NORMALIZING GUANTÁNAMO

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Over the past decade, a growing chorus of courts and commentators has expressed concern that doctrinal accommodations reached in post-9/11 terrorism cases might spill over or "seep" into more conventional bodies of jurisprudence.[1] Thus, the typical narrative goes, civilian criminal courts will encounter immense pressure to bend settled rules of evidence or procedure to ensure that high-profile terrorism suspects aren't acquitted on technicalities, that secrecy concerns don't prevent the government from making its case-in-chief, and so on. Indeed, whether or not one supports "special" procedural and evidentiary rules for terrorism cases, the very real possibility that such rules will not long be limited to the unique context in which they arose has routinely been invoked to militate against such departures in the first place—justifying either rigid adherence to the conventional rules, or the creation of an entirely separate system for dealing with terrorism suspects.

Regardless of where one comes down on this issue, virtually all discussions of the "seepage" concern to date have focused on criminal prosecutions; for obvious reasons, it is in that context that there is the greatest and most systemic likelihood that terrorism cases will exert pressure on judges to distort settled rules. Moreover, it is far less obvious how cases concerning the extracriminal detention or

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1. *See generally* GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009) (making the argument that a hybrid national security court is the solution to the difficulties presented by trying terror suspects in domestic courts); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003) (advocating for a distinct court system to remove risk of expansion of post-9/11 procedure into traditional Article III courts); Amos N. Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008) (presenting two distinct ideas on handling the balance between national security concerns and the rights of terror suspects); Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 (arguing for a specialized court to handle terror suspects instead of trying them in current domestic courts); Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15 (explaining how the *Padilla* case illustrates the inability of domestic courts to overcome procedural hurdles in terror cases). The most thorough academic treatment of the risks posed by adherence to the pre-9/11 models is Robert M. Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008). I, for one, have been fairly skeptical of the argument that terrorism concerns justify a separate system of national security courts. *See, e.g.*, Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505 (2009).

mistreatment of noncitizens at Guantánamo and elsewhere could ever raise comparable concerns; with exceptions not here relevant,[2] the government generally lacks analogous authority over individuals *not* affiliated with al Qaeda and its affiliates.[3] As such, no matter how much disagreement these decisions concerning the scope of the government's detention authority or the relevant burden of proof may provoke,[4] one may assume a variation on the sentiment expressed by then-Chief Judge Mukasey concerning the *Padilla* litigation[5]—that "Padilla's is not only the first, but also the only case of its kind. There is every reason not only to hope, but also to expect that this case will be just another of the isolated cases, like [*Ex Parte*] *Quirin*, that deal with isolated events and have limited application."[6] Like the *Padilla* litigation, there may be every reason to think that, for as interesting as the Guantánamo cases are, and as serious as they are to the parties involved, their broader doctrinal significance is minimal at best.

In the Essay that follows, I offer a somewhat different view. In particular, my thesis is that the Guantánamo jurisprudence of the District of Columbia Circuit ("D.C. Circuit") is beginning to have a growing impact on "ordinary" bodies of American constitutional law, at least in those areas where there *is* the potential for crossover. More to the point, as I've explained elsewhere,[7] the D.C. Circuit has an effective monopoly on Guantánamo litigation. Thus, whatever its merits, we simply can no longer treat the D.C. Circuit's work vis-à-vis Guantánamo as a diversion.

2. There are a number of ways in which the government may seek to detain individuals without charges, including the detention of: (1) non-citizens pending deportation, *see, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001); (2) enemy aliens, *see, e.g.*, Ludecke v. Watkins, 335 U.S. 160 (1948); (3) material witnesses, *see, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011); (4) dangerous sex offenders who are subject to civil commitment, *see, e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997); and (5) individuals who present an imminent risk to public health, *see, e.g.*, Foucha v. Louisiana, 504 U.S. 71 (1992); Jacobson v. Massachusetts, 197 U.S. 11 (1905). But whatever the merits of each of these distinct grounds for noncriminal detention, courts have steadfastly resisted the proposition that they are relevant to the military detention of suspected belligerents.

3. At least where U.S. citizens are concerned, the government must at a minimum have a statutory basis for detention, *see* 18 U.S.C. § 4001(a) (2006) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."), and no statute besides the September 18, 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) authorizes the military detention of terrorism suspects. *But see* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (codified at 8 U.S.C. § 1226(a)) (authorizing the short-term civil detention of noncitizen terrorism suspects).

4. *See generally* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451 (2011) [hereinafter Vladeck, *D.C. Circuit*] (summarizing the contentious debate over the D.C. Circuit's decisions on the merits in Guantánamo habeas cases in the aftermath of Boumediene v. Bush, 553 U.S. 723 (2008)).

5. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

6. *Id.* at 57 (discussing *Ex Parte* Quirin, 317 U.S. 1 (1942), which upheld the jurisdiction of a military tribunal commissioned by President Roosevelt to try eight Nazi saboteurs captured within the territorial United States during the Second World War).

7. Vladeck, *D.C. Circuit*, *supra* note 4, at 1452 & n.14.

To illustrate this claim, I focus on the *Omar* litigation, an outgrowth of a habeas petition brought by a U.S. citizen detained by U.S. forces in Iraq based on allegations that he was actively involved in the insurgency against the Iraqi provisional government.[8] In its most recent decision this July (in *Omar v. McHugh*, or "*Omar II*"), a divided panel of the D.C. Circuit held that Congress had constitutionally barred the federal courts from entertaining the merits of Omar's claim that he credibly fears torture or other forms of cruel, inhuman, or degrading treatment if transferred to Iraqi custody.[9] Specifically, Judge Kavanaugh's majority opinion concluded that the Suspension Clause[10] does not bar Congress from foreclosing federal jurisdiction over such a claim, as it appeared to provide in the REAL ID Act of 2005.[11]

In its holding, the *Omar II* panel relied heavily on an earlier D.C. Circuit decision that *did* arise out of Guantánamo—the decision in *Kiyemba v. Obama* ("*Kiyemba II*"), in which the same court held that the Suspension Clause confers a right to neither notice nor a hearing prior to a detainee's transfer to any country in which the federal government has provided assurances to the court that the detainee will not be tortured.[12] Thus, although *Omar II* is also a military detention case, it is one critical factual step removed from the terrorism-specific context of Guantánamo. And although its rationale relies heavily on a Guantánamo case, the crux of its reasoning is even further divorced from arguments about the *sui generis* nature of post-9/11 terrorism detention. In short, the D.C. Circuit's decision in *Omar II* converts what was a Guantánamo-specific statutory holding into a general rule of constitutional law that can—and will—apply far afield of military detention cases. Indeed, as this Essay concludes, *Omar II*'s analysis not only may impact run-of-the-mill immigration and extradition cases, but it could also empower Congress to further constrain the scope of federal habeas review in a host of additional cases.

8. *See* Omar v. Harvey, 416 F. Supp. 2d 19, 21–22 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), *vacated in part sub nom.* Munaf v. Geren, 553 U.S. 674 (2008).

9. *See* Omar v. McHugh (*Omar II*), 646 F.3d 13 (D.C. Cir. 2011) (citing Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010)). I refer to this opinion as "*Omar II*" to distinguish it from the D.C. Circuit's earlier decision in "*Omar I*." *See* Omar v. Harvey (*Omar I*), 479 F.3d 1.

10. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

11. 8 U.S.C. § 1252(a)(4) (2006) ("Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.").

12. *See Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009). This case is commonly referred to as "*Kiyemba II*" to distinguish it from the litigation concerning the Uighurs' right to be released into the United States, which produced the D.C. Circuit's decisions in "*Kiyemba I*," *see* Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), and "*Kiyemba III*," *see* Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

Put simply, *Omar II* crosses a critical line that the courts had largely observed—perhaps to a fault—in post-9/11 detention cases. And although reasonable people may well disagree about whether *Omar II* is rightly decided, what cannot be gainsaid is that the rule for which it stands is trans-substantive, and could dramatically affect federal habeas review going forward, along with Congress's control thereof, in cases having nothing to do whatsoever with the war on terrorism. Regardless of the effect that seepage is having on procedural and evidentiary issues in criminal cases, it is indisputable that *Omar II* is an example of seepage on an even bigger scale—and *sub silentio*, at that.

I begin in Part I with the relevant background to *Omar II*, including coverage of: (1) the litigation—including *Omar I*—that produced the Supreme Court's 2008 decision in *Munaf v. Geren*;[13] (2) the litigation culminating in the Court's decision on the same day in *Boumediene v. Bush*;[14] and (3) the D.C. Circuit's post-*Boumediene* jurisprudence with respect to Guantánamo,[15] in particular its decision in *Kiyemba II*. In Part II, I turn to the decision in *Omar II* itself. After recounting the proceedings before the district court after the Supreme Court's remand in *Munaf*, Part II focuses on the majority and concurring opinions in the D.C. Circuit, especially the analytical premises underlying Judge Kavanaugh's rationale for the majority. With the background provided in Part I as the backdrop, Part II explains how *Omar II* relied upon the D.C. Circuit's Guantánamo jurisprudence to resolve a general constitutional question of first impression—and in a manner that could have profound significance. Thus, Part II concludes by articulating the ways in which *Omar II* has already had an effect on "ordinary" immigration and extradition cases, and in which it may well yet come to bear on Congress's efforts vis-à-vis other classes of habeas claims.

I. *OMAR I* AND *MUNAF*, *BOUMEDIENE*, AND *KIYEMBA II*

A. *Omar I* and *Munaf*

Shawqi Ahmad Omar was one of a pair of U.S. citizens captured and subsequently detained in Iraq by U.S. forces under the auspices of the Multinational Force-Iraq ("MNF-I").[16] Like Mohammed Munaf,[17] Omar sought to invoke the jurisdiction of the U.S. federal courts to prevent what he believed to be his impending transfer to Iraqi custody on the ground that he feared he would be mistreated—and perhaps even tortured—by Iraqi authorities.[18] To that end, Omar filed a habeas petition in the District of Columbia district court, and concomitantly sought a temporary restraining order (and subsequently a preliminary injunction) barring his transfer pending disposition of his claim for habeas relief.[19]

The government opposed the injunction on three grounds, arguing that the district court lacked jurisdiction over Omar's habeas petition, and that, in any event, Omar could not state a viable claim on the merits, either because his claim presented a nonjusticiable political question or because he had no right not to be transferred.[20] With regard to the jurisdictional issue, the government's argument centered on the Supreme Court's terse 1948 per curiam decision in *Hirota v. MacArthur*,[21] which, the government claimed, foreclosed federal habeas jurisdiction over any individual in "multinational" custody.[22]

The district court held *Hirota* to be distinguishable for three distinct reasons: (1) that Omar was a U.S. citizen, (2) that Omar claimed to be in the "constructive" custody of the United States, and (3) that *Hirota* had been overtaken by subsequent jurisprudence.[23] Judge Urbina did not proceed to rule for Omar on the merits, but instead concluded that his claim was sufficiently serious as to warrant the issuance of a preliminary injunction.[24]

The government took an immediate appeal to the D.C. Circuit, a panel majority of which agreed with the district court in its entirety.[25] In particular, Judge Tatel held that the fact that Omar had not yet been convicted by an Iraqi court rendered *Hirota* distinguishable,[26] and that the district court was within its discretion to enjoin Omar's transfer in order to protect its jurisdiction.[27] Judge Brown dissented in part—largely agreeing with the majority's jurisdictional analysis,[28] but disagreeing with its affirmance of the injunction.[29] Over the dissents of Judges Brown and

13. *See* 553 U.S. 674 (2008).
14. *See* 553 U.S. 723 (2008).
15. *See, e.g.*, *Kiyemba II*, 561 F.3d 509.
16. Omar v. Harvey, 416 F. Supp. 2d 19, 21 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), *vacated in part sub nom.* Munaf v. Geren, 553 U.S. 674 (2008). For a complete background of the case, see *Omar*, 416 F. Supp. 2d at 21–22.
17. *See Munaf*, 553 U.S. at 681 (describing backgrounds of Omar and Munaf).
18. *Omar*, 416 F. Supp. 2d at 22.
19. *Id.*
20. *Id.*
21. 338 U.S. 197 (1948); *see also* Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) (holding that *Hirota* applies to the jurisdiction of the lower federal courts, in addition to the Supreme Court's "original" jurisdiction).
22. *Hirota* had rejected the Supreme Court's jurisdiction to entertain habeas petitions by noncitizens convicted of various war crimes by the Tokyo war crimes tribunal—the International Military Tribunal for the Far East. *See* 338 U.S. 197. For an in-depth discussion of *Hirota* and its relevance (or lack thereof) to *Omar* and *Munaf*, see Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497 (2007); *see also* Aziz Huq, *The* Hirota *Gambit*, 63 N.Y.U. ANN. SURV. AM. L. 63 (2007).
23. *See Omar*, 416 F. Supp. 2d at 23–27. The "constructive custody" distinction was rather tenuous, since Hirota himself had been in the *actual* custody of U.S. forces at the time he sought habeas relief. *See, e.g.*, Karen Shafrir, *Habeas Corpus, Constructive Custody and the Future of Federal Jurisdiction After* Munaf, 16 U. MIAMI INT'L & COMP. L. REV. 91 (2008) (arguing that the *Omar* and *Munaf* cases are evidence of a need for broad construction of "custody").
24. *See Omar*, 416 F. Supp. 2d at 28–30.
25. *See Omar I*, 479 F.3d 1, 3 (D.C. Cir. 2007).
26. *See id.* at 8–9.
27. *See id.* at 11–14.
28. Judge Brown disagreed with the majority that Omar's *citizenship* helped to explain why *Hirota* was distinguishable. *See id.* at 15 n.1 (Brown, J., dissenting in part). Otherwise, Brown agreed that *Hirota* did not apply. *See id.* at 15.
29. *See id.* at 15–20.

Kavanaugh, the D.C. Circuit denied rehearing en banc,[30] and the government sought certiorari from the Supreme Court.

At the same time, Munaf (through his sister as his next friend) also sought to challenge his impending transfer to Iraqi custody.[31] Unlike Omar, however, Munaf had already been convicted by Iraq's Central Criminal Court ("CCC-I"), and was therefore seeking to block his transfer for purposes of serving his sentence.[32] That difference proved critical to Judge Lamberth, who concluded that, unlike in *Omar*, Munaf's case could *not* be distinguished from *Hirota*, and thus the district court lacked jurisdiction to reach the merits.[33]

On appeal, a divided panel of the D.C. Circuit agreed with the district court, concluding: "Our result is required by the Supreme Court's decision in *Hirota v. MacArthur*."[34] Judge Randolph concurred in the judgment, disagreeing that *Hirota* foreclosed jurisdiction,[35] but concluding that Munaf was bound to lose on the merits in any event because of the Supreme Court's decision in *Wilson v. Girard*,[36] which held that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."[37] Munaf then sought review from the Supreme Court, which granted certiorari to both *Munaf* and the government in *Omar*, and consolidated them for purposes of oral argument.[38] In between the grants of certiorari and oral argument, however, the Iraqi Court of Cassation vacated Munaf's conviction,[39] thereby eliminating the distinction that had proved dispositive of the jurisdictional issue in the lower courts.

Perhaps because of that development, the Supreme Court made quick work of the government's reliance upon *Hirota* as cutting against the lower courts' jurisdiction. As Chief Justice Roberts explained, "That slip of a case cannot bear the weight the Government would place on it."[40] Instead, the critical fact for jurisdictional purposes was that the detainees were in the actual custody of the U.S. military.[41] That, according to the Court, was sufficient to trigger the jurisdiction conferred by the federal habeas statute.[42]

But whereas the Court agreed with the *Omar I* panel that the federal courts had jurisdiction to enjoin the transfers, the Court disagreed with the court of appeals that such a difficult jurisdictional issue was, of itself, sufficient to justify a preliminary injunction.[43] Instead, Chief Justice Roberts explained that it was error for the *Omar I* panel to affirm the district court's injunction without holding that Omar was likely to succeed on the merits.[44] Of course, that holding, by itself, would have been sufficient to vacate the decisions below and remand for further proceedings.[45] But the Court went on to reach the merits, even though the parties had scarcely devoted any attention to the merits in their briefing.[46] As Chief Justice Roberts wrote, "Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course."[47]

On the merits, the majority began with a variation on the theme at the heart of Judge Randolph's concurrence in *Munaf*—that "Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil."[48] As such, there was no general basis for enjoining Omar's or Munaf's transfer to Iraqi custody. From there, the Court moved onto the heart of the merits issue—the claim that the detainees feared torture and other forms of mistreatment if transferred. The Court deferred, relying on the Solicitor General's assertions "that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result,"[49] and that "the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs."[50] Thus, as Chief Justice Roberts explained, "The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign

30. *Omar v. Harvey*, No. 06-5126 (D.C. Cir. May 24, 2007).

31. *See* Mohammed v. Harvey, 456 F. Supp. 2d 115, 117 (D.D.C. 2006), *aff'd sub nom.* Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007), *vacated*, 553 U.S. 674 (2008).

32. *See id.* at 117–20.

33. *See id.* at 129–30.

34. *Munaf*, 482 F.3d at 583. Even as it found itself bound to follow *Hirota*, the *Munaf* panel was clear that:

> In holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens. In particular, *Hirota* does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute.

Id. at 584.

35. *See id.* at 585–86 (Randolph, J., concurring).

36. 354 U.S. 524 (1957).

37. *See Munaf*, 482 F.3d at 586 (quoting *Girard*, 354 U.S. at 529).

38. *See* Munaf v. Geren, 552 U.S. 1074 (2007) (mem.).

39. *See* Kevin Jon Heller, *Iraqi Court Reverses US Citizen's Conviction*, OPINIO JURIS (Mar. 2, 2008, 4:50 AM), http://opiniojuris.org/2008/03/02/iraqi-court-reverses-us-citizens-conviction/.

40. Munaf v. Geren, 553 U.S. 674, 686 (2008).

41. *See id.* at 686–88.

42. *See id.*

43. *Id.* at 690.

44. *See id.* at 689–91.

45. *See id.* at 691 ("What we have said thus far would require reversal and remand in each of these cases: The lower courts in *Munaf* erred in dismissing for want of jurisdiction, and the lower courts in *Omar* erred in issuing and upholding the preliminary injunction.").

46. *See id.* at 689–91.

47. *Id.* at 692.

48. *Id.* at 694; *see also id.* at 697 ("[H]abeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them.").

49. *Id.* at 702.

50. *Id.* (internal quotation marks omitted).

justice systems and undermine the Government's ability to speak with one voice in this area."[51]

The opinion, however, seemed to leave open the possibility that, in an appropriate case, the executive branch's assertions might not be conclusive, explaining that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[52] In his concurrence, Justice Souter suggested that the same logic should necessarily extend "to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it."[53] Because there were no compelling reasons to doubt the executive branch's assurances in *Munaf*, though, the Court concluded that judicial intervention was inappropriate.[54]

Finally, the Court went on to consider the possibility that the detainees might nevertheless be entitled to a judicial remedy thanks to the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"),[55] which implemented the United States' treaty obligations under the U.N. Convention Against Torture ("CAT").[56] In particular, section 2242(a) of FARRA provides:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[57]

Thus, FARRA has generally been recognized as creating a substantive statutory right against transfer to torture, at least in cases in which it applies—and, as we will see, therein lies the rub.

More than a little ironically (given that the Court had reached out to decide the merits even though the decisions below only involved jurisdictional questions), the majority ducked the FARRA issue on the ground that it had not been properly raised:

> Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court. Even in their merits brief in this Court, the habeas petitioners hardly discuss the issue. The Government treats the issue in kind. Under such circumstances we will not consider the question.[58]

Although the *Munaf* Court intimated in a footnote that the detainees *could* perfect their FARRA claims on remand,[59] Chief Justice Roberts identified two potential pitfalls to the merits of such a claim:

> First, the Act speaks to situations where a detainee is being "return[ed]" to "a country." It is not settled that the Act addresses the transfer of an individual located in Iraq to the Government of Iraq; arguably such an individual is not being "returned" to "a country"—he is already there.[60]

Second, and perhaps more importantly, the Chief Justice suggested that "claims under the FARR Act may be limited to certain immigration proceedings"[61] since FARRA itself purported to strip the federal courts of jurisdiction to consider claims under the Act "except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252)."[62]

Although the Court's decision left open the possibility that the detainees could state viable FARRA claims on remand, Chief Justice Roberts's footnote 6 articulated two of the biggest potential obstacles to such claims' success.[63] And whereas a number of circuit courts had already rejected the argument that FARRA could only be invoked in removal proceedings,[64] those decisions predated—and Chief Justice Roberts's analysis failed to consider—the REAL ID Act of 2005, which arguably compelled the same result.[65] Indeed, while FARRA could arguably be read to limit judicial review to the context of challenges to removal orders, the REAL ID Act appeared to make that command explicit, providing:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive

51. *Id.*

52. *Id.*

53. *Id.* at 706 (Souter, J., concurring).

54. *Id.* at 702–05 (majority opinion).

55. Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 2681, 2681–761 (codified as amended in 8 U.S.C. § 1231 note and scattered sections of 28 U.S.C.) [hereinafter FARRA].

56. Under Article 3 of the Convention, "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

57. FARRA § 2242(a), 112 Stat. at 2681–822 (codified at 8 U.S.C. § 1231 note).

58. *Munaf*, 553 U.S. at 703 (citations omitted).

59. *See id.* at 703 n.6 ("We . . . express no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on remand.").

60. *Id.* (alteration in original) (citations omitted).

61. *Id.*

62. *See id.*; *see also* FARRA § 2242(d), 112 Stat. at 2681–822 (codified at 8 U.S.C. § 1231 note).

63. *Munaf*, 553 U.S. at 703 n.6.

64. *See, e.g.*, Saint Fort v. Ashcroft, 329 F.3d 191, 193 (1st Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 141 (2d Cir. 2003); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 209 (3d Cir. 2003); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000). *See generally* Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr*:* Ogbudimkpa v. Ashcroft, 113 YALE L.J. 2007 (2004) (explaining why the courts of appeals had interpreted FARRA so as not to divest federal habeas jurisdiction).

65. To that end, the courts of appeals to reach the issue have generally concluded that the REAL ID Act overruled their prior interpretations of FARRA as not precluding habeas review. *See, e.g.*, Kamara v. Att'y Gen., 420 F.3d 202, 209 (3d Cir. 2005) (discussing the relationship between REAL ID and *Ogbudimkpa*).

> means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).[66]

Thus, even if the petitioners could properly invoke FARRA on remand, *Munaf* nevertheless left two critical questions open: whether detainees should have the opportunity to rebut the government's assurance that they will not be mistreated if transferred, and whether Congress had limited (and *could* limit) the federal courts' power to entertain FARRA claims in the context of deportation proceedings.

B. Boumediene

Because of its limited and fact-specific holdings, *Munaf* was dramatically overshadowed by the Supreme Court's decision that same day in *Boumediene*, in which the Court held that: (1) the Suspension Clause "has full effect" with regard to the detention of noncitizens at Guantánamo, and (2) the Military Commissions Act of 2006[67] violated the Suspension Clause by taking away the jurisdiction of the federal courts to entertain habeas petitions brought by Guantánamo detainees without providing an adequate alternative.[68] Whereas the Court had held in *Rasul v. Bush* that the federal habeas *statute* conferred jurisdiction over the Guantánamo detainees' habeas petitions,[69] *Boumediene* went one critical constitutional step further, concluding that Congress was barred from taking that jurisdiction away.[70]

Although much could be—and has been—said about *Boumediene*,[71] a few points are particularly relevant here: First, for the first time, the Court expressly embraced the proposition that, absent a valid suspension of the writ, the Suspension Clause requires the availability of *some* judicial forum in which U.S. detainees can pursue those habeas claims protected by the Clause.[72] The Court did not explain which claims *were* protected by the Clause, although the Justices accepted without dispute that challenges to ongoing executive detention were necessarily included.[73]

Second, and relatedly, the Court for the first time concluded that an act of Congress violated the Suspension Clause because it took away access to a habeas remedy that had previously been available.[74] Justice Kennedy's opinion did not pause to explain *why* Congress lacked the power to take away jurisdiction it didn't have to confer—from courts that it didn't have to create—but given that a combination of statutes and Supreme Court decisions precluded access to any other forum for the Guantánamo detainees,[75] it followed that, in taking away the habeas jurisdiction of the lower federal courts without providing an adequate substitute, Congress was in fact taking away *all* access to a judicial remedy.

Third, although the Court repeated its prior suggestion that the Suspension Clause, "at the absolute minimum," protects the writ "as it existed in 1789,"[76] Justice Kennedy's opinion went out of its way to take the relevant English legal history seriously—even though it ultimately concluded that such history was inconclusive as to the territorial scope of the writ.[77] *Boumediene* thereby appeared to suggest that the Suspension Clause necessarily protects any claim that a detainee could have pursued in a habeas proceeding in pre-revolutionary England. That

66. REAL ID Act of 2005, Pub. L. No. 109-13, §106(a)(4), 119 Stat. 302, 310 (codified at 8 U.S.C. §1252(a)(4)).

67. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

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

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

70. To be fair, the crux of Chief Justice Roberts's dissent in *Boumediene* was that it was premature to conclude that Congress had failed to provide an adequate alternative to habeas without concluding that the "Combatant Status Review Tribunals" failed to provide adequate process. *See Boumediene*, 553 U.S. at 800–803 (Roberts, C.J., dissenting). For more on this argument (and why, in my view, it fails to persuade), see Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2142–44 (2009).

71. *See, e.g.*, Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537 (2010) (examining the implications of the Court's decision in *Boumediene* on habeas corpus law in general).

72. *See* INS v. St. Cyr, 533 U.S. 289 (2001) (reaching basically the same conclusion albeit only in the context of outlining the constitutional issues that would arise if a statute were read to preclude federal habeas jurisdiction).

73. *See, e.g.*, *Kiyemba II*, 561 F.3d 509, 512 (D.C. Cir. 2009) ("The Court in *Boumediene* did not draw (or even suggest the existence of) a line between 'core' and 'ancillary' habeas issues, neither of which terms appears in the opinion . . . . Rather, the Court stated simply that § 2241(e)(1) 'effects an unconstitutional suspension of the writ.' Accordingly, we read *Boumediene* to invalidate § 2241(e)(1) with respect to all habeas claims brought by Guantanamo detainees, not simply with respect to so-called 'core' habeas claims." (citations and footnotes omitted)); *cf.* Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) (suggesting that the "core" of habeas encompasses any claim that "goes directly to the constitutionality of [a detainee's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration").

74. To articulate this point somewhat differently, the Constitution did not compel Congress to either create lower federal courts or to create a federal statutory cause of action for habeas corpus. As Justice Scalia suggested in his dissent in *St. Cyr*, it at least *appears* that there should be no constraint on Congress's power to roll back that habeas jurisdiction which it has chosen to confer, lest the Suspension Clause become a "one-way ratchet." *See St. Cyr*, 533 U.S. at 340 n.5 (Scalia, J., dissenting). Another possibility is that *Boumediene* disproves the Madisonian Compromise. *See* Lumen N. Mulligan, Essay, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535 (2010). Ultimately, both of these views prove too much. The only reason why a statute repealing the habeas jurisdiction of the lower federal courts implicates the Suspension Clause is because of a series of Supreme Court decisions (and Acts of Congress) that closed off access to other potential judicial forums. *See* Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71 (2008) [hereinafter Vladeck, *Riddle*].

75. *See, e.g.*, Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) (barring state courts from issuing writs of habeas corpus to federal jailers); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807) (holding that the Supreme Court can only issue an "original" writ of habeas corpus as an exercise of its constitutional "appellate" jurisdiction); D.C. CODE § 16-1901(b) (2001) (barring District of Columbia local courts from entertaining writs of habeas corpus directed to federal officers). *See generally* Vladeck, *Riddle*, *supra* note 74 (discussing habeas actions in the Superior Court of the District of Columbia).

76. Boumediene v. Bush, 553 U.S. 723, 746 (2008).

77. *See id.* at 752 ("We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point."); *see also* Stephen I. Vladeck, Book Review, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 968 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) [hereinafter Vladeck, *Habeas Revisionism*] ("In that respect, what is perhaps most frustrating about *Boumediene* is how close the Court came to doing right by English history, only to miss the forest for a want of trees.").

conclusion only begs the historical question, of course, but it at least recognizes the necessary implication of any clear answer thereto.

Notwithstanding (or perhaps so as not to distract from) these momentous holdings, the Court declined to offer any guidance as to the procedural, evidentiary, or substantive rules that would govern the nonstatutory habeas review that its opinion compelled. *Boumediene* thereby precipitated a remarkable flurry of litigation in the D.C. courts raising not just the merits of the detainees' habeas claims, but a host of issues related to what the courts should do in cases in which the detainees prevailed.[78]

C. *Kiyemba II*

One such case involved the Uighurs—a group of ethnically Turkic Muslims from a semi-autonomous region of western China.[79] One week after *Boumediene*, the D.C. Circuit held that the Uighurs could no longer be held as enemy combatants.[80] But if the Uighurs could not be detained, neither could they be returned to China, since no one contested that they credibly feared persecution if sent home.[81] Two different claims ensued: First, the Uighurs claimed they had a right to be released into the territorial United States.[82] Second, at a minimum, the Uighurs sought notice and a hearing prior to their potentially involuntary transfer to a third-party country.[83]

In *Kiyemba I*, the D.C. Circuit rejected the Uighurs' first claim, holding that the federal courts lack the power to order the admission of non-citizens into the United States.[84] Although the majority's logic was sweeping, subsequent proceedings before the Supreme Court narrowed the issue somewhat.[85] Indeed, *Kiyemba I* may ultimately be said to stand for the more limited proposition that, where a detainee receives (and declines) a genuine offer to resettle to a third country, the Constitution does not require that the detainee be released into the United States in lieu of continuing detention.[86]

Of far more relevance, especially for present purposes, is the D.C. Circuit's rejection of the Uighurs' second claim in *Kiyemba II*.[87] Writing for a divided panel, Judge Ginsburg held—curiously—that the Uighurs' entitlement to notice and a hearing was foreclosed by the Supreme Court's decision in *Munaf*. As he explained:

> The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws.[88]

In other words, whereas *Munaf* was an extradition case resting on a circumstance-specific factual determination about the likelihood that the detainees faced mistreatment at the hands of a specific foreign sovereign (i.e., Iraq), the D.C. Circuit held that it also applied to preclude notice or judicial review of a detainee's involuntary non-criminal transfer to an as-yet-undetermined country about which no specific determinations could have been made.[89] Thus, as I've suggested previously:

> [A]lthough Judge Ginsburg's opinion appeared to rest on the merits, rather than on the district court's jurisdiction, that distinction effectively collapses in the face of the government's blanket assertion that it does not ever transfer or otherwise repatriate detainees to countries in which they are "more likely than not" to be tortured.[90]

Kiyemba II thereby converted *Munaf*'s highly narrow analysis into a general rule purporting to bar judicial second-guessing of the executive branch in *any* case in

78. *See* Baher Azmy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010) (addressing the common law of habeas); *see also* Vladeck, *D.C. Circuit*, *supra* note 4.

79. *See In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 34–35 (D.D.C. 2008) (concerning seventeen Uighurs held in Guantánamo whom the government detained without judicial redress for a period of seven years).

80. Parhat v. Gates, 532 F.3d 834, 854 (D.C. Cir. 2008).

81. *See Kiyemba I*, 555 F.3d 1022, 1024 (D.C. Cir. 2009) ("Releasing petitioners to their country of origin poses a problem. Petitioners fear that if they are returned to China they will face arrest, torture or execution. United States policy is not to transfer individuals to countries where they will be subject to mistreatment."), *vacated*, 130 S. Ct. 1235 (2010) (per curiam).

82. *See id.* (rendering a decision on this first claim).

83. *See Kiyemba II*, 561 F.3d 509, 516 (D.C. Cir. 2009) (rendering a decision on the second claim).

84. *Kiyemba I*, 555 F.3d at 1028–29.

85. *See id.* ("[E]ach of the detainees at issue in this case has received at least one offer of resettlement in another country. . . . This change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so.").

86. As Justice Breyer explained in his statement respecting the denial of certiorari in *Kiyemba III*, in which Justices Kennedy, Ginsburg, and Sotomayor concurred, "In my view, these [resettlement] offers, the lack of any meaningful challenge as to their appropriateness, and the Government's uncontested commitment to continue to work to resettle petitioners transform petitioners' claim. Under present circumstances, I see no Government-imposed obstacle to petitioners' timely release and appropriate resettlement." *Kiyemba III*, 131 S. Ct. at 1631 (Breyer, J., respecting the denial of certiorari).

87. *See Kiyemba II*, 561 F.3d 509, 516 (D.C. Cir. 2009) (denying petitioners' request to enjoin their transfer based on the expectation that a recipient country will detain or prosecute them).

88. *Id.*

89. *See id.* at 515 n.6 ("*Munaf* concerned a specific transfer, but the transferee sovereign's likely treatment of the petitioners was not material to its holding.").

90. Vladeck, *Habeas Revisionsim*, *supra* note 77, at 974.

which a detainee in U.S. custody faced transfer to the custody of a foreign sovereign.[91]

Finally, the D.C. Circuit reached the issue that *Munaf* had ducked—whether FARRA might provide an independent basis for relief. Taking up Chief Justice Roberts's suggestion from footnote 6 (and ignoring the contraindicated circuit-level authority), the *Kiyemba II* panel concluded that Congress had limited judicial review of FARRA claims to the review of removal orders, citing (but not mentioning by name) the REAL ID Act of 2005.[92] Thus, *Kiyemba II* categorically held that FARRA claims could not be raised outside the context of petitions for review of removal orders, albeit without considering whether such an interpretation of the REAL ID Act might implicate the Suspension Clause, at least in those cases (like *Kiyemba II*) in which the petitioner had no such opportunity.[93]

In a lengthy concurrence, Judge Kavanaugh added one additional substantive point unmentioned by Judge Ginsburg—that, in addition to *Munaf*, the "rule of non-inquiry," pursuant to which U.S. courts generally don't review the fairness of a foreign criminal justice system, compelled deference to the "Executive's considered judgment that transfer is unlikely to result in torture."[94] Whatever the merits of the rule of non-inquiry, especially after FARRA,[95] Judge Kavanaugh's invocation of it in *Kiyemba II* is more than a little curious. After all, unlike *Munaf*, *Kiyemba II* was about a detainee's *transfer* to a foreign country (not necessarily for the purpose of facing prosecution), rather than his extradition thereto.[96] Indeed, in cases like *Kiyemba II*, no foreign sovereign is *requesting* the detainee; rather, they are being sent there because they can no longer be held by the United States.[97]

In his partial (but pointed) dissent, Judge Griffith offered a series of objections to the majority's reasoning, including that: (1) the pre-revolutionary history of habeas in England clearly supported the proposition that the writ could be used to challenge unlawful transfers,[98] (2) *Munaf* was not to the contrary—and was easily distinguishable,[99] and (3) even if *Munaf* was not distinguishable, the Supreme Court had not there categorically precluded detainees from an opportunity to demonstrate that their transfer would be unlawful.[100]

91. *But see* Khouzam v. Att'y Gen., 549 F.3d 235, 259–60 (3d Cir. 2008) (holding that it violates the Due Process Clause to deny a noncitizen in removal proceedings an opportunity to rebut diplomatic assurances made by a foreign sovereign that he would not be tortured if removed to that country).

92. *Kiyemba II*, 561 F.3d at 514–15. Specifically, Judge Ginsburg quoted 8 U.S.C. § 1252(a)(4) (which was added by the REAL ID Act of 2005), even though he only *mentioned* FARRA. *See id.*

93. The *Kiyemba II* majority only mentioned the Suspension Clause twice—in a pair of footnotes neither of which had anything to do with FARRA. *See id.* at 512 nn.1–2.

94. *Id.* at 517, 518 n.4 (Kavanaugh, J., concurring).

95. *See generally* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973 (2010).

96. *Compare* Munaf v. Geren, 553 U.S. 674 (2008), *with Kiyemba II*, 561 F.3d 509.

97. *See Kiyemba II*, 561 F.3d at 1024 (explaining reasons requiring Uighurs' release).

98. *See id.* at 523–24 (Griffith, J., concurring in the judgment in part and dissenting in part).

99. *See id.* at 525–26.

It's worth reflecting a bit on Judge Griffith's historical analysis, for it will also prove relevant to *Omar II*. As the dissent explained:

> The bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas . . . . Because the Habeas Corpus Act of 1679 "was the model upon which the habeas statutes of the 13 American Colonies were based," the Supreme Court has looked to the 1679 Act to determine the contours and content of constitutional habeas. Section 12 of the 1679 Act included a prohibition against the transfer of prisoners to places where the writ did not run. Because *Boumediene* extended constitutional habeas to the Guantanamo detainees, we should acknowledge that jurisdiction to hear the petitioners' claims against unlawful transfer—a fundamental and historic habeas protection—is grounded in the Constitution.[101]

If anything, Judge Griffith *undersold* the historical record. As Professor Paul Halliday's recent study of habeas in pre-revolutionary England demonstrates, the notion that

> the habeas jurisdiction of King's Bench ran to *any* possible unlawful transfer, and not just to those raising claims of torture, is borne out by the various writs issued by Lord Chief Justice Mansfield to prevent the removal from England of individuals allegedly bound for slavery, or to inquire into the propriety of the induction of impressed seamen.[102]

Unlike in *Boumediene*, then, the historical record is far clearer that unlawful transfer was the kind of claim that fell within the scope of English habeas practice at the Founding. To that end, the Suspension Clause should presumably protect a detainee's right to a judicial remedy if he has a colorable argument that his potential transfer is unlawful, even if the detainee must overcome a strong presumption on the merits, based on the executive branch's assurances, that the transfer is, in fact, lawful.[103]

100. *See id.*

101. *See id.* at 523–24 (citations omitted).

102. Vladeck, *Habeas Revisionism*, *supra* note 77, at 975 (emphasis in original).

103. As Judge Griffith explained:

> The possibility of continued detention by a foreign nation on behalf of the United States after a transfer is the very issue we must address. Although the status of these detainees has been put to an adversarial process, whether their transfers will be lawful has not. I do not see how the court can safeguard the habeas rights *Boumediene* extended to these detainees without allowing them to challenge the government's account.

Kiyemba II, 561 F.3d at 525 (Griffith, J., concurring in the judgment in part and dissenting in part).

Notwithstanding Judge Griffith's forceful analysis, the D.C. Circuit denied rehearing en banc by a six-to-three vote,[104] and the Supreme Court denied certiorari.[105] And despite repeated attempts by detainee lawyers to have the D.C. Circuit revisit the issue, the court repeatedly adhered to *Kiyemba II* in subsequent cases, even when the detainee sought to challenge his transfer based on a fear of mistreatment by *non*-state actors (an issue raised in neither *Munaf* nor *Kiyemba II*),[106] or sought initial hearing en banc.[107] As the (similar) six-to-three vote denying en banc review in *Abdah v. Obama* suggests, four of the other six active D.C. Circuit judges appear to agree with Judges Ginsburg and Kavanaugh that *Kiyemba II* follows from *Munaf*—or, at the very least, that it isn't an incorrect reading thereof.[108] And although three Supreme Court Justices dissented from the denial of a stay in a case concerning fear of torture by non-state actors,[109] none dissented from the denial of certiorari in *Kiyemba II*, and only Justices Breyer and Sotomayor dissented (albeit without opinion) from the denial of certiorari in *Khadr v. Obama*, a petition raising the same issue.[110]

Thus, whereas *Munaf* left open both whether detainees could rebut the government's assurances and whether properly raised FARRA claims could provide the basis for relief, *Kiyemba II* appeared to answer both of those questions in the negative, at least where the military detention of terrorism suspects was concerned.[111]

II. *OMAR II* AND ITS IMPLICATIONS

Indeed, the only issue that the D.C. Circuit arguably failed to resolve in *Kiyemba II* and its progeny was the remaining constitutional question: If Congress *had* in fact divested the federal courts of jurisdiction to entertain FARRA claims outside the context of removal proceedings in the REAL ID Act of 2005, did the REAL ID Act thereby violate the Suspension Clause, at least after (and in light of) *Boumediene*? As this Part explains, that is where the decision in *Omar II* comes in—and rather controversially, at that.

104. Kiyemba v. Obama, No. 05-5487 (D.C. Cir. filed July 27, 2009) (mem.).

105. Kiyemba v. Obama, 130 S. Ct. 1880 (2010).

106. *See* Mohammed v. Obama, No. 10-5218, slip op. at 1 (D.C. Cir. July 8, 2010) (per curiam). *But see id.* at 3–4 (Tatel, J., concurring in part and dissenting in part) (explaining why *Kiyemba II* does not necessarily control in other cases).

107. *See* Abdah v. Obama, 630 F.3d 1047 (D.C. Cir. 2011) (mem.) (denying rehearing en banc).

108. *See id.*

109. *See* Mohammed v. Obama, 131 S. Ct. 32, 32 (2010) (Ginsburg, J., dissenting) ("I would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*." (citation omitted)).

110. *See* Khadr v. Obama, 131 S. Ct. 2900 (2011) (mem.).

111. For the proposition that *Kiyemba II* was a Guantánamo-specific (or, at least military detention-specific) rule, consider Judge Kavanaugh's concurrence, which harped on the history of the transfer of "wartime alien detainees" in support of the majority's holding. *See Kiyemba II*, 561 F.3d 509, 519–20 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

By the time *Omar* was finally decided by the district court on remand from the Supreme Court,[112] the D.C. Circuit had already decided *Kiyemba II*, and had therefore already held that the REAL ID Act foreclosed consideration of FARRA claims in any context other than immigration removal proceedings.[113] In other words, *Kiyemba II* had resolved in the specific context of Guantánamo the general statutory question that *Munaf* had left open in Omar's case. Unsurprisingly, then, Judge Urbina found himself bound to follow *Kiyemba II*, and its interpretation of the REAL ID Act. As he explained, "Despite differing circuit interpretations of the REAL ID Act's effect on habeas jurisdiction, this court is constrained by the binding precedent enunciated in *Kiyemba [II]*."[114] As for the grave constitutional question that such a reading thereby presented,[115] Judge Urbina believed that *Kiyemba II* had necessarily (if implicitly) settled that issue, as well:

> Whatever the merit of these arguments, this court is bound by the majority's holding in *Kiyemba*, which—as evidenced by Judge Griffith's dissenting opinion—considered the Suspension Clause issue raised here but nonetheless dismissed the petitioners' FARR Act claims. Indeed, without explicitly addressing the issue, the majority in *Kiyemba* suggests that these Suspension Clause concerns are trumped by the separation of powers principles that preclude judicial second-guessing of the Executive's authority on matters of foreign policy and diplomacy.[116]

Of course, as noted above, *Kiyemba II* had *not* resolved the Suspension Clause issue.[117] And so, when the *Omar* litigation went back to the exact same D.C. Circuit panel that decided *Kiyemba II*, the constitutional issue was front-and-center.

A. *The D.C. Circuit's Decision*

Writing for himself and Judge Ginsburg, Judge Kavanaugh began where Judge Ginsburg's majority opinion in *Kiyemba II* had left off:

> By its terms, the FARR Act provides a right to judicial review of conditions in the receiving country only in the immigration context, for aliens seeking review of a final order of removal. The FARR Act does not give extradition or military transferees—the other two categories in which transfer issues typi-

112. *See* Omar v. Geren, 689 F. Supp. 2d 1 (D.D.C. 2009), *aff'd*, 646 F.3d 13 (D.C. Cir. 2011).

113. *Kiyemba II* was decided on April 7, 2009. *See Kiyemba II*, 561 F.3d at 509. A D.C. Circuit panel composed of Judges Tatel, Brown, and Edwards remanded the *Omar* litigation to the district court on September 2, 2008. *See* Omar v. Geren, 296 F. App'x 72 (D.C. Cir. 2008). The district court issued its decision on September 28, 2009. *See* Omar v. Geren, 689 F. Supp. 2d 1 (D.D.C. 2009).

114. *Omar*, 689 F. Supp. 2d at 6.

115. *See id.* at 6 n.7 ("[T]he fact that the petitioner appears to have no avenue of judicial review would appear to implicate Suspension Clause concerns.").

116. *Id.* at 6–7 (footnotes and citations omitted).

117. *See supra* Part I.C.

> cally arise—a right to judicial review of conditions in the receiving country. Omar is a military transferee, not an alien seeking review of a final order of removal under the immigration laws. Therefore, the FARR Act does not afford him any right to judicial review of conditions in the receiving country.[118]

Recognizing the fact that FARRA "states a broad 'policy' that the Executive Branch presumably has a responsibility to follow with respect to all transfers,"[119] the D.C. Circuit nevertheless ignored other circuit court decisions holding that FARRA could be enforced via habeas,[120] citing *Kiyemba II* as "controlling circuit precedent" for the proposition that "the FARR Act, as supplemented by the REAL ID Act of 2005, does not give military transferees such as Omar [a right to judicial review of conditions in the receiving country]."[121] In other words, the panel's analysis assumed that FARRA had never conferred a substantive right not to be transferred to torture outside the context of removal proceedings to begin with, and so the jurisdictional issue was beside the point.

Moreover, even if FARRA did so provide, Judge Kavanaugh turned to the elephant in the room—the REAL ID Act of 2005, which "made clear that those kinds of transferees have no such right. The REAL ID Act states that only immigration transferees have a right to judicial review of conditions in the receiving country, during a court's review of a final order of removal."[122] But whereas *Omar II*'s FARRA argument assumed that Congress had not created a substantive right in the first place, its analysis of the REAL ID Act necessarily turned on an analytically distinct premise—that Congress *had* conferred such a right in 1998, and had subsequently withdrawn federal habeas jurisdiction with regard to that right in 2005.[123] Whereas the former view was simply inconsistent with the weight of extant precedent, the latter squarely raised the constitutional question that the courts had to that point assiduously avoided.[124]

Turning to the Suspension Clause issue, Judge Kavanaugh started with *Munaf*. As he argued, "The Supreme Court ruled in *Munaf*—litigation in which Omar himself was a party—that the Constitution does not grant extradition or military transferees such as Omar a habeas corpus or due process right to judicial review of conditions in the receiving country before they are transferred."[125] Taking this curious reading of *Munaf* one step further, Kavanaugh turned (as in his *Kiyemba II* concurrence) to the rule of non-inquiry, invoking it as proof that "[t]hose facing extradition traditionally have not been able to maintain habeas claims to block transfer based on conditions in the receiving country."[126] As he continued:

> Similarly, military transferees traditionally have not been able to raise habeas claims to prevent transfer based on conditions in the receiving country. Since the Founding, the United States has routinely transferred wartime detainees at the end of hostilities or as part of an exchange, without judicial review of conditions the transferees would face in the other nation.[127]

Thus, "Omar is in a class of would-be transferees who historically have not been able to bring habeas claims to obtain judicial review of conditions in the receiving country before being transferred."[128]

Of course, since Omar's principal claim was that his transfer would violate the CAT (and, as such, FARRA), the pre-1998 history should not have been dispositive of the merits. Nevertheless, Kavanaugh then invoked *Boumediene* for the proposition that "[t]hat history matters,"[129] concluding that the dearth of historical precedent supporting a right to judicial review of detainee transfers compelled the conclusion that the Suspension Clause did not protect a right to review of FARRA claims.[130]

In so holding, *Omar II* conflated the jurisdictional issue with the merits. After all, the absence of exemplar cases prior to 1998 could just as easily reflect the fact that, prior to FARRA, there was no substantive right *to enforce* via habeas, and so the existence *vel non* of jurisdiction was beside the point.[131] If FARRA conferred a substantive right not to be transferred to torture, then that should have changed the entire analytical foundation of the opinion.[132]

118. *Omar II*, 646 F.3d 13, 17–18 (D.C. Cir. 2011).

119. *Id.* at 18.

120. *See, e.g.*, sources cited *supra* note 64.

121. *Omar II*, 646 F.3d at 17.

122. *Id.* at 18. It is worth noting that there is a non-frivolous interpretation of the REAL ID Act that would have avoided this issue altogether. Indeed, because section 106 of the REAL ID Act was focused entirely on streamlining judicial review in *immigration* cases by funneling claims into a petition for review, one could reasonably—and perhaps convincingly—have concluded that § 1252(a)(4) should not even apply in cases arising outside of the immigration context, in which jurisdiction is otherwise being extinguished, not redirected. Suffice it to say, neither *Kiyemba II* nor *Omar II* considered the merits of this reading, let alone whether it might be supported by the constitutional avoidance canon.

123. *See id.* at 17–18.

124. *See, e.g.*, Mironescu v. Costner, 480 F.3d 664, 677 n.15 (4th Cir. 2007) (explaining that the Court did not decide whether the REAL ID Act would violate the Suspension Clause to the extent it barred habeas jurisdiction over FARRA claims).

125. *Omar II*, 646 F.3d at 18–19.

126. *Id.* at 19.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* at 19–21.

131. Put slightly differently, if the Suspension Clause protects a detainee's right to challenge the legal basis of his detention, the pre-FARRA defect was not the absence of a right to judicial review, but rather the absence of a legal basis that would render transfer to torture unlawful—and therefore a basis for relief in a habeas petition.

132. One way to read *Omar II* is simply as holding that FARRA in fact did no such thing—that the right FARRA created was only conferred upon those individuals in removal proceedings. Leaving aside the absurd result of this argument (in which Congress only conferred such an important right upon *non*citizens), it is belied in any event by the circuit-level authority squarely holding that the right created by FARRA can be enforced via habeas. *See, e.g.*, sources cited *supra* note 64. The *Omar II* majority seemed to realize this as well, since it went on to resolve the constitutional question that such a reading of FARRA would have mooted.

Instead, Judge Kavanaugh moved from there to Omar's argument that the *statutory* right to relief created by FARRA was protected by the Suspension Clause. In his words,

> Because Omar has no constitutional right at stake here (as *Munaf* made clear), Congress has no obligation to provide judicial review for the extra-constitutional responsibilities the FARR Act imposes on the Executive Branch. Omar suggests that Congress cannot express a policy for the Executive Branch to follow without also creating a right to judicial enforcement of that policy. No case has ever said that. Under Omar's approach, Congress may not express a general policy regarding transfers and make that policy judicially enforceable only for immigration transferees. Yet Congress could constitutionally achieve the same result simply by declaring that the transfer policy itself applies only to immigration transferees. The Constitution does not turn on such arcane and empty semantics.[133]

It is unquestionably correct that Congress is under no compulsion to create a statutory right that can be invoked in a habeas proceeding. Similarly, it follows that Congress can repeal whatever right FARRA created. But it again conflates the jurisdictional question with the merits to suggest that, because Congress did not *have to* create the statutory right, and because Congress could therefore take it away, there could be no intervening constitutional right to judicial review to enforce the right *while it existed*. As Judge Griffith explained in his concurrence in the judgment,

> Congress can always repeal statutory rights or create new authority for detention, thereby limiting the range of habeas claims that federal prisoners may bring. But that is not what Congress has done here. It has not repealed section 2242(a), the ground for Omar's claim, but has instead sought to limit his ability to bring his claim in federal court. The majority counters that there is no real difference between expressly repealing a right and accomplishing the same end by stripping habeas jurisdiction. I disagree. A core premise of the Suspension Clause is that the form of legislative action can make a great deal of difference in terms of political accountability: repealing a right tends to focus the public's attention in a way that the lawyerly maneuver of jurisdiction stripping does not.[134]

Rather than respond to that point outright, the *Omar II* panel's fallback argument was that Congress in the REAL ID Act had "repealed" FARRA, at least to the extent that the jurisdictional provision had the *effect* of confining to removal proceedings the substantive right that FARRA arguably conferred:

> [E]ven if the REAL ID Act took away a statutory right that the FARR Act had previously granted, that scenario poses no constitutional problem. Congress does not amend the Constitution, or alter the scope of the *constitutional* writ of habeas corpus, whenever it amends a *statutory* right that might be available in a habeas case. Congress thus remains generally free to undo a statute that applies in habeas cases, just as it can undo other statutory rights that it has created.[135]

Again, as Judge Griffith explained in his concurrence, this analysis is correct, but analytically beside the point.[136] Leaving aside the venerable canon of statutory interpretation that holds that repeals by implication are disfavored,[137] there is simply no indication in the REAL ID Act's text or legislative history that Congress in any way meant to alter the *substantive* right that FARRA had created—quite to the contrary.[138] Indeed, the animating purpose of section 106 of the REAL ID Act was to reorient the structure of judicial review in immigration cases, and funnel most—if not all—claims into petitions for review of removal orders.[139] It would therefore defy common sense to infer, in the absence of any supporting text or legislative history, a congressional intent to extinguish rights that had previously existed.

To understand the weakness in *Omar II*'s logic on this point, consider *Boumediene*: By Judge Kavanaugh's logic, the Supreme Court should have interpreted the Military Commissions Act of 2006[140] as repealing whatever sub-constitutional rights the detainees were seeking to enforce, including their claim that their detention was not actually authorized by the 2001 Authorization for the Use of Military Force.[141] But the right to judicial review that the Court there recognized was a right to review of *any* existing claim that the detainee's confinement violated

133. *Omar II*, 646 F.3d at 22.

134. *Id.* at 29 (Griffith, J., concurring in the judgment) (citation omitted). Although Judge Griffith therefore disagreed with the majority's jurisdictional analysis, he concurred in the judgment because he believed (per Chief Justice Roberts's suggestion in *Munaf*) that FARRA did not create a substantive right for individuals already on a foreign country's soil to contest their transfer to *that* country. *See id.*; *see also* Munaf v. Geren, 553 U.S. 674, 703 n.6 (2008) (explaining that it is not settled that FARRA addresses the transfer of an individual already located in that country because he is not being "returned" to that country).

135. *Omar II*, 646 F.3d at 22 (majority opinion).

136. *See id.* at 25 (Griffith, J., concurring in the judgment).

137. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 416 (1994); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984). Moreover, repeals by implication are *especially* disfavored in appropriations statutes like the REAL ID Act of 2005, which was Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 190 (1978).

138. *See* H.R. REP. NO. 109-72, at 176 (2005) (Conf. Rep.); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 137 n.17 (2006–2007) ("The Conference Report describes this provision as granting, rather than barring, a remedy.").

139. *See* Neuman, *supra* note 138.

140. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

141. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

federal law, be it the Constitution, statute, or treaty.[142] Indeed, the majority painstakingly *avoided* holding that the detainees were protected by other constitutional provisions (such as the Due Process Clause), and virtually all of the Guantánamo cases turn on the substantive claim that the petitioner's detention exceeds the *statutory* authority for detention that Congress has provided.[143]

Thus, *Omar II* stands for either (or both) of two analytically distinct—and incorrect—propositions. Either: (1) FARRA never created a substantive right for individuals to challenge their transfer to torture outside the context of removal proceedings (which is belied by case law from other circuits); or (2) Congress in the REAL ID Act constitutionally divested the federal courts of jurisdiction over FARRA claims, either because the REAL ID Act *repealed* FARRA's substantive right or because it didn't have to.

But it is also worth stepping back for a moment to appreciate the chain of decisions that produced this result. In the D.C. Circuit's view, *Kiyemba II* followed from *Munaf*, and *Omar II* followed from *Munaf* and *Kiyemba II*.[144] This logic thereby allowed for the importation into cases having nothing to do with the war on terrorism—and perhaps even further removed than *Munaf* and *Omar II*—legal principles that the judges who articulated them at least *appeared* to view as limited to Guantánamo. And whereas one might react that, though not technically a terrorism case, *Omar II* is sufficiently isolated so as not to raise seepage concerns, the nature of the D.C. Circuit's holding tolerates no such distinction.

142. In point of fact, the overwhelming majority of the Guantánamo detainees' substantive claims on the merits are that no statute authorizes their detention—*not* that the Constitution forbids it. *See* Vladeck, *D.C. Circuit*, *supra* note 4.

143. Perhaps in light of this concern, the *Omar II* majority amended the original opinion, *see* Omar v. McHugh, No. 09-5410, 2011 WL 2451016 (D.C. Cir. June 21, 2011), to include the following new discussion:

> None of this means that the Executive Branch may detain or transfer Americans or individuals in U.S. territory at will, without any judicial review of the positive legal authority for the detention or transfer. In light of the Constitution's guarantee of habeas corpus, Congress cannot deny an American citizen or detainee in U.S. territory the ability to contest the positive legal authority (and in some situations, also the factual basis) for his detention or transfer unless Congress suspends the writ because of rebellion or invasion . . . . Here, we are addressing Omar's separate argument, not about the positive legal authority or factual basis for his transfer, but rather about conditions in the receiving country. The Supreme Court addressed that argument as well in *Munaf*, and it concluded that a right to judicial review of conditions in the receiving country has not traditionally been part of the habeas or due process inquiry with respect to transfers. Therefore, Congress need not give transferees such as Omar a right to judicial review of conditions in the receiving country.

Omar II, 646 F.3d at 24 (citations omitted). As Judge Griffith explained in his (amended) concurrence, "The majority never explains why the Suspension Clause's protections depend on a distinction between whether Congress has withheld statutory authority from the Executive to transfer a prisoner or granted a statutory right against transfer, and the difference seems to me no more than 'empty semantics.'" *Id.* at 28 (Griffith, J., concurring in the judgment).

144. *See supra* p. 1563 (describing the D.C. Circuit's progression from *Munaf* to *Kiyemba II* and then *Omar II*).

B. Immediate Implications: Immigration and Extradition Cases

Indeed, the question of whether the REAL ID Act of 2005 deprives federal courts of the power to entertain FARRA claims in habeas petitions has already arisen in two additional contexts: cases in which noncitizens facing removal can't pursue such relief in a challenge to their removal order, and cases in which individuals face extradition to a foreign country for purposes of criminal prosecution. In both categories of cases, *Omar II*'s impact could be immediately felt.

Taking the immigration cases first, as noted above, the central purpose of section 106 of the REAL ID Act of 2005 was to streamline judicial review in immigration cases, and to therefore channel into the context of petitions for review claims that had previously been raised primarily in habeas petitions. To that end, there are any number of post-REAL ID circuit-level decisions treating claims for habeas relief as functionally equivalent to petitions for review, and reaching the petitioner's entitlement to relief on the merits under FARRA and the U.N. Convention Against Torture (which FARRA implements).[145]

But there are at least two contexts in which such a remedy might not be available to noncitizens facing removal: those who are placed in expedited removal proceedings under 8 U.S.C. § 1225, and who are therefore not entitled to any direct judicial review of their removal order (and only limited collateral review);[146] and those whose FARRA claim arises after the time period in which a petition for review may be filed has expired.

Although there do not appear to be any reported examples of the prior scenario, the Third Circuit's decision in *Khouzam v. Attorney General*[147] helps to show how the latter scenario might arise. In *Khouzam*, which originated under the Second Circuit's jurisdiction, a noncitizen who was placed in removal proceedings sought to prevent his removal on the ground that he credibly feared torture if returned to his home country, Egypt.[148] Although the Second Circuit concluded that Khouzam was not eligible for asylum or withholding of removal, it also held that Khouzam validly feared torture if returned to Egypt, and so was entitled to deferral of removal.[149]

Years later, the government terminated Khouzam's deferral on the ground that it had received diplomatic assurances from Egypt that Khouzam would not be tortured if sent home.[150] Khouzam in turn filed a habeas petition seeking to block

145. *See, e.g.*, Toledo-Hernandez v. Mukasey, 521 F.3d 332 (5th Cir. 2008); Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007); Toussaint v. Att'y Gen., 455 F.3d 409 (3d Cir. 2006).

146. *See* 8 U.S.C. § 1252(a)(2)(A), (e)(1) (2006).

147. 549 F.3d 235 (3d Cir. 2008).

148. *Id.* at 239–41.

149. Khouzam v. Ashcroft, 361 F.3d 161, 169–72 (2d Cir. 2004).

150. *See Khouzam*, 549 F.3d at 238–39 ("In 2007, without notice or a hearing, the Department of Homeland Security ('DHS') again detained Khouzam, and prepared to remove him based on diplomatic assurances by Egypt that he would not be tortured.").

his impending removal to Egypt, claiming that the Due Process Clause entitled him to an opportunity to contest Egypt's diplomatic assurances before a neutral decision-maker.[151] The Third Circuit agreed on the merits, but only after a convoluted analysis of its jurisdiction. The court held that the REAL ID Act had divested the district court of habeas jurisdiction, but that the government's termination of Khouzam's deferral was itself a removal order reviewable via a petition for review, and so the Third Circuit could nevertheless entertain Khouzam's claim.[152] Had the jurisdictional analysis come out the other way (as the government argued it should—and as it easily might have), the exact same Suspension Clause issue raised in *Omar II* would have materialized.

But whereas *Omar II*'s direct implications in immigration cases have at least thus far proven hypothetical, it is not hypothetical that it will directly impact extradition cases, as well. Consider *Mironescu v. Costner*,[153] in which the Fourth Circuit reviewed a district court decision denying the government's motion to dismiss a Romanian citizen's habeas petition that sought to block his extradition to Romania on the ground that he credibly feared torture if extradited.[154] Without reaching the merits of the detainee's FARRA claim, the Fourth Circuit held that, although review was not barred by the rule of non-inquiry,[155] it *was* barred by section 2242(d) of FARRA, read in conjunction with the REAL ID Act.[156]

Critically, though, whereas *Mironescu* thereby appeared to provoke the same constitutional question that *Kiyemba II* raised (and *Omar II* answered), the Fourth Circuit sidestepped the issue, noting that "Mironescu does not argue that denying him the opportunity to present his CAT and FARR Act claims on habeas review violates the Suspension Clause. We therefore do not address that issue."[157] Put another way, the exact same issue was presented in *Mironescu*, and the Fourth Circuit only failed to resolve it because the petitioner himself didn't raise it.

We hardly need to speculate about the possibility that a similar case might recur; it already has. In *Trinidad y Garcia v. Benov*, a citizen of the Philippines sought to block his extradition to that country to stand trial on kidnapping charges on the ground that he credibly feared torture if extradited.[158] The district court denied the government's motion to dismiss the petition, concluding that its jurisdiction followed from the Ninth Circuit's pre-REAL ID Act decision in *Cornejo-Barreto v. Seifert*,[159] and was not otherwise barred by the rule of non-inquiry or *Munaf*.[160] A

151. Khouzam v. Hogan, 529 F. Supp. 2d 543, 547 (M.D. Pa. 2008).
152. *Khouzam*, 549 F.3d at 244–49.
153. 480 F.3d 664 (4th Cir. 2007).
154. Mironescu v. Rice, No. 05-683, 2006 WL 167981, at *1 (M.D.N.C. Jan. 20, 2006).
155. *Mironescu*, 480 F.3d at 668–73.
156. *Id.* at 673–77.
157. *Id.* at 677 n.15.
158. 715 F. Supp. 2d 974 (C.D. Cal. 2009).
159. 218 F.3d 1004 (9th Cir. 2000).
160. *Trinidad y Garcia*, 715 F. Supp. 2d at 995–98.

three-judge panel of the Ninth Circuit affirmed in an unpublished disposition,[161] but the court has since vacated that decision and reheard the issue en banc.[162] Thus, the Ninth Circuit now has before it the same issue decided in *Omar II*, albeit in the context of a traditional extradition case. If *Omar II* is correct, then the same result should necessarily follow—and thereby bar *any* individual in extradition proceedings from invoking FARRA as a basis for relief.

C. *Longer-Term Implications: Congressional Power over Habeas*

Separate from the direct implications that *Omar II* has had (and will have) in immigration and extradition cases, perhaps its biggest effect will be in its approach to Congress's power to control federal habeas jurisdiction—and federal jurisdiction more generally. To date, *Boumediene* remains the only instance in which the Supreme Court has ever held that an act of Congress violates the Suspension Clause, and if *Omar II* is not directly inconsistent with *Boumediene*, it suggests circumstances in which Congress *may* validly divest the federal courts of habeas jurisdiction *without* providing an adequate alternative remedy. To be sure, *Omar II* arose in the unique context of the REAL ID Act of 2005, but that statute is just one of five distinct pieces of legislation that Congress has enacted during the past fifteen years that somehow restrain the habeas corpus jurisdiction of the federal courts.[163] If there is any daylight between *Omar II*'s endorsement of Congress's power and *Boumediene*'s rejection thereof, it should stand to reason that Congress could easily exploit the former opinion in the future to further cabin detainees' access to the federal courts. I don't mean to oversell the point; there is every reason to hope that Congress will take *Boumediene* seriously, and that the five habeas-stripping statutes enacted between 1996 and 2006 will become a thing of the past. But so long as *Omar II* remains on the books, it will stand as an endorsement of Congress's power to constrict the scope of habeas for statutory rights going forward.

CONCLUSION

To be sure, one reaction to the above may simply be that the D.C. Circuit's decision in *Omar II* is dreadfully wrong, and that the solution is simply to expurgate it—whether through the D.C. Circuit sitting en banc or, if necessary, the

161. Trinidad y Garcia v. Benov, 395 Fed. App'x 329, 332 (9th Cir. 2010).
162. Trinidad y Garcia v. Benov, 636 F.3d 1174, 1175 (9th Cir. 2011) (mem.). This case was argued before the en banc panel on June 23, 2011.
163. In addition to the REAL ID Act and the Military Commissions Act of 2006, both discussed above, Congress also enacted habeas-stripping measures in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat 1214 (codified as amended in scattered sections of 8, 18, 21, 22, 28, 42, 49, 50 U.S.C.), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8, 18 U.S.C.), and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in §§ 10 U.S.C. 801 note, 28 U.S.C. 2241, 42 U.S.C. 2000dd-dd1 (2006)).

Supreme Court. I, for one, very much hope that the opinion meets with such a fate. But given the D.C. Circuit's disinclination to revisit *Kiyemba II*, one might expect a similar aversion to rehearing *Omar II* (or an analogous case) en banc, even if the court *could*. And even though cases like *Trinidad y Garcia* might provoke a circuit split, one might also fear that the Supreme Court will not be inclined to step into such a thorny constitutional thicket.

Thus, on the assumption that the opinion in *Omar II* withstands such scrutiny in the near term, the larger point I aimed to demonstrate in this Essay is the process by which circumstance-specific decisions arising out of Iraq and the war on terrorism became increasingly divorced from their factual uniqueness, and came increasingly to stand for general legal principles the application of which is indifferent to whether the case at issue involves terrorism, war, or any other national security issue. Others have written—and will surely continue to write—about the myriad ways in which such seepage takes place in criminal cases, especially with regard to constitutional rules of criminal procedure and evidence.

But in the final analysis, what is telling about the move from *Munaf* to *Kiyemba II* to *Omar II* is the way in which seepage can happen far afield of ordinary criminal cases, where the issues go to the underlying power of the courts in the first instance and their authority to enforce substantive constraints on government authority, rather than the constraints themselves. Seepage in the former context may be inevitable. But it is only inevitable in the latter context if we continue to fail to appreciate the significance of the distinction between jurisdiction and the merits.