

**EXTENDING DUE PROCESS PROTECTIONS TO
UNADMITTED ALIENS WITHIN THE U.S. THROUGH
THE FUNCTIONAL APPROACH OF BOUMEDIENE**

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INTRODUCTION

At 1:55 p.m. on September 26, 2002, American Airlines Flight 65 from Zurich, Switzerland landed at John F. Kennedy Airport (JFK) in New York City.¹ Canadian citizen Maher Arar² was a passenger on that flight.³ Mr. Arar was returning home from a vacation⁴ and expected to pass through JFK to catch his connecting flight to Montreal, Canada.⁵ However, Mr. Arar was prevented from making that connection.⁶ Although he did not know it at the time, he would not see his home or family again for more than a year.⁷ In the interim, he would be surreptitiously transferred to Syria and tortured in an attempt to uncover intelligence.⁸ He had become part of the Bush Administration's program of extraordinary rendition.⁹

Since his release, investigations in Canada and the U.S. have confirmed that Mr. Arar had no connection to terrorism.¹⁰ However, Mr. Arar's attempts to obtain redress for his egregious mistreatment within U.S. courts have been to no avail. The Second

¹ See DEPT. OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (publicly released June 5, 2008) [hereinafter *OIG Report*], available at

http://ccrjustice.org/files/Office_of_Inspector_General_Report_6.08.pdf at 7.

² Maher Arar is a dual citizen of Canada and Syria. He was born in Syria and immigrated to Canada with his parents when he was 17 years old. He graduated from McGill University with a bachelor's degree in computer engineering and from the University of Quebec with a master's in telecommunications. He is married to a Canadian citizen and has two children. RENDITION TO TORTURE: THE CASE OF MAHER ARAR: JOINT HEARING BEFORE THE SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT OF THE COMMITTEE ON FOREIGN AFFAIRS AND THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 110th Cong. 118 (2007) [hereinafter *Congressional Report*], available at <http://www.foreignaffairs.house.gov/110/38331.pdf> at 25.

³ See COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT ON THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND, Vol. I (2006) [hereinafter *Commission Report*], available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf.

⁴ *Id.* at 294.

⁵ *OIG Report*, *supra* note 1, at 7.

⁶ *OIG Report*, *supra* note 1, at 7-8.

⁷ *OIG Report*, *supra* note 1, at 8.

⁸ See Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 480 (2008); See also *OIG Report*, *supra* note 1, at 8.

⁹ *Id.*

¹⁰ *Congressional Report*, *supra* note 2, at 43; *Commission Report*, *supra* note 3, at 374.

Circuit explained that “Arar is unable to point to any legal authority . . . that, as an unadmitted alien who was excluded . . . , he possess[e] any . . . constitutional [right], the violation of which . . .” entitles him to relief.¹¹ In reaching this conclusion, the court heavily relied upon two doctrines that have had significant influence upon the formation of U.S. immigration law: the entry fiction doctrine¹² and the rule against the extraterritorial application of the Constitution.¹³ For aliens who have not been admitted to the U.S., these two doctrines have traditionally worked to prevent claims of constitutional protection against executive action that otherwise exceeds its constitutional bounds.

Although unadmitted aliens possess some statutory protection under the Immigration and Nationality Act (INA),¹⁴ they have generally been unable to challenge the validity of the INA. Further, unadmitted aliens have few avenues for redress if their rights are violated under the INA.¹⁵ Without a means to

¹¹ *Arar v. Ashcroft*, 532 F.3d 157, 188 (2d Cir. 2008) (*rehearing en banc granted* Aug. 12, 2008).

¹² Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1024 (2007). Under this legal fiction, an alien who has not been formally inspected and admitted into the U.S. is treated as though held at the border, even though the alien is physically present within the U.S. because of detention or parole.

¹³ Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 260, 260 (2009). Under this rule, those outside the border of the U.S. are not entitled to protection under the U.S. Constitution. For purposes of this article, the stated articulation of the rule against extraterritoriality assumes that the person claiming a particular constitutional right is not a United States citizen. Under the Supreme Court’s decision in *Reid v. Covert*, 354 U.S. 1 (1957), it was settled that U.S. citizens are entitled to certain constitutional rights even when outside the U.S.

¹⁴ The category of unadmitted aliens includes aliens denied admission into the U.S. (i.e., aliens paroled into the U.S. or detained therein) and aliens who have entered the U.S. without inspection and admission as defined by the INA. Immigration and Nationality Act [hereinafter *INA*], tit. 1, § 101(a)(13) (2009) (codified at 8 U.S.C. 1101). *See Leng May Ma v. Barber*, 357 U.S. 185, 188-89 (1958) (holding that an alien paroled into the U.S. is not deemed to have entered); *see also* INA § 212(d)(5)(a) (codified at 8 U.S.C. 1182); *Arar*, 532 F.3d at 186-187 (holding that “the Bill of Rights are futile authority to the alien seeking admission”). I will use the terms inadmissible, excludable, and unadmitted synonymously. However, aliens who have entered without inspection and aliens denied entry may be on slightly different constitutional footing. *See generally* Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadydas*, 25 CARDOZO L. REV. 2029, 2029 (2004); *see also infra* note 258.

¹⁵ *See infra* note 146 and accompanying text. In this respect, it could be said that the INA provides no rights to the extent that there is no redress when the rights are violated. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil

check legislative mandates or executive enforcement, inadmissible¹⁶ aliens are subject to the mercy of Congress and the President, with minimal oversight by the judiciary.¹⁷ Although physically present within the U.S., inadmissible aliens are deemed to be outside of the nation's border as a matter of law. Because the scope of the protections of the Constitution's due process clause has been traditionally limited to those within the border, unadmitted aliens have been treated as though beyond its reach.¹⁸

In application, this legal structure has yielded some of the most anomalous and egregious manifestations of executive abuse within our constitutional jurisprudence.¹⁹ During oral argument in the case of *Clark v. Martinez*,²⁰ Justice Stevens asked the government attorney whether the Constitution would permit a U.S. official to shoot an inadmissible alien.²¹ The attorney replied in the negative, but gave no answer when Justice Stevens asked why not.²² The attorney could not respond because the logical conclusion of these two legal doctrines²³ is that an inadmissible alien on U.S. soil is not entitled to constitutional protection, not even to the right against summary execution.²⁴

liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury").

¹⁶ There are many grounds by which an alien may be declared inadmissible. To name just a few, an alien may be deemed inadmissible for having certain health problems, for having an expired visa, for writing a bad check, for jumping a turnstile, entering the country without inspection, or even for giving food to a member of a rebel group that opposes a tyrannical government. *See generally* INA 212(a)(1-10) (2009).

¹⁷ *See generally* Slocum, *supra* note 12.

¹⁸ *See* Slocum, *supra* note 12, at 1026.

¹⁹ *See* Slocum, *supra* note 12, at 1024.

²⁰ *Clark v. Martinez*, 543 U.S. 371 (2005). In *Martinez*, the Supreme Court had to decide whether to extend the rule given in *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001), to inadmissible aliens. The Court in *Zadvydas* held that aliens could not be indefinitely detained without creating constitutional problems. Slocum, *supra* note 11, at 1026. The government in *Martinez* argued that unlike the petitioners in *Zadvydas*, who were admitted aliens, the aliens in *Martinez* were not admitted, and thus could claim no constitutional protection. Petitioner's Brief at *6-7, *Crawford v. Martinez*, 540 U.S. 1217 (2004).

²¹ *See* Slocum, *supra* note 12, at n. 53; *see also* Transcript of Oral Argument at 22-23, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878).

²² *See* Transcript of Oral Argument at 22-23, *Martinez*, 543 U.S. 371 (No. 03-878).

²³ I.e., the extraterritorial rule of constitutional application, Neuman, *supra* note 12, and the entry fiction doctrine, Slocum, *supra* note 12.

²⁴ Slocum, *supra* note 12, at n. 55.

During the last several decades, however, the landscape of constitutional rights of unadmitted aliens has begun to shift in a piecemeal fashion. To avoid the draconian results of consistent application of these two legal doctrines, some courts have made limited extensions of constitutional protection to inadmissible aliens.²⁵ Yet, until recently, there had been no consistent framework from which one could reconcile the cases extending constitutional protection to unadmitted aliens and the non-extraterritorial rule of constitutional application.

In the Supreme Court's decision in *Boumediene v. Bush*,²⁶ Justice Kennedy articulated a functional approach to extraterritorial constitutional application. It conclusively dispelled the bright-line rule that the protections contained within the Constitution never extend beyond the border of the United States.²⁷ This functional approach cohesively explains the landmark cases that extend due process protections to unadmitted aliens and provides a rule by which aliens may argue their entitlement to other constitutional protections, thereby advancing the human rights status of immigrants within the U.S.²⁸

In the following article, I apply the functional approach and argue for extending to unadmitted aliens within the U.S. several Fifth Amendment due process clause protections. Specifically, unadmitted aliens should be entitled to the due process right to basic procedural protection, the right to be free from gross physical abuse, and the right to be free from renditions that enable gross physical abuse.

Because the functional approach of *Boumediene* is best demonstrated in a particular factual setting,²⁹ I will conduct this analysis through the lens of *Arar v. Ashcroft*.³⁰ The facts and legal resolution of *Arar* present a salient example of the severity that results from determining the constitutional rights of inadmissible aliens on the basis of the non-extraterritorial rule strictly applied.³¹ Accordingly, Mr. Arar's case presents an ideal factual

²⁵ See *infra* note 152.

²⁶ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

²⁷ *Id.* at 2244. Neuman, *supra* note 13, at 259-60.

²⁸ See generally Slocum, *supra* note 12, at 1031-32; see also Timothy Zick, *Constitutional Displacement*, 86 WASH. U. J.L. & POL'Y. 515, 558 (2009).

²⁹ Neuman, *supra* note 13, at 260.

³⁰ *Arar*, 532 F.3d at 166.

³¹ See generally Lobel, *supra* note 8.

setting from which to argue for the extension of several basic due process clause protections to unadmitted aliens within the United States.³²

Part I of this article focuses on the relevant facts presented in *Arar v. Ashcroft*, for the purpose of analyzing the application of the functional approach to the due process rights of unadmitted aliens. Part II surveys the current state of the law regarding remedies available to inadmissible aliens who are subjected to human rights abuses like those suffered by Mr. Arar at the hands of U.S. officials. Part III explains how the Supreme Court's recent decision in *Boumediene v. Bush*³³ articulated a different approach to extraterritorial constitutional application, an approach that implicitly overrules the old strict territorial approach given in *U.S. v. Verdugo-Urquidez*.³⁴ Finally, Part IV applies the functional approach to the facts presented in *Arar v. Ashcroft*. I argue there that proper application of the functional approach requires that the due process right to basic procedural protection, the right to be free from gross physical abuse, and the right to not be rendered to another country to be subjected to gross physical abuse must be extended to inadmissible aliens.

I. ARAR V. ASHCROFT—A CASE STUDY

A. *Facts of the Case*

Upon his arrival in the United States, Mr. Arar was required to pass through immigration to catch his connecting flight.³⁵ He presented a valid Canadian passport³⁶ for admission into the U.S. as a nonimmigrant in transit,³⁷ yet he was refused

³² Although Mr. Arar's case has been dismissed on grounds other than his due process rights, his experience and the legal resolution of the case to date is a fair representation of the outcome possible when the extraterritorial principle is strictly applied in conjunction with the entry fiction. *Arar*, 523 F.3d at 164. Accordingly, his case presents an ideal factual setting in which to challenge the current status of constitutional protection of inadmissible aliens. *Id.*

³³ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

³⁴ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

³⁵ See Commission Report, *supra* note 3, at 194.

³⁶ Mr. Arar was born in Syria, but he is a dual citizen of Syria and Canada. See Commission Report, *supra* note 3, at 203.

³⁷ See Immigration and Nationality Act (INA) § 101(a)(15)(C), 8 U.S.C. § 1101(a)(15)(C)(2008). Although, Mr. Arar was not formally applying for admission to the U.S., he was deemed an applicant for admission by operation of law. See OIG Report, *supra* note 1, at 10; see also INA § 235(a)(1) ("An alien . . . who arrives in the

admission and told to wait.³⁸ He had been identified by the State Department's "TIPOFF" system as an alien suspected of having connections with terrorist activity.³⁹

About an hour after being told to wait, FBI officials from the Joint Terrorism Task Force (JTTF) questioned Mr. Arar.⁴⁰ The JTTF officials concluded they had no further interest in investigating him at that time and turned him over to the Immigration and Naturalization Service (INS).⁴¹ INS Officials then determined that he was inadmissible.⁴² Mr. Arar was told he could withdraw his application for admission and return to Zurich.⁴³ He agreed to the arrangement and signed the I-275 Withdrawal of Application for Admission Form.⁴⁴

However, that evening Washington learned of Mr. Arar's detention, and the next day INS Eastern Regional Director J. Scott Blackman rescinded the offer to permit Mr. Arar to return to Zurich.⁴⁵ During this first day in U.S. custody, Mr. Arar was harshly interrogated for approximately eight hours regarding his alleged ties to Al Qaeda and his relationship with Abdullah Almalki.⁴⁶ He also has stated that his requests for an attorney

United States . . . shall be deemed for purposes of this Act an applicant for admission.").

³⁸ See OIG Report, *supra* note 1, at 6; Brief of Plaintiff at 4, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-CV-0259-DGT-VVP).

³⁹ OIG Report, *supra* note 1, at 6.

⁴⁰ OIG Report, *supra* note 1, at 6.

⁴¹ OIG Report, *supra* note 1, at 6.

⁴² OIG Report, *supra* note 1, at 6.

⁴³ OIG Report, *supra* note 1, at 6.

⁴⁴ OIG Report, *supra* note 1, at 11.

⁴⁵ OIG Report, *supra* note 1, at 11. The portion of the Inspector's General Report discussing the meeting that took place in Washington that evening has been redacted. Thus, the reasons the government changed positions is unclear.

⁴⁶ See Brief of Plaintiff at 4-5, *Arar*, 414 F. Supp. 2d at 250. Almalki was the subject of an investigation in Canada, although he has never been charged with any offenses and is presumed to be innocent. See Commission Report, *supra* note 3, at 17. On October 12, 2001, Almalki and Arar were seen together in a café in Ottawa, and on another occasion, the two were seen walking together. Commission Report, *supra* note 3, at 18. Consequently, Canadian investigators conducted a search of Mr. Arar's public records and found a rental application that had listed Mr. Almalki as an emergency contact. Commission Report, *supra* note 3, at 18. Mr. Arar has explained that he met Abdullah Almalki through Almalki's brother Nazih. Congressional Report, *supra* note 2, at 3. The two families immigrated to Canada at approximately the same time; however, Mr. Arar did not know Abdullah well. Congressional Report, *supra* note 2, at 3. Mr. Arar has explained that the Almalki family was the only one his family knew when they moved to Ottawa in October of 1997. Congressional Report, *supra* note 2, at 3. He had

were rejected on the grounds that he had no legal right to one.⁴⁷ After the interrogation, he was shackled and transferred to a cell where he was held for the night.⁴⁸ The cell did not have a bed, and the lights remained on throughout the night.⁴⁹

The next day, at the direction of Blackman, Mr. Arar was taken out of his cell to be interrogated for an additional five hours by INS inspectors.⁵⁰ He made repeated requests to speak with an attorney and to make a phone call, but his requests were denied.⁵¹ During the meeting, the INS officials “offered Arar a new opportunity to withdraw if he agreed to return to Syria.”⁵² Mr. Arar adamantly refused the offer, and the officials responded by threatening to “charge him as a terrorist” and remove him under INA § 235(c) “if he did not agree to return to Syria.”⁵³

Later that evening, Mr. Arar was transferred to the Metropolitan Detention Center in Brooklyn, where he was held for the next three days.⁵⁴ He was given notice of his inadmissibility⁵⁵

needed someone to sign on his rental application and called Nazih; however, Nazih was unavailable and thus sent his brother Abdullah to sign on his behalf. Congressional Report, *supra* note 2, at 3.

⁴⁷ See Commission Report, *supra* note 3, at 3. The Report by the Inspector General states that Mr. Arar was given the opportunity to call the Canadian consulate on Thursday, but that he declined the offer, likely due to the assurances that he could return to Switzerland the next day. See OIG Report, *supra* note 1, at 16. However, on Friday, when Mr. Arar was told that he would not be able to return to Zurich, he requested the opportunity to speak to the Canadian Consulate. OIG Report, *supra* note 1, at 16. The report states the JTTF officials denied his request. OIG Report, *supra* note 1, at 16. Federal regulations require an alien being detained over 24 hours in the U.S. to be given an opportunity to contact his consulate. See 8 C.F.R. § 236.1(e); see also Vienna Convention on Consular Relations, 21 U.S.T. 77 (April 24, 1963).

⁴⁸ Brief of Plaintiff at 5, *Arar*, 414 F. Supp. 2d at 250. To the extent that Mr. Arar was in the U.S. without being formally admitted, he was paroled into the U.S. See INA § 212(d)(5)(A) (codified at 8 U.S.C. 1182).

⁴⁹ Brief of Plaintiff at 5, *Arar*, 414 F. Supp. 2d at 250.

⁵⁰ *Id.* At that time, he was given a cold McDonald’s meal – the only food he had been given since his detention began. *Id.*

⁵¹ *Id.*

⁵² OIG Report, *supra* note 1, at 11.

⁵³ *Id.* See INA § 235(c)(1) permits expedited removal of certain aliens inadmissible on security grounds, without any formal hearing before an immigration officer or judge. INA § 235(c)(1) (codified at 8 U.S.C. 1225). Only the Attorney General can review the order, and he may make the inadmissibility determination based upon “confidential information” if he concludes “disclosure of the information would be prejudicial to the public interest, safety, or security.” *Id.*

⁵⁴ Brief of Plaintiff at 10, *Arar*, 414 F. Supp. 2d at 250.

on Tuesday, October 1, 2002.⁵⁶ The notice stated it had been determined that he was a member of the designated terrorist organization Al Qaeda.⁵⁷ However, the notice did not provide the details of the charges against him, nor information regarding to which country he would be removed.⁵⁸

After receiving notice of his inadmissibility, Mr. Arar was permitted to make his first phone call since his detention had begun, five days prior.⁵⁹ He called his mother-in-law in Canada, after which his wife informed the Canadian Consulate of his detention and retained an immigration attorney on his behalf.⁶⁰ An official from the Canadian Consulate visited Mr. Arar on Thursday, October 3, 2002.⁶¹ At this meeting, Mr. Arar expressed his fear that he would be sent to Syria.⁶² The Canadian official assured him that this would not happen.⁶³

On Thursday, October 4, 2002, in response to questioning from two immigration officers, Mr. Arar designated Canada as the country to which he wished to be removed.⁶⁴ He also made clear his opposition to the immigration officers' request that he agree to be removed to Syria.⁶⁵ Yet the acting Attorney General, Larry Thompson, and INS Eastern Regional Director, Blackman, disregarded Mr. Arar's request to be returned to Canada, stating it would be "prejudicial to the interest of the United States."⁶⁶

⁵⁵ See OIG Report, *supra* note 1, at 14-15. Form I-147 initiates removal proceedings under INA § 235(c) (2009).

⁵⁶ OIG Report, *supra* note 1, at 14.

⁵⁷ OIG Report, *supra* note 1, at 15.

⁵⁸ OIG Report, *supra* note 1, at 15. In fact, the completed I-148 addendum that stated he was being removed to Syria was not served upon Mr. Arar until October 8, 2002, at 4:30 a.m. while he was being taken to the airport to be sent to Syria. The timing of the notice effectively eliminated the possibility for Mr. Arar to prevent his removal to Syria. OIG Report, *supra* note 1, at 17.

⁵⁹ Brief of Plaintiff at 6, *Arar*, 414 F. Supp. 2d at 250.

⁶⁰ *Id.*

⁶¹ See Commission Report, *supra* note 3, at 166; see also OIG Report, *supra* note 1, at 16.

⁶² Commission Report, *supra* note 3, at 31. See *infra* notes 50-51 and accompanying text.

⁶³ Commission Report, *supra* note 3, at 31. See *infra* notes 50-51 and accompanying text.

⁶⁴ OIG Report, *supra* note 1, at 20.

⁶⁵ Brief of Plaintiff at 5, *Arar*, 414 F. Supp. 2d at 250; see also OIG Report, *supra* note 1, at 20.

⁶⁶ See OIG Report, *supra* note 1, at 20. Pursuant to INA § 241(b)(2)(C), the Attorney General may disregard an alien's designation of the country to which the alien wishes

The following day, Mr. Arar was permitted to meet with Amal Oumnih, the attorney his family had secured for him.⁶⁷ This meeting proved to be the first and only opportunity Mr. Arar had to meet with counsel.⁶⁸

At approximately 9:00 p.m. on Sunday, October 6, 2002,⁶⁹ Mr. Arar was removed from his cell to be interrogated by several INS officials.⁷⁰ During the interrogation, he was questioned about why he did not want to be removed to Syria.⁷¹ Mr. Arar originally refused to answer questions in his lawyer's absence; however, the officials deceptively told Mr. Arar his lawyer had chosen to not be present for the interrogation.⁷² During the five and a half hours to follow, Mr. Arar clearly and repeatedly expressed his fear that he would be tortured if he was removed to Syria.⁷³ The "interview" ended at 2:30 a.m.⁷⁴

to be removed if he "decides that removing the alien to the country is prejudicial to the United States." INA § 241(b)(2)(C) (codified at 8 U.S.C. 1231). Though there was never any official explanation for why a return to Canada would be prejudicial, one attorney interviewed stated that there was concern regarding the porous nature of the U.S./Canadian border. OIG Report, *supra* note 1, at 21. Additionally, the Canadian Commission Report, indicated that Canadian Corporal Rick Flewelling informed an FBI agent on October 5, 2002, that there was not enough evidence to charge Mr. Arar in Canada and that it was likely that he could not be refused entry to Canada. Commission Report, *supra* note 3, at 168-69.

⁶⁷ Brief of Plaintiff at 7, *Arar*, 414 F. Supp. 2d at 250.

⁶⁸ *See id.*

⁶⁹ OIG Report, *supra* note 1, at 25.

⁷⁰ Brief of Plaintiff at 7, *Arar*, 414 F. Supp. 2d at 250.

⁷¹ OIG Report, *supra* note 1, at 25.

⁷² OIG Report, *supra* note 1, at 25. Mr. Arar's lawyer, Ms. Oumnih, did not actually receive notice of the interrogation until after it was complete. OIG Report, *supra* note 1, at 25. The OIG Report states that Mr. Arar had two attorneys. OIG Report, *supra* note 1, at 25. INS officials called the attorneys' offices and left messages on Sunday evening just as the interrogation was beginning. OIG Report, *supra* note 1, at 25. When Mr. Arar's criminal attorney spoke with one INS official, he requested the meeting be delayed because he was not able to attend. This request was denied. *See* OIG Report, *supra* note 1, at 24.

⁷³ OIG Report, *supra* note 1, at 25. Mr. Arar was particularly concerned about a return to Syria because he had not completed his necessary military service, as required of Syrian citizens. He also knew of the brutal tactics used by Syrian police against their captives. *See* OIG Report, *supra* note 1, at 25; *see also* Jane Mayer, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 130 (Doubleday 2008).

⁷⁴ *See* OIG Report, *supra* note 1, at 26. INS had initially "concluded that Arar was entitled to protection" under CAT and "that returning him to Syria would more likely than not result in his torture." OIG Report, *supra* note 1, at 22. However, notwithstanding this determination, high ranking members of the Justice Department

The following day, government officials falsely told Mr. Arar's attorney, Ms. Oumnih that Mr. Arar had been taken to the Elizabeth, New Jersey detention facility.⁷⁵ In reality, Mr. Arar was still being held at the Brooklyn Detention Center.⁷⁶ The INS official also suggested to Ms. Oumnih that she could determine Mr. Arar's exact location if she called back the next day; however, Mr. Arar was ordered removed and was on a plane to Syria early the next morning.⁷⁷

Mr. Arar was given the final explanation for his removal at 4:30 a.m. on Tuesday, October 8, 2002, while he was being transported to the airport to be removed to Syria.⁷⁸ Mr. Arar was taken to a New Jersey airfield where he was flown in a privately chartered jet to Washington D.C., and then to Amman, Jordan,

overrode this determination and designated Syria as the country to which Mr. Arar would be removed on the basis of diplomatic assurances. *See* Congressional Report, *supra* note 2, at 20; *See* Letter from Congressman John Conyers Jr. to Hon. Michael Mukasey, Attorney General (July 10, 2008), *available at* <http://ccrjustice.org/files/7.10.08%20Foreign%20Subcommittee%20Letter%20to%20Musakey%20requesting%20special%20counsel.pdf>. Clark Ervin, Inspector General of Department of Homeland Security, testified before Congress that the OIG investigation led him to conclude that the U.S. officials were not struck with naivety when sending Mr. Arar to Syria; rather, officials intentionally rendered him to be tortured for information. *Id.* at 2.

⁷⁵ Brief of Plaintiff at 7-8, *Arar*, 414 F. Supp. 2d at 250.

⁷⁶ *Id.*

⁷⁷ Mr. Arar was informed that he was being removed on the basis of classified information and that his removal to Syria was consistent with Article Three of the Convention Against Torture. OIG Report, *supra* note 1, at 17. The removal order was signed on October 8, 2002 by Deputy Attorney General Larry Thompson. *See* Mayer, *supra* note 68, at 130. Blackman stated that based upon classified and unclassified information, Arar was "clearly and unequivocally" a member of Al Qaeda. OIG Report, *supra* note 1, at 17, 29.

The Canadian Commission Report disagreed with Blackman, stating that there was not sufficient evidence to draw this conclusion. *See* Commission Report, *supra* note 3, at 30. The report concedes that the Commission was unaware of all of the information the U.S. claimed to have (because the U.S. refused to cooperate in the Canadian investigation); however, the report suspects that the U.S. had no independent evidence, aside from what Canada provided, to support the conclusion that Mr. Arar had connections to Al Qaeda. *Id.* The report cites Secretary of State Collin Powell, who said that "the American authorities had relied on information provided by Canada in making the decision to send Mr. Arar to Syria." *See id.* Powell has also stated that "the Arar affair was triggered by enquiries by Canadian sources, and that Arar would not have been on the U.S. radar screen had he not been the subject of attention by Canadian agencies." Congressional Report, *supra* note 2, at 45.

⁷⁸ *See* OIG Report, *supra* note 1, at 17.

making several stops along the way.⁷⁹ Ten hours after landing in Amman, Jordanian officials delivered him to the Syrians,⁸⁰ where he was held for the next year.⁸¹

Ms. Oumnih called the Elizabeth detention facility on Tuesday, October 8, 2002; however, officials told her they were unable to locate Mr. Arar.⁸² It was not until Wednesday that Ms. Oumnih was informed her client had been removed, and several weeks before she discovered through media sources that Mr. Arar was removed to Syria.⁸³

During his detention in Syria, the interrogations about Mr. Arar's relationship with Abdullah Almalki and Al Qaeda continued, at times lasting as long as eighteen hours per day.⁸⁴ He was beaten on his palms, hips, and lower back with a two-inch-thick electrical cable.⁸⁵ He was also punched in his stomach, his face, and the back of his neck.⁸⁶ Mr. Arar was kept in dismal conditions and deprived of food during his captivity, as evidenced by his forty-pound weight loss.⁸⁷ Syria never filed charges against Mr. Arar.⁸⁸

Eventually, the Canadian government secured his release, and Mr. Arar returned to Canada.⁸⁹ Several investigations that followed confirmed that no evidence supported the allegation that he was connected to terrorism in any way.⁹⁰

⁷⁹ See Scott Shane, *Detainee's Suit Gains Support from Jet Log*, NEW YORK TIMES, March 30, 2005.

⁸⁰ See Mayer, *supra* note 68, at 131. See also OIG Report, *supra* note 1, at 30. On October 18, 2007, Mr. Arar testified by video before the Joint Congressional Hearing that he had overheard his U.S. captors talking on the plane, stating that Syria had refused to accept Mr. Arar directly, but that Jordanian officials had acquiesced. Congressional Report, *supra* note 2, at 34.

⁸¹ Commission Report, *supra* note 3, at 45.

⁸² OIG Report, *supra* note 1, at 20.

⁸³ *Id.*

⁸⁴ Brief of Plaintiff at 11, *Arar*, 414 F. Supp. 2d at 250.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 10.

⁸⁸ Jane Mayer, *The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, February 14, 2005 at 106.

⁸⁹ See *id.* at 13.

⁹⁰ Congressional Report, *supra* note 2, at 42; Commission Report, *supra* note 3, at 59.

B. Legal Resolution of the Case

On January 22, 2004, Mr. Arar filed suit against former Attorney General John Ashcroft, FBI Director Robert Mueller, former acting Attorney General Larry Thompson, INS Commissioner James Ziglar, INS District Director Edward McElroy, INS Eastern Regional Director J. Scott Blackman, and several unnamed employees of the FBI and INS.⁹¹ Count One of his complaint was based on the Torture Victim Protections Act (TVPA).⁹² Counts Two and Three were *Bivens*⁹³ claims based on violations of the Fifth Amendment arising from Mr. Arar's torture and detention in Syria.⁹⁴ Count Four was a *Bivens* claim based on Fifth Amendment violations arising from Mr. Arar's treatment while detained in the U.S.⁹⁵

The District Court dismissed all counts. On appeal, a divided panel of the Second Circuit affirmed the dismissal.⁹⁶ The court adopted much of the district court's reasoning, and in several respects went even further.⁹⁷ In regard to Count One, the court stated that Mr. Arar's allegations did not give rise to a claim

⁹¹ *Arar*, 414 F. Supp. 2d at 257.

⁹² *Id.* at 257 (citing 28 U.S.C. § 1350).

⁹³ *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388, 388 (1971). *Bivens* has come to be a vehicle through which individuals may sue federal officials directly for violations of Constitutional rights; *see also* BETH STEPHENS ET. AL., 103 INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Martinus Nijhoff 2008). In *Bivens*, the Supreme Court first implied a federal private cause of action for plaintiffs who had their Fourth Amendment rights violated by federal officials. *Bivens*, 403 U.S. at 389. Notably, the Court reasoned that implying the cause of action would not only provide redress for those whose rights have been infringed, but would also provide an additional check on the exercise of power under color of federal law. *See id.* at 392-98. *Bivens* can be used to imply a cause of action where no satisfactory alternative remedy exists. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988). Conversely, when an adequate alternative remedial scheme exists to redress constitutional violations, courts will refuse to imply a *Bivens* cause of action. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983). Additionally, when implying a *Bivens* cause of action, the court will look to any "special factors counseling hesitation," such as foreign policy, national security, or separation of powers. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (quoting *Bivens*, 403 U.S. at 396); *Correctional Service Corp. v. Malesko*, 534 U.S. 61, 68 (2001). When such special factors do exist, the courts will refuse to imply a *Bivens* cause of action. *See Verdugo-Urquidez*, 494 U.S. at 274.

⁹⁴ *Arar*, 414 F. Supp. 2d at 257-58.

⁹⁵ *Id.*

⁹⁶ *Arar*, 532 F.3d at 163-64.

⁹⁷ *See infra* notes 184, 188-90, 196 and accompanying text.

under the TVPA.⁹⁸ Though acknowledging that the TVPA creates a cause of action for victims of torture against those who have aided and abetted in torture,⁹⁹ the court held that the cause of action is limited to torture committed under “color of foreign law.”¹⁰⁰ Because the court accepted the government’s argument that it had acted pursuant to federal law, the “color of foreign law” requirement was not met.¹⁰¹

Additionally, although the court did not reach the issue, it suggested that the mechanism provided by the INA could prevent federal courts from having jurisdiction to hear claims such as Mr. Arar’s.¹⁰² Notwithstanding the allegations that Mr. Arar was prevented from pursuing his remedies under the INA because (1) he had been denied access to counsel, (2) his location had been concealed from his lawyer, (3) he had been removed in secret before a habeas petition could be filed, (4) he had not been served with the removal order until he was on his way to the airport to be removed to Syria, and (5) his counsel was never served with that removal order,¹⁰³ the court stated that the existence of the immigration scheme was sufficient to bar jurisdiction.¹⁰⁴ The court reached this conclusion despite the clear allegation that Mr. Arar was denied access to his remedies under the INA.¹⁰⁵

⁹⁸ *Arar*, 414 F. Supp. 2d at 266. “The TVPA, which is appended as a statutory note to the Alien Tort Claims Act, 28 U.S.C. § 1350, creates a cause of action for damages against ‘[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture.’” *Arar*, 532 F.3d at 175. Torture is defined as “any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherit in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.” *Arar*, 414 F. Supp. 2d at 260.

⁹⁹ *Arar*, 414 F. Supp. 2d at 261. Every court to consider the question has concluded that those who aid, abet, or conspire with others to torture are likewise liable under the TVPA. *Id.*

¹⁰⁰ *Id.* at 266.

¹⁰¹ *Id.*

¹⁰² *Id.* at 268.

¹⁰³ Replacement Opening Brief For Plaintiff-Appellant at 29, *Arar v. Ashcroft*, 2009 WL 3522887, *rehearing en banc* (2d Cir. Sept. 23, 2008) (No. 06-4216-cv).

¹⁰⁴ *Arar*, 414 F. Supp. 2d at 280-81. The court is apparently satisfied with the minimal process afforded to Mr. Arar.

¹⁰⁵ Replacement Opening Brief For Plaintiff-Appellant at 33, *Arar v. Ashcroft*, 2009 WL 3522887 (No. 06-4216-cv).

Similarly, the court held that the remedial scheme created by the INA was a sufficient alternative remedy, precluding the need to apply a “freestanding” *Bivens* remedy.¹⁰⁶ Strangely, the court noted “it would be perverse to allow defendants to escape liability by pointing to the existence of the very procedures that they allegedly obstructed and asserting that Arar’s sole remedy lay there.”¹⁰⁷ However, notwithstanding the apparent “perversion,” the court relied on an Eighth Circuit decision from 1980 to support its refusal to recognize a *Bivens* cause of action for Mr. Arar’s claims.¹⁰⁸

Additionally, the court concluded Mr. Arar would only be entitled to protection under the due process clause to the extent that he was subjected to “gross physical abuse.”¹⁰⁹ It then found that because Mr. Arar’s treatment within the U.S. did not rise to the level of gross physical abuse, he had no claim under the due process clause.¹¹⁰ The court reasoned that as an unadmitted alien, as a matter of law Mr. Arar was not present within the U.S., and accordingly the due process clause did not fully apply to him.¹¹¹ The court cited with approval the Supreme Court’s decision in *Kwong Hai Chew v. Colding*,¹¹² explaining that the “Bill of Rights is a futile authority for the alien seeking admission”¹¹³

¹⁰⁶ *Arar*, 532 F.3d at 179; see *Wilkie v. Robbins*, 551 U.S. 537, 538 (2007).

¹⁰⁷ *Id.* at 179-80.

¹⁰⁸ See *id.* at 180 (citing *Bishop v. Tice*, 622 F.2d 349, 353 (8th Cir. 1980) (holding that a plaintiff, obstructed by federal officials from accessing an exclusive administrative remedial scheme for wrongful discharge and defamation, could sue the officials, pursuant to *Bivens*, for the obstruction, but could not use *Bivens* to sue for the wrongful discharge or defamation). Plaintiff persuasively argues that *Bishop* fails to support the majority’s conclusion. Replacement Opening Brief for Plaintiff-Appellant at 32-33, *Arar v. Ashcroft*, 2009 WL 3522887 (No. 06-4216-cv). The Plaintiff argued that *Bishop* held “plaintiff could pursue a *Bivens* action for obstruction of access to otherwise exclusive remedies and could recover fully for his underlying injuries . . . if he could show that he would have prevailed had he received any hearing to which he was entitled.” *Id.*

¹⁰⁹ *Arar*, 532 F.3d at 189; see *Correa v. Thorburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990).

¹¹⁰ *Arar*, 532 F.3d at 189.

¹¹¹ *Id.* at 186-87 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”)).

¹¹² *Id.* at 187 (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953)).

¹¹³ *Id.*

The court further held that because Mr. Arar (1) was not entitled to a hearing,¹¹⁴ (2) had no right to counsel,¹¹⁵ and (3) had not alleged that he tried to submit “a written statement . . . for consideration by the Attorney General,”¹¹⁶ none of his limited rights had been infringed upon.¹¹⁷

In short, the majority held that even innocent aliens who dare to make connecting flights at U.S. airports are subject to the whims of DHS and the DOJ. These innocents may be arbitrarily detained and rendered to countries where they will be tortured in the pursuit of intelligence. And all of this may take place subject only to the caveat that the rendition be conducted pursuant to immigration law.¹¹⁸

II. LEGAL RIGHTS AND PROTECTIONS OF INADMISSIBLE ALIENS IN THE U.S., AND CLAIMS OF ABUSE

The facts and holding of *Arar* provide a salient example of the legal status and rights of inadmissible aliens in the custody of the United States government. Excludable aliens within the territory of the U.S., and aliens in U.S. custody abroad, have essentially been given no constitutional protection and few statutory rights.¹¹⁹ Of the rights they do possess, they enjoy virtually no redress for violation of such rights. This calls into

¹¹⁴ INA § 235(c)(2)(B) (codified at 8 U.S.C. 1225).

¹¹⁵ *Id.* at (b)(1)(B)(iv).

¹¹⁶ 8 C.F.R. § 235.8(a); INA § 235 (c)(3) (codified at 8 U.S.C. 1225).

¹¹⁷ *Arar*, 532 F.3d at 187-88. The Court’s conclusion here is questionable at best. INA § 235(b)(1)(A) states that he had a right to an asylum interview regarding credible fear, even though he was subject to expedited removal. INA § 235(b)(1)(A) (codified at 8 U.S.C. 1225). In this interview, he may have had a right for counsel to be present. *See* INA § 240(b)(4)(A) (codified at 8 U.S.C. 1229). Furthermore, CAT applies even to aliens subject to removal under INA § 235(c) (codified at 8 U.S.C. 1225). *See* 8 C.F.R. § 208.18(d). Although arguably § 235(c) aliens do not have a right to counsel under INA § 240(b)(4)(A), as a 235(c) alien, he had the right to submit a statement, through counsel, to the Attorney General. *See* INA § 235(c)(3) (codified at 8 U.S.C. 1225); *see also* INA § 240(b)(4)(A) (codified at 8 U.S.C. 1229). His CAT right to not be removed to a country where he would be tortured was likewise violated. *See* 8 C.F.R. § 208. Additionally, the flimsy diplomatic assurances from Syria almost certainly failed to comply with Federal Regulations. *See* 8 C.F.R. § 208.18(c). His right to contact his consular office within twenty-four hours of being detained was violated. *See* Brief of Plaintiff at 4, *Arar*, 414 F. Supp. 2d at 250. And his right to be free from gross physical abuse was violated to the extent that he was rendered to be tortured. *See infra* notes 342-44 and accompanying text.

¹¹⁸ *See Arar*, 532 F.3d at 164-188.

¹¹⁹ *See infra* notes 132-41, 144-46.

question whether the rights in fact exist at all.¹²⁰ Although this system may have generally dispensed justice throughout U.S. history, in extraordinary times, inadmissible aliens have undoubtedly been the subjects of grave injustice, with little legal recourse and a lack of protection from the judiciary.¹²¹ Maher Arar's case presents a startling example.

A. *Sovereign Immunity and the FTCA*

Under current law, the United States and its officials enjoy sovereign immunity and cannot be sued unless that immunity is waived.¹²² The Liability Reform Act (LRA)¹²³ provides that all civil suits against federal employees acting within the scope of their employment¹²⁴ are barred, unless their conduct is actionable under the Federal Tort Claims Act (FTCA),¹²⁵ with only two

¹²⁰ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

¹²¹ See *Slocum supra* note 12, at 1024 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); see also *Arar*, 532 F.3d at 164-88.

¹²² See *Gray v. Bell*, 712 F.2d 490, 493 (D.C. Cir. 1983); see also Federal Tort Claims Act, ch. 753, 60 Stat. 812, 842-47 (1946) (codified as amended in scatter sections of 28 U.S.C.).

¹²³ Federal Employees Liability Reform and Tort Compensation Act (Westfall Act) of 1988, 28 U.S.C. § 2679.

¹²⁴ The “scope of employment” provision is read very broadly. See *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 32 (D.C. Cir. 2006) (holding that even when alleged misconduct included torture, such an act could be within “scope of employment”). The “courts generally look to *respondeat superior* rules in the place where the [tort occurred]” to determine whether the tort was within the scope of the employee’s authority to act. *Stephens, supra* note 93, at 294. The Court focuses less on the severity of the tort and more on whether the action was taken on the employer’s behalf. *Developments in the Law – Access to Courts: Compensating Victims of Wrongful Detention, Torture, and Abuse in the U.S. War on Terror*, 122 HARV. L. REV. 1158, 1161(2009) [hereinafter *Compensating Victims*]. Just because the act is criminal does not place it outside the “scope of employment.” *Id.* In practice, only “low-level rogue officials’ who clearly act beyond the scope of their regulations and directives” will be held liable under the FTCA. *Id.*; see also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). The United States will substitute itself for the federal employee acting within the scope of his employment and then assert the defense. *Stephens, supra* note 93, at 285 (2008).

¹²⁵ 28 U.S.C. § 2680(h) (1975). For official conduct to be actionable under the FTCA, the conduct must be actionable under the law where the tort occurred. Lee J. Teran, *Obtaining Remedies for INS Misconduct*, 96-05 IMMIGR. BRIEFINGS 1, May 1996, at 10. Both state law torts for negligent actions and intentional torts are actionable under the FTCA. Plaintiffs have successfully sued low level federal law enforcement officers for assault, battery, false imprisonment, outrageous conduct, wrongful detention, and negligent deportation. See, e.g., *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987)

exceptions.¹²⁶ The first exception is for claims arising out of violations of the Constitution.¹²⁷ The second exception permits claims for violations of federal law in which a private cause of action is created.¹²⁸

Very few plaintiffs alleging human rights abuses committed by the U.S. government, similar to those alleged by Mr. Arar,¹²⁹ have sued under the FTCA. This is likely due to the many exceptions and limitations within the FTCA.¹³⁰ One such limitation is that officials may not be sued for “discretionary” acts.¹³¹ Thus, a suit against an immigration officer for failing to

(assault and battery); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986), *aff’d in part, rev’d in part*, 870 F.2d 291 (5th Cir. 1989) (false imprisonment); *Adedeji v. United States*, 782 F. Supp. 688 (D. Mass. 1992) (outrageous conduct); 70 No. 22 Interpreter Releases 744 (June 7, 1993) (wrongful detention); *Munyua v. United States*, No. C-03-04538, 2005 WL 43960 (N.D. Cal. Jan. 10, 2005) (negligent deportation). However, in most successful FTCA cases, plaintiffs have been injured by low level federal employees for “garden-variety torts,” they have not been subjected to the sort of abuse seen in the extraordinary rendition and torture cases. *Compensating Victims*, *supra* note 124, 1159-60.

¹²⁶ 28 U.S.C. § 2679(b)(2) (1988).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See* *Compensating Victims*, *supra* note 124, at 1159-60.

¹³⁰ First, claims for intentional torts are barred by FTCA, unless plaintiff can show that the defendant was an “investigative” or federal “law enforcement officer[.]” *See* *Teran*, *supra* note 125, at 13 (citing *Caban v. United States*, 728 F.2d 68, 72 (2d Cir. 1984); *see also* 28 U.S.C. § 2680(h) (2006); *Stephens*, *supra* note 93, at 281-82. In the immigration setting, such officers would include immigration officers empowered to execute searches, seize evidence, or make arrests; but it would not include high-level officials responsible for giving the orders to abuse. Second, claims where the official exercised “due care, in the execution of a statute or regulation” are barred. 28 U.S.C. § 2680(a) (2006). Third, there can be no suit under the FTCA unless there has been an exhaustion of administrative remedies. If a claimant has failed to file a claim with the appropriate federal agency, then his FTCA claim will be dismissed regardless of the merits of the claim. *See* *Teran*, *supra* note 125, at 14; *see also* *Stephens*, *supra* note 93, at 281-82; *see also infra* note 123-25, and accompanying text; *see also* *Compensating Victims*, *supra* note 124, at 1159-60.

¹³¹ 28 U.S.C. § 2680(a) (2006). For example, all denials of asylum (which are by definition discretionary forms of relief) are immune from liability under the FTCA, regardless of the profound error in the decision. Similarly, denial of the relief of withholding or protection under CAT would likely never give rise to liability under FTCA, because such relief involves the weighing of proof and application of law, which inherently involves discretion. *See* *Stephens*, *supra* note 93, at 300 (“[T]he United States remains immune for any claim ‘based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of federal agency or an employee of the Government, whether or not the discretion involved be abused.’ . . . In general, acts that involve a ‘high-level’ policy or decision are subject to immunity, while those that are ‘low level’ or day-to-day generally are not immune.”).

adhere to the requirements of the INA will only succeed when his failure to follow the INA specifically regards a non-discretionary action.¹³² Another limitation is that federal officials cannot be sued for torts committed outside the territory of the U.S.¹³³ Thus, because the actionable aspects of U.S. government conduct arise out of events occurring outside U.S. territory, aliens subjected to extraordinary rendition by federal officials have significant difficulty bringing suit under the FTCA.¹³⁴

Given the low likelihood of success under the FTCA, aliens subjected to human rights abuses by federal officials essentially have two options. They may argue that their claim is not barred by the LRA because (1) their claim arises out of a violation of the Constitution, or (2) their claim arises out of a violation of a federal statute that creates a private cause of action.¹³⁵ In *Arar v. Ashcroft*, Mr. Arar brought claims under both of these exceptions. Counts Two through Four of his complaint were based on violations of his constitutional due process rights, while Count One was based on the private cause of action created by the TVPA.¹³⁶ As previously discussed, none of these attempts to fall within the LRA's exceptions were successful.¹³⁷

In any event, Mr. Arar's removal depended much upon the DOJ's reliance upon the diplomatic assurances given to determine whether his removal would be consistent with CAT, as such it was likely discretionary within the meaning of the FTCA. Thus Mr. Arar would not have been successful in asserting a cause of action under the FTCA.

¹³² See, e.g., *Munyua v. United States*, No. C-03-04538, 2005 WL 43960, at *6 (N.D.Cal. Jan. 10, 2005) (holding that an immigration officer's negligent failure to refer for a credible-fear interview an arriving alien who expressed a fear of returning to her country was non-discretionary, and thus the official was not entitled to immunity under the FTCA).

¹³³ 28 U.S.C. § 2680(a), (k) (2006).

¹³⁴ See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Supreme Court held that the "foreign country" exception to the waiver of government immunity by FTCA applied where an alien was alleging that he was kidnapped by Mexican officials at the behest of the U.S. Drug Enforcement Agency and delivered into the U.S. in violation of the extradition treaty between Mexico and the U.S. The Court held that even though his alleged injury resulted from acts and decisions originating in the U.S., because the injury occurred outside the U.S., the exception applied. *Stephens*, *supra* note 93, at 298-99.

¹³⁵ *Compensating Victims*, *supra* note 124, at 1160.

¹³⁶ *Arar v. Ashcroft*, 532 F.3d 157, at 163 (2d Cir. 2008).

¹³⁷ *Id.* at 164-88.

B. Claims Arising Out of Violations of the Constitution

The failure of Mr. Arar's constitutional claim is not unique to his case. Inadmissible aliens within the territory of the U.S., and aliens held outside the territory of the U.S., have encountered significant barriers when bringing suit against U.S. officials for human rights abuses.¹³⁸ A major component of this difficulty is the traditional rule against the extraterritorial application of the Constitution.¹³⁹

In order to bring a cause of action for a violation of a constitutional right, an alien plaintiff must either find an appropriate statute to enforce the constitutional right,¹⁴⁰ or move the court to imply a cause of action through a *Bivens* claim.¹⁴¹ As a threshold matter for either approach, the plaintiff must show that he possesses a constitutional right that was violated.¹⁴² For aliens who have not been admitted into the U.S., or who are held outside U.S. territory, this initial hurdle has generally proven insurmountable.¹⁴³

Although the Supreme Court has held that the Fifth Amendment applies to "persons" within the U.S. regardless of unlawful presence,¹⁴⁴ the "entry fiction" doctrine has traditionally

¹³⁸ Compensating Victims, *supra* note 124, at 1159. "[N]o [torture] case against the U.S. government or government officials has survived summary judgment and few are likely to do so under existing law." *Id.*

¹³⁹ Slocum, *supra* note 12, at 1023.

¹⁴⁰ For instance, the Civil Rights Act creates several enforcement mechanisms for plaintiffs to sue for violations of constitutional rights. See Teran, *supra* note 125, at 7; see also Steve Helfand, *Desensitization to Border Violence & the Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 109 (2001). For some inadmissible aliens, a 42 U.S.C. § 1983 claim may be asserted for injuries caused under color of state law. However, such a claim would have been to no avail to Mr. Arar, as he was injured by federal actors.

¹⁴¹ Compensating Victims, *supra* note 124, at 1162.

¹⁴² Teran, *supra* note 125, at 3.

¹⁴³ See Compensating Victims, *supra* note 124, at 1159-60; see generally Teran, *supra* note 125, at 10; Helfand, *supra* note 139.

¹⁴⁴ The protection against deprivation of life, liberty, or property without due process of law applies to "[e]ven one whose presence in this country is unlawful, involuntary, or transitory . . ." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that INS must comply with the requirements of the Fourth Amendment when stopping, arresting, and searching those suspected of unlawful presence); see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments are "universal in their

prevented inadmissible aliens from laying claim to any constitutional protections.¹⁴⁵ An alien who has not been admitted¹⁴⁶ into the U.S. is, as a matter of law, deemed to be located at the border, regardless of his actual location within the U.S.¹⁴⁷ Thus, under the rule that the Constitution does not apply extraterritorially,¹⁴⁸ courts have held that inadmissible aliens have “few, if any, constitutional rights.”¹⁴⁹

Several courts have aptly criticized the effects of this reasoning and have made limited extensions of constitutional protection to unadmitted aliens.¹⁵⁰ However, these decisions have failed to provide a consistent rationale for why inadmissible aliens

application to all persons *within the territorial jurisdiction*” of the U.S.) (emphasis added); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that illegal aliens are persons within the meaning of the equal protection clause of the Fourteenth Amendment).

¹⁴⁵ *See* Slocum, *supra* note 12, at 1023-24; *see also infra* note 258 (discussing the varying treatments of differing statuses of unadmitted aliens).

¹⁴⁶ An alien is deemed to have been admitted into the U.S. only after he has been inspected and lawfully entered at a port of entry. *See* INA § § 101(a)(13)(A) (codified at 8 U.S.C. 1101); 212(d)(5)(a) (codified at 8 U.S.C. 1182); *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (overruled on other grounds); *Amanullah v. Nelson*, 811 F.2d 1(1st Cir. Mass. 1987) (holding that an alien paroled into the U.S. is not deemed to have entered); *see Arar*, 532 F.3d at 206.

¹⁴⁷ *See* Slocum *supra* note 12, at 1023-24; INA § 212(d)(5)(a) (codified at 8 U.S.C. 1182).

¹⁴⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990).

¹⁴⁹ *Slocum*, *supra* note 12, at 1023; *accord* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (holding that because Mezei is treated “as if stopped at the border,” he has no due process rights); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1449 (11th Cir. 1986) (holding that excludable aliens “have virtually no constitutional rights.”).

¹⁵⁰ *See, e.g.,* *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that a legal permanent resident denied entry at the border was entitled to at least minimal procedural due process protection); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (holding that “[t]he ‘entry fiction’ . . . determines the aliens’ rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment.” Excludable aliens “are entitled under the due process clauses of the Fifth and Fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.”); *Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990) (adopting the test of *Lynch* for the Eleventh Circuit); *Correa v. Thornburgh*, 901 F.2d 1166, n. 5 (2d Cir. 1990) (noting that the Fifth Circuit has held that aliens seeking admission are entitled to “protection against gross physical abuse” under the due process clause); *Chi Thon Ngo v. Immigration Naturalization Service*, 192 F.3d 390, 399 (3d Cir. 1999) (holding that excludable aliens are entitled to have review of their continued detention, as a matter of due process).

are entitled to protection under the Constitution.¹⁵¹ In the immigration context, it is clear that inadmissible aliens are entitled, at least, to the process authorized by Congress in the INA.¹⁵² However, because Congress possesses plenary powers over immigration matters, aliens have had little success in challenging the constitutionality of the INA.¹⁵³ Furthermore, where an alien asserts the right to not be removed to a country where he will be persecuted¹⁵⁴ or tortured,¹⁵⁵ the INA specifically precludes a private cause of action.

Moreover, as seen in Mr. Arar's case, the special factors in *Bivens* will create additional difficulties when the claim involves subject matter that even arguably touches upon national security, foreign policy, or state secrets.¹⁵⁶ Further, individual U.S. officials may receive qualified immunity against a *Bivens* claim if the officials act in good faith or make discretionary decisions.¹⁵⁷ As such, excludable aliens who have been subjected to human rights

¹⁵¹ See, e.g., *Arar v. Ashcroft*, 532 F.3d 157, 189 (2d Cir. 2008) (noting that only the Fifth and Eleventh Circuits have held that unadmitted aliens have a due process right to not be subjected to gross physical abuse).

¹⁵² See generally *Jean v. Nelson*, 472 U.S. 846 (1985); see also *Mezei*, 345 U.S. at 212 (holding that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

¹⁵³ See *Jean*, 472 U.S. at 855; see also *Mezei*, 345 U.S. at 210; see also Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346-51 (2008); see generally Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363 (2007).

¹⁵⁴ See INA § 208(d)(7) (codified at 8 U.S.C. 1158) (“Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”).

¹⁵⁵ See 8 C.F.R. § 208.18 (e)(2) (Regarding CAT: “. . . nothing in this paragraph shall be construed to create a private right of action”). The INA similarly negates the ability to create or imply a cause of action for violations of asylum procedures. See INA § 208(d)(6) (“Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”). And FARRA explicitly excludes private causes of action for removals violating CAT. See *Arar*, 414 F. Supp. 2d at 266. Thus, of the rights they do possess under the INA, they are significantly truncated by the lack of a meaningful enforcement mechanism to ensure they will be honored. In this respect, if there is no redress when rights are violated, it is hardly fair to say the INA provides any rights. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury.”).

¹⁵⁶ *Compensating Victims*, *supra* note 124, at 1159.

¹⁵⁷ *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Plaintiff's rights must have been “clearly established” prior to the abuse, otherwise the official is entitled to qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

abuses have rarely been successful in suits against the U.S. which assert claims arising out of violations of the Constitution.¹⁵⁸

C. Claims Arising Out of Violations of Federal Statutes

Claims for statutory violations, when asserted by inadmissible aliens against the U.S. government, have met with similar difficulty. As discussed above, Mr. Arar based his first count on the Torture Victims Protection Act (TVPA).¹⁵⁹ The TVPA meets the second exception under the LRA because it explicitly provides for a private cause of action against anyone who commits torture under color of foreign law.¹⁶⁰ However, as seen in *Arar*, where U.S. officials are alleged to have sent a plaintiff to be tortured, a TVPA claim will be unsuccessful due to the “color of foreign law” element.¹⁶¹ Because Mr. Arar alleged that the U.S. government defendants used the U.S. immigration scheme as a part of the conspiracy to send him to Syria to be tortured,¹⁶² all three judges on the panel concluded that defendants’ conduct occurred under color of U.S. law.¹⁶³ Accordingly, Mr. Arar’s claim under the TVPA was dismissed.¹⁶⁴

Other than the TVPA, no other federal statute that falls within the private cause of action exception to the LRA is available to inadmissible aliens. Filing a claim under the Alien Tort Statute (ATS)¹⁶⁵ would not be a successful strategy for achieving redress for aliens subjected to human rights abuses, such as those experienced by Mr. Arar, because of the doctrine of sovereign

¹⁵⁸ See *Compensating Victims*, *supra* note 124, at 1159. Regarding the cases involving injury to aliens due to constitutional violations, all have been brought by aliens who were already admitted into the U.S. See *e.g.*, *Turkmen v. Ashcroft*, 2006 WL 1662663 *4-17 (E.D.N.Y. 2006); *Khorrami v. Rolince*, 493 F.Supp.2d 1061, 1063 (N.D. Ill 2007); *Turnbill v. U.S.*, 2007 WL 2153279 *2 (N.D. Ohio 2007); *Cesar v. Achim*, 542 F. Supp.2d 897, 899 (E.D. Wisc. 2008).

¹⁵⁹ 28 U.S.C.A. § 1350, sec. 2(a) (“An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual”).

¹⁶⁰ See *Stephens*, *supra* note 93, at 395-401.

¹⁶¹ See *supra* note 104-109.

¹⁶² *Arar*, 532 F.3d at 264.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 28 U.S.C.A. § 1350 (1991) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

immunity. Although the ATS has no “color of foreign law” requirement, and the Second Circuit has already held that torture is actionable under the ATS,¹⁶⁶ such a claim against U.S. officials will fail because the ATS does not independently waive U.S. sovereign immunity.¹⁶⁷ Thus it does not meet the requirements of the second exception under the LRA.¹⁶⁸ Further, because the Supreme Court has held that the ATS is jurisdictional and only creates a mechanism for enforcing international law, it does not, in itself, create a private cause of action.¹⁶⁹

Accordingly under the current law, when the abuses are committed at the behest of the U.S. government, inadmissible aliens subjected to human rights abuses similar to those suffered by Mr. Arar have a very low likelihood of asserting a successful claim against the U.S. government and its officials.¹⁷⁰ As such, the resolution of Mr. Arar’s case thus far is clearly a reflection of the current state of the law: because inadmissible aliens are deemed to be outside the U.S., they have few rights and virtually no means of redressing violations of the rights they do possess.¹⁷¹

¹⁶⁶ Stephens, *supra* note 93, at 116. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Moreover, those who aid or abet in torture have likewise been held liable through the ATS. *See, e.g.*, *Doe v. Unocal*, 395 F.3d 932, 950-51 n.26 (9th Cir. 2002) *vacated by stipulation of settlement*; *Cabello-Barrueto v. Fernandez-Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996). There is no territorial limitation for the ATS such as there is for constitutional claims.

¹⁶⁷ *See* Stephens, *supra* note 93, at 286.

¹⁶⁸ *See* Stephens, *supra* note 93, at 283-300; *see generally* *Turkman v. Ashcroft*, No. 02 CB 2307(JC), 2006 WL 1662663 (2006). *See* *Sanchez-Espinoza v. Regan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *See* 28 U.S.C. § 2680; *See* *United States v. Smith*, 499 U.S. 160 (1991) (holding that the U.S. cannot be sued unless it has consented to the suit). “Unless an action is authorized by the FTCA or expressly excluded from sovereign immunity, the claim is barred.” Stephens, *supra* note 93, at 283 (citing *United States v. Smith*, 499 U.S. 160 (1991) (holding that the doctrine of sovereign immunity bars all claims against the U.S. unless the U.S. consents to the suit).

¹⁶⁹ Stephens, *supra* note 93, at 283-300; *see* 28 U.S.C.A. § 1350 (1991); 28 U.S.C. § 2679 (2009) (Westfall Act).

¹⁷⁰ *See* *Compensating Victims*, *supra* note 124, at 1159. Although there may have been other theoretical claims available, based on treaty violations, such as the Convention Against Torture or the Vienna Convention of Consular Relations, such claims would likely have been of little avail to Mr. Arar because of the implicit limitation in FARRA placed on CAT, as well as rules regarding self-executing treaties and implying causes of action through treaties. *See generally* 28 U.S.C.A. § 1331; Stephens, *supra* note 93.

¹⁷¹ *See* Stephens, *supra* note 93, at 283-300.

III. *BOUMEDIENE* AS A VEHICLE FOR CHANGE

The central issue presented in *Arar* was whether an inadmissible alien had the right to not be rendered to a locale where he would be tortured, and if so, whether he had the right to redress in the federal courts for violation of that right.¹⁷² Based upon the decisions issued to date, the answer to both questions has been a resounding no.¹⁷³ Moreover, as explained above, strict application of the “entry fiction” to the principle of non-extraterritoriality demands the conclusion that inadmissible aliens possess no constitutional rights—not even a right to not be subjected to extraordinary rendition and ensuing torture. Although not all courts have ruled consistently with these two principles,¹⁷⁴ until recently there was no other cohesive explanation for the reach of constitutional protection beyond the territory of the U.S.¹⁷⁵

However, the Supreme Court’s recent decision, *Boumediene*, provides a functional test that not only overrules the strict non-extraterritorial rule of constitutional application,¹⁷⁶ but also creates a mechanism through which inadmissible aliens such as Mr. Arar may gain constitutional protection and thereby obtain redress for injuries caused by the U.S. government’s abuse of human rights.¹⁷⁷

¹⁷² Although the Second Circuit avoided deciding the case on due process grounds and instead opted to dismiss the case on the basis of the *Bivens* factors, it also clearly held that Mr. Arar did not have any due process right on which to base his claim. See *Arar*, 532 F.3d at 157. Due to the far-reaching implications of such a result, the section to follow will focus on the court’s discussion of Mr. Arar’s due process rights. However, there are very compelling arguments against dismissal of Mr. Arar’s case based on the *Bivens* factors. See Replacement Brief for *Amici Curiae* Law Professors in Support of Maher Arar, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (No. 06-4216-cv).

¹⁷³ The Court stated that “Arar is unable to point to any legal authority suggesting that, as an unadmitted alien who was excluded . . . , he possessed any form of . . . constitutional entitlement, the violation of which could constitute a predicate for the *Biven*’s relief he seeks.” *Arar*, 532 F.3d at 188. Moreover, the court declined to decide whether an inadmissible alien within the territory of the Second Circuit would even have the meager due process right to not be subjected to gross physical abuse. See *id.* at 189.

¹⁷⁴ See *supra* note 158.

¹⁷⁵ See *infra* note 289-314 and accompanying text.

¹⁷⁶ *Boumediene v. Bush* 128 U.S. 2229 (2008).

¹⁷⁷ As explained above, there is virtually no other litigation strategy available to an inadmissible alien who has suffered this type of abuse than to sue for a violation of the constitution or to sue for a private cause of action under some other statute. The most relevant statute, TVPA, will be inapplicable whenever the U.S. is responsible for the

A. *Strict Non-Extraterritorial Rule of Constitutional Application*

Before proceeding to discuss the functional test established by *Boumediene*, it is necessary to examine the landscape of constitutional application under the strict non-extraterritorial rule. It should come as no surprise that the rule has been given its most robust articulation when applied against unadmitted aliens who allege injury at the hands of U.S. government officials. In *Arar v. Ashcroft*, for example, the government argued for a very strict non-extraterritorial rule of constitutional application, stating “Arar’s claims alleging torture and unlawful detention in Syria are *per se* foreclosed [by the rule in *Eisentrager*] and its progeny . . . [which] unequivocally establish that non-resident aliens . . . are prohibited from bringing claims under the Due Process Clause.”¹⁷⁸ The government’s argument for the strict rule against extraterritorial application of the Constitution relied primarily upon *Johnson v. Eisentrager*, *United States v. Verdugo-Urquidez*, and *Harbury v. Deutch*.¹⁷⁹

In *Eisentrager*, petitioners were a group of twenty-one German nationals imprisoned in occupied Germany after they were convicted of war crimes by a military commission.¹⁸⁰ Petitioners sought review of their detention via habeas corpus.¹⁸¹ The U.S. Supreme Court denied their request for habeas review, and explained that it is an “alien’s presence within [U.S.] territorial jurisdiction” that creates constitutional protection,¹⁸² and that there is “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their

misconduct. 28 U.S.C. § 1350. Thus, if there is no constitutional right, the alien is limited to suing the U.S. through the FTCA by virtue of the funneling of claims cause under the LRA. 28 U.S.C. § 1346 (1946), 28 U.S.C. § 2679 (1948). As previously discussed, the limitations of the FTCA make it nearly impossible for an alien in the place of Mr. Arar to sue under the FTCA. 28 U.S.C. § 1346 (1946).

¹⁷⁸ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 275 (E.D.N.Y. 2006).

¹⁷⁹ *See Arar v. Ashcroft*, 414 F. Supp. 2d 250, 275 (E.D.N.Y. 2006); *see also Johnson v. Eisentrager*, 339 U.S. 763, 763 (1950); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000) *rev’d on other grounds sub nom.*, *Christopher v. Harbury*, 536 U.S. 403 (2002).

¹⁸⁰ *See Eisentrager*, 339 U.S. at 765-66.

¹⁸¹ *Id.* at 765.

¹⁸² *Id.* at 771.

nationality, wherever they are located and whatever their offenses. . . .”¹⁸³

The Court found that because petitioners were enemy aliens,¹⁸⁴ had never been in or resided within the U.S., had been captured outside the U.S. and held as prisoners of war, had been tried and convicted by a military commission outside the U.S., and had committed offenses against the laws of war outside the U.S., it would be “paradoxical and anomalous” to grant these detainees constitutional rights.¹⁸⁵

Similarly, in *Verdugo-Urquidez*, the U.S. Supreme Court held that the Fourth Amendment did not apply to searches and seizures that occurred in Mexico, even though such searches would have violated the Fourth Amendment if committed within the United States, had been “orchestrated within the U.S.,” and were conducted pursuant to the orders of U.S. government officials within the United States.¹⁸⁶

The majority in *Verdugo-Urquidez* relied on *U.S. v. Curtiss-Wright Exports Corp.*,¹⁸⁷ wherein the Court held that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of [U.S.] citizens.”¹⁸⁸ The Court then explained that even if the plaintiff had suffered a constitutional violation, it had occurred outside of U.S.

¹⁸³ *Id.* at 783. The Court cites the proposition that, the Fourteenth Amendment is “universal in [its] application, to all persons *within the territorial jurisdiction*” of the U.S. *Id.* at 771 (emphasis added) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1896)). The majority in *Boumediene* uses this statement to support its holding that territory and nationality are factors to weigh when deciding whether to extend constitutional reach beyond U.S. territory, although they are not dispositive. *See infra* notes 220-22 and accompanying text.

¹⁸⁴ “The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes [a] preliminary declaration of [the] intention to become a citizen, and they expand to those of full citizenship upon naturalization.” *Eisentrager*, 339 U.S. at 770. The court explains a sliding scale of rights for aliens. *Id.* at 770-71.

¹⁸⁵ *Id.* at 777. Justice Kennedy in *Boumediene* will use these terms in his functional approach for considering whether to extend particular constitutional rights outside the territory of the U.S. *See infra* note 220.

¹⁸⁶ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 276 (2006) (citing *Verdugo-Urquidez*, 494 U.S. 261, 264 (1990)).

¹⁸⁷ *United States v. Curtiss Wright Exports Corp.*, 299 U.S. 304, 318 (1936).

¹⁸⁸ *Id.*

territory, and he thus had no claim under the Fourth Amendment.¹⁸⁹ In interpreting the *Eisenstrager* holding, the Court stated that it “emphatic[ally]”¹⁹⁰ rejected the “claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”¹⁹¹

Although the Court acknowledges that aliens enjoy some constitutional rights,¹⁹² it held that they only enjoy these rights “when they have come within the territory of the United States *and developed substantial connections with this country.*”¹⁹³ Following the logical conclusion of the rule it lay down, the Court

¹⁸⁹ *Verdugo-Urquidez*, 494 U.S. at 265-67. The Court relies upon *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (holding that excludable aliens are not entitled to First Amendment rights, because they are not “people” whom the Amendment protects). The *Verdugo-Urquidez* Court interpreted the *Insular Cases* to stand for the proposition that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.” *Id.* at 267 (citing *Downes v. Bidwell*, 182 U.S. 244 (1901)); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *see also Dorr v. United States*, 195 U.S. 138 (1904); *see also Balzac v. Puerto Rico*, 258 U.S. 298 (1922).

¹⁹⁰ *Verdugo-Urquidez*, 494 U.S. at 269 (“Such extraterritorial application of organic law would have been so significant an innovation in the practice of government that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. . . . No decision of this Court supports such a view.”). The *Verdugo-Urquidez* Court reads the holding of *Reid v. Covert* narrowly, stating that *Reid*’s holding only applies to U.S. citizens overseas. *Id.* at 269-270.

¹⁹¹ *Id.*

¹⁹² *See, e.g., Lopez-Mendoza*, 468 U.S. 1032 (1984) (illegal aliens within the U.S. have Fourth Amendment rights); *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (illegal aliens are protected by the equal protection clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (a resident alien is a “person” within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (aliens are entitled to protection under the just compensation clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens are entitled to Fifth and Sixth Amendment protection); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (aliens are protected by the Fourteenth Amendment).

¹⁹³ *Verdugo-Urquidez*, 494 U.S. at 271 (emphasis added). Additionally, the Court explicitly rejected the plaintiff’s argument that the Fourth Amendment constrains the actions of federal officials equally outside the country as within the country. *Id.* at 270. Plaintiff reasons that even if the Fourth Amendment is not a right to which aliens outside our borders can lay claim, it should at least limit the actions of the government. *Id.* The argument relies on the premise that the U.S. government was created and given its power by the Constitution and should never be able to violate the limits inherent in the founding charter merely by acting outside the border of the U.S. *Id.* Although the *Verdugo-Urquidez* Court rejects this position, Justice Kennedy in *Boumediene* revives this framework. *See infra* note 237 and accompanying text.

held that if an alien is not lawfully within the U.S., the “Bill of Rights is a futile authority.”¹⁹⁴

The D.C. Circuit’s *Harbury* decision represents the culmination of strict adherence to the non-extraterritorial rule of constitutional application articulated in *Verdugo-Urquidez*. A Guatemalan citizen who was “tortured in Guatemala at the behest of C.I.A. officials”¹⁹⁵ brought suit, asserting violation of his constitutional rights. C.I.A. officials had ordered, directed, planned, and orchestrated his torture from within the territory of the United States.¹⁹⁶ Although the court acknowledged that torture “shocks the conscience”—and thus unequivocally violates the due process clause of the Fifth Amendment¹⁹⁷— the court reasoned that because the torture occurred in Guatemala, the plaintiff was outside the reach of the Fifth Amendment’s protection.¹⁹⁸ Consistent with the rule given in *Verdugo-Urquidez*, the court held that the plaintiff had no constitutional rights – not even the right to not be subjected to torture.¹⁹⁹

B. *The Kennedy Concurrence in Verdugo-Urquidez*

In *Verdugo-Urquidez*, Justice Kennedy did not subscribe to the majority’s reasoning.²⁰⁰ Rather, while he acknowledged that he does not believe the Constitution applies to “some undefined, limitless class of noncitizens . . . beyond [U.S.] territory,” he articulated a different test for the extraterritorial application of

¹⁹⁴ *Verdugo-Urquidez*, 494 U.S. at 271 (citing *Bridges v Wilson*, 326 U.S. 135, 161 (1945)).

¹⁹⁵ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 277 (E.D.N.Y. 2006).

¹⁹⁶ *Harbury*, 233 F.3d at 598. Although the case was dismissed before going to trial and thus the validity of plaintiff’s allegations were never given the opportunity to be confirmed in court, the facts were assumed true because of the government motion. *Id.* For purposes of determining the application of the law, the case stands for the proposition that the U.S. government has the ability to order the torture and execution of other aliens outside U.S. territory without facing any constitutional encumbrance.

¹⁹⁷ *Id.* at 602 (citing *Rochin v California*, 342 U.S. 165, 172-173 (1952)) (“No one doubts that under Supreme Court precedent, interrogation by torture . . . shocks the conscience.”).

¹⁹⁸ *Id.* at 603-04 (reasoning that because the “constitutionally relevant conduct . . . – torture – occurred outside the United States,” and because the Court in *Eisentrager* and *Verdugo-Urquidez* emphatically “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States,” no claim arose from the torture plaintiff suffered).

¹⁹⁹ *Id.* at 604.

²⁰⁰ *Verdugo-Urquidez*, 494 U.S. at 276-278.

the Constitution.²⁰¹ He opined that the existing “cases involving the extraterritorial application of the Constitution” each consider a variety of factors to be examined when determining the reach of constitutional protection. He noted that “whether the person claiming [constitutional] protection is a citizen,” and whether that person is within the territory of the U.S. when the constitutional right is violated, are simply two of the many factors for consideration.²⁰² Further, he made clear that “there is no rigid and abstract rule” that limits how Congress may act outside the border of the U.S.; rather, he stated that this determination is shaped by “the conditions and considerations that would make adherence to a specific guarantee altogether impracticable and anomalous.”²⁰³

As such, Justice Kennedy rejected the majority’s rule that the Bill of Rights only limits the government with respect to its interactions with parties protected by the Constitution.²⁰⁴ Rather, he agreed with Justice Harlan’s concurrence in *Reid v. Covert*,²⁰⁵ stating that “the government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”²⁰⁶

C. Boumediene’s Functional Approach

In *Boumediene*,²⁰⁷ Justice Kennedy was given the opportunity to expand upon the approach he had articulated in his *Verdugo-Urquidez* concurrence, in the context of detainees held

²⁰¹ Neuman, *supra* note 13, at n.73 (citing *Verdugo-Urquidez*, 494 U.S. at 275).

²⁰² *Verdugo-Urquidez*, 494 U.S. at 275-277 (Kennedy, J., concurring).

²⁰³ *Id.* at 277-78. (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

²⁰⁴ *See generally id.* at 278.

²⁰⁵ *See generally Reid v. Covert*, 354 U.S. 1 (1957).

²⁰⁶ *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 6) (“I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. [But] the proposition is . . . not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.”) (emphasis in original). He made it clear that he did not interpret the majority’s decision in *Verdugo-Urquidez* to stand for the proposition that aliens outside the border of the U.S. “have no constitutional protection.” *Id.* Ultimately, Justice Kennedy concurred in the result in *Verdugo-Urquidez* because he believed that in that particular case, the application of the warrant requirement of the Fourth Amendment would have been “impracticable and anomalous.” *Id.*

²⁰⁷ *Boumediene v. Bush*, 128 S. Ct. 2229. (2008).

at the U.S. naval base at Guantanamo Bay, Cuba.²⁰⁸ In applying his functional test, the *Boumediene* Court implicitly overruled *Verdugo-Urquidez*'s strict territorial test for determining the extent to which the Constitution applies outside U.S. territory.²⁰⁹

Petitioners in *Boumediene* were aliens detained at Guantanamo Bay²¹⁰ who had been designated as enemy combatants by a Combat Status Review Tribunal (CSRT).²¹¹ They challenged this designation and detention through writs of habeas corpus.²¹² Prior to *Boumediene*, the Supreme Court had held in *Rasul v. Bush* that the right of habeas review extended to the detainees at Guantanamo Bay.²¹³ Congress responded to *Rasul* by passing the Detainee Treatment Act (DTA),²¹⁴ which purported to remove the federal courts' jurisdiction over habeas claims that were filed on behalf of Guantanamo detainees.²¹⁵ When the constitutionality of the DTA was raised in *Hamdan v. Rumsfeld*,²¹⁶ the Supreme Court avoided the question by construing the DTA as inapplicable to pending cases.²¹⁷ In response, Congress passed Section Seven of the Military Commissions Act (MCA),²¹⁸ which clarified that the suspension of habeas corpus was intended to apply to all cases pending on behalf of Guantanamo detainees.²¹⁹

²⁰⁸ See *id.*; see also Neuman, *supra* note 13, at 268-69. The detainees are in a constitutionally analogous position to aliens denied entry into the U.S. *Id.* They are on territory within the sole control of the U.S., they have no right to claim protection from any foreign country, they are deemed to be outside the territory of the U.S., and they must rely almost exclusively on the good mercy of the executive branch for humane and fair treatment. See Slocum, *supra* note 12, at 1024.

²⁰⁹ See Neuman, *supra* note 13, at 262-66.

²¹⁰ *Id.*

²¹¹ See *Boumediene*, 128 S. Ct. at 2241.

²¹² *Id.*

²¹³ *Rasul v. Bush*, 542 U.S. 466, 484 n.15 (2004) (Being "held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing- unquestionably describe[s] 'custody in violation of the Constitution or laws or treaties of the United States,'" which is all that the habeas statute requires.) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J. concurring)).

²¹⁴ Detainee Treatment Act (effective 2006), Pub. L. No. 109-148, § § 1001-1006, 119 Stat. 2739 (codified at 42 U.S.C. 2000dd to 2000dd-1).

²¹⁵ *Boumediene*, 128 S. Ct. at 2240.

²¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²¹⁷ *Id.* at 575-576.

²¹⁸ See 28 U.S.C. § 2241(e) (Supp. 2007).

²¹⁹ *Boumediene*, 128 S. Ct. at 2242.

When the constitutionality of the MCA's Section Seven was challenged in *Boumediene*, the Court held that the statute could not remove federal jurisdiction to hear petitions of habeas corpus from detainees held at Guantanamo Bay without violating the Suspension Clause.²²⁰ In so holding, the Court explicitly rejected the government's contention that "noncitizens . . . detained . . . outside [U.S.] borders have no constitutional rights. . . ."²²¹ Rather, the Court stated that the strict territorial rule raised "troubling separation-of-powers concerns. . . ."²²²

The Bush administration had maintained that by simply locating the detainees outside the U.S. border, it could ensure that they were outside the reach of the Constitution and the courts—effectively trapped within a "legal black hole."²²³ In response to this position, Justice Kennedy stated:

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects the Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter 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."²²⁴

²²⁰ *Id.*

²²¹ *Id.* at 2244. Specifically, the court holds that article one, section nine, clause two of the Constitution has full effect at Guantanamo Bay.

²²² *Id.* at 2236.

²²³ See Neuman. *supra* note, 13 at 260.

²²⁴ *Boumediene*, 128 S.Ct at 2259 (citations omitted). The Court relied on *Reid v. Covert*, 354 U.S. 1 (1957), for the proposition that the Supreme Court has already

By thus rejecting the strict non-extraterritorial test, the Court articulated its functional approach. “[W]hether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and in particular whether judicial enforcement of the provision would be ‘*impracticable and anomalous.*’”²²⁵ Justice Kennedy specifically noted that these practical considerations relate not only to citizenship,²²⁶ but also to place of confinement, and the sufficiency of process provided.²²⁷ Hence, determining the reach of the Constitution in a particular context turns on “objective factors and practical concerns” rather than the formalism of relying exclusively on territorial boundaries.²²⁸ In surveying its decisions regarding extraterritorial constitutional application, the Court had found ample precedential support²²⁹ to reject the government’s

“explicit[ly] rejected a ‘rigid and abstract rule’ for determining where constitutional guarantees extend.” *Boumediene*, 128 S. Ct. at 2255.

²²⁵ See *id.* (emphasis added) (citing *Reid*, 354 U.S. at 74); see also *supra* note 197 and accompanying text.

²²⁶ The Court found no difficulty with the fact that petitioners were non-citizens. The court explained that “[b]ecause the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our [federal] courts can seek to enforce separation-of-powers principles.” *Id.* at 2246. The Supreme Court has held that the “nature of that [constitutional] protection may vary depending upon [immigration] status” of a particular alien. See *Zadvydas*, 533 U.S. at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982)). For constitutional purposes, there is a sliding scale for the extent of constitutional protection given to various immigration statuses. U.S. citizens possess full constitutional protection while in the U.S., and aliens denied admission into the U.S. have the least amount of constitutional protection. See *Wexler*, *supra* note 14, at 2033. Undocumented aliens, admitted nonimmigrant aliens, and admitted legal permanent residents have degrees of constitutional protection ranging between the alien denied entry and the U.S. citizen. *Id.* at 2034. However, immigration status is far from determinative. See *id.*

²²⁷ *Boumediene*, 128 S. Ct. at 2259.

²²⁸ *Id.* at 2258.

²²⁹ *Id.* Justice Kennedy argues that the functional approach to determining extraterritorial application of the Constitution unites the holdings of *Eisentrager*, *Reid*, and the *Insular* cases. The Court explains that its decision in *Eisentrager* is an example of a scenario where “[p]ractical considerations weighed heavily” in balancing the “constraints of military occupation with constitutional necessities.” *Id.* at 2257. In considering whether to extend the constitutional protection of the writ, the Court looked at the detainee’s status as an enemy alien, whether the detainee had been in or resided within the U.S., whether the detainee was captured outside of U.S. as a prisoner of war, whether the detainee was tried by a military commission for offenses committed outside of the U.S., and whether the detainee was at all times imprisoned outside of the U.S.

“formalistic, sovereignty based test for determining the reach” of the Constitution²³⁰ in favor of a functional approach.²³¹

Applying this functional test to the detainees held at Guantanamo Bay, the Court concluded that extending the Suspension Clause would not be “impracticable and anomalous.”²³² The Court arrived at this conclusion because it found that (1) the CSRT fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review,” (2) U.S. control in Guantanamo was “absolute and indefinite,” (3) the writ had historically been used as a check on executive power,²³³ and (4) the exercise of habeas jurisdiction would not impair the “military mission.”²³⁴

Dissenting, Justice Scalia noted that the new test “discards” the Court’s prior rulings that “aliens abroad have no substantive rights under our Constitution,”²³⁵ and he protested that the majority’s functional approach would permit “constitutional rights [to] extend to aliens held outside U.S. sovereign territory.”²³⁶

Much to Justice Scalia’s chagrin, legal scholars have begun to recognize that *Boumediene*’s functional approach does just that, extending constitutional rights to aliens located far outside of the U.S. border.²³⁷ In explaining what he has termed “global due process,” for example, Professor Neuman states that *Boumediene* “elaborates a ‘functional approach’ to the selective application of constitutional limitations to U.S. government action outside U.S. sovereign territory.”²³⁸ He explains that the functional approach

²³⁰ *Id.* at 2257. The Court states that if the Government’s reading were correct, *Eisenstrager* would have been overruled by the *Insular* cases, which is not the case. *Id.* at 2258.

²³¹ *Id.* at 2258.

²³² *See id.* at 2262.

²³³ *Boumediene*, 128 S. Ct. at 2259.

²³⁴ *See id.* The other factors given weight when considering the scope of habeas are: “(1) the citizenship and status of the detainee, and the adequacy of process through which that status determination was made; (2) the nature of the sites where apprehension and then determination took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” Neuman, *supra* note 13, at 266.

²³⁵ *Boumediene*, 128 S. Ct. at 2302.

²³⁶ *Id.*

²³⁷ *See* Neuman, *supra* note 13, at 273.

²³⁸ *Id.* at 259; Gerald L. Neuman, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 113-15 (Princeton Univ. Press) (1996); *see generally* Lobel, *supra* note 8.

rejected the “formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights.”²³⁹ Under this new test, territory matters only as one factor, to be considered amongst other factors including the “practical considerations”²⁴⁰ associated with extending a particular constitutional right. Similarly, Professor Zick predicts that the functional approach will be used to fill the “Constitution’s extra-territorial gaps” in an “ad hoc, case-by-case fashion.”²⁴¹ He states that the Court’s “functional approach to territory and constitutional scope may turn out to be quite significant in terms of extending constitutional liberty” to those outside the U.S. border.²⁴²

D. The Effects of the Functional Approach on the Entry Fiction Doctrine

Given that the entry fiction doctrine places unadmitted aliens outside the border of the U.S., the functional approach is likewise applicable to “extending” constitutional protections to unadmitted aliens detained within the United States.²⁴³ Under the fiction, certain aliens²⁴⁴ physically present within the U.S. are

²³⁹ See Neuman, *supra* note 13, at 261.

²⁴⁰ *Id.*

²⁴¹ See Zick, *supra* note 28, at 593-94; see also Slocum, *supra* note 12, at 1032.

²⁴² Zick, *supra* note 28, at 598.

²⁴³ *Id.*; see also Slocum, *supra* note 12, at 1032. The detainees are in a legal position similar to inadmissible aliens, as both have been thought to be outside the reach of the Constitution by virtue of their being “at the border” of the U.S. *Id.* at 1023-24. Thus, the decisions regarding the constitutional rights of detainees held at Guantanamo Bay are directly relevant for purposes of determining the rights of inadmissible aliens. *Id.* at 1032.

²⁴⁴ The fiction has historically applied only to aliens denied entry and detained or paroled within the U.S. Courts have consistently held that, for purposes of both immigration and constitutional law, these aliens are treated as though detained at the border. See Wexler, *supra* note 14, at 2033-34. Following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, the doctrine was extended with respect to the types of procedures aliens who enter the U.S. illegally are entitled to receive during removal proceedings. *Id.* at 2058-62.

For instance, an admitted alien is entitled to a removal hearing where the government bears the burden of proof, there must be a conviction for criminal grounds of inadmissibility, and the admitted alien is entitled to due process protection. *Id.* Before IIRIRA, aliens who entered without inspection were given these heightened procedural protections; now however, undocumented aliens receive the procedural protection of an alien seeking admission (i.e., the alien bears the burden of showing he is admissible, there is no need for a conviction to exclude on criminal grounds, and he is entitled to no due process protection. *Id.*

treated for legal and constitutional purposes as though they are detained at the border.²⁴⁵

The entry fiction first developed to prevent aliens who had entered the U.S. according to parole or for detention²⁴⁶ from obtaining increased constitutional protection by virtue of their presence within U.S. territory.²⁴⁷ However, in 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to extend this concept to apply also to aliens who entered without inspection; it was intended to prevent unauthorized aliens from enjoying more procedural protections than aliens who were denied entry while seeking lawful admission.²⁴⁸ Hence, in regard to both undocumented aliens and aliens denied entry, the entry fiction depends at least in part on the assumption that aliens outside the border of the U.S. are entitled to no constitutional protections.²⁴⁹

Whether IIRIRA has likewise changed their status constitutionally has yet to be determined. *Id.* Before IIRIRA, undocumented aliens were deemed to be present within the U.S. for constitutional purposes. *See Plyler v. Doe*, 457 U.S. 202, 211-13 (1982) (rejecting Texas’s argument that because illegal aliens were never admitted, they should be treated as though held at the border). After IIRIRA, the term “entry” was replaced with “admission” and the status of unauthorized aliens changed for purposes of the INA. *See Wexler, supra* note 14, at 2061. However, to the extent that undocumented aliens are treated as though detained at the border of the U.S. for constitutional purposes, unauthorized aliens may use the rule given in *Boumediene* to make a claim to constitutional protection, notwithstanding the possible effects of IIRIRA.

²⁴⁵ *See United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *see also Kaplan v. Tod*, 267 U.S. 228, 230 (1925); *see also Slocum, supra* note 12, at 1024.

²⁴⁶ *See Wexler, supra* note 14, at 2039 (citing *Ju Toy*, 198 U.S. at 263; *Kaplan*, 267 U.S. at 228).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2058-59. Because it was clear that aliens stopped at the border could not claim any constitutional right during the process of applying for permission to enter the U.S., concern arose over creating an incentive to enter illegally. If aliens illegally present within the U.S. were granted constitutional protection and those denied entry were not, then aliens would be placed in a better procedural posture to dispute their removal if they had not sought entrance through lawful means. To eliminate the advantage undocumented aliens possessed through unauthorized entries, the solution was to treat aliens who did not enter the U.S. through the usual process of inspection and admission as though they were stopped at the border. Regardless of the strengths of this policy decision, to the extent that the doctrine is used to determine an alien’s human rights, the doctrine should be changed. *See David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 64.

²⁴⁹ *See Slocum, supra* note 12, at 1024; *see also Wexler, supra* note 14, at 2039.

One of the earliest examples of the entry fiction, found in *Shaughnessy v. U.S. ex rel Mezei*,²⁵⁰ provides potent evidence of the potential injustice resulting from application of the doctrine. In *Mezei*, petitioner had been a resident of the U.S. for over twenty-five years when he left the U.S. to visit his dying mother in Romania.²⁵¹ Upon his return,²⁵² he was denied entry without a hearing on the basis of secret information that supposedly showed he was a threat to national security.²⁵³ He was detained at Ellis Island for several years while challenging, on due process grounds, his potentially indefinite detention.²⁵⁴ The Supreme Court rejected his due process argument, reasoning that he was not within the boundary of the U.S and thus enjoyed no rights under the due process clause.²⁵⁵

Similarly, in *U.S. ex rel. Knauff v. Shaughnessy*, petitioner was the wife of a U.S. veteran.²⁵⁶ She was denied entry to the United States on the basis of undisclosed confidential information, the validity of which she could not dispute because she did not have access to it.²⁵⁷ She was detained on Ellis Island and denied a hearing.²⁵⁸ When she challenged the validity of her continued detention under the due process clause, the Supreme Court held that the only process to which she was entitled was the process Congress had given her in the INA, and thus, she could not challenge her indefinite detention.²⁵⁹

²⁵⁰ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). See Slocum, *supra* note 12, at 1024.

²⁵¹ *Mezei*, 345 U.S. at 208.

²⁵² Because he had been out of the country for nineteen months, he was deemed to be seeking admission. As such, he was not given the advantage of being classified as a lawful permanent resident. *Id.*

²⁵³ *Id.* Interestingly, national outcry over his continued detention eventually led Congress to press for an investigation, whereupon the weak evidence against him was revealed. See generally Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1955). He was eventually paroled into the U.S. *Id.*

²⁵⁴ Weisselberg, *supra* note 248, at 965-66.

²⁵⁵ *Id.* at 966.

²⁵⁶ *Shaughnessy*, 338 U.S. 537, 539-40 (1950). Notably, she was denied admission into the U.S. on the grounds that it would be “prejudicial to the interests of the United States” if she were permitted to enter. *Id.* This same rationale echoes in Mr. Arar’s case. *Arar v. Ashcroft*, 532 F.3d 157 (2008).

²⁵⁷ *Shaughnessy*, 338 U.S. at 539-40.

²⁵⁸ See *Knauff*, 338 U.S. at 539-40.

²⁵⁹ Because the INA authorized her continued detention without a hearing upon the basis of secret evidence, even if her detention lasted indefinitely, she could not challenge it under the due process clause. See *Mezei*, 345 U.S. at 212 (“Whatever the

Over a half century after the Court decided *Knauff* and *Mezei*, the strength of the entry fiction has not faded. The Supreme Court in *Zadvydas* explained that the “distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law,”²⁶⁰ noting that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”²⁶¹

However, the functional rule articulated in *Boumediene* has the potential to substantially mitigate the harsh effects of the entry fiction doctrine.²⁶² If it is no longer simply a matter of whether an

procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”) (quoting *Knauff*, 338 U.S. at 544).

²⁶⁰ See *Zadvydas*, 533 U.S. at 693 (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (despite nine years presence in the U.S., an “excluded” alien “was still in theory of law at the boundary line and had gained no foothold in the United States”). Eventually, due to public anger over her continued detention, Congress pressed for an investigation which forced the government to reveal its evidence. She was admitted into the U.S. shortly thereafter. See generally Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1955).

²⁶¹ *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 276-278).

²⁶² Slocum, *supra* note 12, at 1035. It should be noted that the plenary powers doctrine does not limit application of the new rule given in *Boumediene*, because Congress’s plenary powers do not extend to all areas of immigration law and are “subject to important constitutional limitations.” *Zadvydas*, 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)); see also *Landon v. Plasencia*, 459 U.S. 21 (1982). For instance, the Supreme Court has held that Congress does not have the power to authorize indefinite detention of admitted aliens without running afoul of the Constitution. See *infra* note 309 and accompanying text. Conversely, when Congress uses its plenary powers to refuse to admit certain aliens, its power is at its highest, and an alien will likely never claim a constitutional right to enter the U.S. See *Plasencia*, 459 U.S. at 32-33; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 604-10 (1989) (rejecting the alien’s claim that the Constitution would not permit Congress’s exclusion of all Chinese immigrants from entering the U.S. and explaining that “over no conceivable subject is Congress’s power more complete than in immigration”).

Scholars have distinguished between these two extremes by explaining that Congress has an almost unlimited ability to exclude aliens from entering the U.S.; however, its power to regulate aliens within the U.S. is subject to constitutional limitations. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that Congress cannot subject aliens to hard labor for being in the U.S. illegally); see also Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 347 (2008). Because our present analysis pertains to an alien’s right to humane treatment and basic procedural protection, and not selection, the plenary powers doctrine is inapplicable.

alien is inside or outside of the border that determines his constitutional rights, then the entry fiction has a diminishing effect on constitutional determinations.²⁶³ As such, the change of *Boumediene* may relegate the entry fiction to a doctrine whose sole purpose is to determine what type of removal proceedings to apply to aliens.²⁶⁴

E. *The Reach of the Due Process Clause after Boumediene*

Among the constitutional rights that may be extended to inadmissible aliens located within the territory of the U.S., the due process clause is an excellent candidate for several reasons. First, *Boumediene*'s extension of the protections of habeas corpus has already implicitly extended some due process protections to the group.²⁶⁵ One of the central aspects of habeas review is determining whether the basis underlying one's detention violated the Constitution, laws, or treaties, of the U.S.²⁶⁶ Furthermore, the decisions in *Boumediene*, *Rasul*, *Hamdi*, and *Hamdan* make clear that detainees at Guantanamo are at least entitled to the minimal

²⁶³ Slocum, *supra* note 12, at 235. It is conceivable that the entry fiction may have some lingering effect on constitutional determinations, inasmuch as it relates to the single factor of location. However, because the functional approach looks to several factors, the entry fiction is no longer determinative and may carry very little weight given its irrelevance to a test that looks at impracticability and anomaly when extending constitutional rights.

²⁶⁴ See Zick *supra* note 28; see also Wexler *supra* note 14, at 2034-2035.

²⁶⁵ In determining the extent of habeas review of the U.S. government's authority to act in Guantanamo Bay, the Court looked to the "test for procedural adequacy in the due process context." *Boumediene*, v. Bush, 128 S. Ct. 2229, 2268 (2008). The Court held that the due process clause "requires an assessment of, *inter alia*, 'the risk of erroneous deprivation of a liberty interest; and the probable value, if any, of additional or substitute procedural safeguards.'" *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). In applying this rule, the Court found the CSRT deficient in the respect that it limited detainees' ability to rebut the government's allegations, limited the means to find and present evidence, did not provide for assistance of counsel, denied detainees' ability to see secret evidence, and provided detainees with no real opportunity to question witnesses. *See id.* As such, the Court held that the CSRT was not an adequate substitute for the right of habeas corpus. *See id.* at 2268

Interestingly, the Court cited to and relied upon its earlier decision in *Hamdi*, where it held that U.S. citizens held at Guantanamo Bay were entitled to constitutional protections, and that such rights were not adequately protected by the procedures in effect. *See id.* Although *Hamdi* involved the detention of a U.S. citizen, the Court applied similar tests to invalidate the CSRT as an adequate substitute for habeas. *See id.* In making this jump, the Court implicitly extends rights that had been intended for a U.S. citizen to aliens not admitted into the U.S. *See id.*

²⁶⁶ See 28 U.S.C. § 2241(c)(3) (2008).

requirements of the due process clause in regard to their detentions and status determinations.²⁶⁷ Accordingly, there are existing grounds for arguing that the Court has already implicitly extended the reach of procedural due process to similarly situated aliens even when they are detained “outside the border” of the U.S.²⁶⁸

Second, the functional approach provides an empirically accurate framework to distinguish between the results in several landmark due process cases, such as *Landon v. Plasencia*,²⁶⁹ *Lynch v. Cannatella*,²⁷⁰ and *Clark v. Martinez*²⁷¹ (where certain constitutional rights were extended to inadmissible aliens), and *Johnson v. Eisentrager* (where no constitutional rights were extended).²⁷² As such, the functional approach creates a sound normative framework for granting expanded due process protections to unadmitted aliens while avoiding the creation of an “unprotected spot in the nation’s armor.”²⁷³

The Supreme Court’s decisions in *Plasencia* and *Eisentrager* provide excellent examples of the empirical accuracy of the legal framework created by *Boumediene*’s functional approach. In *Plasencia*, the Court held that a legal permanent

²⁶⁷ The Court in *Boumediene* noted that its earlier decision in *Hamdi* made it unclear where its “extrapolation of § 2241 [habeas corpus review] ends and its analysis of the petitioner’s due process rights begins.” *Boumediene*, 128 S. Ct. at 2269 (discussing 28 U.S.C. § 2241).

²⁶⁸ Although the Guantanamo detainees are on slightly different legal footing than unadmitted aliens, their legal similarities outweigh their differences for constitutional purposes. Moreover, the differences are such that they support the argument of extending even greater due process protection to inadmissible aliens. If the Court was willing to extend due process protections to potential terrorists held at Guantanamo Bay, it is difficult to see why these same rights should not be granted to aliens whose only infraction may be an illegal entrance or improper visa.

²⁶⁹ See *Landon v. Plasencia*, 459 U.S. 21 (1982).

²⁷⁰ See *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987).

²⁷¹ See *Clark v. Martinez*, 543 U.S. 371 (2005).

²⁷² See *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950).

²⁷³ See *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001) (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)). Professor Neuman has argued that Justice Kennedy’s functional approach lends itself to too much uncertainty and thus is not the optimal rule. See Neuman, *supra* note 13, at 272. However, he acknowledges that it is a far superior approach for aliens outside the border, from a human right’s perspective, than the strict extraterritoriality rule. *Id* at 259. The relative strengths and weaknesses of the functional approach will need to be tested in future cases; however, it is generally agreed that the new test opens up the door to arguments that were foreclosed under the strict territorial rule of *Verdugo-Urquidez*.

resident who was denied entry upon returning from a brief trip outside the U.S. was entitled to procedural due process.²⁷⁴ The Court looked to the petitioner's connection to the U.S., the length of her departure from the U.S., the government's interest in effective border protection, and the petitioner's liberty interest at stake in the context of the procedures provided.²⁷⁵ The Court gave little weight to the petitioner's status as an alien held at the border when it determined the extent to which she was entitled to procedural due process protections.²⁷⁶

Conversely, the Court in *Eisentrager* held that it would be impracticable and anomalous to extend constitutional protection to a petitioner who:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.²⁷⁷

Although the *Plasencia* and *Eisentrager* opinions were reached many years prior to the *Boumediene* opinion, they are consistent with its functional approach. Further, they provide helpful examples of what is and is not "impracticable and anomalous" with respect to extending procedural due process protections to particular groups of aliens.

Similarly, the Fifth Circuit's decision in *Lynch* fits within the normative framework created by the functional approach of *Boumediene*. The *Lynch* court considered whether sixteen foreign nationals who had entered the U.S. illegally by stowing away aboard a barge²⁷⁸ were entitled to any protection under the due

²⁷⁴ *Plasencia*, 459 U.S. at 32.

²⁷⁵ *Id.* at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976)).

²⁷⁶ The court held that Ms. *Plasencia* could invoke protection under the due process clause, but refused to define the contours of the process to which she was entitled. *Id.* at 32.

²⁷⁷ See *Eisentrager*, 339 U.S. at 777.

²⁷⁸ *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (1987). As such the aliens were inadmissible under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6) (2009). Because they were never inspected and admitted, they were treated as though they were at the border. *Lynch*, 810 F.2d at 1370.

process clause of the Fifth Amendment.²⁷⁹ The aliens alleged that the officers detaining them had beaten them, sprayed them with stun gas, deprived them of food, sprayed them with a fire hose, and left them with only wet clothes and bedding materials.²⁸⁰ The court acknowledged that for immigration purposes, the aliens were treated as though they had never entered the U.S., and thus had no due process right to remain free from detention.²⁸¹ However, the court rejected the government's argument that "excludable aliens possess no constitutional rights."²⁸²

Rather, the court reasoned that the entry fiction is a doctrine that "determines the aliens' rights with regard to immigration and deportation proceedings," but does not "limit the [constitutional] right of excludable aliens detained within the United States territory to humane treatment."²⁸³ The court further stated that there are no conceivable "national interests that would justify the malicious infliction of cruel treatment on a person in the United States . . . simply because that person is an excludable alien."²⁸⁴ Accordingly, the court held that even excludable aliens are "entitled under the due process clauses of the [F]ifth and [F]ourteenth [A]mendments to be free of gross physical abuse at the hands of state or federal officials."²⁸⁵

The holding in *Lynch* is sound. However, the court's reasoning was fundamentally inconsistent with the existing legal framework at the time. If the entry fiction and non-extraterritorial rules are taken seriously, then unadmitted aliens within the border of the U.S. are not entitled to any protection under the due process clause, not even a right to "be free of gross physical abuse."²⁸⁶ Yet the court in *Lynch* premised its holding on the proposition that the entry fiction functions only to determine aliens' rights under immigration law.²⁸⁷ The court left unexplained, though, why it extended only the limited due process

²⁷⁹ *Lynch*, 810 F.2d at 1370.

²⁸⁰ *Id.* at 1367.

²⁸¹ *Id.* at 1370 (citing *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Carlons v. Landon*, 342 U.S. 524, 538 (1952).

²⁸² *Id.* at 1372.

²⁸³ *Id.* at 1373.

²⁸⁴ *Id.* at 1374.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1373.

right to be free from “gross physical abuse to the aliens.”²⁸⁸ Furthermore, the court’s reasoning failed to reconcile its twist on the entry fiction with the traditional articulation of the doctrine.²⁸⁹

Boumediene’s functional approach resolves this inconsistency by justifying the holding of *Lynch* on the basis that it is not “impracticable and anomalous”²⁹⁰ to give inadmissible aliens within the U.S. the right to be “free of gross physical abuse.”²⁹¹ That the *Lynch* holding has been the law of the Fifth Circuit for over two decades is strong evidence that this constitutional extension is neither impracticable nor anomalous.

The same argument may be used to justify the Supreme Court’s decision in *Martinez*,²⁹² which held that the rule given in *Zadvydas*²⁹³—that it is constitutionally impermissible to indefinitely detain admitted aliens—likewise applies to inadmissible aliens.²⁹⁴ Although the Court in *Martinez* largely based its extension of *Zadvydas* on the rationale of statutory

²⁸⁸ If the entry fiction does not place the alien outside the reach of the Constitution, the aliens should be entitled to the full protection of the due process clause, not merely the limited right to be free from gross abuse. See *Slocum supra* note 12, at 1026.

²⁸⁹ See *Lynch v. Canatella*, 810 F.2d 1363 (5th Cir. 1987). The Supreme Court has not limited application of the entry fiction to just immigration matters; rather it has used the fiction to make constitutional determinations as well. See *Slocum, supra* note 12, at 1026; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); see also *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (affirming the continuing validity of *Mezei*).

²⁹⁰ See *Boumediene*, 128 S. Ct. at 2298.

²⁹¹ See *Lynch*, 810 F.2d at 1374. The same reasoning could be used to justify the rules stated in *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990), *Adras v. Nelson*, 917 F.2d 1552, 1560 (11th Cir. 1990), and *Gisbert v. United States Atty. Gen.*, 988 F.2d 1437 (5th Cir. 1993). These important constitutional extensions of due process protection to inadmissible aliens are placed on firmer footing based upon the functional approach of constitutional application given in *Boumediene*, rather than arguing for a variation on the entry fiction doctrine.

²⁹² *Martinez*, 543 U.S. at 371; see also Transcript of Oral Argument at 22-23, *Martinez*, 543 U.S. 371 (No. 03-878)..

²⁹³ *Zadvydas*, 533 U.S. at 678.

²⁹⁴ *Martinez*, 543 U.S. at 377. The Supreme Court in *Zadvydas* held that Congress does not have the authority to indefinitely detain admitted aliens without running afoul of the Constitution. See *Zadvydas*, 533 U.S. at 690. The Court interpreted the INA to not permit this result based on the canon of construction of avoiding constitutional problems when interpreting statutes. *Id.* at 689. The Court explained that a construction of the statute that would permit indefinite detention would violate the Constitution, and thus interpreted the statute to not permit indefinite detention. *Id.* at 690.

construction (i.e., that a provision of the INA²⁹⁵ should have the same meaning when applied to admitted aliens as when applied to unadmitted aliens), the rule articulated in *Boumediene* provides a constitutional justification²⁹⁶ for the continuing validity of the *Martinez* rule.²⁹⁷

The decisions in *Plasencia*, *Lynch*, and *Martinez* demonstrate that certain fundamental due process protections had been extended to inadmissible aliens even before the Supreme Court articulated its functional test in *Boumediene*. However, prior to the rule of *Boumediene*, these extensions of due process protections were based on grounds that failed to adequately address the rule against the extraterritorial application of the Constitution.²⁹⁸ Under the legal framework articulated by *Boumediene*, the extensions of due process within these cases are cohesively explained. As such, the earlier cases should be viewed as landmarks for the types of due process protections that are not “impracticable and anomalous.”²⁹⁹

²⁹⁵ 8 U.S.C. § 1182(d)(5) (2004).

²⁹⁶ Given the administrative ease of applying the rule of *Zadvydas* to inadmissible aliens—as evidenced by the last several years of operating under *Martinez* (i.e., it is not impracticable), and the consistency of interpreting the same statute in the same manner as to both admissible and inadmissible aliens (i.e., it is not anomalous), the rule in *Martinez* could be justified on constitutional grounds by using the functional test of *Boumediene*.

²⁹⁷ This point is not purely academic. The Tenth Circuit recently held that the rule given in *Martinez* was essentially overruled by a regulation issued by DHS. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008). The Tenth Circuit reasoned that because *Martinez* was only based upon the statutory construction of a vague statute, a valid agency rule, entitled to *Chevron* deference, provided the authoritative interpretation of the statute. *Id.* at 1245 (citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

Conversely, if *Martinez* was found to be based on constitutional grounds (i.e., the due process clause does not permit indefinite detention of aliens, whether admitted or not), the Tenth Circuit’s decision would be in error. The *Boumediene* decision could support the constitutional argument for the continuing validity of the *Martinez* rule through a showing that the extension of this constitutional right has not proved to be anomalous or impracticable.

²⁹⁸ See, e.g., *Lynch*, 810 F.2d at 1373-74 (holding that aliens are not outside the U.S. for constitutional purposes under the entry fiction); *Plasencia*, 459 U.S. at 28-29 (relying on the Court’s prior decision in *Fleuti* that a brief departure from the U.S. permits courts to treat the alien as though they never left U.S. territory); see *Martinez*, 543 U.S. at 378 (avoiding the extraterritoriality issue by basing the decision on statutory constitution grounds).

²⁹⁹ See *Boumediene*, 128 S. Ct. 2262.

IV. APPLYING THE FUNCTIONAL APPROACH TO EXTEND DUE PROCESS TO INADMISSIBLE ALIENS

The functional approach articulated in *Boumediene* should be used to extend the reach of the due process clause to unadmitted aliens within the United States. It is well-established that aliens admitted and present within the United States are entitled to constitutional protections.³⁰⁰ When an inadmissible alien is denied constitutional protection because he has not been formally admitted, his constitutional rights turn upon a stamp in his passport.

The *Boumediene* Court criticized the use of territorial manipulation to deny constitutional rights, stating that the political branches do not have the “power to switch the Constitution off at will.”³⁰¹ However, a legal fiction that enables the executive branch to deny an alien constitutional protection simply by denying him entry gives the government the “power to switch the Constitution off.” Accordingly, just as in *Boumediene*, the functional approach should be used to provide an exceedingly important check on executive and legislative power with respect to the treatment of inadmissible aliens.³⁰² Further, extending constitutional protections to people physically present within the U.S., notwithstanding the entry fiction to the contrary, is both feasible and consistent with the United State’s traditional commitment to the rule of law. As such, this extension would be neither impracticable nor anomalous.

The case of Maher Arar presents a compelling factual setting in which to apply the functional approach. Mr. Arar was deliberately denied access to both the courts and to counsel, denied notice of the accusations against him, and denied any

³⁰⁰ See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984) (illegal aliens within U.S. have Fourth Amendment rights); *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (illegal aliens are protected by Equal Protection clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (a resident alien is a “person” within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (permanent resident aliens have Fifth Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (aliens are entitled to protection under the just compensation clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment protections); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886) (aliens are protection by the Fourteenth Amendment).

³⁰¹ *Boumediene*, 128 S. Ct. at 2259.

³⁰² See *Boumediene*, 128 S. Ct. at 2268 (discussing the need to extend constitutional protection as a check against executive power).

opportunity to dispute the erroneous evidence used to condemn him.³⁰³ He was then rendered to Syria to be tortured in an attempt to uncover information useful to the U.S. government.³⁰⁴ All of these events either occurred, or originated from, within U.S. territory and unquestionably would have violated the due process rights of a person located “within” the U.S.³⁰⁵ Yet because Mr. Arar was not admitted, and thus not legally “within” the U.S., it was held he did not enjoy any constitutional rights that would have protected him from mistreatment.³⁰⁶

The functional approach of *Boumediene* provides a test by which constitutional protection may be extended to inadmissible aliens similarly situated to Mr. Arar. Specifically, inadmissible aliens should be entitled to the due process right to basic procedural protection, the right to be free from gross physical abuse, and the right to not be rendered to gross physical abuse.

The Courts in *Plasencia* and *Lynch* held that these specific due process protections apply to inadmissible aliens. These decisions are consistent with the functional approach of *Boumediene* and provide strong evidence that extending to inadmissible aliens the due process rights of basic procedural protection and freedom from gross physical abuse has proven to be neither impracticable nor anomalous.³⁰⁷

A. Due Process Right to Basic Procedural Protection

In *Plasencia*, the Supreme Court found that an inadmissible legal permanent resident returning to the U.S. was entitled to constitutionally sufficient procedures in her exclusion hearing.³⁰⁸ The Court explained that it:

³⁰³ See *Arar v. Ashcroft*, 532 F.3d 157, 187-89 (2nd Cir. 2008).

³⁰⁴ See *id.* at 194.

³⁰⁵ See *id.* at 165, 179.

³⁰⁶ See *id.* at 186-87.

³⁰⁷ See *Boumediene*, 128 S. Ct. at 2262.

³⁰⁸ *Plasencia*, 459 U.S. at 33-34. Even though Ms. Plasencia was a legal permanent resident and was therefore admittedly in a different constitutional setting than Mr. Arar (one factor to consider when extending constitutional protection), the Court’s holdings in her case regarding sufficient procedural due process are relevant.

Given the rule in *Boumediene*, an inadmissible alien in the position of Arar may argue that he was entitled to at least the sort of minimal due process held to be constitutionally necessary in *Plasencia*. See *Boumediene*, 128 S. Ct. at 2268; see also *Plasencia*, 459 U.S. at 33-34. With respect to foreclosing his claim to basic procedural

must consider the interest at stake for the individual, the *risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards* and the interest of the government in using the current procedures rather than additional or different procedures.³⁰⁹

In applying this rule, the Court found that the petitioner's interests, i.e., "the right to stay and live and work" in the U.S., and "the right to rejoin her immediate family," were weighty vis-à-vis "[t]he government's interest in efficient administration of the immigration laws at the border."³¹⁰ Accordingly, the Court remanded the case for a determination of whether the petitioner's exclusion hearing had complied with the minimum requirements of the due process clause, e.g., sufficiency of notice, assistance of counsel, and the petitioner's opportunity to effectively present her case.³¹¹ In effect, the Court reasoned that in light of the "particular circumstances, the practical necessities, and the possible alternatives,"³¹² it would not be "impracticable and anomalous"³¹³ to give Plasencia—an inadmissible alien detained at the border—basic procedural due process protections at her exclusion hearing.³¹⁴

Applying this approach to the facts of *Arar*, it similarly would not be "impracticable and anomalous"³¹⁵ to provide an inadmissible alien—detained at the border while attempting to make a connecting flight—with an opportunity to be heard, to dispute his designation as inadmissible, and to obtain assistance of counsel prior to being rendered to a foreign country in order to be tortured.³¹⁶ The balance plainly tips in favor of extending such

protection, Mr. Arar's position as an alien denied entry is not dispositive. Furthermore, given the fact that Ms. Plasencia was likewise an alien who was denied entry (and thus outside the border of the U.S.), they were on similar territorial footing, even if their immigration statuses varied. See *Plasencia*, 459 U.S. at 34.

³⁰⁹ *Plasencia*, 459 U.S. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976)) (emphasis added).

³¹⁰ *Id.* (no longer citing *Mathews*).

³¹¹ *Id.* at 36-37.

³¹² *Boumediene*, 128 S. Ct. at 2255 (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957)).

³¹³ *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957)).

³¹⁴ See *Plasencia*, 459 U.S. at 32-37.

³¹⁵ *Boumediene*, 128 S. Ct. at 2255 (citing *Reid*, 354 U.S. at 74).

³¹⁶ See *Lobel*, *supra* note 8, at 481.

basic procedural protection: Mr. Arar’s interest in not being tortured weighs heavily against “the interest of the government in using the current procedures.”³¹⁷ The extremely meager procedures afforded to Mr. Arar³¹⁸ created a great “risk of an erroneous deprivation of [his] interest.”³¹⁹ In fact, the benefit of hindsight has demonstrated that it was his erroneous designation, coupled with inflammatory and misleading evidence, which led to the egregious abuse of Mr. Arar.³²⁰ Had Mr. Arar been provided with notice of his designation and removal, and an opportunity to dispute these decisions through the assistance of counsel before a neutral decision maker, his subsequent maltreatment and torture almost certainly would never have occurred.³²¹

Moreover, granting Mr. Arar these “additional or substitute procedural safeguards”³²² would not have been impracticable. At the time of Mr. Arar’s detention and removal, there was an immigration scheme designed for, equipped to, and accustomed to addressing the very issues at stake in his case.³²³ Had Mr. Arar been given an opportunity to use this immigration scheme, the executive branch of the U.S. government would not have enjoyed completely unchecked power to do with him as it willed. In our tripartite government structure,³²⁴ checks on executive power are meant to be the rule, not the exception.³²⁵ Mr. Arar’s case demonstrates the potential for outrageous abuse of the executive

³¹⁷ See *Plasencia*, 459 U.S. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976)); see also INA § 235(c) (codified at 8 U.S.C. 1225).

³¹⁸ See INA § 235(c) (codified at 8 U.S.C. 1225).

³¹⁹ See *Plasencia*, 459 U.S. at 33.

³²⁰ See Commission Report, *supra* note 3. The Court in *Boumediene* held that the due process clause “requires an assessment of, *inter alia*, ‘the risk of erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards.’” *Boumediene*, 128 S. Ct. 2268. (citing *Mathews*, 424 U.S. at 335).

³²¹ See Lobel, *supra* note 8 at 482-500.

³²² *Boumediene*, 128 S. Ct. at 2268 (quoting *Mathews*, 424 U.S. at 335).

³²³ See INA § 235(c) (codified at 8 U.S.C. 1225). It is of no moment that Mr. Arar’s detention and removal roughly corresponded to the requirements of INA § 235(c), because to the extent that INA § 235(c) denied him his constitutionally-protected right to basic procedural protection, the provision is unconstitutional.

³²⁴ *Boumediene*, 128 S. Ct. at 2259.

³²⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). (“Whatever powers the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

branch's power when it deems itself to be beyond the checks and balances established by the Constitution.³²⁶

B. Due Process Right to be Free from Gross Physical Abuse

Similarly, extending to Mr. Arar and similarly situated aliens the right to be free from gross physical abuse would not be “impracticable or anomalous.” As explained in *Lynch v. Cannatella*, there are no conceivable “national interests that would justify the malicious infliction of cruel treatment on a person in United States . . . territory simply because that person is an excludable alien.”³²⁷ Both the Fifth and Eleventh Circuits have held for nearly twenty years that excludable aliens are “entitled under the due process clause of the Fifth and Fourteenth Amendments to be free from gross physical abuse at the hands of state or federal officials.”³²⁸ That this rule has existed for this extended period is ample evidence that there is nothing impracticable or anomalous about extending the right to humane treatment to all people within the U.S., regardless of their immigration status. Federal officials are currently bound by a much higher standard in their dealings with those within the U.S.,³²⁹ and there is absolutely no basis to believe that requiring the same treatment of inadmissible aliens would create any administrative difficulty.

Additionally, it requires only a small step to hold that if an inadmissible alien has a substantive due process right to be free from gross physical abuse at the hands of federal officials within the U.S., then the same alien should have a right to not be rendered by U.S. hands to gross physical abuse outside U.S.

³²⁶ This was the exact same concern that arose out of the executive's manipulation of territorial distinctions in the Guantanamo cases. *Boumediene*, 128 S. Ct. at 2253-58.

³²⁷ *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987).

³²⁸ *Id.* The Eleventh and Second Circuits have made similar pronouncements regarding the substantive due process rights of inadmissible aliens. *See Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990); *see also Correa v. Thornburgh*, 901 F.2d 1166 (2d Cir. 1990).

³²⁹ The due process clause prevents maltreatment of a person where it is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (holding that the due process clause “give[s] protection against torture, physical or mental.”) *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

borders.³³⁰ Otherwise, an alien's right to be free from gross physical abuse would be rendered meaningless. Nothing could be more anomalous than permitting the U.S. to violate the human rights of inadmissible aliens by conforming to legal fictions, manipulating territorial distinctions, and using foreign agents to perform what the inhabitants of the United States deem both detestable and illegal when inflicted upon those within its own border.³³¹ A rule that would have protected Mr. Arar from rendition to a place where he would be tortured would not have jeopardized national security. Rather, his case is just one example in a long list of cases that have jeopardized our relationship with our allies in the international community, making the U.S. look more like a nation of men than a nation of laws.³³²

The obstruction of the procedures known to promote justice and the decision to send one to be tortured are never legitimate government actions. Accordingly, granting a right that would prevent the U.S. government from engaging in these types of human rights abuses could not frustrate any legitimate government function. When constitutional protections are wholesale denied to inadmissible aliens based on a legal fiction, it is a very tenuous argument that ignoring this fiction to provide humane treatment is anomalous. Rather, the converse presents a rule more fit for the term "anomaly."

CONCLUSION

If the executive and legislative branches have the "power to decide when and where [the Constitution's] terms apply,"³³³ the Constitution is not the supreme law of the land, and the two branches instead become law unto themselves.³³⁴ The Supreme

³³⁰ See *Arar v. Ashcroft*, 532 F.3d 157, 205 (2008) (Judge Sack dissenting) ("We have also held that 'when the state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.'") (citing *Matican v. City of New York*, 524 F.3d 151, 156 (2d Cir. 2008)).

³³¹ Such territorial manipulations were explicitly rebuffed by the Supreme Court. *Boumediene*, 128 S. Ct. at 2241. Accordingly, the functional approach is a clear fit for application in Mr. Arar's case.

³³² See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (Doubleday 2009).

³³³ *Boumediene*, 128 S. Ct. at 2236.

³³⁴ "If the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself. . . . To declare . . . the end justifies the means

Court's decision in *Boumediene* is a significant step toward reestablishing the balance of power between the three branches of government with respect to the human rights of aliens outside the literal and fictional borders of the U.S.

Although the functional approach was articulated in the context of detainees held abroad, its application is more widespread. In the face of official abuse, the functional approach to constitutional application has the potential to greatly increase the protections enjoyed by inadmissible aliens located within the U.S. Future litigation regarding the constitutional rights of aliens deemed to be at the U.S. border should test the limits of the functional approach. Although there will be numerous hurdles to overcome in these suits,³³⁵ abandoning the strict non-extraterritorial rule of constitutional application is a step in the right direction. The manipulation of territory and the use of legal fictions to deprive people of the basic rights to fairness and fundamental justice are not the pillars upon which the United States was built.

History has shown that in times of crisis the risk of discarding liberty reaches its zenith. Zealous prosecution of the war on terror has provided ample evidence for the truth of this proposition.³³⁶ However, as Justice Kennedy stated in *Boumediene*, “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”³³⁷ With respect to the constitutional

. . . would bring terrible retribution. Against that pernicious doctrine . . . this [C]ourt should resolutely set its face.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

³³⁵ Qualified immunity may prove to be problematic. A court might conclude that at the time of the abuse, the plaintiff's rights were not yet “clearly established,” and therefore that the officials are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Scheuer v. Rhodes*, 416 U.S. 232 (1974). Additionally, the *Bivens* factors of foreign policy and national security will need to be addressed when the executive abuse touches upon these subjects. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

³³⁶ “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

³³⁷ *Boumediene*, 128 S. Ct. at 2277.

rights of inadmissible aliens, the functional approach has established such a framework—a rule that can both provide for the needs of the nation’s security and also protect the human rights of aliens held in the custody of the U.S. both within and without the nation’s borders.