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Habeas Corpus Outside U.S. Territory: *Omar v. Geren* and Its Effects On Americans Abroad

John Wright

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STUDENT NOTE

Habeas Corpus Outside U.S. Territory: *Omar v. Geren and Its Effects On Americans Abroad*

John Wright

ABSTRACT

The contention between habeas corpus rights and national security interests has been ongoing since the ratification of the U.S. Constitution. History proves that this relationship becomes especially precarious during times of conflict, from the U.S. Civil War and continuing through the War on Terrorism, which began in 2001.

This paper focuses on one of the most recent limitations placed on the right of habeas corpus as determined by the federal judiciary: that a writ of habeas corpus will not stay the transfer of a U.S. citizen to a foreign sovereign's authorities to face charges for alleged crimes committed within that sovereign. The author looks at how this restraint fits within the greater historical framework of the right of habeas corpus, as well as its recent evolution during the War on Terrorism. Lastly, it is determined whether or not the individual challenging the transfer has any further options regarding the appeal of his writ.

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INTRODUCTION

Habeas corpus, among the most fundamental and precious rights in our political system, remains a crucial guard against illegal or unwarranted government detention authority. The Suspension Clause in the United States Constitution dictates that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."¹ Barring extreme circumstances, the clause guarantees an individual the right to come before a court to test the legality of an arrest or commitment or obtain judicial review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence.² Despite this broad constitutional constraint, the recent case *Omar v. Geren*, from the United States District Court, District of Columbia, has established limits on the application of this right under specific circumstances, particularly for situations in the context of the War on Terror outside United States soil.³

BACKGROUND AND EARLY CASE LAW

To fully grasp the implications of the District Court's decision, one must first examine the right of habeas corpus in general, both its origin and evolution through our nation's history. A fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,⁴ the writ of habeas corpus is meant to provide for swift judicial review of alleged unlawful restraints on liberty.⁵ Indeed, it is a wise decision to allow third-party review of governmental decisions, balancing institutional authority with individual liberty.⁶ Consequently, legislation has been passed allowing courts to entertain applications for a writ of habeas corpus.⁷ Upon review of such an application, the court must either award the writ or issue an order directing the respondent to show cause as to why the writ should not be granted, unless it appears from the application that the applicant or person who is detained is not entitled to such a writ.⁸

A. HABEAS CORPUS DURING THE CIVIL WAR

This safeguard, however, is not absolute. At its core, the American constitutional government balances a constant tension between security and liberty.⁹ History provides multiple examples of habeas corpus suspension on the basis of national security. To the great dismay of some legal scholars, the President of the United States has utilized the constitutional power granted in the suspension clause to limit habeas corpus in times of war.¹⁰ During the Civil War, President Lincoln suspended the writ of habeas corpus, resulting in the military detention of more than 20,000 persons suspected of disloyalty against the Union.¹¹ Though his actions were deemed unconstitutional by one judge,¹² Lincoln was not dissuaded from continuing.¹³

¹ U.S. CONST. art. I, § 9, cl. 2.

² BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

³ See generally *Omar v. Geren*, 689 F. Supp. 2d 1, 3 (D.C. Dist. 2009).

⁴ *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

⁵ *Peyton v. Rowe*, 391 U.S. 54, 63 (1968).

⁶ Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring) ("For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.").

⁷ See Issuance of writ; return; hearing; decision, 28 U.S.C. § 2243 (1948).

⁸ *Id.*

⁹ *Hamdi*, *supra* note 6, at 545.

¹⁰ *Id.* ("...deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.").

¹¹ Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 482-83 (2005).

¹² *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861) (Taney, R.) ("The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.").

B. EX PARTE MILLIGAN—PROTECTION OF NON-MILITANTS

Upon the conclusion of the Civil War, the Supreme Court of the United States ruled on a pivotal issue surrounding habeas corpus and military tribunals.¹⁴ In *Ex Parte Milligan*, the high court determined that a military tribunal could not, at any time, try civilians or non-military individuals.¹⁵ The case centered on a United States citizen and Indiana resident, Milligan, who was arrested and charged with, among other things, conspiracy against the United States and inciting insurrection.¹⁶ The charges were brought as a result of Milligan's involvement with a secret society known as the "Order of American Knights" or "Sons of Liberty," that advocated overthrowing the Government and duly constituted authorities of the United States.¹⁷ Tried and found guilty by a military tribunal, Milligan was sentenced to death by hanging.¹⁸

The Supreme Court ruled, however, the military commission in Indiana, under the facts stated in the case, did not have jurisdiction to try and sentence Milligan.¹⁹ The court's reasons for the denial of jurisdiction stemmed from "the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty," and the fact that there are relatively few exceptions that can be substituted for them.²⁰ The Court concluded by stating in emphatic fashion that it was, "unwilling to give [their] assent by silence to expressions of opinion, which [seemed to the Court as] calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion."²¹

IMPACT OF THE WAR ON TERRORISM

There have been more recent illustrations of the struggle over habeas corpus between the branches of government. Since the War on Terrorism began in 2001, the Supreme Court has faced a myriad of habeas corpus issues involving both U.S. citizens and foreign nationals. Significantly, these judgments have established that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in any dominion under United States control are wrongfully imprisoned.²²

A. THE QUESTION OF JURISDICTION

In *Rasul v. Bush*, the Supreme Court was presented with "the narrow but important question whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."²³ Petitioners in the case consisted of two Australian citizens, two British citizens and twelve Kuwaiti citizens who were all captured abroad during hostilities between the United States and the Taliban.²⁴ All three groups of citizens filed separate writs of habeas corpus, and were construed together by the District Court for the District of Columbia, which dismissed all three for want of jurisdiction, holding that "aliens detained outside

¹³ Block, *supra* note 11, at 483.

¹⁴ See *Ex parte Milligan*, 71 U.S. 2 (1866).

¹⁵ *Id.* at 34 ("[M]ilitary tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government.").

¹⁶ See *id.* at 6.

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 135.

²⁰ *Id.* ("And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.").

²¹ *Id.*

²² *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

²³ *Id.* at 470.

²⁴ *Id.* at 470-71.

the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.”²⁵ The Court of Appeals for the District of Columbia Circuit affirmed, stating that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”²⁶ The Supreme Court subsequently granted certiorari to review the petitions.²⁷

Justice John Paul Stevens, writing for the majority, determined that the right to habeas corpus can be exercised by any individual, independent of citizenship status, in “all . . . dominions under the sovereign's control,” including the military base in Guantanamo Bay.²⁸ Stevens argued that, given the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses.²⁹ The majority found the fact that ultimate sovereignty of the base remained with Cuba was irrelevant.³⁰ Accordingly, the Court reversed the lower courts’ rulings, holding that United States courts had jurisdiction over habeas corpus petitions from non-citizens being held in any dominion under United States.³¹

The Court was divided concerning this ruling, with the Chief Justice and Justice Thomas joining Justice Scalia in dissent of the holding. Justice Scalia argued that, because even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee,³² United States courts do not have the jurisdiction to hear writs of habeas corpus petitioned by non-citizens. Scalia warned of the potential “breathhtaking” consequence of this holding, as applied to aliens outside the country, because it potentially permits “an alien captured in a foreign theater of active combat to bring a habeas corpus petition against the Secretary of Defense.”³³ Scalia’s final argument was that the proper course of action would have been through Congress, which could have changed federal judges’ habeas jurisdiction from what the Supreme Court had previously held that to be.³⁴

B. THE RIGHTS OF “ENEMY COMBATANTS”

In *Hamdi v. Rumsfeld*, decided concurrently with *Rasul v. Bush*, the Supreme Court determined that United States citizens who have been designated as enemy combatants by the Executive Branch have a right to challenge their detainment via habeas corpus.³⁵ This case developed from the detention of a United States citizen, named Yaser Esam Hamdi, who allegedly took up arms with the Taliban against the United States.³⁶ Members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, seized Hamdi and eventually transferred him to United States military custody.³⁷ The Government contended that Hamdi was an “enemy combatant,” and that this status justified holding him in the United States indefinitely, without formal charges or proceedings, unless and until it makes the determination that access to counsel or further process is warranted.³⁸

Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus on behalf of his son.³⁹ The petition stated that Hamdi's detention was not legally authorized, that, “[a]s an American citizen . . . Hamdi enjoys the full protections of the Constitution,” and that Hamdi's detention in the United States

²⁵ *Id.* at 472-3.

²⁶ *Id.* at 473 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-8 (1950)).

²⁷ *Id.*

²⁸ *Id.* at 481-2.

²⁹ *Id.* at 480.

³⁰ *Id.* at 485.

³¹ *Id.*

³² *Id.* at 489.

³³ *Id.* at 498.

³⁴ *Id.* at 506.

³⁵ *Hamdi*, *supra* note 6.

³⁶ *Id.* at 510.

³⁷ *Id.*

³⁸ *Id.* at 510-11.

³⁹ *Id.* at 511.

without charges, access to an impartial tribunal, or assistance of counsel “violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution.”⁴⁰ Though the District court for the Eastern District of Virginia ordered that counsel be given access to Hamdi, the Court of Appeals for the Fourth Circuit reversed, stating that the District Court had failed to extend appropriate deference to the Government’s security and intelligence interests.⁴¹ The case itself bounced back and forth between the district and circuit courts,⁴² with the Fourth Circuit eventually denying Hamdi’s constitutional claim, emphasizing that “[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.”⁴³

Writing for a plurality, Justice O’Connor wrote that, although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.⁴⁴ Absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.⁴⁵ Even though the Supreme Court admits that it is “beyond question that substantial interests lie on both sides of the scale in this case,”⁴⁶ it noted that a state of war is not a blank check for the President when it comes to the rights of the nation’s citizens.⁴⁷ Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.⁴⁸

Justice Souter, joined by Justice Ginsburg, concurred with the plurality so far as the fact that Hamdi had the right to challenge his status as an enemy combatant in court, but disagreed with the view that Congress authorized Hamdi’s detention.⁴⁹ Justice Scalia, joined by Justice Stevens, issued a dissent arguing that the government’s course of action was constitutionally sound under the Suspension Clause.⁵⁰ Where the exigencies of war prevent the government from prosecuting a citizen accused of waging war against it, the Constitution’s Suspension Clause allows Congress to relax the usual protections temporarily.⁵¹ Scalia went on to state that the Court proceeded to meet the current emergency in a manner the Constitution did not envision.⁵²

Justice Thomas wrote a separate dissent, arguing that Hamdi’s detention falls squarely within the federal government’s war powers, and that the Court lacked the expertise and capacity to second-guess that decision.⁵³ Given that, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation,”⁵⁴ Thomas believed that the plurality misapplied its chosen framework, “one that if applied correctly would probably lead to the result [Thomas] reached.”⁵⁵ Although Thomas admitted that it was undeniable that Hamdi had been deprived of a serious interest, one actually protected by the Due

⁴⁰ *Id.*

⁴¹ *See id.* (“[I]f Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”).

⁴² *See generally id.* at 512-16.

⁴³ *Id.* at 516 (quoting *Ex parte Quirin*, 317 U.S. 1 (1942)).

⁴⁴ *Id.* at 509.

⁴⁵ *Id.* at 525.

⁴⁶ *Id.* at 529 (“Hamdi’s ‘private interest . . . affected by the official action,’ is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”).

⁴⁷ *See id.* at 536.

⁴⁸ *Id.* at 537.

⁴⁹ *Id.* at 541 (“The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims.”).

⁵⁰ *Id.* at 554.

⁵¹ *Id.*

⁵² *Id.* at 579.

⁵³ *Id.* at 580.

⁵⁴ *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 307, (1981)).

⁵⁵ *Id.* at 594.

Process Clause, the Government possessed an overriding interest in protecting the Nation, which therefore justifies such deprivation.⁵⁶

C. REQUIREMENT FOR CONGRESSIONAL AUTHORIZATION

Since the landmark decisions in *Rasul* and *Hamdi*, the Supreme Court has utilized its universal power to review writs of habeas corpus petitioned by both U.S. citizens and foreign nationals to address further issues. In *Hamdan v. Rumsfeld*,⁵⁷ the Supreme Court determined, among other things, that neither an extant act of Congress nor the inherent powers of the Executive enumerated in the Constitution expressly authorized military commissions established by the Executive Branch to try detainees at Guantanamo Bay.⁵⁸

Congress, in response to the September 11th terrorist attacks, adopted a Joint Resolution, the Authorization for Use of Military Force (AUMF),⁵⁹ authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁶⁰ Pursuant to the AUMF, the President ordered the Armed Forces of the United States to invade Afghanistan, and hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.⁶¹ On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”⁶² The order stated that those subject to the order⁶³ “shall, when tried, be tried by a military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.”⁶⁴ Subsequently, the President announced that Hamdan was subject to the aforementioned order.⁶⁵

Hamdan filed a writ for habeas corpus demanding to know the charges he faced.⁶⁶ The District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings.⁶⁷ The Court of Appeals for the District of Columbia Circuit reversed, rejecting the District Court's conclusion that Hamdan was entitled to relief under Article III of the Third Geneva Convention,⁶⁸ asserting that the Geneva Conventions were not “judicially enforceable.”⁶⁹ Further, the appellate court concluded that there was no

⁵⁶ *Id.* at 598.

⁵⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁵⁸ *Id.* at 636 (“The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ . . . Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).
⁵⁹ 115 Stat. 224.

⁶⁰ *Hamdan*, *supra* note 57, at 568.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (“Those subject to [the order] include any noncitizen for whom the President determines “there is reason to believe” that he or she (1) “is or was” a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.”)

⁶⁴ *Id.*

⁶⁵ *Id.* at 569.

⁶⁶ *Id.*

⁶⁷ *Id.* at 571 (“[The District Court] concluded that the President's authority to establish military commissions extends only to ‘offenders or offenses triable by military [commission] under the law of war;’ that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War; that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear.”).

⁶⁸ 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention).

⁶⁹ *Id.* at 571.

separation of powers objection to the military commission's jurisdiction.⁷⁰ The Supreme Court subsequently granted certiorari to determine whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan could rely on the Geneva Conventions in these proceedings.⁷¹

Justice Stevens, authoring the opinion, determined that, absent express congressional authorization, it was the court's duty to determine whether the military commission complied with the ordinary laws of the United States and the laws of war.⁷² The Geneva Convention, as a part of the ordinary laws of war, was applicable to Hamdan and required that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁷³ The military commission that the President had convened to try Hamdan was found to violate the convention by not meeting its listed requirements,⁷⁴ and therefore was determined illegal.⁷⁵

D. THE MILITARY COMMISSIONS ACT OF 2006

In the wake of the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (MCA),⁷⁶ which established procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions.⁷⁷ Further, § 7 of the MCA expressly eliminated court jurisdiction over all pending and future causes of action other than the limited review permitted under the Detainee Treatment Act (DTA).⁷⁸ Congress's intent was explicit and broad—the MCA would eliminate all constitutional guarantees of habeas corpus to all detainees designated as "enemy combatants" in United States custody, no matter where they were held.⁷⁹

This tension between the three branches of government came to a head in the case *Boumediene v. Bush*.⁸⁰ This case, brought by a representative group of aliens⁸¹ designated as enemy combatants and detained at Guantanamo Bay, presented two questions to the high court: First, whether the aliens have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause;⁸² and second, if the aliens do possess the privilege, whether the Military Commissions Act of 2006 operates as an adequate and effective substitute for habeas corpus.⁸³ The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause, and, as a result, that it was unnecessary to consider whether Congress

⁷⁰ *Id.* at 571-72.

⁷¹ *Id.* at 572.

⁷² *Id.* at 595.

⁷³ *Id.* at 631-32.

⁷⁴ *Id.* at 640.

⁷⁵ *Id.* at 635.

⁷⁶ Military Commissions Act of 2006, 120 Stat. 2600 (2006).

⁷⁷ *Id.*

⁷⁸ *Id.* ("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 . . . Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction 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 and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

⁷⁹ *See id.*

⁸⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸¹ *Id.* at 732 ("There are others detained there, also aliens, who are not parties to this suit.").

⁸² *Id.*

⁸³ *Id.*

provided an adequate and effective substitute for habeas corpus in the DTA.⁸⁴ Subsequently, the Supreme Court granted certiorari.⁸⁵

Justice Kennedy, writing for a five-justice majority, determined that the Court of Appeals was correct to take note of the legislative history when construing the MCA, and agreed with the appellate court's conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions under review.⁸⁶ However, the Court also held that the Suspension Clause of the Constitution has full effect at Guantanamo Bay.⁸⁷ Therefore, if the privilege of habeas corpus is to be denied to the detainees before the court, Congress had to have acted in accordance with the requirements of the Suspension Clause.⁸⁸ Because the MCA did not purport to be a formal suspension of the writ, and the Government, in its submissions to the court, did not argue that it was, the Court determined that the petitioners were entitled to the privilege of habeas corpus to challenge the legality of their detention.⁸⁹

In light of this holding, the question facing the court became whether the MCA accommodated the Suspension Clause mandate.⁹⁰ Although the Government argued there was compliance with the Suspension Clause because the DTA review process provides adequate substitute procedures for habeas corpus,⁹¹ the Court determined that the Government did not establish that the detainees' access to the statutory review provisions at issue was an adequate substitute for the writ of habeas corpus, and that MCA § 7 thus effects an unconstitutional suspension of the writ.⁹² The petitioners, in the Court's mind, were invoking the fundamental procedural protection of habeas corpus, a protection "designed to survive, and remain in force, in extraordinary times."⁹³ Accordingly, the petitioners were to be entitled to the protections that a writ of habeas corpus offers.⁹⁴

E. MUNAF V. GEREN

This case centers on Shawqi Omar (the petitioner in *Omar v. Geren*) and Mohammad Munaf, both of whom are U.S. citizens who voluntarily traveled to Iraq and allegedly committed crimes there.⁹⁵ Petitioner Omar voluntarily traveled to Iraq in 2002 and, in October 2004, was captured and detained in Iraq by U.S. military forces, part of the Multinational Force-Iraq ("MNF-I"), during a raid of his Baghdad home.⁹⁶ Omar is believed to have provided aid to al Qaeda in Iraq by facilitating this group's connection with other terrorist groups, bringing foreign fighters into Iraq, and planning and executing kidnappings in Iraq.⁹⁷ Omar's wife and son filed a next-friend petition for a writ of habeas corpus on Omar's behalf in the District Court for the District of Columbia.⁹⁸ After the Department of Justice informed Omar that he would be referred to the Central Criminal Court of Iraq for criminal proceedings, his attorney sought and obtained a

⁸⁴ *Id.* at 735-36.

⁸⁵ *Id.*

⁸⁶ *Id.* at 738-39.

⁸⁷ *Id.* at 771.

⁸⁸ *Id.* (quoting *Hamdi*, 542 U.S., at 564 (SCALIA, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ.")).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See The Detainee Treatment Act*, § 1005(e)(2)(C), 119 Stat. 2742 ("(i) whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.")).

⁹² *Boumediene*, *supra* note 80, at 792.

⁹³ *Id.* at 798.

⁹⁴ *Id.*

⁹⁵ *Munaf v. Geren*, 553 U.S. 674, 674 (2008).

⁹⁶ *Id.* at 675.

⁹⁷ *Id.* at 681.

⁹⁸ *Id.* at 682.

preliminary injunction barring Omar's removal from United States custody.⁹⁹ The United States appealed and the Court of Appeals for the District of Columbia Circuit affirmed the injunction.¹⁰⁰ A single appellate judge dissented, stating "[T]he District Court had no authority to enjoin a transfer that would allow Iraqi officials to take custody of an individual captured in Iraq—something the Iraqi Government 'undeniably h[ad] a right to do.'"¹⁰¹

Petitioner Munaf voluntarily traveled to Iraq with several Romanian journalists to serve as the journalists' translator and guide.¹⁰² Shortly after arriving in Iraq, the group was kidnapped and held captive for two months, and, after the journalists were freed, Munaf was detained based on the belief that he had orchestrated the kidnappings.¹⁰³ Munaf's sister filed a next-friend petition for a writ of habeas corpus in the District Court for the District of Columbia.¹⁰⁴ The District Court dismissed the petition for lack of jurisdiction, finding that Munaf was "in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly."¹⁰⁵ The Court of Appeals for the District of Columbia Circuit affirmed, distinguishing the prior opinion in *Omar* on the ground that Munaf, unlike Omar, had been convicted by a foreign tribunal.¹⁰⁶ One appellate judge concurred in judgment, concluding that the District Court had improperly dismissed for want of jurisdiction because "Munaf is an American citizen . . . held by American forces overseas," but would have still held that Munaf's habeas petition failed on the merits.¹⁰⁷ The Supreme Court subsequently consolidated both the *Omar* and *Munaf* cases and granted certiorari.¹⁰⁸

The United States acknowledged that both Omar and Munaf are American citizens held overseas in the immediate physical custody of American soldiers who answer only to an American chain of command.¹⁰⁹ Given those circumstances, the Supreme Court declined to preclude American citizens held overseas by American soldiers subject to a United States chain of command from filing habeas petitions.¹¹⁰ The Court then turned to the question of whether United States District Courts may exercise their habeas jurisdiction to enjoin the United States Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution.¹¹¹ Given that the consolidated cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, Supreme Court precedent dictated that the power of the writ should not grant the relief sought by the petitioners.¹¹²

Petitioners Omar and Munaf argued that the writ should be granted in their cases because they have "a legally enforceable right" not to be transferred to Iraqi authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring (FARR) Act of 1998.^{113, 114} The Supreme Court determined, however, that the granting of such writs would interfere with Iraq's sovereign right to

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 682-83 ("construed the injunction only to bar transfer to Iraqi custody and upheld the District Court's order insofar as it prohibited the United States from: (1) transferring Omar to Iraqi custody; (2) sharing details concerning any decision to release Omar with the Iraqi Government; and (3) presenting Omar to the Iraqi Courts for investigation and prosecution.

¹⁰¹ *Id.*

¹⁰² *Id.* at 683.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 684.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 685.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 688.

¹¹¹ *Id.* at 689.

¹¹² *Id.* at 692.

¹¹³ Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 (1998).

¹¹⁴ *Id.*

“punish offenses against its laws committed within its borders.”¹¹⁵ The Court went further to state that such a conclusion would implicate “not only concerns about interfering with a sovereign’s recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders,” but also concerns about “unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.”¹¹⁶ Accordingly, the Court determined that those who commit crimes within a sovereign’s territory may be transferred to that sovereign’s government for prosecution.¹¹⁷

The petitioners contended that these general principles of foreign policy should be trumped because their transfer to Iraqi custody is likely to result in torture, arguing that their claims of potential torture may not be readily dismissed on the basis of these principles because the FARR Act prohibits transfer when torture may result.¹¹⁸ However, the petitioners did not assert a FARR Act claim in their petitions for habeas, nor did they raise the Act in any of the certiorari filings before the Court.¹¹⁹ Accordingly, the Supreme Court refused to consider the question.¹²⁰

The habeas petitioners’ final argument to stay their transfer to Iraqi custody was that the Government may not transfer a citizen without legal authority, and the United States bears the burden of identifying a treaty or statute that permits it to transfer them to Iraqi custody.¹²¹ The Court, however, rejected this argument, stating that Petitioner’s precedent “involved the extradition of an individual from the United States; this is not an extradition case, but one involving the transfer to a sovereign’s authority of an individual captured and already detained in that sovereign’s territory.”¹²² Further, because Omar and Munaf voluntarily traveled to Iraq and were being held there, they are therefore subject to the territorial jurisdiction of that sovereign, not of the United States.¹²³

A unanimous court afforded American citizens held overseas by American soldiers subject to a United States chain of command the right to habeas corpus.¹²⁴ That same unanimous court, however, held that habeas corpus does not require the United States to shelter such fugitives as Omar and Munaf, who are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq from the criminal justice system of the sovereign with authority to prosecute them.¹²⁵ Consequently, the Supreme Court found that the petitioners stated no claim in their habeas petitions for which relief could be granted, and those petitions should have been promptly dismissed.¹²⁶

OMAR V. GEREN—THE CASE AT HAND

Supreme Court decisions on habeas corpus issues during the War on Terror period have generally sustained the right to petition for both foreign nationals as well as U.S. citizens in a wartime setting. In contrast, *Munaf v. Geren* disallowed the use of such a writ in order to stay a transfer to a foreign sovereign to face criminal charges.¹²⁷ Petitioner Omar, however, still believed that such a transfer could be stayed through a writ. Omar subsequently amended his writ to include different arguments and filed, once again, in District Court.¹²⁸

¹¹⁵ *Id.* (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)).

¹¹⁶ *Id.* at 700.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 703.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 704.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 688.

¹²⁵ *Id.* at 705.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Omar*, *supra* note 3, at 3.

A. FACTS OF OMAR V. GEREN

Petitioner, Shawqi Ahmad Omar, as aforementioned, is an American citizen detained in Iraq based on his suspected role in facilitating insurgent activities.¹²⁹ Omar's wife and son commenced these habeas corpus proceedings to prevent his transfer to the custody of Iraqi authorities to face the criminal charges.¹³⁰ After receiving an e-mail from the respondents stating that "a determination was previously made to refer [Omar's] case to the Central Criminal Court of Iraq," counsel for the petitioner filed a motion for an *ex parte* temporary restraining order to prevent the prisoner transfer.¹³¹

The District Court granted the motion for a preliminary injunction, and ordered that "the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them . . . not remove the petitioner" from United States custody.¹³² On review, the Circuit affirmed the order granting the motion for a preliminary injunction.¹³³

The Supreme Court subsequently granted the respondents' petition for a writ of certiorari and consolidated the appeal with another separate petition for a writ of certiorari granted.¹³⁴ The Supreme Court vacated the preliminary injunction and remanded the case for further proceedings.¹³⁵ Subsequently, the Omar filed an amended petition for a writ of habeas corpus, asserting claims under the FARR Act, the Fifth and Eighth Amendments to the U.S. Constitution, and the Citizen Non-Detention Act (CNDA).^{136, 137}

The amended petition asserts that the FARR Act implements the Convention Against Torture (CAT),¹³⁸ which prohibits the government from transferring an individual to a country in which he or she will be subject to torture.¹³⁹ Omar also contended that his transfer to Iraqi authorities would violate his Eighth Amendment right to be free from cruel or unusual punishment.¹⁴⁰ This is because, under Iraqi law, he could be subjected to the death penalty despite the fact that his alleged crimes did not result in any fatalities.¹⁴¹ Lastly, the petitioner asserted that his continued detention by the U.S. military violates the Due Process Clause of the Fifth Amendment as well as the CNDA.¹⁴² The respondents moved to dismiss the amended petition for a writ of habeas corpus, arguing that the amended petition fails to state a claim on which relief could be granted.¹⁴³

B. THE FARR LIMITS JUDICIAL REVIEW

Respondents, in their motion to dismiss, asserted that the petitioner has no claim for relief under the FARR Act because "the Act does not apply to a detainee who is already physically present in the nation to which his transfer is threatened," and also because "the Act precludes judicial review of claims under the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007).

¹³⁴ *Munaf*, *supra* note 95, at 685.

¹³⁵ *Id.* at 705.

¹³⁶ Citizen Non-Detention Act, 18 U.S.C. § 4001(a).

¹³⁷ *Omar*, *supra* note 3, at 3.

¹³⁸ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, AND DEGRADING TREATMENT OR PUNISHMENT, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹³⁹ *Omar*, *supra* note 3, at 4 ("[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.*

¹⁴² *Id.* at 8.

¹⁴³ *Id.* at 4.

Act except in the context of final orders of removal by immigration authorities.”¹⁴⁴ In response, the petitioner contended that 1) Congress’s inclusion in the FARR Act of the phrase “expel, extradite, or otherwise effect the involuntary return” of a person to torture indicates its intent to “prohibit without exception any transfer by U.S. personnel, wherever located, that ends in torture,” 2) the FARR Act does not contain the clear and unambiguous language required to strip federal courts of habeas jurisdiction, and 3) the Suspension Clause prohibits the court from construing the FARR Act so as to preclude habeas jurisdiction.¹⁴⁵

The CAT provides that, “[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁴⁶ The FARR Act implements the CAT requirements by providing, “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”¹⁴⁷ However, the Supreme Court determined that the FARR Act limits the availability of judicial review of CAT claims to solely, “as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act.”¹⁴⁸

C. THE REAL ID ACT OVERTURNS PRECEDENT

The petitioner, relying principally on Supreme Court precedent which has been followed by several circuit courts, contended that, because § 2242(d) of the FARR Act does not contain a sufficiently clear and unambiguous expression of congressional intent to limit judicial review of habeas petitions brought under the FARR Act, that provision does not strip district courts of habeas jurisdiction over FARR Act claims.¹⁴⁹ The court determined, however that the REAL ID Act of 2005¹⁵⁰ supersedes the holdings in these cases, providing, “[n]otwithstanding any other provision of law, including . . . any other habeas corpus provision . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.”¹⁵¹ The Court noted that it expressly determined that the REAL ID Act provision eliminates habeas jurisdiction over FARR Act claims in the case *Kiyemba v. Obama*.¹⁵² As in *Kiyemba*, the Court determined that the petitioner was not challenging a final order of removal, but was instead seeking to enjoin his transfer to the custody of a foreign nation.¹⁵³ Accordingly, the court concluded that the REAL ID Act of 2005 precludes the court's consideration of the petitioner's FARR Act claims.¹⁵⁴

D. SUSPENSION CLAUSE TRUMPED BY SEPARATION OF POWERS

Though the Court did not deny the petitioner’s claim that such a conclusion runs afoul of the Suspension Clause because it would effectively “bar prisoners in such situations from pursuing any judicial recourse to review the legality of executive actions regarding their detention,” the Court did state that it is

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ CONVENTION AGAINST TORTURE, *supra* note 138.

¹⁴⁷ Foreign Affairs Reform and Restructuring Act, *supra* note 113, at § 2242.

¹⁴⁸ *Omar*, *supra* note 3, at 4-5.

¹⁴⁹ *Id.* at 5 (citing *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (In *St. Cyr*, the Supreme Court declined to construe provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) so as to preclude judicial review of an order of removal)).

¹⁵⁰ REAL ID Act of 2005, 8 U.S.C. § 1252 (2005).

¹⁵¹ *Id.* at § 1252(a)(4).

¹⁵² *Kiyemba v. Obama*, 561 F.3d 509, 511 (D.C. Cir. 2009) (Centered around nine individuals held at Guantanamo Bay, challenging their detention by asserting that they feared being transferred to a country where they might be tortured or further detained).

¹⁵³ *Omar*, *supra* note 3, at 6.

¹⁵⁴ *Id.*

bound by the holding in *Kiyemba*.¹⁵⁵ The *Kiyemba* Court suggested that Suspension Clause concerns are trumped by the separation of powers principles that preclude judicial second-guessing of the Executive's authority on matters of foreign policy and diplomacy.¹⁵⁶ Accordingly, the Court ruled that the Suspension Clause does not permit the Court from deviating from *Kiyemba*'s holding, which "precludes a court from considering FARR Act claims asserted in a habeas petition."¹⁵⁷ Consequently, the Court granted the respondents' motion to dismiss the petitioner's FARR Act claims.¹⁵⁸

E. EIGHTH AMENDMENT CLAIMS DISCOUNTED

Omar also contended that his transfer to Iraqi Authorities would violate his Eighth Amendment right to be free from cruel or unusual punishment since, under Iraqi law, he could be subjected to the death penalty despite the fact that his alleged crimes did not result in any fatalities.¹⁵⁹ The District Court for the District of Columbia determined, however, that *Munaf v. Geren* barred the court from issuing a writ of habeas corpus to protect the petitioner from the Iraqi criminal justice system based on the Eighth Amendment.¹⁶⁰ As the *Munaf* Court explained:

[T]he jurisdiction of a nation within its own territory is necessarily exclusive and absolute . . . This is true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people.¹⁶¹

Omar himself traveled to Iraq of his own volition and Iraq plainly has the authority to prosecute him for any crimes he committed within its sovereign territory.¹⁶² Accordingly, the Court held that the Eighth Amendment does not afford Omar the protection that he seeks.¹⁶³

F. FIFTH AMENDMENT DUE PROCESS AND CNDA CLAIMS DISMISSED

Lastly, Petitioner Omar asserted that his continued detention by the U.S. military violates the Due Process Clause of the Fifth Amendment and the CNDA.¹⁶⁴ The Court noted, however, that Omar asserted both of these claims in his original habeas petition, which was subsequently dismissed by the Supreme Court in *Munaf v. Geren*.¹⁶⁵ The petitioner insisted that the Supreme Court did not consider the legality of the petitioner's detention in light of the fact that the FARR Act renders the threatened transfer illegal, and, because of this, his Fifth Amendment and CNDA claims asserted in the amended petition should not be dismissed.¹⁶⁶ The Court was not moved by these arguments and found that because the FARR Act does not provide a legal basis for prohibiting the petitioner's transfer to Iraqi authorities, the petitioner fails to

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *Id.* at 7 (Observing *Kiyemba*, 561 F.3d at 514 ("[t]he Judiciary is not suited to second-guess . . . determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area")).

¹⁵⁷ *Id.* (citing *Kiyemba*, 561 F.3d at 514-15).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 8 (noting that "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them").

¹⁶¹ *Munaf*, *supra* note 95, at 677, 695.

¹⁶² *Id.*

¹⁶³ *Omar*, *supra* note 3, at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

distinguish the Fifth Amendment and CNDA claims raised in this original petition and dismissed by the Supreme Court on this ground.¹⁶⁷ Because the Supreme Court adjudicated and rejected the two arguments Omar was asserting, the court was precluded from reconsidering the two issues.¹⁶⁸ The Court went farther, stating that, even if it were to consider the CNDA claim in the amended petition, the respondents would still prevail because the petitioner's detention is pursuant to congressional authorization.¹⁶⁹ Accordingly, the Court dismissed the petitioner's claim that he was being detained in violation of the Fifth Amendment and the CNDA.¹⁷⁰

CONCLUSION AND IMPACT

The District Court granted respondent's motion to dismiss petitioner's amended writ of habeas corpus.¹⁷¹ Shawqi Ahmad Omar, a U.S. citizen, can therefore be transferred to Iraqi custody.¹⁷² The District Court's affirmation of *Munaf*, when combined with its rejection of the FARR Act defense, leaves American citizens abroad little habeas corpus protection against holdings and transfer to foreign authorities.¹⁷³

Petitioner Omar has appealed the ruling, and the District of Columbia Circuit Court of Appeals subsequently affirmed the District Court's decision, holding that, pursuant to *Munaf*, a transferee such as Omar does not have a habeas corpus or due process right to judicial review of conditions in the receiving country.¹⁷⁴ Omar does not have many options for further petitions, as it seems unlikely that the Supreme Court will overturn *Munaf*.¹⁷⁵ While Congress is free to establish additional statutory protections with respect to transfers,¹⁷⁶ such action seems unlikely, given the fact that most congressional action in recent history has resulted in a constriction of habeas corpus rights, rather than an expansion.¹⁷⁷

Based on the aforementioned case law, the right of both U.S. citizens and foreign nationals to challenge their imprisonment through writs of habeas corpus has been in a state of flux in recent years. The judicial branch, however, has drawn a clear line concerning those persons who are being held in a foreign sovereign for alleged crimes committed there.¹⁷⁸ A writ of habeas corpus will not stay the transfer of that individual to that sovereign's authorities to face the charges for which he is accused.¹⁷⁹ While the right of habeas corpus remains broad, the District Court's decision in *Omar v. Geren*, and its subsequent affirmation at the Circuit Court level, has established that such petitions are not without limits. Current precedent makes U.S. borders a crucial demarcation in habeas corpus application.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 8-9.

¹⁶⁹ Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1501.

¹⁷⁰ *Omar*, *supra* note 3, at 9.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See generally Omar*, *supra* note 3.

¹⁷⁴ *Omar v. McHugh*, 646 F.3d 13, at 24 (D.C. Cir. 2011).

¹⁷⁵ *See generally Omar*, *supra* note 3.

¹⁷⁶ *Omar*, *supra* note 174.

¹⁷⁷ *See generally* Military Commissions Act of 2006, 10 U.S.C. §§ 948-949 (2006).

¹⁷⁸ *See generally Omar*, *supra* note 3.

¹⁷⁹ *Id.*