NOTES

CHARTING A COURSE TOWARD A LEGAL CHALLENGE IN AT-SEA INTERDICTION AND CUSTODY SCENARIOS: HABEAS CORPUS AS A LIGHT ON THE HORIZON

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INTRODUCTION

Land-based migration into the United States has gained increased political and social attention since the Trump administration took office in 2017. As a result, most legal challenges brought by advocacy organizations have centered around cases originating from land border crossings and arrivals at ports of entry. Yet, attempted illegal immigration through maritime routes remains a common occurrence, as it has for decades.[1] In fact, the total known flow of undocumented aliens attempting to enter the United States by maritime routes has increased in recent years, specifically by thirty-six percent from Fiscal Years 2018 to 2019, to a total of 7,093 aliens.[2] This number is projected to remain the same and may even increase in the coming years, which means that issues related to maritime migration will be continuously relevant.[3] Yet, despite the growing sea-based flow of aliens toward the United States, this area of immigration remains largely unseen and unknown to the public—except during times of mass migration, often resulting from economic and political instability in countries such as Cuba, Haiti, and the Dominican Republic. The lack of public attention, exacerbated by the practical difficulties encountered by aliens who seek to draw attention to their own experiences, has left alien rights in the at-sea interdiction context largely

1. *See* AZADEH DASTYARI, UNITED STATES MIGRANT INTERDICTION AND THE DETENTION OF REFUGEES IN GUANTÁNMO BAY 4 (2015) (citing maritime migrant interdiction statistics dating back to 1982).

2. U.S. COAST GUARD ANNUAL PERFORMANCE REPORT (2019) at 32, https://www.uscg.mil/Portals/0/documents/budget/FY19-USCG-APR.pdf?ver=2020-05-20-113137-970 [hereinafter FY 2019 Annual Performance Report].

3. *See id.*

untested and in a greater state of uncertainty than those that are vaguely defined, at best, in the land-based migration context.

In particular, one question generally remains unanswered: can an alien,[4] who was interdicted at sea and held in U.S. government custody outside of the United States, challenge their detention before they are returned to their country of origin? This question seems even more pertinent following the Supreme Court's groundbreaking decision in *Boumediene v. Bush*, which recognized that enemy combatants detained in Guantanamo Bay, Cuba have the right to petition for the writ of habeas corpus. In light of *Boumediene*, this Note seeks to answer that question in the affirmative as it relates to the availability of habeas corpus as one possible route for aliens to challenge their extraterritorial detention. Concededly, habeas corpus may be an imperfect solution in addressing all of the issues that may arise in the at-sea interdiction context, but it serves, at a minimum, as one of the only possible guiding lights for recourse in an otherwise very murky and undefined area of the law.

In examining the availability of habeas corpus, Part I of this Note will provide background on the U.S. government's statutory and policy framework governing at-sea alien interdiction, and specifically the U.S Coast Guard's authority and policy in this area. Then, Part II will examine the legal framework surrounding habeas corpus as it has evolved through case law. In Part III, the current legal framework will be applied to scenarios commonly faced by aliens interdicted at sea in an attempt to determine whether habeas corpus will be found available to aliens in each scenario. This Note, and Part III in particular, will examine the availability of the writ of habeas corpus in two scenarios: (1) aliens held in custody on board a U.S. government vessel—specifically a U.S. Coast Guard cutter,[5] and (2) aliens held in custody at a U.S. government-operated holding facility—specifically the Migrant Operations Center in Guantanamo Bay, Cuba.

This Note will argue that habeas corpus is available to aliens held in both scenarios, and that recognition of this right may be the only available means for aliens who are never brought to the United States to challenge the legality of their detention. In spite of the obstacles that may be encountered by aliens who attempt to exercise this right, this Note will emphasize that recognition of the right's availability is an important first step in ensuring that the Executive's power to interdict and repatriate aliens at sea does not go wholly unchecked.

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4. This Note will refer to persons who are not U.S. citizens as "aliens" in order to mirror the language from the applicable Executive Orders and statutes, including the definition found in 8 U.S.C. § 1101(a)(3) at the time of this writing. Where the term "migrant" appears within this Note, it refers to: (1) persons interdicted at sea who do not have a lawful status in the United States, and (2) persons interdicted at sea who are not U.S. citizens or non-citizen nationals, lawful permanent residents, or parolees with permission to travel and return to the United States; and/or (3) undocumented persons interdicted or intercepted at sea where there is reasonable belief the person is seeking to enter the United States. The term "migrant" is frequently used in U.S. government agency policy and procedure.

5. "Cutter" is the term used to refer to a Coast Guard ship that is greater than sixty-five feet in length.

I. LEGAL FRAMEWORK FOR AT-SEA INTERDICTION AND REPATRIATION

While Congress mandated specific processes and avenues for appeal that must be provided to aliens who migrate by land, Congress has provided neither a mandate nor guidance as to what process should be afforded to interdicted aliens who attempt maritime migration. The legal framework governing at-sea interdiction and repatriation has developed largely in reaction to historical crises, and thus, has seen substantial shifts in policy and practice over time. The reactionary framework that resulted exists largely outside of statutes and regulations and has primarily been promulgated through Executive Orders (E.O.s) and agency implementing policy. As mass migration in the maritime domain has increased in recent decades, executive policies related to maritime migration have focused primarily on deterrence-based strategies. With deterrence in mind, the executive branch has enacted policies that have become progressively less favorable toward aliens who attempt maritime migration in an effort to disincentivize this activity. As executive policy seeks to effectively push the U.S. maritime border further from U.S. territory,[6] the actions of those carrying out this policy are simultaneously pushed further and further from the spotlight. This Part will begin by outlining the minimal statutory framework that applies to at-sea interdictions in Section (A). Following that, Section (B) will outline the specific actions taken by the executive branch in this realm. Finally, Sections (C) and (D) will discuss the statutory authority that tasks the U.S. Coast Guard with both law and enforcement and search and rescue duties related to aliens encountered at sea, along with the policy adopted by the Coast Guard in carrying out those duties.

A. *Statutory Framework*

The Immigration and Nationality Act (INA) was enacted in 1952 and the original act, along with amendments that have been passed over the years, contain many of the major provisions that establish U.S. immigration law.[7] One important feature of the INA is that it establishes the avenues through which an "alien"[8] may be legally admitted into the United States or may be denied entry. Expedited removal is one method for denying an alien entry and is found in Section 235(b)(1) of the INA. Aliens arriving by sea may be subject to expedited removal under INA Section 235(b)(1), which applies to aliens "who arrive[] in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after

6. *Border Security: Hearing Before Subcomm. On Border, Maritime, and Global Counterterrorism, U.S. House of Representatives*, 110th Cong. 20 (2007) (stating that the Coast Guard's "overarching strategy" to "push out our borders" is "an essential element in protecting our homeland") (statement of Rear Admiral David P. Pekoske, Assistant Commandant for Operations, U.S. Coast Guard) [hereinafter Border Security Subcomm. Hearing].

7. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2020).

8. 8 U.S.C. § 1101(a)(3).

having been interdicted in international or United States waters)."[9] In order to be eligible for expedited removal, the alien must be an "applicant for admission" under Section 235(b)(1), and thus must be "present in the United States" and have actually "arrive[d]."[10] Once arrival has been established, the INA allows for expedited removal without a hearing or further review, affording fewer procedural protections as compared to standard removal proceedings.[11]

However, if an alien is intercepted before they actually arrive in the United States, they do not meet the definition of an "applicant for admission." Although the Executive has the ability to bring interdicted aliens ashore for expedited removal as a matter of discretion, this option is not regularly exercised. As a result, if aliens interdicted at sea are not subject to expedited removal, the INA provides no framework at all for their treatment or processing. In the absence of a governing statutory framework, the task of creating U.S. government policy and procedures for at-sea interdictions has fallen to the executive branch. The INA charges the Secretary of Homeland Security with administering and enforcing all laws relating to "immigration and naturalization of aliens," except where certain powers are specifically conferred upon the President, Attorney General, Secretary of State, officers of the Department of State, or diplomatic or consular officers.[12]

The INA also specifically limits judicial review of executive decisions regarding expedited removal orders, only permitting review if the issue presented falls within the specific exceptions outlined in INA Section 242(e).[13] One exception, contained in INA Section 242(e)(2), provides that an alien may challenge the legality of their detention pursuant to an expedited removal order through habeas corpus proceedings, but only if it is based on three narrow grounds.[14] Outside of that, an alien may not challenge discretionary decisions related to orders of removal.[15] While expedited removal affords at least *some* form of limited judicial review to those who qualify, aliens who are interdicted at sea but not brought ashore for expedited removal

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9. 8 U.S.C. § 1225(b)(1).

10. *Id.* An alien "arrives" under this statutory definition if valid entry documents are not presented and the alien has been physically present in the United States for less than two years.

11. *See* CONG. RSCH. SERV., LSB10336, THE DEPARTMENT OF HOMELAND SECURITY'S NATIONWIDE EXPANSION OF EXPEDITED REMOVAL 1–2 (2020), https://fas.org/sgp/crs/homesec/LSB10336.pdf. In standard removal proceedings under Section 240 of the INA, an alien is entitled to a formal proceeding before an immigration judge during which other procedural protections attach, including the right to counsel at the alien's own expense, to apply for any available relief from removal (such as asylum), to present testimony and evidence on the alien's own behalf, and to appeal an adverse decision to the Board of Immigration Appeals (BIA). The alien may also seek judicial review of a final order of removal, where authorized by statute. Conversely, an alien in expedited removal has no right to a hearing, counsel, or to appeal an adverse decision to the BIA; however, an alien in expedited removal may still apply for asylum.

12. 8 U.S.C. § 1103(a)(1).

13. *See generally* HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 33–35 (2019), https://crsreports.congress.gov/product/pdf/R/R45314#_Toc21504984.

14. 8 U.S.C. § 1252(a)(5).

15. 8 U.S.C. § 1252(a)(2)(B).

have *no* statutorily defined avenue to challenge the executive decisions that solidify their fates.

B. *Executive Policy – Migrant Interdiction*

The President has long been recognized as holding plenary power to control immigration into the United States.[16] Under 8 U.S.C. § 1182(f), the President may suspend "entry of any aliens or class of aliens that would be detrimental to the interests of the United States." Additionally, 8 U.S.C. § 1185(a)(1) makes it unlawful for any alien to "depart from or enter or attempt to enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." These two provisions have been cited in numerous Executive Orders restricting or suspending entry of aliens by sea.[17]

In response to the mass-migration created by the Cuban mass exodus known as the Mariel Boatlift,[18] President Ronald Reagan issued Presidential Proclamation 4865 on September 29, 1981.[19] This proclamation suspended the entry of all undocumented aliens into the United States by the high seas and stated that entry "shall be prevented by the interdiction of certain vessels carrying such aliens."[20] On the same day, President Reagan also issued E.O. 12324, which ordered the U.S. Coast Guard to "enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens."[21] E.O. 12324 specifically instructed the Coast Guard to "stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law" and to "return the vessel and its passengers to the country from which it came, where there is reason to believe that an offense is being committed against the United States immigration laws . . . provided, however, that no person who is a refugee will be returned without his consent."[22]

This policy remained in place until May 24, 1992, when President George H. W. Bush revoked E.O. 12324 and issued E.O. 12807 in its place, which remains in effect today.[23] E.O. 12807 declares that

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16. *See, e.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State,* 96 N.C. L. REV. 77, 79 (2017).

17. *See, e.g.*, Exec. Order No. 12807, 57 Fed. Reg. 21,133 (May 24, 1992), as amended by Exec. Order No. 13286, 68 Fed. Reg. 10,617 (Feb. 28, 2003); Exec. Order No. 12324, 46 Fed. Reg. 48,109, Sec. 2(a) (Sept. 29, 1981).

18. In 1980, Cuban president Fidel Castro opened the port of El Mariel and emptied Cuban prisons, which caused over 125,000 Cuban nationals to migrate by sea to the United States. Alberto J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 445 (2004). The mass-migration that occurred as a result of this incident is commonly referred to as the Mariel Boatlift.

19. Presidential Proclamation 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981).

20. *Id.*

21. Exec. Order No. 12324, 46 Fed. Reg. 48,109, § 2(a) (Sept. 29, 1981).

22. *Id.* § 2(c)(3).

23. Exec. Order No. 12807, *supra* note 17 (striking "Attorney General" and inserting "Secretary of Homeland Security"). Executive Order 12807 was prompted by a massive influx of Haitians who took to

> [t]he International legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States.[24]

Most notably, however, E.O. 12807 removes the consent requirement that was present in E.O. 12324, and instead simply requires interdicted vessels and aliens to be returned "to the country from which [they] came, or to another country," regardless of whether the alien assents to their return.[25] That said, E.O. 12807 allows the Secretary of Homeland Security to decide "in his unreviewable discretion . . . that a person who is a refugee will not be returned without his consent," but does not require the Secretary to provide any sort of refugee screening extraterritorially.[26] This policy shift allows the Government to repatriate aliens interdicted at sea automatically—without any screening regarding refugee status unless the Secretary chooses to make such screening available.

The following year in 1993, President William Clinton issued Presidential Decision Directive/NSC-9 (PDD-9) regarding alien smuggling.[27] PDD-9 states that the Department of State will "make efforts to ensure that repatriated migrants are not unfairly or unlawfully penalized simply for seeking to emigrate without authorization. Such efforts may include monitoring returnees and information exchanges with host government officials on post-return status of returnees."[28] The directive also provides that efforts should be taken to "attempt to ensure that smuggled aliens detained as a result of U.S. enforcement actions, whether in the U.S. or abroad, are fairly assessed and/or screened by appropriate authorities to ensure protection of [bona fide] refugees."[29] While PDD-9 also does not mandate refugee screening, it broadly demonstrates the U.S. government's commitment to ensuring that E.O. 12807's removal of the consent requirement does not result in the repatriation of individuals who would otherwise qualify as refugees.

Nearly a decade later, in 2002, President George W. Bush issued E.O. 13276, which clarified responsibilities among the agencies during alien interdiction operations in the Caribbean and remains in effect today.[30] This order

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the sea to escape the killing and torture that resulted following a military coup in Haiti. *See* Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONN L. REV. 1565, 1574 (1997) [hereinafter *Guarding the Coast*].

24. Exec. Order No. 12807 ¶ 2.
25. *Id*. § 2(c)(3).
26. *Id*.
27. PDD/NSC-9, *Alien Smuggling* (June 18, 1993).
28. *Id*. at 2.
29. *Id*. at 1–2.
30. Exec. Order No. 13276, 67 Fed. Reg. 69,985 (Nov. 15, 2002). Executive Order 13276 was amended by Executive Order 13286, in which "the Attorney General" was amended to read, "the Secretary of Homeland Security." Exec. Order No. 13286, 68 Fed. Reg. 10,619 (Feb. 28, 2003).

gives the Secretary of Homeland Security the authority to "maintain custody at any location he deems appropriate, of any undocumented aliens he has reason to believe are seeking to enter the United States who are interdicted or intercepted in the Caribbean region."[31] It also tasks the Secretary of Homeland Security with providing and operating "a facility, or facilities, to house and provide for the needs of any such aliens. Such a facility may be located at Guantanamo Bay Naval Base or any other appropriate location."[32] E.O. 13276 permits, but does not require, the Secretary of Homeland Security to "conduct any screening of such aliens that he deems appropriate, including screening to determine whether such aliens should be returned to their country of origin or transit, or whether they are persons in need of protection who should not be returned without their consent."[33] Under E.O. 13276, if the Secretary of Homeland Security chooses to screen aliens, then the Secretary is also responsible for providing for "the custody, care, safety, transportation, and other needs of the aliens."[34] This order further emphasizes that the U.S. government does not require consent to repatriate aliens interdicted at sea, and screening of such aliens is conducted at the Secretary's discretion. However, if screening occurs, the U.S. government is responsible for ensuring the safety of aliens that remain in its custody.

Executive actions within the maritime immigration space are carried out by a host of government agencies. After the terrorist attacks of September 11, 2001, the Maritime Operational Threat Response (MOTR) Plan was developed in order to facilitate greater interagency cooperation in response to threats within the maritime domain.[35] The MOTR Plan is complemented by Protocols that help guide the interagency—including, specifically, the Departments of State, Defense, Justice, Commerce, Transportation, and Homeland Security—in developing desired national outcomes and courses of action in response to various maritime threats.[36] The MOTR Plan is used on a daily basis[37] in response to scenarios with the potential to have an adverse

31. Exec. Order No. 13276 § 1(a)(i).
32. *Id.*
33. *Id.* § 1(a)(ii).
34. *Id.* § 1(b).
35. Notably, one other event that led to the creation of the MOTR plan was an incident involving a Lithuanian seaman named Simonas "Simas" Kidurka who jumped on board a Coast Guard cutter from a Soviet fishing vessel and requested to defect after claiming he had been threatened. *See* Robert M. Rader, *Alien Crewmen: The United States Asylum Policy*, 4 CORNELL INT'L L. J. 167, 168 (1971). After a series of communication break-downs with the Department of State, the Coast Guard allowed the crew from the Soviet vessel to take Kidurka back on board, where they proceeded to beat him to death. *Id.* at 169. The Coast Guard's actions with respect to Kidurka were highly scrutinized following this incident, which ultimately highlighted the importance of expedient and clear inter-agency communications during sensitive encounters with aliens at sea.
36. *See* Brian Wilson, *The Somali Piracy Challenge: Operational Partnering, the Rule of Law and Capacity Building*, 9 LOY. U. CHI. INT'L L. REV. 45, 67–68 (2011); Department of Homeland Security, Global MOTR Coordination Center, (last visited Dec. 17, 2020), https://www.dhs.gov/global-motr-coordination-center-gmcc.
37. Border Security Subcomm. Hearing, *supra* note 6.

effect on the foreign affairs of the United States.[38] In the context of maritime migration operations, decisions regarding alien repatriation following at-sea interdiction are frequently guided by inter-agency coordination efforts under the MOTR Plan between the Departments of Homeland Security, State, and Justice.[39] Although the Coast Guard is primarily responsible for determining the initial course of action in such scenarios, which will be discussed *infra* in Part I(C), MOTR-based coordination efforts are critical to determining whether aliens will be brought to the U.S. for expedited removal proceedings or, as in most cases, returned to the aliens' country of origin.

C. *U.S. Coast Guard Alien-Migrant Interdiction Authority and Policy*

The Coast Guard, an armed force falling under the Department of Homeland Security, is the lead agency responsible for interdicting migrants at sea.[40] The Coast Guard derives its statutory authority to conduct these interdictions from 14 U.S.C. § 522(a), which states

> [t]he Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. . . . When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested . . . or other lawful and appropriate action shall be taken.[41]

This broad authority empowers the Coast Guard to enforce suspected violations of U.S. immigration laws encountered at sea.[42] When enforcing U.S. immigration laws under this authority, and pursuant to E.O.s 12807 and 13276, the Coast Guard must establish that there is "reason to believe" persons interdicted at sea are "seeking to enter the United States"[43] or that "an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which [the United States has] an

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38. *See* Gary L. Tomasulo Jr., *Evolution of Interagency Cooperation in the United State Government: The Maritime Operational Threat Response Plan,* (May 7, 2010) (unpublished MBA thesis, Massachusetts Institute of Technology) (on file with DSpace@MIT at https://dspace.mit.edu/handle/1721.1/59157).

39. Little other information is publicly available regarding what the MOTR Plan and Protocols specifically call for in such situations because the Plan and Protocols are designated as "For Official Use Only." *See* Craig H. Allen, *A Primer on the Nonproliferation Regime for Maritime Security Operations Forces*, 54 NAV. L. REV. 51, 52 n.3 (2007).

40. *See* 14 U.S.C. § 102 (listing the Coast Guard's primary duties related to enforcement of federal laws and maritime interdiction among others).

41. 14 U.S.C. § 522(a).

42. The Coast Guard also retains authority under the INA to enforce immigration laws due to its status as a part of the Department of Homeland Security, as articulated in 14 U.S.C. § 3(a). *See* 8 U.S.C. § 1103(a)(1).

43. *See* Exec. Order No.13276 § 1(a)(i).

arrangement to assist."[44] Most frequently, the Coast Guard directly enforces immigration laws related to illegal entry, 8 U.S.C. § 1325; illegal re-entry following a removal or deportation order, 8 U.S.C. § 1326; and alien smuggling, 8 U.S.C. § 1324. Each of these statutes specifically requires that a person "enters" or "attempts to enter"; thus, the Coast Guard must establish a reasonable belief that entry has at least been attempted based on the factual circumstances present in each case.[45] Where an interdicted individual is taken into Coast Guard custody based on one of these provisions, the initial determination regarding whether that individual was entering or attempting to enter the United States is left to the discretion of the Coast Guard and is not subject to further review before or after individuals are brought on board Coast Guard cutters.

In some cases where aliens are brought ashore for criminal prosecution or expedited removal under the INA, these determinations may eventually be subjected to at least some review, either before a federal district court judge or an immigration judge.[46] However, if no further action is desired by the U.S. government, the Coast Guard's policy is generally to return or repatriate interdicted aliens who have not reached U.S. soil to "the country from which [they] came."[47] Coast Guard policy therefore complies with E.O.s 12807 and 13276, which make clear that no additional procedure or consent is required before aliens are repatriated. Still, this policy has been met by assertions from the international community[48] that the Coast Guard should be bound by refugee-related duties during at-sea interdictions because the U.S. is signatory to the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention)[49] and its 1967 Protocol.[50]

Article 33(1) of the Refugee Convention creates a duty among Contracting States not to "return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social

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44. *See* Exec. Order No. 12807 § 2(c)(3)

45. *See* 8 U.S.C. § 1325; 8 U.S.C. § 1326(a)(2); *see also* 8 U.S.C. 1324(a)(1)(i) ("any person who . . . brings or attempts to bring to the United States" a person known to be an alien).

46. An alien brought ashore for criminal prosecution must be brought before a magistrate for an initial appearance "without unnecessary delay." *See* Fed. R. Crim. P. 5(a)(1)(B). The review available to aliens brought ashore for expedited removal is discussed *supra*, in Part I(A).

47. *See* Exec. Order No. 12807 § 2(c)(3); *see also* Movimiento Democracia, Inc. v. Johnson, 193 F. Supp. 3d 1353, 1362 (S.D. Fla. 2016).

48. *See, e.g.*, Haitian Ctr. for Human Rights v. United States, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96[1], OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 157 (Mar. 13, 1997) (disagreeing with the U.S. Supreme Court's decision that Article 33 does not apply extraterritorially); UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council, 32 I.L.M. 1215, 1215 (1993) (asserting that Article 33 of the Refugee Convention establishes a duty of *non-refoulement* wherever a state exercises jurisdiction).

49. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch_V_2p.pdf [hereinafter Refugee Convention].

50. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5.

group or political opinion."[51] As noted earlier, E.O. 12807 marked a shift in U.S. policy regarding the duty of *non-refoulement* because it allows for automatic repatriation of refugees without consent.[52] The U.S. government's interpretation of the Refugee Convention, as announced in E.O. 12807, was reviewed and upheld by the Supreme Court in *Sale v. Haitian Centers Council, Inc*.[53] In *Sale*, the Court held that neither the INA nor Article 33 of the Refugee Convention applies extraterritorially and, therefore, the INA and the Refugee Convention do not constrain the President's power to order the Coast Guard to repatriate undocumented aliens interdicted on the high seas without first determining whether they qualify as refugees.[54] Despite the considerable criticism of the *Sale* decision by immigration legal scholars,[55] it remains good law today and effectively forecloses legal challenges related to a lack of or ineffective refugee screening for interdicted aliens.

Despite the Court's decision in *Sale* regarding the legality of repatriation without consent or screening, the Coast Guard trains officers who interact with interdicted aliens to recognize signs that a person may be fearful of return to their country of origin. If a person sufficiently demonstrates that they have manifested a fear of return, they are screened by a Protection Screening Officer (PSO) from the U.S. Citizenship and Immigration Services (USCIS) while on board a Coast Guard cutter to determine if that fear is "credible," such that they may apply for asylum under U.S. law.[56] An alien who has been determined to have "credible fear" by USCIS will generally be transferred from the Coast Guard cutter to a government-operated holding facility in Guantanamo Bay, Cuba, called the Migrant Operations Center, to determine if that fear is "well-founded" and qualifies them for refugee status.[57] Following the decision in *Sale*, the U.S. government's extraterritorial

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51. Under Article 1A(2)) of the Refugee Convention, *supra* note 49, a refugee is any person who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] habitual residence is unable or, owing to such fear, unwilling to return to it.

52. C*ompare* Exec. Order No. 12324 § 2(c)(3) *with* Exec. Order No. 12807 § 2(c)(3).

53. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187 (1993).

54. *Id*. at 159.

55. *See* Mark Von Sternberg, *Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection*, J. MIGRATION & HUM. SEC. 333 (2014).

56. *See* 8 U.S.C. § 1225(b)(1)(B)(v) which defines "credible fear" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum" under 8 U.S.C. § 1158. Under Section 1158(b)(1)(A), the alien must establish that they meet the definition of a "refugee" under 8 U.S.C. § 1101(a)(42) which requires a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion."

57. *See* United States Department of State (DOS), Bureau of Population, Refugees and Migration (PRM), *Fact Sheet Migrant Operations at Guantanamo Bay, Cuba*, (Sept. 2015) [hereinafter PRM Fact Sheet]. The PRM Fact Sheet is no longer available on the Department of State website, but an archived

duties related to refugee determinations under the Refugee Convention and INA are clear, but nearly non-existent. Still, the U.S. government has other duties related to the return of persons encountered at sea, the scope of which has not been as clearly defined by courts.

D. *U.S. Coast Guard Search and Rescue Authority and Policy*

While the Coast Guard frequently interdicts vessels at sea to enforce immigration laws, the Coast Guard is also tasked with maintaining safety of life at sea as the lead agency responsible for maritime search and rescue.[58] In some cases, the Coast Guard's duties to enforce immigration laws and perform search and rescue may intersect, especially where the Coast Guard encounters a vessel that appears manifestly unsafe, and which may, at the same time, be carrying aliens. Many aliens transiting in the Caribbean travel on "crude, handmade, wooden-hulled vessels" that are powered by sailing rigs or "unreliable engines prone to mechanical failure"[59]—creating highly unsafe situations which may ultimately cost aliens their lives. These vessels are often greatly overloaded, carrying more people than is safe, compromising their stability.[60]

Under 14 U.S.C. § 521, the Coast Guard may "perform any and all acts necessary to rescue and aid persons and protect and save property," including on the high seas.[61] The United States is signatory to the International Convention on Maritime Search and Rescue (SAR Convention) and is therefore bound by international duties when conducting SAR operations.[62] When the Coast Guard encounters a vessel carrying aliens that appears unsafe, the Coast Guard must assess the risk of danger to the persons on board. Where the vessel appears to be in "grave and imminent danger and in need of immediate assistance," it is considered to be in the "distress phase,"[63] and the Coast Guard may order persons on board to evacuate the vessel even when they do not wish to.[64] However, if the vessel is not in need of immediate

copy can be found at https://assets.documentcloud.org/documents/2772373/Guantanamo-MOC-Fact-Sheet-as-of-Sept-2015.pdf.

58. 14 U.S.C. §§ 102(3)–(4) (tasking the Coast Guard with enforcement of regulations promoting safety of life at sea and with establishment and operation of rescue facilities).

59. Palmer, *supra* note 23, at 1572.

60. For example, in FY 2019, the Coast Guard interdicted a 40-foot vessel carrying 146 Haitians who were brought on board a Coast Guard cutter due to safety of life at sea concerns. *See* FY 2019 Annual Performance Report, *supra* note 2, at 27.

61. 14 U.S.C. § 521(a)(4) also gives the Coast Guard the authority to "destroy or tow into port sunken or floating dangers to navigation." Under this authority, the Coast Guard frequently destroys vessels used by aliens interdicted and brought on board Coast Guard cutters because the vessels cannot safely be towed and would create a hazard to navigation if left adrift.

62. 1979 International Convention on Maritime Search and Rescue, International Maritime Organization, 1405 U.N.T.S. 118 (June 22, 1985), https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3 [hereinafter SAR Convention]. The 1974 International Convention for Safety of Life at Sea (SOLAS), to which the United States is signatory, also places a duty on vessel masters to render assistance to vessels in distress. Coast Guard Commanding Officers are also bound by this duty.

63. *Id*. at Ch. 5.2.1.3.

64. *See* Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 270 (1st Cir. 2003).

assistance, it will likely be considered in the "alert phase,"[65] and the Coast Guard may offer to bring the persons on board a Coast Guard cutter and destroy the remaining vessel as a hazard to navigation if it cannot be safely towed to port.[66] As will be discussed *infra* in Part III of this Note, the distinction between whether an alien has embarked on a Coast Guard cutter voluntarily or forcibly could affect the alien's availability to later challenge their detention.

While the SAR Convention places no duty on an entity effecting rescue to complete the survivor's voyage, the party responsible for the search and rescue region where the event occurs shall "exercise primary responsibility . . . so that survivors assisted are disembarked from the assisting ship and delivered to a *place of safety*, taking into account the particular circumstances of the case and guidelines developed by the [International Maritime Organization]."[67] The SAR Convention does not define "a place of safety," but it has become internationally understood to mean "a place where the survivors' safety of life is no longer threatened"—a meaning that is closely related to, and may even encompass the principle of *non-refoulement*.[68]

That said, when the Coast Guard rescues aliens at sea, such persons are generally returned to their country of origin unless alternate arrangements are made through cooperation with States and international partners.[69] Therefore, regardless of whether an alien is brought on board a Coast Guard cutter because of suspected violations of U.S. immigration law or because of safety concerns related to search and rescue, the outcome is often the same: the alien is held by the U.S. government until they are returned to their country of origin, with little ability to advocate for alternative courses of action in either situation.[70]

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65. SAR Convention, *supra* note 62, at Ch. 5.2.1.2.

66. *See* 14 U.S.C. § 521(a)(4).

67. SAR Convention, *supra* note 62, at Ch. 3.1.9. (emphasis added).

68. *See, e.g.*, Maritime Safety Comm., *Guidelines on the Treatment of Persons Rescued at Sea*, Maritime Safety Comm. Resolution 167(78), ¶ 6.12 (May 20, 2004); *see also* Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012) (holding that the Italian government violated the duty of *non-refoulement* under the European Convention when it returned Eritrean and Somali migrants interdicted on the high seas to Libya without conducting refugee status screenings). Determinations by the U.S. government regarding return of aliens following search and rescue efforts have yet to be legally challenged, but a challenge brought in this arena could cause the Court to revisit its decision in *Sale* regarding the obligation to provide extraterritorial refugee screening. It is possible that the Court might recognize that the U.S. government's duty to return persons rescued at sea to a "place of safety" under the SAR Convention creates an affirmative obligation to provide extraterritorial screenings regarding refugee status, even though no such duty exists under the INA.

69. *See United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual*, Version 2.0, at 2–56 (Apr. 23, 2018).

70. For example, in Fiscal Year 2018, the Coast Guard repatriated 2,534 Haitian, 724 Dominican, 551 Mexican, and 351 Cuban migrants. *See* U.S. COAST GUARD ANNUAL PERFORMANCE REPORT (2018) at 22, https://www.uscg.mil/Portals/0/documents/budget/FY%202018%20USCG%20APR%20Signed%206-12-19.pdf.

II. THE LEGAL PATHWAY TO CHALLENGE DETENTION

Immigration detention has historically been the subject of many legal challenges, though few cases have specifically dealt with detention arising from at-sea interdiction. In the context of land-based immigration detention, courts have recognized that detainees have only the due process rights afforded specifically by statute[71] and judicial review of decisions related to asylum and deportation are, in many cases, unreviewable.[72] This reality leaves those detained by the U.S. government with few, if any, options to challenge the reasons for, conditions during, or duration of their detention—especially where that detention occurs extraterritorially. Courts have made clear that the INA has no effect outside of the U.S. and any procedures and protections that may be afforded to an alien seeking admission or asylum while on U.S. soil or at a port of entry do not create a right or duty to provide the same to those aliens who have not yet reached the United States.[73] Additionally, the Court has also made clear that the Fifth Amendment does not apply to aliens outside the geographic borders of the United States.[74] Because arguments related to the Fifth Amendment's Due Process Clause are all but foreclosed in this arena, the writ of habeas corpus may be one of the only available means for an alien detained extraterritorially to challenge whether there is a legal basis for their detention or any other issues related thereto. While no court has affirmatively decided whether habeas corpus is available to aliens interdicted at sea who are detained extraterritorially, the groundbreaking decision in *Boumediene v. Bush* appears to have left this issue ripe for review after the Court held that the Suspension Clause of the U.S. Constitution applies with full effect at Guantanamo Bay. This Part will examine the evolution of case law both leading up to *Boumediene*, the *Boumediene* decision itself, and some cases that followed implementing the *Boumediene* framework.

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71. *See, e.g.*, United States Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (holding that an alien who attempted to enter the U.S. illegally and was apprehended 25 yards from the border was not entitled to any procedural rights other than those afforded by statute); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing that "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (holding that "the decision of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law").

72. *See, e.g.*, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("The action of the executive officer under [the authority provided by Congress and delegated by the President] is final and conclusive."); *see generally* Stephen H. Legomsky, *Restructuring Federal Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000) (discussing how the plenary power doctrine, the doctrine of consular absolutism, and court-stripping legislation by Congress have all curtailed judicial review of immigration decisions).

73. *See, e.g.*, Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1505 (11th Cir. 1992) ("The INA expressly creates extensive rights of review regarding asylum claims, but only for aliens who have reached our borders. The INA provides no such provisions for review at the behest of aliens beyond our borders.").

74. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (noting that the Court has previously rejected claims that "aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) (holding that the Fifth Amendment does not confer any rights upon aliens located outside of the United States).

A. *Pre-Boumediene v. Bush*

Although a string of cases challenged U.S. migrant interdiction policy as it evolved in the 1980s and 1990s, few cases challenged the detention aspect directly.[75] Instead, most cases challenged the procedures and rights afforded to interdicted aliens under the INA and other acts. However, in *Cuban American Bar Association v. Christopher*, the plaintiffs took a slightly different approach. The plaintiffs, a group of Cubans and Haitians interdicted at sea who were represented by legal advocacy organizations, were detained in Guantanamo Bay while awaiting either repatriation or third-country resettlement.[76] In *Christopher*, one of the questions presented to the Eleventh Circuit on appeal was whether migrants "in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights."[77] The *Christopher* court held that the migrants had neither constitutional nor statutory rights—specifically under the INA, Cuban Refugee Act, and Cuban Democracy Act.[78] In support of this holding, the court cited cases involving the Fourth, Fifth, and Sixth Amendments—specifically rejecting the proposition that Guantanamo Bay, as a U.S. military base leased abroad, was the functional equivalent of U.S. land borders or ports of entry.[79] This holding was obviously unhelpful to the migrant-plaintiffs, but significantly, it marked the last of many cases where courts refused to recognize Guantanamo Bay as equivalent to U.S. territory and helped set the stage for the Supreme Court's decision in *Rasul v. Bush*.[80]

In *Rasul*, the Supreme Court examined whether detainees said to be enemy combatants were entitled to statutory habeas corpus while detained in Guantanamo Bay.[81] The Court held that U.S. laws applied at Guantanamo Bay, including the statutory habeas provisions at issue.[82] In so holding, the Court noted that the answer to the extraterritoriality question was "clear" and that "[n]o party questions the [Court's] jurisdiction over [the detainees'] custodians."[83] The answer was "clear" to the Court because it found the presumption against extraterritoriality that applies in other contexts had "no application to the operation of the habeas statute with respect to persons detained within the 'territorial jurisdiction' of the United States."[84] The Court

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75. *See, e.g.*, *Baker*, 953 F.2d at 1507, 1511 (holding that aliens interdicted at sea, and who had never presented themselves at the U.S. border, had no right to judicial review of INA procedures and that Executive Order 12324 did not create a right of action for aliens improperly returned to their home country); Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1405–06 (D.C. Cir. 1985) (holding that U.S. refugee law and the Refugee Convention do not apply outside of U.S. territory).

76. Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1419 (11th Cir. 1995).

77. *Id.* at 1421.

78. *Id.* at 1428.

79. *Id.* at 1425.

80. *See* Sonia Farber, *Forgotten at Guantanamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration*, 98 CAL. L. REV. 989, 1003 (2010).

81. Rasul v. Bush, 542 U.S. 466, 473 (2004).

82. *Id.* at 484.

83. *Id.* at 483.

84. *Id.* at 480.

found that Guantanamo Bay is within U.S. territorial jurisdiction because the U.S. lease agreement with Cuba allows the U.S. to exercise "complete jurisdiction and control" for an indefinite duration.[85] The Court's reasoning in *Rasul* demonstrates that even where extraterritoriality may preclude some rights from attaching, it has an entirely different effect on the right to habeas corpus—primarily due to the Court's finding that the U.S. government has territorial jurisdiction over Guantanamo Bay.

B. *Boumediene v. Bush*

Finally, in 2008, the Supreme Court issued the landmark decision in *Boumediene,* which solidified the Court's holding in *Rasul* and opened the door to possible relief for aliens detained outside of U.S. territory. In *Boumediene*, the Court announced two important holdings: (1) that the extraterritorial reach of the Constitution turns "on objective factors and practical concerns, not formalism"[86] and (2) that the Suspension Clause has full effect in Guantanamo Bay.[87] In reaching these holdings, the Court examined the legal relationship between the U.S. and Guantanamo, finding that the U.S. maintains "practical sovereignty" there.[88] The *Boumediene* court rejected formalistic approaches to sovereignty in favor of a more pragmatic view, based on the fact that "the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over [Guantanamo]."[89] In its analysis, the Court noted that the writ of habeas corpus was extended to U.S. territories as early as 1789[90] and that the United States has maintained "plenary control" over Guantanamo ever since it signed the original treaty with Spain in 1755.[91] The Court ultimately concluded that the Constitution applies in Guantanamo based on the degree of control exercised by the U.S. government over the territory, along with concerns that any other holding would create separation-of-powers issues and give the political branches the "power to switch the Constitution on and off at will."[92] This holding is of significant importance because if the Court had found that the Suspension Clause did not apply in Guantanamo, the Executive would effectively be permitted to detain aliens there completely unchecked by the Constitution or other branches of government.

In reaching the second part of its holding, the *Boumediene* court specifically examined a series of three factors, derived from *Johnson v. Eisentrager*, in order to determine the reach of the Suspension Clause. These three factors examine: "(1) the citizenship and status of the detainee and the adequacy of

85. *Id.*
86. Boumediene v. Bush, 553 U.S. 723, 764 (2008).
87. *Id.* at 771.
88. *Id.* at 754.
89. *Id.* at 755.
90. *Id.* at 756.
91. *Id.* at 764–65.
92. *Id.* at 765.

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."[93] As for the first factor, the Court noted that the detainees' status was disputed and the status determination was made through a process with limited procedural protections, opportunity for personal representation, or ability to present evidence on one's own behalf due to confinement.[94] The Court also specifically pointed out that even though review of this status determination was available to the detainees in *Boumediene*, review could not "cure all defects in the earlier proceedings."[95] Next, the Court found that the second factor weighed against the detainees because their "apprehension and detention [were] technically outside the sovereign territory of the United States."[96] However, the Court also noted that the strength of this factor was somewhat diminished by the fact that Guantanamo Bay is "within the constant jurisdiction of the United States" and can be distinguished from territories that the United States does not "intend to govern indefinitely."[97] As for the final factor, the Court was sensitive to the fact that habeas corpus proceedings would likely "require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks," but did not find those facts dispositive.[98] The Court noted that there was no indication that the "military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainee's claims," and thus found that there were "few practical barriers to the running of the writ."[99]

In the end, *Boumediene* clarified what *Rasul* had begun to illuminate: the degree of control exercised over a territory weighs heavily when determining what constitutional rights may attach to non-citizens. Despite the clarity provided by *Boumediene*'s three-factor framework in analyzing the extraterritorial reach of the Suspension Clause, *Boumediene* left other questions unanswered—most notably, the types of challenges that can be brought through extraterritorial habeas petitions and what remedies may be granted based on successful petitions. These issues will be discussed, *infra*, in Parts II(C) and III(B)(2)-(3).

C. *Post-Boumediene v. Bush*

Following the Court's monumental decision in *Boumediene*, the Supreme Court has yet to apply the three-factor framework to extend the reach of the

93. *Id.* at 766.
94. *Id.* at 767.
95. *Id.*
96. *Id.* at 768.
97. *Id.* at 768–69.
98. *Id.* at 769.
99. *Id.* at 769–70.

Suspension Clause beyond Guantanamo Bay.[100] However, since 2008, a few lower courts have applied the *Boumediene* three-factor framework to determine whether the Suspension Clause extends to aliens detained in other extraterritorial locations aside from Guantanamo Bay. Notably, none have extended the Clause further. Several cases originating in the U.S. District Court for the District of Columbia examined whether the Suspension Clause applied at Bagram Airfield in Afghanistan to alien-detainees held after they were apprehended overseas.[101] In *Al Maqaleh II*, the D.C. Circuit reversed the decision below and held that the Suspension Clause did not apply to the detainees held at Bagram Airfield, basing its decision primarily on analysis of the second and third factors regarding the location of detention and practical obstacles associated with the writ, which ultimately weighed against the availability of habeas.[102] Specifically, the *Al Maqaleh II* court found that the second factor weighed against the detainees because the U.S. government did not appear intent on permanently occupying the base in the way that had created *de facto* sovereignty over Guantanamo Bay in *Boumediene*.[103] The third factor also weighed overwhelmingly against the detainees because Bagram Airfield was in the middle of a "theater of war" where the U.S. government had neither *de jure* nor *de facto* sovereignty.[104] Each of the cases that followed *Al Maqaleh II* requested that the question of the Suspension Clause's application at Bagram Airfield be reconsidered based on new evidence relevant to the *Boumediene* factors analysis, but no court found the evidence presented compelling enough to warrant a different outcome.[105] Based on the reasoning contained in these cases, it appears that Guantanamo Bay possesses a special combination of characteristics related to U.S. occupation—a lease of indefinite duration, an intention of to remain permanently, and separation

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100. *See* Benjamin Wittes, Robert M. Chesney, & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking*, BROOKINGS INST. (Apr. 2012). The Supreme Court, however, has relied upon propositions drawn from *Boumediene* to assess the extraterritorial applicability of other constitutional provisions, though *Boumediene*'s effect on the applicability of other constitutional provisions is outside the scope of this Note. *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (discussing the *Boumediene* court's holding that in some circumstances, "foreign citizens in territory under the 'indefinite' and 'complete and total control' and 'within the constant jurisdiction'" of the United States may have some constitutional rights).

101. *See, e.g.*, Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84, 94–99 (D.C. Cir. 2010), *remanded to* 899 F. Supp. 2d 10 (D.D.C. 2012); Amanatullah v. Obama, 904 F. Supp. 2d 45, 55–57 (D.D.C. 2012); Wahid v. Gates, 876 F. Supp. 2d 15, 19–21 (D.D.C. 2012); Hamidullah v. Obama, 899 F. Supp. 2d 3, 7–9 (D.D.C. 2012); Al Maqaleh v. Gates (*Al Maqaleh I),* 604 F. Supp. 2d 205, 214–35 (D.D.C. 2009) (holding that jurisdiction over three habeas petitions filed by three alien-detainees held at Bagram Air Force Base was constitutionally mandated), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

102. *Al Maqaleh* II, 605 F.3d at 96–98.

103. *Id.* at 97.

104. *Id.* at 98.

105. *See Amanatullah*, 904 F. Supp. 2d at 56–57 (holding that the absence of a U.S. plan for withdrawal from Afghanistan and the commencement of civil trials did not undermine the *Al Maqaleh II* court's reasoning); *Wahid*, 899 F. Supp. 2d at 16–17 (holding the information related to recent transfers of Afghan detainees to the Afghan government did not warrant a departure from the *Al Maqaleh II* court's reasoning); *Hamidullah*, 899 F. Supp. 2d at 10 (holding that evidence regarding the detainee's juvenile status and the recent transfers of Afghan detainees to the Afghan government did not undermine the *Al Maqaleh II* court's reasoning).

from an active theater of war—all of which support an extraterritorial extension of the Suspension Clause. It seems that to convince a court to find the Suspension Clause applies extraterritorially under the *Boumediene* factors, the extraterritorial location at issue must possess the same or similar characteristics as Guantanamo Bay, and Bagram Airfield possessed none of these characteristics.

Demonstrating this point, a recent case decided in the Eleventh Circuit shows that *Boumediene*'s effects on habeas jurisprudence may not yet be fully realized with respect to extraterritorial locations possessing some of those special characteristics found in Guantanamo Bay. While not controlling, Judge Rosenbaum applied the *Boumediene* factors in her concurring opinion in *United States v. Cabezas-Montano*, to show why the Suspension Clause should be found to apply to "foreign-national criminal detainees in sole United States custody . . . even if the United States is holding them outside this country."[106] The legal challenges in *Cabezas-Montano* arose based on a Coast Guard interdiction of suspected drug-smugglers—not aliens attempting maritime migration—and one of the multiple issues raised on appeal asked the court to determine whether the aliens' seven-week-detention on board a Coast Guard cutter was an unnecessary delay in their presentment for a probable cause hearing.[107] The *Cabezas-Montano* court held that the appellant had not shown the delay was "unnecessary" under circuit precedent[108] and that the appellant was not protected by the Fourth Amendment due to the Supreme Court's holding in *United States v. Verdugo Urquidez*.[109]

Although Judge Rosenbaum agreed with the *Cabezas-Montano* court's holding, she explained that she would not have agreed with the court's judgment if the appellant had properly raised the issue of his seven-week-detention at-sea on appeal. She explained that if properly raised, the *Boumediene* factors would likely have shown that the appellant was eligible to petition for a writ of habeas corpus challenging his detention.[110] Judge Rosenbaum found that the first factor regarding detainee citizenship and status weighed in the appellant's favor because detainees interdicted by the Coast Guard due to suspected drug trafficking "do not enjoy a proceeding of any type" to determine whether the Coast Guard has correctly established probable cause for

106. United States v. Cabezas-Montano, 949 F.3d 567, 616 (11th Cir. 2020) (Rosenbaum, J., concurring).

107. *Id.* at 590.

108. *Id.* at 593.

109. *Id.* at 593–94 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990)). In *Verdugo-Urquidez*, the Court held that the Fourth Amendment does not apply to extraterritorial searches and seizures of non-citizens who lack a voluntary attachment to the United States. 494 U.S. at 274–75. The holding in *Verdugo-Urquidez*, however, should not be read to limit the reach of the Suspension Clause and the Constitution as a whole. It is clear that *Verdugo-Urquidez* was decided well before *Boumediene*, thus suggesting that the extraterritorial application of the Suspension Clause does not require the same sort of voluntary attachment to the U.S. as does the Fourth Amendment. Although Fourth Amendment jurisprudence is closely related to some of the issues faced by aliens taken into U.S. government custody, such issues are beyond the scope of this Note.

110. *Cabezas-Monanto*, 949 F.3d at 616.

their arrest, "they cannot present evidence contesting their detention," and they are not given "personal representatives."[111] The second factor regarding the location of apprehension and detention also weighed in favor of the appellant because the "United States enjoys absolute and indefinite control over its own ships while they are in international waters."[112] Finally, Judge Rosenbaum found that the third factor pertaining to practical obstacles weighed in favor of the appellant because of the Government's "complete and total control" over the ship, although she also noted that, practically, it might be difficult for a shipboard detainee to prepare and file a habeas petition.[113] In her analysis, Judge Rosenbaum appears to have identified that Coast Guard cutters possess at least a few of the same special characteristics as Guantanamo Bay, which could compel an outcome similar to that reached in *Boumediene*. Therefore, although Judge Rosenbaum's concurrence did not actually decide whether the Suspension Clause applies to aliens held on board Coast Guard cutters, it shows, at a minimum, that judges might look favorably upon such arguments if properly brought before a court. Thus, it appears promising that the factors outlined in *Boumediene* can help pave the way for aliens interdicted at sea who wish to challenge their detention.

III. CHALLENGING THE DETENTION SCENARIOS

As noted in Part II, *Boumediene* leaves open the possibility that the writ of habeas corpus may be available to aliens other than enemy combatants who are detained by the U.S. government outside of U.S. territory. However, in order to make habeas corpus a legal reality for those non-enemy-combatant aliens, courts must first apply the *Boumediene* factors to explicitly recognize that the Suspension Clause extends to their specific population and the extraterritorial location of their detention. Once the applicability of the Suspension Clause is decided, habeas will be available as a matter of right, but aliens must still craft petitions that can succeed on the merits of their claims. This Part will begin by analyzing the two scenarios contemplated within this Note under the *Boumediene* framework in Section (a), in order to demonstrate the likelihood that courts will recognize the Suspension Clause applies to extraterritorial detention on board Coast Guard cutters and at the Migrant Operations Center (MOC) in Guantanamo Bay. The analysis in Section (A) will show there is a strong likelihood that courts will recognize that the Suspension Clause applies to aliens held on board Coast Guard cutters and at the MOC. Next, Section (B) will discuss the three essential requirements for a successful petition for a writ of habeas corpus and will examine the likelihood that these requirements can be met by aliens in the two scenarios contemplated by this Note. Further, Section (B) will demonstrate that

111. *Id.*
112. *Id.*
113. *Id.* at 616–17, n.5.

although many aliens may encounter difficulties when crafting successful petitions on the merits, some aliens may be able to meet the three essential habeas requirements and will have the opportunity to receive meaningful relief through their petitions.

A. *The Availability of the Writ*

As a threshold matter, courts must determine whether the Suspension Clause applies with full effect in the extraterritorial location from which the writ is filed. If the Suspension Clause applies with full effect, the right to habeas corpus will be available unless it has been formally suspended under Article I, Section 9, Clause 2 of the Constitution.[114] A court determining the reach of the Suspension Clause must use the three factors outlined in *Boumediene*: "(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."[115] In this Section, these factors will be applied to the two specific detention scenarios contemplated throughout this Note. The analysis that follows will illustrate that these scenarios are closely analogous to the situation in *Boumediene*, thus suggesting that habeas corpus is likely to be found available to aliens held in both scenarios.

1. *Detention On Board U.S. Coast Guard Cutters*

Alien detention on board a Coast Guard cutter, immediately following at-sea interdiction, yields many of the same analytical results as those reached by the Court in *Boumediene*.

The first factor—the alien's citizenship, status, and the adequacy of the process through which that status determination is made—weighs in favor of the availability of habeas corpus for aliens. Aliens detained on Coast Guard cutters are not U.S. citizens. In order for the Coast Guard to establish jurisdiction to detain those aliens, a status determination must be made as to whether the aliens were seeking to enter the United States in violation of U.S. immigration laws, whether they were in the "distress" or "alert" search and rescue phases, or both. These determinations are made by Coast Guard personnel based upon the factual circumstances in each case, and similar to the argument made by Judge Rosenbaum in her concurrence in *Cabezas-Montano*, the detained aliens receive "no process at all" and "do not enjoy a proceeding of any type."[116] Further, aliens detained on board cutters have no ability to appeal or request review of the Coast Guard's determination once it is made.

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114. The Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, provides that "[t]he 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."

115. Boumediene v. Bush, 553 U.S. 723, 766 (2008).

116. *See Cabezas-Montano*, 949 F.3d at 616 (Rosenbaum, J., concurring).

Although Coast Guard personnel are well-equipped to make such determinations based on their training and experience, and generally do so after thorough consideration of the factual circumstances, the absence of formal process coupled with the absence of an avenue for appeal or review weighs in favor of habeas corpus availability under this factor.

The second factor regarding the nature of the sites of apprehension and detention weighs slightly in favor of habeas corpus availability, as was the case in *Boumediene*. In this scenario, aliens have been interdicted and are being held on board a Coast Guard cutter in international waters, outside of U.S. territorial jurisdiction.[117] However, the Coast Guard cutter itself remains under a type of constant U.S. jurisdiction similar to that found by the Court in *Boumediene*, regardless of where it is located. Both Article 6 of the 1958 Convention on the High Seas (High Seas Convention)[118] and Article 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[119] provide that a vessel on the high seas is subject solely to the exclusive jurisdiction of the flag State.[120] Article 95 of UNCLOS further provides that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."[121] Therefore, when a Coast Guard cutter is on the high seas or elsewhere, the United States, as the flag state, retains exclusive jurisdiction and control over the cutter and crew on board. In some ways, this level of jurisdiction and control is stronger than that exerted over Guantanamo Bay because Coast Guard cutters are wholly owned by the U.S. government and do not operate under lease agreements. The U.S. government's ownership over Coast Guard cutters is also similar to one of the special characteristics pertaining to U.S. indefinite and permanent occupation, as discussed earlier in Part II(C), because there is no indication that the U.S. government intends to cede control of its cutters unless and until they are no longer in serviceable condition. Although it must be noted that the location of

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117. United Nations Convention on the Law of the Sea art. 2–3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. A coastal state maintains sovereignty in its territorial seas, which extend out to twelve nautical miles from the baselines drawn in accordance with UNCLOS. *See id*. The interdiction scenario contemplated by this Note does not explore whether a stronger argument in favor of the Suspension Clause's applicability could be made based upon interdictions that occur in waters where the U.S. has greater territorial sovereignty, such as within the territorial sea, though this nuance should be explored if presented in future cases.

118. Convention on the High Seas art. 6., Apr. 29 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

119. UNCLOS, *supra* note 117, at art. 92.

120. The United States is party to the High Seas Convention, but has not ratified UNCLOS. However, the United States recognizes UNCLOS as customary international law, and thus operates in accordance with UNLCOS to the fullest extent possible.

121. UNLCOS, *supra* note 117, at art. 95. A Coast Guard cutter meets the definition of a warship under UNCLOS Article 29, which provides that a warship is

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

the aliens' apprehension—in this case, international waters—weighs against the availability of habeas corpus because it occurred outside of U.S. territorial seas, the Government's exclusive control over the place of detention likely weighs stronger here, as it did in *Boumediene*, thus tipping this factor slightly in favor of habeas corpus availability.

The third factor regarding the practical obstacles associated with habeas petitions likely weighs strongest against habeas corpus availability. To start, aliens would likely lack the resources necessary to file a petition for habeas corpus. They are unlikely to know how to file such a petition, or what it must include, and would also require assistance from the Coast Guard in order to transmit a petition once prepared. If a petition was received and granted by a court, the Coast Guard cutter would likely be required to divert from its operational mission in order for the alien to appear before a judge. This practical obstacle would be particularly problematic in light of *Boumediene* because there, the Court noted that there was no indication that habeas corpus proceedings would compromise any military missions.[122] Here, by contrast, such proceedings may have a significant effect. In the shipboard detention scenario, at least one Coast Guard cutter would likely be diverted from an operational mission in order to deliver an alien to court for a habeas proceeding, which could compromise the Coast Guard's ability to accomplish certain missions, depending on the cutter's location and operational tasking at the time. However, despite this fact, the Coast Guard cutter in this scenario is not located in a theater of war and therefore possesses the same special characteristic as Guantanamo Bay, which ultimately weakens the weight of this factor against habeas corpus availability, here.

Based on the above discussion, it is clear that analysis under the third factor could create the most difficulty for aliens, the Coast Guard, and judges alike. The potential adverse effects on the Coast Guard's national security and law enforcement missions are highly fact-specific. Therefore, it is possible that a court's analysis under this third factor could consider the scope of each petition's adverse effect on Coast Guard mission performance, and more specifically, how many Coast Guard assets must be diverted in each case.[123] While a case-by-case analysis of these practical obstacles might produce the fairest result, such an analytical approach might prove unworkable in practice. In order for habeas to provide meaningful relief, aliens must know whether they can even file a petition in the first place. Further, the Coast Guard operates in a dynamic environment that requires that operational decisions be made without fear that judges will constantly divert cutters from

122. *See* Boumediene v. Bush, 553 U.S. 723, 769 (2008).

123. Depending on how far an alien is interdicted from the United States and the capabilities of the cutter completing the interdiction, multiple cutters and/or aircraft may be required to divert from their missions in order to deliver aliens to a court for habeas proceedings. For example, if aliens are initially interdicted hundreds of miles from the United States, multiple cutters may need to assist in transporting aliens to court due to the length of the transit.

missions in order to make aliens available for habeas proceedings. Consequently, a more categorical approach may be preferable under this factor because without some assurance as to how the Suspension Clause can apply on board Coast Guard cutters, courts may not receive any petitions at all. Although the third factor creates some analytical difficulties in this scenario, such difficulties should not preclude applicability of the Suspension Clause altogether, but instead must encourage courts to analyze this factor in a way that creates a workable rule fitting the various factual scenarios that are likely to occur.

In summary, despite the difficulties encountered under the third factor, the facts presented in this scenario hue closely enough to those identified in *Boumediene* that courts are likely to recognize the applicability of the Suspension Clause, and thus habeas corpus availability in the cutter-based extraterritorial detention scenario. The lack of process or review regarding the alien's status determination paired with the constant U.S. jurisdiction over the location of detention show that without some opportunity to challenge detention through habeas corpus, aliens could be held on board Coast Guard cutters for indefinite periods of time without hope for intervention.

2. *Detention in Guantanamo Bay*

As compared to the cutter-based detention scenario, a scenario involving detention at the Migrant Operations Center (MOC) in Guantanamo Bay is even more similar to the situation faced by the detainee-plaintiffs in *Boumediene*, therefore making an even stronger showing in favor of the applicability of the Suspension Clause.

The first factor regarding the aliens' citizenship, status, and the procedures accompanying that determination weighs in favor of the availability of habeas corpus for reasons similar to those noted above in the discussion of the cutter-based detention scenario. In order for an alien to be lawfully in U.S. government custody in Guantanamo Bay, it must be determined that there is "reason to believe" the alien was "seeking to enter the United States."[124] There is generally no additional process or determination made as to whether an alien-detainee was "seeking to enter the United States" when they are transferred to the MOC from a Coast Guard cutter, and the status determination initially made by Coast Guard personnel follows the alien when they are transferred.[125]

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124. Exec. Order No. 13276 § 1(a)(i).

125. Although the reason for an alien's initial interdiction and detention will not be reassessed upon transfer to the Migrant Operations Center (MOC), an alien will generally receive additional screening by the United States Customs and Immigration Service while at the MOC to determine whether the alien has a "well-founded fear." This screening process, however, is offered outside of the requirements of the INA and is conducted as a matter of policy. Though a positive credible fear determination may motivate an alien's transfer to the MOC, it seems unlikely that an alien would want to challenge that positive credible fear determination because it may support an application for asylum. Further, as the Court noted in *Thuraissigiam*, habeas corpus is not an appropriate remedy to challenge the outcome of a credible fear determination. *See* United States Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1970 (2020).

Thus, the absence of formal procedure and the lack of availability for appeal or review of the initial status determination establishing jurisdiction to hold aliens at the MOC causes this factor to weigh in favor of habeas corpus availability, here.

The second factor regarding the nature of the sites of apprehension and detention weighs slightly against habeas corpus availability. Although the aliens were interdicted in international waters—not within the U.S. territorial sea—they are currently detained in Guantanamo Bay, the same extraterritorial location examined in *Boumediene*. There, the Court noted that although Guantanamo Bay is "within the constant jurisdiction of the United States," it is leased by the U.S. government, giving the United States *de facto* sovereignty.[126] The treaty that was effective at the time of the *Boumediene* decision remains effective today, giving the United States the same amount of control over Guantanamo Bay as it had in 2008. Therefore, as in *Boumediene*, this factor weighs only slightly against habeas corpus availability.

Finally, the third factor regarding the practical obstacles related to the availability of habeas corpus weighs against the availability of habeas corpus for aliens held at the MOC. If the right to file a habeas petition was extended to these aliens, they would likely struggle to prepare and file petitions while in detention due to a lack of knowledge and resources. Further, although the land-based setting of their detention could allow external advocacy organizations to assist in preparing petitions, such organizations would have no way of knowing a detainee needed or wanted assistance since the Government presently does not publicize information regarding aliens brought to the MOC. In this scenario, the Government would also be forced to bear some of the costs associated with habeas petitions, including those related to administrative filing and making aliens available for habeas proceedings. That said, the *Boumediene* court specifically noted that the increased costs to the Government were not dispositive and were insufficient to warrant denial of this right. The same should hold true here. Additionally, as in *Boumediene*, the availability of habeas corpus for detainees at the MOC is unlikely to compromise military missions, as it would not require significant diversion of personnel or assets in the event a petition is granted and Guantanamo Bay is not in an active theater of war. For these reasons, while the third factor ultimately weighs against habeas corpus availability, its weight is tempered by some of the considerations noted above and should therefore not be found dispositive in this scenario.

In summary, the weights of each factor that are apparent in this scenario are highly similar to those in *Boumediene* and warrant a similar outcome: the Suspension Clause should be found to apply to aliens held at the MOC.[127]

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126. *Boumediene*, 553 U.S. at 755.

127. As an aside, any alternative holding would seem somewhat illogical because it would afford greater rights to enemy combatants deemed to pose a specific national security threat to the United States

Recognition of the Suspension Clause's application, however, is just the first step in an aliens' path to challenging their detention. Aliens in each scenario must still craft a petition for habeas corpus that can succeed on its merits, which will be discussed next in Section (B).

B. *The Nature of the Writ*

If the aliens in each scenario make it past the threshold issue regarding the availability of the writ of habeas corpus, they must still prepare a proper petition. A successful petition must meet three main requirements. First, per the federal habeas corpus statute, the petition must establish that the petitioner is in custody "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States."[128] Second, the petitioner must challenge some aspect of the legality of their detention that falls within the scope of what can be reviewed through habeas corpus. Lastly, the petitioner must seek a remedy that the court can legally force the petitioner's custodian to carry out. All three of these requirements necessitate a fact-intensive inquiry, and a detainee's ability to file a successful petition will depend largely on their ability to present specific evidence to satisfy each requirement. This Section will further explain each of these three requirements and will attempt to predict whether aliens in the two scenarios contemplated by this Note can meet each requirement. Finally, this Section will conclude by offering a specific hypothetical—set within the context of a cutter-based detention scenario—to illustrate how these requirements might be met in reality, and ultimately, to emphasize the importance of allowing interdicted aliens' habeas petitions to be considered on their merits.

1. *Requirement One: In Custody*

Under the first requirement, the petitioner must show they are "in custody" under the federal habeas statute.[129] The "in custody" requirement has traditionally been construed "very liberally" by the Supreme Court for the purposes of federal habeas.[130] Custody requires that a person's liberty be somehow restrained, but need not rise to the level of actual imprisonment.[131] Courts looking to define the scope of custody qualifying for habeas have often looked to historical usages in both English and U.S. common law, which have traditionally recognized that restraint other than formal custody can also

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than to aliens who may pose no such threat and are housed just a few miles away from those enemy combatants on the same military base.

128. 28 U.S.C. § 2241(c). Although the executive policy cited in Part II, *supra*, does not refer to aliens as "detainees" this fact is of little relevance to the inquiry that is conducted in evaluating the merits of a habeas petition.

129. *Id.*

130. Maleng v. Cook, 490 U.S. 488, 492 (1989).

131. *See* Jones v. Cunningham, 371 U.S. 236, 239 (1963) (holding that habeas was available to a former prisoner because his parole conditions were a sufficient restriction on his liberty that represented "custody" within the meaning of the statute).

satisfy this requirement.[132] As relevant here, the Court has recognized that an alien seeking entry into the United States whose movements are restrained "may by habeas corpus test the validity of his exclusion . . . whether he enjoys temporary refuge on land . . . or remains continuously aboard ship."[133]

In both scenarios analyzed in this Note, the alien's liberty and freedom of movement are restricted by the U.S. government as the result of a custodial relationship. While on board a Coast Guard cutter, aliens are typically required to remain in a segregated area on one of the ship's decks, under an awning, and do not have free range to move about the ship.[134] In some instances, aliens held on board cutters may be placed in physical restraints such as metallic or flexible cuffs, but this generally occurs only when aliens exhibit violent, aggressive, or disruptive behavior; appear to be a danger to themselves or others; or are otherwise non-compliant with orders given by law enforcement officers.[135] Aliens held on board cutters after they are interdicted are not formally under arrest, and are instead held for administrative purposes in order to ascertain their status and to determine a proper location for their repatriation. As mentioned earlier in Part I(D), some aliens are also brought on board cutters under the Coast Guard's search and rescue authority because of the unsafe conditions on board the aliens' boats. These safety concerns may establish jurisdiction for detention in place of, or in addition to, a determination regarding whether the aliens were suspected of attempting to illegally enter the United States. Because most persons in rescue situations are considered to have voluntarily boarded Coast Guard cutters, the Government may argue that the voluntariness of the aliens' embarkation prevents them from meeting the "in custody" requirement. This argument has some merit, but may not succeed where the aliens can still show that restrictions have been placed on their movement and liberty once on board. Regardless of whether aliens are rescued for their own safety or interdicted due to suspected violations of U.S. immigration laws, if the aliens can demonstrate that their movements and liberties have been restricted while on board Coast Guard cutters, they will likely satisfy the "in custody" requirement.

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132. *See* Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 351 (1973) (holding that a petitioner "subject to restraints not shared by the public generally" and whose "freedom of movement rest[ed] in the hands of state judicial officials" had satisfied the custodial requirement); *Jones*, 371 U.S. at 239–40 (noting that the King's Bench recognized the availability of habeas corpus for a woman ordered by her guardians to stay away from her husband against her will and for an indentured servant who was assigned to someone else by her master).

133. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213 (1952) (internal citations omitted).

134. Memorandum from the U.S. Coast Guard Rear Admiral S. A. Buschman, *Final Action on Alleged Mistreatment of 24 Migrants Recovered from American Shoals Light While in USCGC DAUNTLESS' Care*, 2–3 (Jan. 30, 2016), https://media.defense.gov/2017/Oct/05/2001823160/-1/-1/0/ASL24_FAM_SIGNED.PDF [hereinafter 2016 USCG Final Action Memo]. The Coast Guard's policy regarding Alien Migrant Interdiction Operations is contained in the U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1H, and the U.S. Coast Guard Maritime Counter Drug and Alien Migrant Interdiction Operations (CD-AMIO) Manual, COMDTINST M16247.4B—both of which have been designated "For Official Use Only" and are not publicly available.

135. 2016 USCG Final Action Memo, *supra* note 134, at 4–5.

Aliens held at the Migrant Operations Center, however, generally have slightly more freedom of movement and liberties. According to U.S. Immigration and Customs Enforcement (ICE), aliens at the MOC are "not incarcerated or detained."[136] Although it has been publicly stated that aliens held at the MOC are free to leave if they agree to return to their country of origin, this remains an untenable option for some—leaving them no other choice but to remain in ICE custody until some other option becomes available.[137] While at the MOC, aliens are housed in an apartment-style building that previously served as military barracks.[138] Aliens at the MOC are permitted to engage in on-base work or recreational activities and can also participate in activities on the leeward side of the base if they properly sign themselves in or out.[139] The International Organization for Migration runs a social service program in Guantanamo Bay in order "to help migrants integrate into the social fabric of the Naval Station, including helping them find jobs."[140] Based on these facts, it seems the situation at the MOC may be less custodial than that on board a Coast Guard cutter, but still has a fair chance at satisfying the "in custody" requirement due to an alien's restriction of movement to a specific geographic area. Although aliens at the MOC have greater liberty than those on board cutters and the detainees in *Boumediene*, they are still limited significantly in what choices they can make and only enjoy what liberties the Government provides. If anything, conditions at the MOC may be seen as akin to those faced by a person on parole following time-served in prison, which have already been recognized as satisfying the custody requirement for the purpose of habeas.[141] Therefore, there is a strong likelihood that aliens being held in either scenario can satisfy the "in custody" requirement for a successful habeas petition due to the restrictions placed by the U.S. government on their physical movements and personal liberties.

2. *Requirement Two: Nature of the Challenge*

Next, petitioners must challenge some aspect of their detention that falls within the scope of what is reviewable through a writ of habeas corpus. Courts seeking to determine what types of challenges may be brought

136. This information was previously found in a fact sheet from July 23, 2004, describing Guantanamo Bay Migrant Operations on the U.S. Immigration and Customs Enforcement (ICE) website; however, that web page has since been removed. An archived copy of this web page is available at http://web.archive.org/web/20070711063736/http://www.ice.gov/pi/news/factsheets/072304gitmo.htm. (last visited Nov. 14, 2020) [hereinafter ICE Fact Sheet]. *See* PRM Fact Sheet, *supra* note 57.

137. J. Lester Feder, Chris Geidner, & Ali Watkin, *Would-Be Asylum Seekers Are Stuck at Guantanamo Bay*, BUZZFEED NEWS (Mar. 20, 2016, 3:27 PM), https://www.buzzfeednews.com/article/lesterfeder/would-be-asylum-seekers-are-stuck-at-guantanamo-bay.

138. ICE Fact Sheet, *supra* note 136.

139. *Id*.

140. PRM Fact Sheet, *supra* note 57.

141. *See* Jones v. Cunningham, 371 U.S. 236, 285 (1963) (holding that parole requiring a parolee to report regularly to a parole officer; remain in a particular community, residence, and job; and to refrain from certain activities satisfied the "in custody" requirement for federal habeas corpus).

through a habeas petition often look to the writ's historical usage because the Suspension Clause is understood to protect, at a minimum, "the writ as it existed in 1789."[142] The Court has repeatedly stated that "the very purpose of the Great Writ is to provide some means by which the legality of an individual's incarceration may be tested."[143] Supreme Court precedent makes clear that a challenge regarding a "pure question of law" falls within a court's habeas powers, and that habeas corpus "has always been available to review the legality of executive detention."[144] In *INS v. St. Cyr*, the Court specifically noted that habeas has traditionally been found available to review "detentions based on errors of law, including the erroneous application or interpretation of statutes."[145] The scope of habeas corpus, however, becomes less clear when petitions call for review of factual findings or decisions left solely to executive discretion. Through habeas, courts may be able to review whether the executive discretion allowed by law or regulation was exercised at all, but not how that discretion was exercised, if used.[146] Recently in *Guerrero-Lasprilla v. Barr*, the Court held that the words "questions of law" in the Limited Review Provision of the INA—which Congress provided as a substitute for habeas review—"must include the misapplication of a legal standard to undisputed facts."[147] Even with this recent holding, the exact scope of habeas review regarding mixed questions of law and fact remains unsettled, especially in the context of U.S. immigration law.[148]

Within the scenarios examined in this Note, there lies an opportunity to bring both a purely legal claim and a claim containing mixed questions of law and fact. A purely legal claim can be brought if an alien challenges whether the required jurisdictional determination was made in order to allow the Coast Guard to hold the alien due to suspected violations of U.S.

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142. United States Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020) (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

143. Rose v. Mitchell, 443 U.S. 545, 586 (1979) (Powell, J., concurring in judgment).

144. INS v. St. Cyr, 533 U.S. 289, 304–05 (2001).

145. *Id.* at 302.

146. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (holding that the issue of whether the Board of Immigration Appeals exercised the discretion afforded by existing regulations could be reviewed through habeas corpus); *Cf* Gutierrez-Chaves v. INS, 298 F.3d 824, 827 (9th Cir. 2002) (holding that habeas was not available "to challenge purely discretionary (yet arguably unwise) decisions made by the executive branch" if there was no actual violation of the Constitution or federal law).

147. 140 S. Ct. 1062, 1072 (2020).

148. Additionally, in *Thuraissigiam*, the Court briefly discussed the scope of habeas corpus when it held that the writ was not available to an alien who was detained in the United States pending expedited removal. 140 S. Ct. at 1963. However, the Court ultimately did not decide whether mixed questions of law and fact could be reviewed through habeas corpus and only noted that "respondent at best raise[d] a mixed question of law and fact," but found that further exploration of this issue was not necessary in reaching its decision. *Id.* at 1981 n.27. In *Thuraissigiam,* the Court was asked to determine whether the limited review provision within 8 U.S.C. § 1252(a)(2)(A)(iii), making credible fear of persecution decisions unreviewable, violated the Suspension Clause. *Id.* at 1963. Thuraissigiam was a Sri-Lankan national that attempted to enter the United States illegally and was apprehended twenty-five yards from the border. *Id.* at 1967. He was subsequently detained for expedited removal and attempted to claim asylum based on his fear of return, but his fear was not found "credible" by the asylum officer during his screening, so he was ordered removed. *Id.*

immigration laws or under the Coast Guard's search and rescue authorities. A determination regarding suspected violations of U.S. immigration laws requires the Coast Guard to find that the aliens were entering or attempting to enter the United States, while a determination under the Coast Guard's search and rescue authorities requires a finding that the aliens were in the "distress" phrase.[149] A challenge of this sort presents a pure question of law because the alien is questioning whether the Coast Guard has made the determination as to which legal authority is being relied upon to establish jurisdiction over the aliens. If the Coast Guard has taken the aliens into custody without actually determining which authority it is operating under, the alien's detention may be found unlawful. If it is apparent that the Coast Guard did, in fact, make the required jurisdictional determination, aliens may also attempt to present a mixed question of law and fact by challenging the application of the Coast Guard's legal authority to the facts upon which the Coast Guard based this determination. For instance, aliens may try to argue that they were not actually attempting to enter the United States and refute the evidence that the Coast Guard used in its determination. It is less clear whether such a challenge would succeed based upon the uncertain state of the law regarding mixed questions, but courts considering such a challenge will likely be guided by the principle that deference should be given to executive judgments made in order to protect national security and preserve foreign relations, and may thus find in favor of the Government.[150] Nevertheless, so long as an alien challenges whether a specific determination as to their entry or attempted entry into the United States was actually made, it is likely that such a challenge will be found to fall within the traditional scope of habeas, satisfying this requirement.

Aside from the possibility of a pure legal claim challenging the basis for their initial confinement, it is possible that aliens may be able to petition for review of other aspects of their detention, such as the length of their confinement. The Court acknowledged in *Zadvydas v. Davis* that an alien who demonstrated that they may be indefinitely detained because there was "no significant likelihood" that they would be released "in the reasonably foreseeable future" was entitled to seek conditional release through habeas.[151] Some aliens at the MOC may face a similar scenario where they have demonstrated a "well-founded fear" of persecution or torture to USCIS, but the only country willing to accept them is the country to which they are afraid to return.

149. *See* 14 U.S.C. § 522(a); Exec. Order No. 13276 at Sec. 1(a)(i) (specifically referencing "entry"); Exec. Order No. 12807, 57 Fed. Reg. 23,133 (May 24, 1992) at Sec. 2(c)(3) (granting authority if there is a reason to believe that a vessel is engaged in "violations of United States law" which encompasses the requirements of 8 U.S.C. §§ 1324–26 all of which make entry or attempted entry an element of the offense).

150. *See* Jama v. Immigration and Customs Enf't, 543 U.S. 335, 348 (2005); Bismullah v. Gates, 501 F.3d 178, 187–88 (D.C. Cir. 2007).

151. 533 U.S. 678, 702 (2001). *Zadvydas* is not directly analogous to the detention scenarios contemplated here, however, because in that case petitioners were aliens whom no other country was willing to accept, whereas here, the aliens may be unwilling to return to the only country willing to accept them.

Unless the U.S. offers the alien asylum or finds a third country willing to resettle them, the alien could be indefinitely held at the MOC, which could give rise to a successful habeas corpus petition similar to the one brought in *Zadvydas*. It is much less likely that an alien would experience prolonged detention on board a Coast Guard cutter due to the Government's need to keep cutters available for other emergent operations. In fact, from Fiscal Years 2018 through 2020, aliens interdicted during Coast Guard migrant operations spent an average of 1.9 days on board Coast Guard cutters.[152] That said, in some exceptional circumstances, migrants could be held on board for longer periods which might necessitate a habeas challenge based on the length of their detention alone.[153] Such prolonged detention might also provide valid grounds for a habeas petition, but it is entirely unsettled how long that detention must continue before a petition would be successful.[154]

In summary, if aliens can affirmatively show that the U.S. government did not actually make a determination that they had proper legal authority to hold the aliens under existing statutes and executive policy, or if the aliens are likely to be detained indefinitely, those aliens are likely to satisfy the second requirement with respect to their habeas petitions.

3. *Requirement Three: Remedy*

Finally, petitioners must also satisfy a third requirement, which demands that the remedy sought be of a nature that a court can legally order the petitioner's custodian to take. A successful petition must carefully define the remedy sought, so as to ask only for a remedy to which the petitioner is legally entitled. Courts have recognized numerous times that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to *secure release* from illegal custody."[155] The *Boumediene* court did not fully address what remedies might be available through habeas petitions and only contemplated that a simple order directing a prisoner's release might be granted.[156] Resultingly, a request for release from custody is seen as falling squarely within the scope

152. Email from the U.S. Coast Guard Office of Maritime Law Enforcement, Dec. 23, 2020 (on file with author).

153. For example, in 2016, a group of twenty-four interdicted aliens was held on board a Coast Guard cutter for over forty days while a repatriation determination was made. *See* 2016 USCG Final Action Memo, *supra* note 134, at 2. Twenty of these aliens were eventually sent to the MOC before they were repatriated to Cuba. *Id.* Note, however, that the aliens remained at sea at the request of the federal judge who was reviewing a claim brought on the aliens' behalf by several Cuban advocates. *Id.*; *see also Movimiento Democracia*, 193 F. Supp. 3d at 1371 (upholding the Coast Guard's determination in the same case under the U.S. Wet-Foot/Dry-Foot Policy).

154. Additionally, it is possible that, as Judge Rosenbaum noted in her concurrence in *Cabezas-Montano*, some level of prolonged, but not indefinite, detention could create grounds for a habeas challenge, but this remains wholly untested and should be explored further by future scholarship. *See Cabezas-Montano*, 949 F.3d at 617 (Rosenbaum, J., concurring).

155. Preiser v. Rodrigues, 411 U.S. 475, 484 (1973) (emphasis added).

156. *See* Boumediene v. Bush, 553 U.S. 723, 787 (2008).

of habeas; however, the requested location for release has been problematic in some cases involving habeas petitions.[157]

The issue regarding the requested location of release was particularly troubling to the Court in *Thuraissigiam*. There, the Court was concerned that Thuraissigiam was not actually requesting release from custody—the traditional remedy sought through habeas—but was instead requesting vacatur of his removal order and a new opportunity to apply for asylum, through which release into the United States would come as a collateral consequence.[158] The Court further noted that the U.S. government was, in fact, happy to release Thuraissigiam back to his home country of Sri Lanka, but he was not entitled to release in order to simply remain in the United States.[159] Ultimately, the Court held that habeas corpus was not available to Thuraissigiam since he did not seek simple release, but appeared to be claiming a "right to enter or remain in [the United States] or to obtain administrative review potentially leading to that result."[160] Therefore, despite the *Boumediene* court's pronouncement that habeas is "above all, an adaptable remedy" whose "precise application and scope [may change] depending upon the circumstances,"[161] it appears that the *Thuraissigiam* court's holding may make it more difficult for petitioners to win on the merits if they cannot solve the release location issue. If petitioners request release to a location where they have a legal right to be, they will likely be able to satisfy this requirement. However, if petitioners simply request release in general, but are unwilling or unable to return to the only country where they have legal rights, courts are unlikely to look favorably on such petitions.

Unfortunately, the location of release will likely create significant difficulty for many alien-petitioners in the scenarios contemplated by this Note. The Government's default position is to repatriate aliens interdicted at sea to their country of origin, and an alien who seeks release elsewhere will bear the burden of establishing their right to enter that country. If aliens simply desire release to their country of origin, there would be no need to bring a habeas petition because, in most cases, return to their country of origin is nearly certain to occur under current executive policy. However, if an alien desires to be released elsewhere, the alien must show that they have a legal right to be released to that country—most likely through a valid visa, work authorization, or other proof that their original voyage complied with that country's immigration laws. It may be difficult for an alien in government custody to

157. *See* United States Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1971 (2020) (characterizing the relief sought as a request for the "opportunity to remain unlawfully in the United States"); Munaf v. Geren, 552 U.S. 674, 697 (2008) (holding that the petitioners were not entitled to release coupled with an injunction prohibiting their transfer to Iraqi officials for prosecution because it would essentially amount to "an order commanding [U.S.] forces to smuggle [the petitioners] out of Iraq").

158. *Thuraissigiam*, 140 S. Ct. at 1969–70.

159. *Id.* at 1970.

160. *Id.* at 1969.

161. *Boumediene*, 553 U.S. at 779.

marshal such evidence, but that does not mean it is impossible, and the right to at least attempt such a showing should be recognized by the courts.

As previously noted, after aliens are first interdicted by the Coast Guard they may request release, but like Thuraissigiam, be unwilling to return to the only country willing to accept them. These aliens are unlikely to be successful in winning release to a country of their choosing and will likely be returned to their country of origin unless they have demonstrated a credible fear of persecution or torture upon return, in which case they will likely be brought to the MOC for further screening. If they demonstrate that their fear is well-founded, the aliens will generally remain at the MOC until arrangements for third-country resettlement can be made. In fact, such situations were one of the reasons why the MOC was originally created—to house aliens interdicted at sea who have a well-founded fear of persecution upon return to their country of origin, but have no legal right to go anywhere else.[162]

As has been highlighted throughout this Sub-section, aliens in the scenarios examined by this Note may find it most difficult to satisfy the remedy requirement. That said, some aliens may be able to show that they have a legal right to go elsewhere upon release, and it is imperative that these aliens' petitions be considered on their merits. No alien should be precluded from filing a petition simply because many other aliens have been, and will be, unable to overcome the release location problem. The summary repatriation of even one person who was entitled to release comes at too great a cost and could ultimately leave them victim to physical threats or financial hardship upon return to their country of origin. That being said, it may be difficult to imagine what a habeas petition satisfying all three requirements might look like in practice. With that in mind, the following Sub-section seeks to illustrate one hypothetical example of a successful habeas petition.

4. *The Habeas Requirements in Practice: An Example*

It is apparent from the preceding analysis that many alien-petitioners may find it difficult to meet all three requirements for successful habeas petitions—the second and third requirements regarding the nature of the challenge and the remedy sought may prove particularly challenging. Nonetheless, some aliens may still be able to meet all three requirements, and this possibility alone should highlight the importance of recognizing the availability of habeas as a means of

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162. Migrants held at the MOC who have been determined to have a well-founded fear of persecution, or who would more likely than not face torture, are granted a "protect" status, but remain "free to return to their country of origin upon request." ICE Fact Sheet, *supra* note 136. While a migrant is held at the MOC, the United States looks for third countries willing to resettle the individual, but this process can be time consuming. *See* DOS, DHS, & Department of Health & Human Services (HHS), *Report to Congress on Proposed Refugee Admission for Fiscal Year 2018, Submitted on Behalf of the President of the United States to the Committees on the Judiciary United States Senate and United States House of Representatives in Fulfillment of the Requirement of Sections 207(d)(1) and (e) of the Immigration and Nationality Act* (Oct. 2017), https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-f.pdf. From 1996 to 2015, DOS arranged resettlement to third countries for a total of 417 aliens who were held at the MOC. PRM Fact Sheet, *supra* note 57.

challenging executive detention. The example that follows describes one situation where it is likely that a court will find all three habeas requirements have been met, illustrating the beacon of hope that habeas can become for certain interdicted aliens.

Suppose that the Coast Guard interdicts a vessel carrying Haitians while it is proceeding northbound away from Haiti. The aliens' vessel also appears unsafe and may sink in the near future. The Coast Guard brings the Haitians on board the Coast Guard cutter and then determines that the cutter cannot safely tow the Haitians' vessel to any nearby ports. Consequently, the Haitians' vessel is deemed a hazard to navigation and destroyed by the Coast Guard. While a headcount is taken on board the cutter, the Haitians claim that they were headed for Turks and Caicos, where they had arranged to work in the hospitality industry. The Coast Guard confirms that all of the aliens are Haitian nationals and informs them that they will be returned to Haiti. Some of the Haitians indicate that they do not want to return to Haiti because there are no job opportunities there, and if returned, they will be unable to feed their families. One middle-aged man also claims that he is afraid to return to Haiti because he has been violently threatened by his neighbor, who lent him money that he is now unable to repay.

In this case, under current U.S. law and policy, the Haitians will likely be returned to Haiti despite their claims that they were heading towards Turks and Caicos—not the United States. Even the Haitian who was threatened by his neighbor will likely be returned to Haiti because he has not expressed a fear of persecution or torture at the hands of the Haitian government and has instead expressed a fear of attack that is personal in nature and not on account of his race, religion, nationality, political opinion, or membership in a particular social group, as required by U.S. asylum law.[163] After the Haitians learn that they will be repatriated to Haiti, they request to leave the cutter, but the Coast Guard refuses to let them leave or to take them to Turks and Caicos.

If the Haitians in this example petition for habeas corpus while on board the Coast Guard cutter, requesting release to Turks and Caicos, they may have a pure habeas claim meeting all three requirements. They are likely to be found "in custody" because the Coast Guard is holding them on board the flight deck of the cutter after destroying their vessel, restricting their freedom of movement, and will not allow them to leave. Due to the aliens' assertions that they were bound for Turks and Caicos, it seems they have at least a colorable claim that they were not violating U.S. immigration laws. Thus, the Coast Guard's reasoning for embarking the Haitians is key to establishing the legality of their custody, and provides grounds to challenge their detention through habeas. Here, it is unclear whether the Haitians were brought on

163. Imagine for the purposes of this example that this Haitian does not provide any other details suggesting the threats against him are related to the categories required by U.S. asylum law. However, if such details were provided, he would likely receive a "credible fear" determination by a Protection Screening Officer from USCIS before a decision regarding his repatriation was made.

board because they were suspected of attempting to enter the U.S. in violation of U.S. immigration laws or whether they were brought on board because of concerns with the safety of their vessel. If the Coast Guard brought the Haitians on board without properly determining that they were entering or attempting to enter the United States and are now holding them in custody solely based on the Coast Guard's search and rescue authority—which requires the Haitians' consent unless they were deemed to be in the "distress" phase—the Haitians will likely have satisfied the second habeas requirement because they are questioning the legal grounds for their initial detention. Finally, the Haitians will have requested an enforceable remedy that likely satisfies the third requirement, at least facially, because they have specifically requested release to Turks and Caicos, where they have alleged a legal right to be.

However, it should be noted that if a petition was granted in such a scenario, it may be difficult for the Haitians to produce evidence while they are still on board the cutter that proves their intent to go to Turks and Caicos. A decision in favor of the Haitians on the merits of this petition would likely require the Haitians to produce a work authorization or other type of visa because ordering release to Turks and Caicos without affirmative proof of the Haitians' legal right to be there would put judges in a position where they could effectively be ordering the Coast Guard to assist the Haitians in violating the immigration laws of another country. For this reason, judges may still be hesitant to order release in situations such as these, even where the claim itself appears to fall squarely within the traditional scope of habeas. Nevertheless, if habeas petitions like these are never heard, repatriation decisions for aliens interdicted at sea will be left wholly to the discretion of the Executive. The consequences of this allocation of power can be severe. Individuals who may not have been bound for the United States in the first place could be returned to countries where they face serious threats, simply because the U.S. government happened to encounter them in international waters. With so much on the line, these sorts of situations surely deserve some judicial review, and the opportunity for such review should not be foreclosed by potential problems of proof that may or may not arise.

To be sure, the difficulties posed by the location of release for detained aliens are not insignificant, and will likely defeat many habeas petitions that are brought by interdicted aliens. That said, the impacts of these decisions on the lives of individuals are too important to ignore. Therefore, the reality that only a small number of petitions will likely satisfy all three habeas requirements should not discourage courts from recognizing the availability of habeas in general. For aliens interdicted at sea, a habeas petition may be their only means of challenging detention that otherwise occurs far away from the United States and out of the public eye. Further, the uncertainty in the law regarding the remedies available through habeas, especially in light of the decision in *Thuraissigiam*, shows that this area is ripe for review. Perhaps it is time to push courts for clarity on this issue, even if uncertainty exists regarding how courts will rule when faced with petitions like those in the aforementioned hypothetical.

IV. CONCLUSION AND THE WAY AHEAD

The discussion throughout this Note demonstrated that the U.S. government's interdiction of aliens at sea is one of the few areas where decisions related to U.S. immigration law are left wholly to the Executive—unchecked by congressional direction or judicial review. Because Congress has allowed the Executive to forgo bringing aliens ashore for expedited removal proceedings, the executive agencies operate in an environment that exists largely outside of statutes and regulations. Decisions in the at-sea interdiction realm are made solely based on current executive policy. Earlier challenges to the Executive's policies in this arena, such as *Sale*, have failed, and courts have all but entirely foreclosed due process challenges of these policies. Advocates are left to wonder: is there even an avenue left for aliens interdicted at sea to challenge their detention? This Note argues that the answer is yes. The answer must be yes, because this Nation was founded on the principle of separation of powers, and at present, that principle is sorely lacking in the at-sea interdiction context.

Although no court has squarely addressed the availability of habeas corpus in the two scenarios examined in this Note, there appears to be a strong likelihood that aliens have the right to file a petition for habeas corpus while detained on board Coast Guard cutters and at the Migrant Operations Center. Courts must start by applying the *Boumediene* factors and recognizing the extraterritorial application of the Suspension Clause for the writ to become available to aliens in these scenarios. Then, aliens must craft habeas petitions that meet the custody, nature of the challenge, and‘ remedy requirements on the merits. However, as discussed earlier, it is clear that this path may be lined with difficulties for many petitioners. Even so, there are strong reasons that support recognition of an alien's right to petition for habeas corpus in the scenarios contemplated within this Note. For one, litigation in this area will help bring clarity in outlining the requirements for an alien to win on the merits. It is unlikely that the issues of remedy and release location will be squarely addressed by a court unless a court is forced to do so. The only way to eliminate the uncertainty that remains regarding these requirements is to bring a challenge and see the result first-hand. If nothing else, failed petitions will enable these issues to garner the public's attention, rather than allowing the Executive's decisions to disappear into a vast oceanic abyss, far from United States territory.

From here, it is clear that aliens in these scenarios should not have to chart a course toward a successful challenge by themselves. Even after the right to habeas is recognized by courts, aliens will continue to face many practical obstacles when preparing petitions, and these obstacles should not go unacknowledged. Legal recognition of the right to habeas does not create a governmental duty to affirmatively promote the exercise of that right, and it is unclear how much assistance the U.S. government would have to provide to support prospective

petitioners.[164] One of the best ways to overcome some of the obstacles faced by petitioners may be through assistance from legal advocacy organizations. Such organizations could create petition templates based on common fact patterns and could make those templates available to aliens seeking to challenge their detention. Some organizations may even offer their legal representation services in support of specific petitions. However, legal advocacy organizations will also face a significant hurdle—gaining access to and communicating with detainees. As previously noted, the Department of Homeland Security typically does not publicize each alien interdiction in real-time, especially when a cutter is actively deployed, because such publicity can create significant operational security concerns. Thus, in order to gain access to the detainees, legal advocacy organizations may need to win a legal battle of their own first, likely on First Amendment right-of-association grounds, though many suits of this kind have previously been unsuccessful.[165] The role of legal advocacy organizations in this fight cannot be adequately addressed in this Note, but undoubtedly warrants exploration in future scholarship, as it may be the key to successful challenges in this area.

Regardless of the difficulties that will undoubtedly arise in the context of habeas petitions filed by aliens interdicted at sea, habeas corpus remains one of the most fundamental checks on the power of the Executive. The imperfect nature of this right as a solution to some of the issues encountered during at-sea interdictions should not preclude the recognition of its availability. Habeas corpus has served as a means to challenge the legality of detention for longer than this great Nation has existed, and it continues to protect the public from wrongful detention at the hands of the Government. Particularly in the immigration legal space, where the Executive is frequently recognized as having near-absolute power to make decisions related to national security and foreign affairs, the writ of habeas corpus is one of the only remaining means of checking this power. To preserve the balance of power among the branches and to uphold the ideals enshrined in our Constitution, courts should formally recognize the availability of this right—even for aliens interdicted and held outside the borders of the United States. For, just as the *Boumediene* court proclaimed, the Constitution cannot be switched "on and off at will."[166]

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164. Once courts recognize that habeas corpus is available to aliens interdicted at sea, the degree of assistance that the Government must provide will need to be fleshed out. Cases from traditional carceral settings, like *Johnson v. Avery*, 393 U.S. 483 (1969), may be informative in helping to determine the Government's baseline obligations with respect to ensuring that aliens can actually file petitions for habeas corpus.

165. *See, e.g.*, *Baker*, 953 F.2d at 1513 (holding that the Constitution, and specifically the First Amendment, does not require the Government to assist a third party in exercising their right of association); Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374, 1337 (D.C. Cir. 1990) (holding that "the Government does not infringe a third party's first amendment right to associate with an alien by holding the alien for a period of time during which the third party is unable to contact him"); Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 816 (D.C. Cir. 1987) (holding that the organizational plaintiffs' First Amendment claim regarding the right to associate with detained Haitian migrants failed because the organizations failed to establish standing).

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