NOTE

The Viability of a Habeas Challenge to Extraterritorial Immigration Detention: A Case Study of Camp Bondsteel

Ammar Inayatali†

Introduction

In the 1990s, the Bush administration changed how industrialized countries process refugees.[1] Instead of allowing refugees to enter their territories and afford them ostensible substantive and procedural asylum protections, industrialized countries began offshoring and externalizing their refugee processing to third-party countries.[2] Today, families who sought refuge in Australia now sit indefinitely confined in Papua New Guinea and Nauru.[3] Refugees who made it

† J.D. Candidate, 2024, Cornell Law School. I would like to thank my supervisor and peers in the Cornell Law Transnational Disputes Clinic including Professor Ian Kysel, Amy Godshall, and Yaeyoung Jane Jho.

1. *See infra* notes 7–9 and the accompanying text for a discussion of Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).

2. *Id.*

3. *See infra* notes 13–14 and the accompanying text for a discussion of *Australia: 8 Years of Abusive Offshore Asylum Processing*, Hum. Rts. Watch (Jul. 15, 2021), https://www.hrw.org/news/2021/07/15/australia-8-years-abusive-offshore-asylum-processing [https://perma.cc/KYU6-H749].

to the UK may soon have to await processing in Rwanda with virtually no hope of ever entering the UK again.[4] The Biden administration is considering interdicting Haitian refugees on the high seas and sending them to Guantanamo Bay for processing.[5] And—despite the administration touting its evacuation of Afghans fleeing the Taliban following the U.S. military's withdrawal, it has stripped Afghans of their rights under international and domestic law by first sending them to military bases abroad for processing instead of bringing them directly to the United States.[6]

This Note analyzes the U.S. treatment of Afghan evacuees at an United States military base in Kosovo—Camp Bondsteel. This Note demonstrates how the Government absconded from its obligations under domestic and international law to afford the evacuees substantive and procedural protections they would have on U.S. soil. Further, this Note shows how the United States is indefinitely detaining Afghans at Camp Bondsteel who it denied entry to the U.S. or who have been awaiting an immigration decision for a prolonged period. Finally, this Note proposes a solution, *federal habeas*, as a vehicle for the evacuees, alongside refugees experiencing similar circumstances, to seek release from the Camp and be brought to the United States. The evacuees, in filing a habeas petition, are likely to face four principal hurdles. First, they must show that the United States is holding them in custody within the meaning of the habeas statute even though the Government has stressed that they are technically "free to leave" the camp. Second, they must show that the Government lacks authority to detain them. Third, they must show that the Government cannot send them back to Afghanistan if the Government cannot find another place to send them. Fourth, they must show that federal courts have authority to order the Government to parole them into the United States if there are no other solutions. I conclude that habeas may offer a viable solution for the evacuees, especially those the Government denied entry to the United States and those who have been awaiting an immigration decision for a prolonged period.

This Note is organized as follows: Section I discusses the global offshoring and externalization movement. Section II discusses the U.S.-Afghanistan evacuation effort; it lays out, via publicly available information, what we know about the camp. Section III discusses habeas as a potential avenue for relief and the four hurdles discussed above.

I. Offshoring and Externalization: A Global Phenomena

In *Sale v. Haitian Centers Council*, the Supreme Court upheld the Bush administration's decision to repatriate Haitians fleeing persecution in their home country, whom the Coast Guard interdicted on the high seas, without affording

4. *What is the UK's plan to send asylum seekers to Rwanda?*, BBC (last visited Mar. 21, 2024) https://www.bbc.com/news/explainers-61782866 [https://perma.cc/8LXF-2VRC] [hereinafter *What is the UK's Plan*].

5. *Id.*

6. *See infra* Part II.

them the opportunity to seek asylum in the United States.[7] The Court held that the decision did not violate the non-refoulement provisions of Article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which the United States acceded to through the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[8] The United States is free under the Refugee Convention to refoul migrants it intercepts *outside its territory* without affording them the opportunity to seek asylum.[9]

Despite international condemnation of the *Sale* Court's ruling,[10] industrialized countries began adopting similar strategies to externalize and offshore their asylum processing to strip migrants of their rights under international and domestic laws.[11,12] For example, since 2013, the Australian government has forcibly transferred over 3,000 asylum seekers to offshore processing camps in Papua New Guinea and Nauru.[13] Families spend years living in substandard conditions in these centers without any guarantee of release besides to their countries of origin.[14] Similarly, the UK government is trying to pass legislation to send asylum seekers to Rwanda.[15] Those the UK offshores to Rwanda will not gain protection in the UK.[16] Instead, the UK will give them the option to stay in Rwanda, return home, or to try to secure protection in another country.[17] Most recently, to the condemnation of 289 human rights and faith-based organizations, the Biden administration is again considering sending and

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7. 509 U.S. 155, 163–66, 187 (1993); *see, e.g.,* Aylet Shachar, *Instruments of Evasion: The Global Dispersion of Rights-Restricting Migration Policies*, 110 Calif. L. Rev. 967, 980–82 (2022); Azadeh Erfani & Maria Garcia, Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum, Nat'l Immigrant Just. Ctr. (2021), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-08/Offshoring-Asylum-Report_final.pdf [https://perma.cc/NDE6-7UNJ].

8. *Sale*, 509 U.S. at 163, 187.

9. *Id.*

10. Shachar, *supra* note 7, at 982 ("Several national and international courts and tribunals critically rebuked the *Sale* ruling and the permissive U.S. stance on preemptive maritime interdiction. The English Court of Appeals, for example, broke the semi-sacred principle of international comity among courts when it referred to the case as 'wrongly decided.' Going a step further, the Inter-American Commission held, contra *Sale*, that the *non-refoulement* provision in the Refugee Convention 'has no geographical limitations,' thus giving legal responsibility and jurisdiction a more robust interpretation than ever before. The provision is, in this vein, no longer focused solely on territorial location (as it is seen under the static model) but also applies to states exercising 'effective control' or 'public power' beyond its borders. A growing number of international law and migration scholars echo this judgement call.").

11. Externalization refers to "the practice of shifting asylum processing or border control to another nation or territory." Erfani, *supra* note 7, at 5.

12. Offshoring refers to the "practice whereby countries of destination for asylum seekers transfer them to other nations or territories, which in turn detain those individuals and/or process their claims—as well as effectuate removals or deportations. This transfer regime effectively outsources the country of destination's obligations under international law and seeks to deter future asylum seekers." *Id.*

13. *Australia: 8 Years of Abusive Offshore Asylum Processing*, Hum. Rts. Watch (Jul. 15, 2021, 6:00 PM), https://www.hrw.org/news/2021/07/15/australia-8-years-abusive-offshore-asylum-processing [https://perma.cc/34ZP-APPV].

14. *Id.*

15. *What is the UK's plan*, *supra* note 4.

16. Shachar, *supra* note 7, at 998.

17. *Id.*

holding Haitian asylum seekers interdicted by the Coast Guard to an offshore migrant detention center at Guantanamo Bay.[18] The Biden administration also continues to offshore its immigration processing of Afghans fleeing the Taliban following the U.S. military's withdrawal from Afghanistan in August 2021.[19]

II. The United States-Afghanistan Evacuation Effort

In August 2021, the United States withdrew the last of its troops from Afghanistan ending its military presence there after nearly twenty years.[20] As a result, the Taliban rapidly gained control of Afghanistan's cities, culminating in its seizure of the capital, Kabul, on August 15.[21] The Taliban's ascent resulted in a refugee crisis.[22] The United Nations warned at the time that up to half a million Afghans could flee the country by the end of the year.[23] Up to 300,000 Afghans supported or were affiliated with the U.S. operation in Afghanistan since 2001 and many fled to avoid being persecuted and tortured by the Taliban.[24]

In response, President Biden announced Operation Allies Welcome (OAW), which directed the Department of Homeland Security (DHS) to coordinate efforts across the State Department (DoS) and Defense Department (DoD) to evacuate vulnerable Afghans.[25] On August 30, 2022, DoD commenced the largest airlift in U.S. history, evacuating more than 120,000 people from Afghanistan in 17 days.[26]

Despite being urged for months by refugee rights organizations to transport evacuees directly to the United States, the Government transported most Afghans to U.S. military bases in the Middle East and Europe.[27] There, the Government screened evacuees for national security and health-related

18. Email from Human Rights Watch to the Hon. Joseph R. Biden, President of the United States (Nov. 4, 2022, 3:26 PM EDT), https://www.hrw.org/news/2022/11/04/letter-human-rights-groups-us-president-joe-biden [https://perma.cc/BA4S-FW9R].

19. *US to lift Afghan visa limit under Biden, Congress deal*, Reuters, Mar. 19, 2024, https://www.reuters.com/world/us/us-lift-afghan-visa-limit-under-biden-congress-deal-2024-03-19/ [https://perma.cc/NAY6-XEBA].

20. Katherine Schaeffer, A year later, a look at public opinion about the U.S. military exit from Afghanistan, Pew Rsch. Ctr. (2022), https://www.pewresearch.org/fact-tank/2022/08/17/a-year-later-a-look-back-at-public-opinion-about-the-u-s-military-exit-from-afghanistan/ [https://perma.cc/C4C3-62NJ].

21. Ahmad Seir, et al., *Taliban sweep into Afghan capital after government collapses*, AP (Aug. 15, 2021, 11:35 PM) https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5 [https://perma.cc/H79P-NZAW].

22. The Visual Journalism Team, *Afghanistan: How many refugees are there and where will they go?*, BBC (Aug. 31, 2023) https://www.bbc.com/news/world-asia-58283177 [https://perma.cc/9K29-LAV4].

23. *Id.*

24. *Id.*

25. U.S. Dep't of Homeland Security, Operation Allies Welcome (2021) [Hereinafter Oaw Factsheet], https://www.dhs.gov/sites/default/files/publications/21_1110-opa-dhs-resettlement-of-at-risk-afghans.pdf [https://perma.cc/M66B-7KXM].

26. U.S. Dep't of Defense Office of the Inspector General, Evaluation of DoD Security and Life Support for Afghan Evacuees at Camp Bondsteel (2022) [Hereinafter OIG Report], https://media.defense.gov/2022/Oct/27/2003103804/-1/-1/1/DODIG-2023-008.PDF [https://perma.cc/32JK-TG6S].

27. Ellen Knickmeyer, *US: Afghan evacuees who fail initial screening Kosovo-bound*, AP (Sept. 4, 2021) https://apnews.com/article/europe-migration-kosovo-3496cbfc937b0b2b3c467d6ad5859091 [https://perma.cc/9926-R4DA]; OAW Factsheet, *supra* note 25.

reasons and processed their immigration applications (predominantly Special Immigrant Visas (SIVs) for those who supported the United States and their families and humanitarian parole) before relocating them to the United States.[28]

A. Camp Bondsteel

Not every Afghan screened at an overseas base made it to the United States. The Government transported those it flagged for security reasons and their families to Camp Bondsteel, a U.S. military base in Kosovo, for further vetting and immigration processing.[29] While DoS maintains operational control of the evacuees, DoD facilitates the preponderance of support for them.[30] As of July 29, 2022, the Government has cycled 759 evacuees through the camp.[31] As of April 2022, there are seventy-five Afghans at Camp Bondsteel.[32]

When the evacuees first arrived at the camp, U.S. officials informed them that the Government only intended to hold them for a few weeks before transporting them to the United States.[33] However, nine months to over a year later, many are still waiting for an immigration decision.[34] The Government denied sixteen evacuees from entering the United States.[35] The Government has not explained to evacuees why they were flagged and why it has taken so long to process their applications, or in some cases, why they were denied.[36] Instead, the Government has touted the success of its vetting system as effectively screening out those "[un]suitable for onward travel to the United States."[37]

However, the Government has shrouded its entire vetting and resettlement process in secrecy. It has prohibited lawyers, refugee rights organizations, and journalists from entering the camp to assist evacuees, it has also

28. OAW Factsheet, *supra* note 25.

29. Ben Fox, *Secrecy Shrouds Afghan refugees sent by US to base in Kosovo*, AP (Oct. 23, 2021) https://apnews.com/article/europe-middle-east-migration-kabul-kosovo-1d9a9998ec36d144a168a0330637580e [https://perma.cc/W9CQ-2699].

30. OIG Report, *supra* note 26, at 4.

31. *Id.*

32. *Id.*

33. Haley Ott, *Afghan official evacuated by U.S. says he and his family living "like prisoners" on American military base in Kosovo*, CBS News (June 29, 2022) https://www.cbsnews.com/news/afghan-refugees-stuck-like-prisoners-american-military-base-kosovo/ [https://perma.cc/7Q8F-8K5F].

34. *Id.*; Hans Nichols & Jonathan Swan, *Scoop: U.S. to deny entry to some Afghans at Kosovo*, Axios (May 16, 2022) https://www.axios.com/2022/05/16/scoop-us-to-deny-entry-to-some-afghans-in-kosovo [https://perma.cc/MY8X-3XRJ].

35. Nichols, *supra* note 34; J.P. Lawrence, *US rejects entry to 16 Afghans staying at base in Kosovo, seeks to relocate them to other* countries, Stars and Stripes (May 26, 2022) https://www.stripes.com/theaters/europe/2022-05-26/kosovo-afghan-evacuees-6135140.html [https://perma.cc/C9Z4-VB2X].

36. Gordon Lubold & Jessica Donati, *Afghans Housed at Military Base in Kosovo Risk Being Denied Entry to U.S. for Alleged Terrorist Ties*, WSJ (Jan. 21, 2022) https://www.wsj.com/articles/afghans-housed-at-military-base-in-kosovo-risk-being-denied-entry-to-u-s-for-alleged-terrorist-ties-11642761008 [https://perma.cc/YVF6-E9UC]; Ott, *supra* note 33; Teri Schultz, *Afghans adrift on US 'lily pad' in Kosovo*, Deutsche Welle (Aug. 28, 2022) https://www.dw.com/en/afghans-adrift-on-us-lily-pad-in-kosovo/a-62942555 [https://perma.cc/8RJG-4LMP].

37. Callie Patteson, *US secretly sending Afghans flagged as security threat to base in Kosovo: report*, New York Post (Oct. 25, 2021) https://nypost.com/2021/10/25/us-secretly-sending-afghans-flagged-as-security-threat-to-base-in-kosovo-report/ [https://perma.cc/J62G-LUQR].

failed to publicly explain why it has been holding the evacuees for so long.[38] Consequently, organizations are unsure how to assist the evacuees.[39] Further, some of the sixteen denied evacuees have stated they have no ties to militant groups, pose no national security threat, and are simply victims of poor translation.[40] Many evacuees once worked alongside American military leaders and diplomats making them eligible for an SIV.[41] Nonetheless, the Government has left evacuees and organizations unsure how to change their status.

The United States is also de facto detaining the evacuees at Camp Bondsteel; the Government has surrounded them with a six-foot-tall fence.[42] The evacuees only have access to a field, the bathrooms, the dining hall, and their tents.[43] Officials at the camp have instructed the evacuees not to leave pursuant to the Government's agreement with Kosovo.[44] The Government maintains, however, that its role is not military, and the evacuees are "free to leave" the base, either to return to Afghanistan or enter broader Kosovo.[45]

However, the evacuees may not return to Afghanistan without facing the substantial risk of torture and persecution by the Taliban. The United States has admitted as much. Shortly after President Biden announced OAW, DHS Secretary Mayorkas announced that the United States would not refoul evacuees to Afghanistan.[46] The State Department has documented Taliban executed killings of former members of the Afghan government and military forces, including those who likely supported the United States.[47] Given the high likelihood that the Taliban would persecute and torture evacuees at Camp Bondsteel for their affiliation with the United States, Government officials have repeatedly stated that the United States will not involuntarily refoul the evacuees to Afghanistan.[48]

The evacuees may also not enter broader Kosovo without jeopardizing their refugee application. The Government has prohibited refugee rights organizations from entering the camp to potentially inform evacuees how Kosovo authorities would treat them on the outside.[49] The government of Kosovo

38. Fox, *supra* note 29; Patteson, *supra* note 37; Knickmeyer, *supra* note 27 ("There's just a staggering lack of transparency from the administration about what is happening' [at its overseas transit centers], said Adam Bates, an attorney with the International Refugee Assistance Project.").

39. Fox, *supra* note 29.

40. Lawrence, *supra* note 35.

41. Lubold, *supra* note 36.

42. OIG Report, *supra* note 26, at 9.

43. Ott, *supra* note 33.

44. OIG Report, *supra* note 26, at 4.

45. *Id.*; Patteson, *supra* note 37.

46. Nick Miroff, *U.S. Has Flagged 44 Afghan Evacuees as Potential National Security Risks Over the Past Two Weeks, Vetting Reports Show*, Wash. Post (Sept. 10, 2021) https://www.washingtonpost.com/national/afghan-refugees-security-risks/2021/09/09/a0c5d1ac-1194-11ec-a511-cb913c7e5ba0_story.html [https://perma.cc/MHD6-A5F9].

47. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Afghanistan, 5–8 (2021).

48. Lawrence, *supra* note 35; *Security Concerns Leave Afghan Evacuees Stuck in Balkan Camp*, VOA (June 3, 2022) [hereinafter *VOA Report*], https://www.voanews.com/a/security-concerns-leave-afghan-evacuees-stuck-in-balkan-camp-/6602721.html [https://perma.cc/UCA7-93TK].

49. Knickmeyer, *supra* note 27.

has refused to disclose to NGOs how it treats evacuees who leave the camp.[50] Hence, if refugee rights organizations are likely uncertain whether the evacuees should leave, the evacuees are highly unlikely to know as well. By leaving the camp, evacuees jeopardize their ability to return by forfeiting their applications to the United States, or in cases of those denied, U.S. facilitated resettlement to a third-party country.[51] Therefore, evacuees may either remain in the camp, or depart, potentially face immigration detention and removal by Kosovo authorities and restart the resettlement process while risking refoulement as undocumented migrants in Eastern Europe.

The United States may be detaining some evacuees indefinitely. The Government has not provided a timeline to process delayed immigration applications.[52] Further, the Government intends to resettle those it denied in third-party countries.[53] However, given that the Government flagged these evacuees for security-related concerns, other countries may be unwilling to take them.[54] The Government also prohibits evacuees from seeking solutions for themselves.[55] Consequently, evacuees at Camp Bondsteel sit in indefinite limbo, their fate in the hands of the U.S. government, unlikely to process their immigration applications soon, and other countries, unlikely to take them in.[56]

III. Habeas: A Potential Solution

The Government, following a global offshoring and externalization movement, stripped the evacuees of substantive and procedural protections they would be entitled to on U.S. soil. For example, contrast their experience to that of asylum seekers on U.S. territory undergoing expedited removal.[57] The Government must inform a refugee undergoing expedited removal of their

50. *See* Jens Stoltenberg, NATO Secretary General & Albin Kurti, Prime Minister of Kosovo, Joint Press Conference (Aug. 17, 2022), https://www.nato.int/cps/en/natohq/opinions_198172.htm [https://perma.cc/6FH8-UEMZ].

51. OIG Report, *supra* note 26, at 4.

52. VOA Report, *supra* note 48; Lubold, *supra* note 36; Fox, *supra* note 29.

53. Lawrence, *supra* note 35.

54. Miroff, *supra* note 46 ("Stewart Baker, a counterterrorism expert who was a top policy advisor at DHS under President George W. Bush, said the Afghan vetting process is uncharted territory' for U.S. security agencies because it's happening partly after evacuees have arrived. 'DHS is doing what they can to vet after the fact. But these people who are here are probably not leaving even if they fail the vetting process,' Baker said. 'It's not clear what countries will take those who we flag as a security concern," he added. 'And what about the ones who aren't cleared to travel? Will these countries send them out into their populations if we don't admit them to come here?'").

55. Ott, *supra* note 33.

56. Acknowledging its delay in processing and resettling the evacuees, the Government extended its agreement with Kosovo to continue holding evacuees at Camp Bondsteel until August 2023. OIG Report, *supra* note 26, at 1.

57. Here, I discuss the Government's immigration processing of asylum seekers undergoing expedited removal to contrast the bare minimum procedural protections it affords to asylum seekers on U.S. soil to those it afforded the evacuees at Camp Bondsteel. Further, I conservatively assume that the Attorney General would have initiated expedited removal proceedings against the evacuees pursuant to his authority under 8 U.S.C. § 1225(b)(1)(A)(iii) if the Government initially brought them directly to the United States. 8 U.S.C. § 1225(b)(1)(A)(iii).

right to asylum (and refoulement protection under the Refugee Convention) and counsel (at their own expense).[58] An asylum officer subsequently interviews the asylum seeker to determine whether they have a credible fear of persecution in their home country.[59] If the asylum officer renders an adverse credible fear decision, the asylum seeker may request a hearing before an immigration judge.[60] If the asylum officer renders an affirmative credible fear decision, United States Citizenship and Immigration Services (USCIS) may conduct a merits interview to elicit information about the asylum seeker's eligibility for asylum, including non-refoulment protection under the United Nations Convention Against Torture (CAT).[61] During the interview, USCIS develops an evidentiary record and permits the asylum applicant and their representative to ask questions.[62] The asylum seeker may subsequently appeal an adverse decision to an immigration judge.[63] Most importantly, the Government may not detain the asylum seeker for longer than six months without formally justifying its delay.[64]

In contrast, the evacuees at Camp Bondsteel may not apply for asylum because the Government never transported them to the United States.[65] Under *Sale*, the Refugee Convention does not prohibit the Government from sending evacuees to Afghanistan if it cannot find third-party resettlement solutions.[66] And the Government, under the guise of secrecy, has not afforded the evacuees the procedural structure and transparency it affords asylum seekers, all while unconstrained under existing case law to indefinitely detain them.[67]

Habeas may offer a potential solution to the evacuees, particularly those denied or awaiting a decision for a prolonged period. The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against lawless government detention.[68] In the immigration setting, a detainee may file a habeas petition in federal court to challenge the lawfulness of their detention and seek release into the United States.[69]

Accordingly, evacuees at Camp Bondsteel may file a habeas petition to challenge the Government's authority to detain them and seek parole into the United States. Given that a court has never ruled on a habeas petition filed by refugees detained by the United States abroad under similar circumstances, the evacuees' litigant may also achieve strategic objectives—namely, (1) to establish that courts may review habeas petitions filed by migrants detained abroad by the United States even when they are technically "free

58. Steve W. Yale-Loehr, Immigration Law and Procedure § 34.02 (Matthew Bender, Rev. Ed. 2022).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See infra* Part III(A)(2).
65. *See* 8 U.S.C § 1158.
66. *See supra* Part I.
67. *See infra* Part III(A)(2).
68. Yale-Loehr, *supra* note 58, § 104.04 (citing Harris v. Nelson, 394 U.S. 286, 290–91 (1969)).
69. *Id.*

to leave," (2) to establish that the Government lacks authority to detain migrants abroad in the immigration context, (3) to enjoin (via habeas) the United States from refouling refugees it detains abroad under CAT as an alternative to the Refugee Convention, and (4) to secure authority for courts to order the Government to parole refugees it unlawfully detains abroad into the United States when there are no other release solutions.

A. Hurdles

The evacuees would likely face four hurdles to obtaining habeas relief. First, they must show that they are in custody of the United States despite being "free to leave" the camp. The evacuees are likely to succeed on this issue. Second, the evacuees must show that the Government lacks authority to detain them under domestic law. The evacuees are likely to succeed on this issue. Third, the evacuees must show that a court sitting in habeas jurisdiction may enjoin the Government under CAT from involuntary transferring them back to Afghanistan. The evacuees are likely to succeed on this issue. Fourth, the evacuees must show that a court may order the Government to parole them into the United States pursuant to its habeas powers. A court may rule favorably for the evacuees on this issue. Hence, a court may grant the evacuees habeas relief and order the Government to parole them into the United States.

1. Custody

A court has subject matter jurisdiction to issue a writ of habeas corpus if the petitioner, among other requirements, is "in custody" of the United States.[70] Though a court has never decided whether migrants detained abroad under circumstances where they are "technically free to leave" are in custody, a court here is likely to hold that the evacuees are in custody of the United States. Courts construe the *in custody* requirement of the habeas statute "very liberally."[71] A petitioner is in custody, within the meaning of the habeas statute, when they are subject to constraints not shared by the public generally.[72] Courts have deemed a petitioner to be in custody even when they are not physically confined.[73] Accordingly, courts have held that foreign citizens on immigration bond are in custody within the meaning of the habeas statute.[74]

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70. 28 U.S.C. § 2241(c)(1), (c)(3).

71. *See* Maleng v. Cook, 490 U.S. 488, 492 (1989).

72. *See e.g.,* Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist., 411 U.S. 345, 351 (1973) (holding that a petitioner "subject to restraints 'not shared by the public generally'" and whose "freedom of movement rest[ed] in the hands of state judicial officials" had satisfied the custodial requirement); Jones v. Cunningham, 371 U.S. 236, 239–40 (1963).

73. *Hensley*, 411 U.S. at 491; *see Jones*, 371 U.S. at 239.

74. Ortiz v. Mayorkas, 2022 WL 595147 at 3 (4th Cir. 2022) ("[A] noncitizen petitioner, subject to final removal proceedings is 'in custody' for habeas purposes, whether or not he is detained.") (quoting Simmons v. INS, 326 F.3d 351, 356 (2d. Cir. 2003)); s*ee e.g.,* Mustata v. U.S. Dep't of Justice, 179 F.3d 1017, 1021 (6th Cir. 1999), Williams v. I.N.S., 795 F.2d 738, 745 (9th Cir. 1986) (upholding habeas jurisdiction to review a final deportation order when the foreign citizen had been ordered to report for deportation); Pelletier v. U.S., 588 F. App'x. 784, 791 (10th Cir. 2014) (foreign citizen was in custody within the meaning of the habeas statute because his immigration bond required him to appear at immigration hearings scheduled at the discretion of the immigration court).

A court is likely to hold that the evacuees are in custody within the meaning of the habeas statute. The Government is constraining the evacuees to a greater extent than it does foreign citizens on bond in the United States. Foreign citizens on bond are freer geographically than the evacuees, who the Government is simply enclosing in the camp. A court may therefore find that the evacuees are subject to constraints more akin to physical confinement than release on bond.

The Government is likely to argue that the evacuees are "free to leave" the camp either to return to Afghanistan or enter broader Kosovo. But as discussed above, the evacuees are not simply "free to leave." They may not return to Afghanistan without facing substantial risk of torture and persecution by the Taliban. The evacuees may also not enter broader Kosovo given their uncertain status and risk of refoulement on the outside and their inability to pursue U.S. facilitated resettlement options upon leaving.[75]

Further note, if the Government initially brought the evacuees to the United States to process their immigration applications, it could not assert that the evacuees are "free to leave" to void a court of its subject matter jurisdiction over the evacuees' habeas petition. The Government would either physically confine the evacuees or release them on bond pursuant to its authority under 8 U.S.C § 1226.[76] In either case, the court would find the evacuees' to have satisfied the in-custody requirement of the habeas statute.

Instead, the Government is holding the evacuees under circumstances that courts have never confronted before in the immigration habeas context—abroad, on a military base, where the evacuees are "free to leave." This exemplifies how the executive branch is attempting to void the evacuees of substantive and procedural habeas protections they would have on U.S. soil and avoid judicial oversight. The Government has asserted the alleged freedom of offshored immigration detainees before. According to Immigration and Customs Enforcement (ICE), refugees at Guantanamo Bay are "not incarcerated or detained" and are "free to leave" if they agree to return to their countries of origin.[77] Here, a court may establish that immigration detainees held by the United States abroad under such circumstances are in custody within the meaning of the habeas statute to protect them from unfettered executive discretion.

2. Detention Authority

In *I.N.S. v. St. Cyr,* the Supreme Court articulated the historical purpose of habeas as an individual's means to challenge the legality of their detention.[78] The Supreme Court held that court's sitting in habeas jurisdiction may review questions of pure law and legal contentions to determine whether to grant habeas relief.[79] A court may grant habeas relief if the Government detained

75. *See supra* Part II(A).
76. 8 U.S.C. § 1226.
77. Kristen R. Bradley, *Charting a Course Toward a Legal Challenge in At-Sea Interdiction and Custody Scenarios: Habeas Corpus as a Light on the Horizon*, 35 Geo. Imm. Law J. 843, 870 (2021).
78. 533 U.S. 289, 301–02 (2001).
79. *Id.*

the petitioner based on an erroneous interpretation or application of law to undisputed facts.[80]

Here, a court may review a question of pure law to determine whether to grant habeas relief to the evacuees: whether there exists law authorizing the Government to hold the evacuees at Camp Bondsteel.

Given the structural and historical purpose of the writ as a judicial safeguard of individual liberty against executive detention, the Government must provide this source of authority.[81] The writ has historically presumed that every individual is entitled to be free and demands that the executive explain their custody of the petitioner.[82]

The Government may invoke three sources of authority to justify holding the evacuees. The three sources of authority are: (1) domestic immigration law – namely, 8 U.S.C § 1226(a) and (c), and 8 U.S.C. § 1231 (a) and (c); (2) the Authorization for Use of Military Force (2001 AUMF)[83] in conjunction with the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA);[84] and (3) U.S. Department of the Army, Navy, Air Force, & Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8 (1997) (Army Regulation 190-8). The court may then determine whether the Government is erroneously interpreting or applying each source to undisputed facts.

Though a court has never ruled on whether the Government may detain migrants abroad in the immigration context, a court is likely to hold that the Government lacks authority to detain the evacuees—especially those denied or awaiting an immigration decision for a prolonged period.

First, 8 U.S.C § 1226(a) and (c) and 8 U.S.C. § 1231 (a) and (c) authorize the Attorney General to detain foreign citizens awaiting removal from the United States or a removal decision. Here, the Secretaries of State, Homeland Security, and Defense are responsible for holding the evacuees, not the Attorney General.[85] Further, the evacuees are not subject to a removal order or awaiting a removal decision.[86]

Even if the Government successfully asserts domestic immigration law as applicable to the evacuees, a court is unlikely to find that it authorizes the Government to hold denied evacuees or those awaiting an immigration decision for longer than six months.

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80. *Id.; see e.g.,* Guerrero-Lasprilla v. Barr, 140 S.Ct. 1062, 1072 (2020); Wang. v. Ashcroft, 320 F.3d 130, 143 (2d. 2003); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3d. 2003); Auguste. v. Ridge, 395 F.3d 123, 138 (3d Cir. 2005); Cadet v. Bulger, 377 F.3d 1173, 1184 (11th Cir. 2004); Singh v. Ashcroft, 351 F.3d 435, 441–42 (9th Cir. 2003).

81. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

82. *See e.g., Ex parte Burford*, 7 U.S. 448, 452 (1806) ("The question is, what authority has the jailor to detain him?"); Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and. . . the traditional function of the writ is to secure release from illegal custody.").

83. Pub. L. 107-40, 115 Stat. 224 (2001).

84. Pub. L. 112-81, 125 Stat. 1298 (2011) (clarifying the scope of AUMF detention authority).

85. *See supra* note 30.

86. *See supra* Part II(A).

In *Zadvydas v. Davis*, the Supreme Court held that Congress, in its immigration laws, did not authorize executive agencies to detain foreign citizens indefinitely.[87] In the context of removal proceedings, the Court held that the Government may not hold a foreign citizen it intends to remove beyond six months if the foreign citizen can show there is no significant likelihood that the Government will remove them in the reasonably foreseeable future.[88] The Court held that Congress doubted whether executive agencies may constitutionally detain foreign citizens for longer than six months without further justification.[89]

In *Clark v. Martinez*, the Supreme Court extended this reasoning and holding to foreign citizens who have not been admitted to the United States.[90] *Clark* involved two Cuban refugees who the Government paroled into the United States.[91] After the refugees committed serious crimes, the Government detained and ordered them deported back to Cuba.[92] However, because Cuba would not accept them, the Government continued to detain them for much longer than six months.[93] The refugees filed habeas petitions challenging the Government's authority to detain them.[94] Extending its holding in *Zadvydas*, the Supreme Court held that the refugees had shown that the government was unlikely to remove them in the reasonably foreseeable future, and over staunch opposition, ordered the Government to parole them into the United States.[95]

Here, denied evacuees face a similar predicament to the petitioners in *Clark*. They are in custody of the United States and cannot return to their country of origin.[96] They, like the petitioners in *Clark*, depend on the Government to reconsider its decision to deny them admission to the United States or resettle them elsewhere. The Government failed to adequately apprise them of their status and its efforts to resettle them and it seems unlikely the Government will resettle them in the reasonably foreseeable future.[97] Therefore, under *Zadvydas* and *Clark,* and absent the Government demonstrating authority beyond its immigration laws to detain these evacuees, the Government is detaining them unlawfully.

The Supreme Court's reasoning in *Zadvydas* and *Clark* also applies to the question of whether the Government, under domestic immigration law, is authorized to detain evacuees awaiting an immigration decision for longer than six months. It is unlikely that Congress authorized executive agencies to indefinitely detain foreign citizens awaiting an immigration decision for fear of reaching constitutional bounds. The Ninth Circuit has gone further to declare unconstitutional the Government detaining asylum seekers indefinitely

87. 533 U.S. 678, 690 (2001).
88. *Id.* at 701.
89. *Id.*
90. 543 U.S. 371, 386–87 (2005).
91. *Id.* at 373–77.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 386–87.
96. *See supra* Part III(A)(I).
97. *See supra* Part II(A).

without a bond hearing.[98] Given that many evacuees have been awaiting a decision for much longer than six months and it is unlikely the Government will be able to provide them a decision in the reasonably foreseeable future,[99] and further if denied they will enter the predicament of denied evacuees discussed above,[100] the Government lacks authority to hold them in custody under domestic immigration law.[101]

Second, the 2001 AUMF and the 2012 NDAA authorize the military to detain individuals who substantially supported al-Qaeda, the Taliban, or associated forces.[102] Here, the Government stated that its detention of the evacuees is not a military, but rather a humanitarian operation.[103] Therefore, a court is unlikely to find the 2001 AUMF and 2012 NDAA applicable to the evacuees.

Third, Army Regulation 190-8 authorizes the U.S. military to detain enemy prisoners of war, retained personnel, and civilian internees.[104] Here, a court is unlikely to find Army Regulation 190-8 applicable to the evacuees at Camp Bondsteel. The evacuees are under the operational control of DoS, not

98. Padilla v. Immigration and Customs Enforcement, 953 F.3d 1134, 1443 (9th Cir. 2020), *rev'd on other grounds*, 141 S.Ct. 1041, 1041–42 (2021).

99. *See supra* Part II(A).

100. *See supra* note 97.

101. The Government may argue that *Zadvydas*, *Clark*, and *Padilla* do not apply to the evacuees because they rely on the applicability of the Due Process Clause of the Fifth Amendment to the detainees in those cases. Zadvydas v. Davis, 533 U.S. 678, 690 (2001); Clark v. Martinez, 543 U.S.371, 389 (2005) (Thomas, J., dissenting); *Padilla*, 953 F.3d at 1142. The Government may argue here that the Due Process Clause of the Fifth Amendment does not apply to foreign citizens detained abroad including the evacuees. *See* e.g., Johnson v. Eisentrager, 339 U.S. 763, 784 (1950); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009). However, the D.C. Circuit has held that the issue of whether the Due Process Clause of the Fifth Amendment applies to foreign citizens abroad is an open question and assumed it to apply in certain circumstances. *See e.g.,* Ali v. Trump, 959 F.3d 364, 369–73 (D.C. Cir. 2020) (assuming that a detainee may bring due process challenges to the length of his detention, the use of hearsay evidence, and the standard of proof governing his detention and rejecting those challenges on the merits); Aamer v. Obama, 742 F.3d 1023, 1038–42 (D.C. Cir. 2014) (assuming that the substantive due process "right to be free from unwanted medical treatment" applies at Guantanamo and rejecting detainees' claims on the merits); Kiyemba v. Obama, 561 F.3d 509, 514 n.4 (D.C. Cir. 2009) (assuming that detainees have the same due process rights as U.S. citizens with respect to their transfer to foreign custody and rejecting their claims on the merits). In *Boumediene*, the Supreme Court departed from its holding in *Eisentrager* that foreign citizens outside U.S. territory do not enjoy constitutional rights. Boumediene v. Bush, 553 U.S. 723, 771 (2008). Citing separation-of-powers principles, the Court extended the protections of the Suspension Clause to foreign citizens the Government was detaining abroad as a means to ensure judicial oversight over executive detention. *Id.* at 765 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) ("To hold the political branches have the power to switch the Constitution on or off at will. . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"). The applicability of the Due Process Clause of the Fifth Amendment to the evacuees flows naturally from the *Boumediene* court's separation-of-powers reasoning. The executive branch attempted, following a global offshoring movement, to strip constitutional and international rights from the evacuees that protect foreign citizens on U.S. soil. A court may step in and vindicate its role to defend the liberty interests of the evacuees from discretionary executive action.

102. 2001 AUMF § 2(a); 2012 NDAA § 1021(a).

103. OAW Factsheet, *supra* note 26.

104. Army Regulation 190-8 § 1-6(e)(10).

the U.S. military.[105] Further, the Government has stated that its detention of the evacuees at Camp Bondsteel is not a military, but rather a humanitarian operation.[106]

3. Refoulement

CAT has been in effect in the United States since November 20, 1994.[107] Article 3 of CAT provides in relevant part that "[n]o State Party shall expel, return. . ., or extradite a person to another State where there are substantial grounds for believing that [t]he[y] would be in danger of being subjected to torture."[108] To implement this provision, Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA), which states:

> 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.[109]

Here, the Taliban is likely to torture the evacuees if the Government returns them to Afghanistan.[110] Therefore, under FARRA, the Government may not involuntarily return the evacuees to Afghanistan.[111]

The Government is likely to argue that a court may not exercise its habeas powers to review the evacuees' FARRA claim. The Government is likely to cite three cases to support this contention. In *Munaf*, two American citizens, Mohammad Munaf and Shawqi Omar, who had voluntarily traveled to Iraq, were arrested by the Multi-National Force-Iraq (MNF-I), a multinational coalition involving American forces.[112] They were given hearings before MNF-I tribunals composed of American officers, who concluded that they posed threats

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105. *See supra* note 30.

106. OAW FACTSHEET, *supra* note 26.

107. The United States Senate ratified the Convention in 1990, *see* 136 Cong. Rec. S10091, S10093 (daily ed. July 19, 1990), the instrument of ratification was deposited with the United Nations in October 1994, and the Convention entered into force for the United States in November 1994. *See* Regulations Concerning CAT, 64 Fed.Reg. 8478, 1999 WL 75823 (Feb. 19, 1999) (Background).

108. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Apr. 18, 1988, 1465 U.N.T.S. 85.

109. Pub.L. No. 105–277, § 2242, 112 Stat. 2681–761, 822 (1998) (codified at 8 U.S.C. § 1231 note).

110. Lawrence, *supra* note 35.

111. In *Sale*, the Supreme Court held that U.S. non-refoulement obligations under the 1951 Refugee Convention and the 1967 Protocol did not apply extraterritorially to Haitian refugees interdicted by the Coast Guard on the high seas and detained on Coast Guard vessels and in Guantanamo Bay. Sale v. Haitian Center Council, Inc., 509 U.S.155, 187. The Court relied on both the plain language of the Convention and the Convention's negotiating history. *Id.* As shown above, CAT plainly requires the Government to comply with its non-refoulement obligations under CAT regardless of where a refugee is located. The United States, by offshoring its processing of the evacuees, attempted to strip them of their international non-refoulement rights. CAT may offer a way for a court to hold that the Government may not refoul refugees regardless of where they are located.

112. Munaf v. Geren, 553 U.S. 674, 680–85 (2008).

to Iraq's security and placed them into American custody.[113] MNF-I referred Munaf and Omar to Iraqi authorities for further criminal proceedings and continued to hold them at the request of the Iraqi government.[114] Munaf and Omar sought to enjoin their transfer from the MNF-I detainee camp to Iraqi custody by filing habeas petitions, alleging that they would likely be subject to torture in Iraqi custody.[115]

The Supreme Court in *Munaf* held that courts may not exercise their habeas powers to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution.[116] First, any release would violate Iraq's sovereign right to prosecute Munaf and Omar for crimes committed within its borders.[117] Munaf and Omar would likely be arrested by Iraqi police if not held by the American military.[118] Further, the United States was holding them at Iraq's request.[119] Second, while the Court acknowledged Munaf and Omar's torture allegations as a matter of serious concern, it deferred to the Government's assessment of transfer country conditions.[120] State Department findings discredited Munaf and Omar's allegations of torture and the Court relied on the Solicitor General's assurances that the United States does not transfer individuals to a country where torture is likely.[121] It therefore chose not to "second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."[122]

Munaf does not control whether a court may review the evacuees' FARRA claim. Unlike *Munaf*, the United States here is not holding the evacuees at the request of the Taliban in Afghan territory. Therefore, by withholding the evacuees' transfer to Afghanistan, the United States would not be infringing upon the Afghan government's sovereign right to render judgment against those who have committed crimes within its borders. Second, the Court in *Munaf* explicitly reserved judgment on two important issues. The Court left open the possibility for a more thorough review of the Secretary's judgement when presented with serious allegations of torture.[123] Unlike the Government in *Munaf*, the Government here has and is likely to take the evacuees' torture allegations seriously, thereby raising this issue for the court's review.[124] The Court in *Munaf* also did not consider whether FARRA prohibited the Government from transferring Munaf and Omar to Iraqi custody because neither individual

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 692.
117. *Id.* at 697–98.
118. *Id.*
119. *Id.*
120. *Id.* at 700–701.
121. *Id.* at 702.
122. *Id.*
123. *Id.* ("This is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured and transferred him anyway").
124. *See supra* Part II(A).

invoked FARRA in their habeas petition.[125] Here, the evacuees would be invoking FARRA for the court's review.

The Government will also likely cite *Kiyemba* to argue that a court, exercising habeas jurisdiction, may not review the evacuees' FARRA claim. In *Kiyemba v. Obama*, nine Uighurs held at Guantanamo Bay for military purposes filed habeas petitions seeking interim relief, to oblige the Government to provide 30 days' notice to the court and to counsel before transferring them from Guantanamo.[126] The detainees "asked the district court to enjoin their transfer because they feared they would be tortured in the recipient country."[127]

Analyzing the request under *Munaf*, the D.C. Circuit held that a court sitting in habeas jurisdiction may not enjoin the Government from transferring a detainee "based upon the likelihood of [their] being tortured in the recipient country."[128] Like the Court in *Munaf*, the court relied on assurances from the State Department that it "does everything in its power to determine whether a particular country is likely to torture a particular detainee."[129] It asserted that, like the Court in *Munaf*, it could not question the Government's determination that a particular recipient country is not likely to torture a detainee.[130]

The petitioners in *Kiyemba* sought to distinguish their case from *Munaf* on grounds that Munaf and Omar did not raise claims under FARRA.[131] The court rejected this difference.[132] It held that Congress limited judicial review under FARRA to "claims raised in a challenge to a final order of removal" and cited the REAL ID Act, although not explicitly naming it, for support.[133] Because the petitioners were not challenging a final order of removal, the court determined it did not have the authority to review their FARRA claims.[134]

Here, *Kiyemba* does not control a court's assessment of its authority to review the evacuees' FARRA claim. First, the court in *Kiyemba* failed to recognize a key issue unanswered by the *Munaf* Court—the possibility of judicial review where allegations of torture are serious. The Government has and is likely to take the evacuees' torture allegations seriously.[135]

Even if the Government refutes the evacuees' torture allegations, it may not rely on *Kiyemba* because the *Kiyemba* court wrongly decided it could not adjudicate the petitioners' FARRA claims. It was not bound by *Munaf* because the two cases are materially distinguishable.

As Judge Griffith argued, in part, in his concurrence, "[c]ritical to *Munaf*'s holding was the need to protect Iraq's right as a foreign sovereign to prosecute" Munaf and Omar.[136] The court did not face this issue in *Kiyemba* because the

125. *Munaf*, 553 U.S. at 703.
126. 561 F.3d 509, 511 (D.C. Cir. 2009).
127. *Id.* at 514.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* Lawrence, *supra* note 35.
136. *Kiyemba*, 561 F.3d at 526.

petitioners in *Kiyemba* were simply requesting notice before being transferred to another country.[137] Further, the *Munaf* petitioners sought a unique type of relief, namely for the Government to shelter them from a foreign sovereign seeking to have them answer for alleged crimes committed within its borders.[138] In *Kiyemba*, again, the petitioners were simply seeking notice to protect themselves from torture in the transfer country.[139]

The court in *Kiyemba* incorrectly decided that FARRA, supplemented by the REAL ID Act, barred the court from reviewing transfer country conditions.[140] The court found that Congress limited judicial review under FARRA to claims raised in a final order of removal.[141] However, the court did not elaborate in its reasoning beyond a verbatim articulation of the relevant statutes.[142] The court attempted to do so in *Omar v. McHugh*.[143]

In *Omar*, the D.C. Circuit adopted its holding in *Kiyemba* to removal order proceedings, limiting a habeas petitioner's right to challenge their transfer by the Government to another country under FARRA.[144] In *Omar,* the court revisited the claims of Shawqi Omar, one of the petitioners in *Munaf*.[145] In this case, *Omar* claimed that FARRA gave him a right to judicial review of the conditions in the receiving country prior to his transfer.[146]

FARRA provides in relevant part:

> (d) REVIEW AND CONSTRUCTION. Notwithstanding any other provision of law. . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention [Against Torture] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), 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).[147]

The court in *Omar* held, by its terms, FARRA provides a right to judicial review of conditions in the receiving country only in the immigration context, for immigrants seeking review of a final order of removal.[148]

The court further held, even if FARRA had extended a right to judicial review to military transferees, a subsequent statute, the REAL ID Act of 2005,

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137. *Id.*
138. Munaf v. Geren, 553 U.S. 674, 693 (2008).
139. *Kiyemba*, 561 F.3d at 526.
140. *Id.* at 514.
141. *Id.*
142. *Id.*
143. 646 F.3d 13, 18 (D.C. Cir. 2011).
144. *Id.*
145. *Id* at 14.
146. *Id.* at 15.
147. Pub.L. No. 105–277, § 2242, 112 Stat. 2681–761, 822 (1998) (codified at 8 U.S.C. § 1231 note).
148. *Omar*, 646 F.3d at 17 ("The FARR Act does not give extradition or military transferees – the other two categories in which transfer issues typically arise – a right to judicial review of conditions in the receiving country.").

"made clear that those kinds of transferees had no such right."[149] The Act specifies:

> Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, United States Code, 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 [§ 242 of the Immigration and Nationality Act] shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT]. . . .[150]

According to the court, the REAL ID Act confirms that Omar did not possess a statutory right to judicial review of conditions in the receiving country.[151]

Omar does not control this court's ability to assess of whether it may review conditions in Afghanistan to determine whether the Government may permissibly transfer the evacuees there under FARRA. First, *Omar*, like *Munaf* and *Kiyemba,* only controls judicial review of conditions in the transfer country when the Government challenges the petitioner's torture allegations.[152] The Government here has and is likely to take the evacuees' torture allegations seriously.[153]

Second, the court in *Omar* incorrectly decided that FARRA, as supplemented by the REAL ID Act, prohibits judicial review of transfer country conditions in response to a habeas petitioner's FARRA claim. The court's holding in *Omar* is problematic for the United States' obligations under CAT. CAT is a non-self-executing treaty that requires domestic legislation to make obligations under the treaty, like non-refoulement, binding U.S. law.[154] FARRA was passed for exactly that purpose: to implement CAT obligations.[155] However, in *Omar*, the court held that FARRA does not apply outside of the limitations of the REAL ID Act, i.e., in cases outside removal proceedings.[156]

Further, the court's interpretation of the limitations of judicial review set forth in FARRA does not conform with the two-part test set out in *I.N.S. v. St. Cyr*, which determines whether a statute strips from a federal court sitting in habeas jurisdiction the authority to adjudicate a claim.[157] Under that test, a statute must contain "a particularly clear statement" before it can be construed as intending to repeal habeas jurisdiction.[158] Even if a sufficiently clear statement exists, courts must determine whether an alternative interpretation of

149. *Id.*
150. Pub.L. No. 109–13, § 106, 119 Stat. 231, 310 (2005) (codified at 8 U.S.C. § 1252(a)(4)).
151. *Omar*, 646 F.3d at 18.
152. *Id.* at 14.
153. *See supra* Part II(A).
154. *Omar*, 646 F.3d at 17; *see also* U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (1990) ("[T]he United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.").
155. *Id.*
156. *Id.* at 18.
157. I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001).
158. Denmore v. Kim, 538 U.S. 510, 517 (2003).

the statute is "fairly possible" before concluding that the law actually repeals habeas jurisdiction.[159]

"FARRA lacks sufficient clarity to survive the 'particularly clear statement' requirement."[160] Further, "[t]he REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting habeas jurisdiction outside that context."[161] Given a plausible alternative statutory construction, a court may not conclude that the REAL ID Act repealed its habeas jurisdiction to review the evacuees' FARRA claim.

4. Release

Critical to the habeas separation-of-powers function to safeguard individual liberty is its remedy: release. In a divided ruling in *Kiyemba (I)*, the D.C. Circuit reversed the district court's decision to order the Government to parole 17 Uighur detainees from Guantanamo Bay into the United States after the district court held that the Government was illegally holding the detainees in custody.[162] Despite there being no alternative remedy and that the detainees would remain confined at Guantanamo Bay as a result, the circuit court relied on immigration cases for the proposition that the political branches have plenary power to exclude individuals from the United States.[163] Such plenary power trumps the judiciary's remedial habeas powers to release a petitioner the Government is detaining illegally.[164]

The evacuees may argue that the D.C. Circuit wrongly decided *Kiyemba (I)*, and that a court, as a result, should order the Government to parole the evacuees into the United States. *Kiyemba (I)* is inconsistent with the Supreme Court's decision in *Boumediene*. In *Boumediene,* the Court extended the Suspension Clause extraterritorially to detainees at Guantanamo Bay after Congress attempted to prohibit them from filing habeas petitions in federal court by passing the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA).[165] The Court stressed the historical role of habeas in common-law England and at the time of the Founding to secure individual liberty by ensuring judicial oversight of executive detention decisions.[166] Fearing that the executive branch would abuse its detention authority and Congress would suspend the privilege of habeas during periods of political unrest, as the King, the courts, and Parliament would often do prior to and after the Founding, the Founders limited the grounds upon which Congress may suspend the privilege of habeas.[167] Hence, habeas and the Suspension Clause, which protects it, play a separation-of-powers function to safeguard individual liberty—to provide for

159. *St. Cyr*, 533 U.S. at 299–300.
160. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012).
161. *Id.*
162. Kiyemba v. Obama, 555 F.3d 1022, 1038 (D.C. Cir. 2009).
163. *Id.* at 1025–26 (citing Wong Wing v. United States, 163 U.S. 228, 237 (1896); Denmore, 538 U.S. at 521-22).
164. *Id.*
165. Boumediene v. Bush, 553 U.S. 723, 732 (2008).
166. *Id.* at 739–46.
167. *Id.* at 743.

judicial oversight of executive detention decisions and limit the discretion of the political branches to suspend the privilege.

In *Boumediene*, Justice Kennedy, writing for the majority, held that Congress must provide an adequate substitute for habeas if it suspends the privilege for an individual detained by the Government.[168] The majority held that the Government failed to provide detainees at Guantanamo Bay an adequate substitute for habeas because the Detainee Treatment Act did not provide for a release remedy, which habeas does.[169] In his dissent, Chief Justice Roberts differed sharply with the majority but, notably, not on the question of whether habeas requires release. His opinion (joined by all of the dissenting justices) argued that the MCA did not violate the Suspension Clause, in part, because the DTA did afford a release remedy.[170] He went on to characterize the "unique purpose" of the writ as to secure release of an applicant from "unlawful confinement."[171] Thus, four dissenting justices, like the five in the majority, agreed that release is fundamental to habeas and that the power to order it is of the essence of judicial power.

The court in *Kiyemba (I)*, however, dismissed the historical separation-of-powers function of habeas and the Suspension Clause to secure individual liberty. The court enabled the executive branch to manufacture circumstances in which it would be practically impossible to release the detainees anywhere outside the United States and thereby dodge the unique and constitutionally protected tool the court had at its disposal to bind the executive's detention powers. This is exactly what the Founders were afraid of—the executive branch detaining people without judicial recourse.[172] Further, the court in *Kiyemba (I)* enabled the executive branch (rather than Congress) to effectively suspend the habeas privilege of the 17 Uighurs, and for that matter any person the executive branch manages to confine under circumstances where it is impossible to release them into the United States. The Founders were fearful that Congress, like Parliament in England, would suspend the privilege of habeas during periods of political unrest.[173] But the executive branch in *Kiyemba (I)*, by offshoring its detention of the Uighurs, and in our case by offshoring the immigration processing of Afghans, has itself managed to suspend habeas privileges because habeas, without its fundamental release remedy, lacks teeth.

Further, the Supreme Court in *Clark* held that federal courts may order the Government to parole a habeas petitioner into the United States against its wishes if the Government is holding them in custody illegally.[174] The Supreme Court in *Clark* implicitly recognized the critical separation-of-powers function of habeas to create authority for the judiciary to bind the executive branch's detention power by preventing it from continuing to detain the petitioners because it was unable to transfer them to another country. The court, under

168. *Id.* at 771.
169. *Id.* at 788.
170. *Id.* at 823.
171. *Id.* at 823 (quoting Allen v. McCurry, 449 U.S. 90, 98 (1980)).
172. *See id.* at 743.
173. *Id.* at 743.
174. Clark v. Martinez, 543 U.S. 371, 386–87 (2005).

a similar line of reasoning, may order the Government to parole the evacuees into the United States.

Conclusion

Following a global offshoring and externalization movement, the Government stripped the evacuees of their rights under domestic and international law. It did so by making the critical decision to not transport them directly to the United States and rather process their immigration applications at an offshore military base. The executive branch aggrandized itself outside bounds the Founders and Congress envisioned in the Constitution and in domestic immigration laws. Habeas, however, a unique and constitutionally protected source of judicial authority, may provide the evacuees, and for that matter, anybody in similar circumstances a means to judicial recourse. A court should, for purposes of safeguarding refugee rights and constraining unfettered executive discretion, parole the evacuees in the United States and bind the executive branch from continuing to offshore and externalize rights for refugees around the world.