutual obligation. Piret states that "when a nation

---

[22] Sitaraman, G. (2012). *The Counterinsurgent's Constitution: Law in the Age of Small Wars*. Oxford University Press: Oxford.

[23] Piret, J. (2008). *Boumediene v. Bush* and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism? *Utrecht Law Review*, 93-93.

[24] Piret, J. (2008). *Boumediene v. Bush* and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism? *Utrecht Law Review*, 94-94.

applies its national laws to actions of non-resident aliens because of the effect of those actions on the legitimate interests of that nation, the mutuality of obligations model requires that, when non-resident aliens are prosecuted for offences against such extraterritorial laws, they are entitled to all the concomitant constitutional protections."[25] However, the Supreme Court has asserted at times a more formalist position on the extension of constitutional liberties beyond the mainland of the United States. In *United States v. Verdugo-Urquidez*, Chief Justice Rehnquist "reinvigorated a restrictive version of the membership approach of the social contract in holding that the defendant had no Fourth Amendment rights in the search of his home in Mexico because he was not a member of 'the people' to whom the Constitution guaranteed rights."[26] In general, the courts have displayed competing perspectives on the extraterritorial applications of constitutional rights to citizens and non-citizens. This is especially noteworthy to frame the understanding of habeas corpus extension and degree of jurisdiction in Guantánamo Bay and Bagram, Afghanistan.

Neuman analyzes three factors concerning the Supreme Court's historical approach to the extraterritorial application of the Bill of Rights in light of the decision in *Boumediene v. Bush*. First, American constitutional rights are not equal to all universal human rights. For instance, "the U.S. understanding of freedom of speech, of property rights, and of separation of church and state, for example, are stricter than international standards."[27] Second, some U.S. constitutional rules are "structurally grounded. To give them effect requires the support of government

---

[25] *Id*.

[26] *Id*. at 95.

[27] Neuman, G. After Guantanamo: Extraterritoriality of Fundamental Rights in U.S. Constitutional Law. *Jus Politicum*. Retrieve from http://www.juspoliticum.com/After-Guantanamo.html.

institutions that the United States cannot maintain in many external locations."[28] Third, some U.S. rights are "defined in too rigid a fashion to take into account the variations that would be needed to apply them extraterritorially...Grafting such flexible balancing tests onto the definition of U.S. constitutional rights in order to facilitate their extraterritorial application could distort their meaning when they are applied domestically."[29] These three conclusions represent that varying approaches to extraterritorial applications of constitutional rights are valid. However, this may also result in different interpretations of the relationship between territory, jurisdiction, and the Constitution, especially cases that are heard by the federal district and circuit courts.

The extraterritorial application of the First Amendment by the courts has been more ambiguous than other constitutional rights, such as habeas corpus protections. In relation to the Suspension Clause, Zick suggests that Raustiala's concept of legal spatiality, the notion that right vary with location, was rejected in *Boumediene v. Bush*.[30] However, the Court did not indicate that the entire Bill of Rights should be applicable abroad. Zick notes that "the Supreme Court has never squarely addressed whether the First Amendment, in particular, applies beyond U.S. borders." One area that Zick analyzes is the citizenship or membership approach that lower courts have adopted to First Amendment cases. For example, Zick stated that in *DKT Memorial Fund Ltd. v. Agency for International Development*, the D.C. Circuit Court dismissed "First Amendment claims brought by foreign organizations that were prohibited during the period of any federal grant from using their own funds to perform or promote abortion as a method of family planning abroad. Such a restriction would violate the First Amendment if applied to

---

[28] *Id*.

[29] *Id*.

[30] Zick, T. (2010). Territoriality and the First Amendment: Free Speech At - And Beyond - Our Borders. *Faculty Publications*. Paper 821, 1593-1593.

domestic organizations."[31] This suggests that the distinction between domestic and foreign organizations is particularly relevant to the courts' analyses of First Amendment protections. Such an understanding may be applied to foreign and domestic terrorist organizations as defined in this thesis. Zick concludes that "it is likely that citizens enjoy at least some limited First Amendment protections when outside U.S. territorial borders. After *Boumediene*, it is at least plausible to argue that the First Amendment protects aliens abroad in some circumstances."[32] Zick analyzed the application of the First Amendment from the perspective of *Boumediene* and relatable extraterritorial doctrine. However, *Holder v. Humanitarian Law Project* provides an alternative understanding about First Amendment protections in association with international actors and security policy aims.

Colangelo examines issues involving extraterritorial jurisdiction with terrorism and piracy. In most cases, extraterritorial criminalization is restricted by state sovereignty. However, piracy crimes are distinguishable from other traditional extraterritorial crimes based in fact on sovereignty. Colangelo argues that "prosecuting a pirate under the law of nations did not interfere with the sovereignty of any other state. Pirates had disavowed their nationality and the laws of their sovereign. By so doing, they brought themselves outside of any state's specific jurisdiction, and were instead subject to the 'law of nations,' which all states could enforce without fear of treading on any other state's sovereignty."[33] Likewise, terrorists have "opted out of the 'law of society': they 'acknowledg[e] obedience to no government whatever [and] act[ ] in defiance of all law,' such as the law distinguishing between military and civilian targets (indeed their purpose

---

[31] *Id*. at 1596.

[32] *Id*. at 1598.

[33] Colangelo, A. Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law. *Harvard International Law Journal*, 48 (1), 144-144.

is often to kill as many civilians as possible), and their acts potentially target all states."[34] Although pirates and terrorists are, in actuality, nationals of a state and that acts occur in a given state's jurisdiction, [terrorists] "are, like pirates, subject to the law of nations, which any state may enforce through criminal prosecution [b]ecause terrorists operate outside the traditional paradigm of state accountability when they commit their crimes."[35] Colangelo notes that "just like prosecuting the pirate, prosecuting the terrorist for offenses against the law of nations disrespects *no state's sovereignty*." Indeed, the principle of universal jurisdiction applies to many prosecutorial strategies against pirates and terrorists. However, certain policies like detention, especially in Guantánamo Bay Detention Camp and Parwan Detention Facility, raise questions concerning jurisdictional issues for courts to hear Guantánamo detainee cases and authorize transfers outside of the United States' control. Furthermore, the relationship between habeas corpus and detention in Afghanistan raises certain implications of state sovereignty that will be analyzed in this thesis.

[34] *Id*. at 45.

[35] *Ibid*.

Chapter 3

Research Design

This thesis provides a qualitative, comparative analysis of the critical distinction between foreign and domestic individuals and organizations, territories, and jurisdiction that has altered the courts analyses of constitutional claims associated with counterterrorism measures. Specifically, this particular distinction features domestic and foreign detention centers and terrorist organizations. It should be prefaced that there is neither a bright line distinction between domestic and foreign characteristics within these two categories nor have the courts decided in favor or against cases in absolute terms between these two categories. Guantánamo Bay is neither wholly domestic territory of the United States nor are there terrorist organizations recognized by the Department of State fully headquartered within the United States.

However, the characteristics concerning the composition of terrorist organizations and detention sites present noteworthy features, which warrant a comprehensive examination of the distinctions between the foreign and domestic elements of these two categories. Habeas corpus cases that will be categorized as "domestic" involve suspects detained in Guantánamo Bay detention camp. Habeas corpus cases categorized as "foreign" involve suspects detained in Parwan Detention Facility in Bagram, Afghanistan. Secondly, First Amendment cases categorized as "domestic" involve terrorist organizations that maintain at least a partial presence in the United States. First Amendment cases categorized as "foreign" involve international terrorist organizations classified in the Foreign Terrorist Organizations list by the Department of State. The decision in *Boumediene v. Bush* highlights this particular distinction concerning the jurisdictional matters of Guantánamo Bay as an area under the sole control of the United States

as compared to Landsberg Prison in Germany. Although this distinction is less definitive in *Holder v. Humanitarian Project*, comparing *Holder* to *Boumediene* sheds light on the implications of foreign and domestic circumstances. Likewise, cases decided by the federal courts, which attempt to maintain the Supreme Court's jurisprudence, will present similar implications regarding this distinction.

With this in mind, it is necessary to present distinct definitions of "domestic" and foreign" in order to precisely fulfill the objectives of this thesis. Each keyword features two definitions associated with the two respective constitutional issues in focus. "Foreign," in relation to material support court cases involving First Amendment free speech and association issues, is defined as any terrorist organization that is headquartered and fully operative in a territory outside of the the United States of America. In the same context, "domestic" is defined as any terrorist organization that is either headquartered and operative in the United States of America or a branch of a Foreign Terrorist Organization[36] that is domiciled in the United States of America. Additionally, "foreign," in relation to detention cases involving Suspension Clause habeas corpus issues, is defined as any territory that is located outside of the United States. Likewise, "domestic" is defined as any territory that is located either in the United States of America or subject to the exclusive jurisdiction of the authorities and courts of the United States of America.

As stated earlier, the two federal counterterrorism policies that I will use will be the Military Commissions Act, specifically §7(e)(1), and the Intelligence Reform and Terrorism Prevention Act, specifically 18 U.S. Code § 2339B. I will utilize court cases to support my

[36] 8 U.S. § 1189 outlines that a Foreign Terrorist Organization is one in which an organization is a foreign organization and engages in terrorist activity that threatens the security of United States nationals or the national security of the United States.

argument. The cases that are analyzed have been specifically selected based on the objectives of this thesis. Again, the two primary cases will be *Holder v. Humanitarian Law Project* and *Boumediene v. Bush*. Additionally, I will utilize cases from the lower federal courts to assess how the rationales of these two cases given by the Supreme Court have been interpreted since the decisions. This is appropriate considering that the activity by the judiciary is based primarily on the lower courts due to the annual number of cases heard compared to the Supreme Court. It is more important to focus on appellate courts instead of district courts because the role of the appellate courts is to review disputed decisions by the lower district courts, specifically answering additional constitutional questions.

Figure 1: Categorization of Analyzed Cases

	Foreign Circumstances	**Domestic Circumstances**
First Amendment *Free Speech & Association*	61 (**4 Case Studies**)	1 (**1 Case Study**)
Habeas Corpus *Detention*	4 (**3 Case Studies**)	72 (**2 Case Studies**)

For First Amendment analysis, I will use cases from the 1st Circuit to the D.C. Circuit Courts of Appeals that cite *Holder*. Broadening my range of circuit courts to select cases will provide a more representative outlook on how the courts throughout the country have interpreted First Amendment claims. To assess habeas corpus rights given to alien detainees, I will use cases decided by the D.C. Circuit Court that cite *Boumediene*. I will be using the D.C. Circuit Court because this court has proper jurisdiction to hear habeas corpus claims by detainees located in

Guantánamo Bay. In total, there are 76 appellate court cases that have cited *Holder* and 62 cases that cite *Boumediene*. The cases that cite *Holder* are from the period of 2010 to 2014. The cases that cite *Boumediene* are from the period of 2008 to 2014. In general, the lower courts have been particularly deferential to the government in foreign and domestic detention cases that cite *Boumediene*. Concerning Guantánamo Bay cases, cases have focused on the affirmation of detainees' status as "enemy combatants" and the jurisdictional limits of the D.C. courts. In cases that involve Bagram detainees, the courts have assessed the multi-factored rationale in *Boumediene* by taking into account issues like the citizenship of the detainees, the nature of the detention facility, and the surrounding circumstances in the area of detention. Alternatively, the lower courts have primarily maintained the decision in *Holder v. Humantiarian Law Project* in foreign cases. However, the courts have been more active to consider First Amendment claims in domestic material support cases.

I have chosen detention and material support cases studies, which are exceptionally important to my primary argument, from the Circuit Courts of Appeals based on the previously stated selection of cited cases. Concerning "domestic" *Boumediene* cases, I will examine two cases. For "foreign" *Boumediene* cases, I will analyze three cases. one of which is a district court case in order to provide greater context to the D.C. Circuit Court of Appeals rulings. Additionally, I will examine four cases that involve "foreign" *Holder* material support cases. I will analyze one case for "domestic" *Holder* material support matters.

Figure 2: Hypothesis

	Foreign Circumstances	**Domestic Circumstances**
First Amendment *Free Speech & Association*	Deference	Activism
Habeas Corpus *Detention*	Deference	Activism

My hypothesis is that the distinction between foreign and domestic circumstances influences the courts to defer to the federal government in *foreign* material support and detention cases while actively intervening to preserve constitutional in *domestic* cases for the two categories. It is important to define deference and activism in this context. First, deference may be defined as the judicial decision to yield to the judgement of Congress or the Executive. Second, activism may be defined as the judicial decision to place constraints on the powers of Congress or the Executive in order to maintain sufficient legal safeguards of constitutional rights. Issues of foreign diplomacy and sovereignty of international states, along with Executive national security powers manifested in the Constitution, should primarily cause the courts to prioritize deference rather than maintenance of constitutional rights especially during a wartime period. Conversely, such diplomatic and national security concerns are reduced as issues take place in domestic detention facilities, like Guantánamo Bay detention camp, and terrorist organizations that are domiciled in the United States and coordinate with solely domestic organizations.

Chapter 4

Boumediene v. Bush: Distinguishing Between Guantánamo Bay and Landsberg Prison

The detention of suspected "enemy combatants" affiliated with foreign terrorist organizations has been a crucial tactic performed by the United States military during the War on Terror. On January 11, 2002, the United States officially opened its detention facility in Guantánamo Bay, Cuba. The United States originally obtained control of Guantánamo Bay in 1903 when President Roosevelt signed the Avalon Lease of Lands for Coaling and Naval Stations. The treaty states that "the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas."[37] Although the United States does not possess ultimately sovereignty over the territory, the lease agreement provides legitimate control in order to pursue its counterterrorism objectives without significant obstructions from the Cuban government or courts. Detention policies specifically in Guantánamo Bay display the importance of territory and jurisdiction as factors used by the courts to assess the reach of the Suspension Clause and due process rights. Since Guantánamo Bay is neither situated within the continental United States nor overseen by a sovereign foreign government, territory has especially developed as a crucial factor for the courts to evaluate in detention cases. The courts' analysis of the Military Commissions Act of 2006 emphasizes the relationship between jurisdiction and the separation of powers, which has persisted in counterterrorism cases. This section analyzes the Supreme Court's rationale in *Boumediene v. Bush*, which concludes that Guantánamo Bay detention camp is more comparable to a domestic

[37] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; February 23, 1903. Retrieved from http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

site instead of Landsberg Prison in Germany during World War II because Guantánamo Bay is under the sole, *de facto* sovereignty of the United States.

4.1. Overview of the Military Commissions Act of 2006

Subsequent to the start of combat operations, President Bush issued a Military Order on November 13, 2001 that authorized the detention and trial by military commission of non-citizens suspected of terrorist acts or associations.[38] In 2004, the Department of Defense established Combatant Status Review Tribunals to determine whether individuals detained in Guantánamo Bay were "unlawful enemy combatants." On September 27, 2006, then Judiciary Committee Chairman and Senator Arlen Specter argued against the federal legislation because it forbade detainees the fundamental right to habeas corpus.

Senator Specter claimed that "the bill before the Senate strips the federal district court of jurisdiction to hear these cases. The right of habeas corpus was established in the Magna Carta in 1215 when, in England, there was action taken against King John to establish a procedure to prevent illegal detention. What the bill seeks to do is to set back basic rights by some 900 years."[39] He further declared that the bill was "patently unconstitutional on its face."[40] Senator Specter pointed out one of the linchpin constitutional rights that preserves individual liberty from arbitrary government power. Yet, Senator Specter contradicted his claims by ultimately voting in

---

[38] §1(f) of the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism stated that "given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

[39] Specter, A. (2006, September 27). Military Commissions Act of 2006. *Vote Smart*. Retrieved from https://votesmart.org/public-statement/218721/military-commissions-act-of-2006#.VMQ_RGTF-mE.

[40] (October 1, 2006). Profiles in Cowardice. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2006/09/30/AR2006093001027.html.

favor of the Military Commissions Act. This particular vote underscores the significance of an independent judiciary to check the Executive even if Congress approves legislation on matters of national security. As a result, the Military Commissions Act of 2006 amended the Detainee Treatment Act of 2005 by denying jurisdiction with respect to habeas actions for detained alien "enemy combatants" located in Guantánamo Bay. §7(e)(1) of the MCA stated that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[41]

4.2. Analysis of *Boumediene v. Bush*

Boumediene concluded a series of cases presented to the Supreme Court that were associated with two primary constitutional questions relevant to the role of the judiciary during the War on Terror. First, do the federal courts of the Untied States have jurisdiction to consider appeals filed on behalf of foreign citizens held by the military in Guantánamo Bay detention camp? The Supreme Court decided in *Rasul v. Bush* that the courts indeed have the authority to determine whether foreign nationals were wrongfully imprisoned based on the sufficient degree of control the United States exercises over Guantánamo Bay, as outlined in the 1903 Lease of Lands for Coaling and Naval Stations. Second, does indefinite detention in Guantánamo Bay for American citizen detainees suspected to be "enemy combatants" violate the Fifth Amendment right of due process? The Supreme Court ruled in *Hamdi v. Rumsfeld* that citizens who are detained have the Fifth Amendment right to contest their status. The Supreme Court faced a

[41] Military Commissions Act of 2006, H.R. 6166. § 7(1)(e) (2006).

further question in *Boumediene v. Bush* that extended these two established principles: do *foreign nationals* have the constitutional privilege of habeas corpus once detained in Guantánamo Bay as suspected "enemy combatants?"

The legislative matter under constitutional question in *Boumediene* was §7(e)(1) of the Military Commissions Act of 2006, which denied jurisdiction to the courts to hear a petition of habeas corpus filed by or on behalf of suspected alien "enemy combatants." Justice Roberts stated in his dissenting opinion in *Boumediene* that the MCA provided the "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[42] Detainees were able to be assigned a military officer as a personal representative during cases considered in the Combatant Status Review Tribunals (CSRTs) who provided advice and presented documentary evidence on behalf of the detainee. *Boumediene* featured six Algerian natives including Lakhdar Boumediene, a citizen of Bosnia and Herzegovina who was arrested based on suspicion that he was involved in conspiring a plot to execute a terrorist attack with al-Qaeda. Once the Supreme Court of Bosnia determined in 2002 that there was insufficient evidence to continue to hold the group, American forces seized them and transported the suspects to Guantánamo Bay detention camp. Boumediene remained detained for six years based on the sole claim that he was an "enemy combatant" until he petitioned the Supreme Court to grant him the right to habeas corpus.

The Supreme Court was required to "determine whether petitioners [were] barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their

---

[42] *Boumediene v. Bush*, 553 U.S. 723 (2008).

physical location, i.e., their presence at Guantánamo Bay."[43] The Supreme Court was confronted with two alternative notions of sovereignty: the colloquial interpretation that sovereignty is the exercise of dominion or power over a given territory and the narrower understanding that sovereignty is considered a claim of right over a territory. The Supreme Court concluded that it is inappropriate to conduct a formalistic interpretation of sovereignty based on territory in the context of the reach of the writ of habeas corpus. The Supreme Court decided in *Johnson v. Eisentrager*, in which the court ruled that the writ of habeas corpus did not extend to detained German war criminals in Landsberg prison in Germany during World War II, that German prisoners were "at no relevant time within any territory over which the United States [was] sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[44] However, the Supreme Court in *Boumediene* expressed that sovereignty is a multifaceted concept. In other words, sovereignty may be interpreted as *de jure* sovereignty, defined by the legal borders of United States' territory, or *de facto* sovereignty, determined by the United States' exercise of power over a given territory.

The government contended that the reach of habeas corpus to foreign nationals should be prohibited in territories that are not under the *de jure* sovereignty of the United States. The Court retorted, "by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal

---

[43] Id.

[44] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

constraint."[45] Thus, the combination of the geographic location of Guantánamo Bay, Cuba and the conditions of the lease agreement made detainees susceptible to Executive manipulation of constitutional rights. The Supreme Court concluded that "abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another."[46] This suggests that the paramount concern of the Court was to maintain a constant institutional role for itself when the Executive exerted power even in areas extending beyond the mainland territories of the United States. From the majority's perspective, *de jure* sovereignty was the proper standard associated with the Suspension Clause when the United States' government conducted unobstructed power on the territory to check fundamental Executive powers. The Court noted that "it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another." Although the Court conceded that Cuba retains *de jure* sovereignty over Guantánamo Bay, it maintained the ruling in *Rasul* that the United States exercises *de facto* sovereignty over the area due to the Avalon Lease, which provides the United States complete jurisdiction and control over the base.

The Supreme Court developed a framework to analyze the differences between the circumstances in *Johnson v. Eisentrager* and detained "enemy combatant" terrorist suspects in Guantánamo Bay detention camp in Cuba during the War on Terror. The framework established three critical factors: (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

[45] *Boumediene v. Bush*, 553 U.S. 723 (2008).

[46] *Id*.

the prisoner's entitlement to the writ. In particular, it is necessary to focus on the second factor in order to understand the Supreme Court's rationale on why Guantánamo Bay is more appropriately classified as a domestic territory to the Untied States rather than Landsberg Prison.

Although the courts have established that constitutional rights apply to aliens within the mainland territories of the United States, the application of such rights to aliens outside of the United States' borders had been viewed as illegitimate. Justice Scalia questioned, "[in] 220 years of [the United States'] history, [has there been] a single case in which it was not a citizen of England or a citizen of the United States in which a common-law writ of habeas corpus issued to a piece of land that was not within the sovereign jurisdiction?" The government contended that Guantánamo Bay was not within the United States' sovereign control. However, the Supreme Court compared the nature of the two aforementioned detention sites to determined if Guantánamo Bay was indeed within the sovereign jurisdiction of the United States.

Although the Court conceded that both detention sites are technically outside the sovereign territory, there are notable differences between Landsberg Prison and Guantánamo Bay. First, the United States' control over Landsberg Prison was neither absolute nor indefinite, which contrasts with the formal agreement of Guantánamo Bay. The United States has obtained control of Guantánamo Bay since 1903 when President Roosevelt signed the Avalon Lease of Lands for Coaling and Naval Stations. During World War II, Landsberg Prison was under the jurisdiction of the combined Allied Forces. In a sense, the conduct by American officials at the prison was checked by the other Allied Forces, which resulted in the United States to be "therefore answerable to its Allies for all activities occurring there." Although Guantánamo Bay is not a technical part of the mainland of the United States, it has been affirmed that the area is

under the legitimate control of the state, which classifies it as a non-foreign land. The Solicitor General stated in the oral arguments that the detainees are "in a place that is under even more complete control and jurisdiction of our national Executive than they would be in the Everglades, because there are no federalism constraints [in Guantánamo Bay]. Our national government supplies the only law."[47] The United States federal government is the sole entity that controls the area and, in turn, all occupants are subject to solely federal laws.

The alternative consideration concerning the nature of the two sites is the duration of American occupancy. The Supreme Court noted that the Allied Forces during the German occupation in World War II had not planned a long-term occupation of Germany. The decision in *Eisentrager* further established the principle of the Insular Cases, in that "there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely."[48] On the other hand, Guantánamo Bay has been under the control of the United States since 1903. The Court concluded that the area "is no transient possession. In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States."[49]

The Supreme Court admitted that "it is true that before [*Boumediene v. Bush*] the Court has never held that non-citizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution."[50] The distinct circumstances to use Guantánamo Bay as a detention site, such as the indefinite detention of

---

[47] Oral Argument Before the Supreme Court of the United States at 8-12. *Boumediene v. Bush*, 553 U.S. 723 (Dec. 5, 2007).

[48] Stephens, Jr., O., & Scheb, J. (2011). *American Constitutional Law: Civil Rights and Liberties, Volume 2*. Boston: Cengage Learning.

[49] *Boumediene v. Bush*, 553 U.S. 723 (2008).

[50] *Id*.

suspects by executive order for the duration of a war that is among the longest in American history, presented the Court no historical analogies. Due to the separation of powers concerns involving the extension of habeas corpus as well as these particular circumstances of Guantánamo Bay, the Supreme Court determined that the *de facto* sovereignty that the United States has over Guantánamo Bay is sufficient to apply the Suspension Clause extraterritorially. The Court noted that "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[51] Such an instrumentalist perspective of the Constitution emphasizes that the Constitution must adhere to the evolutionary and distinctive developments of both the expansive territorial control of the United States and the methods of globalized warfare.

Chapter 5

Post-*Boumediene* Domestic Case Law: Limited Application of the Suspension Clause

Although *Boumediene v. Bush* declared that Guantánamo Bay may be classified as a domestic territory under the control of the United States, federal court case law suggests that the D.C. Circuit Court possesses limited jurisdiction compared to the other federal courts. In particular, cases have arisen concerning whether the writ of habeas corpus may require judicial review on extraditing detainees to countries where they may be susceptible to torture or further detention. Detainees have sought to recover from damages sustained from detention and have challenged the conditions of confinement, both of which are beyond the scope of review for the D.C. courts. The D.C. Circuit Court of Appeals has overturned all habeas corpus cases on various grounds. In addition, the Supreme Court has denied further review of such cases. In 2012, the

[51] *Id.*

Supreme Court denied review of seven cases.[52] Since then, the D.C. Circuit Court of Appeals has practically become the end point of judicial review for detainees. This section examines how limited jurisdiction restricts the power of the courts to hear detainee cases even in a domestic detention site. This section investigates the principle of judicial non-inquiry, which has restrained the courts from comprehensively reviewing international extraditions of detainees in Guantánamo Bay. Secondly, the section argues that the distinctive geographical nature of Guantánamo Bay, as analyzed in *Boumediene*, prevents the extension of additional constitutional applications other than the Suspension Clause to detainees. The Supreme Court classified Guantánamo Bay as a domestic area in comparison to Landsberg Prison in Germany. However, recall that the Military Commissions Act of 2006 originally withdrew the courts' jurisdiction to hear habeas corpus petitions of habeas corpus. Although this particular statute had been overturned in *Boumediene*, the D.C. Circuit Court's jurisdiction to hear alternative cases for detainees in Guantánamo Bay is still contingent on legislation passed by Congress.

The transfer of detainees by the United States government after wartime hostilities to their home countries or accepting third-party countries has developed into a norm since the twentieth century. However, the role of the courts on matters of extradition have been limited particularly due to the principle of non-inquiry, in which the appropriate scope of judicial analysis in an extradition proceeding is limited due to deference on assurances determined by the Executive. The courts have deliberated whether the Suspension Clause may extend beyond Guantánamo Bay to allow proper review of the Executive's assurances against torture or further detention in a sovereign country.

---

[52] (2012, June 11). Supreme Court Denies 7 Detainee Cases, Leaving Crippling Limits on Detainee Rights in Place." *Think Progress*. Retrieved from http://thinkprogress.org/justice/2012/06/11/497319/scotus-denies-7-gitmo-cases/.

Kiyemba v. Obama involved an appeal by Uighurs detained in Guantánamo Bay who petitioned for a writ of habeas corpus questioning their status as "enemy combatants." A secondary issue was that the petitioners requested a 30 days' notice from the federal government to the district court and counsel before being transferred from Guantánamo Bay to two countries, Palau or another unidentified country, in order to assure that that they would not be transferred to a country where they might be tortured or further detained if the court granted their release. The D.C. Circuit Court of Appeals had originally dismissed the case for lack of subject matter jurisdiction, deriving from § 7 of the Military Commissions Act. However, the court reinstated the appeal following decision in *Boumediene v. Bush*, which overturned § 7. Although the basis of the court's decision in *Kiyemba* ultimately rested on its understanding that the judiciary should not interfere with the decision-making of the Executive, the analysis by the court provides insight on how the principle of non-interference of foreign, sovereign laws affects the extent of habeas corpus protection for transferrable detainees.

Judge Griffith suggested in his concurring opinion that "the nine detainees claim their transfers may result in continued detention on behalf of the United States in places where the writ does not extend, effectively denying them the habeas protections *Boumediene* declared are theirs."[53] The petitioners argued that "habeas 'extends to ensuring that any proposed 'release' would not result in 'continued unlawful detention in a location beyond the jurisdiction of the district court...in coordination with or at the behest of the United States.'"[54] Instead of deference to the executive regarding assurance that the recipient state that the detainees would be transferred to would not continue their period of unlawful custody, the petitioners contended that

[53] 05-5487 (D.C. Cir. 2009) (*Kiyemba v. Obama*).

[54] *Id*. at 4.

the rights acquired with a writ of habeas corpus, the ability for the judiciary to properly review the facts and circumstances of the government's allegations about the detainees, should not be cut off once situated in a foreign state. However, the majority opinion relied on the traditional principle to respect the laws of a sovereign state. The court noted that "[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and absolute...The district court may not issue a writ of habeas corpus to shield a detainee from prosecution or detention at the hands of another sovereign on its soil and under its authority."[55] The court dismissed the notion that a writ of habeas corpus would extend to a sovereign state based on the principle of international comity, in which one state voluntarily adopts or enforces the laws of another sovereign state out of mutuality and respect. *Kiyemba* established that the conditions for detention in one state, such as the United States, compared to another are distinct. Subsequent to a release from custody of the United States, "any prosecution or detention the petitioners might face would be effected 'by the foreign government pursuant to its own laws and not on behalf of the United States.'"[56] Thus, the D.C. courts' role to preserve the right to habeas corpus is limited based on the principle to respect the distinct jurisdiction and laws of another state. In this context, the D.C. Circuit Court was unable to formally review the unilateral decision-making of the Executive to extradite the detainees to a foreign country.

The D.C. Circuit Court lacks jurisdiction to hear cases that involve issues associated with Fifth Amendment due process claims such as the adequacy and conditions of detention. Indeed, federal courts are courts of limited subject-matter jurisdiction. The application of the Suspension Clause to detainees in Guantánamo Bay illustrates the distinguishing geographical and legal

---

[55] *Id*. at 12.

[56] *Ibid*.

circumstances of the site as discussed in *Boumediene*. The courts have upheld similar statutes of the Military Commissions Act, which denies these detainees further rights outside of the core liberty to object to one's unlawful custody. For instance, *Al-Zahrani v. Rodriguez* upheld 28 U.S.C. § 2241(e)(1) and (2) of the Military Commissions Act. These statutes, which are amended subsections to the statute analyzed in *Boumediene*, withdrew the courts' jurisdiction to hear or consider "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant" and to hear or consider "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States."[57] This emphasizes the distinction between the courts' jurisdiction to hear petitions based on unlawful custody claims and due process claims that are afforded by the Fifth Amendment. As the D.C. Court of Appeals argued, "the Suspension Clause is not relevant and does not affect the constitutionality of the statute as applied in 'treatment' cases."[58] The jurisdiction of the D.C. courts to hear habeas corpus claims is exclusive to all other constitutional matters for detainees in Guantánamo Bay.

Based on the idiosyncratic degree of control that the United States has over Guantánamo Bay as analyzed in *Rasul* and *Boumediene*, the extension of constitutional rights to such detainees is instituted on a case-by-case basis. In other words, *Boumediene* extended the Suspension Clause, not the entirety of the constitutional amendments, to alien detainees in Guantánamo Bay by invalidating §7(a) of the Military Commissions Act. The D.C. Circuit Court of Appeals has concluded that the federal courts do not possess equal jurisdiction on both

[57] 28 U.S.C. § 2241(e)(1) and (2).

[58] 05-5487 (D.C. Cir. 2009) (*Kiyemba v. Obama*).

detainees' claims against unlawful custody and improper conditions of confinement, which in turn separate due process rights given by the Fifth Amendment from those provided from the Suspension Clause.

Chapter 6

Post-*Boumediene* Foreign Case Law: Limitations for Bagram Detainees

One pivotal question that the judiciary has faced from World War II to the present War on Terror when confronted with habeas corpus claims by detainees controlled by the United States' federal government is "whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection."[59] The historical significance of the 2008 Supreme Court case of *Boumediene v. Bush* rests in the fact that the constitutional right to habeas corpus indeed is guaranteed to "enemy combatants" detained in Guantánamo Bay Detention Camp, including foreign nationals. In the context of the establishment of Parwan Detention Facility in Bagram, Afghanistan by the United States to detain suspected "enemy combatants" involved in the Afghanistan War, the courts have confronted the critical issue of whether the *Boumediene* decision may be applied to detainees located in Afghanistan. Detention cases involving Bagram detainees presents an alternative perspective on the importance of territory as a legal factor. Unlike Guantánamo Bay Detention Camp, Parwan Detention Facility was situated in a foreign, sovereign territory that acted as a theatre of war. These territorial characteristics presented different political and security implications, compared to Guantánamo Bay, that the courts had to consider to determine the

[59] *Boumediene v. Bush*, 553 U.S. 723 (2008).

validity of extending the Suspension Clause into Afghanistan. This section examines the federal courts' comparisons of Parwan Detention Facility with Guantánamo Bay and Landsberg Prison, determining that Parwan Detention Facility classified as a foreign site based on a formalistic *de jure* interpretation of sovereignty.

6.1. Parwan Detention Facility and Guantánamo Bay Detention Camp

Clara Gutteridge declared that Bagram Airforce Base was "Guantánamo Bay's lesser known – but more evil – twin."[60] Although the state intentions of detaining alleged "enemy combatants" and human rights allegations of such detainees in Parwan Detention Facility corresponded with those at Guantánamo Bay Detention Camp in many respects, the conclusions to legal questions raised by Bagram detainees concerning the transnational reach of habeas corpus protections had not been as duplicable in relation to Guantánamo detainees from the courts' perspective. It is necessary to examine the geographical and technical variations of these two detention facilities in order to better understand whether the nuances of Parwan Detention Facility, and similar subsequent international detention facilities, present viable distinctions from Guantánamo Bay that may allow the federal government to circumvent the rule of law and proper checks on Executive detention powers. Before examining the constitutional issues, it is important to briefly describe the historical context of the two detention sites.

The United States has agreed to a lease and Status of Forces Agreement with Afghanistan to control its detention center in Bagram since 2002. The United States established the Bagram Theater Internment Facility, a former Soviet Union aircraft metal plating facility, as the primary detention center for the Afghanistan area in the early phase of Operation Enduring Freedom. The

[60] Gutteridge, C. (2009, June 24). Bagram Lesser Known - But More Evil - Twin of Guantanamo. *Reuters*. Retrieved from http://blogs.reuters.com/great-debate-uk/2009/06/24/bagram-lesser-known-but-more-evil-twin-of-guantanamo/.

United States eventually moved its detention operations to Parwan Detention Facility in 2010. The United States currently holds around 50 non-Afghani prisoners, known as Enduring Security Threats, at Parwan Detention Facility located north of Kabul, Afghanistan. This section analyzes the courts comparisons between Parwan Detention Facility, Guantánamo Bay Detention Camp, and Landsberg Prison to determine whether Parwan aligns more as a domestic or foreign site. The courts have prohibited the extension of the Suspension Clause due to Parwan's association with Lansberg Prison, based particularly on the surrounding circumstances of the detention site during a period of war.

6.2. Analysis of Circuit Court Case Law

There are two guiding precedents that the courts have applied to cases that involve the right to habeas corpus for detainees in Bagram. First, the courts have referenced the 1950 Supreme Court case of *Johnson v. Eisentrager*, which denied the right to habeas corpus to 21 German citizens who had been captured in China by American forces and detained in Landsberg Prison in Germany during World War II. Second, the courts have used the 2008 Supreme Court case of *Boumediene v. Bush*, which granted foreign nationals detained in Guantánamo Bay the right to access the D.C. federal courts in the United States through writs of habeas corpus. The courts have placed the circumstances of the Bagram petitioning detainees on an *Eisentrager-Boumediene* scale. This method is appropriate since the context and various technicalities of Bagram detainees feature elements similar to detainees involved in both aforemetioned cases.

Recall that the courts have utilized a multi-factor test that was constructed by the Supreme Court in *Boumediene* to determine the reach of the Suspension Clause and weigh the circumstances of the Bagram detainees on the *Eisentrager-Boumediene* scale. There are three

factors: (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. It should be noted that these factors are not absolute, meaning that the Court acknowledged that "*at least* three factors are relevant in determining the reach of the Suspension Clause."[61] The courts that have dealt with habeas corpus cases involving detainees located in Parwan have utilized this multi-factor test to assess the reach of the right to habeas corpus outside of Guantánamo Bay.

The essential issue of whether the constitutional right to habeas corpus may apply to detainees located in Bagram, Afghanistan originated in 2010 when four Parwan detainees filed petitions against President Obama and then Secretary of Defense Robert Gates seeking habeas corpus protections. The D.C. District Court faced this issue in *al-Maqaleh v. Gates*, which featured foreign nationals who had been captured outside of Afghanistan yet were detained at Parwan Detention Facility.[62] The court had originally decided that the right to habeas corpus should be granted to Parwan detainees because the "issues [in *al-Maqaleh*] closely parallel[ed] those in *Boumediene*, in large part because the detainees themselves as well as the rationale for detention are essentially the same."[63] The D.C. District Court applied the circumstances of Parwan Detention Facility to the scale in order to determine whether they relate more with Landsberg Prison in Germany during World War II, warranting the guidance of *Eisentrager*, or

---

[61] *Boumediene v. Bush*, 553 U.S. 723 (2008).

[62] The petitioners involved in the case were Fadi al-Maqaleh, a Yemeni citizen who claimed to be captured beyond Afghanistan, Haji Wazir, an Afghan citizen who was captured in Dubai, United Arab Emirates in 2002, Amin al-Bakri, a Yemeni citizen who was captured in Thailand in 2002, and Redha al-Najar, a citizen of Tunisia who was captured in Pakistan in 2002. Although all were captured beyond the borders of Afghanistan by the United States, it is important to note that Wazir is a citizen of Afghanistan, which raises different implications for the reach of habeas corpus protections.

[63] 06-1669 (D.D.C. 2010) (*al-Maqaleh v. Gates*).

Guantánamo Bay detention camp during the emergence of the War on Terrorism, which would allow the court to use *Boumediene*.

The court concluded that "the differences in control and jurisdiction do not significantly reduce the 'objective degree of control' the United States has at Bagram. As a practical matter, however, when assessing day-to-day activities at Bagram, the lack of complete 'jurisdiction' does not appreciably undermine the conclusion that the United States exercises a very high 'objective degree of control.'"[64] Thus, although the duration of the United States' presence in Bagram relates more to that at Landsberg, the Court inferred that "on the Guantánamo-Landsberg spectrum, the *objective degree of control* the United States has at Bagram resembles US control at Guantánamo more closely than US control at Landsberg."[65] This practical approach reflected the relationship between the United States' military and their detainees rather than the geographic distinctions of American operations.

Sovereignty has historically been an indicator of the appropriate reach of both governmental control over a population and the application of constitutional rights to its respective population. In the following case of *al-Maqaleh v. Gates*, known as *al-Maqaleh II*, the federal government argued in front of the D.C. Circuit Court that "the *Boumediene* analysis has no application beyond territories that are, like Guantánamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto* sovereignty."[66] The emphasis of sovereignty in extraterritorial habeas jurisprudence has shifted from *de jure* sovereignty, as defined by the legal borders of United States' territory, to *de facto* sovereignty, as defined by the United States'

---

[64] *Id.* at 29.

[65] *Id.* at 31.

[66] 605 F.3d 84, 17 (D.C. Cir. 2010) (*al-Maqaleh II*).

exercise of power over a given territory. Justice Jackson emphasized in *Eisentrager* that *de jure* sovereignty was the determinative factor to decide the reach of habeas corpus. He stated that "we are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[67] Likewise, Justice Kennedy in *Boumediene* admitted that "the Court has never held that non-citizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution."[68] However, Justice Kennedy's subsequent rationale on the issue of sovereignty focused more on the degree of control the military asserted over Guantánamo than on sovereignty in its strict, Westphalian sense. *Boumediene* reflects the principle of habeas corpus as a vital tool to preserve the judiciary's role to check the discretion of the Executive, which is especially noteworthy in today's globalized military operations.

The D.C. District Court and Circuit Court presented polarized rationales on the issue of sovereignty. The District Court recognized that the *de facto* sovereignty of the United States applied to Parwan by emphasizing the "high objective degree of control at Bagram." On the contrary, the Circuit Court highlighted the *de jure* sovereignty of Afghanistan over Bagram in *al-Malaqeh II* by acknowledging that "the detention is within the sovereign territory of another nation, which itself creates practical difficulties."[69] This shift from *de jure* to *de facto* sovereignty by the courts presents a discord concerning which type of sovereignty is most appropriate to consider when analyzing the third factor of the *Boumediene* test. As Nelson notes, the change

---

[67] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[68] *Boumediene v. Bush*, 553 U.S. 723, 41 (2008).

[69] 605 F.3d 84, 25 (D.C. Cir. 2010) (*al-Maqaleh II).*

from *de jure* to *de facto* sovereignty and "the emerging consideration of fluid, more practical factors in the *Boumediene* analysis creates an uncertain future for territorial sovereignty at Bagram and future foreign detention sites."[70] Nonetheless, the Circuit Court's rationale presently stands paramount. This perspective overlooks the fundamental principle of habeas corpus as a check on Executive discretion that the District Court had weighed.

The D.C. District Court in *al-Maqaleh v. Gates* confronted the separation of powers concern by taking a similar stance as the Supreme Court in *Boumediene*. It noted how integral the writ of habeas corpus is for the constitutional system of checks and balances. The court stated that "respondents suggest that to hold that the Suspension Clause reaches these petitioners would be a usurpation of the Executive Branch's powers -- it would allow the judiciary to 'superintend the Executive's conduct in waging a war.' But the writ of habeas corpus plays a unique role in our constitutional system of checks and balances."[71] With this in mind, the court placed greater scrutiny on whether the differences between the two detention facilities significantly impacted the "objective degree of control" by the United States over them rather than expressing greater lenience toward the government's position. The first issue that the court analyzed was the site of detention factor. The presence of the United States in Bagram, Afghanistan is determined by both a lease and a Status of Forces Agreement (SOFA), which is the terms of the United States' presence in Afghanistan. The court stated that when "read together, the United States appears to have near-total operational control at Bagram. For instance, paragraph 9 of the lease grants the United States exclusive use of the premises at Bagram."[72] Furthermore, the court compared the

---

[70] Nelson R., L. (2011). Territorial Sovereignty and the Evolving *Boumediene* Factors: *Al Maqaleh v. Gates* and the Future of Detainee Habeas Corpus Rights. *University of New Hampshire Law Review*, 311-312.

[71] 06-1669, 18-19 (D.D.C. 2010) (*al-Maqaleh v. Gates*).

[72] *Id*. at 28.

Bagram SOFA provisions to the lease of Guantánamo when considering the element of jurisdiction that the United States has over each detention facility. The SOFA provisions provide some limited jurisdiction at Bagram. There are no explicit limits on the amount of jurisdiction that the United States has at Guantánamo.

The court also took into account the degree of American presence in both detention facilities. First, the existent of a SOFA in itself expresses a "manifestation of the full sovereignty of the state on whose territory it applies."[73] This is important considering that no such agreement is in place for American operations in Guantánamo Bay. The court also noted that Bagram features a sizable population of Afghan workers and contractors in addition to the American ally forces who operate outside of the base. This contrasts with the fact that only American personnel access Guantánamo Bay. Thus, the court stated that "this almost-exclusive US presence at Guantánamo contributed to the Supreme Court's conclusion that 'in every practical sense Guantánamo is not abroad.'"[74] These technicalities suggest that Bagram is less typical of conventional, mainland control by the United States over a detention facility.

Although the District Court acknowledged these differences, it determined that the "objective degree of control" is not substantially different between Guantánamo and Bagram, even when compared to the circumstances in Landsberg. The court compared Bagram to the control the United States had over Landsberg. It noted that "it is the United States, not US allies, that detains people at the Bagram Theater Internment Facility and that operates (and hence fully controls) that prison facility and its occupants, which was not the case at Landsberg."[75] The

[73] *Id*.

[74] *Id*.

[75] *Id*. at 31.

United States did not possess practically full control over Landsberg. The coordination between the United States and its allies in World War II acted as a viable check on the conduct of the American government.

The District Court's basis on the appropriate reach of the Suspension Clause is the relationship between the state government and the controlled suspects, without equal consideration of the geographic aspects of this relationship. The court also held this to the underlying motivation of the Supreme Court in *Boumediene*. The court referenced that the "*Boumediene* Court was motivated in no small part by the concern that the Executive could, under its argument, shuttle detainees to Guantánamo 'to govern without legal constraint.'"[76] From the court's perspective, the fact that all petitioners were captured outside of the war zone in Afghanistan and then placed in Bagram distinguishes them from detainees captured within the borders of Afghanistan. It stated that "such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene* -- the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely."[77] The court gave merit to this even when acknowledging that Bagram was located in a theater of war. This outlook provides a more flexible framework in the present context of increasingly globalized wartime operations. In sum, the court determined that the "objective degree of control" the United States had at Bagram resembled its control at Guantánamo more than at Landsberg when the circumstances were put on the Guantánamo-Landsberg spectrum.

---

[76] *Id*. at 25.

[77] *Ibid*.

The D.C. District Court concluded that the practical obstacles present in Bagram align more with the threats in Landsberg Prison than in Guantánamo. However, it astutely assessed that the present obstacles do not pose as dire of threats to proper military operations as the government had conveyed. The court justified this by arguing that "the United States has firm control over the Bagram detention facility, and the United States has provided detainees with far greater wartime process in past settings...Only a limited subset of detainees -- non-Afghans captured beyond Afghan borders -- will be affected by this ruling."[78] This specific assessment essentially takes into account the internal stability of American control over Parwan instead of touching upon the surrounding, external security threats of the ongoing combat missions in Afghanistan. A judgement emphasizing the latter issue would weigh executive wartime powers in a greater sense. Lastly, the court pointed out that the decision would have a minimal impact on only a "limited subset of detainees," which reflects the concern to balance the preservation of an integral check on executive power of habeas corpus compared to the realistic ramifications that the decision would have led to on the battlefield.

The two factors that convinced the D.C. Circuit Court in *al-Maqaleh II* to distinguish the circumstances of Guantánamo Bay Detention Camp from Parwan Detention Facility are the nature of the sites where apprehension and then detention took place and the practical obstacles inherent in resolving the prisoner's entitlement to the writ. Judge Henderson decided that "the nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either *Boumediene* or *Eisentrager*."[79] The District Court inferred that the technicalities of the two

[78] *Id*. at 43.

[79] 605 F.3d 84, 21 (D.C. Cir. 2010) (*al-Maqaleh II)*.

respective lease agreements and the degree of control the United States has had within the detentions facilities in Parwan and Guantánamo were similar. However, *al-Maqaleh II* concluded that "while it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantánamo, the *surrounding circumstances* are hardly the same."[80] First, the court differentiated the two facilities based on the duration of use by the United States. The United States has maintained its control of Guantánamo Bay since 1903 even with ultimate sovereignty owed to Cuba, which has historically hostile relations with the United States. Concerning Bagram, the court stated that there is no intent by the government to occupy the base with permanence, nor is there hostility on the part of the host state of Afghanistan. It concluded, "the notion that *de facto* sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case."[81] Although the issue of sovereignty was not a determinative factor, the second factor of the *Boumediene* test, the nature of the detention site, weighed more in favor of the circumstances of *Eisentrager* from the court's perspective.

The circumstances pertinent to the third factor, the practical obstacles of providing writs of habeas corpus, weighed heavily in favor of associating with *Eisentrager* compared to *Boumediene*. In fact, the D.C. District Court stated that since Bagram remains a theater of war, "the position of the United States is even stronger in this case than it was in *Eisentrager*."[82]Although active hostilities during World War II had ended at the time of the *Eisentrager* decision, the Supreme Court acknowledged that there were serious threats still

[80] *Id*. at 22.

[81] *Id*. at 24.

[82] 06-1669, 22-22 (D.D.C. 2010) (*al-Maqaleh v. Gates*).

existent that had warranted deference to the Executive instead of prioritizing judicial interference with military operations. The court argued that "petitioners cannot credibly dispute that all of the attributes of a facility exposed to the vagaries of war are present in Bagram."[83] The United States had both conducted combat missions in Afghanistan and the threats to the military were still realistic at the time of the *al-Maqaleh II* decision. These circumstances led the court to believe that deference to the Executive was warranted more in Bagram than the situation in Landsberg. The third factor of the *Boumediene* test was primarily determinative of the decision by the Circuit Court to dismiss the right of habeas corpus to the petitioners. Recall that the district court had acknowledged as well that Bagram was in an active theater of war. However, it balanced this with the other factors that the detainees were captured outside of the war zone and that the United States held practically similar control over Parwan as Guantánamo on technical grounds. The Circuit Court had not similarly taken into account the separation of powers implications of denying habeas corpus in the same manner as the District Court did in *al-Maqaleh*. This more formalistic assessment places greater significance on the Executive's traditional wartime powers in the context of analyzing the third factor of the *Boumediene* test.

A key circumstance that distinguishes the reach of habeas corpus to detainees in Parwan compared to Guantánamo is that the citizenship factor of the *Boumediene* test is more essential when applied to Bagram than in Guantánamo Bay. It is important to recall the Kennedy Court stating in *Boumediene* that "while obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that

[83] *Id.* at 23.

issuing the writ would be 'impracticable or anomalous' would have more weight."[84] Due to the political expertise, enumerated powers in foreign relations, and diplomatic matters that Congress and the Executive engage in with foreign states, it is a norm for the judiciary to defer to these two branches when confronting issues of diplomacy. Detainees designated as "enemy combatants" by a given government present national security concerns for both the state that designates the suspects and the state in which the suspects are detained. Thus, a unilateral decision by one state to release such detainees may result in political friction between the foreign state and the host state. This is especially noteworthy in the context of detainees who are citizens of the host country.

The D.C. District Court in *al-Maqaleh* suggested that "as to the fourth [detainee], his Afghan citizenship -- given the unique 'practical obstacles' in the form of friction with the 'host' country -- is enough to tip the balance of the *Boumediene* factors against his claim to habeas corpus review. When a Bagram detainee has either been apprehended in Afghanistan or is a citizen of that country, the balance of factors may change."[85] Given that none of the detainees in Guantánamo Bay were citizens of Cuba, this "practical obstacle" was not factorable to deny habeas corpus in that particular context. The District Court further noted that "such unilateral release of Bagram detainees by the United States could easily upset the delicate diplomatic balance the United States has struck with the host government."[86] From the perspective of the judiciary, the principle of making a unilateral determination without the consent from the host

[84] *Boumediene v. Bush*, 553 U.S. 723, 41 (2008).

[85] 06-1669, 4 (D.D.C. 2010) (*al-Maqaleh v. Gates*).

[86] *Id.* at 42.

state's government when dealing with citizens of the particular host state disrupts the proper institutional roles of the federal government.

The concern over the diplomatic relations between the United States and Afghanistan is further emphasized in *al-Maqaleh v. Hagel* in which the Circuit Court responded to the Appellants' evidence of a letter signed by Abdul Karim Khurram, the Chief of Staff for President Karzai, that, they argued, suggested the Afghan government preferred the extension of Suspension Clause jurisdiction to them. The court retorted by stating, "we recently made clear that the President *alone* conducts the nation's foreign policy and it is to him that we turn for authoritative statements on our relations with foreign powers. Trying to divine the letter's meaning would carry us beyond the bounds of our authority and into the exclusive 'province...of the Executive.'"[87] Due to the diplomatic nature of these issues that revolve around international relations between states, the court confessed that "we run the very high risk of misstating Afghanistan's formal policy and 'embarrass[ing] the executive arm of the government in conducting foreign relations.'"[88] The court acknowledged the important separation of powers implications in possibly overstepping its boundaries on checking the diplomatic discretion of the Executive.

The Executive is the forerunner when dealing with matters of foreign affairs. Likewise, the judiciary does not possess any enumerated powers that focus on diplomacy. In this sense, deference is justified. However, the court later discusses another aspect that considers the separation of powers between the three branches which provides a different perspective on

---

[87] 12-5404, 33-34 (D.C. Circ. 2013) (*al-Maqaleh v. Hagel*).

[88] *Id*. at 35. The court later references Justice Jackson's opinion in *Chi. & S. Air Lines v. Waterman S.S. Corp*. which states that "the very nature of executive decisions as to foreign policy is political, not judicial...They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

deference to President's wartime powers. This concerns the argument that the court in *al-Maqaleh II* excessively weighed the third factor of the *Boumediene* test, the practical obstacles inherent in resolving the prisoner's entitlement to the writ, compared to the other two factors. The court acknowledges that the Suspension Clause is a cornerstone check on overreaching executive power. However, the understanding that Parwan is located in a theater of war warrants "plac[ing] another separation of powers concern on the scale."[89] Thus, the Suspension Clause contends with the exclusive powers of the political branches to conduct foreign relations and execute their war powers.

The assessment by the Circuit Court of the separation of powers concerns raised is grounded in the distinction that Bagram, unlike Guantánamo, lies in a theater of war. This is taken into account for the third factor. The Court notes that *Boumediene* suggested that "if the detention facility [in Guantánamo] were located in an active theater of war, arguments that issuing the writ would be impracticable or anomalous would have more weight."[90] The court concluded that "detention decisions made at Bagram are inextricably a part of the war in Afghanistan. Reviewing those decisions would intrude upon the President's war powers in a way that reviewing Guantánamo detentions does not. [R]espect for the separation of powers impels us to stay our hand."[91] In this respect, the court decided in relation to separation of powers principles. However, unlike the previous issue concerning the decision based on the Khurram note, this conclusion was drawn while weighing a cornerstone, enumerated power of the judiciary. The assessment by Justice Henderson heavily emphasizes the relationship between the

---

[89] *Id*. at 36.

[90] *Boumediene v. Bush*, 553 U.S. 723, 41 (2008).

[91] 12-5404, 38 (D.C. Circ. 2013) (al-*Maqaleh* v. Hagel).

constitutional powers of the judiciary and Executive in light of the third factor of *Boumediene*. It is important to note that the third factor calls for analysis on practical obstacles, not solely constitutional ones in the context of the President's war powers. The analysis in *Hagel* conflates the constitutional matters of the Executive with the jurisdictional implications reltaed to the extraterritorial extension of the Suspension Clause when weighing the practical obstacles of providing writs of habeas corpus to detainees. The Supreme Court's multi-factor test in *Boumediene* directly applied to determinations of jurisdiction for the courts to hear habeas corpus claims rather than incorporated the political and constitutional issues of the separation of powers.

The Suspension Clause is essential to preserve the separation of powers because it checks the political branches from having the "power to switch the Constitution on or off at will" without judicial review.[92] If the Executive would have the ability to spotlight areas of the world beyond the reach of habeas corpus, it would be able to circumvent the constitutional system of checks and balances on the political branches. Likewise, the role of the judiciary would be undermined. This phenomenon, known as Executive manipulation, has been discussed in cases pertinent to Bagram detainees. The Circuit Court in *al-Maqaleh v. Hagel* analyzed this issue. The court stated that "if the President has a choice to detain an alien at a location to which the writ runs, but instead chooses to detain the alien at Bagram (or some other foreign locale) because the writ does not reach there, he has engaged in impermissible 'manipulation' which weighs in favor of extending the Suspension Clause to the site of detention."[93] The court noted that the *Boumediene* multi-factor test is not necessarily rigidly set to only three factors. This presents the

[92] *Boumediene v. Bush*, 553 U.S. 723, 35 (2008).

[93] 12-5404, 38 (D.C. Circ. 2013) (al-*Maqaleh v. Hagel*).

potential addition of a "manipulation" factor when assessing future habeas corpus cases for detainees outside of Guantánamo. However, the court concluded that these particular Bagram cases did not allow the formal creation of this fourth factor.

The petitioners in *Hagel* argued that transfers to Bagram from Guantánamo increased after *Rasul v. Bush*. Furthermore, they claimed that officials had discussed detainee transfers and habeas jurisdiction before *Rasul* was issued. However, the court determined that the petitioners did not present concrete, particularized evidence that was needed to prove that the government indeed attempted to manipulate its detention powers. This aligns with the argument in *al-Maqaleh II* that "its resolution can await a case in which the claim is a reality rather than a speculation."[94] Lastly, the courts doubted this motive because it would have required the military and Executive officials to have anticipated the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.[95] Both arguments by the courts suggest that developing a fourth factor calls for convincing evidence that presents realistic facts about the Executive's motives. Furthermore, the evidence must apply to the particular situation of the petitioning detainee. Although the courts will likely place strict scrutiny on petitioners' claims regarding this, the courts are cognizant of this potential abuse of power by the Executive. Due to the presently indefinite nature of the War on Terrorism which involves worldwide terrorist organizations that are perceived threats to the national security of the United States, the guidelines in the *Boumediene* decision are left to be potentially adaptable to suit the developments and sophistication of the military's future operations.

---

[94] 605 F.3d 84, 25 (D.C. Cir. 2010) (*al-Maqaleh II*).

[95] *Id*. at 25-26.

The United States formally handed over full control of Parwan Detention Facility, which had contained around 3,000 detainees, to the Afghanistan government in March of 2013. The detention site in Bagram had caused diplomatic strife since its establishment in 2002. President Karzai had condemned it as a "Taliban-making factory" that "is against the Afghan constitution, against all Afghan laws and against the sovereignty of [the] country."[96] Since this transfer, the Afghanistan government has released 560 detainees without trial, many of whom were citizens of Afghanistan. On February 13, 2014, the Afghanistan government released 65 high-profile detainees from Parwan, which the United States had condemned as a "deeply regrettable" decision.[97] Since the United States continued to control the non-Afghan citizen detainees, the transfer did not raise significantly new implications for these particular detainees. Instead, the conduct by Afghanistan of the detention center had resulted in severe diplomatic hostilities between the two countries.

The Pentagon issued an official declaration that the United States had closed its operations at Parwan Detention Facility on December 10, 2014 after it turned over two Tunisian prisoners to Afghan authorities. President Obama formally declared the end to Operation Enduring Freedom in Afghanistan fourteen days later during his annual Christmas Day address to the military. Although around 10,800 American soldiers will remain in Afghanistan to train and assist the army of Afghanistan, the declaration concluded the formal combat mission of the war. The official closure and turn over of detainees located in Parwan Detention Facility closes the door on future habeas corpus cases for the federal courts to hear. *al-Maqaleh II* and *al-*

---

[96] Loyn, D. (2014, February 13). Afghan Prisoners Freed from Bagram Amid US Protests. *BBC News*. Retrieved from http://www.bbc.com/news/world-asia-26166949.

[97] Embassy of the United States Kabul, Afghanistan. (2014, February 13). U.S. Embassy Statement on the Release of Dangerous Detainees. *Embassy Statements 2014*. Retrieved from http://kabul.usembassy.gov/st-021314.html.

Maqaleh v. Hagel will act as the guiding precedents for subsequent involving circumstances that are similar to the presence of the United States military in the Afghanistan War.

Chapter 7

Holder v. Humanitarian Law Project: Preserving International Counterterrorism Aims

The proliferation of aid to sub-state organizations during conflicts in the War on Terror has been a primary target for international counterterrorism measures. One of the core counterterrorism objectives of the United States is to isolate terrorist organizations from alternative forms of support and communication, which will ultimately degrade and destroy such organizations. This aim is associated with the developments of sub-state actors' activities to remain functional in contemporary conflicts. Since many terrorist organizations originate from weak states, these actors are supported through "new forms of predatory private finance [that] include[s] loot and pillage, 'taxation' of humanitarian aid, Diaspora support, kidnapping, or smuggling in oil, diamonds, drugs, people."[98] Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004 as a key counterterrorism policy to stifle international terrorist organizations' access to resources, personnel, and services. Specifically, the legislation amended 18 U.S.C. § 2339B, the existing material support statute associated with Foreign Terrorist Organizations (FTOs) designated by the Department of State. Section 6603 of the bill amended the terrorist assistance statute to define material support as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification,

[98] Kaldor, M. (2013). In Defence of New Wars. *Stability*, 2(1): 4, 3-3.

communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."[99] Violating § 2339B is a proximity crime, in which certain conduct is reprehensible because of its proximity to other crimes, such as terrorist activity.[100] For instance, an individual who funnels money to a terrorist organization that uses the funds to purchase weapons in order to murder American civilians would be convicted for material support. The funds are the genesis of the conduct by the terrorists.

Material support has developed as a primary method to aid and finance sub-state terrorist organizations in conflicts throughout the War on Terror. Thus, balancing the maintenance of material support objectives and constitutional rights is contingent upon the location of activities by terrorist organizations. In other words, the fact that Foreign Terrorist Organizations are indeed foreign alters the courts' evaluation of maintaining First Amendment protections. This section discusses the Supreme Court's reasoning to prioritize deference to Congress rather than maintenance of First Amendment doctrine due to the collective security objectives and sensitive diplomatic relations that are vital to facilitate international counterterrorism measures. The fact that the two terrorist organizations involved in *Holder v. Humanitarian Law Project* were headquartered in a foreign state legitimized deference to Congress from the perspective of the Supreme Court.

---

[99] Doyle, C. (2010). Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B. *Congressional Research Service*, 25-25. Retrieved from https://www.fas.org/sgp/crs/natsec/R41333.pdf.

[100] *Id*. at 1.

7.1. Overview of 18 U.S.C. § 2339B

The primary intention of the material support statute is to stifle the preparation of terrorist organizations to execute attacks. 18 U.S.C. § 2339B has become a crucial tool to prosecute and, in turn, prevent potential terrorist activity during the War on Terror.[101] Since 2010, the government has charged more than 150 persons with violating § 2339B. A 2014 study conducted by Project SALAM and the National Coalition to Protect Civil Freedoms concluded that 94.2% of all terrorism-related convictions on the DOJ list have either been preemptive prosecution cases or cases that involved elements of preemptive prosecution.[102] Considering the aforementioned definition of material support, the statute may be applied to a diverse range of activities due to its broad scope. Applications of this statute mainly target suspects who provide conventional forms of material support, such as monetary contributions, weaponry and equipment, or advanced training on how to conduct violent activities to FTOs. In addition to these common forms of material support, the federal government has also deemed individuals who have assisted in unconventional activities such as supplying satellite television services to Hezbollah's television station, *Al Manar,*[103] advising the Partiya Karkerên Kurdistan with legal support on peaceful dispute resolutions,[104] and operating websites on behalf of Saudi extremist

[101] 18 U.S.C. § 2339B(1) outlines that "whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have *knowledge* that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism."

[102] Downs, S. & Manley, K. (2014). Inventing Terrorists: The Lawfare of Preemptive Prosecution. *National Coalition to Protect Civil Freedoms* and *Project SALAM*, 2-2. Retrieved from http://www.projectsalam.org/Inventing-Terrorists-study.pdf.

[103] Goldstein, J. (2007, April 9). First Amendment Defense is Pursued in Hezbollah TV Case. *The New York Sun*. Retrieved from http://www.nysun.com/new-york/first-amendment-defense-is-pursued-in-hezbollah/52057/.

[104] Liptak, A. (2010, June 21). Court Affirms Ban on Aiding Groups Tied to Terror. *The New York Times*. Retrieved from http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=all&_r=0.

groups as actors that provided material support under the same statute.[105] David Cole argues that what "makes the law attractive to prosecutors - its sweeping ambit - is precisely what makes it so dangerous to civil liberties."[106] Since a violation of 18 U.S.C. § 2339B is a proximity crime that has been issued to prevent a multiple forms of support to FTOs, the statute also confronts the fundamental constitutional civil liberties of the First Amendment freedom of speech and association.

7.2. Analysis of *Holder v. Humanitarian Project*

In 2010, the Supreme Court decided *Holder v. Humanitarian Law Project*, which ruled that non-violent material support, including speech-related activities, provided to Foreign Terrorist Organizations violates 18 U.S.C. § 2339B and is not protected by the First Amendment. The case involved Humanitarian Law Project, a non-profit organization that held consultant status in the United Nation. Humanitarian Law Project was dedicated to the protection of human rights and promotion of peaceful resolutions to conflicts by enforcing established international human rights and humanitarian laws. Humanitarian Law Project conducted several activities with the Partiya Karkerên Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) such as "training PKK members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka."[107] The PKK and LTTE were both officially designated as Foreign Terrorist Organizations by the

---

[105] Barrett, P. (2003, May 28). Idaho Arrest Puts Muslim Student Under U.S. Scrutiny, Examination. *The Wall Street Journal*. Retrieved from http://www.wsj.com/articles/SB105406885465552500.

[106] Cole, D. & Dempsey X., J. (2006). *Terrorism and the Constitution: Sacrificing Civil Liberties In The Name Of National Security*, 165-165. New York: The New Press.

[107] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

Department of State on October 8, 1997 due to their violent terrorist actions with the ultimate intention to establish independent states for each of the respective ethnic minorities that the organizations claimed to have represented. Humanitarian Law Project contended that the definitions of "training," "expert advice or assistance," "service," and "personnel" of § 2339B violated the First Amendment rights to free speech and association.

The Supreme Court held that the application of § 2339B was constitutional to the particular forms of support that Humanitarian Law Project sought to provide to the two terrorist organizations. In particular, the Supreme Court justified its deference to Congress based on not only the direct ramifications that result from individuals providing material support to international terrorist organizations, but also the detriment to diplomatic relations with international allies if the First Amendment would protect such aid to Foreign Terrorist Organizations. The Court stated that "the PKK and the LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies."[108] Consequently, the Supreme Court in *Holder* relied on a crucial congressional finding associated with the consequences of providing any form of material support to terrorist organizations. H.R. 3143 determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution* to such an organization facilitates that conduct."[109] Congress further found that Foreign Terrorist Organizations maintain neither organizational nor financial firewalls with respect to funds or benefits received for civil activities or unlawful, violent activities. The Court

---

[108] *Id.*

[109] *H. R. 3143: To Deter Terrorism, Provide Justice for Victims, and for Other Purposes*, US House of Representatives, 113th Congress, Section 2(5). Retrieved from https://www.congress.gov/bill/113th-congress/house-bill/3143/text.

concluded that "money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.'"[110] Charitable donations to such organizations with the intent to fund social services or political representation may be redirected to fund the purchase of weaponry. Although this pertains to monetary support, the Court analogized this rationale with support of expert advice to FTOs. Such advice may be utilized to conduct broader strategies to promote terrorism. The Court argued that "a foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote."[111] Since terrorism has developed into one of the foremost factors associated with the national security strategies of the United States since 2001, the Court was especially deferential to Congress' findings pertaining to the threats and nature of FTOs.

The Court discussed the importance of collective cooperation between international states to execute effective counterterrorism measures. The Court argued that "we see no reason to question Congress's finding that 'international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage.'"[112] The material support statutes in the Intelligence Reform and Terrorism Prevention Act supplement this international aim. The Supreme Court focused on the consequences that such aid would have on the national security of allied states.

---

[110] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

[111] *Id*. at 32.

[112] *Id*. at 27.

The underlying rationale that the Supreme Court provided to uphold the prohibition on all material support rests on the sensitive diplomatic relations that the Executive maintains with foreign allies. The Court referenced that "'a number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations,' and those attacks 'threaten [the] social, economic and political stability.'"[113] The Foreign Terrorist Organizations List administered by the Department of State features organizations such the PKK that have primarily conducted insurgencies against their respective state governments, rather than executing terrorist attacks within the United States. From this perspective, attacks by similar terrorist organizations "threaten [the] social, economic and political stability" of foreign governments such as Turkey, which is a fellow member state of the North Atlantic Treaty Organization. Humanitarian Law Project advocated that § 2339B should have been interpreted to consider the intent of the individual or group to provide aid to a Foreign Terrorist Organization, rather than the consequential effects of providing such material support. However, the Supreme Court disregarded this proposal by taking into account the perspective of a foreign government on individuals providing material support to terrorists that withstands terrorist attacks from a given FTO. The Court suggested that "from Turkey's perspective, there likely are no such activities" that are legitimate to humanitarian efforts.[114]

The Supreme Court also ruled that § 2339B does not violate the First Amendment based on the distinction between permissible independent advocacy or expression about an FTO and conduct that qualifies as material support *in the form of* speech. The Court suggested that the

---

[113] *Ibid.*

[114] *Id*. at 28.

statute applies to only a narrow category of speech: that which is to, under the direction of, or in coordination with Foreign Terrorist Organizations. *De Jonge v. Oregon* asserted that "the question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its *purpose*; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."[115] Additionally, the landmark case of *Brandenburg v. Ohio* declared that "the constitutional guarantees of free speech do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to *inciting or producing imminent lawless action* and is *likely to incite or produce* such action."[116] The courts have historically placed strict scrutiny on egregious speech if it does not incite imminent criminal or violent activities. From this traditional tendency of the courts, Humanitarian Law Project's argument that the interpretation of § 2339B should consider the intent of providing material support to a Foreign Terrorist Organization held legitimacy. Yet, *Holder v. Humanitarian Law Project* broadened this distinction between independent advocacy and otherwise material support in order to balance the interests of preserving First Amendment free speech and association rights with the findings of Congress in areas of international counterterrorism. As discussed, terrorist organizations that reside and conduct terrorist activities in foreign states influence the collective nature of international counterterrorism legislation and diplomatic relations. These international affairs and national security concerns superseded the traditional doctrines of the First Amendment in the Supreme Court's decision based on the threats that transnational terrorist organizations pose to states' national security.

---

[115] *De Jonge v. Oregon*, 299 U.S. 353 (1937).

[116] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Chapter 8

Post-*Holder* Domestic Case Law: First Amendment Priority

Holder v. Humanitarian Law Project resulted in tension between two duties of the Supreme Court: to check the powers of the political branches by overturning statutes that conflict with constitutional liberties and to interpret statutes with respect to the expertise of the political branches on issues of foreign policy and national security. Since *Holder* involved two Foreign Terrorist Organizations, the latter duty gained greater priority for the Roberts Court. Having said that, the circuit courts have displayed greater discretion to weigh First Amendment arguments with rationale in *Holder* on subsequent cases that do not involve FTOs. Individuals or organization whose activities reach a terrorist organization that is only active within the United States, rather than a Foreign Terrorist Organization, do not feature similar diplomatic and international security concerns. This section explains that the courts have prioritized an adherence to First Amendment doctrine in cases that involve domestic terrorist organizations due to the lack of considerations on diplomatic relations and international affairs.

8.1. Overview of Executive Order 13224

President George W. Bush on September 23, 2001 issued Executive Order 13224, pursuant to the International Emergency Economic Powers Act, on September 23, 2001, which grants the president the authority to "block the assets of individuals and entities that provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations."[117] § 2(a) of E.O. 13224 prohibits any individuals from making "any contribution

[117] Office of the Coordinator for Counterterrorism. (2001). *Executive Order 13224*. Retrieved from http://www.state.gov/j/ct/rls/other/des/122570.htm.

of funds, goods, or services to or for the benefit of" designated entities.[118] The consequences of entities designated as Specially Designated Global Terrorists (SDGT) under E.O. 13224 are essentially identical to those under 18 U.S.C. § 2339B. SDGTs are prohibited to "assist in, sponsor, or provide financial, *material*, or technological support" to terrorist organizations. Recall that "domestic" is defined as any terrorist organization that is either headquartered and operative in the United States of America or a branch of a Foreign Terrorist Organization that is domiciled in the United States of America. Al-Haramain Islamic Foundation, Oregon (AHIF-Oregon) was a non-profit organization aimed to promote the greater understanding of Islam. AHIF-Oregon was a domiciled branch of the al-Haramain Islamic Charity Foundation, which was a Saudi Arabian-based charity that had been designated by the Secretary of the Treasury as a terrorist organization in 2004 under Executive Order 13224. This decision was based on al-Haramain's "significant financial ties to the Bosnia-based NGO al-Furqan, and al-Qaida financier Wa'el Hamza Julaidan, who was designated by the Treasury Department on September 6, 2002."[119] The Multicultural Association of Southern Oregon (MCASO), a community-based organization that promoted multiculturalism, intended to sponsor events and conduct various activities in coordination with AHIF-Oregon. However, § 2(a) of E.O. 13224 prohibited MCASO from performing such activities.

---

[118] *Id.*

[119] U.S. Department of the Treasury. Protecting Charitable Organizations - A. Retrieved from http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities_execorder_13224-a.aspx.

8.2. Discussion of *al-Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*

The Ninth Circuit Court of Appeals decided *al-Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*, which involved challenges to AHIF-Oregon's designation as a terrorist organization and the constitutionality of § 2(a) of E.O. 13224. MCASO argued that E.O. 13224 violated its First Amendment rights to work in association with AHIF-Oregon. The Ninth Circuit Court of Appeals applied a narrow interpretation of *Holder* as the guiding precedent to analyze the plaintiff's First Amendment claim. The court acknowledged that "although both this case and *HLP* involve the proposed provision of services to a designated entity, the facts of this case differ from *HLP*'s in two significant ways."[120] First MCASO averred specific actions in coordination with AHIF-Oregon, unlike the general assertions by Humanitarian Law Project, although both cases featured as-applied challenges. MCASO desired to "speak to the press, hold demonstrations, and contact the government [on the behalf of AHIF-Oregon. [MCASO also wanted to] organize public education activities in conjunction with AHIF-Oregon [and conduct] a 'coordinated press conference.'"[121] Second, the nature of AHIF-Oregon differed in comparison to the Partiya Karkerên Kurdistan and Liberation Tigers of Tamil Eelam, which is of crucial distinction. Although AHIF-Oregon was neither a wholly domestic nor foreign organization, the court classified AHIF-Oregon as domestic because it was "incorporated under Oregon law, it is physically located in Oregon, it has funds in domestic bank accounts, and it has conducted most of its activities in the United States."[122] In all practical senses, the characteristics of AHIF-Oregon classified itself most similarly as a domestic entity instead of a foreign organization, such

---

[120] 10-35032, 18098 (D.C. Cir. 2011) (*al-Haramain Islamic Foundation, Inc., v. U.S. Department of Treasury*).

[121] *Id*.

[122] *Id*. at 18099.

as FTOs.The court furthered this distinction by applying the institutional makeup of AHIF-Oregon to the three rationales advanced by the Supreme Court in *Holder*: that speech-related activity is similarly fungible as to money, concerns about how such activity may intensify the legitimacy of an terrorist-affiliated organization, and the broader foreign policy implications associated with the aims of the particular statutes.

Though the court determined that the first two rationales did not apply as strongly to AHIF-Oregon as Humanitarian Law Project, it is of utmost importance to focus on the analysis of the third rationale associated with the nature of AHIF-Oregon. Recall that the Supreme Court argued, "providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks."[123] The central premise in this context is that aiding Foreign Terrorist Organizations disrupts diplomatic relations and undermines efforts to build alliances internationally. This was of particular consideration in *Holder* because the terrorist activity conducted by the PKK is a means to achieve a separate ethnic state from Turkey, which is an American ally and fellow member of the North Atlantic Treaty Organization (NATO). However, the court noted in *al-Haramain* that "the Supreme Court's concern about foreign nations' perception of 'Americans furnishing material support to foreign groups,' is *diminished* to some extent here because MCASO seeks to assist only AHIF-Oregon, a *domestic* branch of AHIF."[124] The court decided that MCASO had the First Amendment right to engage in advocacy and activity in coordination and on behalf of AHIF-Oregon. This was primarily based on the distinction that the domestic branch of the al-Haramain Foundation located in Oregon

[123] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

[124] 10-35032, 18103 (D.C. Cir. 2011) (*al-Haramain Islamic Foundation, Inc., v. U.S. Department of Treasury*).

does not pose as grave of security threats to the United States' diplomatic relations with international allies in comparison to aid given to Foreign Terrorist Organizations.

Chapter 9

Post-*Holder* Foreign Case Law: Maintenance of the *Holder* Decision

Prohibitions on providing material support to terrorist organizations have developed into collective security measures in which international states cooperate and legislate policies with mutual aims to delegitimize the goals and restrain the resources of terrorist organizations. This purpose is illustrated in the previous discussion of the rationale by the Supreme Court in *Holder v. Humanitarian Law Project*. The federal courts have attempted to apply *Holder* to subsequent acts of providing material support, in particular two aspects of the decision: maintaining the distinction between permissible individual advocacy and prohibited conducted coordinated with FTOs and to prohibit any form of aid to FTOs, which is the primary aim of the material support statutes. This section analyzes how designations by the Department of State on terrorist organizations to the Foreign Terrorist Organization List are consequential for individual conduct previously permissible under the First Amendment. Additionally, the section discusses how the courts have defined certain conduct by individuals that has normally been protected by the First Amendment as one part in the overall schemes to provide material support to FTOs. These two phenomena highlight the ramifications of terrorist organizations being foreign rather than domestic, which have caused the courts to maintain the logic in *Holder* instead of upholding established First Amendment doctrine.

Since 18 U.S. Code § 2339B applies once the Department of State designates terrorist organizations as Foreign Terrorist Organizations, activities previously permissible under the First Amendment are illegal in association with terrorist organizations post-designation. *El-Mezain v. United States* featured individuals who had aided Hamas by raising funds through the corporate entity Holy Land Foundation for Relief and Development (HLF), a Texas-based, pro-Palestinian charity that the federal government charged was created for the sole purpose of acting as a financing arm for Hamas. Holy Land Foundation was considered the largest Muslim charity located in the United States, with the objective of providing humanitarian assistance to Palestinians who lived in Israeli-occupied territories of the West Bank and Gaza. The government contended that HLF assisted Hamas by funneling money to zakat committees located in the West Bank. It determined that HLF sent approximately $12.4 million outside of the United States from 1995 to 2001 with the intent to willfully contribute funds, goods, and services to Hamas.

Hamas is similar to the Partiya Karkerên Kurdistani and the Liberation Tigers of Tamil Eelam in the sense that Hamas is comprised of political, military, and social arms. Although the Holy Land Foundation promoted itself as aiding the arm of Hamas that provided social services, the decision in *Holder v. Humanitarian Project* established that any aid may legitimize the conduct of the terrorist organization, which Congress originally intended to prohibit. Defendants Baker, El-Mezain, and Elashi were members of a Palestine Committee that created HLF and other affiliated organizations in the United States. Additionally, defendant Abdulqader was a member of a band that performed and traveled around the United States to speak on behalf of HLF and raise funds for the charity.

The First Amendment claims in *El-Mezain* involved Abdulqader's conduct during fundraising events in association with the Holy Land Foundation. Abdulqader had filmed approximately twelve video recordings of his participation in musical and dramatic performances that referenced Hamas and contained Islamic or anti-Israel themes. Such performances were conducted at various fundraising events, which were sponsored by the Holy Land Foundation. The court noted that although "most of the performances occurred before Hamas was designated as a terrorist organization, three were recorded after the designation."[125] Hamas was officially designated as a Federal Terrorist Organization by the Department of State on October 8, 1997. In this case, conduct that would qualify as providing or conspiring to provide material support under 18 U.S.C. § 2339B would have needed to occur on or after the date of designation. Consequently, Abdulqader was a member of the conspiracy to fund HLF after October 8, 1997.

The court discussed that the defendants, including Abdulqader, "participated in fundraising events at various forums, including conventions, services at mosques, seminars and other programs...*Prior* to the designation of Hamas as a Foreign Terrorist Organization, the speakers sponsored by the HLF often praised the efforts of Hamas and its violent activities against Israel, and encouraged financial support for those efforts. *After* Hamas' designation, upon instruction by the HLF, the speakers changed tactics by using inflammatory language which was designed to support Hamas and its violent activities without openly mentioning Hamas."[126] This distinction in the timeline of Abdulqader's activities guided the court to eventually conclude that some of his activity had in fact violated 18 U.S.C. § 2339B.

---

[125] 09–10560, 08–10664, 08–10774, 10–10590 and 10–10586 (5th Cir. 2011) (*El-Mezain v. United States*).

[126] *Id*.

Abdulqader had argued that the speech-related activities in all of the video recordings were protected under the First Amendment. Although the court noted that a conviction of a crime cannot take place simply on the basis of a suspect's beliefs, one's expression of those beliefs, or one's associations, it stated that "if a defendant's speech, expression, or associations were made with the intent to willfully provide funds, goods, or services to or for the benefit of Hamas, or to knowingly provide material support or resources to Hamas, then the First Amendment would not provide a defense to that conduct."[127] It is important to remember that *Holder* established an additional circumstance in which speech itself may be criminal. The Supreme Court ruled that speech could be criminalized if it provides material support to designated terrorist organizations. Although mere association or independent advocacy of an organization is permissible under the First Amendment, speech that furthers criminal conduct is not protected.

The court's indication of permissible speech-related activity before the designation of Hamas as an FTO provides critical insight into the impact of 18 U.S.C. § 2339B, the designations by the Department of State, and the subsequent ruling in *Holder* have on the degree of First Amendment protections. The court recognized that "the pre–1995 video recordings of Abdulqader's speech could not themselves be criminal under *Humanitarian Law Project* because it was not illegal at that time to support Hamas."[128] The fact that Hamas, a foreign organization that has conducted terrorist activity, was officially designated as an FTO in itself altered the scope of First Amendment protections. Once Hamas was designated, speech and conduct within the confines of the subsequently applied material support statutes were prohibited, which reflects the significance of international diplomatic and national security concerns. In addition, the court

---

[127] *Id.*

[128] *Ibid.*

admitted that "Abdulqader's speech may have been protected *prior* to Hamas's designation as a terrorist organization, but it became relevant to proving whether he joined the conspiracy that began after the designation."[129] Regarding the court's acknowledgement that the speech in the video recordings was relevant to determining whether Abdulqader joined the conspiracy to provide material support to Hamas, the distinction between protected independent advocacy of an organization and impermissible activity in coordination with an organization explains this matter. The court argued that the suspects involved in the case were "perfectly right to say, 'I support Hamas.'"[130] In other words, speech activity conducted independently would be protected by the First Amendment no matter the date of designation of Hamas as an FTO. Having said that, the court furthered its point by stating that "when [individuals] start giving money to Hamas, then what they said can and will be used against them to determine their intent." In relation to the mental state clause of 18 U.S.C. § 2339B, in which an individual must have knowledge that the terrorist organization engages in terrorist activity, speech that assists the administration of material support to an FTO may be utilized to determine that the suspect attempted to further the activity of the organization.

Although al-Haramain Islamic Foundation, Oregon and the Holy Land Foundation for Relief and Development were both established within the United States at the time of their respective litigation, AHIF-Oregon represents a domestic organization more than HLF based on HLF's more direct affiliation with Hamas, a designated Foreign Terrorist Organization. In other words, the Ninth Circuit Court determined that MCASO's activities with AHIF-Oregon would only reach the branch in Oregon since AHIF was not a singular entity. Whether such activities

[129] *Ibid*.

[130] *Id*.

would influence actions by al-Haramain Islamic Foundation in Saudi Arabia or other international branches that had been designated as Specially Designated Global Terrorists by the Department of the Treasury was only speculative. The court argued that "MCASO seeks to advocate with and on behalf of AHIF–Oregon, not the larger AHIF organization...[I]n contrast to the direct aid to the wholly foreign organization at issue in HLP and the clear possibility of freeing up assets, the link between the services at issue here and the freeing of resources is less direct and more speculative."[131] Although the court indicated that activities could indeed aid the larger international organization to a degree, the speculative end point of aid did not influence the court's prioritization to uphold MCASO's First Amendment rights instead of deferring to the federal government's claims. Conversely, the Fifth Circuit Court determined that advocacy would ultimately translate to material support for both the Holy Land Foundation and, more importantly, Hamas. Group members of the Holy Land Foundation have been found guilty of directly providing material support to Hamas. In 2004, HLF was found liable by a federal civil court for the 1996 Hamas shooting death of an Israeli-American in Jerusalem.[132] Furthermore, five HLF leaders were found guilty of providing more than $12 million in material support to Hamas in 2008.[133]

Similar to the rationale in *Holder v. Humanitarian Law Project*, the courts have been primarily concerned about the end point of aid to a scrutinized organization. This perspective aligns with the broader international counterterrorism objectives articulated by the Supreme Court in *Holder*. The Ninth Circuit Court stated that "the ability of the United States to explain

---

[131] 10-35032, 18098 (D.C. Cir. 2011) (*al-Haramain Islamic Foundation, Inc., v. U.S. Department of Treasury*).

[132] Zanotti, J. (2010). Hamas: Background and Issues for Congress. *Congressional Research Service*, 24-24. Retrieved from http://www.fas.org/sgp/crs/mideast/R41514.pdf.

[133] *Id*.

that it permits coordinated advocacy only and with respect to only the domestic branch of AHIF distinguishes [*al-Haramain Foundation Inc. v. U.S. Department of the Treasury*] from the direct training of a wholly foreign organization [such as Hamas] actively at war with an ally [like Israel].” If aid does not directly flow to FTOs, rather to a domestic organization like AHIF-Oregon, the activities by the recipient organization would be contained within the United States This significantly diminishes strained diplomatic relations with foreign allies and the global threats of terrorism. Consequently, the courts may place stricter scrutiny on suspected violations of the First Amendment based on the domestic nature of a given organization.

The courts have also maintained *Holder's* assertion that speech-related activity as a part of conduct in coordination with Foreign Terrorist Organizations may be considered material support. *United States v. Hassan* involved three individuals, Mohammad Omar Aly Hassan, Ziyad Yaghi, and Hysen Sherifi, who had committed to a radicalized form of jihad in which there was a religious obligation to kill non-Muslims and provide material support to al-Qaeda while being directed by the group leader known as Daniel Boyd. The members communicated with each other, including posting radicalized Islamic teachings by Anwar al-Awlaki, a prominent cleric who had been suspected of being affiliated with al-Qaeda, purchasing weapons, and traveling to countries such as Jordan, Israel, and Kosovo in search of participating in weapons training and eventually entering the battlefield to make jihad. Consequently, these members were charged for providing material support under § 2339A. Although there are some variations in the elements between 2339A and 2339B, both criminalize the provision of material support. Thus, the circumstances associated with the decision in *Holder v. Humanitarian Project* concerning the arguments raised that involved the First Amendment.

The appellants relied on *Holder* for their First Amendment claims on the basis that they could not be convicted under § 2339A[134] for "simply speaking, writing about, or even joining a terrorist organization." *Holder* declared that individuals may independently express their viewpoints or advocate for the aims of a terrorist organization. The Supreme Court had concluded that § 2339B covered only a narrow category of speech, including any speech-related activity that is in coordination with FTOs. The Fourth Circuit Court noted that the proposition by the appellants did not undermine any of the appellants' convictions. Instead, their convictions were based "not only on their agreement to join one another in a common terrorist scheme, but also on a series of calculated overt acts in furtherance of that scheme."[135] This suggests that the speech-related activity by the group members was one aspect of a process that involved developing a conspiracy to conduct terrorist activity. A conspiracy has been held as an agreement to commit an illegal act.

The speech elements of the group's activities developed the ultimate plot to commit terrorism overseas. In the case of *Wisconsin v. Mitchell*, the Supreme Court decided that "the First Amendment...does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[136] The Fourth Circuit Court relied on this precedent to justify the charges under 2339A. The court referenced that "the appellants engaged in extensive conversations with Boyd and others about the necessity of waging violent jihad and their shared

---

[134] 18 U.S.C. § 2339A criminalizes "whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources." This prohibits individuals who provide material support, "knowing or intending that they are to be used in preparation for, or in carrying out," violations of certain terrorism statutes such as 18 U.S.C. § 2339B.

[135] 12-4061 (4th Cir. 2014) (*United States v. Hassan*).

[136] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

goal of reaching the jihadist battlefield."[137] Furthermore, "Hassan's and Yaghi's Facebook postings advocating violent jihad, as well as their conversations with Boyd to that effect, serve as compelling support for the jury's finding that Hassan and Yaghi travelled abroad with the hope of acting on their beliefs by engaging in jihad."[138] The terrorism statutes involved in the circumstances of *Hassan* and *Holder* have incorporated speech as prohibited conduct that culminates to plots to provide material support for terrorism. Communications that involved coordination to travel to other countries in order to wage war with other jihadis who may be associated with FTOs are not protected by the First Amendment. Material support charges have allowed the courts to take into consideration the broader objectives of speech-related activity, which may be ultimately aimed to coordinate terrorism, in First Amendment claims like *Hassan*.

The courts have similarly applied *Holder*'s guidelines to in *United States v. Augustin.* *Augustin* involved seven actors, Augustin, Phanor, Abraham, Augustine, Batiste, Herrera, and Lemorin, who were convicted of a conspiracy to provide material support to al-Qaeda by agreeing to provide personnel, including themselves, to work under al-Qaeda's direction and control while knowing that al-Qaeda hasd engaged in terrorist activity.[139] Phanor argued that unskilled conduct, photographing a federal building from a vantage point accessible to the general public, should not have constituted material support. The suspects had given Ellie Assaad, an informant for the FBI, photographs and video recordings of the North Miami Beach FBI building the downtown courthouse complex. These actions were intended to blow up five FBI offices throughout the United States, including the Miami office.

---

[137] 12-4061 (4th Cir. 2014) (*United States v. Hassan*).

[138] *Id*.

[139] 09-15985 (11th Circ. 2011) (*United States v. Augustin*).

Precedent supports the extension of the First Amendment to protect recording or photographing on public property as a form of expression, although subject to time, place, and manner restrictions. For instance, *Smith v. Cumming* argues that individuals have a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."[140] The court in *Augustin* acknowledged that "we agree with Augustine and Phanor that the recorded images themselves would not actually have been material in furthering the proposed plot to attack the federal buildings." However, the act of photographing in association with the broader objective of attacking the FBI office alters the perspective on First Amendment protections. The court decided that "we nevertheless conclude that Augustine and Phanor's volunteering of their service to Al Qaeda was sufficient for a jury to deem it material support in the form of personnel." *Holder* determined that speech which involves expert advice or a specialized skill is considered a service to an FTO. Furthermore, the individual who provides such a service may be classified as personnel to the terrorist organization.

The court determined that Augustin, Phanor, and Augustine's "participation in the ceremony itself, and their resulting awareness of the plot against the Miami FBI building - rather than the particular words uttered by any given defendant - [was] sufficient evidence supplying knowledge and intent to their later participation in the photographing and videotaping of the federal buildings." The fact that the suspects participated in the oath ceremony implied that they volunteered their service to provide photographs of federal buildings that would later be bombed by al-Qaeda. Again, the association with al-Qaeda and, in turn, the broader aspirations of the plot was the linchpin to convicting the suspects of providing material support to al-Qaeda.

---

[140] 99-8199, (11th Cir. 2000) (*Smith v. Cummings*).

Within the context of terrorism statutes that prohibit material support, *Ali Hamza Ahmad Suliman al-Bahlul v. United States* provides further insight into the extension of First Amendment protections to non-nationals in reference to the decision in *Holder v. Humanitarian Law Project*. The case featured Bahlul, a personal assistant to Osama bin Laden, who produced propaganda videos for al-Qaeda and assisted with preparations for the attacks on September 11, 2001. After being captured in Pakistan by the United States military, Bahlul was transferred to Guantánamo Bay and charged with three crimes: conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes.[141] Bahlul appealed his prosecution for the al-Qaeda recruitment video that sponsored the terrorist attack on the U.S.S. Cole in 2000 by raising a First Amendment claim. Although the court dismissed this claim, it provided insight concerning the extension of First Amendment protections for non-nationals. The court acknowledged that Bahlul's argument may have had merit if his activity occurred in Guantánamo Bay or in other territories under the jurisdiction of the United States. However, the First Amendment does not apply to aliens in foreign countries. Since Bahlul's conduct of leading Osama bin Laden's media operations occurred in Afghanistan, the right to free speech did not apply to him.

Furthermore, the court demonstrated, by referring to *Holder v. Humanitarian Law Project*, that the First Amendment would not protect Bahlul's activities even if the right was indeed extended to him. The court argued that speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is not protected by the First Amendment as established in *Brandenburg v. Ohio*.[142] In particular, this is emphasized

---

[141] 11-1324, (D.C. Circ. 2014) (*Ali Hamza Ahmad Suliman al-Bahlul v. United States).*

[142] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

when the government attempts "to prevent imminent harms in the context of international affairs and national security."[143] The fact that the court presented this hypothetical underscores the justification of the judiciary to defer to the political branches on matters of international security and counterterrorism.

Chapter 10

Implications

Although the expected decisions by the courts as illustrated in the originally hypothesis are mostly accurate, the D.C. Circuit Court has mainly deferred to the government in domestic detention cases in Guantánamo Bay. However, the reviews of detainees' status as "enemy combatants" by the D.C. Circuit Court reflects a degree of activism. The *Boumediene* decision highlighted the role of the D.C. courts in principle to hear habeas corpus claims by detainees in Guantánamo Bay. It has been argued that the "Kennedy [court] had acted in [*Boumediene v. Bush*] only to assure that the federal courts had a role in the detention process, but 'was less concerned' with what that role would look like in practice."[144] The aftermath of the *Boumediene* decision resulted in "some 250 habeas petitions filed on behalf of Guantánamo detainees in the U.S. District Court for the District of Columbia."[145] In this sense, the D.C. courts have been active in the review of the "enemy combatant" status of detainees determined by the CSRTs. Since 2008, 649 of the original 780 detainees have been transferred.[146] However, the full

---

[143] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

[144] Denniston, L. (July 17, 2012). Ex-judge: Boumediene is being "gutted." *SCOTUSblog*. Retrieved from http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted/.

[145] Garcia, M. (2008). Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus. *Congressional Research Service*, 9-9. Retrieved from http://www.fas.org/sgp/crs/natsec/RL34536.pdf.

[146] (2015). The Detainees. *The New York Times*. Retrieved from http://projects.nytimes.com/guantanamo/detainees.

assertion of judicial activism in domestic Guantánamo Bay cases would include more substantive decisions instead of mere reviews of detainees' status. As previously examined, the courts have been extraordinarily deferential to the federal government in cases that involve extradition or Fifth Amendment claims of recovery from damages due to the lack of jurisdiction given to the D.C. courts as well as the numerous national security doctrines that the federal government has utilized in such cases.

Figure 3: Findings

	Foreign Circumstances	**Domestic Circumstances**
First Amendment *Free Speech & Association*	Deference	Activism
Habeas Corpus *Detention*	Deference	Activism & Deference

The developments in federal court case law for detainees in Guantánamo Bay raise an alternative reasoning for the courts' tendencies to decide such detention and material support cases. Even though the writ of habeas corpus is a vital element to the institutional relevancy of the judiciary, the release of terrorist detainees from unlawful detention determined by the courts raises more severe national security threats than the courts permitting egregious speech-related activities. Consider the remarks by Justice Scalia in his dissenting opinion in *Boumediene v. Bush*. Justice Scalia advocated that the extension of habeas corpus to suspected terrorists would "make the war harder on us. It [would] almost certainly cause more Americans to be killed...In the short term, however, the decision [could have been] devastating. At least 30 of those

prisoners hitherto released from Guantánamo Bay have returned to the battlefield."[147] The threat of suspected "enemy combatants" returning to the battlefield as a consequence of judicial review for detainees, as Justice Scalia advocated, represents a central distinction between the value of the Suspension Clause and the First Amendment in the wartime context.

Concerning the relevance of the First Amendment to periods of war, Stone argues that "dissent can readily be cast as disloyalty. A critic who argues that troops are poorly trained or that the war is unjust may make a significant contribution to public discourse. But he also gives 'aid and comfort' to the enemy...Public disagreement during a war can both strengthen the enemy's resolve and undermine the nation's commitment to the struggle."[148] The essence of this argument is that dissent disrupts the legitimacy of the government's objectives and assertions to justify its wartime policies. In turn, this disloyalty may undermine the solidarity of the United States' military ambitions, which may be exploited by the opposition groups. However, the materialization of this threat is less imminent compared to the relinquishment of detained "enemy combatants" for two reasons.

First Amendment case law, such as *Brandenburg v. Ohio*, has established a high threshold for speech-related activities insofar as dissent that incites subversive or violent *actions* may be suppressed. The courts' historical tolerance of egregious speech reflects the exceptional standards of deliberative democracy in the United States. In the context of speech-related activity that classifies as material support, *al-Haramain* indicates that such activity conducted by organizations within the United States is more manageable to contain, which reduces the realistic national security concerns of activity done in coordination with Foreign Terrorist Organizations.

---

[147] *Boumediene v. Bush*, 553 U.S. 723 (2008).

[148] (2009, July 1). Free Speech and National Security. *Indiana Law Journal*, 940-940.

Conversely, relinquishing detainees from Guantánamo Bay theoretically presents a more imminent threat. Abdallah Salih al-Ajmi, whom the U.S. military accused of fighting with the Taliban in Afghanistan and wanting to kill Americans, was involved in one of three suicide bombings that killed seven Iraqi security forces in Mosul, Iraq in 2008.[149] Although the threat of permitting dissent is the delegitimization of the overall military objectives of the nation during a period of wartime, the threat of releasing detainees is the uncontrolled conduct by actors hostile to the United States and its allies.

Counterterrorism missions, legislation, and policies enacted by the United States since the emergence of the War on Terror have diminished the traditional respect to preserve the internal and external sovereignty of states in order to combat the threats posed by transnational terrorism. Surely, multilateral agreements and diplomacy have been vital political practices during the modern era of warfare. However, the fact that the most lethal terrorist organizations reside in states that feature unstable, decentralized governments provides greater leverage to foreign states to intervene and regulate the internal affairs of a weak state. This is also relevant since terrorist organizations function based on the support of populations within and outside of their residing state. State borders themselves do not contain terrorist activities within a country. Rather, governments have concluded that collective political, economic, and legal efforts of international states are the most effective to combat terrorism in a given state. As previously examined, this is reflected in the Supreme Court's rationale in *Holder v. Humanitarian Law Project.*

[149] White, J. (May 8, 2008). Ex-Guantanamo Detainee Joined Iraq Suicide Attack. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703456.html.

Holder v. Humanitarian Project and the subsequent federal court cases that involve instances of individuals providing material support to terrorist organizations illustrate the priorities of the courts to maintain counterterrorism objectives in relation to First Amendment claims. For instance, *El-Mezain v. United States* emphasizes the consequences that designations of terrorist organizations as Foreign Terrorist Organizations by the Department of State have on individuals' activity associated with such organizations. The discussion by the court in *El-Mezain* concerning prohibiting activity in coordination with Hamas after its listing in 1997, as well as the fluctuation of the amount of listed terrorist organizations, represent the political nature of the Foreign Terrorist Organization list. Critics have argued that "there are countless cases in which competing priorities, special circumstances, or political sensitivities make it preferable to keep a group off the list and instead deal with it through less public means."[150] Since it was instituted in 1997, the FTO list has grown from 30 organizations to 59 during the War on Terror. In particular, 10 organizations have been officially delisted since 1999, most recently the United Self Defense Forces of Colombia, the Moroccan Islamic Combatant Group (GICM), and the Mujahedin-e Khalq Organization (MEK). In the case of the MEK, individuals and entities in the United States may engage in activity with the organization that considers itself the principal resistance group to the government of Iran, which is affiliated with the National Council of Resistance of Iran.

Since the MEK's delisting, individuals may engage in activity, such as political or humanitarian efforts that may fall within the scope of First Amendment protections, with the MEK, which was prohibited before 2012. It should also be noted that the MEK was delisted as a Specially Designated Global Terrorist under Executive Order 13224, the same policy under

---

[150] Cronin K., A. (2011, December 21). Why the Haqqani Network is not on the Foreign Terrorist Organizations List. *Foreign Affairs*. Retrieved from http://www.foreignaffairs.com/articles/136974/audrey-kurth-cronin/why-the-haqqani-network-is-not-on-the-foreign-terrorist-organiza.

analysis in *al-Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury.* On the other hand, individuals are sanctioned from engaging in activity with groups like Hamas and Hezbollah, both of which feature local political support and provide social services, due to their listings on the Foreign Terrorist Organization List.

Justice Jackson once asserted that "the Constitution is not a suicide pact."[151] In other words, national security concerns warrant either deference to the political branches or restraints on constitutional liberties, rather than strict adherence to the founding principles of the Constitution's individual rights. As military strategies have adapted to the characteristics of contemporary warfare, so too have traditional doctrines and applications of constitutional rights. The Supreme Court's distinction between permissible independent advocacy of a Foreign Terrorist Organization and impermissible activity done in coordination with the same Foreign Terrorist Organization alters the traditional balance between protected free speech and prohibited subversive activity.

Additionally, the Supreme Court's inclusion of speech-related activity in the definition of material support has broadened the original understandings of prohibited aid. These established rules have been maintained by the federal courts in subsequent cases. In the case of detention, terrorism and the proliferation of militarized sub-state actors have disrupted the binary distinction between combatants and civilians. Thus, there is less assurance to detain true "enemy combatants" based on terrorist resemblances to civilians. This central dilemma has been significant in relation to the extraterritorial extension of the Suspension Clause to detainees. As previously illustrated, the two primary perspectives of sovereignty, *de facto* and *de jure*, further

[151] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

represent the globalized nature of military operations conducted by the United States. The notorious motto by the Bush administration in which "the world is a battlefield" suggests that the application of *de facto* sovereignty on habeas corpus claims is the greater safeguard to preserve the separation of powers compared to *de jure* sovereignty.

The idiosyncratic nature of Guantánamo Bay detention site has presented both opportunities for detainees to utilize constitutional rights while being limited due to the narrow jurisdictional grounds that exist in Guantánamo Bay compared to the mainland territories of the United States. As previously discussed, the courts have established that constitutional rights apply to individuals within the territories of the United States, regardless of citizenship. This is important to consider in terms of transferring detainees from Guantánamo Bay into the United States during periods of war. During these debates to shut down the detention facility Guantánamo Bay and transfer detainees to a prison located in the state of Illinois, Representative Lamar Smith argued that "bringing Gitmo detainees to the U.S. gives terrorists access to additional constitutional rights. These new rights may help terrorists avoid conviction and even file civil suits against American officials."[152] In one respect, this implies the lasting indication that the federal government has utilized Guantánamo Bay as a method to evade full constraints on the rule of law. Alternatively, Representative Smith's argument illustrates that framing a detention site as *foreign* provides the federal government significant discretion to detain "enemy combatant" in comparison to a domestic facility.

The Department of Justice published the Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (NDAA), which analyzes the relationship

[152] (2009, December 15). Lawmakers Spar Over Decision to Transfer Gitmo Detainees to Illinois Prison. *Fox News*. Retrieved from http://www.foxnews.com/politics/2009/12/14/illinois-prison-house-gitmo-detainees/.

between transfers of Guantánamo Bay detainees into the mainland of the United States and the applicability of existing immigration laws to such detainees. Section 1039(b)(1)(B)[153] and (D) of the NDAA are of particular relevance to the question of whether additional legal rights may be granted to detainees on the basis of territory. In general, the report differentiated non-citizen detainees from conventional immigrants, arguing that "Congress separately has the authority to expressly provide by statute that the immigration laws generally are inapplicable to any Guantánamo detainees held in the United States pursuant to the Authorization for Use of Military Force as informed by the laws of war."[154] Although one may argue that immigration laws would apply to detainees in general once transferred to the mainland territory of the United States, the report concludes that relevant case law would not apply to Guantánamo Bay detainees.

For instance, the Supreme Court determined in *Zadvydas v. Davis* that "an alien's post-removal-period detention [under statute should be granted] a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."[155] If applicable to Guantánamo Bay detainees, *Zadvydas* would bar the federal government from detaining "enemy combatants" for longer than six months. Indefinite detention would " raise serious constitutional concerns," which associates with the primary concern of the Kennedy Court in *Boumediene v. Bush* to preserve the right of habeas corpus. Having said that, the Supreme Court noted in *Zadvydas* that its decision "did not preclude longer periods of

---

[153] Section 1039(b)(1)(B) states, "an assessment of the extent to which an individual detained at Guantanamo, if transferred to the United States, could become eligible, by reason of such transfer, for...any required release from immigration detention, including pursuant to the decision of the Supreme Court in *Zadvydas v. Davis*." Furthermore, Section 1039(b)(1)(D) states if detainees would be eligible for "any additional constitutional right." Retrieved from http://armedservices.house.gov/index.cfm/files/serve?File_id=215AC26C-A0E7-4B02-A63C-DD9D800AF2DB.

[154] Kadzik, P. (2014). Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014. *U.S. Department of Justice*, 9-9. Retrieved from https://s3.amazonaws.com/s3.documentcloud.org/documents/1160074/5-14-14-kadzik-to-pjl-re-fy14-ndaa.pdf.

[155] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

detention in cases of '*terrorism* or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[156] Since the laws of war, including the AUMF, would permit the federal government to detain the "enemy combatants" for the duration of the conflict, detainees would be strictly distinguishable from individuals in an immigration removal context.

As previously stated, the Suspension Clause is the sole constitutional right guaranteed to suspects detained in Guantánamo Bay due to the limited jurisdiction granted to the D.C. courts. Although detainees transferred to the United States would be afforded the constitutional rights normally provided to immigrant detainees, the national security implications associated with Guantánamo Bay detainees prohibit further extensions of constitutional rights and legal protections. The report concluded, "for aliens detained under the AUMF, any arguably applicable constitutional provisions should be construed consistent with the individuals' status as detainees held pursuant to the laws of war, and the government's national security and foreign policy interests and judgments should be accorded great weight and deference by the court."[157] Indeed, the territory that Guantánamo Bay detainees is located in influences the extent of constitutional and legal protections. Guantánamo Bay detainees may be provided greater constitutional protections during removal proceedings and trials in the mainland of the United States relative to those afforded at Guantánamo Bay detention camp. However, the national security concerns

---

[156] Kadzik, P. (2014). Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014. *U.S. Department of Justice*, 7-7. Retrieved from https://s3.amazonaws.com/s3.documentcloud.org/documents/1160074/5-14-14-kadzik-to-pjl-re-fy14-ndaa.pdf.

[157] *Id*.

associated with such detainees prevent them from gaining entirely equal legal protections as immigrant detainees.

The *al-Maqaleh* cases raise pivotal issues concerning future instances of American military operations. Although the D.C. District Court originally upheld detainees' right to habeas corpus primarily on the basis of the objective degree of control that the United States possessed over Parwan, the Circuit Court of Appeals overruled this decision in part because the United States was still active in a theater of war in Afghanistan during detention operations. Considering that the Authorization for Use of Military Force has granted the federal government power to conduct persistent military actions throughout the War on Terror, the courts will be faced with further questions concerning the surrounding circumstances of a detention site in future periods of conflict. Surely, the D.C. Circuit's rationale would be appropriate based on a case during the time of a formal war declared by Congress. However, informal military operations raise concerns about the appropriateness of the Circuit Court's decision in comparison to the D.C. District Court.

Constitutional matters involving counterterrorism are not exclusive to detention and material support cases. For example, there are vital implications of the Fourth Amendment's applicability to the international mass surveillance programs by the United States and its allies and the Fifth Amendment's interpretations related to the covert drone operations on American citizens. In fact, multiple counterterrorism programs are linked to each other in order to stifle terrorist aims. The Joint Terrorism Task Force has played a critical role in the United States' counterterrorism regime. The War on Terror will feature continued reliance on law enforcement and intelligence gathering programs in addition to conventional military operations. Existing

case law related to the War on Terror will instruct the courts in subsequent cases. The overall question in the future will not only be *if* the Constitution should follow the American flag, but *how far* the flag will travel throughout international battlefields.

Works Cited

05-5487 (D.C. Cir. 2009) (*Kiyemba v. Obama*).

06-1669 (D.D.C. 2010) (*al-Maqaleh v. Gates*).

09–10560, 08–10664, 08–10774, 10–10590 and 10–10586 (5th Cir. 2011) (*El-Mezain v. United States*).

09-15985 (11th Circ. 2011) (*United States v. Augustin*).

10-35032, 18098 (D.C. Cir. 2011) (*al-Haramain Islamic Foundation, Inc., v. U.S. Department of Treasury*).

11-1324, (D.C. Circ. 2014) (*Ali Hamza Ahmad Suliman al-Bahlul v. United States).*

12-4061 (4th Cir. 2014) (*United States v. Hassan*).

12-5404, 33-34 (D.C. Circ. 2013) (*al-Maqaleh v. Hagel*).

99-8199, (11th Cir. 2000) (*Smith v. Cummings*).

605 F.3d 84, 17 (D.C. Cir. 2010) (*al-Maqaleh II*).

(2015). The Detainees. *The New York Times*. Retrieved from http://projects.nytimes.com/guantanamo/detainees.

(2012). Best Practices: Combating the Abuse of Non-Profit Organizations (Recommendation 8). *FAFT*. Retrieved from http://www.fatf-gafi.org/topics/fatfrecommendations/documents/bpp-npo-2013.html.

(2012, June 11). Supreme Court Denies 7 Detainee Cases, Leaving Crippling Limits on Detainee Rights in Place." *Think Progress*. Retrieved from http://thinkprogress.org/justice/2012/06/11/497319/scotus-denies-7-gitmo-cases/.

(2009, December 15). Lawmakers Spar Over Decision to Transfer Gitmo Detainees to Illinois Prison. *Fox News*. Retrieved from http://www.foxnews.com/politics/2009/12/14/illinois-prison-house-gitmo-detainees/.

(2006, October 1). Profiles in Cowardice. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2006/09/30/AR2006093001027.html.

Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; February 23, 1903. *Lillian Goldman Law Library*. Retrieved from http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

Ackerman, B. (2004). The Emergency Constitution. *Faculty Scholarship Series*. Paper 121, 1032, 10667, 1069, 1071.

Barrett, P. (2003, May 28). Idaho Arrest Puts Muslim Student Under U.S. Scrutiny, Examination. *The Wall Street Journal*. Retrieved from http://www.wsj.com/articles/SB105406885465552500.

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

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Colangelo, A. Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law. *Harvard International Law Journal*, 48 (1), 144-145.

Cole, D. & Dempsey X., J. (2006). *Terrorism and the Constitution: Sacrificing Civil Liberties In The Name Of National Security*, 165-165. New York: The New Press.

Cronin K., A. (2011, December 21). Why the Haqqani Network is not on the Foreign Terrorist Organizations List. *Foreign Affairs*. Retrieved from http://www.foreignaffairs.com/articles/136974/audrey-kurth-cronin/why-the-haqqani-network-is-not-on-the-foreign-terrorist-organiza.

De Jonge v. Oregon, 299 U.S. 353 (1937).

Denniston, L. (July 17, 2012). Ex-judge: Boumediene is being "gutted." *SCOTUSblog*. Retrieved from http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted/.

Downs, S. & Manley, K. (2014). Inventing Terrorists: The Lawfare of Preemptive Prosecution. *National Coalition to Protect Civil Freedoms* and *Project SALAM*, 2-2. Retrieved from http://www.projectsalam.org/Inventing-Terrorists-study.pdf.

Doyle, C. (2010). Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B. *Congressional Research Service*, 25-25. Retrieved from https://www.fas.org/sgp/crs/natsec/R41333.pdf.

Embassy of the United States Kabul, Afghanistan. (2014, February 13). U.S. Embassy Statement on the Release of Dangerous Detainees. *Embassy Statements 2014*. Retrieved from http://kabul.usembassy.gov/st-021314.html.

Garcia, M. (2008). Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus. *Congressional Research Service*, 9-9. Retrieved from http://www.fas.org/sgp/crs/natsec/RL34536.pdf.

Goldstein, J. (2007, April 9). First Amendment Defense is Pursued in Hezbollah TV Case. *The New York Sun*. Retrieved from http://www.nysun.com/new-york/first-amendment-defense-is-pursued-in-hezbollah/52057/.

Gutteridge, C. (2009, June 24). Bagram Lesser Known - But More Evil - Twin of Guantanamo. *Reuters*. Retrieved from http://blogs.reuters.com/great-debate-uk/2009/06/24/bagram-lesser-known-but-more-evil-twin-of-guantanamo/.

Hoffman, B., Rosenau, W., Curiel, A., & Zimmermann, D. (2007). The Radicalization of Diasporas and Terrorism. *RAND Corporation*, 33-33.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

H. R. 3143: To Deter Terrorism, Provide Justice for Victims, and for Other Purposes, US House of Representatives, 113th Congress, Section 2(5). Retrieved from https://www.congress.gov/bill/113th-congress/house-bill/3143/text.

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

Kadzik, P. (2014). Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014. *U.S. Department of Justice*, 7, 9. Retrieved from https://s3.amazonaws.com/s3.documentcloud.org/documents/1160074/5-14-14-kadzik-to-pjl-re-fy14-ndaa.pdf.

Kaldor. M. (2007). *Human Security*. Cambridge: Polity.

Kaldor, M. (2013). In Defence of New Wars. *Stability*, 2(1), 3.

Kaldor, M. (2005). Old Wars, Cold Wars, New Wars, and the War on Terror. *Cold War Studies Centre, London School of Economics*, 10-10.

Liptak, A. (2010, June 21). Court Affirms Ban on Aiding Groups Tied to Terror. *The New York Times*. Retrieved from http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=all&_r=0.

Loyn, D. (2014, February 13). Afghan Prisoners Freed from Bagram Amid US Protests. *BBC News*. Retrieved from http://www.bbc.com/news/world-asia-26166949.

Military Commissions Act of 2006, H.R. 6166. § 7(1)(e) (2006).

Nelson R., L. (2011). Territorial Sovereignty and the Evolving *Boumediene* Factors: *Al Maqaleh v. Gates* and the Future of Detainee Habeas Corpus Rights. *University of New Hampshire Law Review*, 311-312.

Neuman, G. After Guantanamo: Extraterritoriality of Fundamental Rights in U.S. Constitutional Law. *Jus Politicum*. Retrieve from http://www.juspoliticum.com/After-Guantanamo.html.

Oberschall, A. (2008). How Democracies Fight Insurgents and Terrorists. *Dynamics of Asymmetric Conflict*, 8, 10.

Office of the Coordinator for Counterterrorism. (2001). *Executive Order 13224*. Retrieved from http://www.state.gov/j/ct/rls/other/des/122570.htm.

Oral Argument Before the Supreme Court of the United States at 8-12. *Boumediene v. Bush*, 553 U.S. 723 (Dec. 5, 2007).

Piret, J. (2008). *Boumediene v. Bush* and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism? *Utrecht Law Review*, 93-94.

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

Scahill, J. (2013). *Dirty Wars: The World is a Battlefield*. New York: Nation Books.

Sitaraman, G. (2009). Counterinsurgency, The War on Terror, and The Laws of War. *Virginia Law Review*, 1753-1753.

Sitaraman, G. (2012). *The Counterinsurgent's Constitution: Law in the Age of Small Wars*. Oxford: Oxford University Press.

Specter, A. (2006, September 27). Military Commissions Act of 2006. *Vote Smart*. Retrieved from https://votesmart.org/public-statement/218721/military-commissions-act-of-2006#.VMQ_RGTF-mE.

Stephens, Jr., O., & Scheb, J. (2011). *American Constitutional Law: Civil Rights and Liberties, Volume 2*. Boston: Cengage Learning.

Stone, G. (2009, July 1). Free Speech and National Security. *Indiana Law Journal*, 939.

U.S. Department of the Treasury. Protecting Charitable Organizations - A. Retrieved from http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities_execorder_13224-a.aspx.

Terminiello v. City of Chicago, 337 U.S. 1 (1949).

White House. (2011). *National Strategy for Counterterrorism*, 10-10. Retrieved from https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

White, J. (May 8, 2008). Ex-Guantanamo Detainee Joined Iraq Suicide Attack. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703456.html.

Williams, D. (2014). Relevance of Mary Kaldor's 'New Wars' Thesis in the 21st Century. *Journal of Law and Conflict Resolution*, 6(5), 86-87.

Wisconsin v. Mitchell, 508 U.S. 476 (1993).

Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Zadvydas v. Davis, 533 U.S. 678 (2001).

Zanotti, J. (2010). Hamas: Background and Issues for Congress. *Congressional Research Service*, 24-24. Retrieved from http://www.fas.org/sgp/crs/mideast/R41514.pdf.

Zick, T. (2010). Territoriality and the First Amendment: Free Speech At - And Beyond - Our Borders. *Faculty Publications*. Paper 821, 1593, 1596, 1598.