

**TAKING THE WRONG ROAD:
BOUMEDIENE, TERRITORY, AND HABEAS CORPUS**

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The Supreme Court’s 2008 5-4 decision in *Boumediene v. Bush*¹ created a heated split among the Justices, but the heat was in the service of a distinction—was Guantanamo Bay enough “like” US territory that the constitutional right of habeas corpus applied to alien individuals detained there?—that should have been irrelevant to the real issues in the case. All nine Justices take as a given that habeas, at least in the case of non-citizens, has territorial limits on its application, even though at least the majority recognized that the core reason for the existence of habeas corpus may have as much or more to do with a judicial check on the executive than as an individual right.² As a result, the majority, unconvincingly, construes a relevant (if wrongly-decided) precedent, *Johnson v. Eisentrager*,³ in a way that not one out of 100 law students reading *Eisentrager* for the first time would agree with, so as to reach Guantanamo Bay—territory controlled by, but not owned by (in the sense of sovereign to), the United States.⁴

¹ 553 U.S. ___ (2008).

² See, e.g., *id.*, at ___ (“the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers”). Its location in Article I, rather than in the Bill of Rights, reinforces the notion that the privilege of the writ of habeas corpus wasn’t just intended as an individual right.

³ 339 U.S. 763 (1950).

⁴ For an example of a standard interpretation of the holding in *Johnson v. Eisentrager*, see Kathleen Sullivan & Gerald Gunther, *CONSTITUTIONAL LAW* 271 (16th edition 2007) (“The Eisentrager Court stressed that the aliens in that case could not be extended the privilege of litigation in U.S. courts because they ‘at no relevant time were 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.’”). Contrast this with the majority’s opinion in *Boumediene*, *supra*, 553 U.S., at ___: “Practical considerations weighed heavily . . . in *Johnson v. Eisentrager* The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. . . . In considering these factors the Court sought

Meanwhile, Justice Scalia’s dissent, for the four remaining Justices, focuses on an even narrower view of relevant territory, while calling the idea that habeas “jurisdiction followed the King’s officers” something that “is not credible at all.”⁵ While there *are* difficult process issues, the ability to think through them is side-tracked by a wrongheaded focus, on the part of all nine Justices, on the territorial “scope” of habeas corpus.⁶

To see how badly all nine Justices went astray in *Boumediene*, albeit following the path set for the Court by *Eisentrager*,⁷ it is necessary to understand (1) the original

to balance the constraints of military occupation with constitutional necessities. . . . The Court’s . . . determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding. . . . That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it.” Justice Scalia, in dissent, concludes (as would my hypothetical 100 law students) that “[t]his is a sheer rewriting of the case. *Eisentrager* mentioned practical concerns to be sure—but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*.” (emphasis in original). This is not to say that there are not other parts of the opinion in *Johnson v. Eisentrager* that could suggest that the Court was not crisply focused on the issue of habeas jurisdiction. See *infra*, note __.

⁵ *Boumediene v. Bush*, *supra*, 553 U.S., at __ (Scalia, J., dissenting).

⁶ It is possible to read Justice Kennedy’s opinion in *Boumediene* as undertaking this tortured reading of *Johnson v. Eisentrager* for a reason. As Justice Scalia notes, had the military seen this coming, they “surely would not have transported prisoners [to Guantanamo Bay], but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention,” *Boumediene v. Bush*, *supra*, 553 U.S., at __ (Scalia, J., dissenting). (Actually, while this might have been *legally* prudent, after the attacks of September 11, 2001, Guantanamo Bay may have offered a “impregnable fortress” location, safe from al Qaeda attacks, that other foreign military bases simply did not offer.) Given Justice Kennedy’s obvious concern with executive manipulation of “[o]ur basic charter,” *id.*, at __, he may have been attempting to make the line not quite so bright.

⁷ While *Johnson v. Eisentrager* is, correctly, read as a case about the territorial limitation on habeas for aliens, the majority is none too careful about a distinction that will be central to this piece—the *availability* of habeas versus the *substantive and procedural rights* that can be asserted in such habeas proceeding. Thus, for example, Justice Jackson’s opinion at one point states “[w]e hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States,” *Johnson v. Eisentrager*, *supra*, 339 U.S., at __. That would be a statement on the merits (e.g., rights such as the Fifth and Sixth Amendment do not apply), but its reasoning would not apply

purpose of habeas corpus—and why it is embodied in the Constitution, rather than in the Bill of Rights, (2) the distinction in the *rights involved* between citizens and aliens (and, within aliens, resident and foreign aliens), and, perhaps most importantly, (3) the source of those rights. In doing so, territory recedes as a factor and power comes to the fore. I want to take as my starting point the literalist observation of Professor Richard Epstein, “How to Complicate Habeas Corpus,” *New York Times*, June 21, 2008:

Nothing in the suspension clause distinguishes citizens from aliens. . . . If the conditions for suspending habeas corpus are identical for citizen and alien, so too should be the conditions for applying it. If citizens overseas are entitled to habeas corpus, so are aliens. Viewed this way, the court did not need to decide whether or not Guantanamo was American territory. Its ambiguous status no longer matters. *Eisentrager* disappears on originalist grounds.

to, for example, a habeas attack on the designation of *being* “an alien enemy engaged in the hostile service of a government at war with the United States.” Apparently, these German nationals did not contest that designation, and thus the further statement that “[i]t being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed,” *id.* at __, is, again, a statement about the merits—the detention was appropriate because the determinations (whether the law of war applied; whether an offense against them had been committed) were committed to the unreviewable discretion of the military tribunal. See *infra*, note __. The dissent notes this confusion, although reads the majority opinion, as have others, as a case about the issue of “[d]oes a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him?”, *id.*, at __ (Black, J., dissenting). See also Richard Fallon & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2056 (2007) (describing Justice Jackson’s opinion as “opaque” and noting that while “[m]uch of the language suggested that the federal courts categorically lacked jurisdiction over aliens detained abroad, other parts “can be read as ordering dismissal because, on the merits, the petitioners lacked any constitutional rights.” They also posit that “[a]n alternative interpretation is that since the petitioners’ constitutional rights had not been violated—possibly because they had none—the Court saw no constitutional difficulty in dismissing on jurisdictional grounds.” Fallon & Meltzer, however, favor the reading “that aliens detained abroad generally have no constitutional right to habeas” and, “so interpreted, we would regard it as both rightly decided and soundly reasoned,” *id.*).

Epstein is right, but not because of literal text (or libertarian principles) alone. Let me flesh out why, under almost any view, *Boumediene*, majority and dissent alike, took the wrong road.

(1) Habeas, properly understood, is a *process* designed to ask one question, and one question only: “Does the King (or sovereign, or executive) properly detain me?” This is a question of the proper exercise of the King’s power, utterly devoid of any substantive content (as one must look elsewhere to determine the proper scope of the King’s power). As such, it is a “right” as much (or more) of the judiciary as of the individual—and thus is one of the individual rights not in the Bill of Rights as well as one of the few jurisdictional grants to courts in the Constitution that Congress is constrained (via the “suspension” clause) in limiting or eliminating, Art. I, Sec. 9, Cl 2. Its entire meaning is exhausted by asking whether the detention of an individual by the sovereign comports with the rights of the individual bringing the habeas action. Habeas does not define those rights, it only provides the courts with a way to hold the sovereign accountable for his actions as defined by other bodies of law. Conflating them only confuses analysis.⁸

That is the reason why the habeas process is not territorially driven. It focuses on the sovereign’s power over the person detained,⁹ not over the territory of detention.

⁸ Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 988-89 (1998) (“One might confuse the absence of a right to judicial trial with the absence of a right to habeas corpus to keep executive adjudicators within their authority, but that would be a serious error”). See also Richard Fallon & Daniel Meltzer, *supra*, at 2037-40 (distinguishing between “jurisdiction,” “the substantive lawfulness of detention,” and “procedural questions”).

⁹ See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001):

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At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest. See, e.g., *Swain v. Pressley*, 430 U.S. 372, 280, n. 13 (1977); *id.*, at 385-386 (Burg-

It is a right of courts vis-à-vis the executive, and it is a right, unlike normal court jurisdiction, that Congress is constrained from touching (except in cases of suspension).¹⁰ If the King has the *power* to detain, the courts have the jurisdictional right, via the habeas petition, to inquire into the basis of that detention: Does the King have not just the power, but the right? That is why the idea that “jurisdiction follows the King’s officers,” far from being “not credible,” is, logically, at the center of the idea that motivates the “Great writ.” And that issue of power is why, at the edges, territorial “sovereignty” (or control) does, in fact, come into play. Is it the King, or is it some other authority, who in fact *controls the detention*? This is a complicated question in cases of “joint” military ventures (such as the Allies in Europe at the end of World War II, as may have been in play in *Eisentrager*, although given no role in the opinion itself), or other cases of “shared” sovereignty. If the King is not the one who, at the end of the day, does the detaining, the courts cannot well order relief (or release) by telling the

er, C.J., concurring) (noting that “the traditional Great Writ was largely a remedy against executive detention”); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“This historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”).

As a consequence, the Court went on to say, *id.* at 301-02:

In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.

See also Gerald Neuman, *supra*, at 987 (“[h]istory directs our attention to executive detention unauthorized by law as a central concern of the Suspension Clause”); *id.*, at 1022 (“[t]he fundamental purpose of a habeas corpus guarantee is to ensure that executive officials will not be left to determine the scope of their own authority to arrest and detain individuals. Not even Congress can grant them that freedom, except in times of extreme national emergency. Habeas corpus invokes the independence of the courts to ensure that individuals are detained only for reasons defined by law”).

¹⁰ For that reason, the majority’s rejection of the effort, in the Military Commissions Act of 2006, to strip habeas jurisdiction from courts (“[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”), rather than suspend the writ pursuant to Article I, Section 9, paragraph 2, was correct. See *Boumediene v. Bush*, *supra*, 553 U.S., at ___ (“MCA §7 thus effects an unconstitutional suspension of the writ”).

King to do so.¹¹ That issue is not without its own complexities (including the incentives of the King to remove habeas rights by transferring a detainee to a force that the King does not, himself, control but who is viewed as “friendly”). But those issues of manipulation are not the issues involved in any modern habeas decision, as, indeed, the King gives up enormous control through such machinations.

(2) But to say that habeas is, fundamentally, an inquiry into the King’s power to detain, itself says little: Habeas is an inquiry into the King’s authority, without *any* underlying vision of what the substance or process might be that gives the King’s detention legitimacy. As with any court action, the applicable rules (including whether appropriate process was provided) comes from other bodies of law that are asserted to apply to the person bringing the claim. It is here that there could be distinct rights be-

¹¹ A variation on this likely explains, and makes all-but-irrelevant, English case law prior to 1789. *Boumediene* discusses cases such as habeas actions against the King of England vis-à-vis the detention of individuals in places such as Scotland and Hanover—“territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover),” *id.*, at ____. These are easily explained as cases of dual “hats”: English court could examine the legality of detention by the King of England, wearing his “King of England” hat. But when he was acting pursuant to his “King of Scotland” hat, English courts lacked jurisdiction to examine the legality of his actions, just as a US court today would lack the jurisdiction to examine the legality of detention pursuant to Canadian or French authority. It has nothing to do with territory, it has to do with who is exercising the power and pursuant to which hat. When there are two separate Kings—one in England and one in Scotland—this would be obvious. It is made more obscure, perhaps, by the fact that (unlike any analogy in the United States) the King of Scotland and the King of England were one and the same person. But to treat this as a territorial issue, rather than a power issue, only obfuscates things—this is less a consequence of “prudential barriers,” as the *Boumediene* majority puts it, as it is of the idea of parallel authority of the courts and the King. And while Justice Scalia seems to recognize this point of two “separate” sovereigns even if one person—“the writ has never extended to Scotland, which, although united to England when James I succeeded to the English throne in 1603, *was considered a foreign dominion under a different Crown*” (emphasis added), *id.*, at ____ (Scalia, J., dissenting)—he does not take this point to its logical conclusion: The English courts lacked jurisdiction over this “different Crown” not because of territory, but because the examination would be into the power held by the King of Scotland, not by the King of England.

tween citizens, resident aliens, and non-resident aliens that arise both out of status and out of the basis for detention.¹²

(3) Citizens have the rights provided by the Constitution, including the Bill of Rights, as well as statutory rights enacted by Congress and other rights (such as treaties or rights recognized by the law of nations).¹³ If the executive detains a citizen, he should be required to demonstrate compliance with those underlying substantive rights—and that proposition no longer appears in the slightest controversial.¹⁴

The constitutional rights of aliens, whether resident or foreign, are not always the same. Citizens have many constitutional rights (*e.g.*, voting) not provided to aliens, whether resident or nonresident. Resident aliens, as recognized in *Johnson v. Eisen-*

¹² The Court made precisely this distinction in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), holding, first, that “[a]n alien immigrant, prevented from landing . . . and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful,” but, second, since on immigration “the final determination of [relevant] facts may be entrusted by congress to executive officers,” who become “the sole and exclusive judge of the existence of those facts,” then “the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.” Thus, habeas was available, but the substantive and procedural rights within it were vanishingly small; that being so, due process was satisfied and the habeas action was dismissed, not for lack of jurisdiction but for lack of cause.

¹³ See US Constitution, Art. I, Sec. 8, Cl. 10 (recognition of the law of nations). The law of war, discussed below, is a subset of the law of nations, and recognized by Congress pursuant to articles of war or treaties and conventions. See *Ex Parte Quirin*, 317 U.S. 1, 27 (1942).

¹⁴ While earlier opinions suggested that these rights abroad *might* be less than in the United States, see *In re Ross*, 140 U.S. 453 (1911), the continuing vitality of that decision is problematic after *Reid v. Covert*, 354 U.S. 1 (1954). As all the Justices in *Boumediene* seem to accept the idea that habeas would run to citizens abroad. See, *e.g.*, Justice Scalia: “the writ of habeas corpus *does* run abroad for the benefit of United States citizens,” *Boumediene v. Bush*, *supra*, 553 U.S., at ___ (Scalia, J., dissenting; emphasis in original). See also Richard Fallon & Daniel Meltzer, *supra*, at 2053 (“There is little doubt today that some federal district court has statutory jurisdiction to review the lawfulness of the detention of citizens held abroad”). This is obviously correct because, unless one recognized a “citizen” exception to the territorial application of habeas expressed in *Eisentrager* and *Boumediene*, the constitutional rights found to apply to spouses of US military overseas in *Reid v. Covert* could be circumvented by simply trying, and detaining, the citizen on the overseas military base. As I argue below, it is far easier—and logical—to focus on power, rather than territory (with the inevitable resulting need for further exceptions to deal with our fundamental concepts of fairness to citizens).

trager, are nonetheless accorded many of the constitutional rights of citizens, albeit not all. But focusing on differing rights of voting or deportation (for example), which may turn on citizenship, confuse the issue when criminal proceedings or rights of “enemy combatants”¹⁵ are at play. To be sure, some *pre-trial* rights associated with criminal proceedings may be limited to citizens, or to aliens within the United States, such as the conclusion of the Court regarding Fourth Amendment search and seizure in the 1990 case of *United States v. Verdugo-Urquidez*.¹⁶ But that is a far cry from saying that the government can detain a nonresident alien abroad, who is not subject to the law of war, for violations of our criminal laws *without* bringing criminal charges and without any opportunity for a court to intervene.

To see this, consider the status of a nonresident alien who violates the criminal laws of the United States. He masterminds, or funds, the murder of a US citizen or the blowing up of a building such as the government building in Oklahoma City—criminal acts under applicable US laws. But he is not a member of any broader terrorist network, and he is thus not an enemy “combatant” (as members of the al Qaeda network at

¹⁵ Some have concluded that enemy combatants is a status *exclusively* applicable to non-citizens. Citizens who engage in war against the United States can (and, under this view, must), instead, be prosecuted for the crime of treason. See *Hamdi v. Rumsfeld*, 542 U.S. 507, at 554, 572 (2004) (Scalia, J., dissenting). This is, arguably, the holding of *Ex Parte Milligan*, 71 U.S. 2 (1866), as well, although the Court brushes by that in *Ex parte Quirin*, *supra*, 317 U.S., at __ (Milligan, unlike Haupt (a citizen involved in the *Quirin* case), “was not an enemy belligerent”).

¹⁶ 494 U.S. 259 (1990) (holding the Fourth Amendment did not apply to searches by US officials of the homes of non-resident aliens in Mexico). *Verdugo-Urquidez* relied on *Eisentrager*, not on the reach of habeas but rather for the proposition that the Fifth Amendment protections did not adhere to nonresident alien enemy combatants, *id.*, at 269. The question of the applicability of the Bill of Rights—rights focused on the individual—to non-citizens is complex, but it is a distinct question than the issue of the reach of habeas corpus.

least arguably are) under the law of war.¹⁷ The law of war is irrelevant; if the United States has the authority to detain him, it is pursuant to our own criminal laws. There is no doubt that he, like a citizen or a resident alien, can be tried for his crimes—and, if tried, is entitled to all of the trial rights of a criminal defendant, which turn not on citi-

¹⁷ The application of the law of wars to terrorist activities is uncertain, as its written codification was not produced with such activity in mind. Rather, it contemplated basically three types of armed conflict: conflicts between nations, conflicts between a nation and a liberation movement, and conflicts between a state and well-organized insurgencies. Article 2 of the Geneva Convention dealing with prisoners of war (“Convention (III) relative to the Treatment of Prisoners of War”) applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” as well as “to all cases of partial or total occupation of the territory of a High Contracting Party.” <http://www.unhcr.ch/html/menu3/b/91.htm>. This fits better in, say, Afghanistan (during the regime of the Taliban) or Iraq than for alleged members of the al Qaeda network picked up elsewhere. A Congressional report tries to draw the line as follows:

The law of war may be applied only to acts that are part of an “armed conflict.” A terrorist act is not seen to be an act of war unless it is part of a broader campaign of violence directed against the state. Where terrorist acts amount to no more than “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence,” the Hague and Geneva Conventions do not apply. Instead, peacetime domestic criminal laws and international conventions aimed at the repression of terrorism would come into play, obligating states parties to the agreements to try or extradite those believed responsible.

CRS Report for Congress, “Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions” 10-11 (2001). See also M. Ghandi, “Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals,” ISIL YEAR BOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html> (“The common article 3 is applicable to civil wars and at the same time it is not applicable either to civil commotion or to the low intensity armed rebellion. It does not also apply to the guerrilla warfare tactics of terrorist groups”). A discussion of these complexities can be found in Steven Ratner, “Re-thinking the Geneva Conventions,” January 30, 2003, at <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>.

President Bush, in 2002, “determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war,” see <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>. He did, otherwise, determine that the Geneva Conventions applied to the Taliban but not to al Qaeda, and that the Taliban were unlawful combatants, not prisoners of war under Article 4 of the Third Geneva Convention. http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf. The non-application of common Article 3 to the Taliban was rejected by the Supreme Court in *Hamden v. Rumsfeld*, 548 U.S. ___ (2004). Congress responded, in the Military Commissions Act of 2006, by deeming a military commission to be a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions,” and then providing that alien unlawful enemy combatants subject to trial by these military commissions cannot “invoke the Geneva Conventions as a source of rights.”

zenship or territory, but on the nature of a criminal conviction sought by our government.¹⁸

Of course, the nonresident alien has to be caught and brought to the United States, through extradition or some other process, and thus ultimately necessarily enters the “territory” of the United States, but that is for the purposes of holding the criminal trial pursuant to which the government hopes to convict, and imprison, the nonresident alien according to the valid laws of our country. If the government (that is, the executive branch) were, instead, to try to detain that individual outside of the United States, without bringing him to trial, or were to try him for his statutory crimes by a military tribunal overseas,¹⁹ it should be obvious that he would have the “privilege” of a habeas corpus action to require the government to try him (via a civilian Article III court) or release him. Keeping him outside of the United States should not change the nature of the government’s responsibilities. The government cannot circumvent the rights the individual would so clearly hold in any Article III criminal trial by refusing to bring the person to trial, and habeas makes courts the guardian of that limitation on government. Since habeas runs only to officials of the United States, it is, of course, central to this that our government, and not some foreign entity, do the detention, and

¹⁸ *United States v. Verdugo-Urquidez*, supra, 494 U.S., at 278 (Kennedy, J., concurring) (“[t]he United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution”).

¹⁹ Again, the individual in question is not subject to the law of war, nor otherwise associated with a military presence overseas, cf., *Reid v. Covert*, supra, 340 U.S. 1, so there is no plausible basis for a trial for violation of a US criminal statute in front of a military tribunal.

have the power of release—but that, again, goes ultimately to power over the *person*, not *territory*.²⁰

Once this point is accepted with respect to mine-run criminal defendants, untouched by the law of war, the idea of “territory” as a touchstone of habeas corpus has been revealed to be bogus and there is no reason why the *territorial* applicability of habeas corpus should be any different when the nonresident alien is held as an enemy combatant. To be sure, the *substantive* and *procedural* rights are different (assuming the government does not want to try the person under United States criminal statutes), and are given, at least in the first instance, by the law of war not by the Constitution, and there may be some necessary practical adjustments,²¹ but the right to contest the detention or conviction under the law of war still runs to the legitimacy of the exercise of power by the sovereign, and is thus reachable by habeas.

(4) At bottom, the Justices themselves ironically reveal a discomfort with territory alone as the touchstone of the application of habeas corpus. When it comes to the rights of *citizens*, the implications of the territorial approach—in which the executive could detain citizens outside of the United States for criminal violations without the applica-

²⁰ The appropriate outcome of this hypothetical situation seems obvious to me, and is an important starting-point before turning to the cases of alleged enemy combatants. That there is a paucity of habeas cases involving nonresident aliens accused of non-war-related criminal offenses against the United States, turns on the fact that the government relies on extradition, following foreign seizure, rather than direct seizure by the United States, of nonresident aliens for a whole host of reasons, not the least of which is respecting the sovereignty of and treaties with foreign nations. That the executive, in fact, does not seize and detain in foreign countries nonresident aliens sought for violation of US laws, does not diminish the value of the consideration of the application of habeas in the counterfactual hypothetical of such a seizure and detention. That is, if a foreign country didn’t care, and our executive therefore acted to seize and detain in that country, would our judiciary, upon petition by the detainee, be without jurisdiction to inquire into the legality of the executive’s actions?

²¹ See *Johnson v. Eisentrager*, *supra*, 339 U.S., at ___ (Black, J., dissenting).

tion of habeas—seems (for good and sufficient reasons) unpalatable. Justice Scalia’s answer is that, vis-à-vis citizens, habeas corpus “changed” when placed in our Constitution, since the nature of the Constitution was a “bottoms-up” concept arising from the consent of the governed—citizens. He writes, in *Boumediene*: “The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government.”²² Justice Scalia does not point to any evidence that the drafters intended this “change” from the traditional understanding of habeas—but it is a change made necessary by the fixation on the idea that habeas is territorially-hedged and by the obvious desire to conclude “that the writ of habeas corpus *does* run abroad for the benefit of United States citizens.”

As I have tried to demonstrate, properly understood, the writ was limited by the reach of power of the King, not by territory, and thus needed no “expansion” for the protection of citizens when placed in the Constitution. Just as importantly, if one is going to create a “new” role for habeas by its adoption in the Constitution because of the fundamental nature of that document, why stop with the nature of the government’s relationship to the governed? In other words, if one is going to “expand” the conception of the writ as it existed in England in 1789 so as to protect citizens because such an expansion is obviously related to the underlying conception of our Constitution, why not similarly “expand” the conception of the writ in terms of territory because of the clear

²² *Boumediene v. Bush*, *supra*, 553 U.S., at ___ (Scalia, J., dissenting).

concern, and constitutional structure, about separation of, and limitations on, powers? The second expansion, as a matter of the “nature” of the Constitution, seems just as plausible as the first.

Finally, as I suggested above, if we focus not on nonresident alien enemy combatants, but on nonresident aliens, not subject to the law of war, charged with violations of US criminal laws, the idea that the executive could detain them indefinitely, if outside the United States, and never subject them to an Article III criminal trial, is an extraordinary abdication of the judicial check on the executive, but one that is necessary in *any* territory (rather than power)-based view of habeas, whether that of Justice Scalia or that of the *Boumediene* majority. It, like the clock that strikes thirteen, is not only the wrong result, but casts doubt on all that came before it: One reaches these unpalatable anomalies only by assuming that the reach of habeas was limited by territory, not by power, in the first place.

It is the case that the procedural (and substantive) rights such enemy combatants have are complex and somewhat murky—but that is because they are not fleshed out, as they are in the case of criminal proceedings, by our Constitution and laws but, rather, derive, in the first instance, from the law of war. The relevant rules for the detention, and/or conviction, of foreign aliens are not set by the Constitution, but by Congressional statutes (if and when relevant), treaties entered into by the US, and the law of nations (either through treaties, other enactments of Congress, or, possibly, “funda-

mental” international laws of civilized nations).²³ Generally speaking, those are encompassed today by the Geneva Conventions, as filled in by (and reflecting) the law of war.

Here, again speaking generally, the most important and relevant category (putting aside aliens not engaged in combat or otherwise specifically targeted by US laws) is that of “enemy combatants,” which come in two flavors. The first consist of *lawful* enemy combatants—think of Nazi soldiers during World War II. Classically, these combatants wear uniforms, fight for governments with whom we are engaged in armed conflict, and comply with the applicable law of war.²⁴ When captured, the law of

²³ This statement needs to be qualified by some of the discussion in *Boumediene* and its reliance on the Constitution, not on the law of war (including common Article 3 of the Geneva Conventions). While *Hamdan v. Rumsfeld*, *supra*, 548 U.S., at ___, relied on the incompatibility between military tribunal proceedings that had been authorized and common Article 3 of the Geneva Conventions, that path had been blocked by the Military Commissions Act of 2006, which “deemed” military commissions to be a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions,” and went further to say that alien enemy combatants subject to trial by these commissions cannot “invoke the Geneva Conventions as a source of rights.” With that path blocked, the *Boumediene* majority, without precisely specifying what its source of rights was, seems to have expansively interpreted the due process rights (of citizens) in the plurality opinion in *Hamdi* to be a constitutional “substitute” for these Geneva Conventions rights in cases of alien enemy combatants.

²⁴ Article 4 of the Third Geneva Convention (“relative to the Treatment of Prisoners of War”) defines “prisoners of war” for present purposes as:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

war commonsensically provides that they can be detained for the duration of the conflict—so they do not go back and continue the fight against the detaining country—but they violate neither domestic laws nor the law of war.²⁵ Their detention is not pursuant to criminal authority, but rather due to their status and the overriding nature that frames the law of war. For them, the only conceivably relevant habeas questions are (a) whether they were, in fact, lawful enemy combatants (i.e., soldiers or the equivalent) and (b) whether the conflict continues. And the processes (or lack thereof) for determining that spring not from the Constitution, at least in the first instance, but from the law of war.

The lot is different for *unlawful* enemy combatants, because they are outside the protections of soldiers on the field of battle provided by the law of war. Spies, saboteurs, combatants after peace has been declared by a government, and others whose actions place them outside the law of war, can not only be held for the duration—as are lawful enemy combatants—but can also be convicted of crimes against the law of war. For them, the legal thicket is at its most complex, for one must determine whether they were unlawful (rather than lawful) and, then, the substantive correctness of a conviction for the violation of an underlying law of war (or statutory right).²⁶ (Thus, *Eisen-*

(As noted earlier, *supra*, note __, these categories fit better members of a terrorist organization fighting alongside Afghanistan’s Taliban government than it does to those who are detained for their involvement in the attacks of September 11, 2001.)

²⁵ Under the Third Geneva Convention, they are referred to as “prisoners of war,” and they “shall be released and repatriated without delay after the cessation of active hostilities,” Article 118. They can be tried and convicted for crimes while being held as prisoners of war, but “only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,” Article 102.

²⁶ See Article 5 of the Third Geneva Convention (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the

trager was correct to note that the petitioners in that case did not contest that they were enemy combatants, but as they were not just detained for the duration (since the war against Germany was over) but, rather, were convicted for “violating laws of war,” the issue is not the simple one of the *detention* of enemy combatants but the trial and conviction of *unlawful* enemy combatants for violations of the law of war. *Eisentrager’s* comment that the petitioners were, concededly, enemy combatants, does not answer the substantive role of habeas in cases of conviction (for unlawful activity) rather than detention (which holds for lawful and unlawful combatants alike.)

* * *

categories enumerated in Article 4 [i.e., prisoner of war status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”). This “competent tribunal” was designed to be a tribunal of more than one person, so that decisions “which might have the gravest consequences should not be left to a single person,” COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77, [HTTP://WWW.ICRC.ORG/IHL.NSF/COM/375-590008?OPENDOCUMENT](http://www.icrc.org/ihl.nsf/com/375-590008?opendocument). Unlawful enemy combatants—who, by their status are *not* prisoners of war under the Third Geneva Convention—seem to have the right, in addition to the Article 5 right, “to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated” if he “is to be tried by that Party for an offence arising out of the hostilities,” Article 45(2) of Protocol I Additional to the Geneva Conventions of 1949 (1977), <http://www.unhcr.ch/html/menu3/b/93.htm>. (The United States is not a signatory to Protocol I, but largely because of concerns about Article 44’s prisoner of war status for some liberation fighters without uniform, <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM>. The United States has not questioned the applicability of Article 45(2).) See Madeline Morris, “Taking Liberties: The Personal Jurisdiction of Military Commissions,” Duke Law School Public Law & Legal Theory Paper No. 215 (August 9, 2008), at 14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1222622 (“In sum, under the international law of war—endorsed and adopted as such by the US—all combatants held by enemy forces are presumed to be lawful combatants, entitled to POW rights and protections, from the time they are taken into captivity. That presumption may be rebutted only through a determination of unlawful combatant status by a competent tribunal composed of more than one person. A combatant who (pursuant to a competent tribunal determination) is held as a non-POW, and who is to be tried for crimes arising from the hostilities has the right to assert POW status and to have a *de novo* judicial adjudication of combatant status, separate and distinct from the status determination earlier made by a competent tribunal.”). Note that if the issue is detention *only* for the duration of the conflict, the designation—lawful (prisoner of war) or unlawful—does not matter (at least, as between the two), and hence would not necessarily trigger the “competent tribunal” process of Article 5 of the Third Geneva Convention, *unless* issues of distinct treatment of lawful versus unlawful enemy combatants were also at issue. Compare common Article 3 to Parts II & III (Articles 12 through 108, applicable to prisoners of war) of the Third Geneva Convention.

Every one of these categories of individuals has habeas rights, if held by or pursuant to executive power (and thus within the jurisdictional power of US courts to order the release). But the extent of their habeas rights varies dramatically, having *nothing* to do with *where* the executive detains them, but with their underlying substantive and procedural rights. Nonresident aliens whom the government wishes to prosecute under our domestic criminal laws have substantive rights defined by those laws and well-recognized procedural rights crafted for the carrying out of criminal trials; that's my Oklahoma City analogy.

Lawful enemy combatants (that is, prisoners of war), particularly during a time of war, have almost nothing to contest: Were they, in fact, captured on a field of battle at a time when they could be reasonably identified as an enemy combatant? (Wearing an enemy uniform would, itself, be a per se reason to hold an individual as an enemy combatant.²⁷) Moreover, the reality is that the decisions to hold such POWs are made by people far down the chain of command, rather than anyone in the upper echelons of the executive branch. During armed conflict, the idea that a conclusive presumption (or unreviewable discretion) is given to the decision of field commanders in the detention and retention of POWs, is a nod both to the realities of the battlefield and to the almost impossible proof difficulties of demonstrating otherwise. This “process” is minimal to nonexistent, and derives from the source of the substantive right to detain—the law of war. (In that context, it is analogous to the cases that note that the process due is con-

²⁷ This is not to say that there could never be error—such as innocent victims placed in uniforms by an enemy—but that these rare cases of error would be left, under the law of war, to be sorted out by the military on the scene. That sorting, appropriate in a time of war, is all the process that is due, see *Nishimura Ekiu v. United States*, *supra*, 142 U.S. 651.

tained within the substantive right being defined.²⁸) The context demands the summary conclusions. That we don't have habeas actions involving POWs during a time of war against an identified government is not only not surprising, but all but inevitable—and has nothing at all to do with *where* they were held. Any one attempting a habeas petition under such circumstances should have it dismissed on its face, not because there is not a habeas right but because the law of war almost surely provides that the process required for detention under these circumstances is vanishingly small.

But those pragmatic reasons for the classification of POWs during times of armed conflict, do not themselves address the cases of those who are detained because they are *unlawful* enemy combatants—fighting in violation of the law of war. Here, the possibility of error is much higher: Absent (often) a uniform, and absent a government against which war has been declared, the possibility of mistake is much greater. Moreover, unlawful enemy combatants may not only be detained for the duration (in that respect, just like lawful enemy combatants), they (unlike lawful enemy combatants) can be tried for violations of the law of war, where the consequences can rise to death rather than detention for the duration. Anyone detained as an *unlawful* enemy combatant has the identical habeas right to show that the reason for detention—in this case, violation of the law of war—is incorrect. And since the pragmatic reasons for deferring to the soldiers in the field with respect to POWs are less intense and the consequences

²⁸ Cf. *Arnett v. Kennedy*, 416 U.S. 134 (1974). While this idea has proven to have little play when US substantive laws are involved, it may have considerable traction when the rights are given by the law of war, rather than by Congressional enactment. See also *Nishimura Ekiu v. United States, supra*, 142 U.S. 651.

of error so much greater, the “process” due is correspondingly greater.²⁹ And it is greater still if the issue is not *detention* for the duration (in which there is no distinction between lawful and unlawful enemy combatants) but *trial and conviction* for *violations* of the law of war.

To be sure, we have little guidance about what those procedures should be, because of the paucity of cases in which (a) the status and/or the violation was contested and (b) habeas wasn’t (incorrectly) territorially circumscribed. *That* set of issues—how to sort out how to determine those rights (including the required procedures, as provided by the law of war)—rather than the territorial reach of habeas, should be at the center of the inquiry in cases such as *Boumediene*. It is complicated,³⁰ but aided enormously by the proper focus. All nine Justices in *Boumediene*, by focusing on territorial control, as well as these issues, simply confuse things.

* * *

One could say this is missing the forest for the trees, as *Boumediene* did, in fact, focus precisely on what are the appropriate procedures to apply in a habeas action, which is, as I have concluded, where the action should be. But, under the reasoning of the majority as well as the dissent, one gets access to those procedures *only* in a case where a habeas action would lie, and the danger of *Boumediene* is that, by focusing on control over territory, rather than control over the petitioning individual, it suggests

²⁹ See *supra*, note ____.

³⁰ At least some of the complexities related to the law of wars are explored in the material cited, *supra*, notes __ & __. Added to that is the layer of rights derived from the Constitution, not from the law of war, discussed in both *Hamdi v. Rumsfeld*, *supra*, 542 U.S. 507, and in *Boumediene v. Bush*, *supra*, 553 U.S. ____.

there are wide swaths of the world in which the government may detain purported enemy combatants, and convict purported unlawful enemy combatants for violations of the law of war, with absolutely *no* enforceable rights. Habeas does not need to be suspended; it simply never applies. The executive, at least unless constrained by Congress, can do what he wants in terms of the detention and conviction for violations of the law of war (or any other source of crimes) of nonresident aliens outside of the territory “of” the United States. The majority and the dissent differ trivially on what that territory encompasses, but they both agree that it is limited and, with it, so, too, the right of habeas is likewise limited. That elimination of the judiciary’s check on the executive—the core role of habeas—is the core danger of *Boumediene*, and in this respect, the majority’s reasoning is only marginally “better” than that of the dissent.³¹

There is a second danger to the opinions in *Boumediene* as well. While the difficult issues reside in the process to be given one who challenges detention as an enemy combatant and/or conviction as an unlawful enemy combatant for violations of the law of war, one other red herring should be avoided as well. Despite the pages given to the issue by the majority and the dissenters in *Boumediene*, an issue should not be whether habeas is unavailable because Congress has provided an “adequate” *substitute* for habeas by statute.³² Absent the suspension of habeas by the standards of the Constitution, courts have habeas jurisdiction, period. Congress can no more define what that

³¹ This, again, assumes that the majority’s opinion isn’t mangling *Eisentrager* for the purpose of making its “territorial” limit less potent than it might seem on its face. See note __, *supra*.

³² Chief Justice Roberts “alternative” dissent for the four dissenting Justices uses this approach in seeking to avoid the difficult constitutional issue raised by the territory of Guantanamo Bay, *Boumediene v. Bush*, *supra*, 553 U.S., at ___ (Roberts, C.J., dissenting). It is unsatisfactory—even if ultimately it would prove to be right as a reason for *dismissing* a habeas petition based on the adequacy of the procedures—for the reasons given in this paragraph.

jurisdiction entails than it can strip the courts of that jurisdiction, absent jumping through the hoops required by the suspension clause.

A habeas court, in the exercise of its jurisdiction, might decide not to respond to the habeas petition until the other paths of review are exhausted. And Congress might (and hopefully has or will) provide a procedure that, when followed, is deemed by a habeas court to be entirely adequate—and thus a reason to dismiss the habeas petition not for lack of jurisdiction but for lack of any ground on which to fault the legality of the detention. But in previous cases holding such alternative procedures sufficient, habeas in fact remained in place, to be invoked upon a showing that the statutory “substitute” procedures were inadequate or ineffective.³³ The issue in the habeas proceeding is whether the detention or proceeding provided complies with the process demanded by the law of war (or our Constitution), where the minimum standards are set, not by Congress, but by the law of war (or our Constitution). Congress may or may not have created adequate procedures. Whether it did is *the* issue to be tested in the habeas case—but congressional action specifying underlying process does not *eliminate* the possibility of habeas action (again, absent suspension).

Seen this way, *Eisentrager’s* reliance on territory is wrong, but the opinion in *Boumediene* is right vis-à-vis the Guantanamo Bay detainees, albeit for the wrong reasons.³⁴ A return to first principles is going to be much more satisfying than a wrong-

³³ See, e.g., *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

³⁴ To be sure, one can legitimately contest whether *Boumediene* is “right” in the sense of whether the majority is requiring too much process to satisfy, within the habeas proceeding, the rights of detainees under the applicable law of war. What I mean by saying *Boumediene* is “right” is that it is

headed, and generally pointless, focus on whether a particular parcel of land is “sovereign” to the United States, when it is without controversy that the detention is pursuant to the power and purported authority of the United States’ executive.

It is power over the person, not over the territory, that brings habeas into play. *Eisentrager* set us on the wrong path, although three Justices at that time saw, and commented upon, its error,³⁵ and its error is now compounded, despite all their disagreements, by all nine of the *Boumediene* Justices who assert that territorial dominance, rather than the legitimacy of the power of executive detention, is central to the application of the Constitution’s habeas corpus provision. The “Great writ” deserves a return to first principles in its application by getting off of the road to territory and getting on the road to power.

right to say that the Guantanamo Bay detainees have *access* to habeas corpus to raise the substantive and related procedural rights supplied by the law of war.

³⁵ *Johnson v. Eisentrager*, *supra*, 339 U.S., at ___ (Black, J., dissenting).