

RESORTING TO EXTRAORDINARY WRITS: HOW THE ALL WRITS ACT RISES TO FILL THE GAPS IN THE RIGHTS OF ENEMY COMBATANTS

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The indefinite detention of prisoners at Guantánamo Bay Naval Base raises serious concerns about what rights those detainees are entitled to and whether detainees will have the power to exercise them. How, for instance, could a detainee pursue a meaningful appeal of a decision of the Combatant Status Review Tribunal without effective assistance of counsel? How could a detainee challenge his detention when the U.S. government renders that detainee to foreign custody? The All Writs Act, a broad and historic statute originally codified in the Judiciary Act of 1789, provides that “courts may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The Act grants the courts equitable power to issue injunctions that ensure that litigants’ substantive rights are not frustrated by interstices in the applicable law. It is in this Act that district courts exercising habeas corpus jurisdiction found detainees’ rights to effective assistance of counsel and thirty days’ notice prior to transfer to foreign custody. While the Military Commissions Act stripped the courts of habeas jurisdiction with respect to alien enemy combatants, the equitable power granted by the All Writs Act can attach to any jurisdiction, including the appellate power given to the D.C. Circuit Court of Appeals to review determinations made at Guantánamo Bay. This Note provides a roadmap that courts should apply when considering whether to issue an All Writs Act injunction, and concludes that such injunctions are not only permissible but also an appropriate and important exercise of the courts’ power.

INTRODUCTION

One of the central controversies in the war on terror has been the government’s detention of hundreds of prisoners in Cuba, Iraq, and elsewhere. The detention of these prisoners has been the subject of four Supreme Court decisions and two major statutory revisions. Despite the attention paid by the Court, Congress, and the President, little clarity has emerged regarding the process due to these enemy combatants.

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After the Supreme Court ruled that detainees housed at Guantánamo Bay were entitled to petition for a writ of habeas corpus,¹ the Defense Department provided “notifications” to the detainees informing them that they could challenge their detention “through a process called a *petition for a writ of habeas corpus*.”² The notifications failed to explain what the petition was or how a detainee would go about filing one.³ Moreover, the government refused to allow counsel to meet with the detainees, creating what one judge called a “Sisyphean quagmire.”⁴ Through these acts, the government sought to turn the Supreme Court’s order into a set of formalities imposing no substantive obligations.

In response to the executive branch’s attempts to frustrate meaningful application of the judiciary’s orders, some courts have robustly exercised their power to manage the treatment of and process due to detainees. Whenever the judiciary takes a supervisory role over the executive branch, however, questions of judicial competence are appropriate: Should the judiciary make detailed decisions regarding the execution of its orders, or should it rely on the executive to interpret and implement such orders and evaluate only after the fact? These questions are amplified when the judiciary’s management relates to the treatment of enemy combatants during wartime given the executive’s power to wage war.

Despite these questions, many courts have recently exercised such supervisory powers under the All Writs Act (AWA).⁵ The AWA applies where a legislative scheme is unclear or incomplete. The language grants courts power to issue “necessary or appropriate” writs, and thus operates as a gap-filler for the *casus omissus*—the unprovided-for case.⁶ The body of AWA jurisprudence is wide in the context of habeas corpus petitions because habeas corpus proceedings

¹ *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004).

² *Adem v. Bush*, 425 F. Supp. 2d 7, 12 (D.D.C. 2006).

³ *Id.* at 12 n.9. The district court noted:

The Court doubts that most Americans would understand the meaning of the phrase “petition for a writ of *habeas corpus*.” To expect Adem, who does not speak English and who ‘almost certainly lack[s] a working knowledge of the American legal system’ to intuit the meaning of an ancient, Latin, legal term of art is simply absurd.

Id. at 25.

⁴ *Id.* at 14. When assistance from counsel was granted by the D.C. District Court, notifications of this right were mailed in English to the detainees. There is no evidence that these mailed notifications were ever translated. *Id.* at 17 n.20.

⁵ 28 U.S.C. § 1651(a) (2000).

⁶ William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 995–96 (2001).

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are subject to neither federal civil nor criminal procedural rules.⁷ It is also unsurprising that the AWA would have a wide berth in war on terror issues since these issues operate either as a new body of law or as a purely executive prerogative.

In contrast to the cases described in this Note, the AWA's discretionary power historically has been exercised sparingly. By virtue of its infrequent use and discretionary nature, jurisprudence concerning the issuing of extraordinary writs, or so-called "All Writs Act injunctions,"⁸ is sparse, and a clear standard is lacking on the face of the statute. Because the Guantánamo detainee cases invoking the AWA have come before many judges, the decisions risk being characterized as discretionary actions not grounded in sound jurisprudence.

It is therefore appropriate that Part I of this Note reviews and organizes the AWA jurisprudence, with a focus on the Supreme Court and the circuit courts. This Part demonstrates that certain factors prove decisive in the granting of an AWA injunction. The courts have not acted capriciously, but rather have developed factors that take into account each word of the statute and the Act's history. These factors provide a framework for reviewing the application of the AWA to specific rights, such as the effective assistance of counsel, throughout the Note.

Part II considers two applications of the AWA in the Guantánamo cases before the statutory right to habeas corpus was extinguished by the Military Commissions Act (MCA).⁹ In one case, the D.C. District Court established a right to effective assistance of counsel grounded in the AWA. Another series of decisions, which I call the "transfer abeyance" cases, considered injunctions against detainee transfer to the custody of a foreign country to eliminate pending habeas claims. These decisions have varied in both outcome and reasoning, inconsistently applying the AWA jurisprudence outlined in Part I. Because the MCA extinguished the detainees' habeas claims, the D.C. Circuit never reviewed these AWA cases, and so the confused jurisprudence stands. This Part is not only descriptive, but draws on the district court decisions and Supreme Court jurisprudence to show a way all these cases could have been resolved consistently

⁷ The principal case in this area is *Harris v. Nelson*, 394 U.S. 286 (1969). In *Harris*, the Supreme Court ruled that a prisoner seeking discovery could do so, despite the fact that the Federal Rules of Civil Procedure's discovery provisions do not apply to habeas petitioners and the habeas statutes do not themselves permit discovery, because of the necessity that the court engage in a factual hearing. *Id.* at 293, 299.

⁸ *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004).

⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 7, 9, 120 Stat. 2600, 2635-37 (to be codified at 28 U.S.C. § 2241, 10 U.S.C. § 801).

and fairly. Finally, this Part considers the role of classic equity courts to conclude not only that courts *can* exercise the AWA injunction power, but that they should.

Part III evaluates the effect of the MCA and the Detainee Treatment Act (DTA)¹⁰ on the power of courts to issue AWA injunctions. The MCA stripped the district courts of any jurisdiction over habeas corpus petitions filed by alien enemy combatants, eliminating any possible AWA usage. However, the DTA created a new form of appellate jurisdiction in the D.C. Circuit over determinations made at Guantánamo. The D.C. Circuit has already used this appellate power as a basis for action under the AWA, issuing an injunction granting detainees meaningful assistance of counsel. The implication of this order is that the applicable AWA law is the same under the DTA as it was under the habeas statutes. This Note concludes that the roadmap provided for using the All Writs Act is not *sui generis* to the Guantánamo experience, but rather can be applied wherever a court considers issuing an AWA injunction.

I THE ALL WRITS ACT

The AWA provides in totality: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”¹¹

The AWA was initially codified in the Judiciary Act of 1789.¹² The Judiciary Act, passed in September of 1789, has been described by Justice O’Connor as “the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself,”¹³ and by Justice Brown as “probably the most important and most satisfactory Act ever passed by Congress.”¹⁴ The Judiciary Act established the Supreme Court and inferior courts and enumerated the basic powers of the judicial branch.¹⁵

Section 14, which became known as the “all-writs” provision, contains what has been described as “[t]he most expansive and open-

¹⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(a), 119 Stat. 2739, 2740–41 (codified at 10 U.S.C. § 801 note (Supp. V 2005)).

¹¹ All Writs Act, 28 U.S.C. § 1651(a) (2000).

¹² Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651(a)).

¹³ Sandra Day O’Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990).

¹⁴ *Id.* (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923)).

¹⁵ *Id.* at 2.

ended language” in the Judiciary Act.¹⁶ The Act allows a federal court to “avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.”¹⁷

To understand the power of the AWA, it is useful to understand the origin of the writ system itself. In the classic English writ system, an “original writ” could be obtained from the Chancellor and represented “distinct, rigid forms of action with their own peculiar pleadings and procedures” in the Court of Common Pleas.¹⁸ The King’s Bench was created to decide cases outside the scope of the original writs, issuing “prerogative writs” to compel executive and judicial officials to obey the law.¹⁹ Moreover, a court with jurisdiction could always issue “judicial writs” as needed to carry on its proceedings, such as to ensure compliance with its processes.²⁰ Finally the Chancery Court could grant remedies when other courts could not because of technical writ and evidentiary difficulties. The Chancellor was granted unbridled discretion by the King to do justice and “to order a defendant . . . to do (or refrain from doing) a particular act.”²¹ From this body of law evolved the substantive law of equity.²²

This equitable power of the courts has evolved from unbridled discretion to a limited common-law doctrine. As Professor Eskridge has noted: “In its strict literal sense, the term ‘equity of the statute’ only referred to judicial *extension* of statutory terms to a *casus omissus*, the unprovided-for case.”²³ Eskridge explains that this method derived from a Roman law concept “that gaps in statutes could be filled by analogy to other parts of the statute or of the code.”²⁴ This description of the equity courts’ role is akin to the modern use of the AWA. The AWA may only be used in the *casus omissus*, the case where the petitioner has no other recourse. Some legal scholars theorize that the American system of separation of

¹⁶ Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1507.

¹⁷ United States v. N.Y. Tel. Co., 434 U.S. 159, 172–73 (1977).

¹⁸ Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 801 (2001).

¹⁹ *Id.* at 802.

²⁰ *Id.*

²¹ *Id.* at 803.

²² *Id.* at 804.

²³ Eskridge, *supra* note 6, at 995–96. Professor Eskridge’s historical study of the Judiciary Act of 1789 bears particular relevance to this Note, as it covers the precise period when the Act was passed and provides an important analysis of the courts’ role in gap-filling to ensure that litigants’ rights are not frustrated.

²⁴ *Id.* at 996 n.22.

powers repudiated the English equity courts.²⁵ Professor Eskridge responds with a persuasive historical analysis showing that America's early judicial history actually reflects the characteristics of the courts of equity.²⁶

Of course, the AWA embodies an accretion of power in the judiciary that raises separation-of-powers concerns about courts' competence to issue broad orders to the executive branch in wartime. It is well established that the federal courts have power "to say what the law is."²⁷ "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."²⁸ When federal courts involve themselves in lawmaking, they must engage in a "subsidiary process of evaluating competing policies [and] determining which is preferable,"²⁹ a process best left to the political branches.³⁰

However, the AWA operates solely as a "gap filler."³¹ This limitation of scope prevents an accretion of power in the judiciary because courts can only act to fill gaps left by Congress. Moreover, the AWA may be viewed as a broad statutory delegation of authority by Congress to the courts to fill existing gaps by developing law, in the same way that the grant of admiralty jurisdiction permits the courts to make law.³² The separation-of-powers concern is further mitigated by the 218 years of "congressional acquiescence and tacit approval"³³ demonstrated by the lack of a repeal or material revision of the AWA over its long history.

This background material explains the purpose of, concerns about, and limitations on the AWA. The next section turns to the elements necessary for judicial invocation of the Act.

²⁵ E.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–78 (2001) (arguing that English equity principles were not imported to American judicial system, given strong separation of judicial and legislative activities and structure of legislative branch in American constitutional system).

²⁶ Eskridge, *supra* note 6, at 1009–87.

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁸ THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Terence Ball ed., 2003).

²⁹ Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Col-lateral Review*, 96 NW. U. L. REV. 1413, 1429 (2002).

³⁰ See *id.* at 1429–30 (citing superior congressional, relative to judicial, competency at making policy choices).

³¹ *Id.* at 1460–61 (quoting *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2001)).

³² *Id.* at 1467.

³³ *Id.*

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A. Necessary Elements for Application of the All Writs Act

Although the Act is short, it does present certain prerequisites to the issuance of an AWA injunction: the absence of alternative avenues to obtain the same relief, an independent basis for subject-matter jurisdiction, and a finding that the writ is necessary or appropriate in aid of that jurisdiction. Further, the form of the injunction should conform to the usages and principles of law. Because this area of the law is undertheorized in the secondary literature, each of these elements will be taken up in turn through a careful analysis of Supreme Court and lower federal court precedent.

While this Part will consider the four factors for issuing an extraordinary writ under the AWA, it will not make a distinction among the various common-law writs. This is because courts have shown an “almost complete lack of contemporary interest in the technical distinctions between different forms of the writs.”³⁴ Rather, the “current flexible approach [is] to work free from the shadows of antique practices.”³⁵ Accordingly, this Note follows the Eleventh Circuit’s nomenclature, which refers to any order under the power of the AWA as an “All Writs Act injunction.”³⁶

1. The Absence of Alternative Remedies

The first prerequisite for issuing an AWA injunction is the absence of alternative remedies. If alternative avenues are available, the court should not resort to an AWA injunction. “Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.”³⁷ The AWA does not authorize courts to issue “ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”³⁸

Two important questions remain undecided in this area. The first is whether an injunction under the AWA should only issue when traditional preliminary injunction standards are unavailing. In *Klay v.*

³⁴ 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932.2 (2d ed. 1996).

³⁵ *Id.* Wright, Miller & Cooper’s treatise considers the AWA specifically in circumstances relating to an appellate court’s power to issue writs to a lower court. *Id.* §§ 3932–36. The treatise, like most others in this area, does not have a summary of the standards for use of the AWA to review executive action. However, the modern abandonment of distinctions among the classic writs has occurred in all contexts, as is demonstrated by the fact that none of the district court decisions in the detainee cases identified the specific writ they issued.

³⁶ *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004).

³⁷ *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985).

³⁸ *Id.*; see also *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32–33 (2002) (finding removal statute precluded “All Writs removal”).

United Healthgroup, Inc., the Eleventh Circuit described three types of injunctions.³⁹ A “traditional” injunction serves as an interim or permanent remedy for certain breaches of common law, statutory, or constitutional rights.⁴⁰ Both the Eleventh and D.C. Circuits balance four factors in determining whether to issue a traditional injunction: (1) a substantial likelihood of movant’s success on the merits; (2) irreparable injury to the movant; (3) injury to the opposing party; and (4) the public interest.⁴¹

The second type of injunction is a “statutory injunction,” where a statute bans conduct or creates rights and specifies that courts may grant injunctions. The statute itself controls the standard for granting such an injunction.⁴²

The third type is the so-called “All Writs Act injunction.” The AWA injunction may be granted whenever it is “calculated in [the court’s] sound judgment to achieve the ends of justice entrusted to it.”⁴³ Whereas a “traditional” injunction requires a party to state a claim, an AWA injunction requires only that a party point to a threat to the integrity of some ongoing or prospective proceeding, or of some past order or judgment. The Eleventh Circuit held that there is no need to balance the four factors of the traditional injunction standard; a court may enjoin almost any conduct “which, left unchecked, would have . . . the practical effect of diminishing the court’s power to bring the litigation to a natural conclusion.”⁴⁴

In an important footnote, the Eleventh Circuit explained that “a district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act.”⁴⁵ The key difference between an AWA injunction and a traditional injunction is the purpose for which it is issued. A traditional injunction issues to protect an individual; an AWA injunction issues to protect the integrity of court orders or proceedings. Conceivably, a petitioner, pleading a different yet consistent set of facts, could make a case for both types of injunctions. An

³⁹ 376 F.3d at 1097–1100.

⁴⁰ *Id.* at 1097 (internal citation omitted).

⁴¹ *Id.* (quoting *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000)); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998).

⁴² *Id.* at 1098.

⁴³ *Id.* at 1100 (alteration in original) (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)). Moreover, an AWA injunction may be issued not only to parties to the suit, but also to third parties who “are in a position to frustrate the implementation of a court order or the proper administration of justice.” *Id.* (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977)).

⁴⁴ *Id.* at 1102.

⁴⁵ *Id.* at 1101 n.13. The court went on to hold that a district court may not issue an AWA injunction when a party is actually seeking a traditional injunction. *Id.*

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open question is whether a petitioner who is entitled to a traditional injunction is precluded from seeking an AWA injunction.

The second unresolved issue is whether the AWA should be applied where nonstatutory, constitutional remedies may be available. The AWA is a remedy of last resort; a court must first consider whether any other remedy is available. However, such an inquiry runs up against the canon of construction that a court should avoid a constitutional basis for decision if there is a nonconstitutional alternative.⁴⁶

Since a traditional injunction may enforce the Constitution, this controversy overlaps with the first question discussed above. The answers to both questions are open to debate and will be treated as such by this Note.

2. *An Independent Basis for Jurisdiction*

The second requirement for an AWA injunction is an independent basis for jurisdiction. The AWA authorizes writs in aid of jurisdiction, but does not create any federal subject-matter jurisdiction.⁴⁷ The “in aid of . . . jurisdiction” language does not enlarge a court’s jurisdiction.⁴⁸ So, for instance, the AWA does not provide an alternative authority to remove a case from state court; such authority must already exist based on the federal removal statute.⁴⁹

An independent basis for jurisdiction is, therefore, a *sine qua non* of the AWA. The habeas statutes,⁵⁰ for example, provide courts with satisfactory jurisdiction to enable the issuance of extraordinary writs.⁵¹ There is also an independent basis for jurisdiction when the court has “*prospective jurisdiction*.”⁵² If a court *would have* jurisdiction to review a claim, AWA jurisprudence allows for the issuance of writs to

⁴⁶ See, e.g., *Harris v. McRae*, 448 U.S. 297, 306–07 (1980) (noting that statutory basis for decision is preferable to constitutional one).

⁴⁷ *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 31 (2002).

⁴⁸ *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999).

⁴⁹ *Syngenta*, 537 U.S. at 32–33.

⁵⁰ 28 U.S.C. §§ 2241, 2254 (2000).

⁵¹ See *supra* note 7 and accompanying text.

⁵² *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004). As then-Circuit Judge Roberts held: “Once there has been a proceeding of *some* kind instituted before an agency or court that might lead to an appeal, it makes sense to speak of the matter as being ‘within [our] appellate jurisdiction’—however prospective or potential that jurisdiction might be.” *Id.* at 529. There is a corollary limit:

It is one thing to say that we have such authority when, in the formulation used by the Supreme Court, a case is within our appellate jurisdiction although no appeal has been perfected. It is quite another to claim such power solely on the basis that events *might* lead to a filing before an agency or lower court, which *might* lead to an appeal to this court.

Id. (internal citations and quotation marks omitted).

ensure the claim could be heard at some future time.⁵³ The appellate court's authority "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."⁵⁴ In sum, the AWA protects a court's jurisdiction in the past, present, and future: It empowers courts to safeguard not only ongoing proceedings, but also potential future proceedings and previously issued orders and judgments.⁵⁵

3. *Necessary or Appropriate in Aid of Jurisdiction*

A third requirement under the AWA is that it be exercised only "in aid of" that jurisdiction.⁵⁶ The Supreme Court has noted that an "attempt to draw a distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties is specious."⁵⁷ Courts exercise jurisdiction only in order to protect or enforce the legal rights of parties in cases or controversies.⁵⁸ Nonetheless, the power to issue writs under the AWA is limited to orders in response to threats to jurisdiction; it is not broadly available to protect the parties' rights. In one case, the Eleventh Circuit asked whether the actions to be enjoined "threatened or undermined either [the court's] jurisdiction over a pending matter . . . or any previous orders it entered."⁵⁹

The AWA as currently enacted enables the issuance only of those writs "necessary or appropriate" in aid of jurisdiction.⁶⁰ However, although earlier forms of the AWA lacked the "or appropriate" language, the statute was never limited to issuing writs only when necessary "in the sense that the court could not otherwise physically discharge" its duties.⁶¹ Rather, the AWA served as a "legislatively approved source of procedural instruments designed to achieve 'the

⁵³ See *id.* at 527–28 (describing how court's statutory jurisdiction to review final order allowed for issuance of writ).

⁵⁴ *FTC v. Dean Foods Co.*, 384 U.S. 597, 603–04 (1966) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)).

⁵⁵ *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100–01 (11th Cir. 2004).

⁵⁶ 28 U.S.C. § 1651(a) (2000).

⁵⁷ *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.23 (1977) (citation omitted).

⁵⁸ *Id.*

⁵⁹ *Klay*, 376 F.3d at 1110; see also *infra* Part II.C.2 (analyzing limited nature of injunctions in Guantánamo cases).

⁶⁰ 28 U.S.C. § 1651(a). The predecessors to the modern AWA did not expressly authorize writs "appropriate" to the exercise of jurisdiction, but only "necessary" writs. *N.Y. Tel. Co.*, 434 U.S. at 173.

⁶¹ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

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rational ends of law.’”⁶² The “necessary or appropriate” language, in conjunction with the broad “in aid of” interpretation, should be construed to permit writs that are salutary to the court’s exercise of jurisdiction or adjudication of the claims before it.⁶³

4. *Usages and Principles of Law*

In issuing an AWA injunction, a court will fashion equitable procedures that do not derive from legislatively codified practice. The statute’s only guidance in this matter requires courts to issue writs “agreeable to the usages and principles of law.”⁶⁴ In the habeas context, the Supreme Court has recommended that “the courts . . . fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.”⁶⁵ This recommendation commands habeas judges to seek guidance from existing rules and procedures (such as the Federal Rules of Civil Procedure), rather than to establish procedures from scratch.

B. *The All Writs Act in Application*

AWA injunctions are rarely issued and are subject to judicial discretion. To answer the question of when an extraordinary writ should be issued, the Supreme Court has quoted Gilbert and Sullivan: “What never? Well, *hardly* ever!”⁶⁶ This sparing approach preserves the independence of both judges and executive officials.⁶⁷

Despite infrequent use, the application of AWA injunctions against the executive branch is not of recent vintage. In *Marbury v. Madison*, Chief Justice Marshall held that the provision of all the writs

⁶² *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)).

⁶³ *New York Telephone* describes several cases construing “necessary or appropriate” action, such as an order commanding a prisoner to be transported to the court to argue his own appeal, the issuance of discovery orders in habeas proceedings, and an order preventing a merger that might impair later appellate jurisdiction. 434 U.S. at 173.

⁶⁴ 28 U.S.C. § 1651(a).

⁶⁵ *Harris*, 394 U.S. at 299; see also *Hilton v. Braunskill*, 481 U.S. 770, 776 n.5 (1987) (noting evident need “for principles to guide the conduct of habeas proceedings”); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (“To say that the precise provisions of Rule 23 do not apply to habeas corpus proceedings, however, is *toto caelo* different from asserting that we do not have authority to fashion expeditious methods of procedure in a specific case.”).

⁶⁶ *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

⁶⁷ Steven Wisotsky, *Extraordinary Writs: “Appeal” by Other Means*, 26 AM. J. TRIAL ADVOC. 577, 579 (2003). Writs may be issued against district court judges by appellate court judges, in a manner akin to an interlocutory appeal. *Id.* at 577–78. In such cases, the policy against meddling with ongoing trials justifies minimizing interference under the Act. *Id.* at 579–80. Where the writ is issued against executive agencies or officials, separation-of-powers concerns justify sparing usage.

to the federal courts would enable the Supreme Court to order the Secretary of State to issue undelivered commissions of service.⁶⁸ The early interpretation of the AWA “confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts’ jurisdiction.”⁶⁹

*Harris v. Nelson*⁷⁰ provides an important example of the Supreme Court using the AWA to fill an important gap in the habeas context. Although the habeas statutes do not authorize discovery procedures,⁷¹ the Court allowed the lower court to approve discovery measures so a federal prisoner could adequately pursue his habeas claim in a fair and meaningful way.⁷² In its ruling, the Court relied on the AWA, which it described as a “legislatively approved source of procedural instruments designed to achieve ‘the rational ends of law.’”⁷³ Without the discovery devices, petitioners would be trapped in the interstice—granted the right to review, but not the ability to meaningfully pursue it.

II

THE GUANTÁNAMO CASES UNDER HABEAS

As explained in Part I, the AWA operates as a gap-filler. In granting injunctions mandating or prohibiting executive action, the court may ensure that the artifices of the executive branch do not frustrate a court’s orders or render a litigant’s rights immaterial. The rule prohibiting resort to the AWA where a statutory regime governs⁷⁴ is therefore sensible: There should be no resort to a gap-filler where the regime has no gaps.

Rasul v. Bush determined that federal courts had jurisdiction to hear petitions for writs of habeas corpus from enemy combatants detained at the Guantánamo Bay Naval Base.⁷⁵ However, *Rasul* left undetermined “what further proceedings may become necessary.”⁷⁶ The district courts thus had a substantial gap to fill: How should a factual inquiry be undertaken? What procedural tools should detainees have to pursue their claims?

⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 149–50 (1803). The Court denied relief, however, for want of an independent basis for jurisdiction. *Id.* at 180.

⁶⁹ *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813)).

⁷⁰ 394 U.S. 286 (1969).

⁷¹ *Id.* at 290, 297.

⁷² *Id.* at 300.

⁷³ *Id.* at 299 (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)).

⁷⁴ See *supra* Part I.A.1.

⁷⁵ 542 U.S. 466, 483–84 (2004).

⁷⁶ *Id.* at 485.

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Because many detainees filed petitions in a short period before multiple judges, the Guantánamo experience provides a fascinating case study of how the AWA is applied and what powers it bestows on judges.⁷⁷ It also demonstrates the difficulty in applying the legal standards of the sparse statute consistently. The district court judges disagreed not only about result; even those judges who granted the same motions applied different reasoning.

To examine and clarify this jurisprudence, this Part will consider two procedural rights granted by at least some of the judges in the D.C. District Court: the right to thirty days' notice prior to a custodial transfer to another country and the right to effective assistance of counsel. These are not the only two rights considered or granted under the AWA.⁷⁸ Rather, they present useful examples in considering four issues: (1) whether the courts accurately follow the Supreme Court jurisprudence; (2) where the courts find useful analogies; (3) whether the courts resort to traditional injunction standards; and (4) whether the courts consider other factors before granting AWA relief. While I ultimately conclude that the issuance of an AWA injunction was correct in these cases, much of the district courts' jurisprudence was misguided or misapplied.

⁷⁷ The Guantánamo experience is unique as an instance in which the district courts acted pursuant to their authority under the AWA. To put this exercise in context, a review of all opinions citing to the All Writs Act reveals only two instances since 2000 in which the D.C. District Court has issued an AWA injunction in cases not related to military detainees. *Cobell v. Norton*, 226 F. Supp. 2d 1, 141 (D.D.C. 2002); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 180 F. Supp. 2d 130, 133, 136 (D.D.C. 2001). In each instance, the D.C. Circuit overruled the district court. *Cobell v. Norton*, 334 F.3d 1128, 1141 (D.C. Cir. 2003); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

⁷⁸ For instance, at least one court has declined to require mental competency discovery and hearings. *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004). Judge Bates denied the motion, finding "petitioners have identified no legal proceeding for which there is a legal right to a determination of mental competency at this time." *Id.* at 48. In another case the release of medical records following evidence of forced feedings was required. *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 23 (D.D.C. 2005). Further, at least one court used the power of the AWA to require the government to "preserve and maintain all evidence, documents and information relating or referring to" the petitioners in that case. *El-Banna v. Bush*, No. Civ.A. 04-1144(RWR), 2005 WL 1903561, at *1-3 (D.D.C. July 18, 2005). Petitioners have alleged that the latter preservation order may have been violated after the CIA admitted the destruction of videotapes documenting the interrogation of two alleged al Qaeda operatives. Motion to Compel Respondents to Report on Their Compliance with the Court's Preservation Order of July 18, 2005 at 1-2, *Abdullah v. Bush*, No. 05-00023(RWR) (D.D.C. Dec. 10, 2007), available at <http://www.scotusblog.com/wp/wp-content/uploads/2007/12/abdullah-motion-12-10-07.pdf>.

A. *The Transfer Abeyance Cases*

The transfer abeyance motions sought injunctions either preventing the government from transferring detainees into the custody of foreign governments or requiring thirty days' notice to counsel prior to such transfer. Within three months of a *New York Times* series describing a "secret program to transfer suspected terrorists to foreign countries for interrogation,"⁷⁹ the district court ruled on thirty-four separate transfer abeyance motions.⁸⁰

The motions came before multiple judges who ruled inconsistently both as to application of the AWA and as to result. In addition to varying application of the factors described in Part I.A, some district courts introduced further confusion by relying on the four-factor traditional injunction test in the AWA context.⁸¹

1. *Application of Traditional or AWA Injunction Standards*

Further elaboration of the differences between traditional and AWA injunctions is necessary before the inconsistent application in the Guantánamo cases can be fully appreciated. As discussed in Part I.A, a traditional injunction under Rule 65⁸² requires consideration of four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury; (3) injury to the opposing party; and (4) furthering the public interest.⁸³ In contrast, an AWA injunction may be granted whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it."⁸⁴

There are important reasons why an injunction grounded in the AWA should not be subject to the restrictions of the traditional

⁷⁹ Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1; see also Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1 (describing secret jet and cover corporation used for CIA rendition program). Guantánamo detainees seeking preliminary injunctions against transfer cited both of these articles as exhibits in filings. See, e.g., *Al-Marri v. Bush*, No. Civ.A.04-2035(GK), 2005 WL 774843, at *2 (D.D.C. Apr. 4, 2005). Jehl & Johnston, *supra*, stated that the Pentagon had handed over sixty-two prisoners to the custody of Pakistan, Morocco, Saudi Arabia, and Kuwait. The State Department had identified each of the four countries as practicing torture in their prisons. *Id.* A later article described the "major acceleration" of such transfers. Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1. Jehl indicated that recent "court decisions" had contributed to making Guantánamo Bay "seem less attractive to administration policy-makers." *Id.*

⁸⁰ Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 667 (2006).

⁸¹ See *supra* notes 39–46 and accompanying text.

⁸² FED. R. CIV. P. 65.

⁸³ *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998).

⁸⁴ *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)).

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injunction standard. The first and most important is that the Supreme Court does not reference the traditional standard when approving action under the AWA.⁸⁵ A second reason is that in some situations it is not clear how the traditional standard would apply. Whereas a traditional injunction requires the proponent to state a cause of action and demonstrate why she is likely to prevail on the merits, an AWA injunction requires the proponent to point to a threat to the integrity of some past, present, or future court proceeding.⁸⁶ Success on the merits of the underlying claim need not be demonstrated for an AWA injunction; the concern is not whether the proponent is entitled to relief but whether the legitimacy of the court proceeding itself will be undermined.⁸⁷ The language of the AWA clearly states that it may be invoked only “in aid of” the court’s jurisdiction.⁸⁸ Since it is the integrity of the court’s jurisdiction that is the harm addressed, a factor evaluating the “irreparable injury” to the proponent is inapposite. Rather, the court is to “issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of [its] orders.”⁸⁹ It is injury to the court’s integrity, and not to the movant, that is the AWA’s focus.

It may seem strange that the residual power in the AWA appears to set a lower bar than the traditional injunctive standard. But recall that an AWA injunction is different in kind than a traditional injunction. It is available only in limited circumstances to protect the integrity of a court’s jurisdiction and its proceedings. Further, although the standards described in Part I.A are qualitatively different, they are not necessarily more or less easily satisfied than the traditional injunctive standard.

Nonetheless, many of the transfer abeyance motions in the D.C. District Court were granted or denied on the basis of a traditional injunctive standard. In certain cases, the decision to use the traditional standard was correct, as the injunction was not grounded in the AWA.⁹⁰ However, other cases appeared to use the AWA to grant

⁸⁵ See *id.* at 1100–01 (listing Supreme Court cases approving actions under AWA without applying traditional injunction standard).

⁸⁶ *Id.* at 1099–1100.

⁸⁷ For instance, in *United States v. International Brotherhood of Teamsters*, 728 F. Supp. 1032, 1043–44 (S.D.N.Y. 1990), a district court enjoined all state and federal courts in the United States and Canada from hearing collateral challenges to a settlement consented to before the district court. In the context of a previous proceeding, such as the *Teamsters* case, and a future appellate proceeding, see *infra* Part III.B, it is not clear how the factor requiring success on the merits of the underlying claim would apply.

⁸⁸ 28 U.S.C. § 1651(a) (2000).

⁸⁹ *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

⁹⁰ See, e.g., *Abdah v. Bush*, No. Civ.A.04-1254(HHK), 2005 WL 711814, at *5 (D.D.C. Mar. 29, 2005). *Abdah* found that Federal Rule of Appellate Procedure 23(a) prevented

motions but applied the four factors of the traditional injunction standard. Two cases, *Al-Joudi v. Bush* and *Al-Marri v. Bush*, noted specifically that the authority was pursuant to the AWA yet applied the traditional injunctive standard.⁹¹

A comparison of two judges' on-the-merits analysis highlights the confusion. One court granting a traditional injunction did not consider the likelihood of success on the merits of the underlying habeas claim; instead, the court questioned whether the transfer would "deprive the court of its jurisdiction."⁹² Yet in a striking juxtaposition, another court granting an AWA injunction *did* consider the habeas claims without first establishing a threat to its own jurisdiction.⁹³

Only one decision granting an injunction to prevent detainee transfer seems to apply portions of the Supreme Court jurisprudence correctly. In *Kurnaz v. Bush*,⁹⁴ the district court noted that the court must have authority to "preserve [its] jurisdiction."⁹⁵ The government had conceded both that some detainees might be transferred and that such a transfer would divest the court of its jurisdiction.⁹⁶ Although the court's analysis is short, its reasoning is based only on the danger to the court's jurisdiction, the harm the AWA addresses.

One case denying a detainee transfer injunction also applied the AWA standard as opposed to the traditional injunctive standard. In *Al-Anazi v. Bush*, the district court held that a court could "enjoin almost any conduct which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion."⁹⁷ While correctly choosing the AWA and not the

officials from impeding ongoing habeas corpus hearings by physically removing the prisoner from the territorial jurisdiction of the court. *Id.* The reasoning was followed in three other cases. See Chesney, *supra* note 80, at 667 & n.37 (describing four decisions relying on Rule 23(a)). In dicta, the court noted that were Rule 23(a) inapplicable, the court could employ the AWA to order the same relief. *Abdah*, 2005 WL 711814, at *6 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999)). At least one other district court decision rejected this interpretation of Rule 23(a), finding it "implausible that Congress intended the Rule to block the movement of detainees captured in the course of ongoing military hostilities." *O.K. v. Bush*, 377 F. Supp. 2d 102, 116–17 (D.D.C. 2005). In dicta, the D.C. Circuit noted its agreement with the *O.K.* court's interpretation of Rule 23(a). *Qassim v. Bush*, 466 F.3d 1073, 1078 (D.C. Cir. 2006).

⁹¹ *Al-Joudi v. Bush*, No. Civ.A.05-301(GK), 2005 WL 774847, at *3, *4 n.10 (D.D.C. Apr. 4, 2005); *Al-Marri v. Bush*, No. Civ.A.04-2035(GK), 2005 WL 774843, at *3, *4 n.11 (D.D.C. Apr. 4, 2005).

⁹² *Abdah*, 2005 WL 711814, at *5.

⁹³ *Al-Joudi*, 2005 WL 774847, at *3–5; *Al-Marri*, 2005 WL 774843, at *3–5.

⁹⁴ No. Civ.04-1135(ESH), 2005 WL 839542 (D.D.C. Apr. 12, 2005).

⁹⁵ *Id.* at *2.

⁹⁶ *Id.*

⁹⁷ 370 F. Supp. 2d 188, 195 (D.D.C. 2005) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004)).

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traditional standard, the district court nevertheless misapplied the AWA standard.⁹⁸

2. *Applying the AWA Standard*

In those transfer abeyance cases that considered the AWA standard, no court correctly applied each of the four elements discussed in Part I.A: (1) absence of alternative remedies; (2) independent basis for jurisdiction; (3) whether the action is “necessary or appropriate” “in aid of” that jurisdiction; and (4) conformity with the principles and usages of law, in particular analogizing to other procedures to fashion relief.

In the short *Kurnaz* opinion, while the court properly disregarded the traditional standard, it also failed to apply the AWA standard adequately. In particular, the court did not explicitly consider whether there was an absence of alternative remedies.⁹⁹ This is particularly notable since the court decided *Kurnaz* two weeks after another judge decided *Abdah v. Bush*, which found Appellate Rule 23(a), governing transfer of habeas petitioners, applicable to detainee transfers.¹⁰⁰ Given this, the district court should have first addressed itself to the statutory remedies. The court should have either granted a traditional or statutory injunction on that basis, or explicitly rejected the statutory remedies and only then granted an AWA injunction.

At least one case stated the correct standard, but then applied an unnecessarily high bar to relief and denied the motion. In *Al-Anazi*, the district court held that it could enjoin any conduct which would diminish the court’s power to bring the litigation to completion. The court then sought evidence that the government was “seeking to thwart” the court’s jurisdiction.¹⁰¹ Taken literally, such a standard requires that the government act with intent to evade jurisdiction. This heightened standard contradicts the same judge’s statement that the court could enjoin all conduct that would have the “practical effect of diminishing the court’s power.”¹⁰²

Additionally, a number of judges rejected the transfer abeyance motions because of their interpretation of the court’s jurisdiction. One such court ruled that “the All Writs Act becomes inapplicable once the respondents release the petitioners from United States custody because they will have obtained the result requested and at that point there will be no further need for this Court to maintain jurisdic-

⁹⁸ See *infra* Part II.A.2.

⁹⁹ *Kurnaz*, 2005 WL 839542, at *2.

¹⁰⁰ No. Civ.A.04-1254(HHK), 2005 WL 711814, at *5 (D.D.C. Mar. 29, 2005).

¹⁰¹ *Al-Anazi*, 370 F. Supp. 2d at 195.

¹⁰² *Id.*

tion.”¹⁰³ Such a determination presumes that any conclusion of custody by the United States represents success to a habeas petitioner.¹⁰⁴ These rulings appear to have been effectively overruled by the D.C. Circuit decision that affirmed an injunction prohibiting Multinational Forces in Iraq (MNF-I) from releasing a U.S. citizen captured in that country to Iraqi custody.¹⁰⁵

Finally, none of the cases granting a transfer abeyance injunction specifically considered the Supreme Court’s command that courts “fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.”¹⁰⁶ Had they done so, they might have found Appellate Rule 23(a) informative. Even if they agreed with the D.C. Circuit dicta that Appellate Rule 23(a) does not apply to military detainee transfers,¹⁰⁷ they could use the rule as an analogy.¹⁰⁸

3. Separation-of-Powers Considerations

Only one court denied relief in part because of separation-of-powers concerns.¹⁰⁹ In *Almurbati v. Bush*, the court found that any injunction would be “tantamount to an unconstitutional encroachment” on the executive branch.¹¹⁰ In the same D.C. Circuit case enjoining MNF-I from releasing a detainee to Iraqi custody, the court again seems to have overruled this concern: “To be sure, a decision on the merits might well have *implications* for military and foreign policy, but that alone hardly makes the issue non-justiciable.”¹¹¹ The D.C.

¹⁰³ *Almurbati v. Bush*, 366 F. Supp. 2d 72, 80 (D.D.C. 2005).

¹⁰⁴ This seems particularly unusual considering the discussion of Appellate Rule 23(a) in connection with the ruling in *Abdah*. See *supra* note 90 and accompanying text. If it were legally permissible to moot a habeas petition by transfer, it seems this would also moot the rule in these cases.

¹⁰⁵ *Omar v. Harvey*, 479 F.3d 1, 3, 12 (D.C. Cir. 2007). Although the Supreme Court has granted certiorari in *Omar*, the Petition did not raise the issue of whether transfer to foreign authorities would constitute release for the purpose of extinguishing a habeas claim. Petition for Writ of Certiorari at I, 16–26, *Geren v. Omar*, 128 S. Ct. 741 (Sept. 21, 2007) (No. 07-394).

¹⁰⁶ *Harris v. Nelson*, 394 U.S. 286, 299 (1969). The Court has made clear that “[w]here their duties require it, this is the inescapable obligation of the courts.” *Id.*; see also *supra* Part I.A.4.

¹⁰⁷ *Qassim v. Bush*, 466 F.3d 1073, 1078 (D.C. Cir. 2006).

¹⁰⁸ See, e.g., *Al Odah v. United States*, 346 F. Supp. 2d 1, 7 n.9 (D.D.C. 2004) (using Criminal Justice Act as analogy for providing right to counsel).

¹⁰⁹ *Almurbati v. Bush*, 366 F. Supp. 2d 72, 75, 81–82 (D.D.C. 2005).

¹¹⁰ *Id.* at 81.

¹¹¹ *Omar v. Harvey*, 479 F.3d 1, 10–11 (D.C. Cir. 2007) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The grant of certiorari in this case may bring this analysis into some doubt, as the government raised separation-of-powers concerns as a ground for reversal in its Petition. Petition for Writ of Certiorari at I, 21, 24, *Geren v. Omar*, 128 S. Ct. 741 (Sept. 21, 2007) (No. 07-394).

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Circuit noted that in extradition cases courts draw a distinction between free release and transfer of custody, and that such cases similarly implicate foreign policy concerns.¹¹²

B. *Al Odah and the Right to Counsel*

1. *Finding the Right to Counsel in the AWA*

*Al Odah v. United States*¹¹³ was the first case of a Guantánamo detainee seeking access to counsel under the AWA. Although never explicitly considering the Supreme Court's jurisprudence as creating a multi-factor test, the district court came close to following the factors discussed in Part I.A.

First, the district court noted the absence of a statutory regime governing the situation: "If the federal habeas corpus statute did address the issue of appointment of counsel, the Court would not be in a position to look to the All Writs Act."¹¹⁴ Quoting *Harris v. Nelson*, the court found that while Congress required a consideration of the facts, the habeas statutes were "largely silent" on the process for doing so.¹¹⁵

Second, the district court also established that the court had an independent basis for jurisdiction grounded in the habeas statutes.¹¹⁶ Third, the court read the AWA's requirement that writs issue when necessary or appropriate in aid of jurisdiction broadly. It noted that once jurisdiction is properly taken under the habeas corpus statutes, a court may act as necessary "in order that a fair and meaningful evidentiary hearing may be held."¹¹⁷

Fourth, the district court followed the Supreme Court recommendation in "fashion[ing] procedures by analogy to existing procedures."¹¹⁸ The court analogized to case law under the Criminal Justice Act (CJA), which permits the use of funds to appoint counsel in habeas petitions when the "interests of justice so require."¹¹⁹ The court considered two factors from CJA precedent: whether the petition was "nonfrivolous" and "whether the nature of the litigation will make the appointment of counsel of benefit to the litigant and the

¹¹² *Omar*, 479 F.3d at 10, 12.

¹¹³ 346 F. Supp. 2d 1 (D.D.C. 2004).

¹¹⁴ *Id.* at 7 n.8.

¹¹⁵ *Id.* at 6 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 7 (quoting *Harris*, 394 U.S. at 300).

¹¹⁸ *Id.* at 6.

¹¹⁹ 18 U.S.C. § 3006A(a)(2)(B) (2000); *Al Odah*, 346 F. Supp. 2d at 7 & n.9, 8.

court.”¹²⁰ The claim was nonfrivolous because of the detainees’ indefinite and incommunicado detention. Appointment benefited both the litigant and the court given the difficulties in conducting an investigation, grappling with the U.S. legal system, and overcoming language barriers.¹²¹

2. *National Security Concerns and the Attorney-Client Privilege*

The AWA’s “necessary and appropriate” language takes on new salience when national security concerns are at issue. The preceding section demonstrated that in *Al Odah*, the district court abided closely to this Note’s interpretation of the Supreme Court’s jurisprudence, as well as the process for finding and applying an appropriate analogy. While this Note focuses on the experience of the Guantánamo detainees, it is useful to consider *Padilla ex rel. Newman v. Bush*,¹²² in which a U.S. citizen held on U.S. soil applied for an AWA injunction, to understand how the scope of AWA rights can be altered.

In *Padilla*, Attorney General Michael Mukasey, then a district court judge in New York, granted counsel access to an enemy combatant but limited the scope of the right because of national security concerns.¹²³ In contrast, the court in *Al Odah* did not consider the countervailing security considerations until *after* holding that the court had discretionary authority to appoint counsel.¹²⁴ The court prohibited monitoring procedures that would burden attorney-client

¹²⁰ *Al Odah*, 346 F. Supp. 2d at 8 (quoting *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990)).

¹²¹ *Id.* The government argued that the CJA applies only to proceedings “intimately related to the criminal process.” Respondents’ Reply Memorandum in Further Support of Response to Complaint at 8, *Al Odah*, 346 F. Supp. 2d 1 (No. 02-CV-0828). This argument was inapposite to the court’s judgment, since the court used the CJA merely as an analogy. See *Al Odah*, 346 F. Supp. 2d at 7 n.9 (“The Court has not found that . . . entitlement to counsel is grounded in the dictates of [the] Criminal Justice Act; rather . . . [that it] provides a useful and persuasive procedural approach . . .”).

¹²² 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

¹²³ *Id.* at 603–05. The court addressed national security concerns by granting a limited right to counsel solely to present facts to the court, *id.* at 603, thereby excluding Padilla from using counsel to conduct discovery, cross-examine witnesses, and rebut testimony. See Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When “Fears and Prejudices Are Aroused,”* 2 SEATTLE J. SOC. JUST. 129, 146 (2003) (criticizing use of AWA rather than Sixth Amendment to provide Padilla right to counsel); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, LAW & CONTEMP. PROBS., Spring 2005, at 285, 322 (criticizing ruling for “sharply limit[ing] Padilla’s ability to advocate”). The court also held that “there is no reason that military personnel cannot monitor Padilla’s contacts with counsel.” *Padilla*, 233 F. Supp. 2d at 603; see also Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 44 n.14 (2004) (describing decision and procedures from point of view of Padilla’s counsel).

¹²⁴ *Al Odah*, 346 F. Supp. 2d at 8.

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privilege, holding that “access to attorneys is not a matter of Government discretion.”¹²⁵

In other words, *Padilla* invoked attorney-client privilege only to the extent necessary or appropriate in aid of the court’s jurisdiction. *Al Odah* determined that a right to counsel aided the court’s jurisdiction. The latter court severed the question of attorney-client privilege from the decision to grant counsel access, and provided a broader protection based on the privilege’s longstanding and exceptional history.¹²⁶

C. Conclusions About the District Courts’ Experience and the All Writs Act

The previous sections of this Part have considered whether the AWA power *can* be exercised. It is appropriate here to stop and ask whether it *should* be and to draw other conclusions about the application of the AWA in the habeas cases.

1. A Confused Jurisprudence

Much of this Note’s description of the transfer abeyance cases is phrased as a critique of the various judges’ inability to apply the jurisprudence correctly in any single case. I support the outcomes of providing detainees with access to counsel in order to adjudicate habeas claims meaningfully, and of preventing transfer that would frustrate potential rights to release. However, it is also important to show that these results are legally proper. While each court applies one or more elements of the Supreme Court jurisprudence correctly, each either applies one or more incorrectly, or leaves a factor undiscussed.

However, the confused jurisprudence of the transfer abeyance cases is no reason to deny relief under the AWA. First, *Al Odah* presents an important example of the correct application of the Supreme Court jurisprudence. Second, the D.C. Circuit will now have the opportunity to pick and choose well-analyzed portions among the

¹²⁵ *Id.* at 10.

¹²⁶ The court rejected all monitoring and review requests, and instead required security clearances for the lawyers and treatment of information covered under the privilege as confidential for national security reasons. Review of privileged communications would occur only if the attorney wished to disclose the information to colleagues or support staff. *Id.* at 10, 13, 14. *Al Odah* rejected government reliance on *Padilla* and a “flimsy assemblage of cases,” pointing out that the Supreme Court had overruled *Padilla*, and that the monitoring portion of the decision was “pure dicta and contained virtually no analysis.” *Id.* at 12. The *Al Odah* framework was applied in a protective order governing counsel access to all Guantánamo detainees. *Adem v. Bush*, 425 F. Supp. 2d 7, 12 (D.D.C. 2006); see also, e.g., *Adem v. Bush*, No. 05-723(RWR)(AK), 2006 WL 1193853, at *8 (D.D.C. Apr. 28, 2006) (applying *Al Odah* rule).

different district court decisions. The previous section provides guidance for future courts, examining what reasoning comported with the Supreme Court's decisions and what strayed.

2. *Judicial Competence*

Two weightier questions are whether courts *should* take an active role in the management of executive functions, particularly in wartime, and whether the courts are judicially competent to do so.

The first question can be answered by placing the district courts' jurisprudence in its historical context. Without the right to counsel and transfer abeyance injunctions, the Guantánamo detainees would occupy a formalistic black hole, granted the statutory right to habeas corpus but lacking both counsel to pursue the right and the ability to prevent government frustration of it by removal. In such circumstances, the Supreme Court instructs the lower courts to rule by analogy,¹²⁷ another similarity to the equity courts' *casus omissus* doctrine. The district court in *Al Odah* exercised a minimalist approach by adopting a close analogy, granting the right to counsel under a congressionally created standard for a similar situation.¹²⁸

The *casus omissus* doctrine has two facets in common with the AWA: a gap-filling role and a preference for filling that gap using analogies to well-settled law. The remaining language of the AWA, that the writs issue only when necessary or appropriate in aid of the court's jurisdiction, provides a limited role for the *casus omissus* doctrine. Gaps may be filled only when necessary or appropriate to preserve the court's integrity. This statutory grant of equitable power by Congress to the courts seems not only restrained but wise. Absent this power, the district courts' ability to hear the habeas petitions would have been illusory.

The second question, whether the court is judicially competent to make these decisions, may be answered by considering the district courts' actions in the right to counsel and transfer abeyance cases. There is certainly an argument that courts should act in a minimalist fashion during wartime.¹²⁹ However, the district courts' experience has been to grant rights to detainees only to render the court competent to hear the cases, not to further a substantive agenda. This is a minimalist usage consistent with the courts' proper role. Without lawyers, the Guantánamo detainees have no meaningful ability to make a

¹²⁷ See *supra* Part I.A.4.

¹²⁸ See *supra* notes 118–21 and accompanying text.

¹²⁹ See generally Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (arguing that court rulings during wartime should minimally interfere with executive authority and finding that most rulings already do so).

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factual case before the court. If the detainees are no longer in U.S. custody, they cannot argue for their release in U.S. courts.

III

THE ALL WRITS ACT WITHOUT HABEAS CORPUS

A necessary prerequisite for AWA relief is the existence of an independent basis for jurisdiction.¹³⁰ The *Rasul* decision definitively determined that the habeas statutes provided such a basis for the Guantánamo detainees.¹³¹ In response, in late 2006, Congress passed the Military Commissions Act (MCA), which stripped the courts of all jurisdiction to hear petitions for habeas corpus from Guantánamo detainees.¹³² However, Congress had passed the Detainee Treatment Act (DTA) in 2005, permitting the D.C. Circuit to hear appeals from Combatant Status Review Tribunals (CSRTs) and military commissions at Guantánamo Bay.¹³³ After briefly describing this new appellate jurisdiction over CSRTs, this Part will demonstrate that the D.C. Circuit can and should exercise the same active role in the administration of the Guantánamo detainees that the district courts took under their now-defunct habeas jurisdiction.

A. The New Appellate Jurisdiction

In 2006, the MCA eliminated any statutory basis for habeas jurisdiction over Guantánamo detainees.¹³⁴ Further, the Act stripped jurisdiction to hear other actions relating to “any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien.”¹³⁵ These provisions applied to “all cases, without exception, pending” at the time of enactment.¹³⁶

¹³⁰ See *supra* Part I.A.2.

¹³¹ *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004).

¹³² Pub. L. No. 109-366, §§ 7, 9, 120 Stat. 2600, 2635–37 (2006) (to be codified at 28 U.S.C. § 2241, 10 U.S.C. § 801). On June 29, 2007, the Supreme Court granted certiorari in *Boumediene v. Bush*, 127 S. Ct. 3078 (2007), and *Al Odah v. United States*, 127 S. Ct. 3067 (2007), in a remarkable turnaround following a previous denial of certiorari in both cases, *Boumediene*, 127 S. Ct. at 3078. For a discussion of the case, see *infra* notes 163–64 and accompanying text.

¹³³ Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (2005) (codified at 10 U.S.C. § 801 note (Supp. V 2005) and 28 U.S.C. § 2241(e) (Supp. V 2005)). CSRTs are used to determine whether individual detainees should continue to be classified as enemy combatants. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (Jul. 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

¹³⁴ Military Commissions Act § 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241(e)(1)).

¹³⁵ *Id.*

¹³⁶ *Id.* § 7(b).

However, the already-enacted DTA had created a new form of judicial review in the D.C. Circuit.¹³⁷ The DTA “impose[s] judicial oversight on a traditionally unreviewable exercise of military authority by the Commander in Chief. [The DTA] arguably ‘spea[ks] not just to the power of a particular court but to . . . substantive rights . . . as well.’”¹³⁸ Such a grant of authority is particularly important to courts’ ability to use the AWA to oversee detentions at Guantánamo since the AWA requires an independent basis of jurisdiction.

Although the MCA cut off the detainees’ statutory right to habeas, it expanded the D.C. Circuit’s appellate jurisdiction, making review of CSRT decisions “as of right.”¹³⁹ With respect to CSRTs, the D.C. Circuit’s appellate jurisdiction is limited to reviewing confinement of detainees for whom CSRTs have already been conducted. The D.C. Circuit can only review whether the CSRT determination is “consistent with the standards and procedures specified by the Secretary of Defense,” and whether the use of such standards and procedures is consistent with the Constitution and laws of the United States.¹⁴⁰

Early indications are that this review will be broad. In July 2007 the D.C. Circuit ruled that the record on review will represent “such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.”¹⁴¹ This means that the D.C. Circuit can consider evidence that was unnecessary to the CSRT’s decision, as well as evidence that the CSRT did not even

¹³⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2814 n.2 (2006) (Scalia, J., dissenting) (“Historically, federal courts have never reviewed the validity of the final decision of any military commission; their jurisdiction has been restricted to considering the commission’s ‘lawful authority to hear, decide and condemn.’” (emphasis omitted) (quoting *In re Yamashita*, 327 U.S. 1, 8 (1946))).

¹³⁸ *Id.* (internal quotation marks omitted).

¹³⁹ Military Commissions Act § 9(2). In *Hamdan*, the Supreme Court took jurisdiction in part because *Hamdan* “ha[d] no automatic right to review of the commission’s final decision,” since *Hamdan* was not subject to the death penalty and might receive a sentence shorter than ten years’ imprisonment. *Hamdan*, 126 S. Ct. at 2788 (internal quotation marks omitted); see also Detainee Treatment Act of 2005, 10 U.S.C. § 1005(e)(3)(B) (Supp. V 2005). Congress perhaps sought to foreclose further interlocutory review by the Supreme Court by guaranteeing D.C. Circuit review of all military commission decisions.

¹⁴⁰ Detainee Treatment Act § 1405(e)(2)(C).

¹⁴¹ *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007) (internal quotation marks omitted). The D.C. Circuit panel denied a government petition for rehearing in October 2007. *Bismullah v. Gates*, No. 06-1197, 2007 WL 2851702, at *1 (D.C. Cir. Oct. 3, 2007). The government has also filed a motion for rehearing en banc. Petition for Rehearing and Suggestion of Rehearing En Banc, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Sept. 7, 2007).

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request to view.¹⁴² The D.C. Circuit also declined to give the CSRT's status determination deference. The Court noted that "[i]f a preponderance of the evidence in the record . . . supports the Tribunal's finding, then the Tribunal's status determination must be upheld."¹⁴³ As such, it appears that the hearings in front of the D.C. Circuit can be on a record broader than that used by the CSRT, with no required deference to CSRT findings.

B. AWA Injunctions Following the Military Commissions Act

On July 20, 2007, the D.C. Circuit issued its first AWA injunction related to the Guantánamo detainees.¹⁴⁴ In *Bismullah v. Gates*, the first appeal of a CSRT to the D.C. Circuit,¹⁴⁵ the panel unanimously issued a new Protective Order granting the Guantánamo detainees access to counsel¹⁴⁶ and granting counsel access to classified information.¹⁴⁷

Although the D.C. Circuit reached a conclusion consistent with the Supreme Court's AWA jurisprudence, the court cited to only one D.C. Circuit opinion and no Supreme Court opinions in applying the AWA.¹⁴⁸ However, by considering the language of the opinion and the structure of the relief granted, it is easy to see that the court considered or applied at least most of the factors.

1. The Absence of Alternative Remedies

The D.C. Circuit in *Bismullah* never holds that there is no alternative remedy whereby the detainees can obtain access to counsel. This is an important omission from the opinion; the court should first establish that the petitioner has no other recourse before considering the AWA.

Nonetheless, a consideration of the CSRTs and the DTA demonstrates that there was no alternative recourse. The CSRTs are not created by Congress, but Congress did require the Pentagon to submit procedures for them.¹⁴⁹ Detainees are appointed "personal represent-

¹⁴² *Bismullah*, 501 F.3d at 180, 185–87.

¹⁴³ *Id.* at 186.

¹⁴⁴ *Id.* at 187–91.

¹⁴⁵ Robert M. Chesney, *Judicial Review, Combatant Status Determinations, and the Possible Consequences of Boumediene*, 48 HARV. INT'L L.J. ONLINE 62, 64 (2007), <http://www.harvardilj.org/online/110>.

¹⁴⁶ *Bismullah*, 501 F.3d at 187–89.

¹⁴⁷ *Id.* at 187–88.

¹⁴⁸ *Id.* at 187 (citing *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75–76 (D.C. Cir. 1984)).

¹⁴⁹ Detainee Treatment Act of 2005, 10 U.S.C. § 1405(a) (Supp. V 2005). The currently applicable procedures can be found at Memorandum from Gordon England, Deputy Sec-

atives,” who are commissioned officers with top secret security clearance but may *not* be a judge advocate.¹⁵⁰ The personal representative must make the following statement to the detainee: “I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.”¹⁵¹

As such, since neither the DTA nor the procedures governing the CSRTs provide a right to counsel, and the appointed “personal representative” cannot substitute for counsel at the D.C. Circuit, there is no statutory alternative governing counsel access for detainees appealing CSRT determinations. Although the court in this instance failed to eliminate other available alternatives explicitly, there were none. However, to render a jurisprudentially sound decision in the future, courts would do well to explicitly consider and reject any (potential) alternative sources of statutory relief presented by the parties.

2. *An Independent Basis for Jurisdiction*

Bismullah’s first holding, defining the record on review and declining to accord deference, establishes that the court had an independent basis for jurisdiction.¹⁵² The court had properly taken jurisdiction as soon as an appeal had been made of the CSRT determinations. As explained in Part I.A, the court in each instance should establish that the petitioner has an independent basis for jurisdiction and is not relying on the AWA itself for jurisdiction.

The government conceded jurisdiction in *Bismullah*, and so the issue was not contested.¹⁵³ While not directly including the independent basis for jurisdiction as a piece of its AWA analysis, the court did properly find jurisdiction over the case.

3. *Necessary or Appropriate in Aid of Jurisdiction*

The *Bismullah* court made many statements that grounded its decision in the “necessary or appropriate” language of the AWA. For instance, in determining that counsel should have access to classified information, the court noted:

retary of Defense on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Jul. 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

¹⁵⁰ Memorandum from Gordon England, *supra* note 149, at Enclosure (3), § A.

¹⁵¹ *Id.* at Enclosure (3), § D.

¹⁵² *Bismullah*, 501 F.3d at 184–86; see also *supra* Part III.A.

¹⁵³ Corrected Brief for Respondent Addressing Pending Preliminary Motions at 1–2, *United States v. Bismullah*, No. 06-1197 (D.C. Cir. Apr. 10, 2007).

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We think it clear that this court cannot discharge its responsibility . . . unless a petitioner's counsel has access to as much as is practical of the classified information regarding his client. Counsel simply cannot argue, nor can the court determine, whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence.¹⁵⁴

Importantly, although the above quotation appears to grant counsel access to classified information because it is *necessary* to the court's review, in other instances the court applies a lesser standard. For instance, in setting out rules for attorney-client privilege, the court noted:

Without expressing any view as to whether the attorney-client privilege applies in this context, we must agree that "full and frank communication" between a detainee and his counsel will help counsel present the detainee's case to the court, and thereby aid the process of review with which we have been charged by the Congress.¹⁵⁵

In this case the court appears to be agreeing with petitioner, not because full and frank communication between detainee and counsel are absolutely necessary to the adjudication of the claim, but because it would be *helpful*. This language matches the Supreme Court's interpretation that the AWA power not be limited to circumstances where "the court could not otherwise physically discharge" its duties,¹⁵⁶ and instead understands the AWA's role as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law."¹⁵⁷

Finally, the court applied this standard appropriately by not considering the four-factor test for a traditional injunction.¹⁵⁸ Indeed, at no time in the opinion did the court consider whether the petitioners were likely to succeed on the merits of their appeal.

4. *Usages and Principles of Law*

The *Bismullah* court does not specifically analogize to existing law. However, this does not necessarily contradict Supreme Court jurisprudence. The Supreme Court's recommendation that "the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" was limited specifically to the habeas context.¹⁵⁹

¹⁵⁴ *Bismullah*, 501 F.3d at 187.

¹⁵⁵ *Id.* at 189.

¹⁵⁶ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

¹⁵⁷ *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)) (internal quotation marks omitted).

¹⁵⁸ See *supra* Part II.A.1.

¹⁵⁹ *Harris*, 394 U.S. at 299.

Nonetheless, there is some evidence that the circuit court sought to align itself where possible with the district court's Protective Order arising out of *Al Odah*,¹⁶⁰ later referred to as the Status Quo Order.¹⁶¹ Ruling by analogy is less disruptive to litigants and provides a measure of predictability. Moreover, it follows the traditional function of the equity courts in filling the *casus omissus*,¹⁶² where the courts rule under the AWA by analogy. The circuit court appropriately considered the Status Quo Order as the previously existing but no longer valid law governing counsel access. Unfortunately, the court engaged in no discussion of why the Status Quo Order was an appropriate analogy, nor did it identify that it was using the Order in that manner.

C. The Future of the All Writs Act

The first important conclusion to draw from the experience of the D.C. District and Circuit Courts is that the AWA operates in a similar manner whether the jurisdiction is based on the habeas corpus statutes or the appellate power of the DTA. This is important for two reasons.

First, the Supreme Court recently granted a writ of certiorari in *Boumediene v. Bush*.¹⁶³ The questions presented in the case include whether the MCA validly stripped federal court jurisdiction over the habeas petitions.¹⁶⁴ This Note does not predict whether the Supreme Court will rule in favor of the detainees or how broad a ruling the Court will make. However, this Note does conclude that the standard governing the issuance of AWA injunctions will be the same whether the court's basis for jurisdiction is habeas corpus or the DTA.

Second, if the AWA jurisprudence for a right to counsel is the same whether the basis for jurisdiction is the habeas statutes or the DTA, then we would expect that the jurisprudence for the right to transfer abeyance would be equally indistinguishable. This second

¹⁶⁰ See *Adem v. Bush*, 425 F. Supp. 2d 7, 11 (D.D.C. 2006) ("*Al Odah* set the parameters for the final Amended Protective Order and Revised Access Procedures subsequently approved by Judge Joyce Hens Green in *In re Guantanamo Cases*, 344 F.Supp.2d 174 (D.D.C.2004).").

¹⁶¹ *Bismullah v. Gates*, 501 F.3d 178, 187–88, 190 (D.C. Cir. 2007); Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Cases*, No. 02-CV-0299(CKK) (D.D.C. Nov. 8, 2004), available at http://www.globalsecurity.org/security/library/policy/national/02-299a_08nov2004.pdf. The Chief Judge of the D.C. District Court entered the Protective Order, which governed detainees' access to the outside world. *Adem*, 425 F. Supp. 2d at 9 n.5 (D.D.C. 2006) (describing access to mail granted by Protective Order).

¹⁶² See *supra* notes 23–33 and accompanying text.

¹⁶³ 127 S. Ct. 3078 (2007).

¹⁶⁴ Petition for Writ of Certiorari at i, *Boumediene*, 127 S. Ct. 1478 (Mar. 5, 2007) (No. 06-1195).

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point warrants some further discussion by briefly applying the four factors outlined in Part I.A.

First, there is no alternative remedy for stopping detainee transfers. Appellate Rule 23(a),¹⁶⁵ on which at least one district court judge previously issued a preliminary injunction,¹⁶⁶ is applicable only to habeas proceedings. Moreover, the DTA and MCA provide no procedure to prevent release or transfer.¹⁶⁷ Second, this Note has already shown that there is appellate jurisdiction in the D.C. Circuit to review CSRT determinations.¹⁶⁸

Third, enjoining the transfer is necessary to aid the court's jurisdiction. The transfer of a detainee to a foreign jurisdiction would have "the practical effect of diminishing the court's power to bring the litigation to a natural conclusion."¹⁶⁹ The DTA explicitly states that such a transfer would eliminate the D.C. Circuit's jurisdiction to review CSRTs.¹⁷⁰ Fourth, the court should be expected to fill in the gaps by analogy to existing law. Just as the circuit court in *Bismullah* looked to the Status Quo Order,¹⁷¹ so too can the circuit court granting a transfer abeyance motion look to similar motions granted by the district courts under habeas jurisdiction.¹⁷²

¹⁶⁵ FED. R. APP. P. 23(a).

¹⁶⁶ *Abdah v. Bush*, Civ.A. No. 04-1254(HHK), 2005 WL 711814, at *5-7 (D.D.C. Mar. 29, 2005).

¹⁶⁷ The MCA amended the habeas statute to read that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an enemy combatant. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (to be codified at 28 U.S.C. § 2241(e) (Supp. V 2005)). However, this language amends only the habeas statute, and is not included in the limitations of the D.C. Circuit's scope of review. I believe that it is more appropriately seen as an attempt to preclude not only primary habeas jurisdiction, but any AWA actions appurtenant to habeas proceedings to limit transfer or regulate conditions of confinement.

¹⁶⁸ See *supra* Part III.A.

¹⁶⁹ *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 195 (D.D.C. 2005) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004)).

¹⁷⁰ Detainee Treatment Act of 2005, 10 U.S.C. § 1405(e)(2)(D) (Supp. V 2005) ("The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.").

¹⁷¹ *Bismullah v. Gates*, 501 F.3d 178, 187-88, 190 (D.C. Cir. 2007).

¹⁷² There are at least two cases in which the D.C. Circuit and the D.C. District Court have enjoined the transfer of detainees. In *Omar v. Harvey*, the D.C. Circuit enjoined the transfer of a U.S. citizen in the custody of Multinational Forces in Iraq (MNF-I) to the Central Criminal Court of Iraq. 479 F.3d 1, 3-4 (D.C. Cir. 2007); *Omar v. Harvey*, 416 F. Supp. 2d 19, 28 (D.D.C. 2006) (noting "concern that any physical transfer of the petitioner may prematurely moot the case or undo this court's jurisdiction"). In late 2007, the Supreme Court granted certiorari in *Omar*. In a second recent (and extraordinary) case, the D.C. District Court enjoined a Guantánamo detainee's transfer pursuant to the court's seemingly extinguished habeas jurisdiction, noting the "deep shadow of uncertainty over the jurisdictional ruling" of the D.C. Circuit in *Boumediene v. Bush*, given the Supreme

CONCLUSION

This Note has provided a roadmap of at least one line of decisions that explicate what is legally permitted to the courts under the AWA. Although the Guantánamo detainees' experience has provided a unique opportunity to study the AWA's application, this roadmap is not *sui generis* to their experience. Rather, it sets the parameters of federal courts' powers whenever needed to fill the interstices of federal law to prevent the frustration of the court's role. The courts are not helpless to effectuate their orders or prevent the executive branch from extinguishing their jurisdiction. This role of the courts is not inappropriate; rather it is a necessary element of the courts' ability to act as a coequal branch of government and to enforce the rights of the litigants before them.

Court's remarkable grant of certiorari in the case, *see supra* note 132. *Alhami v. Bush*, No. 05-359(GK), slip op. at 6-8 (D.D.C. Oct. 2, 2007). Despite the caption, the name of the petitioner in the case is Rahman, and that is the name by which the case is commonly referred.