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INTRODUCTION

As the United States continues to prosecute its war on terrorism at home and abroad, questions will inevitably arise about the jurisdiction of the federal courts to consider challenges to military detention and interrogation overseas. In *Rasul v. Bush*, the Supreme Court declared that federal courts may entertain the claims of those detained at Guantanamo Bay, Cuba,[1] but it said little about the scope and limits of its jurisdictional holding. Reports indicate that the United States may be detaining and interrogating suspected members of al Qaeda at

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1 *See* 542 U.S. 466, 485 (2004).

locations around the world, perhaps through cooperative arrangements with other governments.[2] *Rasul's* emphasis on the degree to which the United States exercises hroad, day-to-day control over Guantanamo Bay and over the immediate custody of the detainees held there, however, leaves open the possibility that federal jurisdiction may not extend to many of these U.S. detention and interrogation centers elsewhere in the world.[3]

Questions may also arise about which federal courts have proper jurisdiction over proceedings that challenge overseas detention. In *Rumsfeld v. Padilla,* the Court declined to reach the merits of a challenge to Mr. Padilla's detention as an enemy combatant.[4] Instead, the Court concluded that Mr. Padilla should have sued in the South Carolina federal district court—the district court with territorial jurisdiction over the military official with immediate responsibility for Mr. Padilla's custody at the naval brig in which he was held.[5] While *Padilla*

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2 *See* HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM "GHOST DETAINEES" 4–6 (2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf (reporting on CIA interrogation facilities around the world and noting that friendly governments, like Pakistan, may hold suspects at the CIA's behest); Nick Childs, *CIA Accused over "Ghost Detainees,"* BBC NEWS, Sept. 9, 2004, http://news.bbc.co.uk/2/hi/americas/3643194.stm (reporting that U.S. army generals testified before a Senate committee that the United States may have detained anywhere from a couple of dozen to one hundred prisoners in secret locations, and noting that the United States failed to notify the International Committee of the Red Cross of these detentions); Ian Fisher, *Rights Group Lists 26 It Says U.S. Is Holding in Secret Abroad,* N.Y. TIMES, Dec. 2, 2005, at A6; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program,* NEW YORKER, Feb. 14, 2005, at 106 (describing the U.S. government's arrest and transportation of a Canadian citizen to a site in the Middle East where he was allegedly tortured into confessing to terrorism-related activities, and identifying Jordan, Syria, Morrocco, and Egypt as countries to which U.S. agents have sent detainees); Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light,* WASH. POST, May 11, 2004, at A1 (describing secret CIA interrogation facilities in Afghanistan, Iraq, and Qatar, and reporting that the United States has held up to 9,000 individuals overseas, mostly under military authority); Steven R. Weisman & Ian Fisher, *U.S. to Respond to Inquiries over Detentions in Europe,* N.Y. TIMES, Nov. 30, 2005, at A3. *See generally* Diane Marie Amann, *Abu Ghraib,* 153 U. PA. L. REV. 2085 (2005) (discussing how the U.S. Executive "dispersed [detainees] across the globe," *id.* at 2085, and asserting that "[p]ervasive failure to comprehend potentially applicable laws enabled the Executive to maintain [these] zones of detention," *id.* at 2087).

3 *See Rasul,* 542 U.S. at 480 (emphasizing that the United States, by virtue of its agreements with Cuba, exercises complete jurisdiction and control over Guantanamo Bay); *cf. id.* at 487 (Kennedy, J., concurring) (noting that "Guantanamo Bay is in every practical respect a United States territory, and it is far removed from any hostilities," and arguing that these factors distinguish the case from the German prison facility involved in *Johnson v. Eisentrager,* 339 U.S. 763 (1950)).

4 542 U.S. 426, 430 (2004).

5 *See id.* at 445–46, 451. Since the Court's decision came down, Padilla refiled his claim in the district court in South Carolina. Padilla v. Hanft, 389 F. Supp. 2d 678, 678 (D.S.C. 2005), *rev'd,* 423 F.3d 386 (4th Cir. 2005), *petition for cert. filed,* 74 U.S.L.W. 3275 (U.S. Oct. 25, 2005) (No. 05-533). An initial order, entitling him to release from confinement as an enemy combatant, was overturned on appeal. *See Padilla,* 423 F.3d at 397. The government's decision to indict Padilla on criminal charges may moot his challenge to his

arose from detention in the United States, the requirement that habeas petitioners name their immediate custodian[6] has long complicated the exercise of overseas jurisdiction, especially when coupled with the statutory admonition that the federal courts may exercise habeas power only "within their respective jurisdictions."[7] Congress has not incorpoated Guantanamo Bay (or other military bases and detention centers around the world) into the territory of the United States, and has not erected any court to hear claims arising from such detention centers. Therefore, the exercise of habeas jurisdiction to review detention throughout the world seems vulnerable to Justice Scalia's dissenting argument in *Rasul*—namely, that such review lacks any statutory predicate.[8]

This Article examines the limits of habeas jurisdiction in a world in which the military power of the United States has projected the nation's influence well beyond its borders.[9] The Article makes two fundamental claims. First, it argues that the federal courts do indeed possess broad authority to inquire into the legality of detention (and other military conduct) overseas, so long as the inquiry examines actions of the U.S. government. This conclusion may seem controversial at first, but it flows from a recognition that federal law structures and constrains virtually all of the actions of the nation's armed forces and intelligence services, both here and abroad.[10] The traditional role of

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detention as an enemy combatant. *See* Neil A. Lewis, *Terror Trial Hits Obstacle, Unexpectedly*, N.Y. TIMES, Dec. 1, 2005, at 30.

6 *See Padilla*, 542 U.S. at 445–46.

7 *See* 28 U.S.C. § 2241(a) (2000). On the origins of this limitation on the district courts' habeas power, see *infra* Part III.B.1.

8 *See Rasul*, 542 U.S. at 488–89, 497–500 (Scalia, J., dissenting) (criticizing the majority's conclusion as to the availability of habeas to test confinement in Guantanamo Bay as seemingly inconsistent with the jurisdictional restrictions of § 2241, and questioning how Guantanamo Bay can be considered "part of the United States for purposes of its domestic laws").

9 For a deft introduction to this issue from the perspective of conflicts of law, see Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017 (2005).

10 Although the Constitution makes the President of the United States the Commander-in-Chief, U.S. CONST. art. II, § 2, cl. 1, it authorizes Congress to make laws for the "Government and Regulation" of the armed services, U.S. CONST. art. 1, § 8, cl. 14. Unlike in England, where the Crown issued Articles of War to regulate those in military service, the power to issue such rules in the United States has always been vested in Congress. *See* Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 MIL. L. REV. 1, 25 (2005) (noting that "[t]hroughout early English history, kings promulgated codes of conduct upon which the British Articles of War were eventually based"). The Continental Congress enacted Articles of War to regulate those fighting in the Revolutionary War, and subsequent Congresses have amended and revised the Articles over the years in the exercise of their Article I powers. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 209 (Philadelphia, H.C. Carey & I. Lea 1825); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 47–48 (2d rev. ed. 1920).

the judiciary has been to confine the lawmaking and executive powers within constitutional limits, and to enforce statutory limitations on the scope of military justice and other executive action.[11] While the judicial sphere of influence over military affairs has always been quite narrow, particularly as it relates to the exercise of military power in the field of combat,[12] federal courts have long entertained legal challenges to the scope of military authority.[13] The narrowness of review in the context of overseas actions properly traces less to the absence of territorial jurisdiction than to a judicial conclusion that federal civil law places no applicable constraints on the particular military activities in question.[14]

In defending this broad conception of federal judicial power, this Article first examines cases from the British Empire. These decisions invariably assume that British law controls the exercise of British military power throughout the empire; judicial power to review military conduct follows from the idea of military submission to civilian oversight, and such oversight travels with the armed forces.[15] Close examination of U.S. cases involving habeas jurisdiction confirms that the United States holds a similar conception of judicial power in relation to military authority.[16] Despite appearances to the contrary, the Supreme Court's decision in *Johnson v. Eisentrager* did not deny the jurisdiction of the federal courts to inquire into the legality of the imprisonment of German war criminals.[17] Most tellingly, the Court considered the merits of petitioners' claim that the military tribunals in question had exceeded the scope of their lawful jurisdiction.[18] Subsequent decisions confirm the Court's willingness to inquire into the merits of overseas detention and to occasionally grant relief.[19]

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11 For accounts of the role of the civilian courts in overseeing the exercise of military authority and in preventing the application of military justice to those not properly subject to its rigors, see FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA 78–85 (1967); WINTHROP, *supra* note 10, at 885–92.

12 The Administrative Procedure Act, for example, exempts from its coverage courts martial, military commissions, and "military authority exercised in the field in time of war or in occupied territory." *See* 5 U.S.C. §§ 551(1)(F)–(G), 701(b)(1)(F)–(G) (2000).

13 *See* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975). *See generally* Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) (subjecting officers of court martial that exceeded its jurisdiction to liability in trespass). For a summary of the role of federal courts in overseeing military justice, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 727–29, 745–47 (2004).

14 *See infra* Part II.B (discussing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

15 *See infra* Part II.A.

16 *See infra* Part II.B.

17 *See Eisentrager*, 339 U.S. at 789–90.

18 *See id.*

19 *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955); Burns v. Wilson, 346 U.S. 137, 142 (1953).

After establishing the applicability of federal law, this Article considers the statutory basis for the power of federal courts to hear challenges to detention abroad. Somewhat paradoxically, it finds that territorial limits under the relevant habeas statute, 28 U.S.C. § 2241, raise genuine doubts about the federal courts' power to issue writs of habeas corpus to challenge custody overseas.[20] Rather than ignoring these territorial limits, the federal courts should conclude that the habeas statute does not apply to detention outside the territorial jurisdiction of the United States. That conclusion, however, need not bar judicial review, but should be seen as inviting actions for declaratory and injunctive relief brought on the basis of the authority conferred in 28 U.S.C. § 1331.[21]

Section 1331's familiar grant of arising-under jurisdiction provides the courts with ample authority to hear claims relating to unlawful confinement overseas, and does so without the territorial constraints that accompany the habeas statute.[22] Such a shift to nonstatutory review of overseas detention solves the territorial problem and provides a foundation for a form of detention litigation more in tune with current practice. The traditional function of the writ of habeas corpus was to require the custodian to produce the petitioner's body in court for release from confinement in the event the court ruled in the petitioner's favor.[23] The statutory restrictions on habeas authority arose from congressional concerns about the possible expense and inconvenience of transporting a habeas petitioner from one district to another to satisfy the traditional in-court production requirement.[24] To overcome that inconvenience, the modern cases often dispense with the actual issuance of the writ and the required in-court production of the petitioner, and resolve the matter on the basis of briefs and affidavits.[25] What the courts do in such cases more closely resembles litigation over an application for injunctive and declaratory relief than litigation over a traditional petition for habeas corpus.[26] Indeed, in both *Rasul* and *Hamdi v. Rumsfeld*, the

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20 *See infra* notes 184–85 and accompanying text.

21 *See infra* Part III.A.

22 *See* 28 U.S.C. § 1331 (2000).

23 *See infra* note 215 and accompanying text.

24 *See infra* notes 216–20 and accompanying text.

25 *See infra* notes 221–23 and accompanying text.

26 *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) (asserting that "law" is not "a deduction from principles of ethics or admitted axioms . . . which may or may not coincide with [courts'] decisions," but rather a "prophec[y] of what the courts will do in fact"); Clyde W. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 177 & n.12 (1960) (emphasizing the need for attention to what the courts do, and not what they say).

petitioners were not immediately released from custody despite mounting successful challenges to government detention.[27]

The suggested reliance on nonstatutory review and § 1331 to ground applications for injunctive and declaratory relief also helps to solve the frustrating problem of proper venue in overseas cases. Justice Scalia's dissenting opinion in *Rasul* noted that the majority's decision would apparently invite forum shopping by making any one of the ninety-four federal district courts a proper venue for habeas litigation.[28] Justice Kennedy's concurring opinion in *Padilla* echoed this concern and expressed his own preference for venue at a convenient center of official authority in the United States.[29] Reliance on nonstatutory review solves these venue problems by triggering the application of the venue rules of § 1391(e). Under those rules, venue lies in the district in which the government officials reside and where a substantial event giving rise to the claim occurred.[30] Such a venue rule helps to justify the traditional preference for the litigation of overseas cases in or around the nation's capital.

This Article has three Parts. Part I provides a brief overview of the Court's decisions in *Rasul* and *Padilla* and the two important jurisdictional puzzles they present. Part II takes up the question of overseas detention, looking in particular at the evolution of the common law and the decisions (habeas and otherwise) applying that law to military operations overseas. Part II also examines leading cases in the United States from the period after World War II, when issues of territorial scope first drew sustained attention. Part II shows that the courts have consistently taken a broad view of the potential application of federal law to military action, in keeping with the notion that the civilian courts must stand ready to hear challenges to the exercise of military authority. Part III investigates the puzzle of the territorial limits of the habeas statute. It concludes that these limits on federal judicial authority do not restrict the power of federal courts under

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27 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (vacating the decision below and remanding for further proceedings, and holding that Mr. Hamdi had a right to counsel on remand); Rasul v. Bush, 542 U.S. 466, 485 (2004) (reversing and remanding with directions that the district court consider the merits of petitioner's claims). Mr. Rasul remained in custody for a time after a subsequent disposition in his favor in the district court, but he was later released. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). The government also released Mr. Hamdi after negotiating a surrender of his U.S. citizenship and his return to Saudi Arabia. Joel Brinkley & Eric Lichtblau, *Held 3 Years by U.S., Saudi Goes Home,* INT'L HERALD TRIB. (London), Oct. 13, 2004, at 2, *available at* 2004 WLNR 5298182.

28 *See Rasul,* 542 U.S. at 498–99 (Scalia, J., dissenting).

29 *See* Rumsfeld v. Padilla, 542 U.S. 426, 426, 452–53 (2004) (Kennedy, J., concurring).

30 28 U.S.C. § 1391(e) (2000).

§ 1331 to hear suits for injunctive and declaratory relief against responsible federal officials in the United States.

I
FRAMING THE ISSUES AFTER *RASUL V. BUSH* AND *RUMSFELD V. PADILLA*

In the wake of the attacks of September 11, 2001, the federal government embarked on military operations overseas, both in Afghanistan and later in Iraq. As with any military conflict, the United States captured enemy soldiers—some with ties to al Qaeda—and decided to house certain of them at Guantanamo Bay for screening, interrogation, and eventual trial as enemy combatants.[31] To defend such detention, the government argued that the Supreme Court's decision in *Eisentrager* articulated a general principle that the federal courts lacked jurisdiction to review the detention of aliens captured in a shooting war overseas.[32] Although the government's litigation strategy succeeded in the lower federal courts, which agreed with its no-jurisdiction position and dismissed petitions for habeas relief,[33] the strategy failed at the Supreme Court.

In *Rasul*, the Court held that those housed at Guantanamo Bay could invoke federal judicial power,[34] delivering what some have interpreted as a stinging rebuke to the government's legal strategy in the war on terrorism.[35] Some hands were undoubtedly stung, but the decision stopped short of rejecting the government's entire submission. Writing for a five-Justice majority, Justice Stevens based his decision in large measure on the statutory rules that govern habeas jurisdiction at the district court level.[36] Justice Stevens treated *Eisentrager* as if its jurisdictional ruling had been based upon an earlier de-

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31 For an account of the capture of enemy combatants during the conflict in Afghanistan and their ultimate detention at Guantanamo Bay, see Brief for the Respondents at 3–7, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343). Of the some 10,000 individuals the government took into custody, some 650 were housed at Guantanamo Bay at the time of the *Rasul* litigation. *Id.* at 6. Decisions to detain these individuals were said to turn on field assessments of the circumstances of capture, the threat posed by the individual, and his intelligence value. *Id.* at 5. The government's stated interest in the intelligence value of the detainees raises questions under the Geneva Conventions, which prohibit both the interrogation and punishment of individuals who qualify as prisoners of war. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L. J. 367, 371–72 (2004).

32 *See* Brief for the Respondents, *supra* note 31, at 10.

33 *See* Al Odah v. United States, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *rev'd sub nom. Rasul*, 542 U.S. 466.

34 *See Rasul*, 542 U.S. at 485.

35 *See, e.g.*, Linda Greenhouse, *Justices Affirm Legal Rights of "Enemy Combatants": Ruling Applies to Those Held Either in U.S. or at Guantánamo*, N.Y. TIMES, June, 29, 2004, at A1.

36 *See Rasul*, 542 U.S. at 475–79.

cision, *Ahrens v. Clark*, as indeed it had been in part.[37] Noting that *Ahrens* itself had later been overturned in *Braden v. 30th Judicial Circuit Court*,[38] Justice Stevens concluded that the statutory basis for *Eisentrager*'s jurisdictional ruling had disappeared.[39] He also noted that, at common law, habeas had issued beyond territorial boundaries to facilitate an inquiry into the legality of detention.[40] Finally, Justice Stevens emphasized the degree to which the United States exercised control over Guantanamo Bay.[41]

Justice Scalia took issue with all three points. In the main, his opinion for three dissenting Justices focused on *Eisentrager*, and on what he termed the government's reasonable reliance on that precedent as a decision foreclosing review of the claims of alien detainees held abroad.[42] He challenged Justice Stevens's handling of the *Braden* decision, arguing that it had little real impact on the continuing vitality of *Eisentrager*.[43] In addition, he argued that habeas at common law issued abroad only for the benefit of citizens and subjects, and did not extend to aliens.[44] Justice Scalia argued that the common law history supported his vision of habeas as a tool for the review of the detention of U.S. citizens held by the federal government.[45] Finally, Justice Scalia depicted Guantanamo Bay as lying outside the sovereign territorial boundaries of the United States and treated that factor as decisive for habeas purposes.[46]

Rasul thus resolves only a relatively narrow question of judicial jurisdiction, leaving open both the many merits questions that will arise upon remand and the jurisdictional issues that may arise from detention elsewhere in the world. The government had sought a broad jurisdictional ruling, freeing it from any obligation to defend the legality of the detentions at Guantanamo Bay and elsewhere.[47] Having failed to secure such a ruling, the government must now fight the particular constitutional issues on their own terms. Litigation on remand has focused on the issues that lurked beneath the government's jurisdictional submission: the various limits on the judicial en-

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37 *See id.* at 476–77. In *Ahrens v. Clark*, the Court ruled that the habeas statute required detainees in the United States to file their petitions in the district court with territorial jurisdiction over their immediate custodian. 335 U.S. 188, 193 (1948).

38 *See* 410 U.S. 484, 496–97 (1973) (casting doubt on broad reading of *Ahrens* and permitting petitioner to pursue habeas relief outside of his district of incarceration).

39 *See Rasul*, 542 U.S. at 478–79.

40 *Id.* at 480–84.

41 *Id.* at 476, 480; *cf. id.* at 478–79 (Kennedy, J., concurring) (emphasizing the degree of U.S. control over Guantanamo Bay).

42 *See id.* at 488–89 (Scalia, J., dissenting).

43 *Id.*

44 *See id.* at 496–98, 502–05.

45 *See id.*

46 *See id.* at 503.

47 *See supra* notes 31-32 and accompanying text.

forcement of the Geneva Convention, the possibly limited extraterritorial application of Fifth Amendment due process protections, and the arguably inapplicable Sixth Amendment right to counsel.[48]

One can also predict that the *Padilla* decision may further complicate jurisdictional matters. Attorneys in New York filed the petition on Mr. Padilla's behalf after he was transferred to a brig in South Carolina for detention as an alleged enemy combatant.[49] The claims proceeded to judgment in the Southern District of New York and then to review before the Second Circuit, which invalidated the government's detention of Mr. Padilla.[50] The Supreme Court granted review to consider the legality of the enemy combatant designation, but ultimately dismissed on the ground that Mr. Padilla's lawyers filed the petition in the wrong court.[51] As the Court noted, habeas law ordinarily requires the petition to name the immediate custodian.[52] Mr. Padilla's attorneys had named Mr. Rumsfeld, the Secretary of Defense, and had based jurisdiction on the district court's ability to assert long-arm jurisdiction over him in New York.[53] Although it acknowledged that some exceptions had developed in the past, the *Padilla* Court reinvigorated the immediate-custodian requirement and the rule that district courts may entertain habeas applications only on behalf of those confined within their own territorial jurisdictions.[54]

By restating the traditional immediate-custodian and district-of-confinement requirements, the Court inevitably raised doubts about the jurisdiction it had been at pains to confirm in *Rasul v. Bush*.[55] Habeas challenges to overseas confinement have typically named high government officials working in and around the nation's capital.[56] In many of these cases, as in *Rasul* itself, the petitioner filed in the Dis-

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48 *See* Hamdan v. Rumsfeld, 415 F.3d 33, 43 (D.C. Cir. 2005) (upholding the President's order to try an alleged al Qaeda supporter before a military commission at Guantanamo Bay, and rejecting claims that the Geneva Convention created a judicially enforceable barrier to such tribunals). *Compare In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (concluding that due process protections extended to those held at Guantanamo Bay, and that the government's new tribunal for the review of enemy combatant designations did not satisfy due process), *with* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (accepting the government's submission that aliens detained at Guantanamo Bay lack judicially enforceable rights).

49 Rumsfeld v. Padilla, 542 U.S. 426, 432 (2004).

50 *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426.

51 *See Padilla*, 542 U.S. at 451.

52 *Id.* at 434, 442.

53 *See id.* at 432–33.

54 *Id.* at 440–48.

55 *See* 542 U.S. 466, 475–84 (2004). Notably, the author of the *Rasul* majority opinion, Justice Stevens, dissented in *Padilla* and argued against the immediate custodian and territorial restrictions. *See Padilla*, 542 U.S. at 458–65 (Stevens, J., dissenting).

56 *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (Secretary of the Air Force); Burns v. Wilson, 346 U.S. 137 (1953) (Secretary of Defense).

trict of Columbia—the district with territorial jurisdiction over the respondent's place of employment.[57] In reviewing these dispositions, the Court has simply assumed without deciding that the lower federal courts were empowered to hear the petitions, even though this approach would seemingly violate the immediate-custodian requirement. Thus, the puzzle remains after *Padilla*: The majority treated its opinion as applying only to physical custody in the United States and explicitly assumed the existence of an exception for challenges to overseas detention,[58] but it has so far failed to identify the statutory basis of this exception.[59]

Justice Kennedy's concurring opinion in *Padilla* also mentions the overseas problem. The concurrence expresses agreement with the application of the immediate-custodian and district-of-confinement rules to a domestic case like *Padilla*, but views these rules as operating more as limits on venue or personal jurisdiction than as rules of subject matter jurisdiction.[60] Although Justice Kennedy described *Rasul* as an example of the overseas exception,[61] he did not embrace Justice Scalia's suggestion (in his *Rasul* dissent[62]) that the overseas exception potentially opened all ninety-four district courts to overseas petitioners. Instead, the concurrence seeks to restrict the exception to the district court with "the most immediate connection to the named custodian."[63] While this language expresses Justice Kennedy's own venue preference, it fails to identify a statutory basis for the overseas exception itself or for limiting that exception to districts of "immediate connection" to the noncustodial respondent.

Rasul and *Padilla* thus leave the lower courts with a host of unanswered questions about the scope of habeas jurisdiction and venue. Uncertainty lingers about the territorial limits of habeas power, as well as about which district court, if any, may hear challenges to overseas detention. The next two Parts of this Article attempt to provide answers to these questions.

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57 *See, e.g.*, *Toth*, 350 U.S. at 13 n.3; *Burns*, 346 U.S. at 138–39. Of course, to the extent the petition names a Pentagon official, venue might be appropriate instead in the Eastern District of Virginia.

58 *See Padilla*, 542 U.S. at 436 n.9, 447 n.16.

59 *See id.* at 428 (concluding that a habeas petitioner seeking to cballenge "present physical custody within the United States" sbould name his immediate custodian as the respondent and file the petition in the district of confinement).

60 *See id.* at 451–53 (Kennedy, J., concurring).

61 *See id.* at 452–53.

62 *See* Rasul v. Bush, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting).

63 *See id.*; *Padilla*, 542 U.S. at 453 (Kennedy, J., concurring).

II
JURISDICTION TO REVIEW MILITARY DETENTION OVERSEAS

Justice Scalia starkly posed the territorial-power question in his dissenting opinion in *Rasul*. In agreement with the government's brief, Justice Scalia contended that the federal courts lack power to hear habeas corpus claims on behalf of aliens imprisoned in foreign territory.[64] This Part analyzes the no-jurisdiction claim by examining the common law tradition of judicial oversight of military affairs that the British colonists in North America inherited from England.

A. The Common Law Tradition of Judicial Oversight in the British Empire

Our assessment of judicial oversight begins by separating the ideas of legislative and judicial jurisdiction. Legislative jurisdiction, or what the international lawyers call "jurisdiction to prescribe," speaks to the power of a nation to regulate a particular event through the application of its own laws.[65] Judicial jurisdiction, by contrast, speaks to the power of the court to render a judgment that is binding on the defendant.[66] Both doctrines arose during times of rigid territorialism;

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64 *See Rasul*, 542 U.S. at 505–06 (Scalia, J., dissenting).

65 Questions concerning legislative jurisdiction, or jurisdiction to prescribe, typically arise from the proposed application of constitutional or other U.S. law to events overseas. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 794 (1993); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246–47 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Langraf v. USI Film Prods., 511 U.S. 244, 251 (1994); United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990). The *Third Restatement of Foreign Relations Law (Third Restatement)* identifies a variety of conduct that will support the exercise of legislative jurisdiction, including conduct that occurs within the nation's territory, conduct that causes effects in the United States, conduct that affects the status of persons or interests in the United States, and the activities of U.S. nationals outside as well as inside U.S. territory. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). In cases in which more than one state may claim an interest that will support an assertion of legislative jurisdiction, the *Third Restatement* suggests a balancing approach. *See id.* § 403. *See generally* Roosevelt, *supra* note 9, at 2030–41 (providing an overview of the evolution of the law governing the extraterritorial application of U.S. law).

66 Modern decisions treat the due process clause as a restriction on the power of U.S. courts to entertain claims (and render enforceable judgments) against nonresident defendants. In a departure from the territorialism of earlier decisions, the Court now permits a state court to bind the defendant so long as the defendant had certain minimum contacts with the forum, such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-3(1)(a) (3d ed. 1998) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The minimum-contacts standard has enabled state courts to exercise long-arm jurisdiction over nonresident defendants who might otherwise lack close affiliation with the state. *See id.* § 4-1(3). Federal courts for the most part borrow these state long-arm statutes, and the constitutional limits on their scope, in assessing their own power to entertain claims against defendants from outside the forum state. *See id.* § 5-2(4)(a). Under such a regime, most federal courts around the country could entertain claims against high government officials in Washington, D.C. on the theory that government policy emanating from the nation's capital produced consequences in the district

a nation's jurisdiction to prescribe applied most obviously to events that occurred within its own territorial boundaries, just as its jurisdiction to adjudicate depended on its power over persons and property within its borders.[67] As territorial restrictions relaxed during the last century, jurisdiction to prescribe and jurisdiction to adjudicate have expanded to encompass certain kinds of extraterritorial events, including those that produce effects within the nation.[68]

Yet even during times of strict territorialism, it was understood that a nation's laws follow a nation's soldiers into battle.[69] In other words, the national authorities clearly had jurisdiction to prescribe, or to provide rules for the government and regulation of the armed forces operating abroad. In England, this tradition of carrying law into battle began quite early. According to Blackstone's *Commentaries* and other authorities, the Court of the Constable and Marshal arose in the fourteenth century to provide rules for the enforcement of discipline among the Crown's soldiers (or knights), and its authority explicitly extended to those involved in foreign wars, such as the Crusades.[70] This court, also known as the court of chivalry, had both jurisdiction to prescribe and jurisdiction to adjudicate with respect to the military overseas.[71]

During the seventeenth century, with the passing of the court of chivalry, England turned to courts martial to mete out punishment to those involved in military service, conferring jurisdiction both to prescribe and to adjudicate.[72] For controlling law, the courts martial looked to the Articles of War, which the Crown promulgated to regulate the conduct of those engaged in military service at home and abroad.[73] Parliament adopted a series of Mutiny Acts that gave courts

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that would satisfy the minimum-contacts test. *See, e.g.*, Padilla v. Rumsfeld, 352 F.3d 695, 710 (2d Cir. 2003) (upholding the power of the federal court in New York to exercise long-arm, in personam jurisdiction over Defense Secretary Donald Rumsfeld on the theory that Rumsfeld's decision to classify Padilla as an illegal combatant led to a change in Padilla's status in New York), *rev'd on other grounds*, 542 U.S. 426. In addition to the *Padilla* case in New York, California federal courts asserted in personam jurisdiction over the government officials working in the District of Columbia who were allegedly responsible for the conditions of detention at Guantanamo Bay. *See, e.g.*, Gherebi v. Bush, 352 F.3d 1278, 1284 (9th Cir. 2003) (upholding power of district court in California to exercise jurisdiction over Secretary Rumsfeld), *vacated*, 542 U.S. 952 (2004), *remanded to* 374 F.3d 727, 739 (9th Cir. 2004) (concluding that the *Padilla* Court's district-of-confinement rule foreclosed the assertion of jurisdiction over Secretary Rumsfeld in California, and ordering the transfer of the action to the District of Columbia).

67 *See* DAVID P. CURRIE ET AL., CONFLICT OF LAWS 732 (6th ed. 2001).

68 *Id.*

69 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *263.

70 *See id.*; 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 573–77 (1922).

71 *See* GREAT BRITAIN WAR OFFICE, MANUAL OF MILITARY LAW 8–10 (6th ed. 1914) [hereinafter MANUAL OF MILITARY LAW].

72 *See* 1 HOLDSWORTH, *supra* note 70.

73 *See* MANUAL OF MILITARY LAW, *supra* note 71, at 6–7.

martial authority to adjudicate and punish those in active service.[74] Jurisdiction to adjudicate overseas derived from the nature of the tribunal; courts martial were not courts of record, and had no clerk, seal, or permanent location.[75] Rather, they were convened on the order of the commanding officer, and served as temporary tribunals to consider charges of wrongdoing and recommend proper punishments.[76] The military itself carried out the tribunals' sentences following their adoption by the commanding officer.[77]

Although recognized as lawful tribunals within their proper sphere, courts martial were subject to the oversight and control of the superior courts at Westminster to keep them within the bounds of their jurisdiction.[78] Military courts, at least in the early years, lacked power to entertain civil actions against soldiers; actions in trespass or debt against such members of the military were the proper subject of the courts of regular civil jurisdiction. Courts martial also lacked power to proceed against those who were not properly subject to military discipline; civilians not duly enrolled in the military could challenge military detention or punishment on the ground that the courts martial had no authority over them.[79] As a consequence, the common and statutory law of England specified the boundaries of military authority, even when the events in question happened to take place overseas.

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74 Application of martial law during times of peace and to those not formally subject to military discipline was seen as a violation of the English Constitution, and was made a grievance in the Petition of Right. *See* CHARLES M. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW, AS APPLICABLE TO THE ARMY, NAVY, MARINES, AND AUXILIARY FORCES 4–6 (2d rev. ed., London, John Murray 1874). Throughout the civil disorders of the seventeenth century, the royal and parliamentarian sides issued Articles of War to regulate their armies. *Id.* at 6–19. Following the Restoration and the Glorious Revolution, Parliament established a legal footing for military discipline with the adoption of the Mutiny Act of 1689. *Id.* at 20–21. *See also* 1 HOLDSWORTH, *supra* note 70, at 577 (describing the Mutiny Act as legalizing both military law and the courts martial that administered it); Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 87 (1989) (same).

75 For descriptions of the practice and procedure of courts martial, see MANUAL OF MILITARY LAW, *supra* note 71, at 35–54. For an account of Britain's use of courts martial in British North America during the Seven Years' War, see WIENER, *supra* note 11, at 32–63. By the nineteenth century, the laws of the United States provided that military personnel "shall, at all times and in all places, be governed by the articles of war." WINTHROP, *supra* note 10, at 83. Today, the Uniform Code of Military Justice expressly provides for the punishment of violations of military law by service members overseas. *See* 10 U.S.C. § 805 (2000); *see also* Clarke v. Morey, 10 Johns. 69 (N.Y. 1813) (refusing to treat plaintiff's status as a British subject as a bar to suit in American courts, despite the pendency of the War of 1812 with Great Britain).

76 *See* MANUAL OF MILITARY LAW, *supra* note 71, at 35–54.

77 *See id.*

78 *See id.* at 120–29.

79 *See* WIENER, *supra* note 11, at 19–31.

Although the court martial was available to mete out military justice anywhere in the world,[80] the civilian courts were far less readily accessible to review claims of illegality and to pass upon matters alleged to fall outside the sphere of military control. Throughout the eighteenth century, the slow pace of travel surely prevented ready access to the courts at Westminster and gave the British military the final say on many questions of detention and punishment overseas.[81] But in the few cases that came before them, civilian courts measured the legality of military and imperial action overseas by reference to the laws of Britain. One can see this presumptive reliance on British law in a series of tort claims brought in the superior courts of Westminster to challenge the legality of detention and other military action overseas.

The overseas tort cases established three important principles. First, and somewhat remarkably, the superior courts had little doubt that they enjoyed legislative jurisdiction to apply English common law to disputes overseas. In the leading case, *Mostyn v. Fabrigas*, the Court of King's Bench affirmed a judgment in favor of a native Minorcan whom the military governor of Minorca had illegally detained and banished from the island.[82] In this, and other cases arising in the military enclave of Gibraltar, the superior courts at Westminster applied British law to determine the legality of the actions of military governors overseas.[83] This presumptive application of British law followed

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80 Exercise of jurisdiction over military personnel overseas seemingly comports with modern notions of the scope of jurisdiction to prescribe. *See* Blackmer v. United States, 284 U.S. 421, 437 n.2 (1932); United States v. Bowman, 260 U.S. 94, 102 (1922). While the application of U.S. military law to service members overseas presents few conceptual difficulties, the debate continues over the extent to which military law may apply to civilians serving alongside the military. *See* Reid v. Covert, 354 U.S. 1 (1957); *cf.* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–67 (2000) (making it a crime for civilians accompanying military forces overseas to violate military law and providing for their prosecution before federal courts, rather than courts martial). For a summary of developments since *Reid*, see Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995).

81 In one case, British naval officers destroyed houses located on the coast of Nova Scotia belonging to "sutlers"—individuals who had supplied British sailors with liquor. A naval officer, one Captain Gambier, brought one of the offended sutlers back to England on board his ship. After consulting with friends, the sutler sued Gambier for damages and won. In recounting the tale in *Mostyn v. Fabrigas*, Lord Mansfield wryly notes that the sutler would likely never have reached England to bring the action had the officer not been so "inattentive" as to have brought him aboard ship. (1774) 98 Eng. Rep. 1021, 1032 (K.B.).

82 *Id.* at 1021. For accounts of the *Mostyn* litigation, see WINTHROP, *supra* note 10, at 885 n.39. Similarly, in *Cooke v. Maxwell*, (1817) 171 Eng. Rep. 614 (K.B.), an American plaintiff successfully sought damages after the British governor of Sierra Leone ordered the destruction of his factory in Congo. For an account, see WINTHROP, *supra* note 10, at 886 n.40.

83 *See, e.g.*, Glynn v. Houston, (1841) 2 Eng. Rep. 337 (L.R.C.P.). Frederick Wiener discusses the case of *Comyn v. Sabine*, in which the Court of King's Bench awarded a civilian damages of £700 to compensate for losses suffered in an illegal flogging imposed by the

from the fact that the military governors in question (like British soldiers and naval officers) traced their authority to the Crown, and were therefore required to answer to the Crown's judges for the lawful exercise of their authority.[84] Thus, while disputes between private parties overseas might lie beyond the power of the courts at Westminster, an action for trespass that put the governor's authority into issue would "most emphatically lie against the governor."[85]

Second, while the overseas decisions recognized the possible relevance of local law and local courts, they created a fairly robust presumption in favor of the application of British law by British courts. As Lord Mansfield explained, parties could challenge the jurisdiction of the King's Bench only by showing that another court would have jurisdiction over the claim.[86] If, as in *Mostyn*, such an alternative forum did not exist, adjudication by the superior courts at Westminster was seen as essential to prevent a failure of justice.[87] As for applicable law, the decisions acknowledged that local law might provide officials with a defense to liability, but they placed the burden of proving the content of such exculpatory local law on the defendant official.[88] In *Mostyn*, the governor argued that he enjoyed despotic power within the district where he acted, partly due to the fact that Spanish law extended such authority to the island's governors before the British took control.[89] Lord Mansfield found that the governor had failed to prove the content of this competing body of Spanish law,[90] clearing the way for the court's application of British law as the basis for rejecting the governor's claim of authority to imprison by fiat.[91] This presumptive application of British law by British courts flatly rejects the notion that the exercise of military authority creates a lawless enclave.[92]

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order of the military governor of Gibraltar. *See* WIENER, *supra* note 11, at 16 & n.55. Wiener describes Comyn, also known as Conning and Conner, as a carpenter who was not subject to military discipline; counsel for the governor apparently conceded liability. *See id.*

84 As Lord Mansfield noted in *Mostyn*, the governor's authority rested on the Crown's issuance to him of letters patent defining his responsibilities. 98 Eng. Rep. at 1023. Although Mansfield acknowledged that the Minorcan governor enjoyed power like that of a viceroy, still Mansfield insisted that the nature and extent of the governor's power was subject to review in the King's courts. *See id.* at 1027.

85 *See id.* at 1028.

86 *See id.*

87 *Id.*

88 *See id.* at 1029.

89 *See id.* at 1028.

90 *See id.*

91 *Id.* at 1029.

92 Mansfield's approach in deferring to local authority but rejecting lawless enclaves makes good sense when examined from the perspective of legislative jurisdiction, or jurisdiction to prescribe. Where the Crown colony or dominion enjoyed local institutions and a judicial system, the English courts at Westminster would usually defer to local tribunals as courts of first instance. Parties dissatisfied with local justice could appeal to the Privy

Third, and in keeping with their rejection of lawless enclaves, the superior courts extended British law to all claimants who suffered unlawful detention or other invasions of their liberty or property. As Lord Mansfield explained in *Mostyn*, the King's courts were available to all suitors and not just to British subjects born "within the sound of Bow Bell."[93] Other cases extended the benefit of access to British courts to subjects of Great Britain as well as to aliens.[94] Certainly his status as an American citizen did not bar a fellow named Cooke from claiming damages from the British officials responsible for the destruction of his factory in Congo.[95] Thus, while common law courts would refuse to hear the claims of alien enemies during times of war, this disability did not apply to aliens as a general matter and did not prevent them from bringing suit in British courts.[96]

Similar principles of legislative jurisdiction governed applications for habeas corpus, as the well-known case of *Rex v. Cowle* illustrates.[97] Although the writ of habeas corpus would not as a general matter run from Westminster into Scotland, where independent superior courts existed,[98] the enclave of Berwick was not subject to Scottish jurisdiction and had no court with authority to issue the writ.[99] For Lord Mansfield, the absence of an alternative court provided decisive support for the exercise of habeas jurisdiction. As he explained, the

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Council, where local legal principles controlled except to the extent they were repugnant to English law. *See* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION 2–3, 73 (2004). The Privy Council thus operated as an institution that could mediate between conflicting bodies of local and English common law. *See* KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 433–37 (1996). When, by contrast, the territory lacked institutions for local self-governance and a local judiciary, there was no mechanism for an appeal to Privy Council and no barrier to first-instance relief in the superior courts at Westminster. *See id.* Both on the island of Minorca, where the British ruled under the Treaty of Utrecht, and within the military fortress of Gibraltar, which the British had captured from the Spanish in 1704, Mansfield understood the absence of local legal institutions not as creating a lawless enclave but as eliminating any possible conflict and clearing the way for the application of English law. *See supra* note 84. For accounts of British control over Gibraltar, see ROBERTS-WRAY, *supra*, at 681–82.

93 98 Eng. Rep. at 1027. The plaintiff had been born in a conquered country, but nonetheless owed allegiance to the Crown and thus qualified as a subject. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *370. Great Britain later developed the idea of a British "protected person" to capture the notion that the degree of allegiance and protection owed to and from an individual born within a protectorate might differ from that of a subject. *See* ROBERTS-WRAY, *supra* note 92, at 561–63.

94 *See Mostyn*, 98 Eng. Rep. at 1025 (argument of counsel) (citing a case in which a plaintiff described as an "alien infidel" was permitted to sue representatives of the former governor of Patna for money due under an employment contract).

95 Cooke v. Maxwell, (1817) 171 Eng. Rep. 614 (K.B.).

96 *See Mostyn*, 98 Eng. Rep. at 1027–28, 1032.

97 (1759) 97 Eng. Rep. 587 (K.B.).

98 Following the union of Scotland and England in 1707, Scotland remained relatively independent from England and retained its own court system. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *95–99.

99 *See Cowle*, 97 Eng. Rep. at 598.

King's Bench could issue the writ to any place "under the subjection of the Crown of England."[100] For Mansfield, that broad conception of habeas authority included territories beyond the realm, including the Isle of Man, the colonies in America and the West Indies, and the Channel Islands of Jersey and Guernsey.[101] Although questions might arise concerning the ability of the court to enforce its decrees and provide effective relief, Mansfield concluded that habeas would often provide the "most effectual remedy" for unlawful detention.[102]

Dating from the middle and late eighteenth century, these cases help to explain later decisions in which the superior courts at Westminster issued the writ of habeas corpus to test the legality of detention overseas.[103] Perhaps the most famous of these cases, *Ex parte Anderson*,[104] arose on the eve of the American Civil War and involved the issuance of the writ from Westminster to prevent Canadian officials from extraditing a runaway slave to the slave-holding state of Missouri, from which he had escaped.[105] The case began when the United States invoked its extradition treaty with Great Britain, seeking the return of Anderson to face the state criminal charge that he had murdered a white man during his escape from slavery in Missouri. Canadian officials imprisoned Anderson pending resolution of the extradition issue by the courts. While judicial process ground along in Canada, abolitionists in England approached the superior courts in London for a writ of habeas corpus. Remarkably, the Queen's Bench agreed to issue the writ and directed an officer in Canada to serve the writ on Anderson's custodian after concluding that the treaty did not authorize extradition on the facts of the case.

In the course of its opinion, the Queen's Bench rejected two weighty arguments against the assertion of habeas jurisdiction. The first argument rested on a claim that the courts at Westminster should defer to those in Canada; after all, the Canadian courts were vested with habeas jurisdiction and were open to entertain any claims Ander-

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100 *Id.* at 599.

101 *See id.* at 600.

102 *Id.*

103 In both *Mostyn* and *Cooke*, the King's Bench concluded that its legislative jurisdiction extended to events that occurred in British enclaves and protectorates overseas. Judicial jurisdiction, in contrast, depended on the ability of the plaintiff to serve the defendant with process in England itself. Both *Mostyn* and *Cooke* featured claims against defendants who had since returned to England and were subject to the power of the superior courts there. It followed that, with both legislative and judicial jurisdiction, the superior courts faced no obstacle to the adjudication of these claims.

104 (1861) 30 Eng. Rep. 129 (L.J.Q.B.).

105 *See generally* Robert C. Reinders, *The John Anderson Case, 1860–1: A Study in Anglo-Canadian Imperial Relations*, 56 CAN. HIST. REV. 393 (1975) (describing the background of the litigation and the reaction of the press in both England and Canada).

son might assert, subject to ultimate review in the Privy Council.[106] By conducting direct judicial supervision of detention in Canada in an original proceeding, the Queen's Bench in England inserted itself into the middle of an ongoing litigation and offended Canadian dignity and notions of self-government.[107] The second argument rested on the inability of the Queen's Bench to enforce its order through the issuance of a body attachment—the traditional remedy for official noncompliance with a habeas directive.[108] Acknowledging both difficulties, the court concluded that it lacked discretion to decline the writ and that it could fairly rely on Canadian officials to enforce its judgments.[109] It thus established an important precedent for broad exercise of habeas jurisdiction.[110]

Subsequent decisions extended the scope of habeas jurisdiction throughout the British Empire as a check on military government. Although Parliament quickly provided a statutory basis for the Queen's Bench to defer to any established local court system, such as that in Canada, the new legislation otherwise left intact the habeas jurisdiction of the courts at Westminster and confirmed that the writ would run into those parts of the British Empire where no local court system had been established.[111] Two cases help to illustrate that principle. The first arose from the indefinite detention of a local chieftain in the British protectorate of Bechuanaland, in what we know today as the African nation of Botswana.[112] The chieftain, one Sekgome, sought habeas relief in the King's Bench in London in a proceeding brought against the Secretary of State for the Colonies, the official in London directly responsible for oversight of colonial affairs.[113] Although the King's Bench ultimately upheld the detention order as valid, the judges suggested in dicta that the writ would run to test the legality of confinement, either to the Secretary or to the High Commissioner as the person with control (if not custody) of the petitioner.[114] Subsequent cases confirmed this dicta, holding that an official in London

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106 As the Queen's Bench explained, it was aware that the decision might be seen as "inconsistent with that higher degree of colonial independence, both legislative and judicial, which has happily been carried into effect in modern times." *Anderson*, 30 Eng. Rep. at 132.

107 *See* Reinders, *supra* note 105, at 409.

108 *Anderson*, 30 Eng. Rep. at 131–32.

109 *Id.* at 132.

110 *See* Norman Bentwich, *Habeas Corpus in the Empire*, 27 L.Q. REV. 454, 455 (1911) (describing the case and the legislature's subsequent action to prevent further issuance of the writ to a colony).

111 *See* Habeas Corpus Act, 1862, 25 & 26 Vict., c. 20 (Eng.). For an account, see Reinders, *supra* note 105, at 412–13.

112 *See* Rex v. Earl of Crewe, (1910) 2 Eng. Rep. 576 (K.B).

113 *Id.* at 576–77.

114 *See id.* at 592–93 (Lord Vaughan Williams); *id.* at 618 (Lord Farwell). *But see id.* at 629 (Lord Kennedy, dissenting).

would serve as a proper respondent for a habeas petition aimed at challenging detention in a British protectorate overseas.[115]

In the British Empire, then, the courts at Westminster exercised legislative jurisdiction over events anywhere in the world that they regarded as properly subject to the laws of the realm. Military detention overseas clearly came within the scope of matters that the superior courts regarded as governed by British law. The basis for judicial jurisdiction varied somewhat. Sometimes the superior courts based their exercise of judicial power in trespass litigation on the presence of the defendant in Britain;[116] sometimes, as in *Ex parte Anderson*, the courts actually issued the writ to custodians overseas;[117] sometimes they proceeded against high government officials in Britain, who were bound to comply with judicial decrees.[118] One finds little evidence of a reluctance to assert jurisdiction over the claims of non-native subjects of Britain. Just as the court in *Ex parte Anderson* viewed a runaway slave as entitled to the writ,[119] so too did the courts in the African colonial cases entertain the petitions of conquered tribal leaders.[120] While British law may have regarded all such petitioners as subjects of Britain, in the sense that they all owed obedience to the Crown, the evident trigger for the exercise of jurisdiction was the simple fact of wrongful detention.

B. Common Law Jurisdictional Norms in the United States

Upon declaring independence, the United States borrowed both the English Articles of War and England's reliance upon the civilian courts to keep courts martial within the bounds of their jurisdiction. An early decision by Chief Justice Marshall, *Wise v. Withers*, squarely held that courts martial lacked jurisdiction to punish individuals who were not properly subject to military discipline.[121] Furthermore, the Chief Justice ruled that the members of the court martial were subject to suit for damages as trespassers for exceeding the boundaries of their authority.[122] Later cases made clear that individuals could seek relief from wrongful military detention by challenging the authority of

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115 For an account, see ROBERTS-WRAY, *supra* note 92, at 611–15; Bentwich, *supra* note 110, at 454.

116 *See generally* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

117 *See, e.g.*, ROBERTS-WRAY, *supra* note 92, at 612.

118 *See id.* at 612–15.

119 *See supra* notes 104–05 and accompanying text.

120 *See, e.g.*, ROBERTS-WRAY, *supra* note 92, at 612–15; *supra* note 95 and accompanying text.

121 *See* 7 U.S.(3 Cranch) 331, 337 (1806).

122 *Id.*

courts martial through petitions for writs of habeas corpus.[123] As in England, then, trespass and habeas provided two complementary forms of action by which an individual might challenge unlawful military detention.

The courts of the United States had few occasions to consider the legality of military detention overseas during the nineteenth century. Most military activity occurred within the nation's own borders. But a handful of nineteenth-century cases in Indian territory establish the willingness of the federal courts to entertain habeas and trespass claims to vindicate the interests of those wrongfully subjected to military authority.[124] Perhaps most noteworthy, the Circuit Court of the District of Nebraska ruled that Native American members of the Ponca Tribe were entitled to habeas relief from military detention aimed at removing them from the Omaha reservation in Nebraska and returning them to their former reservation in Indian country (Oklahoma).[125] In so ruling, the court found that Native Americans enjoyed a right to petition for habeas, rejecting the government's argument that the privilege extended only to citizens of the United States.[126] The court also found that the military had failed to act within the bounds of law in detaining tribal members for purposes of an unjustified removal.[127] In permitting noncitizens to petition, such rulings confirmed a series of decisions that had permitted aliens to invoke the habeas jurisdiction of the federal courts.[128]

The nation's first wide-scale experience with overseas military detention dates from the immediate aftermath of World War II. Both in Japan and Germany, the victorious Allied Powers convened military tribunals to hear a series of war crime cases against former officers of the defeated nations (and others).[129] Those convicted of war crimes

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123 *See, e.g.*, Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 725–30 (2002) (discussing a famous case dating from the War of 1812, in which Andrew Jackson ordered the imprisonment and deportation of a judge in New Orleans, who subsequently challenged the legality of Jackson's imposition of martial law and obtained a sizable award of damages that Congress later agreed to pay on behalf of Jackson).

124 *See, e.g.*, Bates v. Clark, 95 U.S. 204, 209–10 (1877); Waters v. Campbell, 29 F. Cas. 412, 414 (C.C.D. Or. 1877) (No. 17,265); *In re* Carr, 5 F. Cas. 115, 115–16 (C.C.D. Or. 1875) (No. 2,432).

125 *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 696–97 (C.C.D. Neb. 1879) (No. 14,891).

126 *See id.* at 700.

127 *Id.*

128 *See, e.g.*, United States v. Jung Ah Lung, 124 U.S. 621, 622–23 (1888); Chew Heong v. United States, 112 U.S. 536, 538 (1884); *see also* Clarke v. Morey, 10 Johns. 69 (N.Y. 1813) (refusing to treat plaintiff's status as a British subject as a bar to suit in American courts, despite the pendency of the War of 1812 with Great Britain).

129 *See* Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 608–13 (1948); Dallin Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 169–73. Fairman distinguishes the courts that the Allies

and other offenses filed a series of petitions with the Supreme Court, raising a host of challenges to the legality of the military tribunals.[130] For the most part, the Court declined to hear these petitions, concluding that direct review of the decisions of military tribunals in Europe would call for a forbidden exercise of its original jurisdiction.[131] So long as the Court adheres to this view, both aliens and citizens detained abroad may have difficulty in persuading the Court to assert original jurisdiction over their habeas petitions (except in the unlikely event that the petitions fall within one of two narrow categories of original jurisdiction conferred in Article III).[132] Ordinarily, parties can sidestep this restriction on the Court's original jurisdiction by first commencing suit in a lower federal court and subsequently invoking the Court's appellate jurisdiction to review any lower court disposition.[133] But the statutory restrictions on the ambit of the district court's habeas jurisdiction were seen as an obstacle to asserting jurisdiction over the custodian of petitioners detained overseas.[134] Some members of the Court responded to the petitions of the German war

established as part of their occupation of Italy and Germany (Allied Military Government) from those that it established at Nuremburg to try war criminals (War Crimes Tribunals). *See* Fairman, *supra.* Ultimately, the U.S. federal courts concluded that the tribunals at Nuremburg were not tribunals of the United States, and thus were not subject to review by Article III courts. *See Ex parte* Flick, 76 F. Supp. 979, 981 (D.D.C. 1948).

130 *See generally* Fairman, *supra* note 129, at 589 (reporting that petitions were filed both on behalf of German and Japanese nationals who were convicted of war crimes and by some American citizens whom occupation courts had convicted of more mundane postwar crimes).

131 *See id.* at 591. Familiar decisions restrict the Court's ability to exercise original jurisdiction except in the cases identified in the Constitution. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). Nonetheless, an original petition may invoke the Court's appellate jurisdiction, so long as the petition seeks the functional equivalent of appellate review. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 77 (1807). Ordinarily, that means the petitioner must first seek review before another federal tribunal before filing a petition with the Supreme Court. *See* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1465–99 (2000). As applied to the German war crime petitions, the principle of limited original jurisdiction was seen as a barrier to direct Supreme Court supervision. *See Ex parte* Betz, 329 U.S. 672, 672 (1946); *see also In re* Dammann 336 U.S. 922, 922 (1949) (dismissing petition for want of original jurisdiction); Everett v. Truman, 334 U.S. 824, 824 (1948) (denying leave to file original petition for habeas review and noting that four Justices would have set the case for argument on the jurisdictional issue).

132 *Cf.* Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (refusing to exercise original jurisdiction over a petition seeking review of the International Military Tribunal's convictions in the Far East, concluding that the tribunal was not a U.S. tribunal but rather was one established by the Allied Powers).

133 *See, e.g., In re* Yamashita, 327 U.S. 1, 4–5 (1946).

134 The relevant statute, empowering the district courts to issue writs of habeas corpus only within their respective jurisdictions, was later codified in 28 U.S.C. § 2241(a) (2000). In *Rumsfeld v. Padilla*, the Court similarly viewed § 2241(a) as an obstacle to jurisdiction, stating, "[J]urisdiction over Padilla's habeas petition lies in the Southern District [of New York] only if it has jurisdiction over [Padilla's custodian]"; the Court concluded that it did not. 542 U.S. 426, 442 (2004).

criminals by calling for briefs on the issue of what court would have power to hear the petitions.[135]

These issues came to a head in *Johnson v. Eisentrager*.[136] The petitioners were German nationals captured in China and charged with conducting bellicose activities on behalf of the Axis powers after the war's official end.[137] After their conviction and transfer to Germany for imprisonment, they sought habeas relief in the District Court of the District of Columbia, which dismissed the petition, emphasizing jurisdictional problems.[138] The court of appeals reversed in a decision that framed the Supreme Court's response.[139] Writing for the appellate panel, Judge Prettyman noted the problems associated with the power of the district courts to exercise original habeas jurisdiction over detention in Germany.[140] He also noted the Supreme Court's own inability to entertain original habeas petitions to review executive detention.[141] These gaps in jurisdiction threatened to foreclose habeas review altogether, an outcome that Judge Prettyman viewed as incompatible with the constitutional prohibition against the suspension of the privilege of the writ of habeas corpus.[142] Judge Prettyman accordingly invoked first principles in arguing that the petitioners' right to federal judicial consideration of their constitutional claims necessitated a finding of jurisdiction in the lower court.[143]

The Court rejected this proposed emphasis on first principles. In a wide-ranging opinion, Justice Jackson concluded that the German petitioners had no right to be released from their detention overseas.[144] Despite reciting a variety of territorial considerations, the Court carefully avoided deciding on the ground that the federal courts could not exercise judicial and legislative jurisdiction over the legality of detention at a prison in occupied Germany.[145] Early in its opinion, the Court assumed that while the district court could not issue process to the immediate custodian in Germany, it could assert authority over the Secretary of Defense and other military officials in

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135 *See, e.g.*, *Everett*, 334 U.S. at 824–25. Justice Douglas later argued that the district court would have jurisdiction over such cases, notwithstanding the statutory restriction. *See Hirota*, 339 U.S. at 199–200 (Douglas, J., concurring).

136 339 U.S. 763 (1950).

137 *See id.* at 765–66.

138 *See id.* at 767 (describing the district court as dismissing the habeas petition on the basis of Ahrens v. Clark, 335 U.S. 188 (1948)).

139 *See* Eisentrager v. Forrestol, 174 F.2d 961 (D.C. Cir. 1949), *rev'd sub nom. Eisentrager*, 339 U.S. 763.

140 *See id.* at 967.

141 *See id.*

142 *See id.* at 965.

143 *See id.*

144 *See Eisentrager*, 339 U.S. at 790–91.

145 *See id.* at 768.

Washington, D.C.[146] It further assumed that such respondents would have lawful authority to effect the release of the petitioners.[147] The Court regarded these procedural niceties as grounding the judicial power sufficiently to authorize the federal courts to consider all of the contentions that the petitioners had advanced.[148] After doing so, the Court arrived at its conclusion: "[N]o right to the writ of habeas corpus appears."[149]

In reaching the merits and dismissing the petition on that basis, the Court assumed the existence of judicial jurisdiction. On the issues of legislative jurisdiction and the application of federal law to events overseas, the Court offered a more mixed account. On the one hand, the Court denied that many of the rights said to be grounded in federal law actually extended to the alien petitioners in the circumstances of the particular case.[150] The Court's rationale was partly territorial, expressing a reluctance to extend constitutional rights to detainees overseas.[151] The decision also rested, however, on judicial deference to the exercise of military authority in the aftermath of a shooting war.

On the other hand, despite this posture of deference, the Court took pains in reviewing the petitioners' constitutional and jurisdictional claims.[152] Perhaps most revealing was the care with which the Court considered the claim that the tribunals had exceeded the scope of their rightful authority.[153] Although it articulated a narrow scope of review, the Court agreed to consider "the lawful power of the commission to try the petitioner for the offense charged."[154] Such an inquiry presupposes a power to intervene judicially had the tribunals overstepped their boundaries.[155] In other words, the Court stood ready to perform its traditional function as a superior court of civil jurisdiction to review the work of military tribunals and to keep them within the bounds of their authority. In the end, then, *Eisentrager* assumed that the federal courts had both judicial and legislative jurisdic-

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146 *See id.* at 769.

147 *Id.* at 766–67.

148 *See id.* at 767.

149 *Id.* at 781.

150 *See id.* at 785.

151 *Id.* at 783–85. Thus, the Court made reference to territoriality in the course of rejecting the claim that the Constitution established rights of personal security or immunity from military trial for the benefit of alien enemies detained and convicted overseas. *See id.*

152 *See id.* at 778–91.

153 *See id.* at 785–88.

154 *Id.* at 787.

155 That presupposition lay at the heart of the Court's rejection of the government's position in *Rasul*. *See* Rasul v. Bush, 542 U.S. 466, 483–84 & n.15 (2004). Against this backdrop of considered review and rejection on the merits, the government's decision in *Rasul* to portray *Eisentrager* as a flat barrier to judicial jurisdiction looks particularly adventuresome. *See id.* at 478–79.

tion to review the work of military tribunals. The case was less about territorial limits than about the proper role of federal courts in reviewing the actions of the military. Thus, the Court described the "ultimate question" in the case as one of the "jurisdiction of civil courts of the United States vis-á-vis military authorities."[156]

It could hardly have been otherwise. As was the case in England, when the United States mounts a military operation overseas, the Constitution and laws of the United States control every move. The Constitution structures the war power in various well-known particulars, and federal laws control every facet of military life, from the role of the Joint Chiefs of Staff down the chain of command to the actions of the soldier in the field. To be sure, the federal courts do not play a significant role in overseeing compliance with this complex body of military law; that is the job of the military justice system and courts martial. But the federal courts police the boundaries of military justice, preventing the application of military law to those not properly subject to its terms.[157] When the military operates overseas, it remains subject to the judicial power just as it remains subject to the President's power as Commander-in-Chief.

C. Exploring the Limits of Legislative Jurisdiction

Rasul makes explicit what *Eisentrager* had implied, empowering federal judges to exercise judicial jurisdiction in conducting an inquiry into the legality of military detention overseas.[158] As in *Eisentrager*, the action in *Rasul* against high government officials in Washington, D.C. was seen as grounding the judicial jurisdiction of the federal courts, empowering them to reach the merits.[159] In conducting such review, federal courts must now determine what federal standards, if any, apply to military detention overseas. A full review of the complex body of law that governs the extraterritorial application of the Constitution and laws of the United States lies beyond the scope of this essay.[160] But this subpart will nonetheless offer a brief sketch of some of the considerations that may shape decisions about when to apply the law of the United States.

1. *Military Bases or Enclaves*

The *Rasul* decision answers the judicial-jurisdiction question, but leaves open the problem of what law governs the legality of detention

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156 *Eisentrager*, 339 U.S. at 765.

157 *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13, 23 (1955).

158 *See Rasul*, 542 U.S. at 485.

159 *See id.* at 474–75.

160 An overview of some of the relevant issues appears in Roosevelt, *supra* note 9, at 2030–41.

and interrogation at Guantanamo Bay and other military bases around the world. Questions concerning the application of U.S. law to nonresident aliens detained at such facilities arose on remand in the *Rasul* case. One can approach such questions by beginning with the presumption that the common law applies to the exercise of military authority overseas. To be sure, the common law permitted military officers to justify their action by reference to local law, and thus acknowledged that local law might offer a defense or justification for particular actions.[161] But the common law also rejected the idea that the military could establish a lawless enclave in which the executive branch officials in charge were a law unto themselves.[162] This rejection of the lawless enclave provides an appropriate starting point for the analysis of military detention at bases around the world.[163]

A presumption in favor of the application of U.S. law would invite a range of responses. The government might attempt to show that another body of local law regulates the conduct of the U.S. military.[164] Such a showing of a competing, and possibly conflicting, body of local law might well rebut the presumption and lead U.S. courts to conclude that U.S. law does not apply. But the United States has taken pains to ensure that U.S. law applies to service members stationed abroad in such countries as the United Kingdom, Germany, and Japan.[165] Under the terms of status of forces agreements (SOFAs), service members bear criminal responsibility for violations of both the U.S. and local law of the country in which they serve.[166] While service

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161 *See supra* note 88 and accompanying text.

162 *See supra* notes 87–92.

163 *See generally* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOYOLA L. REV. 1, 44 (2004) (arguing for the extraterritorial application of U.S. law to prevent the creation of lawless enclaves).

164 As an alternative, the government could attempt to justify the detention by reference to U.S. law. Among other doctrines, the government would presumably invoke the separation of powers and political question doctrines, the territorial limits on the Constitution's application overseas, and the inability of nonresident aliens to rely on other U.S. constitutional and statutory protections. Whatever the merit of these arguments, they differ importantly from the claim that U.S. law simply does not apply to military enclaves.

165 The Bush Administration's antipathy toward the International Criminal Court (ICC) flows in part from concern that acceptance of ICC jurisdiction may erode the United States' ability to ensure that U.S. criminal standards are applied to the conduct of service members overseas. *See* John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., U.S. Dep't of State, Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), *available at* http://www.state.gov/t/us/rm/15158.htm. The United Kingdom recently announced that it would commence war crime prosecutions against certain of its service members in connection with their alleged murder of prisoners in Afghanistan, but that such prosecutions would go forward in U.K. courts. *See* Philippe Sands, *So This Is the Real Reason the Generals Are Up in Arms*, INDEP. ON SUNDAY (U.K.), July 24, 2005, at 27, *available at* 2005 WLNR 11588109.

166 *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces art. VII, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]. Many SOFAs have been modeled upon the SOFA that governs

members may face local criminal responsibility, the military has long taken the position that it enjoys primary responsibility to regulate the conduct of service members working on military bases and enclaves.[167] In rejecting the application of local law at such bases as a general matter, the government may find it difficult to invoke conflicting local law as a bar to the application of U.S. legal rules to military bases overseas.[168] In other words, it seems clear that U.S. law would govern the criminal liability, if any, of military and civilian personnel for abuse of prisoners at Guantanamo Bay.[169] Because U.S. law governs the treatment of detainees, it should also govern the legality of their detention.[170]

NATO troops. *See generally* Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 148–53 (1994) (describing the typical factors that SOFAs address). Under the NATO SOFA, U.S. service members working overseas may be prosecuted for violations of U.S. law if local law does not apply, and for violations of local law if U.S. law does not apply. *See* NATO SOFA, *supra*, art. VII, § 2. In cases in which the conduct violates both U.S. law and local law, U.S. law presumptively applies if the conduct victimizes a U.S. national or occurs in the course of official duties. *See id.* art. VII, § 3. Off-duty criminal conduct directed at foreign nationals falls presumptively to local prosecution. *See* Erickson, *supra*. While SOFAs ordinarily include certain safeguards for service members prosecuted for violations of local law, U.S. constitutional assurances do not extend to such prosecutions. *See* Wilson v. Girard, 354 U.S. 524, 528–29 (1957).

167 *See Girard*, 354 U.S. at 529–30.

168 At Guantanamo Bay, for example, service members would face liability before courts martial for any misconduct they commit. Civilian employees of the military and other operatives who do not belong to the armed forces, however, would face criminal accountability under the terms of a criminal statute that extends U.S. criminal law to the special maritime and territorial jurisdictions of the United States. *See* 18 U.S.C. § 7(3) (2000). U.S. law thus controls the conduct of U.S. civilians and aliens housed at Guantanamo Bay. *See* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992).

169 Civilian employees of the armed forces and other personnel who lack a service connection may not be prosecuted before courts martial. *See* Reid v. Covert, 354 U.S. 1, 16 (1957). To fill this gap in the application of U.S. law to civilian employees overseas, Congress recently adopted the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261–67 (2000)). The Act makes domestic federal criminal standards applicable to civilians overseas and subjects these civilians to prosecution before the courts of the United States for any violations they commit. *See* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad: A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2001*, 51 CATH. U. L. REV. 55, 55 (2001); Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446, 449 (2001). Notably, the Act does not limit its application of U.S. law to territories or enclaves of the United States, but applies wherever such civilians are employed. *See* Yost & Anderson, *supra*.

170 A somewhat similar problem of extraterritoriality arises under the European Convention on Human Rights, which establishes human rights assurances applicable to the jurisdiction of a member state. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221. Under decisions of the European Court of Human Rights in Strasbourg, a member state may act within its jurisdiction when it exercises military or security control over a situation outside the territorial boundaries of the member state. Thus, the Court held that the Convention applied to Turkey's actions in Kenya, where a leader of the Kurdish workers' party was transferred into the custody of Turkey's security forces. *See* Öcalan v. Turkey, App. No. 46221/99

2. *Detention by Foreign Governments*

The global war on terror has apparently resulted in the detention and interrogation of suspected terrorists in U.S.-run facilities abroad and in the facilities of friendly foreign governments. In one important case, *Abu Ali v. Ashcroft*, Saudi government officials took a U.S. citizen studying in Saudi Arabia into custody and held the student in a Saudi detention facility for several months.[171] The petitioner's parents, acting as next friends, filed a petition for habeas relief in the District Court for the District of Columbia, arguing that the U.S. government directed the petitioner's arrest and detention.[172] In response, the government challenged the district court's territorial jurisdiction over detention facilities overseas and argued that it did not have actual "custody" of the petitioner for habeas purposes.[173] The district court refused to dismiss on either point, applying the overseas exception from *Rasul*[174] and concluding that the petitioner had made out a plausible claim of constructive custody.[175]

Such a decision makes a good deal of sense. To be sure, habeas jurisdiction has traditionally included a custody requirement, limiting the issuance of the writ to the party with some degree of custody of the petitioner.[176] But today, habeas litigation does not invariably require in-court production of the petitioner and does not often result in unconditional release orders. Relaxation of the custody requirement to permit challenges in constructive-custody cases enables the habeas petitioner to probe the extent of the U.S. government's re-

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(Eur. Ct. H.R. May 12, 2005), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUdoc-en; *see also* Issa v. Turkey, App. No. 31821/96 (Nov. 16, 2004), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUdoc-en (concluding that the Convention could apply, on a theory of effective control, to a military incursion by Turkey into northern Iraq). *See generally* Philip Leach, *The British Military in Iraq: The Applicability of the* Espace Juridique *Doctrine Under the European Convention on Human Rights*, 2005 PUB. L. 448, *available at* http://www.londonmet.ac.uk/londonmet/library/i86023_24.doc (arguing for the application of the Convention to British military action in Iraq on a theory of effective control).

171 350 F. Supp. 2d 28, 31–32 (D.D.C. 2004).

172 *Id.* at 30–31.

173 *Id.* at 30, 38.

174 *Id.* at 44.

175 *See id.* at 50. Following the district court decision, the federal government secured the release of Abu Ali from Saudi authority and brought him to Arlington, Virginia to face federal criminal charges that he provided material support to a terrorist organization, namely al Qaeda. Eric Lichtblau, *American Accused of a Plot to Assassinate Bush*, N.Y. TIMES, Feb. 23, 2005, at A1. The indictment alleged that while a student in Saudi Arabia, he joined with other al Qaeda members or sympathizers in discussing a plot to assassinate President George W. Bush. *Id.*

176 Such a custody requirement arose at a time when the writ precipitated the production of the petitioner in court upon pain of contempt; a respondent who lacked custody could neither be fairly charged with the production (or release) of the petitioner nor threatened with contempt sanctions for failing to do so. But custody requirements did not apply with the same severity in all circumstances. For more on the custody requirement and its evolution in the British Empire, see *supra* text accompanying notes 112–15.

sponsibility for his detention and to secure relief for any improper government conduct. The foreign government may ultimately decide to prosecute the petitioner or to impose further detention in accordance with its own law, and a federal court would have no role in overseeing such decisions.[177] But by permitting a challenge to the actions of the U.S. government in securing detention overseas, the decision helps to prevent the simple fact of foreign custody from being used to bypass otherwise applicable limits on the federal government's power to detain and interrogate.[178]

3. *Oversight of Military Tribunals*

Litigation over the legality of military tribunals in Japan and Germany after World War II provides some guidance as to the scope of federal judicial oversight of the legality of military tribunals on foreign soil. In general, the Supreme Court reached the merits of challenges to the tribunals that had been erected entirely under the authority of the U.S. government.[179] Such U.S. tribunals were seen as necessarily subordinate to the courts of the United States, at least with respect to claims that the military lacked proper authority to establish such tribunals or that, once established, the tribunals had exceeded the limits of their authority.[180] By contrast, the Court refused to authorize review of the tribunals that had been erected through the joint authority of the Allied command.[181] The Court's reluctance to claim a role in the oversight of an international tribunal, as opposed to one erected by the United States, reflects a more general reluctance to review the work of international adjudicative bodies.[182]

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177 *See* Wilson v. Girard, 354 U.S. 524, 529–530 (1957).

178 Despite its expansion of notions of custody, the decision finds some support in the history of habeas corpus. Common law custody rules invited the British Crown to evade habeas remedies in the seventeenth century through shifting custody from jail to jail or transferring prisoners to Scotland for detention. *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 18 (2d ed. 1989). In response to these and other perceived threats to liberty, Parliament adopted the Habeas Corpus Act of 1679, which included a provision that made the practice of removing prisoners from the jurisdiction to deprive them of habeas a serious offense. *See id.* at 199.

179 *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

180 *See id.* at 766–67.

181 *See* Hirota v. MacArthur, 338 U.S. 197, 198 (1948); *see also* Fairman, *supra* note 129, at 615 (observing that "[t]he International Military Tribunal which sat at Nürnberg . . . was no more subject to American law or judicial review than to the control of the three other Governments participating in the Tribunal").

182 *See, e.g.*, Pfander, *supra* note 13, at 768. On the preference in international law for reliance on civilian courts, as opposed to military tribunals, in the imposition of criminal sanctions, see, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222; Universal Declaration of Human Rights, G.A. Res. 217A, art. 10, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). The European Court of Human Rights has construed the independent and impartial tribunal rule of Article 6 to foreclose adjudication of criminal charges

III
LITIGATING OVERSEAS DETENTION CASES: THE NONSTATUTORY ALTERNATIVE

While history provides strong support for the application of U.S. law to determine the legality of U.S. military detention overseas, identifying the statutory predicate for such litigation presents a puzzle. The habeas statute authorizes district courts (and other federal judges) to grant writs of habeas corpus "within their respective jurisdictions."[183] But the territorial jurisdiction of the district courts ends at the borders of the United States, and does not extend overseas.[184] To be sure, *Rasul* and *Padilla* continue the practice of recognizing an overseas exception to this territorial restriction. But this exception remains controversial and gives rise to the venue issues that Justice Scalia identified in his *Rasul* dissent and that Justice Kennedy sought to address in his *Padilla* concurrence.[185]

Rather than struggle to identify an exception to the territorial limits of the habeas statute, this Part proposes to give these limits literal effect in overseas cases. Such an interpretation would restrict the power of the district courts to "grant" writs of habeas corpus outside the United States, as Justice Scalia argued. But it would not bar the district courts from entertaining suits and proceedings to test the legality of the government's policy of overseas detention. Lacking

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before military tribunals, *see, e.g.*, Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. at 93, and tribunals on which military officials sit as judges, *see* Öcalan v. Turkey, App. No. 46221/99, para. 118 (Eur. Ct. H.R. May 12, 2005), http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUdoc-en (search by Application Number). In dealing with terrorists, it is possible that nations will opt for a military model of interdiction and punishment rather than a civilian model of reliance upon criminal law processes. For an account of the challenges such a switch to a military model poses for human rights regimes, see Gerald L. Neuman, *Counter-Terrorist Operations and the Rule of Law*, 15 EUR. J. INT'L L. 1019 (2004).

183 28 U.S.C. § 2241(a) (2000).

184 Federal law defines the jurisdiction of the district courts of the United States in territorial terms, typically by specifying particular counties of a state as a judicial district. *See id.* §§ 81–131. District courts have been established in all fifty states, Puerto Rico, and the District of Columbia. *See id.* District courts thus lack territorial jurisdiction over places, including Guantanamo Bay, that have not been incorporated into and made a part of the U.S. judicial system. This territorial definition of district court authority, when coupled with the restrictive language of the habeas statute, gives rise to the district-of-confinement rule. *See* Rumsfeld v. Padilla, 542 U.S. 426, 442–43 (2004). As explained below, the rule grows out of the perceived inconvenience associated with the use of habeas as a form of judicial process commanding the production of the prisoner. *See infra* notes 221–24. The district-of-confinement rule thus operates as a rule of judicial jurisdiction, as Justice Kennedy suggested. *See Padilla*, 542 U.S. at 451–52 (Kennedy, J., concurring). The rule differs from the ordinary presumption against the extraterritorial application of U.S. law. *Cf.* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (stating that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"). *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

185 *See supra* notes 28–29, 60–63 and accompanying text.

habeas authority, district courts still enjoy ample power to hear civil actions for declaratory and injunctive relief under 28 U.S.C. § 1331, including claims to enjoin government officials from detention practices that violate federal rights. The proposal to reconceptualize overseas detention litigation as a suit for injunctive and declaratory relief offers a more coherent account of what the courts actually do than the continued reliance upon an under-theorized and textually questionable overseas habeas exception.[186]

This Part begins with a description of the case for recognizing the proposed equitable or nonstatutory alternative to habeas litigation. It then considers predictable arguments against such an approach, including arguments based upon the idea that habeas corpus provides the exclusive remedy for claims challenging the constitutionality of current confinement.

A. Declaratory and Injunctive Relief as an Alternative to Habeas Corpus

One can understand a challenge to overseas confinement as a suit for injunctive and declaratory relief from unconstitutional government action. Under the general grant of federal question jurisdiction, the federal district courts enjoy subject matter jurisdiction over cases arising under the Constitution, laws, and treaties of the United States.[187] The fact that the detention in question takes place overseas does not affect the availability of subject matter jurisdiction. To be sure, the Court has limited the overseas application of some federal statutes (particularly in the employment area),[188] and it has sometimes treated issues of extraterritorial application as a matter of subject matter jurisdiction.[189] Most scholars agree, however, that extraterritorial application presents not a question of subject matter jurisdiction, but rather a question of legislative jurisdiction that determines the plaintiff's ability to state a claim for relief.[190] Thus, even assuming that a challenge to the legality of military detention presents

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186 At the same time, reliance upon nonstatutory review for overseas litigation need not pose any threat to the district-of-confinement and immediate-custodian rules as they apply to litigation over detention in the United States.

187 *See* 28 U.S.C. § 1331. In 1976, Congress amended the general federal question statute to eliminate an amount-in-controversy requirement of $10,000 in federal government litigation. *See* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified as amended at 28 U.S.C. § 1331(a)). The amendment secured federal jurisdiction for all federal claims against federal officials and the government, including claims to challenge the legality of administrative action that might otherwise have failed to satisfy the jurisdictional threshold. *See* Califano v. Sanders, 430 U.S. 99, 105 (1977).

188 *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 249–50 (1991).

189 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

190 *See, e.g.*, Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case*, 89 AM. J. COMP. INT'L. L. 750, 750 n.3 (1995).

a question involving the extraterritorial application of U.S. law,[191] such extraterritoriality would not threaten the district court's subject matter jurisdiction.

To establish the existence of a right of action, plaintiffs seeking relief against overseas confinement may pursue nonstatutory review of agency action.[192] Originally based upon the presumptive availability of suits for injunctive and declaratory relief and on such remedies as the writ of mandamus, nonstatutory review provides litigants with a right of action to challenge the legality of government action in circumstances in which Congress has failed to make explicit statutory provision for judicial oversight.[193] Today, Congress has enshrined nonstatutory review in the Administrative Procedure Act (APA), which establishes a presumption in favor of judicial review as a basic principle of federal law.[194] Even assuming the inapplicability of the APA to certain aspects of the nation's national security apparatus,[195] the tradition of nonstatutory review would provide the basis for a legal challenge to the constitutionality of detention.[196]

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191 One might argue that an action against the Defense Department to challenge a policy of military detention formulated in Washington, D.C. does not present a genuine case of extraterritoriality, even when the detention itself takes place overseas. *Cf.* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 536–537 (D.C. Cir. 1993) (finding that an agency's failure to prepare an environmental impact statement occurred in the United States, and rejecting the "proposition that [such] conduct occurring within the United States is rendered exempt from otherwise applicable statutes merely because the effects of its compliance would be felt [outside the nation's boundaries]").

192 We associate the right of action to enjoin unconstitutional state action with the decision in *Ex parte Young*, 209 U.S. 123, 152 (1908). Parties may also seek to enjoin federal governmental officials from taking action in violation of federal rights. *See* Stark v. Wickard, 321 U.S. 288, 290 (1944).

193 For an overview of nonstatutory review, see LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965), and Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

194 Section 10 of the APA establishes a presumption in favor of judicial review, either under any special statute that Congress has provided or by reliance upon suits for declaratory and injunctive relief or upon other forms of nonstatutory review. *See* Administrative Procedure Act § 10, 5 U.S.C. §§ 701–06 (2000). The Declaratory Judgment Act, 28 U.S.C. § 2201 (2000), provides the district courts, in cases of actual controversy, with authority to declare the rights and legal relations of the parties. While these statutes do not confer subject matter jurisdiction, *see* Califano v. Sanders, 430 U.S. 99, 105 (1977) (APA); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950) (Declaratory Judgment Act), they either create or assume the existence of nonstatutory federal rights of action to secure relief from illegal federal government action, *see, e.g.*, *Skelly Oil*, 339 U.S. at 671–72.

195 *See* Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (exploring in dicta the scope of the APA exception for military action in the field of battle); *see also* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 512–15 (2005) (discussing possible exceptions that might "exempt a military agency . . . from APA strictures").

196 The fundamental basis for nonstatutory review traces to the willingness of courts, applying common law precepts, to recognize a right of action against a government official to protect a legal right. *See* Byse & Fiocca, *supra* note 193, at 321–22. Individuals detained

Federal courts in the District of Columbia have long assumed that the right to judicial review extends to suits seeking to challenge government action either taken overseas or affecting suitors there. In *Rusk v. Cort*, for example, the plaintiff sought to challenge loss of citizenship imposed upon him for failing to return to the United States to report to his draft board.[197] Rather than requiring the plaintiff to return to the United States and submit to a complex review process under immigration laws, the Supreme Court allowed him to file an action for declaratory and injunctive relief against the Secretary of State in the District of Columbia.[198] Nonstatutory review has also been made available to permit district courts in the District of Columbia to entertain constitutional challenges to decisions of the High Court of the Territory of American Samoa.[199] The actions themselves go forward against the Secretary of the Interior, a cabinet-level official residing in the District of Columbia, and they rest upon the assumption that the Secretary enjoys the authority to compel the High Court to bring its decisions into conformity with law.[200] Nonstatutory review thus provides the gap-filling vehicle by which individuals alleging a constitutional violation to which no mode of statutory review applies may bring their claims to federal court.

Other procedural aspects of the litigation would seem quite straightforward. Just as in habeas litigation generally, high government officials in Washington, D.C.[201] cannot invoke the doctrine of

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in violation of the Constitution or laws of the United States would certainly qualify as having suffered a private wrong entitling them to damages. For an example of the Court's willingness to recognize nonstatutory review as a tool to remedy alleged constitutional violations, see Webster v. Doe, 486 U.S. 592, 603–04 (1988).

197 369 U.S. 367, 369–70 (1962). Although the *Califano* Court later withdrew the APA as the source of subject matter jurisdiction for its decision in *Rusk*, it based its decision on the availability of general federal question jurisdiction as an alternative source of authority. *See Califano*, 430 U.S. at 105–06. *Califano* thus leaves intact the *Rusk* Court's conclusion that the plaintiff had a right of action to pursue such relief against the government.

198 *See Rusk*, 369 U.S. at 379–80.

199 The United States Court of Appeals for the D.C. Circuit has held that district courts may entertain actions in the nature of mandamus against the Secretary of the Interior to facilitate judicial review of High Court decisions. *See* Corp. of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 830 F.2d 374, 387 (D.C. Cir. 1987). For an account, see Pfander, *supra* note 13, at 752–54. The reliance on mandamus was necessitated by the failure of Congress to craft an organic act for American Samoa with the usual provisions for appellate review of territorial judicial decisions. *See id.*

200 *See Hodel*, 830 F.2d at 376. Such review enables the federal courts to hear claims that the High Court—sitting in Samoa, itself several thousand miles away from the nation's capital—failed to give effect to binding rules of U.S. constitutional law in the course of its decisions. *See id.* at 386–87. In the course of such litigation, federal courts must determine the extent to which constitutional guarantees apply in American Samoa (under the doctrine of incorporation) and must pass on claims of constitutional violation. *See id.* at 368.

201 The Court has long since approved of the power of litigants to name high government officials in suits for injunctive and declaratory relief, at least outside the habeas context. *See, e.g., Webster*, 486 U.S. 592; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,

official immunity against constitutional challenges to government action.[202] Venue would often be appropriate in the District of Columbia as the place where most such officials reside and as the only place in the United States in which any substantial event might be said to have taken place for venue purposes.[203] Service on the government official, with a copy to the Attorney General of the United States, would suffice to confer personal jurisdiction on the district courts.[204]

B. Habeas Does Not Displace Nonstatutory Review

However plausible, such an equitable model of overseas detention litigation must confront the negative implications of the habeas statute and the doctrine of habeas exclusivity. If the habeas statute denies the district courts power to entertain habeas petitions in cases involving overseas detention, critics may argue that the same restriction would bar equitable claims that seek the functional equivalent of habeas relief. Critics might bolster this argument against allowing an end-run around the territorial limits of the habeas statute by drawing on a doctrine of habeas exclusivity that the Supreme Court has developed and extended in recent years. Beginning in *Preiser v. Rodriguez*[205] and continuing in *Heck v. Humphrey*,[206] the Court has treated habeas corpus as the exclusive federal judicial remedy for prisoners who wish to challenge state court convictions and has forbidden petitioners from switching to alternative forms of relief, such as actions under § 1983.[207] If habeas provides the sole remedy for wrongful detention,

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582 (1952); *cf.* Rumsfeld v. Padilla, 542 U.S. 426, 435 n.8 (2004) (refusing to resolve a split in the circuits as to whether immigrants may name the Attorney General of the United States in a habeas litigation challenging deportation).

202 Although officials in the executive branch enjoy qualified immunity from a suit for damages, *see* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U.S. 478, 497 (1978), the immunity does not apply to suits for injunctive and declaratory relief or to actions in the nature of mandamus, *see* Shields v. Utah Idaho Cent. R.R. Co., 305 U.S. 177, 183–84 (1938) (injunctive relief); Houston v. Ormes, 252 U.S. 469, 472–74 (1920) (mandamus). While later decisions invoked sovereign immunity when alternative remedies at law were judged adequate, *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18 (1949), the broad waiver of sovereign immunity in the APA essentially moots the problem, *see* 5 U.S.C. § 702 (2000); RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 960, 968–69 (5th ed. 2003).

203 *See* 28 U.S.C. § 1391(e) (2000). Of course, the plaintiff in such an action may claim that venue would be proper in a judicial district in which the plaintiff resides under 28 U.S.C. 1391(e)(3). But as noncitizens of the United States, most prospective plaintiffs held in detention facilities overseas would lack a U.S. residence on which to base such a venue claim. As for U.S. citizens with established residences, the statute would provide a venue option at the plaintiff's residence in keeping with the liberal venue rules that govern litigation against the federal government.

204 *See* FED. R. CIV. P. 4(i).

205 411 U.S. 475, 486 (1973).

206 512 U.S. 477, 481 (1994).

207 *See* 42 U.S.C. § 1983 (2000).

then the territorial limits on the habeas power in § 2241 might appear to foreclose reliance on alternative remedies.[208]

The next two sections address these arguments against the equitable alternative to habeas relief. The sections show that territorial limits arose to restrict the use of habeas corpus as a form of judicial process to compel in-court production of the prisoner. Such limits need not apply to habeas substitutes, such as actions for injunctive and declaratory relief. Similarly, the notion of habeas exclusivity arose to prevent petitioners from side-stepping the special rules that apply to collateral review of the constitutionality of state court convictions. Such exclusivity does not govern challenges to executive detention, where alternative remedies, including declaratory relief, have long been seen as appropriate substitutes for habeas litigation.

1. *The Inapplicability of Territorial Limits*

History supports a personal jurisdictional characterization of the habeas statute's territorial limits. The precursor to § 2241 entered the statute books during Reconstruction, as the Republicans expanded habeas to provide a judicial remedy for those detained under color of both state and federal authority.[209] During debates on the bill, Senator Johnson questioned the territorial ambit of the contemplated habeas power.[210] Under the unqualified terms of the statute, he feared that district courts might claim the power to issue writs of habeas corpus on behalf of persons "imprisoned in any part of the United States."[211] Senator Johnson fretted that district courts in the District of Columbia might, for example, issue the writ on behalf of a person imprisoned in the district of Florida.[212] Questions understand-

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208 In a contemporary of the *Rasul* litigation, the D.C. Circuit Court adopted a similar conception of habeas exclusivity in refusing to permit the *Al Odah* petitioners to disclaim reliance on habeas corpus in their challenge to detention at Guantanamo Bay. *See* Al Odah v. United States, 321 F.3d 1134, 1144–45 (D.D.C. 2003), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004). This Article contends below that exclusivity arguments drawn from cases brought by prisoners held under state or analogous law do not apply to cases involving executive detention.

209 *See* Fairman, *supra* note 129, at 634–40.

210 *See* CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867).

211 *Id.*

212 *See id.* Professor Fairman reports that Senator Johnson had represented Dr. Mudd, the physician who provided medical treatment to John Wilkes Booth after Booth assassinated Abraham Lincoln. *See* Fairman, *supra* note 129, at 636–38. Dr. Mudd was charged before a military commission with complicity in the crime and was held pending trial in the District of Florida. *Id.* Fairman believes that Johnson's efforts as counsel to procure a writ of habeas corpus to test Mudd's trial by commission made him a particularly knowledgeable critic of habeas authority. *See id.*

ably arose about the potential expense and inconvenience of such an unlimited habeas authority.[213]

A brief sketch of habeas practice helps to explain the nature of these problems. At the time Senator Johnson raised his concern, habeas proceedings began with the submission of a motion or petition for the writ supported by affidavits or sworn statements.[214] If the showing of cause was sufficient, the judge would issue the writ of habeas corpus, directing the respondent to bring the petitioner into court, along with the reasons for confinement, for a judicial disposition of the claim of unlawful imprisonment.[215] The requirement of the petitioner's in-court production explains the emphasis on geographic convenience; one supporter of the bill, Senator Trumbull, acknowledged that it would "hardly be tolerated that the district judge in California should issue a writ of habeas corpus to bring before him some person from Maryland."[216] Other aspects of habeas practice, including the asymmetric rules of finality[217] and the rules of successive

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213 The Court's own historical accounts of the adoption of the territorial restriction parallel the one in the text. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004).

214 *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

215 In the Act of February 5, 1867, Congress provided for the custodian to return the writ together with the petitioner and the cause of confinement within three to ten days, depending on the distance between the place of confinement and the courtbouse. *See id.*, 14 Stat. at 386. Federal courts enforced obedience to writs of habeas corpus (and other prerogative writs) through the issuance of a body attachment that would authorize the marshal to arrest the jailer. *See id.*

216 *See* CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867). Adoption of the statute would not necessarily have produced the problems that Senator Johnson highlighted. The district courts had long taken the position that their power to issue process, in habeas proceedings and otherwise, extended only within the territorial boundaries of their districts. *See Ex parte* Graham, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5657) (holding that lower federal courts may not issue their process into another district); *In re* Bickley, 3 Fed. Cas. 332 (S.D.N.Y 1865) (No. 1387) (finding that that the district court in New York lacks power to issue a writ of habeas corpus in relation to an imprisonment in Massachusetts). By reading such territorial limits into the new habeas statute, district courts would avoid the inconvenience noted by the advocates of the more restrictive language.

217 At common law, petitioners who won release achieved a decisive victory, but respondents that successfully defended detention might face a number of successive petitions before another court or judge of competent jurisdiction. *See* SHARPE, *supra* note 178, at 201–02. The decisiveness of a petitioner's victory flowed from the absence of any provision for appellate review; habeas arose as a summary process, was tried on affidavits, and was determined without a jury. *See id.* Under the Judiciary Act of 1789, no provision was made for an appeal from a babeas disposition (just as there was no provision for an appeal from an acquittal of an individual at trial). *See* ch. 20, 1 Stat. 73. The Act of February 5, 1867 included a provision for appellate review of lower federal courts by the Supreme Court. Ch. 28, § 1, 14 Stat. at 386. No doubt the provision reflected the government's concern that some lower courts might be too quick to grant the writ in challenges to military reconstruction. Congress's decision to repeal this provision, upheld in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–14 (1869), left the Court free to review a lower court decision through the submission of a successive "original" petition as in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99–101 (1807). *See* Pfander, *supra* note 131, at 1478–79.

petitioning,[218] would have exacerbated the threat posed by a territorially unrestricted habeas power. Although sponsors of the bill doubted that the courts would adopt such a reading of the legislation, they nonetheless agreed to limit the district courts' power to issue the writ "within their respective jurisdictions."[219] The evident purpose of these limits was to ensure that habeas litigation went forward in the most convenient forum, where the district court enjoyed personal jurisdiction over the immediate custodian and only a short distance separated the place of confinement from the courthouse.[220]

The procedural rules that drove the territorial restrictions of the nineteenth century no longer invariably apply to litigation over the legality of detention. In 1941, the Supreme Court abandoned the practice of requiring in-court production of petitioners and approved the litigation of habeas issues through the issuance of an order to show cause, followed by the submission of briefs and affidavits.[221] The habeas statute codifies this practice, permitting a district court to issue an order to show cause rather than the writ itself as the prelude to an inquiry into detention.[222] "Habeas corpus" petitioners no longer routinely appear in court[223] and no longer invariably seek release from custody as the remedy.[224] The rules of finality have changed as well; petitioners must make a substantial showing to justify the submission of second or successive petitions.[225] Finally, federal law provides for appellate review of habeas decisions regardless of whether the decision favors the government or the petitioner.[226]

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218 On the inapplicability of claim and issue preclusion, see SHARPE, *supra* note 178, at 202–03. In the well-known case of *Ex parte Bollman*, the petitioners first sought relief from the circuit court for the District of Columbia. 8 U.S. at 76 n.2. Lacking any statutory basis for an appeal from the circuit court's denial of relief, petitioners simply filed in the Supreme Court, and eventually gained their release from custody. *See id.* at 101. Indeed, the petitioners attended the proceeding and were freed by the Court's decision. *See id.* at 125, 136. Justice Johnson's dissent in *Bollman* focuses in part on the Court's conclusion that it enjoyed habeas jurisdiction that overlapped with that of the lower court. *See id.* at 104 (Johnson, J., dissenting). For a general discussion of *Bollman*, see Pfander, *supra* note 131, at 1478–87.

219 *See* CONG. GLOBE, 39th Cong., 2d Sess. 790 (1867).

220 *See supra* notes 216–18 and accompanying text.

221 *See* Walker v. Johnston, 312 U.S. 275, 284 (1941).

222 *See* 28 U.S.C. § 2254 (2000).

223 The district courts have not ordered the production of the petitioner in court in any of the recent challenges to detention of enemy combatants. Of course, the petitioner may at some point appear in court to testify in a proceeding.

224 In addition to release from custody, habeas litigants may challenge the collateral consequences of a wrongful conviction, including the possibility of future incarceration. *See, e.g.*, Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 488–89 (1973).

225 In cases involving the use of habeas to challenge a criminal conviction, rules of finality generally limit successive petitions. *See* 28 U.S.C. § 2244. In cases involving a challenge to executive detention, similar judge-made rules have arisen as a bar to successive petitions. *See* Amerson v. INS, 36 F. Supp. 2d. 339, 344 (D. La. 1998).

226 *See* 28 U.S.C. § 2253(a).

With the abandonment of key features of habeas practice, including the tradition of in-court production of the prisoner, detention litigation today more closely resembles a suit for injunctive and declaratory relief than the traditional petition for habeas corpus. In *Braden v. 30th Judicial Circuit Court*, for example, the Supreme Court permitted a habeas petitioner who was incarcerated in Alabama on a state criminal conviction to challenge the timeliness of a prospective criminal proceeding in Kentucky.[227] In two related innovations, *Braden* permitted an action for relief other than immediate release from custody to proceed in a district other than that of the immediate custodian.[228] In doing so, the decision treated the territorial restrictions of § 2241 less as an inflexible jurisdictional barrier than as a venue provision that served to allocate the litigation to the district court with the most immediate connection to the Kentucky criminal proceeding.

While *Padilla* reaffirms the territorial model for custody in the United States (and the accompanying district-of-confinement and immediate-custodian rules),[229] the habeas statute itself provides the basis for rejecting that model in overseas cases. If we interpret § 2241 as denying district courts the power to issue writs of habeas corpus in relation to detention overseas, then overseas detainees may be able to seek alternative forms of relief. The territorial limits of the statute might thus serve to confine the rigidity of *Padilla* to domestic cases, leaving overseas litigation to develop in accordance with the more flexible tradition of nonstatutory review.[230]

2. *The Inapplicability of Habeas Exclusivity*

Reliance upon a nonstatutory action for injunctive and declaratory relief in overseas cases to which habeas corpus does not extend may appear to run counter to the tradition of habeas exclusivity in the United States.[231] But that tradition of exclusivity arose in connection with the Court's desire to preserve the limits it placed on the ability of state prisoners to mount collateral attacks in federal court on state criminal convictions. Familiar limits include the barrier to cognizance of alleged violations of the Fourth Amendment;[232] the exhaustion doctrine, restricting access to federal court until the petitioner has

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227 *Braden*, 410 U.S. at 500–01.

228 *See id.*

229 *See* Rumsfeld v. Padilla, 542 U.S. 426, 446–51 (2004).

230 For a discussion of the changing nature of habeas litigation, and its impact on the continued vitality of the immediate-custodian rule in the immigration context, see Armentero v. INS, 412 F.3d 1088 (9th Cir. 2005) (Berzon, J., dissenting).

231 *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973).

232 *See* Stone v. Powell, 428 U.S. 465, 493–94 (1976).

first sought relief in state court;[233] and the rules barring relief except in cases in which the state courts failed to correctly apply an established rule of constitutional law.[234] Exclusivity functions to protect the values of federalism and finality that underlie the development of these limits on habeas authority.[235]

In litigation over executive detention overseas, the federalism and finality values that drive exclusivity do not apply.[236] In overseas cases, the petitioners challenge not a criminal conviction (whether in state or federal court), but detention based upon the decision of an executive government official. Such a focus on executive detention lies at the heart of the writ's historic function, but within that core, no rules of exclusivity have developed. The common law treated a variety of remedial forms as substitutes for habeas corpus.[237] Blackstone acknowledged the importance of habeas corpus as the preferred remedy, but identified four other remedies for wrongful confinement.[238] Three operated like habeas in affording specific relief from custody; the fourth, the action in trespass for false imprisonment, provided compensation or satisfaction for wrongful confinement.[239] More recent scholarship confirms the availability of an array of remedies for illegal custody.[240] The prerogative writs of certiorari, mandamus, and prohibition were sometimes used to secure the petitioner's release

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233 *See* 28 U.S.C. § 2254(b)(1) (2000); O'Sullivan v. Boerckel, 526 U.S. 838, 844–45 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982).

234 *See* 28 U.S.C. § 2254(d)(1); *cf.* Teague v. Lane, 489 U.S. 288, 298 (1989) (barring habeas relief in state prisoner cases except as to state court errors in applying established principles of federal law).

235 Thus, in the Court's most recent decision in this area, it found that the doctrine of habeas exclusivity did not bar a § 1983 claim seeking declaratory and injunctive relief for a violation of federal law that habeas could not remedy. *See* Wilkinson v. Dotson, 544 U.S ___, ___, 125 S. Ct. 1242, 1244–45 (2005). The appellant in *Wilkinson* sought to challenge the state procedures for considering an application for parole. *Id.* at 1244. The appellant, if successful, would have received a new parole proceeding, but the fact and duration of confinement would not have changed. *See id.* at 1248. By concluding that habeas relief did not apply, the Court found no basis for preempting the § 1983 action for injunctive and declaratory relief. *See id.* at 1249.

236 Of course, the exhaustion requirement may apply in executive detention cases as in immigration cases in which applicants for release from custody under immigration laws must first exhaust available remedies before filing a habeas petition. *See* Duvall v. Elwood, 336 F.3d 228, 232–33 (3d Cir. 2000).

237 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *128.

238 Blackstone identified the interest in personal liberty as an absolute right of individuals, and divided the array of available remedies into those designed to obtain release from custody and those designed to obtain damages for wrongful confinement. *Id.* As for release, Blackstone identified three outmoded writs and a fourth, habeas corpus, that issued to compel release from custody. *Id.* at *128–38. As for damages, Blackstone pointed to the all-purpose trespass action, which encompassed claims for false imprisonment, assault, and battery. *Id.* at *138.

239 *Id.*

240 *See* SHARPE, *supra* note 178, at 60.

from unlawful custody.[241] In addition, the declaratory judgment action substitutes for habeas corpus by providing an alternative mode of challenging the legality of custody.[242]

In the United States, the Supreme Court has long recognized that alternative forms of relief may substitute for habeas corpus. In *United States v. Hayman*, the Court ruled that Congress could substitute review by motion under § 2255 for review by petition for writ of habeas corpus under § 2241 as the primary method for collateral judicial review of federal criminal convictions.[243] The crucial issue, as the Court recognized, was to allow Congress the flexibility to substitute a more convenient mode of review while preserving the fundamental features of habeas oversight.[244] Moreover, in a series of cases involving claims that the availability of habeas impliedly displaced other remedies such as suits seeking nonstatutory review, the Court has declined to treat habeas remedies as preclusive.[245]

Questions of implied preclusion have arisen most commonly in immigration litigation, in which habeas corpus provides the traditional remedy for individuals seeking to challenge deportation and exclusion orders.[246] In *Shaughnessy v. Pedreiro*, which began as an action for declaratory and injunctive relief to challenge deportation, the government argued that the habeas remedy impliedly precluded any reliance on other forms of relief, such as nonstatutory review.[247] The Court rejected the argument, emphasizing that the APA, when interpreted in connection with a new immigration statute, created a presumption in favor of nonstatutory review that could stand alongside the habeas remedy.[248] In subsequent decisions, the Court made nonstatutory review available as an alternative to habeas in exclusion cases as well.[249] While it has acknowledged that Congress retains control over the availability of review and may restrict it in appropriate situations,[250] the Court clearly recognized that nonstatutory review might

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241 *Id.*

242 *Id.* at 60–61.

243 United States v. Hayman, 342 U.S. 205, 219 (1952).

244 *See id.* at 219–21.

245 *See infra* text accompanying notes 261–64.

246 On the significance of the habeas remedy in the immigration context, see INS v. St. Cyr, 533 U.S. 289, 300–01 (2001).

247 349 U.S. 48, 52 (1955).

248 *Id.* at 51.

249 *See* Brownell v. We Shung, 352 U.S. 180, 184 (1956).

250 Following *Pedreiro* and *We Shung*, Congress modified the process for reviewing immigration proceedings. For an account of the legislative changes, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998). On the Court's use of the Suspension Clause to resist overbroad congressional efforts to exclude review, see *St. Cyr*, 533 U.S. 289.

coexist with habeas as an alternative remedy, even for aliens in custody.[251]

If available habeas remedies do not ordinarily displace nonstatutory review, then it makes no sense to argue that implied habeas preclusion eliminates recourse to other avenues for challenging overseas detention.[252] Nonstatutory review has always played the role of a gap filler, securing an adequate mode of judicial review in cases in which the statutory provisions for such review fall short. In the case of overseas detention, the habeas statute creates a gap by declining to authorize issuance except within U.S. territory.[253] As previously discussed, the apparent purpose of the territorial restriction was to ensure proper venue and personal jurisdiction, and not to foreclose judicial review in overseas cases.[254] Indeed, the Supreme Court's repeated recognition of overseas petitioners' right to test the legality of their detentions notwithstanding the habeas statute clearly reflects the Court's conclusion that the statute has little force as an implied restriction of overseas cases. By recognizing the availability of nonstatutory review, the Court could place its overseas exception on a sound foundation.

Of course, reliance upon nonstatutory review through an action for declaratory and injunctive relief might restrict the full range of remedial options familiar to habeas litigation. But the remedial authority of the district courts would not likely diminish in any significant way. To be sure, district courts would dispense with required in-court production of the petitioner, but such production has long since disappeared from habeas practice.[255] Moreover, the Court has made clear that the All Writs Act[256] provides the district courts with authority, even in proceedings that substitute for habeas corpus, to order the production of a detained plaintiff in appropriate circumstances.[257] It thus seems clear that the district courts would retain the power to order the plaintiff's production either to secure testimony about the conditions of confinement or to enforce a release order. District courts might also stretch precedents slightly to secure the

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251 *See We Shung*, 352 U.S. at 186.

252 Lower federal courts have occasionally treated habeas as the exclusive remedy for certain kinds of challenges to custody and have barred other forms of relief. *See, e.g.*, LoBue v. Christopher, 82 F.3d 1081, 1082 (D.C. Cir. 1996). However much weight such decisions carry in light of conflicting Supreme Court authority, they clearly have little persuasive force in an overseas context in which the relevant statute forecloses habeas relief altogether.

253 *See* 28 U.S.C. § 2241(a) (2000).

254 *See supra* notes 229–30 and accompanying text.

255 *See supra* note 223.

256 28 U.S.C. § 1651(a).

257 *See* United States v. Hayman, 342 U.S. 205, 220–21 (1952).

right of third parties to file nonstatutory review complaints as the next friends of those imprisoned.[258]

C. The Loss of the Suspension Clause

Perhaps more troubling to some, the switch from habeas (with an overseas "exception") to nonstatutory review might expose the availability of review to the risk of congressional or presidential suspension. The Court has indicated in recent years that the Suspension Clause may impose important limits on the ability of Congress to curtail judicial review. The Court has used its desire to avoid such constitutional questions to justify a fairly aggressive approach to the interpretation of statutes that purport to restrict review. Thus, in *INS v. St. Cyr*, the Court found that a statute avowedly seeking to restrict habeas review in the immigration field might present a constitutional question under the Suspension Clause and interpreted the statute to dodge the question that such curtailment presented.[259] Supporters of broad review may fear that the Court will prove less protective of nonstatutory review than of review couched in terms of the "great writ" of habeas corpus.[260]

In considering this argument, one should first recognize that the Court may use other constitutional provisions and principles to resist curtailing judicial review. In *Webster v. Doe*, the Court refused to construe a statute granting discretion to the director of the CIA as precluding judicial review of constitutional claims, based partly on doubts derived from the Due Process Clause.[261] In *Felker v. Turpin*, the Court emphasized its own appellate jurisdiction as a potential source of doubts about the scope of congressional power.[262] In *Crowell v. Benson*, the Court creatively reinterpreted a federal statute to preserve a litigant's right to invoke the judicial power of the United States in an Article III court for review of an agency's determination of certain kinds of legal claims.[263] With this array of alternative bases for resisting curtailment of review, some scholars believe that the Suspen-

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258 *See* Whitmore v. Arkansas, 495 U.S. 149, 163 n.4 (1990).

259 533 U.S. 289 (2001). For an account, see Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002).

260 The Court has provided little guidance as to the protections afforded by the Suspension Clause, even in wholly domestic cases. The Court has indicated that the Suspension Clause at a minimum protects the writ as it existed in 1789, and thus encompasses review of errors of law and challenges to the jurisdiction of the custodian. *See St. Cyr*, 533 U.S. at 302. But it has used this historic conception of the writ as the basis for demanding a clear statement rather than as a basis for invalidating federal laws. *See id.* at 299–300. How well the constitutional interpretation on which the *St. Cyr* Court based its clear statement requirement will hold up in post–September 11 litigation remains an open question.

261 *See* 486 U.S. 592, 603 (1988).

262 *See* 518 U.S. 651, 660–61 (1996).

263 *See* 285 U.S. 22, 89 (1932).

sion Clause adds little to the constitutional limits on congressional power.[264]

One should also recognize that these suspension arguments would remain available even if the nonstatutory conception of overseas detention litigation prevailed. If Congress declined to make habeas available and substituted instead a more restricted form of nonstatutory review under § 1331, litigants may challenge the resulting remedial options as a prohibited curtailment of their right to the writ. The English common law history recounted in Part I may reinforce such an argument, but the historical failure of the American habeas statute to make an explicit provision for the issuance of the writ to overseas custodians may detract somewhat from its force. Importantly, though, the Court has made it clear that arguments based on the Suspension Clause remain viable in the wake of a congressional shift from traditional habeas proceedings to more modern forms of detention litigation.[265] In the end, the substance matters more than the form of the remedy in determining whether any particular adaptation presents a Suspension Clause problem.

CONCLUSION

The scope of judicial review of government action in the global war on terror may well turn on how we characterize the work of the nation's justice, security, and defense apparatus. When the Department of Defense conducts a shooting war, judicial deference seems both appropriate and overwhelmingly likely. Indeed, one can attribute the deference of the lower federal courts in the early rounds of the *Rasul* litigation to this tradition of judicial deference to the government during times of war. By the time the case reached the Supreme Court, however, the hostilities in Afghanistan had ended and the Court faced the prospect that those captured might be detained into the indefinite future.[266] Similarly, the district court's decision to

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264 *Cf.* Daniel Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1998) (emphasizing Article III as an important constitutional limit on Congress's power to curtail judicial review). *Compare* Neuman, *supra* note 250 (arguing that the Suspension Clause acts as a restriction on Congress's power to curtail judicial review of immigration orders), *with* Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068 (1998) (arguing that due process provides the relevant limits on congressional power).

265 *See* Swain v. Pressley, 430 U.S. 372, 380–82 (1977) (entertaining, but rejecting on the merits, a claim that Congress violated the Suspension Clause by ending routine habeas review in the federal district courts and switching to review before Article I tribunals); United States v. Hayman, 342 U.S. 205, 223 (1952) (entertaining, but rejecting on the merits, a claim that Congress violated the Suspension Clause by restricting habeas review and substituting a § 2255 motion by federal prisoners who wish to challenge their federal convictions).

266 *See* Rasul v. Bush, 542 U.S. 466, 485 (2004).

order Mr. Padilla's release was no doubt due in part to the court's perception that the circumstances surrounding his apprehension in Chicago more nearly resembled the arrest of an accused criminal than the capture of an enemy soldier.[267] The Fourth Circuit rejected the district court's approach based largely on its finding that Mr. Padilla had been determined to have fought against U.S. forces in Afghanistan, and was properly characterized as an enemy combatant.[268]

The APA helps to confirm the propriety of judicial review in military cases overseas. The Act's definition of an agency includes the Defense Department, and it establishes a presumption of judicial review in many cases. To be sure, the Act does not purport to regulate review in two situations:[269] the judgments of courts martial and military commissions and the exercise of military authority in the field of war or in occupied territory. But the failure to regulate in these two exceptional cases invites the courts to consider other sources of relevant law and generally confirms that judicial oversight extends to overseas conduct of the military (at least when the field-of-war and occupation exceptions do not apply). When the exceptions do not apply, the APA's presumption in favor of judicial review applies with its customary vigor and helps to confirm the availability of nonstatutory review of overseas military detention.

This confirmation that federal law provides the measure of the legality of U.S. military actions overseas draws on several centuries of Anglo-American law. English law followed the English army into battle and the superior courts at Westminster stood ready to apply the common law to test the boundaries of military authority throughout the empire. Just as Lord Mansfield rejected the notion that military authority in Minorca and Gibraltar created lawless enclaves, last Term's decision in *Rasul* rejected the creation of a lawless enclave in Guantanamo Bay.

Rasul's rejection of the immediate-custodian model of habeas jurisdiction provides the foundation for a more capacious model of nonstatutory review in which overseas detention gives rise to an action for injunctive and declaratory relief. Such an approach would clarify the power of the courts to proceed against high government officials in Washington, D.C., the very officials whose policy decisions the litigation seeks to contest. Moreover, the nonstatutory review model would invite federal courts to recognize that U.S. law follows the U.S. military into bases and detention centers around the world. Just as the members of the armed forces must follow the military code and

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267 *See* Padilla v. Hanft, 389 F. Supp. 2d 678, 685 (D.S.C.), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3275 (U.S. Oct. 25, 2005) (No. 05-533).

268 *See Padilla*, 423 F.3d at 397.

269 *See supra* note 12.

the orders of the President, so too must they respect any decisions in which the federal courts conclude that the executive branch has exceeded legal boundaries. The ultimate question, as Justice Jackson explained in *Johnson v. Eisentrager*, is not the scope of habeas jurisdiction overseas, but the jurisdiction of the civil courts in relation to military authorities.[270] While the civil courts may choose to defer, they doubtless have the power to overturn unlawful military detention.

270 *See supra* note 156 and accompanying text.