STATUS-DIFFERENTIATED ACCESS TO FEDERAL HABEAS RELIEF FOR U.S. CITIZENS AND NONCITIZEN NATIONALS DETAINED IN AMERICAN SAMOA

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This Note highlights a troubling gap in access to federal habeas relief for persons detained in American Samoa, the only United States territory that does not confer birthright citizenship on persons born there. There is no law affirmatively establishing that persons detained in American Samoa are entitled to seek federal habeas relief, regardless of citizenship status. However, there is a theoretical pathway for U.S. citizens detained in American Samoa to petition for federal habeas relief using a common law exception to the "immediate custodian rule" that requires habeas petitioners to name their local warden as respondent. This rule usually creates an insurmountable barrier to federal habeas relief because there is no federal court in American Samoa and no federal court can assert personal jurisdiction over a prison warden in American Samoa. The exception is explicitly available only to U.S. citizens detained outside the territorial jurisdiction of any federal court. The Secretary of the Interior has plenary authority over American Samoa. Therefore, as indicated by the U.S. District Court for the District of Hawaii in Barlow v. Sunia*, a U.S. citizen detained in American Samoa could name the Secretary as respondent and petition for federal habeas relief in the District of D.C.*

Because this exception does not extend to noncitizen U.S. nationals detained in American Samoa, and the "noncitizen national" designation exists only in American Samoa, this population is uniquely precluded from accessing federal habeas relief, a privilege the Supreme Court has extended to extraterritorial noncitizen detainees in notable cases like Rasul v. Bush *and* Boumediene v. Bush*, among others.*

There are myriad solutions available to correct differentiated access based solely on citizenship status. The simplest option would be for the federal courts to expand the Padilla *exception to include noncitizen nationals. Alternatively, Congress could*

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establish a federal court in American Samoa or expand an existing federal court's jurisdiction to encompass claims arising out of the Territory. Unfortunately, there are also significant barriers to enacting those solutions. This is in large part because the federal government has unrestricted power over American Samoa, and the Territory's small population and remote location make amassing sufficient political power to compel change unlikely.

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INTRODUCTION

There is a significant, underappreciated gap in access to federal habeas relief for persons detained in American Samoa. U.S. citizens detained in the Territory can seek federal habeas relief using an exception for citizens detained outside the territory of any federal court, but noncitizen nationals are foreclosed from the exception explicitly because of their citizenship status.[1] This gap arises largely because the law governing the relationship between the federal government and American Samoa is scant; the instruments of cession signed in 1900[2] and 1904[3] transferred plenary power over American Samoa to the President of the United States, who delegated it to the Secretary of the Interior in 1956.[4] The Secretary maintains plenary authority over American Samoa today.

The continued existence of this power structure makes American Samoa unique among the other major territories of the United States—Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands—because it is the only

1. *See infra* Part II.

2. Instrument of Cession by the Chiefs of Tutuila Islands to United States Government, U.S.-Tutuila, Apr. 17, 1900, 1 Papers Relating to the Foreign Relations of the U.S. 853 [hereinafter Tutuila Cession].

3. Instrument of Cession by the King and Chiefs of Manu'a to United States Government, U.S.-Manu'a, July 16, 1904, *Cession of Manu'a Islands*, AM. SAM. BAR ASS'N [hereinafter Manu'a Cession], https://asbar.org/cession-of-manua-islands/ [https://perma.cc/F 4LQ-PQKY] (last visited Dec. 26, 2023).

4. Exec. Order No. 10264, 16 Fed. Reg. 6417 (June 29, 1951).

territory that remains both "unorganized" and "unincorporated."[5] The Supreme Court established the doctrine of territorial incorporation in *The Insular Cases*,[6] a series of decisions from the early twentieth century. Together, *The Insular Cases* created a framework under which the Constitution does not apply automatically or in full to newly acquired U.S. territories.[7] Instead, only the "fundamental" provisions of the Constitution apply; which provisions are fundamental is determined on a territory-specific basis.[8]

A territory is incorporated when Congress explicitly states its intention to incorporate the territory and place it on a formal path to statehood.[9] Notably, not one of the five major territories is incorporated. Instead, four of the territories are "organized," meaning Congress has passed an organic act defining the territory's governance structure and providing a bill of rights—which is to say, stipulating which provisions of the Constitution extend to the territory.[10] For all four organized territories, Congress extended the Citizenship Clause of the Fourteenth Amendment, providing for birthright citizenship in those territories.[11]

Because American Samoa is unorganized[12] and attempts to extend the Citizenship Clause to the Territory have repeatedly failed,[13] people born in American Samoa are not entitled to full citizenship. Instead, they are noncitizen nationals, a designation that applies exclusively in American Samoa.[14] In the context of a federal habeas petition, this citizenship status differentiation proves fatal to a noncitizen national's petition because there is no federal court in American Samoa and the exception that circumvents the personal jurisdiction issue created by the "Immediate Custodian" rule is available only to U.S. citizen petitioners.[15]

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5. *See* Fitisemanu v. United States, 1 F.4th 862, 875 n.15 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

6. *See generally, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922).

7. *See, e.g.*, DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 85–87 (2019).

8. *Id.*

9. *Balzac*, 258 U.S. at 311 ("Incorporation has always been a step, and an important one, leading to statehood . . . . [I]t is reasonable to assume that, when such a step is taken, it will be begun and taken by Congress deliberately, and with a clear declaration of purpose, and not left a matter of mere inference or construction.").

10. *See Fitisemanu*, 1 F.4th at 865.

11. *See id.*; Sean Morrison, *Foreign in A Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 140, 140 n.453 (2013).

12. *See* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 528 n.199 (2006).

13. *See infra* Section II.B.

14. Miller v. Albright, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island.") (citation omitted).

15. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 2 (2008) [hereinafter GAO Report],

Existing scholarship robustly considers the lack of birthright citizenship in American Samoa and the tricky questions about extraterritorial habeas that arose post-*Boumediene v. Bush*,[16] but the precise question of access to federal habeas relief for persons detained in American Samoa has not been squarely addressed.[17]

This Note seeks to fill that gap. Part I outlines necessary background information about *The Insular Cases*, American Samoa, and habeas corpus. Part II specifically considers habeas corpus in the American Samoa context. Section II.A uses the example of *Barlow v. Sunia*,[18] a recent unpublished opinion from the U.S. District Court for the District of Hawaii, to construct a detailed review of a habeas petition from a U.S. citizen detained in American Samoa. Section II.B expands on the *Rumsfeld v. Padilla*[19] exception the court in *Barlow* identified as a possible avenue for U.S. citizens detained in American Samoa to seek federal habeas relief. Section II.C explores the implications for noncitizen nationals seeking federal habeas relief. Part III reviews available solutions to address the issue of status-differentiated access to federal habeas relief.

I. BACKGROUND

The gap in access to federal habeas relief for persons detained in American Samoa exists at the intersection of the incorporation doctrine created by *The Insular Cases*, American Samoa's unique status as the only unorganized major U.S. territory, and the law governing extraterritorial access to federal habeas relief. Each of these three areas of law is explored briefly in this Part.

A. The Insular Cases

Understanding the unique relationship between the American system of law and the U.S. territories requires understanding the judicially constructed doctrine enabling (and arguably mandating) differential treatment of territories. Today, this doctrinal framework exists as a spectral relic of a more openly imperialistic moment in American history. Unfortunately, like most specters, the doctrine does not exist merely in the background; it rattles the pipes and moves the furniture around, leading to inconsistent and often structurally tenuous jurisprudence.

The incorporation doctrine developed in the early twentieth century through a series of Supreme Court decisions considering whether, how, and to what

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https://www.gao.gov/assets/gao-08-1124t.pdf [https://perma.cc/9SFG-FGMD]; Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736, at *8 (D. Haw. Nov. 12, 2019) (citing Rumsfeld v. Padilla, 542 U.S. 426, 435, 447 n.16 (2004)).

16. 553 U.S. 723 (2008).

17. *See, e.g.*, Dennis Schmelzer, *Historically Unappealing:* Boumediene v. Bush, *Appellate Avoidance Mechanisms, and Black Holes Extending Beyond Guantanamo Bay*, 23 WM. & MARY BILL RTS. J. 965, 989–90 (2015); Gretchen C.F. Shappert & Adam F. Sleeper, *International & Territorial Border Searches: The Border-Search Exception as Applied in the U.S. Territories of the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, & Puerto Rico*, 69 U.S. DEP'T JUST. J. FED. L. & PRAC. 205, 242–43, 242 n.230 (2021).

18. No. CV 18-00423-JAO-KJM, 2019 WL 5929736 (D. Haw. Nov. 12, 2019).

19. 542 U.S. 426 (2004).

extent the U.S. Constitution applied to newly acquired territories such as Puerto Rico, Guam, and the Philippines.[20] Those decisions are now collectively referred to as *The Insular Cases*.[21] Together, they stand for the controversial proposition that only the "fundamental" provisions of the Constitution apply to territories upon acquisition.[22] Under the quasi-constitutional framework of *The Insular Cases*, the Constitution can apply to territories in full if they become "incorporated," meaning that Congress enacts legislation placing the territory on a path to statehood.[23]

Meanwhile, judicial interpretation determines the constitutional status of unincorporated territories: *The Insular Cases* did not define or enumerate the "fundamental" provisions of the Constitution, leading to inconsistent and unpredictable case-by-case analyses of how the Constitution applies in U.S. territories.[24]

Scholarship analyzing *The Insular Cases* agrees that the cases were grounded in a racist and xenophobic ideology that sought to justify the U.S. government's ability to wield plenary authority over constitutionally subordinate territories in perpetuity.[25] The litigation leading up to the Supreme Court decision departed from then-settled constitutional law that still causes "serious judicial

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20. *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 798–99 (2005).

21. Which cases comprise *The Insular Cases* is itself a question that is subject to debate. *See id.* at 809.

22. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922). For a persuasive argument that this "standard" account misrepresents the actual holdings of *The Insular Cases*, see Burnett, *supra* note 20.

23. *Balzac*, 258 U.S. at 311 ("Incorporation has always been a step, and an important one, leading to statehood . . . . [I]t is reasonable to assume that, when such a step is taken, it will be begun and taken by Congress deliberately, and with a clear declaration of purpose, and not left a matter of mere inference or construction.").

24. Burnett, *supra* note 20, at 811–12.

25. *See, e.g.*, Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2454 (2022) (describing the framework created by *The Insular Cases* as "a racially motivated imperialist legal doctrine"); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1665 (2020) (referring to *The Insular Cases* as "much-criticized"); José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 436–37 (1978) ("The decisions in the *Insular Cases*, now barely remembered by students of the Court and generations of Americans anxious to avoid the complex and somewhat unpleasant history of colonialism, prompted Finley Peter Dunne's Irish-American political sage, Mr. Dooley, to expound his most famous doctrine of constitutional interpretation: 'no matther whether th' constitution follows th' flag or not, the supreme coort follows th' iliction returns.'"); *see also* IMMERWAHR, *supra* note 7, at 85–87. Indeed, scholars have been critical of *The Insular Cases* since the year the first decisions were handed down. *See* Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 170 (1901) ("The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the [C]ourt, are, I believe, without a parallel in our judicial history . . . . Until some reasonable consistency and unanimity of opinion is reached by the [C]ourt upon these questions, we can hardly expect their conclusions to be final and beyond revision.").

confusion and incoherence."[26] Scholars are divided about whether to overrule *The Insular Cases* or "repurpose" them to protect territorial cultures and practices that arguably would not survive constitutional challenge.[27]

Presently, there is only one incorporated U.S. territory: Palmyra Atoll, an island in the Pacific Ocean that is uninhabited except for occasional visiting researchers.[28] The remaining 13 U.S. territories are unincorporated, and only 5 of them are populated.[29] Of those five territories, four are considered "organized," meaning that Congress has passed an "organic act" providing for a bill of rights and structure of government for the territory.[30] Generally, organic acts stipulate the scope of the Constitution's application for their respective territories, though they do not "incorporate" the territory unless Congress explicitly intends to do so.[31] The fifth, American Samoa, is both unincorporated and unorganized. It is the only populated territory with this status.

B. American Samoa

Because of its unique territorial status, American Samoa represents the present-day incarnation of one especially controversial result of *The Insular Cases*: permanent colonial territories that are subject to the plenary power of the U.S. government while lacking the full and unqualified protections of the U.S. Constitution.[32] In reality, American Samoa's situation is not that stark—the Territory is not, and should not be, considered a "mere[] belonging"[33] of the United

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26. Ponsa-Kraus, *supra* note 25, at 2458.

27. *Id.* at 2455–57.

28. *Definitions of Insular Area Political Organizations*, U.S. DEP'T INTERIOR, OFF. INSULAR AFFS., https://www.doi.gov/oia/islands/politicatypes [https://perma.cc/S4SZ-Q5UM] (last visited Dec. 4, 2023).

29. *See id.* (defining "incorporated territory" as "a United States insular area, of which only one territory exists currently, Palmyra Atoll, in which the United States Congress has applied the full *corpus* of the United States Constitution as it applies in the several States"; and "territory" as "[a]n unincorporated United States insular area, of which there are currently thirteen"); *see also USGS Science in the American Territories*, U.S. GEOLOGICAL SURV. (May 17, 2023), https://www.usgs.gov/tools/usgs-science-american-territories [https://perma.cc/LM6D-NME3].

30. *See* Puerto Rico Federal Relations, ch. 145, 39 Stat. 951 (1917) (Puerto Rico's first permanent organic act); Organic Act of Guam, ch. 512, 64 Stat. 384 (1950); Organic Act of 1936, ch. 699, 49 Stat. 1807 (1936) (later repealed and replaced by the Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 (1954)); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) (amended by Pub. L. No. 99-396, 100 Stat. 837 (1986)).

31. Burnett, *supra* note 20, at 827, 866 n.303.

32. *See* Cabranes, *supra* note 25, at 424, 478; Ponsa-Kraus, *supra* note 25, at 2455.

33. Ponsa-Kraus, *supra* note 25, at 2471. Ponsa-Kraus's article offers a full-throated call to overrule *The Insular Cases* and adopt an alternative legal scheme for preserving American Samoa's unique cultural practices and land transfer systems.

States.[34] Nonetheless, it is important to scrutinize the "perplexing and unclear"[35] *Insular Cases* framework and highlight its negative consequences.

One such consequence is that American Samoa has no structural protection against the federal government's plenary power over the Territory[36]—the Territory's sole federal representation is a nonvoting delegate to the U.S. House of Representatives.[37] In striving for a measure of independence and protection for its cultural practices, the American Samoa Government has repeatedly resisted efforts to extend the Citizenship Clause to the Territory, a change that would nudge American Samoa closer to parity with the other major territories.[38] Unfortunately, so long as American Samoa retains its unique status as the only major unorganized territory, it remains wholly subject to federal power; the Territory's only available protections are norm- and optics-based.[39]

This Section provides contextual information about American Samoa's history, governance system, and relationship to the Secretary of the Interior before

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34. Whether *The Insular Cases* are valid law is a question that, to this author, is distinct from the determination of what relationship or governmental structure the American Samoa Government and the people of American Samoa wish to maintain relative to the United States. For a Samoan perspective, see Uilisone Falemanu Tua, Comment, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246 (2010).

35. *Id.* at 264.

36. *See* Fitisemanu v. United States, 1 F.4th 862, 875 n.15 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (rejecting the D.C. Circuit's conclusion in *Tuaua v. United States*, 788 F.3d 300, 305–06 (D.C. Cir. 2015) that American Samoa is not completely subject to U.S. political jurisdiction and reasoning that "as the only populated territory for which Congress has not passed an organic act, American Samoa is 'unorganized' and therefore *especially* subject to American political control") (emphasis added).

37. 48 U.S.C. § 1731.

38. *See, e.g.*, S. Con. Res. No. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021), https://www.americansamoa.gov/_files/ugd/abcfec_4ed0ab5ffa8249d6b3206a8009bebbf2.pdf [https://perma.cc/SQV8-B2MJ]; *Fitisemanu*, 1 F.4th at 867 ("Public opinion among American Samoans appears to have shifted, with the elected government of American Samoa intervening in this case to argue against 'citizenship by judicial fiat.' Limited evidence exists regarding American Samoan public opinion on the question of birthright citizenship, but what little evidence there is suggests Intervenors are not out of step with the people they represent.").

39. *See, e.g.*, Press Release, Am. Samoa Gov't, Governor Lemanu Meets with the Department of Interior to Review the Approved Constitutional Amendments (Feb. 9, 2023), https://www.americansamoa.gov/_files/ugd/4bfff9_df6f18d68f504f1894666de7d111cf4d.pdf [https://perma.cc/58UU-23SR] ("The Secretary of Interior, Ms. Haaland reassured Governor Lemanu that the department is reviewing the constitutional amendments in the spirit of respect for our self-determination. Ms. Haaland stated that a thorough review of the amendments is underway – mindful that this is the first time in more than 40 years that amendments have been approved by the voters."); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel (*Hodel II*), 830 F.2d 374, 378 (D.C. Cir. 1987) ("[A] decision to intervene in the judicial system of American Samoa 'cannot be taken lightly,' as any intervention might jeopardize the United States policy of 'fostering greater self-government and self-sufficiency without disturbing the traditional Samoan cultural values.'").

considering the jurisdictional challenges to bringing a habeas petition arising from American Samoa in federal court.

The islands now collectively known as American Samoa gained territorial status beginning in 1900 when the Matai leadership ceded Tutuila, the largest island, to the United States.[40] Four years later, the King and Chiefs of Manu'a ceded their islands to the United States in a separate instrument of cession.[41] A joint resolution from 1929 ratified the cessions and decreed that "[u]ntil Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct."[42] In 1951, President Truman signed Executive Order 10264, transferring authority over American Samoa to the Secretary of the Interior.[43] The Secretary of the Interior ("the Secretary") maintains plenary authority over American Samoa today.[44]

People born in American Samoa are not U.S. citizens. They are noncitizen U.S. nationals, entitled to privileges such as the ability to reside and work anywhere in the United States. Noncitizen nationals, however, lack several privileges enjoyed by U.S. citizens. They cannot vote in federal elections (other than voting to elect the Territory's single nonvoting congressional delegate), run for federal office, or serve in law enforcement roles outside of American Samoa.[45] Though the Citizenship Clause has never been extended to American Samoa, citizenship has been a contested and high-profile issue in the Territory since its cession. When the people of American Samoa "learned they were not considered American citizens, many advocated for citizenship. This effort culminated in the creation of the American Samoan Commission in 1930, which recommended that Congress grant citizenship to the people of the Territory. The United States Senate passed legislation to this effect, but the effort failed in the House."[46]

Although Congress has never passed an organic act establishing a governance structure and bill of rights for American Samoa, the Territory adopted a constitution (approved and formally promulgated by the Secretary) in 1967 and has a tripartite government that sits under the "supervision and direction" of the

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40. *American Samoa*, U.S. DEP'T INTERIOR, OFF. INSULAR AFFS., https://www.doi.gov/oia/islands/american-samoa [https://perma.cc/C7HP-35DD] (last visited Dec. 4, 2023).

41. Manu'a Cession, *supra* note 3, at 3.

42. H.R.J. Res. 281, 70th Cong., 45 Stat. 1253 (1929) (enacted).

43. Exec. Order No. 10264, *supra* note 4.

44. *American Samoa*, U.S. DEP'T INTERIOR, OFF. INSULAR AFFS., *supra* note 40. *See also Hodel II*, 830 F.2d at 376.

45. GAO REPORT, *supra* note 15, at 4.

46. Fitisemanu v. United States, 1 F.4th 862, 866–67 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

Secretary.[47] Amendments and modifications to the Constitution of American Samoa must be approved by the Secretary and "may be made only by Act of Congress."[48]

American Samoa's judicial branch consists of a local district court and a High Court led by a chief justice and associate justice, both appointed with life tenure by the Secretary.[49] Unlike the district courts in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, the High Court of American Samoa is not an Article IV territorial court established by Congress.[50] Further, unlike state courts, the High Court does not have concurrent jurisdiction to hear federal claims, save for a few enumerated and congressionally authorized exceptions (e.g., food safety, protection of animals, conservation, and shipping issues).[51]

The High Court's appellate division hears cases by panel, and each panel must consist of three associate justices and two trial division judges.[52] Because there are only two associate justices within the American Samoa judiciary—and typically one of them has been involved with the case under appeal—the Secretary customarily appoints federal judges, often from the Ninth Circuit Court of Appeals, to serve temporarily as acting interim justices in the appellate division.[53]

The Secretary's plenary authority encompasses the power to review and overturn decisions of the High Court of American Samoa.[54] Though the Secretary "has generally removed himself from overseeing the routine affairs of the High Court,"[55] the breadth of the Secretary's authority remains apparent. In 1985, Interior Secretary Donald P. Hodel implicitly acknowledged the extent of his authority over the High Court in explaining why he declined to intervene in a legal proceeding:

> As Secretary, I have held no hearing and read no briefs. To have done so, or to do so now, with a view toward overruling the High Court's decision, in what I perceive to be a highly complicated case, puts the

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47. U.S. DEP'T INTERIOR, Sec'ys Ord. No. 2657 (Aug. 29, 1951) (amended by Sec'ys Ord. No. 3009 (Sept. 13, 1977)).

48. 48 U.S.C. § 1662a. In November 2022 Amata Coleman Radewagen, American Samoa's Delegate to the United States House of Representatives, introduced HR 9350 and referred it to the House Committee on Natural Resources. The proposed bill would repeal § 1662a and allow "the people of American Samoa to approve amendments to the territorial constitution based on majority rule in a democratic act of self-determination." H.R. 9350, 117th Cong. (2022).

49. GAO REPORT, *supra* note 15, at 5–6.

50. *See Territorial Courts*, U.S. GOV'T MANUAL, https://www.usgovernmentmanual.gov/Agency?EntityId=k4Ycqx9urZw=&ParentEId=384h6UoqM8c=&EType=/sbLHImeIYk=# [http://perma.cc/A4QL-JJJD] (last visited Jan. 24, 2024); Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736 at *4 n.5 (D. Haw. Nov. 12, 2019) (citations omitted) ("Congress did not establish the courts of American Samoa . . . ."). The District Court of Puerto Rico, however, was established under Article III. U.S. GOV'T MANUAL, *supra*.

51. GAO REPORT, *supra* note 15, at 14.

52. *Id.* at 5–6.

53. *Id. See also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel (*Hodel I*), 637 F. Supp. 1398, 1412–13 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987).

54. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel (*Hodel II*), 830 F.2d 374, 378–79 (D.C. Cir. 1987).

55. *Hodel I*, 637 F. Supp. at 1412–13.

> Secretary in the position of an appellate court, superimposed over the duly constituted judiciary. Moreover, I am aware of no evidence that this case jeopardizes United States policy. Nor, does this case appear to present such a clear abuse of judicial discretion that intervention is dictated. For these reasons I choose not to intervene.[56]

However, even though the Secretary has historically declined to wield authority over the American Samoa judiciary, the breadth of the Secretary's power has not gone unnoticed. The Governor of American Samoa periodically initiates constitutional conventions via executive order when it is "timely and warranted" to do so.[57] A consistent topic at the conventions is the Secretary's broad authority over the Territory, specifically the power to review and overrule decisions of the High Court.[58]

At the 2022 Constitutional Convention, which concluded in September, delegates approved eight proposed constitutional amendments to be considered via national referendum.[59] Three of the amendments each proposed removing from the Secretary a power over the Territory: the power to (1) appoint the Chief and Associate Justices of the High Court; (2) review or overturn decisions of the High Court; and (3) have the final say on bills passed by the American Samoa Legislature over the Governor's veto.[60] Voters rejected all three of these amendments in a November 2022 territorial referendum.[61] The Governor's 2023 State of the Territory Comprehensive Report referred to the three amendments limiting the Secretary's power as the "Amendments to Develop Local Self-Government," noting specifically that "[d]eveloping and strengthening local government depends on *increasing* the authority of the American Samoa Government while *decreasing* the authority of the Secretary of Interior."[62] As the report also noted, given the American Samoa voters' rejection of all three proposed amendments, for now, "American Samoa's relationship with the Secretary of Interior remains the same."[63]

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56. *Hodel II*, 830 F.2d at 378–79.

57. OFF. OF THE GOVERNOR, AM. SAMOA GOV'T, Exec. Order No. 006-21 (2021), https://www.americansamoa.gov/_files/ugd/abcfec_7bd93201f1cc41db9d873247d0fce66e.pdf [https://perma.cc/GK88-VHE8].

58. *See, e.g.*, AM. SAMOA GOV'T, 2023 STATE OF THE TERRITORY COMPREHENSIVE REPORT 165–67 (2023) [hereinafter 2023 COMPREHENSIVE REPORT], https://www.americansamoa.gov/_files/ugd/4bfff9_d4e1f14b6f064725acdb66e4ea04f4cd.pdf [https://perma.cc/P75G-WSLD]; THE FUTURE POL. STATUS STUDY COMM'N AM. SAMOA, FINAL REPORT (2007), https://www.americansamoa.gov/_files/ugd/4bfff9_2d989857e06146179537335cd4fea7b4.pdf [https://perma.cc/BU33-MJNG]; AM. SAMOA GOV'T, 2022 CONSTITUTIONAL CONVENTION, SUMMARY OF AMENDMENTS TO THE REVISED CONSTITUTION OF AMERICAN SAMOA APPROVED BY THE 2022 CONSTITUTIONAL CONVENTION (2022) [hereinafter CONSTITUTIONAL CONVENTION SUMMARY], https://www.americansamoa.gov/_files/ugd/4bfff9_637c7079564f4812ae2c848e48753e7d.pdf [https://perma.cc/94ME-4K75].

59. CONSTITUTIONAL CONVENTION SUMMARY, *supra* note 58.

60. *Id.*

61. 2023 COMPREHENSIVE REPORT, *supra* note 58, at 165–67. For a local perspective on the Territory's resistance to changing its governance structure, see Falemanu Tua, *supra* note 34, at 288–91.

62. 2023 COMPREHENSIVE REPORT, *supra* note 58, at 166–67.

63. *Id.* at 167.

The Insular Cases created a framework through which the federal government can hold unincorporated and unorganized territories in perpetuity; in addition to justifying Congress's lack of action in passing an organic act for the Territory or addressing the citizenship issue, *The Insular Cases* provide the federal courts with an ongoing justification for refusing to intervene.[64]

Because there is no federal court in American Samoa and no existing federal court empowered to hear claims arising from American Samoa, anyone attempting to bring a claim in federal court will face significant hurdles in establishing both personal and subject matter jurisdiction.[65]

Subject matter jurisdiction is the more straightforward of the two dimensions—as the court explained in *King v. Morton*,[66] so long as plaintiffs can assert "some statutory basis for jurisdiction . . . . the door of the district court . . . cannot be shut to Samoan plaintiffs properly challenging the lawfulness of the actions of an official of the United States government."[67] Two additional complications are the possibility of an "exhaustion" requirement and potential ambiguity in the asserted statutory basis for jurisdiction that leaves open the question whether the statute applies to American Samoa.[68] Both are relevant in the habeas context and will be examined in detail in Section II.A.

The more challenging barrier is personal jurisdiction because defendants residing in American Samoa overwhelmingly will not satisfy the minimum contacts requirements of modern jurisdiction doctrine, even under the "nationwide" minimum contacts analysis.[69]

In *Hueter v. Kruse*,[70] plaintiffs filed a civil claim against defendants residing in American Samoa, alleging improper conduct that took place entirely in American Samoa. The U.S. District Court for the District of Hawaii concluded it could not exercise personal jurisdiction over the defendants. The court examined its jurisdiction pursuant to both the forum-specific minimum contacts standard under Hawaii's "long-arm statute"[71] and the "nationwide" minimum contacts standards established by the "federal long-arm statute."[72]

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64. Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) ("We instead recognize that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process. We further understand text, precedent, and historical practice as instructing that the prevailing circumstances in the territory be considered in determining the reach of the Citizenship Clause. . . . Such consideration properly falls under the purview of Congress . . . ."). *See also id.* at 865 n.1.

65. GAO REPORT, *supra* note 15, at 2, 29.

66. 520 F.2d 1140 (D.C. Cir. 1975).

67. *Id.* at 1144. This does not relieve plaintiffs of the significant hurdles associated with bringing civil rights actions against government officials, e.g., qualified immunity.

68. *See* Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736, at *4–5 (D. Haw. Nov. 12, 2019); Hueter v. Kruse, 576 F. Supp. 3d 743, 768–69 (D. Haw. 2021).

69. *Hueter*, 576 F. Supp. 3d at 766–71; Fed. R. Civ. P. 4(k)(2).

70. 576 F. Supp. 3d 743 (D. Haw. 2021).

71. *Id.* at 765–66; Fed. R. Civ. P. 4(k)(1)(A).

72. *Hueter*, 576 F. Supp. 3d at 766–71; Fed. R. Civ. P. 4(k)(2).

Under the forum-specific minimum conducts standard for exercising specific personal jurisdiction over a non-resident defendant, the court found that "there [were] no contacts—let alone sufficient minimum contacts—between either [American Samoa] Defendant and Hawaii to support the court's exercise of personal jurisdiction under" Hawaii's long-arm statute.[73]

When the forum long-arm statute fails, the federal long-arm statute permits a district court to exercise personal jurisdiction over a defendant if "(1) the action arises under federal law, (2) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction, and (3) the court's exercise of jurisdiction comports with due process."[74]

The second prong of the nationwide minimum contacts analysis—whether the defendant is subject to jurisdiction in any state court of general jurisdiction—is complicated in the context of a claim arising from American Samoa because courts typically analyze only whether a *state* court can exercise personal jurisdiction over the defendant, i.e., courts in the 50 states and the District of Columbia.[75] Because the High Court is not a court of general jurisdiction "but is instead a legislative court with 'discrete and limited jurisdiction' over certain federal law claims,"[76] when applying the nationwide contacts standard to "a federal claim arising in the unorganized, unincorporated territory of American Samoa, an analysis that considers only personal jurisdiction could produce an outcome in which no court has both personal and subject-matter jurisdiction over a federal claim—an outcome at odds with the purpose of Rule 4(k)(2) itself."[77]

As the court explained in *Hueter*, claims arising from American Samoa "would fall into a jurisdictional neverland if the Rule 4(k)(2) analysis focused solely on personal jurisdiction."[78] The court resolved the complication by applying a modified version of the 4(k)(2) analysis, in which it asked two questions under the second prong:

> (1) is the High Court Trial Division a "state's court of general jurisdiction" as contemplated by Rule 4(k)(2)(A); and (2) does the High Court Trial Division have jurisdiction—both personal and subject matter—to hear the claim asserted against the defendant. If the answer to both questions is "yes," Rule 4(k)(2) is inapplicable, and this court does not have jurisdiction via the federal long-arm statute.[79]

The court concluded the High Court could properly be a "state court" for the purposes of the Rule 4(k)(2) analysis, though it acknowledged that "the analysis

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73. *Hueter*, 576 F. Supp. 3d at 766.

74. *Id.* at 767 (quoting Ayla, LLC v. Alya Skin Pty. Ltd., 11 F.4th 972, 978 (9th Cir. 2021)).

75. *Id.* at 767–68.

76. *Id.* at 768 (citing Star-Kist Samoa, Inc. v. M/V CONQUEST, 1987 WL 1565394, at *1 (High Ct. App. Div. 1987)).

77. *Id.* (citing Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1414 (Fed. Cir. 2009).

78. *Id.* at 768 n.21.

79. *Id.* at 769.

[was] muddied from the outset because the High Court of American Samoa is not, literally speaking, a 'state's court.'"[80] It explained that the distinction arises because states are considered sovereign and their "judicial power flows from [that] inherent sovereignty . . . and vests state courts with correspondingly inherent authority to exercise broad general jurisdiction, including over claims arising under federal law," whereas "territories are not considered independent sovereigns. As such, territorial courts do not possess inherent judicial power. Instead, territorial courts were legislatively established by Congress, and it is Congress that determines the scope of their jurisdictional authority."[81]

Despite the limited federal jurisdiction Congress has extended to the High Court, and the High Court's own expressed reluctance to expand its jurisdiction without explicit authorization from Congress,[82] *Hueter* nonetheless concluded the High Court could properly be considered a state court of general jurisdiction. The court in *Hueter* construed the Secretary's approval of the Revised Constitution of American Samoa as a delegation of authority to the Fono, American Samoa's legislature, to designate the High Court a court of general jurisdiction, which it has done by statute.[83]

From a policy perspective, the *Hueter* analysis could be a useful tool for other courts that want to discourage attempts at federal forum shopping, effectively broadening the High Court's implicit jurisdiction over federal claims and supporting increasing self-governance in American Samoa. The *Hueter* analysis offers a resolution to American Samoa's "jurisdictional neverland" problem that, based on the court's rationale, presumptively favors returning cases to the High Court.

However, the analysis does not solve the jurisdictional problem for claims that can only be heard by federal courts or where the High Court is not an appropriate forum. Habeas petitions fall within this category; like persons detained pursuant to a state court judgment, persons detained in American Samoa under a High Court judgment must exhaust their locally available remedies before seeking federal habeas relief. Empowering the High Court to consider federal habeas claims would merely create a duplicative process rather than providing an alternate source of relief.[84]

In short, the pathway into federal court for federal habeas petitions arising from American Samoa is far from clear. Courts face unique challenges in determining how to treat American Samoa and the High Court given Congress's failure to pass an organic act for the Territory. In addition, courts frequently employ prudential tools of avoidance, deference, or novel constructions such as the *Hueter* analysis rather than reach the merits of a claim. Courts' reluctance to intervene is understandable,[85] but preserving the status quo leaves unsettled the question of

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80. *Id.*

81. *Id.* (citations omitted).

82. United States v. Lee, 472 F.3d 638, 643 (9th Cir. 2006) (quoting Star-Kist Samoa, Inc. v. The M/V Conquest, 3 Am. Samoa 2d 25, 28 (1986)).

83. *Hueter*, 576 F. Supp. 3d at 769–70.

84. *See* discussion *infra* Section II.A.

85. *See supra* note 39 and accompanying text.

whether any federal court can exercise both personal and subject matter jurisdiction over claims arising from American Samoa.

C. Habeas Corpus

The "Great Writ" of habeas corpus is an extraordinary remedy meant to provide recourse to individuals who are unlawfully imprisoned.[86] Petitioning for a writ of habeas corpus compels the petitioner's immediate custodian to "show . . . the body"[87] by appearing in front of a court to prove the petitioner's detention is lawful. While at first glance the ethos of habeas is conceptually simple, centuries of evolving jurisprudence and diligent scholarship reveal the remedy's uniquely perplexing nature.[88]

This Section considers two statutory bases for petitioning a federal court for a writ of habeas corpus[89] and examines current scholarship engaging with the thorny questions surrounding how habeas interacts with the Constitution.[90] Next, this Section briefly reviews the law governing extraterritorial habeas access before concluding by highlighting several procedural elements and practical considerations relevant to obtaining habeas relief.

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86. Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219, 220 (2021).

87. The Latin phrase "habeas corpus," literally translated, means "show me the body" or "you have the body." *See* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1750 (2009).

88. *See, e.g.*, Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 251–52 (2005) (grappling with the conundrum inherent in the Supreme Court's lack of original habeas jurisdiction coupled with the fact that "inferior federal courts are constitutionally optional"); Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 907–10 (2017) (unpacking the Court's holding in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and the "far-reaching" and "novel and important" implications of "a constitutional right to a collateral post-conviction remedy in cases in which direct relief is no longer available").

89. Specifically, 28 U.S.C. §§ 2241, 2254. Consideration of § 2255, a third provision extending federal habeas jurisdiction, is omitted because the Samoan High Court was not "established by Act of Congress" and the provision is therefore unavailable to petitioners in custody pursuant to judgments of the High Court. 28 U.S.C. § 2255; Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736, at *4 n.5 (D. Haw. Nov. 12, 2019) (citations omitted) ("That provision covers individuals in custody 'under sentence of a court established by Act of Congress' and requires those individuals to bring the petition in 'the court which imposed the sentence.' Congress did not establish the courts of American Samoa . . . .").

90. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007) ("Although the Suspension Clause signals the historic importance of habeas corpus, just what it protects is a difficult puzzle.") (footnote omitted); Stephen I. Vladeck, *The Suspension Clause As A Structural Right*, 62 U. MIAMI L. REV. 275, 278 (2008) ("[T]he view of the Suspension Clause 'as a structural right' is, in fact, another version of the long-recognized (if currently underappreciated) view of the Suspension Clause as creating no rights whatsoever, but merely empowering Congress to do away with the writ of habeas corpus only when exigency demands.").

Two of the federal habeas statutes are potentially available to persons detained in American Samoa. The first, 28 U.S.C. § 2241, gives federal courts authority to hear habeas petitions from prisoners convicted under federal law, detained in federal prison, or who allege their detention (even in a non-federal facility) is in violation of the Constitution or federal law.[91] As explained below, federal courts have subject matter jurisdiction to hear habeas petitions from persons detained outside the territorial jurisdiction of any federal court, so long as the court also has personal jurisdiction over the petitioner's custodian.[92]

The second statute, 28 U.S.C. § 2254, restricts the broad authority conferred by § 2241 and imposes additional requirements that must be satisfied before courts can hear habeas proceedings initiated by petitioners detained "pursuant to the judgment of a State court."[93] Functionally, § 2254 filters out large swaths of potential petitioners convicted and sentenced under state law. Federal courts cannot hear state petitions unless (1) the petitioner has exhausted all possible state remedies;[94] (2) no state remedies or corrective processes exist; or (3) "circumstances exist that render" available state remedies or corrective processes "ineffective to protect the rights of" the petitioner.[95]

Perhaps unsurprisingly, § 2254 broadly implicates Congress's desire to preserve the traditionally deferential posture that federal courts adopt when operating in the porous area of dual authority in a federalist judiciary.[96] The statute also restricts the relief federal courts can provide: state habeas petitions "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication"[97] (1) violated or unreasonably applied clearly

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91. 28 U.S.C. § 2241(c).

92. *See infra* Section II.A. This assumes that the petitioner falls properly within the limitations enumerated in 28 U.S.C. § 2241(c).

93. 28 U.S.C. § 2254.

94. The exhaustion requirement is broadly construed. 28 U.S.C. § 2254(c) provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

95. 28 U.S.C. § 2254(b)(1).

96. *See, e.g.*, Dominguez v. Kernan, 906 F.3d 1127, 1135 (9th Cir. 2018) (citations omitted) ("Congress placed these additional limits on petitions under § 2254 because a state court judgment 'carries a heightened presumption of legitimacy.' Because a state court judgment 'is presumptively legitimate,' moreover, so too is custody attributable to that judgment. Congress therefore concluded 'it was acceptable to place obstacles in the paths of prisoners' who are challenging custody attributable to a state court judgment."); Bush v. Gore, 531 U.S. 98, 136–37 (2000) (Ginsburg, J., dissenting) ("[N]ot uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that 'there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.'" (quoting Stone v. Powell, 428 U.S. 465, 493 n.35 (1976))).

97. 28 U.S.C. § 2254(d).

established federal law;[98] or (2) was based on an unreasonable determination of fact.[99] Finally, this provision bars habeas relief for petitions asserting "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings . . . ."[100]

In addition to the express language of the provision, case law shows that § 2254 is the "exclusive remedy" for petitioners in custody pursuant to a state court judgment, thus barring them from seeking habeas relief pursuant to one of the other federal statutes.[101]

The Constitution does not provide that the Supreme Court has original jurisdiction to hear habeas petitions.[102] Additionally, because the Suspension Clause does not directly protect or address jurisdiction or any mechanism of access to habeas review,[103] the Supreme Court has repeatedly grappled with the boundary

98. The full text is: "[unless the adjudication of the claim] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This substantially raises the bar for petitioners asserting state convictions that violated federal constitutional or statutory rights. One explanation is structural—because federal district courts can hear state habeas petitions but cannot bind state courts, permitting district courts to review state court interpretations of federal law in the absence of Supreme Court jurisprudence would violate federalism principles by improperly elevating district courts. *See, e.g.*, Bowling v. Parker, 882 F. Supp. 2d 891, 898–99 (E.D. Ky. 2012). Another explanation is that Congress implicitly handed the federal courts nearly unfettered discretion to avoid or dispose of state habeas petitions. *See* Recent Case, *Criminal Law—Federal Habeas Review Under AEDPA—Sixth Circuit Interprets "Clearly Established Federal Law" Narrowly.—* Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012)., 126 HARV. L. REV. 860, 862 (2013) (arguing that the court adopted a narrow "holdings, as opposed to the dicta" definition of "clearly established Federal law, as determined by the Supreme Court of the United States" and then used that definition to "dispose of habeas cases" and "aggressively impose[] its view on lower courts"); *see also* Leading Cases, *"Clearly Established Law" in Habeas Review*, 121 HARV. L. REV. 335, 336 (2007) ("In defining the relevant 'clearly established law' strictly and imbuing it with newfound weight, the Court effectively eliminated the question of whether such law was applied reasonably.").

99. Despite the wording, this is no typical equity backstop giving courts discretion to avoid rulings that would offend "traditional notions of fair play and substantial justice . . . implicit in due process . . . ." Milliken v. Meyer, 311 U.S. 457, 463 (1940). On the contrary, the subsection immediately following establishes a presumption that state court determinations of fact are correct, placing the burden of rebutting the presumption by clear and convincing evidence onto the petitioner. 28 U.S.C. § 2254(e)(1).

100. 28 U.S.C. § 2254(i).

101. *See Dominguez*, 906 F.3d at 1135 (quoting White v. Lambert, 370 F.3d 1002, 1006, 1009–10 (9th Cir. 2004) (stating that § 2254 is the exclusive remedy for state prisoners in custody pursuant to a state court judgment but noting that § 2241, the general federal habeas statute, is available for state prisoners not in custody pursuant to a state court judgment, e.g., those seeking pre-trial relief or awaiting extradition), *overruled on other grounds by* Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010).

102. U.S. CONST. art. III, § 2, cl. 2.

103. The Suspension Clause directly governs Congress's ability to suspend the writ of habeas corpus. U.S. CONST. art. I, § 9, cl. 2.

between Congress's power to curtail or expand federal court jurisdiction and the scope of the habeas privilege protected by the Suspension Clause.[104]

In 2008, the U.S. Supreme Court invalidated a statute removing federal habeas jurisdiction for petitioners designated as enemy combatants and detained at Guantanamo Bay in *Boumediene v. Bush*.[105] It reasoned that, absent an adequate substitute procedure, the Court could "not impose a *de facto* suspension [of habeas corpus] by abstaining from" deciding the constitutional question implicated by the statute.[106] While *Boumediene* does not expressly say that the Constitution mandates a minimum level of federal habeas jurisdiction, it implicitly ratifies the existence of a limitation on congressional authority to remove habeas review from federal courts absent a formal suspension of the writ.

Legal scholars and practitioners puzzled over *Boumediene* and its implications for extraterritorial habeas.[107] The Court in *Boumediene* found that precluding federal review of the detainees' habeas petitions violated the Suspension Clause,[108] in part because the United States has de facto, though not de jure, sovereignty over Guantanamo Bay.[109] Justice Kennedy, writing for the majority, elucidated the role Guantanamo's territorial status played in the analysis, using three factors to determine the reach of the Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the

104. *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289, 300 (2001) ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions. . . . Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953))).

105. 553 U.S. 723 (2008).

106. *Id.* at 771.

107. *Id.* (concluding that the Suspension Clause "has full effect at Guantanamo Bay" and invalidating statutory provision precluding federal jurisdiction over habeas petitions brought by noncitizen "enemy combatants"); *see also, e.g.*, Stephen I. Vladeck, *The Riddle of the One-Way Ratchet Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2d 71, 72–73 (2008) (referencing Hartnett, *supra* note 88, and noting that the majority in *Boumediene* "offered no explanation of how the Constitution could prohibit Congress from taking away jurisdiction that it was not obliged to confer, from courts that it was not obliged to create").

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

109. *Boumediene*, 553 U.S. at 755. The majority rejected a formalistic approach to determining sovereignty, drawing support from *Johnson v. Eisentrager*, 339 U.S. 763 (1950): "[B]ecause the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility." *Boumediene*, 553 U.S. at 763 (citations omitted).

prisoner's entitlement to the writ."[110] He contrasted Guantanamo Bay with the territories involved in *The Insular Cases*. While "there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely" in *The Insular Cases*, "Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[111]

In *Rasul v. Bush*, an earlier case considering a similar question of access to federal habeas review for extraterritorially detained noncitizen enemy combatants, the Court placed significant weight on the respondents' concession that the federal courts would have jurisdiction to hear a habeas petition from an American citizen detained in the same extraterritorial facility as the petitioners.[112] In holding that the noncitizen detainees could seek habeas relief under the federal statute, the Court said, "[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[113]

Finally, several procedural features and practical considerations unique to habeas are especially relevant to the question of access to federal habeas relief from American Samoa. First, both the "immediate custodian" requirement[114] and the "exhaustion" requirement[115] for petitioners seeking federal review of a state court conviction create complications for a petitioner detained in American Samoa. The immediate custodian rule requires that habeas petitioners name their immediate custodian, typically a prison warden, as respondent when seeking relief from physical confinement (as opposed to a higher-level official, district attorney, or other supervisory government actor).[116] The requirement is statutory[117] and reflects the historical nature of the writ wherein the immediate custodian was required to "show . . . the body."[118] For petitioners detained outside the territorial reach of the federal courts, this rule may present insurmountable hurdles if no federal court can assert personal jurisdiction over their immediate custodians.[119] In certain cases, the

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110. *Id.* at 766, 768–69 (citations omitted). Justice Kennedy drew heavily from *Eisentrager*, 339 U.S. at 777–78 (concluding that German nationals detained by the U.S. military in Germany following their conviction by military tribunal for war crimes had no right to petition federal courts for habeas relief; petitioners had no basis upon which to assert that federal courts had jurisdiction, because "at no relevant time were [the prisoners] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States").

111. *Boumediene*, 553 U.S. at 766, 768–69 (citations omitted).

112. 542 U.S. 466, 481 (2004).

113. *Id.*

114. Wales v. Whitney, 114 U.S. 564, 574 (1885); Rumsfeld v. Padilla, 542 U.S. 426, 435, 447 n.16 (2004).

115. 28 U.S.C. § 2254(c).

116. *Padilla*, 542 U.S. at 435.

117. 28 U.S.C. § 2243.

118. *See supra* note 87 and accompanying text; *see also Padilla*, 542 U.S. at 434–35.

119. *See Padilla*, 542 U.S. at 447 n.16.

Court has softened or carved out exceptions to the rule's strict application, such as when an American soldier or other citizen is detained outside the jurisdiction of the federal courts.[120]

The exhaustion requirement applies to habeas petitions brought under both § 2254[121] and § 2241, the general habeas statute.[122] Whereas exhaustion under § 2254 is required by the statute, the exhaustion requirement under § 2241 was imposed by the courts.[123] Like the immediate custodian rule, the exhaustion requirement has been applied to petitioners seeking federal habeas review for territorial court convictions.[124] Petitioners must show they have given the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[125] In *Barlow v. Sunia*, the court considered how the requirement would apply in the territorial context. It reasoned that "the question is not simply whether a certain territorial remedy is *available*; instead, the question is whether that available remedy is part of the territory's ordinary appellate review procedure."[126]

In addition to the procedural requirements, several practical considerations unique to habeas are particularly important to consider in the American Samoa context. First, the vast majority of people petitioning for habeas relief are self-represented.[127] Navigating the complex and overlapping rules governing habeas petitions, particularly for petitioners seeking federal review following a state or territorial habeas process, is a daunting task. Prisoners also face significant information constraints. Access to information can be dependent on the detention facility's law library or its willingness to support prisoners in accessing the materials to prepare a habeas petition. Further, the average habeas process takes ten years.[128]

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120. *Id.* at 435 n.9. *See also id.* at 447, n.16 ("[W]e have similarly relaxed the district of confinement rule when 'American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus.' In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides.") (citations omitted).

121. *See supra* note 94 and accompanying text.

122. Laing v. Ashcroft, 370 F.3d 994, 997–98 (9th Cir. 2004).

123. *Id.*

124. Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736, at *4 (D. Haw. Nov. 12, 2019) (citing White v. Klitzkie, 281 F.3d 920, 923 n.3 (9th Cir. 2002)) ("[T]he Ninth Circuit has applied § 2254 to petitioners incarcerated within a United States territory pursuant to a conviction from a territorial court—essentially treating such petitioners as equivalent to state prisoners. . . . [W]hile there may be dispute regarding the source of an exhaustion requirement, there can be no doubt it applies with equal force to territorial remedies."); *see also* Pador v. Matanane, 653 F.2d 1277, 1279 (9th Cir. 1981).

125. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

126. *Barlow*, 2019 WL 5929736, at *5.

127. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS, (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/KX6Z-NYSR] ("[F]rom 2000 to 2019, in 91 percent of prisoner petition filings, the plaintiffs were self-represented.").

128. *Frequently Asked Questions*: *How Long Does Habeas Take?*, NAT'L HABEAS INST., https://habeasinstitute.org/faq [https://perma.cc/LR2F-7R2N] (last visited Dec. 21, 2023).

Habeas is a lengthy process in part because it requires "reinvestigat[ing] a case from scratch."[129]

While all habeas petitioners face staggering barriers regardless of location, those detained in American Samoa face acute obstacles to relief, many beyond their control. Unless courts are incentivized or specifically empowered to hear these claims, they will continue to be litigated out of sight and disposed of on procedural grounds.

II. HABEAS PETITIONS FROM AMERICAN SAMOA

No published federal cases have considered habeas petitions from American Samoa on the merits.[130] Of course, a dearth of cases alone does not mean anything about whether federal courts *can* properly assert jurisdiction over these petitions. A more plausible explanation is that these cases are unlikely to ever reach trial.[131] But *Barlow v. Sunia*,[132] a recent unpublished case from the District of Hawaii considering a habeas petition from American Samoa,[133] provides a thorough and detailed analysis. Using *Barlow* as a guide, this Part first reviews the federal court's jurisdictional analysis of a habeas petition arising from American Samoa. Second, it considers how the jurisdictional analysis in *Barlow* would change if the petitioner were a noncitizen national. Finally, this Part concludes by examining the implications of federal habeas relief for persons detained in American Samoa being differentially accessible based solely on citizenship status.

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129. *Id.*

130. *See Barlow*, 2019 WL 5929736, at *1 ("To resolve Respondents' motion, the Court must address how procedural rules governing habeas corpus relief in federal district court apply to a petitioner incarcerated in American Samoa, an unincorporated territory without Article III courts whose judicial system is *de jure* overseen by the Secretary of the Department of the Interior. The question appears to be one of first impression across all federal courts despite American Samoa's status as a United States territory for over a century."). Additionally, two published federal cases incidentally reference habeas petitions filed by individuals detained in American Samoa. The first, *King v. Morton*, 520 F.2d 1140, 1151 n.6 (D.C. Cir. 1975) (Tamm, J., dissenting), mentions that the appellant moved at the last minute to characterize his claim as a habeas petition and defers consideration of the habeas characterization because the majority opinion remanded the case to the district court. The second, *Majhor v. Kempthorne*, 518 F. Supp. 2d 221, 231 (D.D.C. 2007), states only that the court "dismissed the plaintiff's habeas petition and complaint without prejudice *sua sponte*" in a pretrial order. The dismissal order specifies that the district court dismissed the habeas petition without prejudice because the petitioner failed to exhaust his available remedies for habeas relief through the Samoan High Court system and alternately failed to offer concrete evidence that those remedies would be inadequate to protect his constitutional rights. Order at 3–6, Majhor v. Kempthorne, 518 F. Supp. 2d 221 (D.D.C. Aug. 24, 2007) (No. 07-1465).

131. *See* discussion *infra* Section II.A about the settlement agreement ultimately reached in *Barlow*.

132. *Barlow*, 2019 WL 5929736.

133. *Id.* at *2.

A. Barlow v. Sunia*: A Case Study*

James Barlow, an American citizen, sought federal habeas relief after he was convicted via bench trial in the High Court of American Samoa and subsequently detained in the American Samoa Territorial Correctional Facility.[134] Barlow exhausted direct appeals of his conviction in the High Court, but he did not petition the High Court for habeas relief or seek review by the Secretary before petitioning for a writ of habeas corpus in the U.S. District Court for the District of Hawaii, where he alleged violations of his Fifth and Sixth Amendment rights.[135] Barlow named two respondents: the warden of the American Samoa Territorial Correctional Facility and the director of the American Samoa Government Office in Hawaii, whom Barlow asserted was the party responsible for all American Samoa Government business in Hawaii.[136]

After a detailed jurisdictional analysis, the court concluded Barlow had failed to name a proper respondent and that the District of Hawaii was therefore an improper venue.[137] After dismissing both respondents, the court on its own initiative transferred Barlow's petition to the U.S. District Court for the District of Columbia, where it expected Barlow would be able to file an amended petition naming a proper respondent: the Secretary of the Interior.[138] As an American citizen, the court reasoned that Barlow was entitled to an exception to the Immediate Custodian rule for U.S. citizens detained outside the territorial jurisdiction of any federal court.[139] The court's analysis of subject matter and personal jurisdiction is reviewed below.

Federal subject matter jurisdiction over habeas petitions derives primarily from statute, with the Suspension Clause acting as a backstop only in exceptional circumstances.[140] A petitioner detained in American Samoa could seek federal habeas relief pursuant to two statutory provisions: 28 U.S.C. § 2241 and § 2254.[141] Section 2241 grants district courts general authority to hear and decide habeas petitions, whereas § 2254 restricts the authority granted in § 2241 for, *inter alia*, petitioners detained under state court judgments.[142]

In *Barlow*, the petitioner filed under § 2241. The respondent argued that § 2241 was an improper vehicle for Barlow's petition and that he was instead required to file pursuant to § 2254.[143] Because the court concluded the District of Hawaii was an improper venue, it declined to definitively answer the question about which provision was the proper statutory basis for Barlow's petition.[144] Nonetheless,

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134. *Id.* at *2–3.
135. *Id.* at *3.
136. *Id.* at *2.
137. *Id.* at *6–8.
138. *Id.* at *9–10.
139. *Id.* at *8.
140. *See supra* Section I.C.
141. *See Barlow*, 2019 WL 5929736, at *3–4.
142. *Id.*
143. *Id.* at *3.
144. *Id.* at *4–5.

the court considered each provision's potential applicability, finding viable arguments for each party's position.[145]

Citing *Rasul*, *Boumediene*, and several Ninth Circuit cases, the court construed § 2241 as "authoriz[ing] the Court to grant habeas relief to Petitioner, an American citizen incarcerated within an unincorporated territory of the United States,"[146] so long as Barlow could show his custody violated the Constitution or federal law. The only other potential barrier to Barlow petitioning pursuant to § 2241 would be if he were required to proceed under § 2254.

Whether Barlow needed to petition using § 2254 depended on whether his conviction in the High Court could be "characterized as a *state* judgment" and his detention in American Samoa "defined as *state* custody."[147] The court cited Ninth Circuit precedent applying § 2254 to "petitioners incarcerated within a United States territory pursuant to a conviction from a territorial court—essentially treating such petitioners as equivalent to state prisoners."[148] But in contrast to other territories (e.g., Guam), the court observed that no statute directs that American Samoa be treated as a state for habeas purposes.[149]

Although the court suggested that § 2241 was the proper basis for Barlow's petition,[150] it had an additional justification for avoiding the question. The proper statutory basis issue arose solely because the parties incorrectly believed the "exhaustion requirement [for federal habeas petitions in non-federal custody] applie[d] only to petitions brought under § 2254."[151]

Exhaustion is a threshold barrier to federal habeas relief for petitioners in non-federal custody, *regardless of the petition's jurisdictional basis in § 2241 or § 2254*.[152] While § 2254 directly imposes the exhaustion requirement, exhaustion under § 2241 is a judge-made doctrine "requir[ing], as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before

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145. *Id.* at *4.

146. *Id.* at *3.

147. *Id.* at *4.

148. *Id.*

149. *Id.* at *4 n.7*; see also id.* at *4 ("[W]hen Congress has wanted to treat American Samoa as a 'State' in other contexts, it has said so explicitly.").

150. *Id.* at *4 n.7 ("Guam's Organic Act . . . provides that prisoners from Guam's territorial courts should be treated like state prisoners for habeas purposes . . . . Similar provisions exist for the Virgin Islands and Northern Mariana Islands. American Samoa has no organic act, meaning there is no similar provision—which also tends to support Petitioner's position that the proper review here is under § 2241.") (citations omitted).

151. *Id.* at *4.

152. *Id.* (citing Dominguez v. Kernan, 906 F.3d 1127, 1135 n.9 (9th Cir. 2018))*; see also* Braden v. 30th Jud. Cir. Ct. of Kentucky, 410 U.S. 484, 490–91 (1973) (internal quotation marks omitted) ("The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement . . . . [Exhaustion] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings.").

seeking relief under § 2241."[153] Thus, Barlow was subject to the exhaustion requirement no matter the statutory basis for his petition.

The exhaustion requirement "give[s] the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[154] To satisfy the exhaustion requirement, then, petitioners need to pursue every remedy that is part of the jurisdiction's ordinary appellate review procedure.[155]

Determining American Samoa's ordinary appellate review procedure for a federal habeas petition involves thorny questions about the Secretary's plenary authority over the Territory, particularly the lack of any formally established procedure for appealing to the Secretary.[156] Though the court declined to reach those questions, it suggested that existing federal precedent would have supported a finding that "exhausting territorial remedies in American Samoa requires only a direct appeal to the highest court."[157]

Because the exhaustion requirement applied to Barlow regardless of the statute under which he petitioned, the court effectively faced four interrelated issues: (1) the proper statutory basis for Barlow's habeas petition;[158] (2) the source of the exhaustion requirement;[159] (3) what available remedies constitute the Territory's ordinary appellate review procedure;[160] and (4) whether Barlow had actually exhausted his available remedies in American Samoa.[161] Because the parties had not "satisfactorily addresse[d] how *American Samoa* views exhaustion within its court system,"[162] and the petitioner failed to name a respondent over whom the court could assert personal jurisdiction, the court found it "more prudent to decline to definitively resolve the question of exhaustion at this juncture."[163]

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153. Castro-Cortez v. I.N.S., 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds by* Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

154. *Barlow*, 2019 WL 5929736, at *5 (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)).

155. *Id.*

156. *Id.*

157. *Id.* at *5 n.9 ("It bears noting, however, that another federal court has suggested that exhausting territorial remedies in American Samoa requires only a direct appeal to the highest court. *See King v. Morton*, 520 F.2d at 1144 ('Exhaustion is not at issue here, since King has already appealed his conviction to the highest court in American Samoa.'). Further, in a case Petitioner relies on here, the Secretary himself seemed to agree with *King v. Morton* that exhaustion entails only appeal to the highest court in American Samoa. *See* Def.'s Resp. to Order to Show Cause 7, ECF No. 16, *in Majhor v. Norton*, Civil Action No. 07-1465 (RBW) (D.D.C.) (Sept. 25, 2007) ('In *King*, plaintiff had already appealed his conviction to the highest court in American Samoa prior to filing suit in the United States District Court for the District of Columbia. . . . Plaintiff is required to exhaust his local remedies before proceeding in federal court. *King*, at 1144.').").

158. *Id. at* *3–4.

159. *Id.* at *5.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

Despite the court utilizing prudential avoidance mechanisms and declining to decide the exhaustion issue, nothing in the *Barlow* opinion suggests the court doubted the existence of federal subject matter jurisdiction to hear Barlow's petition (though the court made clear its lack of personal jurisdiction over the respondents, noting that "the custodian's absence from the territorial jurisdiction of the district court is fatal to habeas jurisdiction"[164]). The opinion merely leaves unresolved what the precise source of the court's authority to hear the claim would have been in a case where the court could properly exercise personal jurisdiction over the respondents. This conclusion comports with the Supreme Court's reasoning in both *Rasul* and *Boumediene* that, absent a formal suspension of the writ, access to federal habeas relief cannot be precluded in territories like American Samoa over which the U.S. has de jure or de facto sovereignty.[165]

Assuming federal courts can establish subject matter jurisdiction over habeas petitions arising from American Samoa, the next step in the analysis is to determine whether the court has personal jurisdiction over the named respondents. Both § 2241 and § 2254 permit courts to grant writs of habeas corpus only within their "respective jurisdictions,"[166] generally defined as territorial personal jurisdiction over the respondent.[167] The writ of habeas corpus acts upon the custodian by compelling the custodian to "produce the body."[168] If the petitioner prevails, the custodian must release the petitioner from custody.[169] Any court issuing a writ necessarily has jurisdiction over the custodian; otherwise, it could not compel the custodian to bring the petitioner before the court.[170] In *Barlow*, the court conducted a two-step inquiry, examining (1) whether the defendants were proper respondents to Barlow's habeas petition and (2) if the court had personal jurisdiction over the properly named respondent(s).[171]

First, the baseline requirement for naming respondents in habeas petitions is the "immediate custodian rule," which requires petitioners to name the government official with direct custody over them.[172] The immediate custodian rule applies to petitions brought under both § 2241 and § 2254.[173] Barlow named the warden of his detention facility and the director of the American Samoa Government Office in Hawaii as respondents to his petition.[174] The warden was a proper immediate custodian as he was the territorial official responsible for overseeing the facility where Barlow was incarcerated.[175]

The director bore no direct relationship to Barlow's incarceration, and the court rejected Barlow's argument that the director acted as an agent of the warden

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164. *Id.* at *7 (quoting Rumsfeld v. Padilla, 542 U.S. 426, 445 (2004)).
165. *See supra* Section I.C.
166. 28 U.S.C. § 2241(a).
167. *See* Rumsfeld v. Padilla, 542 U.S. 426, 444–45 (2004).
168. *See* Braden v. 30th Jud. Cir. Ct. of Kentucky, 410 U.S. 484, 494–95 (1973).
169. *Id.*
170. *Id.* at 495.
171. *Barlow*, 2019 WL 5929736, at *6.
172. *Id.*
173. *Id.*
174. *Id.* at *2.
175. *Id.* at *6.

in Hawaii.[176] Accordingly, the court concluded the director was not a proper immediate custodian and dismissed the action against him.[177]

Second, courts must have personal jurisdiction over properly named respondents to comply with the statutory requirement for issuing writs of habeas corpus. Habeas petitions are generally filed in the district in which the petitioner is physically confined so courts may easily assert personal jurisdiction over the petitioner's immediate custodian.[178] Here, however, Barlow was confined *outside* the territorial jurisdiction of any federal court. He could not file his petition in his district of confinement "because Congress has neither created a federal district court in American Samoa nor directed an existing American Samoa court to assert jurisdiction over federal habeas petitions."[179] As the Supreme Court noted in *Rumsfeld v. Padilla*, "the custodian's absence from the territorial jurisdiction of the district court is fatal to habeas jurisdiction."[180]

The court concluded that it "lack[ed] [personal] jurisdiction because: (1) the Warden, who *is* Petitioner's custodian, is *not* present within the District of Hawaii; and (2) the Director, who *is* present within the District of Hawaii, is *not* a proper respondent because he is not the Petitioner's custodian."[181] The court further explained that:

> Even if the Court assumes the Warden contacted officials in Hawai'i about food provisions for the correctional facility or flew to or through Hawai'i for general trainings or on other business, Petitioner's claims of unlawful confinement as a result of unconstitutional court proceedings in no way relate to those hypothetical connections between the Warden and Hawai'i.[182]

Hueter v. Kruse[183] offers a thorough analysis of the District of Hawaii's power to assert personal jurisdiction over defendants from American Samoa who lacked the requisite "minimum contacts" with either Hawaii or, under the nationwide minimum contacts analysis, the United States as a whole.[184] In short, the court concluded it could not exercise personal jurisdiction over the American Samoa defendants under either the Hawaii or federal long-arm statute.[185]

In *Barlow*, both parties analyzed the court's jurisdiction based on Hawaii's long-arm statute, but the court explicitly rejected the long-arm statute as a permissible basis for asserting jurisdiction over the respondent to a habeas petition. The court cited *Rumsfeld v. Padilla* in support of its conclusion that the Supreme Court had rejected the use of "long-arm jurisdiction [because it] would conflict with the relevant habeas statutes, encourage forum-shopping, and risk creating

176. *Id.*
177. *Id.*
178. *Id.* at *7.
179. *Id.* at *7.
180. 542 U.S. 426, 445 (2004).
181. *Barlow*, 2019 WL 5929736, at *7.
182. *Id.* at *7 n.11.
183. *See supra* Section I.B.
184. 576 F. Supp. 3d 743, 765–71 (D. Haw. 2021).
185. *Id.* at 771. *See also supra* Section I.B, discussing *Hueter* in more detail.

overlapping jurisdiction among various district courts."[186] Because the court concluded that it lacked personal jurisdiction over the warden, it also dismissed the action against him.[187]

Despite dismissing both named respondents from the petition, the court transferred Barlow's petition sua sponte to the District of D.C.[188] Although it decided Hawaii was an improper venue, the court remarked that citizens incarcerated in American Samoa are "not . . . left without redress."[189] Turning again to *Rumsfeld v. Padilla*, the court applied an exception to the Immediate Custodian rule that is available for citizens confined outside the territory of any district court.[190] The exception allows petitioners to name a supervisory official as the respondent and file their petitions in the district where the supervisory official resides. The court reasoned that Barlow could amend his petition upon transfer to the District of D.C., naming the Secretary of the Interior as respondent.[191] The Secretary would be a proper respondent because of his plenary authority over American Samoa, and the District of D.C. would be the proper venue because the Secretary undisputedly resides there.[192]

Based on the court's reasoning in *Barlow*, a single narrow pathway exists for U.S. citizens detained in American Samoa to seek federal habeas relief. When *Barlow* was decided in the District of Hawaii, the proposal to apply the *Padilla* exception and file an amended petition naming the Secretary as respondent in the District of D.C. was wholly theoretical.

A PACER search reveals that Barlow did file an amended petition in the District of D.C. naming the Secretary as respondent.[193] However, Barlow's claim was never actually litigated—instead, the parties spent roughly ten months in discussions about possible settlement offers and the petitioner's attempt to seek a pardon from the Governor of American Samoa.[194] The parties ultimately filed a stipulated dismissal order and the case was dismissed without prejudice.[195] It is not clear whether the parties reached a settlement agreement or under what conditions they reached the agreement to dismiss the case.[196]

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186. *Barlow*, 2019 WL 5929736, at *7.

187. *Id.* at *8.

188. *Id.* at *8–9.

189. *Id.* at *8.

190. *Id.* (citing Rumsfeld v. Padilla, 542 U.S. 426, 447 n.16 (2004)) ("In such cases, [courts] have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides.").

191. *Id.* at *9.

192. *Id.* at *8.

193. Joint Status Report at ¶ 2, Barlow v. Bernhardt, No. 1:19-CV-03442-EGS (D.D.C. May 18, 2020), ECF No. 39 (on file with author).

194. Joint Status Report, Barlow v. Bernhardt, No. 1:19-CV-03442-EGS (D.D.C. Dec. 15, 2020), ECF No. 45 (on file with author).

195. Verified Stipulation of Dismissal, Barlow v. Bernhardt, No. 1:19-CV-03442-EGS (D.D.C. Jan. 16, 2021), ECF No. 46 (on file with author).

196. Postscript: A local news outlet posted an article just a few weeks before the dismissal that suggests Barlow was granted parole and living in California while he continued

Unfortunately, the stipulated dismissal means the *Barlow* court's proposed pathway for U.S. citizens detained in American Samoa to seek federal habeas relief remains untested and therefore, at this point, only theoretical. Similarly, the plaintiffs in *Hueter* failed to timely file an opening brief, resulting in dismissal of their appeal and leaving untested the district court's novel construction of the nationwide minimum contacts analysis.[197]

B. The Padilla *Exception*

The court in *Barlow* identified an exception to the traditional immediate custodian requirement in habeas cases as a potential way for the petitioner, a U.S. citizen, to seek federal habeas relief. But that exception is expressly limited to U.S. citizens. As the Supreme Court described in *Rumsfeld v. Padilla*, "we have . . . relaxed the district of confinement rule when '*American citizens* confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus.'"[198]

Neither the Supreme Court in *Padilla* nor the district court in *Barlow* contemplated whether the exception could apply to a noncitizen national, most likely because the status designation applies only to American Samoa and thus to vanishingly few potential cases relative to citizens.[199] The obvious implication is that, based on the law as it currently exists, there is no pathway to federal habeas relief for a noncitizen national petitioner.

C. Implications

While the privilege of access to habeas relief is heavily protected, it has not been adjudicated as a fundamental constitutional right.[200] Additionally, the territorial context implicates the framework derived from *The Insular Cases* for analyzing which constitutional provisions are "fundamental" and therefore applicable to American Samoa.[201] Despite these countervailing considerations, challenging differential access for citizens and noncitizens implicates several constitutional

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to seek a formal pardon from the Governor of American Samoa. Fili Sagapolutele, *Barlow appeals to Gov Lolo to grant pardon and commutation*, SAMOA NEWS (Dec. 15, 2020, 7:57 AM), https://www.samoanews.com/local-news/barlow-appeals-gov-lolo-grant-pardon-and-commutation [https://perma.cc/J8V4-5YSV].

197. Order, Hueter v. Kruse, No. 21-16942 (9th Cir. Apr. 27, 2022), ECF No. 4 (on file with author).

198. 542 U.S. 426, 447 n.16 (2004) (emphasis added) (quoting Braden v. 30th Jud. Cir. Ct. of Kentucky, 410 U.S. 484, 498 (1973)).

199. The cases referring to the exception primarily concern military personnel. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 148–50 (1953) (Frankfurter, J., concurring), *reh'g denied*, 346 U.S. 844, 851–52 (opinion of Frankfurter, J.); Hirota v. Gen. of the Army Douglas MacArthur, 338 U.S. 197, 199–205 (1949) (Douglas, J., concurring).

200. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 743, 771 (2008)*; see also* Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 19 (2012) ("[A]lthough we may (inartfully) refer to the "right" of habeas corpus, habeas is not a right; it is a remedy . . . .").

201. *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1459–61 (9th Cir. 1990).

provisions, namely Fifth Amendment[202] due process and equal protection, as well as the Suspension Clause. Federal courts have distilled *The Insular Cases* framework into the "impracticable and anomalous" test and frequently use it to discern the Constitution's reach in a particular territory.[203] While "test" might connote a strict or formalist examination, the typical court's approach much more closely resembles a factors-based or totality of the circumstances analysis, emphasizing "that whether a constitutional provision has extraterritorial effect" depends on the circumstances, necessities, and alternatives that Congress could consider, especially "whether judicial enforcement of the provision would be 'impracticable and anomalous.'"[204]

Separation of powers concerns also factor into the impracticable and anomalous inquiry.[205] The difficulty arises from the complete lack of congressional guidance for courts to rely on when considering whether a noncitizen national is entitled to federal habeas relief. In such a scant and arcane area of law, courts are overwhelmingly likely to rely on doctrines of avoidance or procedural mechanisms to dismiss these challenges rather than decide them on the merits.[206] To do otherwise would risk an invasion of Congress's sphere of authority, an especially troubling prospect given the low likelihood of congressional action on American Samoa.

The American legal system has consistently permitted differential treatment based on citizenship status so long as the government can assert a rational

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202. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1405 n.12 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987) (explaining that "the High Court of American Samoa has itself ruled that fifth amendment due process and equal protection standards do apply to that territory" and citing two U.S. Supreme Court cases both holding that the due process guarantee of the Fifth Amendment is applicable to territorial governments (citing Torres v. Puerto Rico, 442 U.S. 465 (1979) (examining Board v. Flores de Otero, 426 U.S. 572 (1976))).

203. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 870 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022). The impracticable and anomalous test first appeared in Justice Harlan's concurring opinion in *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring).

204. *Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

205. *Fitisemanu*, 1 F.4th at 881 (concluding extension of birthright citizenship to American Samoa would be impracticable and anomalous despite argument that doing so would be "irrelevant to how the Constitution" affects the Territory and reasoning that, in the absence of sufficient case law on point, the "considerations . . . belong most properly to Congress").

206. *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977), is a notable exception. There, the court applied the impracticable and anomalous test and concluded that extending the constitutional guarantee of a jury trial in criminal proceedings would not be impracticable or anomalous for "serious" criminal proceedings in American Samoa. *Id.* at 17. The court's reasoning in *King* was notably less deferential than the 10th Circuit's reasoning in the recent *Fitisemanu* decision. *Compare King*, 452 F. Supp. at 12–17 (refuting arguments that American Samoa's unique cultural practices make imposition of jury trials undesirable), *with Fitisemanu*, 1 F.4th at 879 ("No circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives.").

basis for the discrepancy.[207] In *Barlow*, though, the court was clearly concerned that the jurisdictional challenges hindering Barlow's petition would leave him without recourse and so it (1) proposed sua sponte an applicable exception to the immediate custodian rule; (2) suggested a proper respondent; and (3) transferred Barlow's petition to the appropriate venue.[208] It is difficult to imagine what government interest could rationally justify categorically denying noncitizen nationals the same recourse, especially in light of the reality that the noncitizen national status designation applies exclusively to American Samoa, a territory over which the United States maintains de jure sovereignty.[209]

In *Boumediene* the Court, responding to the "Government's view . . . that the Constitution had no effect [at Guantanamo Bay], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term," rejected the argument because the

> necessary implication . . . is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.[210]

The Court's underlying concern was separation of powers, specifically the danger of allowing the political branches to use formalistic notions of sovereignty to accrete to themselves "the power to switch the Constitution on or off at will."[211] Unlike Guantanamo Bay, the United States maintains de jure sovereignty over American Samoa—there is no barrier, formalistic or otherwise, limiting the federal government's sovereignty and plenary authority over the Territory.

The Court's sovereignty analysis in *Boumediene* indicates that there is less justification for categorically denying access to federal habeas relief for noncitizen nationals detained in American Samoa than there was for the petitioners. Given the separation of powers concerns grounding the Court's analysis, it seems irrelevant that *Boumediene* arose as a result of Congress deliberately acting to withdraw habeas jurisdiction in Guantanamo Bay, whereas the lack of habeas access in American Samoa stems more from passivity or oversight. Barring access to federal habeas relief in American Samoa for anyone, let alone for only a specific subset of the population, would undermine the Court's assertion that "[t]he Constitution grants

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207. *See generally* Hodel v. Indiana, 452 U.S. 314 (1981); Heller v. Doe, 509 U.S. 312 (1993); Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990); Segovia v. United States, 880 F.3d 384 (7th Cir. 2018).

208. Barlow v. Sunia, No. CV 18-00423-JAO-KJM, 2019 WL 5929736, *8–9 (D. Haw. Nov. 12, 2019).

209. Miller v. Albright, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island." (internal citation omitted)).

210. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

211. *Id.*

Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[212]

Access to habeas relief is a critical mechanism for protecting individual liberty and constraining the power of the political branches. To condition access to the remedy based solely on whether a petitioner in American Samoa is a noncitizen national or U.S. citizen seems fundamentally at odds with the Supreme Court's habeas jurisprudence and constitutes a violation of one of the treaties of cession transferring sovereignty over American Samoa to the United States: "[T]here shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein . . . ."[213] Unlike U.S. or foreign citizens, noncitizen nationals have no sovereign nation other than the United States providing recourse or protection; despite being denied full participation in the benefits of citizenship, noncitizen nationals owe allegiance to the United States and are wholly subject to its authority.[214]

At a minimum, noncitizen nationals should know whether they have access to federal habeas relief. This is especially important given the exceptionally heavy burden on petitioners seeking federal habeas relief while incarcerated in American Samoa. Beyond the logistical complications of being imprisoned thousands of miles from any federal court, there is no clear law that can guide petitioners in discerning whether an attempt to vindicate their rights in federal court will be futile. Both citizen and noncitizen petitioners face scant legal guidance in this area. One obvious consequence is that only those petitioners who have the means to obtain expert legal representation will be able to gamble on gaining access to a federal forum, especially because taking the gamble could mean losing the chance for a less unfavorable outcome (i.e., obtaining some measure of relief via settlement negotiations).

The territorial incorporation doctrine created in *The Insular Cases* gave Congress a systematic way to control the level of power it wields over territories. Dividing territories into "incorporated" locations on the path to statehood and "unincorporated" ones not pursuing statehood, but still subject to U.S. authority, gave Congress the flexibility to choose when, if ever, to cease ruling a territory "unhindered by most constitutional restrictions."[215]

In the century since *The Insular Cases* were decided, not one of the five major U.S. territories has been incorporated.[216] Instead, Congress enacted organic

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212. *Id.*

213. Manu'a Cession, *supra* note 3.

214. 8 U.S.C. §§ 1101(a)(22)(B), 1408; *see also* Fitisemanu v. United States, 1 F.4th 862, 875 n.15 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (rejecting the D.C. Circuit's conclusion in *Tuaua v. United States*, 788 F.3d 300, 305–06 (D.C. Cir. 2015) that American Samoa is not completely subject to U.S. political jurisdiction and reasoning that "as the only populated territory for which Congress has not passed an organic act, American Samoa is 'unorganized' and therefore *especially* subject to American political control." (emphasis added)).

215. Burnett, *supra* note 20, at 801.

216. The five populated territories are Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa. *See Definitions of Insular Area Political Organizations*, *supra* note 28.

acts for four of the major territories, simulating the effects of incorporation by applying the Constitution to those territories through legislative action. At first glance, this might seem equivalent to incorporation. However, as Professor Christina Duffy Ponsa-Kraus argued in 2005,[217] the true legacy of *The Insular Cases* may not be the distinction between incorporated and unincorporated territories but rather the acknowledgment that Congress has the power to divest itself of sovereignty over unincorporated territories.[218] Whether purposefully or not, Congress has preserved its "deannexation" power by opting not to incorporate territories.

Deannexation power seems logical and desirable in the context of the United States' decision to recognize Philippine independence in 1946 by ratifying the Treaty of Manila. Thirty years earlier, the U.S. had promised to alienate its sovereignty over the Philippines in the Jones Act of 1916.[219] Additionally, mutually consensual deannexation, whereby a sovereign nation and one of its territories agree that the sovereign nation will relinquish its authority over the territory—as in the case of the Marshall Islands[220]—is an attractive tool for promoting further decolonization and retreat from the remnants of U.S. imperialism. For American Samoa and the other unincorporated territories, however, a latent deannexation power can also look like an omnipresent guillotine; if the federal government theoretically has the power to unilaterally divest itself of sovereignty over American Samoa, the Territory might sensibly hesitate before challenging or criticizing the

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217. Burnett, *supra* note 20.

218. *Id.* at 801–02 ("[T]he significance of the distinction between incorporated and unincorporated territories has been substantially exaggerated. Contrary to the long-standing consensus, the incorporated/unincorporated distinction did not mirror a distinction between places where the Constitution applied 'in full' and places where only its 'fundamental' provisions applied. To the contrary, incorporated and unincorporated territories were much more similar in this respect than scholars have argued; and whether a place was within or outside the narrowly defined 'United States' rarely determined whether a given constitutional provision applied there . . . . While it is true that the *Insular Cases* rejected the assumption that all U.S. territories were on their way to statehood, the unprecedented implication of this reasoning was not that Congress could withhold statehood indefinitely from an unincorporated territory—after all, Congress could withhold statehood indefinitely from an incorporated territory, too—but rather that the United States could relinquish sovereignty over an unincorporated territory altogether. The *Insular Cases* established that such territories could be separated from the United States, or what I call here 'deannexed,' as long as they remained unincorporated. Preserving the option of deannexation was precisely the reason not to incorporate a territory in the first place.").

219. *Id.* at 866 n.303. *See also* Boumediene v. Bush, 553 U.S. 723, 756–57 (2008) (quoting statement in the Jones Act that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein").

220. *See, e.g.*, Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 48–50 (2003). Characterizing Marshallese independence as "mutually consensual" flattens a deeply complex, politically fraught, and legally questionable transition, especially in light of staggering and ongoing harm to the Marshall Islands stemming from U.S. nuclear testing during the WWII era. *See generally* Dallin J. Prisbrey, Article, *Jodik: A Creative Proposal for Seeking Justice Through āneen Kio (Wake Island)*, 23 ASIAN-PAC. L. & POL'Y J. 54 (2022).

status quo. American Samoa stands out as uniquely vulnerable because it lacks the statutory protection of organic acts that have been extended to the other populated territories.

The Insular Cases did not explicitly endorse the proposition that it is constitutionally permissible for the United States to hold unincorporated territories subject to the plenary power of the federal government in perpetuity. Indeed, the cases implicitly support the opposite view: that incorporation is inevitable for territories over which the U.S. intends to retain sovereignty. Justice Brown, writing for the majority in *Downes*, concisely articulated the central tension at play:

> [I]t is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, *if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so*. Conceding, then . . . that it would be a [constitutional] violation . . . to accept a cession of and permanently hold territory which is not intended to be incorporated, the presumption necessarily must be that . . . when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate.[221]

This view is consistent with the Philippines and Marshall Islands examples, where the United States acquired or annexed the territories in the course of a military conflict (the Spanish-American War and World War II, respectively) and expressed no intention of permanent dominion over the territories.[222] This rationale for permitting a pre-incorporation or unincorporated-until-deannexed period doesn't apply to American Samoa. Neither the treaties of cession[223] nor the statute setting out U.S. authority over American Samoa[224] implicate any intention that the cessions constituted a temporary transfer of power.

Further, one of the deeds of cession explicitly stipulated that "there shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein . . . ."[225]

The political palatability of treating incarcerated noncitizen nationals differently than American citizens in American Samoa depends on the importance of portraying the United States as a non-imperialist promoter and global champion of self-governance, democracy, and local sovereignty. The likelihood of this issue capturing the attention of the political branches is low, given the exceedingly small population of people incarcerated in American Samoa, only some of whom are

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221. Downes v. Bidwell, 182 U.S. 244, 343–44 (1901) (emphasis added).

222. *See supra* notes 219–20 and accompanying text.

223. Tutuila Cession, *supra* note 2; Manu'a Cession, *supra* note 3.

224. 48 U.S.C. § 1661(c) ("Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.").

225. Manu'a Cession, *supra* note 3; *cf.* Tutuila Cession, *supra* note 2.

noncitizen nationals.[226] But the issue is a distillation of the macro-level issues implicated by *The Insular Cases*, American Samoa's unique status, and the perennial separation of powers questions that arise in murky or underdeveloped areas of law where neither the Constitution nor federal statutory law is dispositive.

Unfortunately, no discussion about American Samoa's political status can ignore the reality that American Samoa has vanishingly little political power. American Samoa is represented in the federal government by a nonvoting delegate to the House of Representatives. Other than electing this delegate, American Samoans cannot vote in federal elections, leaving the Territory functionally disenfranchised at the federal level.[227] The Secretary of the Interior has plenary power over the Territory,[228] including the power to review decisions of the High Court.[229] Changes to the structure of the American Samoa Government or amendments to its constitution must be approved by Congress.[230] Additionally, the Territory is geographically remote and based on 2022 population estimates has the smallest population among U.S. states and territories.[231] These issues created by American Samoa's unique political status are inherently complex and difficult to distill into the kinds of soundbites that lend themselves to effective public opinion campaigns that could pressure elected officials to take action.[232]

Nonetheless, public perception is probably the most powerful political consideration at play. Current geopolitical tensions, especially in the Pacific region,

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226. *American Samoa (USA)*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/american-samoa-usa [https://perma.cc/R3S6-5VHM] (citing the total population of incarcerated persons in American Samoa as of March 2022 at 301) (last visited Dec. 27, 2023).

227. *Our District: American Samoa—A Territory of the United States*, WEBPAGE OF CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, https://radewagen.house.gov/about/our-district [https://perma.cc/U3XQ-6FUD] (last visited Dec. 4, 2023). Washington, D.C., Guam, Puerto Rico, the U.S. Virgin Islands, and the Northern Mariana Islands are similarly disenfranchised.

228. Exec. Order No. 10264, *supra* note 4.

229. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 378–79 (D.C. Cir. 1987).

230. 48 U.S.C. § 1662a.

231. *See generally Population of the US States and Principal US Territories*, NATIONS ONLINE, https://www.nationsonline.org/oneworld/US-states-population.htm [https://perma.cc/SLB9-SXA7] (last visited Feb. 9, 2024); *see also The World Factbook American Samoa*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/american-samoa/ [https://perma.cc/CF3W-PTRK] (last visited Jan. 9, 2024); *The World Factbook Northern Mariana Islands*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/northern-mariana-islands [https://perma.cc/Z4YU-AMMB] (last visited Jan. 9, 2024).

232. Nor are these issues limited to American Samoa. As Anjanette Delgado recently wrote in her article *What the Women of the World's Oldest Colony Know About Violence*, N.Y. TIMES (June 12, 2023), https://www.nytimes.com/2023/06/12/opinion/puerto-rico-gender-violence.html [https://perma.cc/36WC-JGWL], political disenfranchisement in Puerto Rico plays a powerful role in many of the problems facing Puerto Rico: "[A]s a territory that is neither independent nor a state — we have no voice in Congress — the tension feeds lack of clarity and an illusion of self-governance that obscures our political reality. It robs us of a defined national identity, an economic road map and political dignity."

could prompt the federal government to avoid exercises of raw power over politically vulnerable populations.[233] Increasingly strained relations between the United States and China amplify the strategic importance of maintaining influence in and strong ties to the Pacific region.[234] But the sensitive political climate is a double-edged sword. The federal government's likely reluctance to act publicly against the American Samoa government could afford American Samoa the flexibility to practice a higher degree of self-governance than is technically permitted, developing a set of de facto practices over what could be several generations. However, the Territory's underlying vulnerability would remain unchanged, notwithstanding the American Samoa government's potential reliance on its adopted practices. The federal government's authority over American Samoa is unrestricted—at the outer extremes, Congress could repeal the Constitution of American Samoa, depose its entire government, and install designated federal officials to directly govern the Territory.

III. AVAILABLE SOLUTIONS

Myriad practical, feasible solutions exist to address status-differentiated access to federal habeas relief for petitioners detained in American Samoa. Four options are discussed briefly below: (1) expanding the *Padilla* exception to include noncitizen nationals; (2) establishing a federal court in American Samoa; (3) empowering a designated federal court to hear habeas petitions arising from American Samoa; and (4) conferring jurisdiction to hear federal habeas petitions to the High Court of American Samoa. A complete analysis of the propriety and feasibility of these proposals is outside the scope of this Note. Future work will be necessary to fully consider the implications of extending the *Padilla* exception to include noncitizen nationals; the second, third, and fourth options have been thoroughly considered by existing scholarship.[235]

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233. For example, the Australian government's decision to reinstate a race-based prohibition barring alcohol possession in indigenous Aboriginal communities immediately drew widespread criticism and condemnation on the global stage. Yan Zhuang, *Authorities Reinstate Alcohol Ban for Aboriginal Australians*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/world/australia/alice-springs-alcohol.html [https://perma.cc/J7SU-98Q8].

234. Nowhere is this dynamic clearer than in the Biden administration's decision to formally recognize the Cook Islands as a sovereign nation. Even the Prime Minister of the Cook Islands acknowledged that pursuing full independence from New Zealand had been "on hold" before the U.S. announcement "put [it] back on the agenda." Pete McKenzie, *U.S. Recognition of Tiny Pacific Country Reshapes Its New Zealand Ties*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/world/asia/biden-cook-islands-new-zealand.html [https://perma.cc/RDP9-2YWU]. However, the strategic military value of U.S. territories in the Pacific exerts an undeniable force on those populations, which tend to enlist at disproportionately high levels. *See* Sara A. Topol, *The America that Americans Forget*, N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/magazine/guam-american-military.html [https://perma.cc/ANX8-F4PE].

235. *See generally, e.g.*, Falemanu Tua, *supra* note 34; Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379 (1991); Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325 (2008).

Each option presumes that extending federal habeas relief to noncitizen national petitioners is preferable to explicitly precluding it, whether that preclusion would apply only to noncitizen nationals or to all petitioners incarcerated in American Samoa, regardless of citizenship status.

The first option, expanding the *Padilla* exception to encompass noncitizen nationals, is both the easiest to implement and the most precise—it solves the identified problem without implicating any broader concerns about the Constitution applying in full to American Samoa. Because the exception would be by judicial fiat and the noncitizen national designation is statutorily controlled and presently applies only in American Samoa, courts could expand the exception without congressional involvement or fear that the expansion might open the door to other groups not contemplated.

Courts might be reluctant to expand the exception due to concerns about invading Congress's domain; however, given that the exception itself was judicially created, precedent obviously exists that supports a flexible approach in service of ensuring access to federal habeas relief for Americans detained outside the territorial jurisdiction of the federal courts. Though noncitizen nationals are not U.S. citizens, they are undeniably Americans. Additionally, noncitizen nationals seeking federal habeas relief fit squarely within the contours of the famous *Carolene Products* footnote four: "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[236]

However, no court can expand the *Padilla* exception without an opportunity to do so—in other words, the burden of implementing this change functionally falls on a noncitizen petitioner detained in American Samoa and seeking federal habeas relief. As discussed in Section II.C, this is an exceptionally heavy burden given the hurdles of bringing a claim against a federal official, procedural incentives to settle rather than risk trial, and the fact that the petition would be predicated on an untested argument.

The second option—establishing a federal court in American Samoa—is a more complex proposition that would necessarily involve congressional action and significant collaboration between the U.S. Congress and the American Samoa government. But the option isn't novel; both the federal government and Samoan scholars have previously considered and advocated for establishing a federal court in American Samoa.[237] There are two primary avenues to establish a federal court located in American Samoa: (1) establishing an Article IV territorial court; or (2) establishing a court as a division of the U.S. District Court for the District of Hawaii, an Article III court.[238] One of the most significant challenges associated with this option overall would be delineating the resulting court's jurisdiction. Establishing a federal court would require Congress to carefully consider which provisions of the Constitution apply to American Samoa and how to effectively exclude cases that

236. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).
237. *See generally* GAO REPORT, *supra* note 15; Falemanu Tua, *supra* note 34.
238. GAO REPORT, *supra* note 15, at 26–31.

could implicate the land tenure system and *matai* title traditions that American Samoa has consistently cited as a reason for resisting full application of the Constitution.[239] One possible solution could be allowing "the federal jurisdiction of the court [to] grow over time."[240] However, this would require ongoing federal legislative action, which could raise feasibility concerns.

The third option—designating an existing federal court to hear claims arising from American Samoa—would similarly require congressional action. While this option would open up an unambiguous avenue for people in American Samoa to access federal relief, there would likely be logistical challenges in implementing it. For example, assuming the District of Hawaii would be the designated court given its relative proximity to American Samoa, would Congress authorize additional judgeships for the court to mitigate any impacts on capacity? Would the judges hear claims from American Samoa using remote conferencing technology? Or would they be required to "ride circuit" and visit American Samoa on a regular schedule to hear cases? Conversely, would plaintiffs from American Samoa be required to travel to Hawaii to access the court? Would defendants? Based on these logistical issues, this likely is not the strongest option.

The fourth option—expanding the High Court's jurisdiction so that it could hear federal habeas claims—would be relatively simple to implement, requiring only that Congress enact a statute conferring jurisdiction.[241] However, this option is the weakest—despite its simplicity, it arguably fails to satisfactorily address a key underlying issue. While it would solve the problem of unequal access to federal habeas relief based on citizenship status, it would functionally withdraw the benefits of having access to a separate court system with the ability to provide relief. Just as state prisoners seeking federal habeas relief would likely find the second review futile if it happened in the same courtroom with the same presiding judge, petitioners detained in American Samoa would likely find cold comfort in being able to access federal habeas relief only through the High Court.

Though these options are not created equal, they demonstrate that solutions are readily available should Congress or the courts decide to act.

CONCLUSION

This Note identifies what might appear to be a small-scale, technical problem about habeas relief in American Samoa. Based on the statistics of American Samoa's overall and incarcerated populations alone, that characterization makes sense. However, the fact that access to federal habeas review for people imprisoned in American Samoa depends on citizenship status is representative of a much larger

239. *Id.* at 23–24.

240. *Id.* at 27–28.

241. Congress could effect this change in one of two ways. First, it could directly enact a statute extending greater federal jurisdiction to the High Court of American Samoa, as it has done in the past. *See* Weaver, *supra* note 235, at 366 n.329. Second, it could approve an amendment to the Constitution of American Samoa—under 48 U.S.C. § 1662a, "[a]mendments of, or modifications to, the constitution of American Samoa, as approved by the Secretary of the Interior . . . may be made only by Act of Congress."

problem: some of the most vulnerable people in the Territory are the ones being disadvantaged by the arcane and unexamined areas of law left over from an era of overt imperialism. Failing to appreciate and examine these legal issues only perpetuates untenable access to justice problems and leaves the impacted individuals with no clear recourse. When Congress is not incentivized to proactively address issues like the one identified by this Note, people turn to the courts for relief. Unfortunately, courts can use prudential avoidance doctrines—and the staggeringly complex procedural requirements that self-represented petitioners must attempt to navigate—to ensure they need never reach the merits of these issues.

No matter how small the population, the federal government should be proactive and transparent about the rights and remedies available to those over whom it exercises power. This is more important, not less, in American Samoa, a population that stands alone in its structural exposure to the vagaries of federal authority.