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Adrift at Sea: How the United States Government is Forgoing the Fourth Amendment in the Prosecution of Captured Terrorists

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ADRIFT AT SEA: HOW THE UNITED STATES GOVERNMENT IS FORGOING THE FOURTH AMENDMENT IN THE PROSECUTION OF CAPTURED TERRORISTS.

Frank Sullivan

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I. INTRODUCTION

Since September 11th, 2001, the United States Government has faced the ever-evolving challenge of combating foreign terrorists. The capture of a suspected terrorist by United States forces presents several legal issues, including, questions over the nature of the terrorism suspect's capture, subsequent treatment and afforded rights.[1]

Additionally, United States Government officials face the controversial decision about what to do with captured terrorism suspects: either detain them as enemy combatants at Guantanamo Bay to face a military tribunal, or try them before a civilian court in the United States.[2] Since the attacks of September 11th and the beginning of the War on Terror, terrorism suspects have been tried in military tribunals as well as civilian courts. However, under the current administration, the preferred method has been to seek justice in civilian courts.[3]

Recently, suspected ringleader of the 2012 Benghazi terrorist attack,[4] Ahmed Abu Khatallah,[5] has been subjected to this policy, and

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[1] *See* Steve Vladeck, *Kidnapping Is Legally Dubious, But It's Also The Best Way To Get Terrorists*, WASH. POST, June 18, 2014 (presenting legal issues regarding rendition of terrorist suspects).

[2] For arguments promoting both sides in one particular case, see Karen DeYoung, Adam Goldman and Julie Tate, *U.S. Captures Benghazi Suspect In Secret Raid,* WASH. POST, June 17, 2014.

[3] *See* Karen DeYoung, Adam Goldman and Julie Tate, *U.S. Captures Benghazi Suspect In Secret Raid,* WASH. POST, June 17, 2014.

[4] For more information on the Benghazi attack, including background on Ahmed Abu Khatallah as well as details of the attack from several witnesses close to Abu Khatallah and present on the night of the attack, see David D. Kirkpatrick, *A Deadly Mix In Benghazi*, N.Y. TIMES, Dec. 28, 2013, http://www.nytimes.com/projects/2013/benghazi.

[5] While the English spelling of his name sometimes differs based on the source, from 'Khattala' to 'Khatallah,' this comment uses the spelling 'Khatallah,' which is used in the formal Indictment filed by the United States Attorney's Office for the District of Columbia. *See* Indictment at 1, United States v. Abu Khatallah, No.14-141 (2014).

is being tried in a civilian court in Washington D.C.[6] Charged in relation to the September 11th, 2012, attack on the United States diplomatic compound in Benghazi, Libya, in which Ambassador J. Christopher Stevens, Foreign Service Information Management Officer Sean Patrick Smith, and CIA Security Officers Tyrone Snowden Woods and Glen Anthony Doherty were killed,[7] suspected leader of Ansar al-Sharia, Ahmed Abu Khatallah, was captured by a team of United States Special Forces in mid-June, 2014.[8] After his capture in Libya, Ahmed Abu Khatallah was immediately transported to an American military vessel, the *USS New York*, which transported Khatallah across the Atlantic Ocean to face trial in federal court in the District of Columbia.[9]

The capture and subsequent handling of Ahmed Abu Khatallah implicates several legal questions surrounding United States policy regarding the capture of suspected terrorists.[10] Despite questions surrounding the handling of Abu Khatallah, the decision by the Obama administration to transport Abu Khatallah back to the United States on an American military ship was both deliberate and strategic.[11] By choosing to transport Abu Khatallah by military ship,[12]

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[6] *See* Karen DeYoung and Ann E. Marimow, *Benghazi Suspect Ahmed Abu Khattala May Be Brought To U.S. On Navy Ship,* WASH. POST, June 18, 2014.

[7] *See* Government's Motion For Pretrial Detention at 7, United States v. Abu Khatallah, No.14-141 (2014).

[8] *See Id.* at 10.

[9] *See* Thomas Gibbons-Neff, *USS New York, Carrying a Benghazi Suspect, Has Gone Dark,* WASH. POST, June 25, 2014.

[10] *See* Ben Brumfield, *What's Next For Benghazi Terror Suspect Ahmed Abu Khatallah?,* CNN, June 18, 2014.

[11] The reasoning for doing so primarily revolves around the rather dubious nature of the capture of the suspect by extraordinary rendition. The difficulty in finding countries willing to allow suspects who have been subject to rendition to pass through their sovereign territory during the process of transporting the suspect to America makes transportation by way of military ship extremely convenient, if not necessary. *See* Ben Brumfield, *What's Next For Benghazi Terror Suspect Ahmed Abu Khatallah?,* CNN, June 18, 2014.

[12] Whether the United States is legally able to use the military for purposes of law enforcement is a separate, distinct legal question. Under the Posse Comitatus Act, the armed forces are restrained from aiding civilian law enforcement authorities in keeping the peace and arresting felons. *See* 18 U.S.C. § 1385 (1978). *See also* 10 U.S.C. § 375 (1981) (requiring the Department of Defense to prescribe

the Obama administration had several days to question and search Abu Khatallah before the vessel reached the United States.[13] Further, because much of the trip from Libya to the United States involved crossing the Atlantic Ocean, in international waters, FBI agents were able to search Abu Khatallah without a warrant and question him without reading him his Miranda rights.[14]

This article will argue that the current Administration's practice of searching individuals without a warrant by way of transporting suspected terrorists[15] on military ships through international waters is in direct conflict with the Fourth[16] Amendment.[17] On its face, this practice appears to comply with

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regulations ensuring that the U.S. Navy, among others, does not directly participate in civilian law enforcement absent authorization by law). The Department of Justice maintains the Posse Comitatus Act does not apply outside of the territory of the United States, and as such, for the purposes of this article, it will be assumed that the United States Government's practice of using military vessels in a law enforcement capacity for suspects bound for civilian courts is itself legal. *See* Int'l Law Dep't, U.S. Naval War College, U.S. Navy, NWP 1-14M, The Commanders Handbook on the Law of Naval Operations, § 3.11.3.1, p. 3-13 (2007).

[13] *See* Evan Perez and Holly Yan, *Controversy Swirls Over Handling Of Benghazi Suspect Abu Khatallah,* CNN, June 29, 2014 (Ahmed Abu Khatallah questioned aboard ship for two weeks).

[14] *See* Michael Schmidt, Matt Apuzzo, Eric Schmitt and Charlie Savage, *Trial Secondary As U.S. Questions a Libyan Suspect,* N.Y. TIMES, June 19, 2014.

[15] Ahmed Abu Khatallah is not the first suspected terrorist held aboard military vessels pending transfer to the United States. *See* Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES, July 6, 2011 (describing the handling of Somali Ahmed Abdulkadir Warsame aboard the *USS Boxer*); Benjamin Weiser and Eric Schmitt, *U.S. Said to Hold Qaeda Suspect on Navy Ship*, N.Y. TIMES, Oct. 6, 2013 (Libyan Abu Anas al-Libi aboard the *USS San Antonio*).

[16] The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[17] Again, recognizing that contravention of the Fourth Amendment is likely only a collateral benefit and not the official reasoning for the use of military ships to transport suspected terrorists, *see* Note 11 *supra*. Additionally, this discussion will be limited to the applicability of the Fourth Amendment to Abu Khatallah, as well as similarly situated suspected terrorists. Questions surrounding Miranda and the Public Safety Exception, while extremely important and relevant to Abu Khatallah,

numerous Supreme Court cases establishing the extraterritorial reach of the Fourth Amendment.[18] However, the Supreme Court's decision in *Boumediene v. Bush*[19] raises questions regarding the applicability of the Fourth Amendment on a United States military vessel, even if the ship is located in international waters.

To answer these questions, it is necessary to first understand the extraterritorial applicability of the Constitution. Part II of this article will describe the extraterritoriality of the United States Constitution. Part III will explore the Supreme Court's ruling in *Boumediene* and its impact on the extraterritorial application of the Constitution. Part IV will examine the United States' position on the jurisdiction surrounding American military vessels. Part V discusses a few policy considerations implicated by the analysis of Parts II-IV.

II. THE EXTRATERRITORIALITY OF THE CONSTITUTION

The extraterritoriality of the Constitution can be broken down as it applies to three main categories of individuals: (1) non-United States citizens present within the territory of the United States, (2) United States citizens outside of the territory of the United States, and (3) non-United States citizens outside of the territory of the United States.

Section A will give a brief overview of the applicability of the Constitution to the first two categories, non-United States citizens within the United States and United States citizens abroad. Section B will give a more in-depth look at the category in which Ahmed Abu

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as well as other similarly situated suspected terrorists, are too much to address here and will be saved for another time.

[18] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not apply to foreign citizens in foreign territories); INS V. Lopez-Mendoza, 468 U.S. 1032 (1984) (assuming illegal aliens in the United States have Fourth Amendment rights); Reid v. Covert, 354 U.S. 1 (1957) (Constitutional provisions applicable to United States citizens abroad); Johnson v. Eisentrager, 339 U.S. 763 (1950) (no extraterritorial application of the Fifth Amendment).

[19] 553 U.S. 723 (2008).

Khatallah falls, a non-United States citizen located outside of the United States.

A. Applicability to non-United States Citizens within the United States, and United States Citizens Abroad.

In *Kwong Hai Chew v. Colding*,[20] the Supreme Court addressed the issue of whether a Chinese national lawfully living in the United States could be detained without first receiving notice of the charges levied against him, while further denying the individual any opportunity to voice their opposition to the detention.[21] The Supreme Court held that non-United States citizens present within the United States are afforded constitutional protections.[22] In deciding the case, the Court stated the "well-established" principle that, if an alien is lawfully present in the United States, he is within the protection of the Fifth Amendment and may not be deprived of life, liberty or property without due process.[23]

The Supreme Court first addressed whether the Constitution, and more specifically the Fifth and Sixth Amendments, apply to United States citizens outside of the United States in *Reid v. Covert.*[24] In *Reid*, the Court addressed the issue of whether military trials of civilian spouses of servicemen stationed abroad were constitutional.[25] Upon rehearing and reconsideration, the Supreme Court reversed their earlier decision[26] and held that civilian spouses of servicemen

[20] 344 U.S. 590 (1953).

[21] *Kwong Hai Chew*, 344 U.S. at 595.

[22] *Id.* at 600.

[23] *Id.* at 596. *See also* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.); Johnson v. Eisentrager, 339 U.S. 763, 770-771 (1950) (Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights.).

[24] 354 U.S. 1 (1957).

[25] *Reid*, 354 U.S. at 5.

[26] *See* Kinsella v. Krueger, 351 U.S. 470, 487 (1956) (holding that Fifth and Sixth Amendments do not protect American citizens tried by the American Government for crimes committed and tried in a foreign land).

stationed abroad could not be tried by a military tribunal.[27] Trying a civilian in a military tribunal was held to be in violation of the civilian's Fifth[28] and Sixth[29] Amendment rights.[30]

The Supreme Court reasoned that, because the United States' power and authority is solely created by the Constitution, the Government must act within constitutional limitations.[31] The Court rejected the argument that only fundamental constitutional rights protect Americans abroad.[32] Instead, the Court found in favor of extending every provision of the Constitution to American citizens, either at home or in another land.[33]

Kwong Hai Chew and *Reid* thus begin to define the breadth and limits of constitutional applicability. Instead of universal applicability, the Constitution applies to United States citizens, in the United States as well as abroad, and to foreign nationals that are lawfully within the territory of the United States. However, one question remains: do the provisions of the Constitution restrain the United States when it acts against a foreign national outside of the territory of the United

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[27] *Reid*, 354 U.S. at 5.

[28] The Fifth Amendment reads, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger... nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[29] The Sixth Amendment reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

[30] *Reid*, 354 U.S. at 5.

[31] *Id.* at 6 (citing Marbury v. Madison, 1 Cranch 137, 176-180 (1803)).

[32] *Reid*, 354 U.S. at 9.

[33] *Id.* at 9. However, courts have since limited the extent to which some constitutional provisions apply to citizens outside of the United States. *See e.g.,* In re Terrorist Bombings of U.S. Embassies in East Africa (Fourth Amendment Challenges), 552 F.3d 157, 167 (2nd Cir. 2008) (holding that "the Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness.").

States? The Supreme Court first addressed this question in *United States v. Verdugo-Urquidez*.[34]

B. Applicability to non-United States Citizens Outside the United States.

For decades, the Supreme Court's landmark decision in *Verdugo* has stood as the guidepost for determining whether foreign citizens located outside of the United States have rights under the United States Constitution. In *Verdugo,* the Supreme Court addressed whether the Fourth Amendment's warrant requirement was violated when Drug Enforcement Agency (DEA) agents searched the defendant's house without a search warrant.[35] The Court ultimately held that because the defendant was a Mexican national, and the property searched was located in Mexico, the Fourth Amendment did not apply.[36]

The defendant in *Verdugo,* a citizen and resident of Mexico, was apprehended by Mexican authorities based on an American arrest warrant issued in connection with narcotics distribution.[37] The Mexican citizen was transported to the Mexican-American border where he was delivered to United States Marshals for arrest.[38] Following the arrest, DEA agents, in conjunction with Mexican Federal Judicial Police Officers searched the defendant's properties in Mexicali and San Felipe and seized evidence of the defendant's narcotics trafficking.[39]

At trial, the District Court for the Southern District of California suppressed the seized evidence, concluding that the Fourth Amendment applied to the search and that there had been no justification for searching the premises without a warrant.[40] The

[34] 494 U.S. 259 (1990).
[35] *Verdugo,* 494 U.S. at 261.
[36] *Id.* at 274-75.
[37] *Id.* at 262.
[38] *Id.*
[39] *Verdugo,* 494 U.S. at 262.
[40] *Id.* at 263.

Court of Appeals for the Ninth Circuit, although divided, affirmed the District Court's ruling by relying on *Reid*.[41] On further appeal, in a 6-3 decision, the Supreme Court held that the Fourth Amendment did not apply to the defendant because at the time of the search, the defendant "was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico."[42]

Chief Justice Rehnquist, writing for the majority opinion, examined the function of the Fourth Amendment compared to the Fifth Amendment, which was at issue in *Reid*.[43] Chief Justice Rehnquist stated that while constitutional violations of the Fifth Amendment occur at trial, violations of the Fourth Amendment are "fully accomplished" at the time of the search.[44] Therefore, even if there was a constitutional violation of the defendant's Fourth Amendment rights, it occurred solely in Mexico.[45] Remedial exclusion of the evidence is a separate question and does not touch on the existence of a constitutional violation in and of itself.[46]

The Chief Justice, in an effort to determine whether the Fourth Amendment was meant to apply to foreign nationals, analyzed the language and history of the Fourth Amendment.[47] First, the language of the Fourth Amendment, using the term of art 'the people,' refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[48]

Second, the history of the Fourth Amendment suggests that its provisions were meant to protect the American people against arbitrary action by the United States Government, and not intended to restrain the actions of the United States Government against aliens

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41 *Id.*
42 *Id.* at 274-75.
43 *Id.* at 264.
44 *Id.*
45 *Verdugo*, 494 U.S. at 264.
46 *Id.*
47 *Id.* at 265.
48 *Id.*

outside American territory.[49] As an example, Chief Justice Rehnquist noted that in 1798 Congress passed an act allowing commanders of both public and private armed vessels of the United States to "subdue, seize and take any armed French vessel . . . on the high seas."[50] While some commanders were held liable for seizures beyond the scope of Congress' grant of authority,[51] the Supreme Court never suggested the Fourth Amendment restrained commanders from conducting such seizures authorized by Congress.[52]

Finally, Chief Justice Rehnquist looked at previous case law to determine whether the Fourth Amendment applied to the DEA search conducted in Mexico.[53] The opinion in *Verdugo* stated that the Court of Appeals' global application of the Constitution goes against precedential cases, known as the *Insular Cases*.[54] As Chief Justice Rehnquist points out, the *Insular Cases*[55] held that not every constitutional provision applies to Government activity, even when the United States may have sovereign power, and that only fundamental constitutional rights are guaranteed to inhabitants of unincorporated territories of the United States.[56] Because the Constitution "does not, without legislation and of its own force" apply to territories ultimately governed by Congress, the claim that

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[49] *Id.* at 266.

[50] *Id.* at 267. *See also* §§ 1-2 of An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578-9.

[51] *See, e.g.*, Little v. Barreme, 2 Cranch 170, 177-178 (1804); *cf.* Talbot v. Seeman, 1 Cranch 1, 31 (1801) (seizure of neutral ship lawful where American captain had probable cause to believe vessel was French).

[52] *Verdugo,* 494 U.S. at 268.

[53] *Id.*

[54] *Id.*

[55] *See, e.g.,* Balzac v. Porto Rico, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (jury trial and indictment by grand jury provisions inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (Revenue Clauses inapplicable to Puerto Rico).

[56] *Verdugo,* 494 U.S. at 268 (citing *Dorr,* 195 U.S. at 148).

protections of the Fourth Amendment extend to aliens in foreign nations is especially weak.[57]

In addition to the *Insular Cases*, Chief Justice Rehnquist found support for holding that the Fourth Amendment does not apply to foreign nationals in foreign territories in *Johnson v. Eisentrager*.[58] The Chief Justice emphasized that while some constitutional provisions extend beyond the citizenry of the United States, the *Eisentrager* opinion emphatically rejected the extraterritorial application of the Fifth Amendment, as the extraterritorial application of organic law is a practice that every modern government is opposed to.[59]

In contrast to the *Insular Cases* and *Eisentrager,* the Chief Justice distinguished *Verdugo* from the *Reid* decision relied on by the lower courts.[60] In quoting from the *Reid* decision, Chief Justice Rehnquist emphasized that, "when the government reaches out to punish *a citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land."[61] While the lower courts interpreted such language as constraining federal officials under the Fourth Amendment wherever and against whomever they act, the Chief Justice stated that *Reid* dealt with United States citizens abroad and that the holding of *Reid* is therefore not applicable to the case at hand.[62]

Chief Justice Rehnquist similarly rejected the contention that case law dealing with the application of the Constitution to foreign nationals within the United States[63] applies to the case at hand because the defendant in *Verdugo* had no voluntary connection with the United States, and foreign nationals can only avail themselves of

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[57] *Verdugo,* 494 U.S. at 268 (citing *Dorr,* 195 U.S. at 149).

[58] 339 U.S. 763 (1950) (rejecting the claim that enemy aliens imprisoned in Germany after World War II are entitled to habeas corpus writs in federal courts on the ground that their war crimes convictions were violations of the Fifth Amendment and other constitutional provisions).

[59] *Verdugo,* 494 U.S. at 269 (citing *Eisentrager,* 339 U.S. at 784).

[60] *Verdugo,* 494 U.S. at 270.

[61] *Verdugo,* 494 U.S. at 270 (quoting *Reid*, 354 U.S. at 5-6).

[62] *Verdugo,* 494 U.S. at 270.

[63] *See Kwong Hai Chew*, *supra* note 21.

the protections of the Constitution when they come within the territory of, and develop substantial connections with, the United States.[64] In response to Justice Stevens' concurrence,[65] Chief Justice Rehnquist stated that the applicability of the Fourth Amendment should not turn on the "fortuitous circumstance" that the foreign national had been transported to the United States prior to the search. Chief Justice Rehnquist maintained that only voluntary presence in the United States invokes constitutional protections for foreign nationals.[66]

In his concurrence, Justice Kennedy noted that in addition to the reasoning of the Chief Justice, practicality concerns also weigh in favor of the Fourth Amendment not having any application to searches of foreign nationals in foreign territories.[67] Justice Kennedy reasoned that due to the absence of local magistrates or judges in foreign territories that have the authority or ability to issue American search warrants, as well as the "differing and perhaps unascertainable conceptions of reasonableness" in foreign territories, the warrant requirement of the Fourth Amendment should not apply in foreign territories as it does in the United States.[68] Likewise, Justice Stevens concurred with the majority opinion that the Fourth Amendment does not apply, primarily because American magistrates have no authority to authorize searches in foreign territories.[69]

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[64] *Verdugo,* 494 U.S. at 271. (citing Plyer v. Doe, 457 U.S. 202, 212 (1982) ("The provisions of the Fourteenth Amendment are universal in their application, *to all persons within the territorial jurisdiction*…") (emphasis in original); *Kwong Hai Chew*, 344 U.S. at 596("But *once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders") (emphasis in original)).

[65] In his concurrence, Justice Stevens stated that aliens lawfully present in the United States are protected by the Fourth Amendment, regardless of whether they are present voluntarily or, as in the case at hand, involuntarily. *Verdugo,* 494 U.S. at 279 (Stevens, J., concurring).

[66] *Verdugo*, 494 U.S. at 272. However, the voluntary presence standard failed to gain acceptance by a majority of the Court and is therefore dicta.

[67] *Verdugo,* 494 U.S. at 278 (Kennedy, J., concurring).

[68] *Id.* Additionally, in his dissent, Justice Blackmun agreed that the Warrant Clause does not apply and searches conducted abroad are subject only to the reasonable aspect of the Fourth Amendment. *Id.* at 297 (Blackmun, J., dissenting).

[69] *Verdugo*, 494 U.S. at 279 (Stevens, J., concurring).

Applying the Supreme Court's previous analyses of the scope of the Constitution to the Government's actions in dealing with Ahmed Abu Khatallah, it seems that the Constitutional protections of the Fourth Amendment do not apply. First, Abu Khatallah is not a citizen of the United States, and therefore cannot avail himself of the Fourth Amendment's protections on the grounds of citizenship. Second, the search of Abu Khatallah did not occur in the territory of the United States, but rather occurred in international waters, eliminating the protections of the Fourth Amendment afforded non-citizens within the United States. Lastly, while an argument can be made that Abu Khatallah was in the possession of the United States when he was searched, the Chief Justice's "voluntary connection" language from *Verdugo* suggests that because Abu Khatallah had no connection to the United States other than his capture and subsequent rendition to justice, which is most certainly not a voluntary connection, the Fourth Amendment does not apply.

Following the *Verdugo* holding, the United States could have viably searched, without a search warrant, not only Abu Khatallah's physical person in international waters, but also any properties owned by Abu Khatallah outside of the United States (i.e., his house in Libya). However, the Supreme Court's decision in *Boumediene v. Bush* raises questions as to whether the Constitution in fact does apply to Abu Khattallah, and whether the Government's search of Abu Khatallah was legal.

III. *BOUMEDIENE V. BUSH* AND *DE FACTO* JURISDICTION THROUGH EXCLUSIVE CONTROL

In *Boumediene,* the Supreme Court dealt with several issues revolving around foreign national enemy combatants held at Guantanamo Bay.[70] Specifically, the Supreme Court addressed whether foreign nationals detained at Guantanamo Bay could avail themselves of the constitutional protection of the Writ of Habeas

[70] *Boumediene*, 553 U.S. at 732.

Corpus.[71] The Supreme Court in *Boumediene* denied the Government's argument that the foreign nationals were held in territory outside of the Nation's borders, which therefore leaves the detainees without constitutional rights,[72] and concluded that foreign nationals detained as enemy combatants at Guantanamo Bay may invoke the protections of habeas corpus.[73] In doing so, the Supreme Court created a functional test to determine the extraterritorial reach of the Constitution.[74]

Writing for the majority, Justice Kennedy acknowledged that pursuant to the agreement between Cuba and the United States, Cuba retains "ultimate sovereignty," while the United States exercises "complete jurisdiction and control" over Guantanamo Bay.[75] Because of this division of power, Justice Kennedy stressed that while Cuba has *de jure* jurisdiction over Guantanamo Bay, the United States nonetheless has *de facto* jurisdiction.[76] This distinction ultimately lead Justice Kennedy to conclude that "[i]n every practical sense Guantanamo [Bay] is not abroad; it is within the constant jurisdiction of the United States."[77] Because of the "complete and total control" of the United States over Guantanamo Bay, foreign detainees held there could avail themselves of the constitutional protections of habeas corpus.[78]

Justice Kennedy found support for the holding in the lack of prudential concerns previously preventing the extension of habeas corpus to territories under the sovereign control of a different nation.[79] Specifically, Justice Kennedy noted that there was no reason

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[71] *Id.*

[72] *Id.* at 739.

[73] *Id.* at 798.

[74] *Id.* at 764.

[75] *Boumediene*, 553 U.S. at 753. *See also* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418.

[76] *Boumediene*, 553 U.S. at 755.

[77] *Id.* at 769.

[78] *Id.* at 771.

[79] *Boumediene,* 553 U.S. at 751. *See generally* King v. Cowle, 2 Burr. 834 (As a territory that was not a part of England, yet controlled by the English monarch, the writ of habeas corpus was never extended to Scotland); R. Sharpe, The Law of Habeas Corpus 191 (2d ed. 1989). *See also* Note on the Power of English Courts to

to believe that a federal court's order would be disobeyed at Guantanamo Bay, and that no other law besides that of the United States applies to the naval base.[80]

Additionally, Justice Kennedy attempted to reconcile his functional holding with previous case law. First, in addressing the *Insular cases*, Justice Kennedy found that by utilizing the doctrine of territorial incorporation,[81] the Court devised a functional approach to the application of the Constitution.[82] This approach served as a foundation to the functional approach established by the Supreme Court in *Boumediene*.[83]

Second, Justice Kennedy found support for his holding in the practical concerns that influenced the Court in *Reid*.[84] Justice Kennedy read *Reid* to rely not on the citizenship of the petitioners, but instead on the petitioner's place of confinement and trial.[85] Relying primarily on Justice Frankfurter's and Justice Harlan's concurrences in *Reid*, Justice Kennedy noted that *Reid* rejected a rigid rule in favor of analyzing the circumstances of each particular case when applying the Constitution extraterritorially.[86]

Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and On the Position of Scotland in Relation to that Power, 8 Jurid. Rev. 158 (1896).

[80] *Boumediene*, 553 U.S. at 751.

[81] Under the doctrine of territorial incorporation, utilized in the *Insular cases*, the Constitution is fully incorporated and applies only to territories destined for statehood. For unincorporated territories (those not destined for statehood) the Constitution only applies in part, determined by the situation of the territory and its relationship to the United States. *See Dorr*, 195 U.S. at 143.

[82] *Boumediene*, 553 U.S. at 759. *See also Balzac*, 258 U.S. at 312.

[83] *Boumediene*, 553 U.S. at 764.

[84] *Id.* at 759.

[85] *Id.* at 760.

[86] *Boumediene*, 553 U.S. at 768. In his concurrence to *Reid* Justice Harlan rejected a "rigid and abstract rule," reading the *Insular cases* to mean that constitutional provisions' extraterritorial effect depends on the particular circumstances, particularly whether judicial enforcement would be "impracticable and anomalous." *Reid*, 351 U.S. at 74-75 (Harlan, J., concurring in result). *See also Reid*, 351 U.S. at 54 (Frankfurter, J., concurring in result).

Lastly, to reconcile his holding with the holding of *Eisentrager*, Justice Kennedy distinguished Landsberg prison from Guantanamo Bay on the basis that, while both are located outside the sovereign territory of the United States, Guantanamo Bay is under the *exclusive* control of the United States, whereas Landsberg prison was under the control of the combined Allied Forces.[87] In an attempt at further reconciliation, Justice Kennedy noted that nothing in *Eisentrager* stated that *de jure* sovereignty has ever been the only consideration in determining the reach of the Constitution.[88] Justice Kennedy thus concluded that "a common thread" used to determine "questions of extraterritoriality turn on objective factors and practical concerns, not formalism[,]" and thus unites the *Insular cases, Eisentrager*, and *Reid*.[89]

However, as Justice Scalia pointed out in his dissent in *Boumediene*, the majority completely missed the mark with *Eisentrager*, which "conclusively establishes the opposite" of a functional test for extraterritoriality.[90] Quoting Justice Jackson in *Eisentrager*, Justice Scalia noted, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the judiciary power to act."[91] From the language in *Eisentrager*, Justice Scalia concluded that *Eisentrager* "*held* beyond any doubt - that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."[92]

The *Insular cases*, *Reid*, and *Eisentrager*, do in fact stand for the same idea, as observed by the majority. However, the majority interpreted these cases incorrectly. Instead of standing for a functional approach to extraterritoriality, Justice Scalia pointed out that, like *Eisentrager*, the *Insular cases* stand for the proposition that aliens outside of United States sovereign territory do not have

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[87] *Boumedien*, 553 U.S. at 768. The United States was therefore "answerable to its Allies" for all activities occurring at Landsberg prison. *Id.*

[88] *Boumediene*, 553 U.S. at 764.

[89] *Id.*

[90] *Id.* at 834 (Scalia, J., dissenting).

[91] *Boumedien*, 553 U.S. at 835 (Scalia, J., dissenting) (quoting *Eisentrager*, 339 U.S. at 770-71).

[92] *Boumediene*, 553 U.S. at 835 (Scalia, J., dissenting) (emphasis in original).

constitutional rights.[93] Quoting *Balzac v. Porto Rico*,[94] Justice Scalia stated that, "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power of that government is exerted*."[95] Moreover, all of the Justices of the *Reid* majority, save one, limited their analysis to the rights of citizens abroad.[96]

The *Insular cases* dealt with territory that was a part of the United States' sovereign territory,[97] the *Reid* Court addressed the rights of citizens abroad, and *Eisentrager* specifically declined to extend constitutional privileges to foreign nationals outside of United States sovereign territory. Functional approach or not, the idea that the Constitution applies to foreign nationals outside of the United States' sovereignty can not be found in any of the Supreme Court's previous opinions. Contrary to Justice Kennedy's ultimate holding in *Boumediene*, Justice Frankfurter stated in his concurrence that, while the "deck of a private American vessel . . . is considered for many purposes constructively as territory of the United States . . . persons on board such vessels . . . cannot invoke the protection of the provisions [of the Constitution] until brought within the actual territorial boundaries of the United States."[98] Thus, the functional *de jure* versus *de facto* sovereignty approach adopted by the majority in *Boumediene* is not only judicially created, but is a blatant misconstruction and revision of the Court's previous case law in a weak attempt at justification.

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[93] *Boumediene*, 553 U.S. at 839 (Scalia, J., dissenting).

[94] 258 U.S. 298 (1922). Justice Kennedy cited this case in concluding that the *Insular Cases* created a functional test for the application of the Constitution to American territories. *See Boumediene*, 553 U.S. at 758.

[95] *Boumediene*, 553 U.S. at 839 (Scalia, J., dissenting) (quoting Balzac v. Porto Rico, 258 U.S. at 312.) (emphasis added).

[96] *Boumediene*, 553 U.S. at 839 (Scalia, J., dissenting). *See Reid*, 354 U.S. at 5-6 (plurality opinion of Black, J., Harlan, J., and Frankfurter, J., concurring in result). Justice Frankfurter was the only Justice in the majority that did not limit the analysis to American citizens abroad. However, Justice Frankfurter went a step further and limited his analysis to civilian dependents of American military abroad, an even narrower class.

[97] *See Boumediene*, 553. U.S. at 839; *Verdugo*, 494 U.S. at 268; *Reid,* 354 U.S. at 13 (plurality opinion of Black, J.).

[98] *Reid*, 354 U.S. at 55-6. (quoting In re Ross, 140 U.S. 453, 464 (1891).

Although *Boumediene* seems to have rewritten the *Insular* cases, *Reid*, and *Eisentrager*, and did not overrule *Verdugo* despite being in direct contradiction to it, it is still controlling law. Therefore, there is a rather gray area of law regarding the application of the Constitution to foreign national terror suspects held aboard American military vessels that are located in international waters. Under *Eisentrager* and *Verdugo*, the Fourth Amendment would not apply to the search of a foreign-national terrorism suspect, so long as the search occurs outside of the territory of the United States, where the United States lacks *de jure* sovereignty. Under *Boumediene*, however, the Fourth Amendment seemingly applies to a search of such foreign-national terrorism suspects if conducted within an area where the United States exercises *de facto* sovereignty through 'complete and total control,' in addition to searches conducted within the *de jure* sovereignty of the United States. While the *Eisentrager*/*Verdugo* and *Boumediene* rules may lead to the same result in some cases, such as if a search of a foreign-national terrorism suspect occurred within the sovereign territory of the United States, the same cannot be said when the search is conducted where the United States only exercises *de facto*, and not *de jure* sovereignty.

Such a situation is in fact presented by the handling of Ahmed Abu Khatallah by the United States Government. By searching Abu Khatallah on a military vessel in international waters, the United States searched Abu Khatallah in a location where the country certainly lacks *de jure* jurisdiction (by virtue of being in international waters), yet arguably exercises *de facto* jurisdiction (by virtue of being on an American military vessel). Applying the *Boumediene* holding to the actions of the Government in dealing with Abu Khatallah, his search would not be legal, absent a warrant, if the military vessel on which the search occurred can be equated to being under *de facto* sovereignty of the United States.

One significant question thus arises: was Ahmed Abu Khatallah within the 'complete and total control' of the United States when he was searched while being held on the American military ship in international waters? The answer to this question may dictate not only the legality of the Government's actions with Abu Khatallah, but also may impact the future course of conduct of the United

States in dealing with similarly-situated terrorism suspects that have been captured.

IV. DOES THE UNITED STATES EXERCISE *DE FACTO* SOVEREIGNTY OVER AMERICAN MILITARY SHIPS IN INTERNATIONAL WATERS?

In determining whether an American military vessel in international waters is equivalent to Guantanamo Bay for *Boumediene* purposes, several sources may help shed light on how the vessel should be treated. One such source is the United Nations Convention on the Law of the Sea.[99]

Designed to define the rights and responsibilities of nations regarding the world's oceans, the Convention on the Law of the Sea states that, "[s]hips have the nationality of the State whose flag they are entitled to fly,"[100] and that, "ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas."[101] Additionally, the Convention goes further in specifying that warships on the high seas "have complete immunity from the jurisdiction of any State other than the flag State."[102] Lastly, the Convention mandates that every State shall "assume jurisdiction under its internal law over each ship flying its flag."[103]

Following the language in the Convention of the Law of the Sea and the rule laid down in *Boumediene*, a search of Ahmed Abu Khatallah aboard an American military ship in international waters would be subject to the restrictions of the Fourth Amendment.

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[99] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 243.

[100] United Nations Convention on the Law of the Sea art. 91, Dec. 10, 1982, 1833 U.N.T.S. 243.

[101] United Nations Convention on the Law of the Sea art. 92, Dec. 10, 1982, 1833 U.N.T.S. 243.

[102] United Nations Convention on the Law of the Sea art. 95, Dec. 10, 1982, 1833 U.N.T.S. 243.

[103] United Nations Convention on the Law of the Sea art. 94, Dec. 10, 1982, 1833 U.N.T.S. 243.

Because he was searched on an American military vessel, the ship carries the nationality of the United States and is subject to the exclusive jurisdiction of the United States. The "internal law" that the Convention subjects the ship to as an American vessel most certainly refers to the United States Constitution, including the provisions of the Fourth Amendment.

The provisions of the Convention on the Law of the Sea do not bind the United States because the United States has not become a signatory party to the Convention.[104] However, customary international law echoes the rule eventually adopted by the Convention on the Law of the Sea. Predating the Convention on the Law of the Sea, the Permanent Court of International Justice stated in *The Case of the S.S. "Lotus" (France v. Turkey)*[105] [*hereinafter* "the *Lotus* case"], "a ship on the high seas is assimilated to the territory of the State the flag of which it flies."[106] Furthermore, the *Lotus* case points out that "a ship is placed in the same position as national territory," and that "what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."[107]

While the U.N. Convention on the Law of the Sea may not bind the United States, the *Lotus* case does bind the United States absent conflicting domestic law.[108] Because neither Congress nor

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[104] Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, JA 422, Operational Law Handbook, p. 163 (2014). *But see Id.* at n. 13 (describing support for US ratification, including support from former Presidents Bill Clinton and George W. Bush).

[105] *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

[106] *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, ¶ 65 (Sept. 7).

[107] *Id.*

[108] The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that customary international law is binding on the United States in the absence of conflicting domestic law). On the other hand, courts have held that customary international law is not controlling where Congress has specifically enacted a law on the issue. *See* Echeverria-Hernandez v. INS, 923 F.2d 688, 694 (9th Cir. 1991), *vacated on other grounds,* 946 F.2d 1481 (1991) (holding that the customary norm of safe haven in times of civil war was preempted by the enactment of the Refugee Act of 1980 and the executive act of voluntary departure).

courts have directly dealt with the territorial characteristics of military vessels, The Commander's Handbook on the Law of Naval Operations is perhaps the most important tool in analyzing the way the United States Government views its military vessels, as well as the jurisdictional laws surrounding them. It is therefore helpful in determining whether an American military vessel can be equated to Guantanamo Bay for *Boumediene* purposes of applying the Constitution to foreign nationals.

According to the Commander's Handbook, which provides guidance for American military officers "on the rules of law governing naval operations in peacetime and during armed conflict,"[109] United States Naval policy *requires* warships to assert the rights of sovereign immunity.[110] The privilege of sovereign immunity entitles all U.S. warships and United States ships (USS) to "exclusive control over persons onboard such vessels with respect to acts performed onboard."[111] More importantly, the Commander's Handbook states, "U.S. law applies at all times aboard U.S. vessels as the law of the flag nation and is enforceable on U.S. vessels . . . anywhere in the world."[112]

Similar to the Commander's Handbook, the Judge Advocate General's Operational Law Handbook, which acts as a "how to" guide for military lawyers[113] declares that state craft, including warships, are "absolutely immune on the high seas."[114]

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[109] Int'l Law Dep't, U.S. Naval War College, U.S. Navy, NWP 1-14M, The Commanders Handbook on the Law of Naval Operations, p. 3 (2007).

[110] Int'l Law Dep't, U.S. Naval War College, U.S. Navy, NWP 1-14M, The Commanders Handbook on the Law of Naval Operations, § 2.2.2, p. 2-2 (2007).

[111] Int'l Law Dep't, U.S. Naval War College, U.S. Navy, NWP 1-14M, The Commanders Handbook on the Law of Naval Operations, § 2.1, p. 2-1 (2007).

[112] Int'l Law Dep't, U.S. Naval War College, U.S. Navy, NWP 1-14M, The Commanders Handbook on the Law of Naval Operations, § 3.11.2.1, p. 3-10 (2007).

[113] Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, JA 422, Operational Law Handbook, p. i (2014).

[114] Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, JA 422, Operational Law Handbook, p. 174 (2014) (citing article

Both the Commander's Handbook and the Operational Law Handbook strongly suggest that American military ships in international waters are essentially United States territory abroad, and certainly under the exclusive control and jurisdiction of the United States. Both the Commander's Handbook and the Operational Law Handbook thus can be said to equate an American military ship in international waters to Guantanamo Bay, for *de facto* jurisdictional purposes. Similar to the *Boumediene* reasoning of "complete and total control" that the United States holds over Guantanamo Bay, the Commander's Handbook gives the United States "exclusive control" over military vessels such as the one used to transport Ahmed Abu Khatallah.

Moreover, the Commander's Handbook specifically states that U.S. law applies at all times on American flagged vessels. Surely, U.S. law refers to the whole Constitution including the Fourth Amendment. Therefore, the United States Government must abide by the Fourth Amendment when it searches terrorism suspects like Ahmed Abu Khatallah aboard an American military vessel, even if the vessel is located in international waters.

V. RAMIFICATIONS OF EXTENDING FOURTH AMENDMENT PROTECTIONS TO FOREIGN NATIONALS HELD ABOARD AMERICAN MILITARY SHIPS IN INTERNATIONAL WATERS.

The practice of extending the provisions of the Fourth Amendment to foreign nationals held aboard an American military vessel in international waters raises several important policy considerations. Firstly, who has the jurisdiction to issue warrants for such searches? Could any federal judge in the United States issue such a warrant? Or would it be limited to judges within a certain jurisdiction? And if so, which jurisdiction? Similarly, what court can hear challenges to such warrants? Would it be the district court to which the suspect is ultimately brought? Or would it be a special court created specifically for such purposes?

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95 of the Convention of the Law of the Sea). *See also Id.* at 171 (providing complete sovereign immunity for State vessels).

The second policy consideration implicated by such a decision is what effect that decision will have on future dealings with captured terrorism suspects. The United States can easily defeat having to grant the protections of the Fourth Amendment to a foreign suspect by delaying the suspect from reaching an American vessel. Capturing forces could take the time to search and interrogate the suspect in the nation where the capture takes place before transporting the suspect back to the United States. However, this would result in added delay, and most likely added risk for both the capturing forces and the captured suspect, who would have to spend more time in a likely hostile environment. The consequences of extending the protections of the Fourth Amendment to foreign suspects aboard American ships in international waters could therefore result in a failure to even prevent a search of the suspect without a warrant, while at the same time place American citizens, and even the foreign suspect himself, at greater harm.

A third important policy consideration is the likelihood of compliance with such a rule. Compliance with such a rule ultimately relies on whether the information resulting from a search would later be used or excluded from the trial of the captured terrorism suspect. Exclusion of ill-gotten information would most likely help ensure compliance with the requirements of the Fourth Amendment. However, if the Government already has a strong enough case (and if the Government is going to exercise its rendition powers, it likely has a strong enough case already) then exclusion of the information resulting from the search would not be of much consequence. Searches would be conducted more for intelligence value rather than evidentiary value during a subsequent prosecution, and the threat of future exclusion of information gained would therefore not stop searches when a warrant is unable to be obtained. The rule requiring a warrant would thus prove toothless, all the while unnecessarily restricting the later prosecution of the captured suspect.

VI. CONCLUSION

While the history of decisions regarding the extraterritorial application of the Constitution, from *Eisentrager* to *Verdugo*, seems to

suggest that the United States Government's search of Ahmed Abu Khatallah aboard a ship in international waters is legal, the Supreme Court's decision in *Boumediene* challenges that theory.

Following the *Verdugo* holding and Justice Frankfurter's concurrence in *Reid*, the Fourth Amendment would not be applicable to foreign nationals held aboard American ships in international waters. However, following the more recent *Boumediene* holding, because the American military vessel on which he was searched is subject to the exclusive control and jurisdiction of the United States, despite being in international waters and outside United States territory, the protections of the Fourth Amendment would seemingly extend to Abu Khatallah just as the protections of a habeas corpus petition extended to the detainees held at Guantanamo Bay in *Boumediene*. In other words, the Fourth Amendment would protect Abu Khatallah because an American military ship in international waters is "not abroad; it is within the constant jurisdiction of the United States."[115]

Regardless of the lack of value and heavy burden produced by such a rule, in light of *Boumediene*, the Fourth Amendment, as well as the rest of the Constitution, likely applies to foreign terrorism suspects held aboard American military vessels, even if the ships are located in international waters. This unintended consequence of the *Boumediene* decision leaves the United States Government operating in a dubious zone of legality when it searches terrorist suspects aboard military vessels absent a warrant, and may ultimately necessitate a change in the way the United States deals with captured terrorism suspects in the future.

[115] *See Boumediene*, 553 U.S. 723 at 769; Rasul v. Bush, 542 U.S. 466, 480 (2004).