Substantial Connection: The Intersection of Extraterritorial Jurisdiction and Constitutional Protections for Foreign National Contractors Serving with or Accompanying U.S. Armed Forces

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Abstract

Every day, many foreign nationals place their lives in danger for the benefit of the United States while serving with U.S. Armed Forces in hostile environments. In *United States v. Ali*, the U.S. Court of Appeals for the Armed Forces held that a combat interpreter did not have a substantial connection, as envisioned under *United States v. Verdugo-Urquidez*, with the United States to entitle the interpreter to Fifth and Sixth Amendment protections. Although the result is likely correct given that U.S. service members prosecuted under the Uniform Code of Military Justice (UCMJ) are not entitled to the specific protections which were requested by the interpreter, the *Ali* decision creates concerns as to how future courts may apply the substantial connection test.

Given the constraints the substantial connection test imposes within the military context, the practical emphasis of *Boumediene v. Bush*, and the interplay between the sufficient nexus and substantial connection tests, this Comment argues that military courts should utilize sufficient nexus factors, in addition to the *Boumediene* three-part test, when addressing whether foreign nationals are entitled to constitutional protections. Adopting this method would ensure that the connection emphasis of *Verdugo-Urquidez* is maintained, while also allowing foreign national contractors tried under the UCMJ to have a meaningful analysis into the extent of their connection with the United States.

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2014. Dedicated to Sergeant First Class Riley G. Stephens, 1st Battalion, 3rd Special Forces Group (Airborne). Killed In Action, September 28, 2012, Wardak Province, Afghanistan.

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I. INTRODUCTION

Consider the following two scenarios involving the underlying facts of *United States v. Ali*[1] and *United States v. Brehm*, respectively.[2]

Scenario One: An interpreter with dual Canadian and Iraqi citizenship is employed for an American company that has a contract to provide linguistic services for the U.S. military.[3] Before beginning his assignment in Iraq, he travels to Fort Benning, Georgia, to conduct pre-deployment training and receive military equipment.[4] Upon arriving in Iraq, the interpreter is assigned to live at a combat outpost and is embedded with a U.S. military squad that conducts training operations

1. United States v. Ali (*Ali II*), 71 M.J. 256 (C.A.A.F. 2012).
2. United States v. Brehm (*Brehm II*), 691 F.3d 547 (4th Cir. 2012).
3. *Ali II*, 71 M.J. at 259.
4. United States v. Ali (*Ali I*), 70 M.J. 514, 516 (A. Ct. Crim. App. 2011).

with the Iraqi police.[5] The interpreter is present alongside U.S. military forces during missions and initially sleeps in the same quarters as the military squad.[6] By all accounts, the interpreter is an integral and necessary part of the U.S. military unit.[7]

During the course of his deployment, the interpreter gets into a physical altercation with another interpreter.[8] After being separated, he misappropriates a knife from the squad leader and subsequently cuts the other interpreter.[9] Military officials charge the interpreter under the Uniform Code of Military Justice (UCMJ)[10] with wrongful appropriation of the knife, making a false official statement, and impeding the subsequent investigation.[11]

Scenario Two: A South African citizen is employed as a travel supervisor for an American company that has a contract with the Department of Defense (DOD) to provide support services for U.S. Armed Forces in Afghanistan.[12] The contractor's specific duties include making travel arrangements and processing outgoing and incoming personnel.[13] These personnel are not U.S. military personnel, but civilian contractors.[14] Additionally, the DOD issues an authorization letter that grants the South African permission to reside on the military base, receive meals, and access military exchange stores.[15]

One day, the South African attacks and injures a British contractor.[16] U.S. officials charge the South African under the Military Extraterritorial Jurisdiction Act (MEJA)[17] with assault with a dangerous

5. *Ali II*, 71 M.J. at 259.

6. *Id.*

7. *See Ali I*, 70 M.J. at 518 (noting that Ali's "presence as an interpreter was essential to the ability of the unit to accomplish its primary mission of training and advising the Iraqi police").

8. *Id.* at 516.

9. *Id.*

10. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946 (2006 & Supp. V 2012). The interpreter was charged under the UCMJ because his status as a host-country national, an Iraqi citizen serving with the U.S. military in Iraq, likely rendered him ineligible to be charged under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). *See Ali I*, 70 M.J. at 516 n.4.

11. *Ali I*, 70 M.J. at 514. The interpreter was also charged with aggravated assault with a dangerous weapon, but the charge was later dropped pursuant to a plea agreement. *Id.* at 517.

12. United States v. Brehm (*Brehm I*), No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Brehm II*, 691 F.3d 547, 549 (4th Cir. 2012).

17. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. §§ 3261–67 (2006). The MEJA subjects persons to U.S. jurisdiction who commit an offense that is punishable by confinement of over a year, while being "employed by or accompanying

weapon and assault resulting in serious bodily harm.[18] After conducting a telephonic hearing with a U.S. Magistrate Judge, the South African is transported to Virginia to await trial.[19]

Although the two cases involve foreign national contractors who were serving with or accompanying U.S. Armed Forces, the outcomes of the seemingly similar cases were decidedly different. Under Scenario One, the *Ali* court held that the interpreter's connections to the United States were not substantial enough to entitle the interpreter to Fifth and Sixth Amendment[20] due process protections.[21] Under Scenario Two, the *Brehm* court held that the South African's connections to the United States were significant enough to establish a "suitable proxy for due process purposes."[22]

Given the fact that Ali was charged under the UCMJ[23] and Brehm was charged under the MEJA,[24] there remains some discussion about whether the cases create a circuit split.[25] Instead of focusing on the

the [U.S.] Armed Forces outside the United States." *Id.* § 3261(a)(1). The purpose of the MEJA was to help fill the "jurisdictional gap" under which overseas crimes committed by persons supporting U.S. Armed Forces went unpunished due to lack of jurisdiction. *See* K. Elizabeth Waits, Note, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 516–19 (2006) (discussing the scope by which the MEJA closes the jurisdictional gap).

18. *Brehm II*, 691 F.3d at 549.

19. *Id.*

20. U.S. CONST. amends. V, VI.

21. *Ali II*, 71 M.J. 256, 268 (C.A.A.F. 2012). The specific constitutional protections sought by Ali consisted of a grand jury indictment, an independent judge, and trial by jury. *Id.* at 276. Unlike trial under the UCMJ, these types of protections are commonly afforded to persons tried under the MEJA. *See, e.g.*, United States v. Green, 654 F.3d 637, 641, 645 (6th Cir. 2011) (noting that a civilian defendant who was tried under the MEJA was indicted by a grand jury and convicted at trial by a jury).

22. *Brehm II*, 691 F.3d at 553.

23. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946 (2006 & Supp. V 2012). Ali was ineligible to be tried under the MEJA because of his status as a host-country national. *See* 18 U.S.C. § 3267(1)(C) (2006). The author uses the term "host-country national" to refer to a foreign national military contractor who is a citizen of the nation in which she is working.

24. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. §§ 3261–67 (2006). Brehm was not a host-country national because he was a South African citizen supporting U.S. Armed Forces while he was in Afghanistan. *Brehm II*, 691 F.3d at 549. Thus, he was not exempt from prosecution under the MEJA. *See* 18 U.S.C. § 3267(1)(C) (2006).

25. *Compare* Jeremy W. Steward, *MEJA Update-United States v. Brehm*, 31(B)LOG (Aug. 15, 2012, 12:09 PM), http://bit.ly/QjLWgK (remarking that the difference in underlying statutes may allow for the difference in due process protections between Ali and Brehm), *with* Petition for Writ of Certiorari at 33, *Ali II*, 71 M.J. 256 (C.A.A.F. 2012) (No. 12-805), *cert. denied*, 133 S. Ct. 2338 (2013) (arguing that the *Brehm* and *Ali* decisions create a circuit split), *and* Steve Vladeck, *Brehm: Fourth Circuit Creates Split in Contractor-Contacts Analysis*, LAWFARE BLOG (Aug. 12, 2012, 7:00 PM),

possibility of a circuit split, however, this Comment will utilize the practical connection analysis of *Brehm*[26] to highlight the concerns stemming from the *Ali* decision.[27]

Specifically, this Comment will analyze the *Ali* court's application of the substantial connection test formulated by the plurality in *United States v. Verdugo-Urquidez*.[28] The substantial connection test requires that foreign nationals come within the territorial confines of the United States *and* voluntarily establish a substantial connection with the United States to receive constitutional protections.[29] In light of the court's substantial connection application, the defendant in *Ali* was found to have no Fifth or Sixth Amendment constitutional protections,[30] despite the seemingly more substantial connections present in *Ali* than in *Brehm*.[31]

This Comment will argue that, as applied to foreign nationals who serve with or accompany U.S. Armed Forces, the *Ali* decision is problematic in two ways. First, it may unnecessarily prevent future foreign national defendants from asserting Fifth and Sixth Amendment claims that are unaffected by a military trial.[32] Second, the use of the substantial connection test within the military context prevents any meaningful consideration of a foreign national's connection with the United States.[33]

Part II of this Comment will address the sufficient nexus test[34] used by some circuit courts in determining whether extraterritorial jurisdiction over the defendant satisfies the Due Process Clause of the Fifth Amendment.[35] Part II will also discuss cases addressing the applicability

http://bit.ly/NsbbMM (arguing that a split is created despite the difference in underlying statutes).

26. *Brehm II*, 691 F.3d at 553.

27. *Ali II*, 71 M.J. 256, 268 (C.A.A.F. 2012).

28. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

29. *Id.* at 271 (plurality opinion) (establishing that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country").

30. *See Ali II*, 71 M.J. at 268 (noting the "whatever rights [Ali] had were met through the [UCMJ]").

31. *Compare Ali II*, 71 M.J. at 259 (discussing interpreter's pre-deployment training, clothing, living arrangements, and significance of his job), *with Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (discussing contractor's job as a travel supervisor who processed incoming and outgoing company employees).

32. *See infra* Part III.B.1.

33. *See infra* Part III.B.2.

34. *See* United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States. . . .").

35. U.S. CONST. amend. V.

of other constitutional protections to foreign nationals. Part III will analyze the connection analyses in *Brehm* and *Ali,* and suggest that military courts consider sufficient nexus factors, in addition to the three-part test in *Boumediene v. Bush*,[36] when addressing whether foreign nationals are entitled to constitutional protections.

In light of the employment realities of many foreign nationals who serve with or accompany U.S. Armed Forces,[37] a framework that applies nexus factors, in addition to the *Boumediene* three-part test,[38] is needed to ensure that these workers are given meaningful consideration of their connection with the United States.[39]

II. EXTRATERRITORIAL JURISDICTION AND DUE PROCESS FRAMEWORKS

A. Sufficient Nexus Test

Circuit courts have developed different[40] tests to ensure that the application of an extraterritorial statute over a foreign national defendant does not "violate the due process clause of the [F]ifth [A]mendment."[41] One such test, adopted by the U.S. Courts of Appeals for the Second, Fourth, and Ninth Circuits,[42] is known as the "sufficient nexus" test.[43]

1. Sufficient Nexus Rationale

A key sufficient nexus case is *United States v. Davis*.[44] In *Davis*, the U.S. Coast Guard was suspicious that a British marked boat on a watch list was smuggling drugs.[45] After receiving permission from

36. Boumediene v. Bush, 553 U.S. 723 (2008).
37. *See infra* Part III.B.2.
38. *See Boumediene*, 553 U.S. at 766 (establishing a three-part factor test).
39. *See infra* Part III.D.
40. *See* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 348–72 (2012) (describing the development of the nexus- and fairness-based tests). Although the nexus- and fairness-based tests are commonly thought of as being different, one court has remarked that the distinction between the two is not significant. *See* United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 728 n.9 (E.D. Va. 2003) (noting that the "difference [between the nexus and fairness tests] is less real than apparent; the existence of a nexus is what makes the prosecution neither arbitrary nor fundamentally unfair").
41. United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990).
42. *See* United States v. Mohammad-Omar, 323 F. App'x 259, 261–62 (4th Cir. 2009); United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987).
43. *See* Stigall, *supra* note 40, at 348–57 (discussing the development of the sufficient nexus test).
44. United States v. Davis, 905 F.2d 245 (9th Cir. 1990).
45. *Id.* at 247.

British officials to enter the boat, Coast Guard personnel boarded the boat and found over 7,000 pounds of marijuana.[46] The boat captain, a British citizen, was charged and convicted under the Maritime Drug Law Enforcement Act (MDLEA)[47] with intent to distribute the drugs.[48]

On appeal, the boat captain argued that the MDLEA did not apply to "persons on foreign vessels outside the territory of the United States."[49] The court disagreed.[50] First, the court found that Congress had constitutional authority to make the MDLEA apply extraterritorially.[51] Next, the court addressed the question of whether applying the MDLEA to the defendant's specific acts would violate due process concerns.[52] The court rationalized that "there must be a sufficient nexus between the defendant and the United States, . . . so that such application [of the extraterritorial statute] would not be arbitrary or fundamentally unfair."[53] Applying the sufficient nexus test, the *Davis* court found that a sufficient nexus existed because the defendant's goal of smuggling drugs into the country was for the purpose of enabling illegal actions within the United States.[54]

In other words, the sufficient nexus referred to was the connection between the United States and the individual defendant.[55] By analyzing whether a defendant's connection with the United States is sufficient for due process purposes, courts have a tool to ensure that, as applied to the specific defendant, the application of the statute is not simply random or unjust.[56] By preventing such an application, the Fifth Amendment[57] due process concern is thereby satisfied.[58]

Although *Davis* emphasized the scope of a defendant's connection with the United States from the perspective of intended effects,

46. *Id.*

47. Maritime Drug Law Enforcement Act, 46 U.S.C. app. §§ 1901–04 (Supp. IV 1986) (current version at 46 U.S.C. §§ 70501–08 (2006 & Supp. IV 2008)).

48. *Davis*, 905 F.2d at 247.

49. *Id.*

50. *Id.* at 248.

51. *Id.*

52. *Id.*

53. *Davis*, 905 F.2d at 248–49.

54. *Id.* at 249.

55. *Id.* at 248–49 (remarking "there must be a sufficient nexus between the defendant and the United States").

56. *Id.* at 249 n.2 (describing the ultimate question as being whether "application of the statute to the defendant [would] be arbitrary or fundamentally unfair").

57. U.S. CONST. amend. V.

58. *Davis*, 905 F.2d at 249 (stating "a sufficient nexus exists so that the application of the Maritime Drug Law Enforcement Act to Davis' extraterritorial conduct does not violate the due process clause").

subsequent courts applying the sufficient nexus test have expanded upon the scope of factors considered.[59]

2. Expansion of the Sufficient Nexus Test

Whether the subject matter at issue impacts significant American interests is also a factor considered under the sufficient nexus test.[60] In *United States v. Shahani-Jahromi*,[61] the court applied the sufficient nexus test in addressing whether the application of an extraterritorial statute violated the defendant's Fifth Amendment due process rights.[62] The defendant was charged with violating the International Parenting Kidnapping Crime Act[63] for keeping his daughter in Iran for the purpose of thwarting the mother's custody rights.[64] Applying the sufficient nexus test, the court found a sufficient nexus existed because "the United States manifestly [had] a clear interest in ensuring that parental rights are respected, especially when the marital domicile of the parents [was] within the United States."[65] Similarly, employment is also a relevant factor in applying the sufficient nexus test.[66]

In *United States v. Ayesh*,[67] the court found employment to be a suitable basis for establishing a sufficient nexus.[68] Ayesh was a Jordanian resident who was working in Iraq as a shipping and customs manager for the U.S. Department of State.[69] Ayesh was charged with abusing his position to steal money.[70] Although neither party raised the sufficient nexus concern, the court nonetheless considered the issue.[71] Analogizing the sufficient nexus test to the minimum contacts test,[72] the court found a sufficient nexus existed because the defendant's

59. *See Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *4 (E.D. Va. Mar. 30, 2011) (discussing other nexus factors considered by courts to include "(1) the defendant's actual contacts with the United States, including [one's] citizenship or residency; (2) the location of the acts allegedly giving rise to the alleged offense; . . . (4) the impact on significant United States interests" and employment).

60. *Id.*

61. United States v. Shahani-Jahromi, 286 F. Supp. 2d 723 (E.D. Va. 2003).

62. *Id.* at 725.

63. International Parenting Kidnapping Crime Act, 18 U.S.C. § 1204 (Supp. V 1993) (current version at 18 U.S.C. § 1204 (2006)).

64. *Shahani-Jahromi*, 286 F. Supp. 2d at 725.

65. *Id*. at 728.

66. *See* United States v. Ayesh, 762 F. Supp. 2d 832, 842 (E.D. Va. 2011).

67. United States v. Ayesh, 762 F. Supp. 2d 832 (E.D. Va. 2011).

68. *See id.* at 842.

69. *Id.* at 834.

70. *Id.* at 833.

71. *Id.* at 842.

72. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating "to subject a defendant to a judgment in personam" due process requires that a defendant "have certain minimum contacts" with the forum state).

employment with the United States "was central to the commission of his alleged crimes."[73]

The sufficient nexus test serves as a device for courts to ensure that Fifth Amendment due process protection is satisfied by ensuring that extraterritorial statutes are not haphazardly applied to foreign national defendants.[74] Although not identical, other constitutional protections concern similar sufficient nexus traits such as extraterritoriality, practicality, and the scope of the connection between the United States and the foreign national.[75]

B. Constitutional Protections

Courts have also addressed the similar, but separate issue of whether foreign nationals are entitled to non-jurisdictional constitutional protections.[76] Similar to the connection concern with extraterritorial jurisdiction, the underlying analysis also centers on the scope of the foreign national's connection with the United States.[77]

1. Emphasis on Formalism

Johnson v. Eisentrager[78] involved the issue of whether German enemy prisoners, who were convicted by a military commission, were entitled to writs of habeas corpus.[79] The Court found that the defendants were not entitled to the writs,[80] holding that "the Constitution does not confer a right of personal security . . . from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[81]

73. *Ayesh*, 762 F. Supp. 2d at 842.

74. *See* United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

75. *See* Boumediene v. Bush, 553 U.S. 723, 764 (2008) ("[T]he idea [is] that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."); United States v. Verdugo-Urquidez, 494 U.S 259, 271 (1990) (establishing that aliens receive constitutional rights when they voluntarily establish a significant connection with the United States).

76. *See Verdugo-Urquidez*, 494 U.S. at 261 (considering "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country"); Ali v. Rumsfeld, 649 F.3d 762, 769–72 (D.C. Cir. 2011) (addressing whether detainees held in Iraq and Afghanistan could assert due process and cruel punishment claims under the Fifth and Eighth Amendments).

77. *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (applying the substantial connection test to determine whether an alien was entitled to assert First and Fifth Amendment claims).

78. Johnson v. Eisentrager, 339 U.S. 763 (1950).

79. *Id.* at 765–66.

80. *Id.* at 785.

81. *Id.*

In its analysis, the Court focused on a formalistic actual presence test that addressed whether the enemy aliens were "within [United States] territorial jurisdiction."[82] This rationale equates actual presence with affording constitutional protections.[83] Because the enemy aliens in *Eisentrager* were never present within the territorial confines of the United States, the Court concluded that the enemy aliens were not entitled to writs of habeas corpus.[84]

2. Extending the Formalistic Focus

United States v. Verdugo-Urquidez involved a Mexican drug leader who was extradited to the United States after being arrested in Mexico by Mexican police.[85] While the drug dealer was incarcerated in a U.S. jail, Drug Enforcement Agency (DEA) agents received approval from Mexican officials to search his Mexican residences.[86] Verdugo-Urquidez moved to suppress the evidence found at the residences on the basis that the Fourth Amendment[87] applied to the DEA agents' searches.[88]

In its plurality opinion, the Court disagreed and held that the Fourth Amendment did not apply "to the search and seizure by United States agents of property that [was] owned by a nonresident alien and located in a foreign country."[89] Similar to *Eisentrager*, the Court's rationale emphasized a territorial analysis, stating "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[90]

In developing this substantial connection test, the plurality synthesized case law involving multiple constitutional amendments.[91] Indeed, despite its Fourth Amendment-specific holding, the substantial connection test has been applied to cases addressing the applicability of other constitutional protections to foreign nationals as well.[92]

82. *Id.* at 771.

83. *Eisentrager*, 339 U.S. at 777–78 (noting that "permitting [the aliens'] presence in the [U.S.] implied protection").

84. *Id.* at 785.

85. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).

86. *Id.*

87. U.S. CONST. amend. IV.

88. *Verdugo-Urquidez*, 494 U.S. at 263.

89. *Id.* at 261 (plurality opinion).

90. *Id.* at 271.

91. *See id.* (addressing prior cases involving the First, Fourth, Fifth, Sixth and Fourteenth Amendments).

92. *See* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (applying the substantial connection test to determine whether an alien was entitled to First and Fifth Amendment protections); *Ali II*, 71 M.J. 256, 268 (C.A.A.F. 2012) (applying the substantial connection test to determine whether foreign national contractor was entitled to Fifth and Sixth Amendment protections).

3. A Shift Toward a Practical Analysis

Boumediene addressed, among other things, the question of whether detainees held at Guantanamo Bay were entitled to writs of habeas corpus.[93] In arguing that the Suspension Clause[94] had no application to the detainees, the U.S. government looked to *Eisentrager* for the proposition that technical, or de jure, sovereignty,[95] was the relevant consideration.[96] As Cuba maintained legal sovereignty over the base, the detainees were not present within the United States and were therefore not entitled to the writs of habeas corpus.[97]

The Court, however, rejected the argument that *Eisentrager* represented the notion that territorial analysis was the sole factor to consider with issues of extraterritoriality.[98] Instead, the Court noted that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[99] Irrespective of the technical question of whether Guantanamo was within the formal territory of the United States, the Court applied a functional analysis to determine that the United States exercised practical, or de facto sovereignty,[100] over the base.[101]

To aid this analysis, the Court identified three factors to consider in determining whether the Suspension Clause applied to detainees.[102] The relevant factors are:

93. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

94. U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause prohibits suspending the writ of habeas corpus, except "in Cases of Rebellion or Invasion [where] the public Safety may require it." *Id.*

95. *See* Anthony J. Colangelo, *"De Facto Sovereignty": Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 626 (2009) ("'[D]e jure sovereignty' means 'formal' or 'technical' sovereignty in the sense of formal recognition of sovereignty by the government vis-à-vis other governments.").

96. Brief for Respondents, at 19–20, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2972541, at *19–20 ("'[A]t no relevant time' were the petitioners 'within any territory over which the United States is sovereign.'" (quoting Johnson v. Eisentrager, 339 U.S. 763, 778 (1950))).

97. *Boumediene*, 553 U.S. at 753 ("[T]he Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.").

98. *Id.* at 764 ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.").

99. *Id.*

100. *See* Colangelo, *supra* note 95, at 626 (arguing that "'de facto sovereignty' means both practical control and jurisdiction over a territory, such that the de facto sovereign's laws and legal system govern the territory").

101. *Boumediene*, 553 U.S. at 755 (noting that the United States "maintains *de facto* sovereignty over [the base]").

102. *See id.* at 766. It should be noted, however, that the factors are not exhaustive, but merely the minimum factors that must be considered. *See id.* (stating that "*at least*

> (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 prisoner's entitlement to the writ.[103]

Applying the three-factor test, the Court found that the first factor weighed in favor of the defendants in light of their contentious status as enemy combatants and the lack of procedural protections that they were afforded.[104] Addressing the second factor, the Court also found in favor of the defendants.[105] While recognizing that detention outside the technical territory of the United States usually weighs against defendants, the Court once again looked beyond a formalistic analysis and distinguished Guantanamo on the basis of its perpetual nature.[106] As to the last factor, the Court also found in favor of the defendants.[107] The Court focused on the non-hostile environment of Guantanamo and the lack of conflict that would arise with the host nation if the writ were issued.[108] Finding that all three factors weighed in favor of the defendants, the Court held that the Suspension Clause "ha[d] full effect at Guantanamo Bay."[109]

Although *Boumediene* repudiated a solely formalistic application of *Eisentrager*,[110] concerns still remain as to *Boumediene's* coexistence with *Verdugo-Urquidez*.[111] To this end, the U.S. Court of Appeals for the Ninth Circuit has recently applied both *Verdugo-Urquidez* and *Boumediene* in addressing the applicability of constitutional protections for foreign nationals.[112]

three factors are relevant") (emphasis added); *see also* Al Maqaleh v. Gates, 605 F.3d 84, 98–99 (D.C. Cir. 2010) (observing that manipulation of the detention site by government officials, by strategically choosing a detainee's detention site, may be an additional factor to consider under *Boumediene*).

103. *Boumediene*, 553 U.S. at 766.

104. *Id.* at 767.

105. *Id.* at 768.

106. *Id.*

107. *Id.* at 769.

108. *Boumediene*, 553 U.S. at 769–70. Although the Court found in favor of the detainees as to the third factor, the Court did remark that "if the detention facility were located in an active theater of war," the practicality argument might have gone against the defendants. *Id.* at 770.

109. *Id.* at 771.

110. *See id.* at 762–64 (rejecting the argument that *Eisentrager* stood for the idea that *de facto* sovereignty is the sole consideration in issues of extraterritoriality).

111. *See infra* Part III.B.2.

112. *See* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (applying the substantial connection test and the *Boumediene* functional approach).

4. Combining Verdugo-Urquidez and Boumediene

In *Ibrahim v. Department of Homeland Security*,[113] the court considered the issue of whether a foreign national on a student visa, who left the United States to present her academic research at a conference in Malaysia, could assert First and Fifth Amendment[114] claims.[115]

The foreign national, a doctoral student at Stanford University, was mistakenly placed on the "'No-Fly List' and other terrorist watchlists."[116] Prior to leaving for Malaysia, the student had resided in the United States for four years.[117] Upon attempting to return to the United States, the student was prevented from returning due to her placement on the watch lists.[118]

The student argued that her mistaken placement on the watch lists violated her First and Fifth Amendment rights.[119] Utilizing *Verdugo-Urquidez*, the U.S. government put forth a territorial-centric argument that the student's voluntary exit from the United States thereby forfeited her right to assert any constitutional claims.[120]

The court rejected this argument and stated that "the law that we are bound to follow is, instead, the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo-Urquidez*."[121] In light of the student's four years spent at Stanford, along with her purpose to further her relationship with the United States via the Malaysian conference, the court held that the student had a "'significant voluntary connection' with the United States" and was therefore able to assert her constitutional claims.[122]

Although these decisions initially focused heavily on physical presence with regard to issues of extraterritoriality,[123] the post-*Boumediene* and *Davis* era of cases indicate a shift toward a more practical analysis.[124]

113. Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2012).
114. U.S. CONST. amends. I, V.
115. *Ibrahim*, 669 F.3d at 987, 994.
116. *Id.* at 986.
117. *Id.* at 997.
118. *Id.* at 986.
119. *Id.* at 994. Specifically, the student claimed that the placements violated her freedom of association, equal protection, and due process rights. *Id.*
120. *Ibrahim*, 669 F.3d at 996.
121. *Id.* at 997.
122. *Id.*
123. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States."); Johnson v. Eisentrager, 339 U.S. 763, 777–78 (noting that "permitting [the aliens'] presence in the [U.S.] implied protection").
124. *See Ibrahim*, 669 F.3d at 997 (disregarding the government's argument by which "any alien, no matter how great her voluntary connection with the United States,

III. EXTENDING THE NEXUS AND *BOUMEDIENE* FRAMEWORKS

The type of functional approach applied in *Brehm* stands in stark contrast to the formalistic approach applied by the *Ali* court.[125] In light of the similar concerns raised by jurisdictional and other constitutional protections,[126] as well as the modern day hiring practices of many foreign national military contractors,[127] courts should consider sufficient nexus factors, in addition to the three *Boumediene* factors, when determining the applicability of constitutional protections for foreign national military contractors prosecuted under the UCMJ.[128]

A. Connection Analyses of Brehm *and* Ali

1. Practical Connection Analysis—*Brehm*

In applying a sufficient nexus test analysis, the *Brehm* court focused on the extent to which significant American interests were impacted by Brehm's actions.[129] Specifically, the court noted concern for law and order, military discipline, the use of military resources for Brehm's confinement, and the DOD authorization letter given to Brehm.[130]

Similar to the de facto approach taken in *Boumediene*,[131] the *Brehm* court looked beyond the fact that the military base was "not technically [within the] territory of the United States."[132] Instead, the court viewed the case with regard to the practical considerations on the ground.[133]

immediately loses all constitutional rights as soon as she voluntarily leaves the country"); *Brehm II*, 691 F.3d 547, 552–53 (4th Cir. 2012) (disregarding a formalistic analysis in place of a nexus analysis that focused on the extent to which "significant American interests" were affected).

125. *Compare Brehm II*, 691 F.3d at 552–53 (focusing on the extent to which "significant American interests" were affected despite the fact that the military base was not within the territorial confines of the United States), *with Ali II*, 71 M.J. 256, 268 (C.A.A.F. 2012) ("[W]e are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is [not] present within the sovereign territory of the United States. . . .").

126. *Compare* United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990) (discussing the connection (i.e., the sufficient nexus) between the defendant and the United States), *with Verdugo-Urquidez*, 494 U.S at 271–72 (focusing on whether the defendant voluntarily established a substantial connection with the United States).

127. *See infra* Part III.B.2.

128. *See infra* Part III.D.

129. *Brehm II*, 691 F.3d at 552–53 (noting that the contractor's "actions affected significant American interests at" the military base).

130. *Id.*

131. *See* Boumediene v. Bush, 553 U.S. 723, 755 (2008) (noting that the United States maintained "*de facto* sovereignty over [the] territory").

132. *Brehm II*, 691 F.3d at 553.

133. *See id.* (describing the pervasiveness of the American influence on the military base).

Conversely, had the court applied a formalistic framework, it seems less likely that the court would have been able to justify that a sufficient nexus existed.[134] In contrast to *Brehm*, the *Ali* court was much more reluctant to look past territorial formalities.[135]

2. Formalistic Connection Analysis—*Ali*

Unlike in *Brehm*, the *Ali* court adhered to a very formalistic analysis in addressing the defendant's connection to the United States.[136] Utilizing *Eisentrager* and *Verdugo-Urquidez* for guidance,[137] the court stressed the territorial aspects of Ali's case.[138]

The court primarily emphasized duration and physical location.[139] While the court acknowledged Ali's trip to Fort Benning, the court noted that his stay was "brief."[140] This description, along with the court's formalistic emphasis on territorial concerns,[141] leads to the inference that the court viewed the substantial connection test as requiring foreign nationals to establish their connection with the United States while within the United States.[142]

This is not to say that the majority's application of the substantial connection test to the facts of Ali is flawed,[143] but rather that the territorial constraint[144] of the substantial connection test itself creates

134. *See Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (discussing contractor's job as a travel supervisor who also processed incoming and outgoing civilian employees). Viewed in a formalistic context, Brehm's contacts could be considered very attenuated. *See id.*

135. *See Ali II*, 71 M.J. 256, 267–68 (C.A.A.F. 2012).

136. *See id.* (stressing Ali's lack of prolonged presence within the United States).

137. *See id.* at 268 (stating that there is no law that "mandates granting a noncitizen Fifth and Sixth Amendment rights when they have not 'come within the territory of the United States and developed substantial connections with this country'" (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990))); *id.* ("[T]he privilege of litigation has been extended to aliens . . . only because permitting their presence in the country implied protection." (quoting Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950))).

138. *See id.* ("The offenses giving rise to the charges against Ali took place outside the United States.").

139. *See id.* at 267–68.

140. *Ali II*, 71 M.J. at 268.

141. *See id.* at 267–68 ("Those protections, however, are the result of the alien's presence 'within the territory' of the United States." (quoting Wong Wing v. United States, 163 U.S. 228, 238 (1896))).

142. *See id.* at 267 ("[A]liens receive constitutional protections when they have come *within the territory of the United States and developed substantial connections with this country*." (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)) (alteration in original)).

143. *See id.* at 268 (applying the substantial connection test).

144. *See Verdugo-Urquidez*, 494 U.S. at 271 (requiring that foreign nationals to "come within the territory of the United States" to receive constitutional protections).

concerns beyond the facts of *Ali*.[145] As a result of this territorial prerequisite, the extent of the analysis of a foreign national's connection with the United States is likely limited to times in which he or she is present within the technical borders of the United States.[146] Indeed, had Ali stayed in Fort Benning for a longer period of time, it seems likely that he would have satisfied the substantial connection test under the majority's reasoning.[147]

Although the court briefly mentions Ali's overseas employment within the context of the substantial connection test,[148] its portrayal of his occupation differed drastically from its description of his employment earlier in the opinion.[149] In addressing the jurisdictional issue,[150] the majority highlighted the importance of Ali's job in finding a basis for jurisdiction.[151] The majority described Ali as "virtually indistinguishable from the troops . . . and [that] he faced the same daily routines and threats as [the military squad]."[152]

While the majority extensively quoted trial court passages describing the importance of Ali's position with regard to the jurisdictional issue,[153] it devoted only one half-sentence to Ali's employment in the context of its substantial connection analysis.[154] This is concerning because it is the importance of Ali's position to U.S. interests that highlights the full extent of Ali's connection with the United States.[155] Given the territorial constraints of the substantial

145. *See infra* Part III.B.2.

146. *See Ali II*, 71 M.J. at 268 (addressing Ali's employment within a half sentence). *But see* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 995 (9th Cir. 2012) ("The Supreme Court has held in a series of cases that the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not.").

147. *See Ali II*, 71 M.J. at 268 (describing the duration of defendant's visit to the United States).

148. *Id.* ("[H]is employment with a United States corporation outside the United States [does not] constitute[] a 'substantial connection' with the United States as envisioned in *Verdugo-Urquidez*.").

149. *Compare id.* (phrasing Ali's occupation as "employment with a United States corporation outside the United States"), *with id.* at 264 ("For operational purposes, Ali's role as [an] interpreter was integral to the mission of 1st Squad.").

150. *See id.* at 263–64 (considering whether Ali was "serving with" or "accompanying an armed force").

151. *See id.*

152. *Ali II*, 71 M.J. at 264.

153. *See id.* at 263–64.

154. *See id.* at 268.

155. *See id.* at 264 ("As an interpreter, Ali would have been specifically targeted by the enemy in an attempt to inhibit United States Army communications capabilities.").

connection test,[156] however, the result was a situation where form overcame substance.[157] In addition to the substantial connection issue, the majority's cursory mention of *Boumediene* is also a concern.[158]

The majority in *Ali* failed to give any meaningful consideration to *Boumediene's* functional emphasis.[159] The majority only references *Boumediene* in a single footnote that responds to a concurring opinion's mention of *Boumediene*.[160] Although the *Ali* majority acknowledged that a practical approach was necessary in the case,[161] it never mentioned the *Boumediene* three-factor test.[162] Instead, the only reference to a *Boumediene* factor was the court's mention of citizenship within the footnote.[163]

While citizenship is a factor mentioned in both the sufficient nexus and *Boumediene* tests,[164] it is but *one* factor. Merely discussing citizenship ignores the broader practical emphasis, as well as the other factors, of *Boumediene*.[165] As such, despite claiming to recognize the importance of a practical analysis, the majority failed to give any meaningful analysis within a practical framework.[166]

Beyond the intricacies of *Ali*, the court's decision leaves questions as to its applicability to Fifth and Sixth Amendment[167] protections other than the specific protections claimed by Ali,[168] and also as to the

156. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (requiring foreign nationals to "come within the territory of the United States" to receive constitutional protections).

157. *See Ali II*, 71 M.J. at 268 (finding that Ali's connections did not satisfy the substantial connection test).

158. *See id.* at 269, n.25.

159. *See generally id.* at 258–71 (failing to discuss *Boumediene* other than in a brief footnote).

160. *Id.* at 269, n.25.

161. *Id.* ("We agree that such a[] [practical] analysis is necessary in this case. . . .").

162. *See* Boumediene v. Bush, 553 U.S. 723, 766 (2008) (establishing a three-factor test).

163. *Ali II*, 71 M.J. at 269 n.25 (remarking "'[t]hat the petitioners in [*Covert*] were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States.'" (quoting Boumediene v. Bush, 553 U.S. 723, 760 (2008))).

164. *See Boumediene*, 553 U.S. at 766 (determining citizenship to be a relevant factor); *Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *4 (E.D. Va. Mar. 30, 2011) (describing citizenship as a relevant factor in nexus cases).

165. *Boumediene*, 553 U.S. at 766.

166. *See* Petition for Writ of Certiorari, *supra* note 25, at 29–30 (describing the majority opinion in *Ali* as having failed to address all of the *Boumediene* factors).

167. U.S. CONST. amends. V, VI.

168. *See Ali II*, 71 M.J. at 276 (Baker, C.J., concurring) (describing the specific protections sought by Ali, including grand jury indictment, an independent judge, and trial by jury).

interplay between *Verdugo-Urquidez* and *Boumediene* within the military context.[169]

B. Aftermath of Ali

Although Ali's case was unique,[170] and its result was likely correct,[171] the decision creates concerns as to whether future foreign national contractors charged under the UCMJ can claim Fifth or Sixth Amendment[172] protections beyond the specific protections sought by Ali.[173] Furthermore, although the substantial connection and *Boumediene* tests may likely be reconciled within the civilian context,[174] the territorial constraint of the substantial connection test,[175] along with the practical hiring realities of foreign national military contractors,[176] prevents any meaningful analysis of a foreign national's connection with the United States and makes reconciliation unlikely within the military context.[177]

1. Constitutional Protections Not Altered by the Military Context

The *Ali* decision may prevent future foreign national defendants charged under the UCMJ from asserting non-UCMJ protections[178] that

169. *See infra* Part III.B.2.

170. *See Ali II*, 71 M.J. at 279–80 (Effron, J., concurring) (describing the uniqueness of Ali's case given his status as a host-country national who was ineligible to be tried under the MEJA).

171. *See id.* at 277 (Baker, C.J., concurring) (agreeing with the majority's analysis that Ali's "Fifth and Sixth Amendment rights were not violated by his court-martial, but through a distinct and narrower analysis"). The result was likely correct because even U.S. military personnel tried under the UCMJ are not entitled to the specific constitutional protections sought by Ali. *See id.* at 271 ("What [Ali] was not entitled to were rights extending beyond those provided to members of the Armed Forces as a matter of constitutional law.").

172. U.S. CONST. amends. V, VI.

173. *See infra* Part III.B.1.

174. *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (applying the substantial connection test and the *Boumediene* functional approach to a case involving a foreign national on a student visa).

175. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (requiring that foreign nationals "come within the territory of the United States" to receive constitutional protections).

176. *See infra* Part III.B.2.

177. *See infra* Part III.B.2.

178. Within this section, the author uses the term "non-UCMJ protections" to refer to constitutional protections derived from the Constitution and not from specific UCMJ articles.

are unaltered by the context of a military trial.[179] While similar, many UCMJ protections[180] are not identical to non-UCMJ protections.[181]

The *Ali* court's broad statement that it is "unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a non-citizen"[182] who has not satisfied the substantial connection test has been criticized as unnecessarily broad.[183] Viewed in this manner, there is a concern that the *Ali* case will prohibit future foreign national defendants tried under the UCMJ from asserting *any* Fifth or Sixth Amendment non-UCMJ protections unless they are physically within the United States or meet the substantial connection test.[184]

As a result of its overly broad conclusion, the *Ali* court may have unnecessarily closed off non-UCMJ protections, such as a void for vagueness claim,[185] which have no counterparts within the UCMJ.[186] While many UCMJ protections have comparable counterparts to non-UCMJ protections,[187] a void for vagueness claim has no comparable

179. *See, e.g.*, United States v. Moore, 58 M.J. 466, 468–69 (C.A.A.F. 2003) (analyzing whether an order given to a service member was unconstitutionally vague in violation of the service member's Fifth Amendment due process rights).

180. Within this section, the author uses the term "UCMJ protections" to refer to due process protections that are specifically listed within the UCMJ.

181. *See* United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005) (noting that "an appellant's constitutional due process right to a speedy post-trial review, [is] a right separate and distinct from the [the UCMJ-based] 'sentence appropriateness' review under Article 66"); John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 751–52 (2010) (discussing the scope by which courts-martial have fewer protections than civilian trials).

182. *Ali II*, 71 M.J. 256, 268 (C.A.A.F. 2012).

183. *See id.* at 276–77 (Baker, C.J., concurring) (criticizing the majority's opinion as "relying on an expansive theory"); *id.* at 279 (Effron, J., concurring) (criticizing the majority's opinion as affirming "on grounds broader than necessary for the resolution of [the] case").

184. *See id.* at 277 (Baker, C.J., concurring) (agreeing with the majority's result, but on different and narrower grounds).

185. *See* Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (citations omitted).

186. *See* Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946 (2006 & Supp. V 2012). The author credits Captain Chad M. Fisher for giving him the idea to utilize a void for vagueness claim. Email from Chad M. Fisher, U.S. Army Judge Advocate, Gov't Appellate Div., to author (Sept. 21, 2012, 9:52 EST) (on file with author).

187. *See, e.g.*, United States v. Burrell, 13 M.J. 437, 440 (C.A.A.F. 1982) (addressing the distinction between the UCMJ speedy trial provision and the Sixth Amendment speedy trial provision).

counterpart and derives its authority directly from the Fifth Amendment.[188]

Furthermore, unlike the specific non-UCMJ protections sought by Ali,[189] which are not granted to *any* persons tried under the UCMJ,[190] a military trial does not prevent a defendant from asserting a void for vagueness claim.[191] Therefore, the court may have unnecessarily closed off constitutional protections with no UCMJ equivalents and which are distinguishable from the specific protections claimed by Ali.[192] In addition to *Ali's* possible future effect on non-UCMJ protections, reconciling the substantial connection test with *Boumediene* within the military context is also problematic.[193]

2. Searching for *Boumediene*

The hiring methods of many foreign national military contractors[194] raise concerns not present within the civilian context; namely, a substantial number of foreign national military contractors are not (and likely will never be) physically located within the United States for a significant amount of time.[195] Although *Ibrahim* represents the first case to combine the substantial connection test with *Boumediene's* practical emphasis,[196] it is distinguishable by the fact that alien residents on

188. *See* United States v. Moore, 58 M.J. 466, 469 (C.A.A.F. 2003) (analyzing whether an order given to a service member was unconstitutionally vague in violation of the service member's Fifth Amendment due process rights).

189. *See Ali II*, 71 M.J. 256, 276 (C.A.A.F. 2012) (Baker, C.J., concurring) (describing the specific protections sought by Ali, including grand jury indictment, an independent judge, and trial by jury).

190. *See id.* at 271 (Baker, C.J., concurring) ("What [Ali] was not entitled to were rights extending beyond those provided to members of the Armed Forces as a matter of constitutional law.").

191. *See, e.g.*, United States v. Pope, 63 M.J. 68, 73 (C.A.A.F. 2012) (discussing a service member's challenge that an Air Force regulation violated his due process rights because it was unconstitutionally vague).

192. *See Ali II*, 71 M.J. at 268 (phrasing its finding as a blanket prohibition against allowing foreign nationals that do not meet the substantial connection test from asserting any Fifth or Sixth Amendment claims).

193. *See infra* Part III.B.2.

194. *See* Sarah Stillman, *The Invisible Army*, NEW YORKER (June 6, 2011), http://nyr.kr/mSc5EU (discussing the common practice by which many foreign national contractors are often hired from within third-world countries).

195. *Compare* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 986 (9th Cir. 2012) (involving a foreign national on a student visa who had resided within the United States for four years while attending school), *with Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (observing that Brehm had never stepped foot within the United States before his trial).

196. *See Ibrahim*, 669 F.3d at 997 (applying both the *Boumediene* functional approach and the substantial connection test to analyze a foreign national defendant's First and Fifth Amendment claims).

student visas are purposefully located within the territorial boundaries of the United States due to their attendance at American schools.[197] Indeed, the *Ibrahim* court used the fact that the student attended Stanford for four years as the basis for why she satisfied the substantial connection test.[198] Unlike foreign nationals on student visas, the majority of foreign nationals that serve with or accompany U.S. Armed Forces never step foot within the United States.[199]

The territorial presence requirement[200] of the substantial connection test is an issue because the modern-day hiring practices of foreign national military contractors involve hiring many of these workers directly from foreign countries.[201] Thus, the likelihood that these workers will ever step foot in the territorial confines of the United States to satisfy the substantial connection test is unlikely.[202] Additionally, a substantial number[203] of these workers are host-country nationals.[204] This is relevant because host-country nationals are not eligible to be tried under the MEJA[205] and therefore, like Ali, would be tried under the UCMJ.[206]

Even the few foreign nationals who are lucky enough to come within the United States are still unlikely to satisfy the territorial requirement of the substantial connection test.[207] Similar to the trip taken by Ali, these visits usually occur only to conduct pre-deployment training for a short period of time.[208] Given the territorial focus of

197. *See, e.g.*, *id.* at 986 (describing the foreign national student who attended Stanford for four years).

198. *Id.* at 997.

199. *See, e.g.*, *Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (noting that prior to his trial, Brehm had never been within the United States).

200. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (requiring that foreign nationals "come within the territory of the United States" to receive constitutional protections).

201. *See Stillman*, *supra* note 194 (discussing the common practice by which American companies sub-contract military support contracts to recruitment agencies located in third-world nations and also noting that over 70,000 third-country nationals work on behalf of U.S. Armed Forces in Iraq and Afghanistan).

202. *See, e.g.*, *Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (noting that prior to his trial, Brehm had never been within the United States).

203. *See* David Isenberg, *Contactors in War Zones: Not Exactly "Contracting,"* TIME (Oct. 9, 2012), http://ti.me/VVpHzP (remarking that out of the approximately 137,000 contractors working within U.S. Central Command, 50,560 were host-country nationals).

204. The author uses the term "host-country nationals" to refer to foreign national military contractors who are citizens of the nation in which they are employed. For example, Ali was an Iraqi citizen who was employed in Iraq while supporting U.S. Armed Forces as an interpreter. *Ali II*, 71 M.J. 256, 259 (C.A.A.F. 2012).

205. *See* 18 U.S.C. § 3267(1)(C) (2006).

206. *Ali II*, 71 M.J. at 258.

207. *See, e.g.*, *id.* at 268 (finding that Ali did not satisfy the substantial connection test despite his trip to the United States).

208. *Id.* (referencing Ali's "brief predeployment training at Fort Benning, Georgia").

Verdugo-Urquidez, this brief amount of time is unlikely to qualify as a substantial connection.[209]

Therefore, despite the significant contributions many foreign national military contractors have made for the benefit of the United States,[210] a rigid application of the substantial connection test prevents any meaningful consideration of the full scope of these acts.[211] This dominance of formalism over practicality directly frustrates the functional approach rationale of *Boumediene*.[212] Thus, the *Ibrahim* court's hybrid approach may not be a workable solution within the military context.[213]

Given the interaction and similar purposes of the jurisdictional sufficient nexus factors as related to the substantial connection and *Boumediene* constitutional protections tests, a consideration of sufficient nexus factors, in addition to the *Boumediene* factors, could serve as a suitable proxy for the substantial connection test in light of the problems that the substantial connection test poses within the military context.[214]

C. *Intersection Between the Sufficient Nexus, Substantial Connection, and* Boumediene *Tests*

While jurisdiction is distinct from whether a foreign national is entitled to other constitutional protections,[215] an analysis of both issues highlights the close fluidity between the two frameworks.[216] Much like

209. *Id.* (declining to grant constitutional protections to Ali in light of his brief presence within the United States).

210. *See* Jesse Ellison, *As War Nears An End, Our Afghan Translators Are Being Left Behind*, DAILY BEAST (Oct. 21, 2012, 4:45 AM), http://thebea.st/RM5EQp (describing an incident where a host-country national combat interpreter was injured from "shrapnel from a rocket-propelled grenade" while serving on a mission with U.S. Armed Forces).

211. *See Ali II*, 71 M.J. at 268 (addressing Ali's employment in one-half sentence).

212. *See* Boumediene v. Bush, 553 U.S. 723, 764 (2008) (recognizing that the "common thread" between the Court's precedent is "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism").

213. *Compare* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 986 (9th Cir. 2012) (involving a foreign national on a student visa who had resided within the United States for four years while attending school), *with Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011) (observing that Brehm had never stepped foot within the United States before his trial).

214. *See infra* Part III.D.

215. *Compare Brehm II*, 691 F.3d 547, 549 (4th Cir. 2012) (addressing whether the application of the statute, as applied to Brehm, violated due process concerns), *with Ibrahim*, 669 F.3d at 986 (addressing whether a student foreign national could assert First and Fifth Amendment rights).

216. *See Boumediene*, 553 U.S. at 754–55 (disregarding the technical formalities of de jure sovereignty in place of a practical analysis); *Ibrahim*, 669 F.3d at 997 (disregarding the government's argument by which "any alien, no matter how great her voluntary connection with the United States, immediately loses all constitutional rights as soon as she voluntarily leaves the country"); *Brehm II*, 691 F.3d at 552–53 (disregarding

the connection concern in *Verdugo-Urquidez*, the sufficient nexus test emphasizes the relationship between the foreign national and the United States.[217] Additionally, despite the territorial emphasis of *Verdugo-Urquidez*,[218] the sufficient nexus and substantial connection tests share a common thread that unites them: fairness.[219] The sufficient nexus test is predominantly concerned with ensuring that the application of the extraterritorial statute to the defendant is not random or unfair.[220] Similarly, the substantial connection test "was an elaboration of its earlier language in *Johnson v. Eisentrager* . . . [which stated] that an alien 'is accorded a generous and ascending scale of rights as he increases his identity with our society.'"[221] Viewed in this context, a broader rationale uniting both frameworks is that the more substantial an alien's connection becomes with the United States, the fairer it is that the alien is entitled to constitutional protections and subjected to extraterritorial jurisdiction.

Likewise, there is significant interplay between the sufficient nexus and *Boumediene* tests.[222] In applying the sufficient nexus test, the *Brehm* court did not allow the territorial formalities of the military base to be dispositive of whether the application of the statute satisfied due process.[223] Similarly, *Boumediene* did not allow the territorial formalities of Guantanamo to be dispositive of whether the detainees could assert constitutional protections.[224]

Given the difficulty in reconciling *Boumediene* and *Verdugo-Urquidez* within the military context,[225] a test that applies the sufficient

the territorial formalities of the military base in favor of a practical method to analyze the scope of defendant's connection with the United States).

217. *Compare* United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990) (discussing the connection between the defendant and the United States), *with* United States v. Verdugo-Urquidez, 494 U.S 259, 271 (1990) (focusing on whether the defendant voluntarily established a substantial connection with the United States).

218. *See Verdugo-Urquidez*, 494 U.S. at 271 (requiring that foreign nationals "come within the territory of the United States" to receive constitutional protections).

219. *See id.* at 283 (Brennan, J., dissenting) (describing the concept of the mutuality principal as it relates between jurisdictional and "certain correlative rights").

220. *Davis*, 905 F.2d at 249.

221. *Ibrahim*, 669 F.3d at 995 (quoting *Verdugo-Urquidez*, 494 U.S. at 269).

222. *Compare* Boumediene v. Bush, 553 U.S. 723, 766 (2008) (listing factors to consider, including citizenship, status, location, and practicality of resolving the issue), *with Brehm I*, No. 1:11-CR-11, 2011 WL 1226088, at *4 (E.D. Va. Mar. 30, 2011) (describing relevant factors from prior nexus cases as involving citizenship, residency, location of the offense, effect of the defendant's conduct on the U.S., employment with a U.S. agency, and the "impact on significant [U.S.] interests.").

223. *See Brehm II*, 691 F.3d 547, 553 (4th Cir. 2012).

224. *See Boumediene*, 553 U.S. at 754.

225. *See supra* Part III.B.2.

nexus factors of employment and significant interests impacted,[226] in addition to the *Boumediene* three-factor test,[227] should be adopted when addressing whether a foreign national tried under the UCMJ is entitled to constitutional protections.

D. A Practical Proposal

An analysis that considers the sufficient nexus factors of employment and significant American interests impacted by a foreign national contractor's actions would serve as a "suitable proxy"[228] for the substantial connection test because the two factors would retain the connection-centric emphasis of *Verdugo-Urquidez*,[229] while also allowing for a meaningful analysis of the connection within a military context.[230] Moreover, language in *Boumediene* specifically allows for other factors to be considered in addition to those included in its three-factor test.[231]

1. Scope of Employment

A scope of employment factor could better account for the practical connection that a foreign national serving with or accompanying U.S. Armed Forces has with the United States.[232] Employment has previously been used as a relevant factor within the sufficient nexus context.[233] Furthermore, the practical emphasis of *Boumediene* would allow courts to weigh the extent to which some occupations establish a greater connection than others.[234] A job that is deemed essential to the functioning of an American military, aid, or state organization may be determined to establish a greater connection with the United States than a job that is not considered as vital.[235]

226. *See Brehm I*, 2011 WL 1226088, at *4 (describing relevant nexus factors such as employment and the "impact on significant [American] interests").

227. *See Boumediene*, 553 U.S. at 766 (establishing a three-factor test).

228. *Brehm II*, 691 F.3d at 553.

229. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have . . . developed substantial connections with this country.").

230. *See supra* Part III.B.2.

231. *See Boumediene*, 553 U.S. at 766 (stating that "*at least* three factors are relevant") (emphasis added).

232. *See Ali II*, 71 M.J. 256, 264 (C.A.A.F. 2012) ("Ali's role as [an] interpreter was integral to the mission of [the military] squad.").

233. *See* United States v. Ayesh, 762 F. Supp. 2d 832, 842 (E.D. Va. 2011).

234. *See Boumediene*, 553 U.S. at 764 ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.").

235. *See Ali I*, 70 M.J. 514, 518 (A. Ct. Crim. App. 2011) (stating that Ali's "presence as an interpreter was essential to the ability of the unit to accomplish its primary mission of training and advising the Iraqi police").

2. Significant American Interests Impacted

Addressing whether the subject matter at hand impacts significant American interests would serve as an effective factor to ensure that the connection is of a "substantial" nature,[236] rather than being of a merely "sufficient" manner.[237] Additionally, similar to its application in *Brehm*, the factor would also serve as an effective tool to allow courts to look beyond technical formalities and address the full scope of American interests affected.[238]

IV. CONCLUSION

While trying foreign national defendants under the UCMJ is rare,[239] the *Ali* decision raises broader concerns about the impact that the application of the substantial connection test may have for future foreign national defendants,[240] as well as its impact on constitutional protections not affected by the context of a military trial.[241] In light of the realities of how many of these foreign nationals come to be employed,[242] the substantial connection test, as applied within the military context, serves as a barrier that allows technicalities to dominate the practical emphasis of *Boumediene*.[243]

Foreign nationals serving with or accompanying U.S. Armed Forces deserve a full analysis of the significant contributions that many of them make for the benefit of the United States.[244] As Chief Judge Baker noted, "[S]ervice with the Armed Forces of the United States in the

236. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (addressing whether a foreign national has developed a substantial connection with the United States).

237. United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990).

238. *See Brehm II*, 691 F.3d 547, 552–53 (4th Cir. 2012) (addressing the pervasiveness of "the American influence" in place of territorial formalities).

239. *See Ali II*, 71 M.J. 256, 280 (C.A.A.F. 2012) (Effron, J., concurring) (describing the uniqueness of Ali's case given his status as a host-country national who was ineligible to be tried under the MEJA).

240. *See id.* at 268 (majority opinion) (addressing Ali's employment within a half sentence despite the majority's earlier detailed description of Ali's vital importance to U.S. military interests).

241. *See id.* at 276 (Baker, C.J., concurring) (criticizing the majority as "relying on an expansive theory"); *id.* at 279 (Effron, J., concurring) (criticizing the majority's opinion for affirming "on grounds broader than necessary for the resolution of [the] case").

242. *See* Stillman, *supra* note 194 (discussing the common practice by which many foreign national contractors are often hired from within third-world countries).

243. *Compare* Boumediene v. Bush, 553 U.S. 723, 764 (2008) ("[T]he idea [is] that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."), *with* United States v. Verdugo-Urquidez, 494 U.S 259, 271 (1990) (requiring aliens to come within the formal borders of the United States to receive constitutional protections).

244. *See* Ellison, *supra* note 210.

uniform of the United States in sustained combat is a rather substantial connection to the United States."[245]

245. *Ali II*, 71 M.J. at 278 (Baker, C.J., concurring).