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About Time: The Timeliness of Habeas Corpus and an Exceptional Circumstance in Boumediene v. Bush

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The Timeliness of Habeas Corpus
And an Exceptional Circumstance
In *Boumediene v. Bush* – A Precedent
Abstract

In wartime states of emergency, the Supreme Court has historically held that a constitutional entitlement to habeas review is neither predicated on the length of detention nor the timeliness of due process, but rather is objective, concrete, and atemporal. The question of wartime habeas corpus has therefore always been an ontological question, exclusively determined by the corresponding categories of subject and space. However, this paper argues that a surreptitious shift in methodology buried inside the ostensible precedent of *Boumediene v. Bush* should not be overlooked, for the ruling signals the inaugural moment whereby the length and indefinite duration (i.e. the time) of an alien petitioner’s wartime, extraterritorial confinement becomes dispositive for the Court. No longer are the twin categories of subject and space of exclusive relevance for determining wartime habeas corpus –rather, in 2008, some 6+ years after *Boumediene* petitioners’ capture and detention, and 7+ years after the declaration of a global war of indefinite duration, it’s also now about time.
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‘The cases before us...do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here... [T]he costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.’

I. Introduction
A. Boumediene v. Bush – a Precedent

In Boumediene v. Bush, the Supreme Court established a precedent when it ruled that aliens held in military detention outside US national territory have a constitutional entitlement to habeas corpus. Finding the review procedures of the Detainee Treatment Act (DTA) an inadequate substitute for habeas proceedings, and thus holding that §7 of the Military Commissions Act (MCA) operates an unconstitutional suspension of the writ, the Court ordered Congress to comply with the constitutional requirements of the Suspension Clause more generally, without going so far as to summarily itemize what, precisely, would satisfy as an adequate habeas substitute. Delivering the majority opinion, Justice Kennedy concluded with a clarifying note:

‘Our holding…should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs…. However, some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.’

The two written dissents in Boumediene executed different criticisms of the majority opinion to the same end. Chief Justice Roberts argued that the Court prematurely ruled on the constitutional issue of the detainees’ access to habeas corpus, rather than waiting for petitioners to exhaust their Article III remedies, as provided by the DTA. If the collateral review procedures available through the CSRT’s, coupled with the D.C. Circuit’s jurisdiction over final review – procedural substitutes to which, as Roberts points out, no detainee had yet made recourse – turned out to satisfy the requirements of due process, ‘[t]he question of the writ’s reach need not be addressed.’ Instead, the Court ‘rushes to decide’ the constitutional question of the extraterritorial reach of habeas corpus, therein departing from the ‘ordinary course’ of constitutional adjudication. Why the Court would so hastily act, the Chief Justice could only puzzle; he could not ‘help but

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1 128 S. Ct 2229 (2008)
2 Ibid 2277
3 Ronald Dworkin has argued (“Why It Was a Great Victory”, New York Review of Books, Vol. LV, No.13 Aug. 14th 2008) that although apparent contradiction exists between the two dissenting opinions – with Roberts arguing that the ruling would have little practical effect for the achievement of liberty sought by detainees, while Scalia insisted that it’s practical effects (i.e. the potential achievement of liberty for some terrorists) would likely result in deaths of more Americans– both were nonetheless signed by all four dissenters. However accurate Dworkin’s observation of these competing logics, the two dissents nonetheless share a singular polemic against the majority’s ‘exceptional’ departure from traditional Court practices of constitutional avoidance and judicial deference to the Executive in wartime military matters.
4 128 S. Ct 2229, 2281 (2008) (C.J. Roberts, dissenting) (‘If the CSRT procedures meet the minimal due process requirements outlined in Hamdi, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question.’)
think...that [the] decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.'

Justice Scalia’s dissent took issue with what he called the majority’s ‘patently false’ reading of the Court’s 1950 ruling in Johnson v. Eisentrager. Scalia argued that the legal precedent established in Eisentrager—that aliens held in military detention abroad lack a constitutional right to habeas review—‘conclusively establishes the opposite’ of the Court’s contemporary usage. A writ of habeas has never extended to aliens detained abroad in an ongoing war. However, Scalia protests, ‘[w]hat drives [the Court’s] decision is neither the meaning of the Suspension Clause, nor the principles of precedents, but rather an inflated notion of judicial supremacy.’

Justice Souter’s 2-page concurrence provides a direct reply to the two dissents, arguing that what is ‘insufficiently appreciated [by both] is the length of the disputed imprisonments, some of the prisoners here being locked up for six years.’ Souter shirked at ‘suggestions of judicial haste...[as] out of place given the Court’s realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country.’ It is far from being the case that the majority ruling is about control of federal policy, or represents some self-inflated exercise in judicial supremacy; rather, Souter justified, the precedent established in Boumediene is a mere ‘act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoner and to the Nation.’

B. Thesis
Announcement of the Boumediene decision on July 12th, 2008 unsurprisingly re-ignited the legal and political debates in media res amongst critics, advocates, and neutral observers of the Bush Administration’s military detention policies. Civil libertarians generally lauded the practical courage of the Court as an exercise in judicial responsibility, while some argued that it could have gone yet further. Proponents of judicial deference contrarily criticized the Court for overstepping its jurisdictional bounds, with some going so far as to accuse it of engaging in ‘judicial imperialism of the highest order.’

The truth of the matter is, questions of the scope of constitutional rights for aliens detained abroad during wartime —when in a radically unconventional war of indefinite duration, detaining combatants declared a priori unlawful, and in a space over which the

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5 Ibid 2279, 2280 (C.J. Roberts, dissenting) (‘All that today’s opinion has done is shift responsibility for...sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.’)
6 128 S. Ct. 2229, 2303 (J. Scalia, dissenting)
7 Ibid 2278 (J. Souter, concurring) {my emphasis}
8 Ibid 2279 (J. Souter, concurring)
9 The most intellectually gratifying debates occurred through the online “Insta-Symposium” sponsored by Opinio Juris (http://www.opiniojuris.org/posts/chain_1213336401.shtml).
US lacks sovereignty but maintains ‘complete jurisdiction and control’—has no clear precedent. Both sides of the debate (whether between Justice Scalia and Justice Souter, or David Cole and John Yoo) implicitly concede that the technical ambiguities produced by the novel legal status of (1) the subject of the enemy combatant and (2) space of Guantanamo Bay, Cuba, render obsolete any available common law precedent, and therefore share a mutual acknowledgement that Boumediene’s holding that the Suspension Clause extends to aliens detained abroad establishes it, as such.

And yet despite this aforementioned consensus, a fundamental methodological shift made by the Court when arriving at the Boumediene ruling has gone relatively unnoticed. Lacking the statutory predicate upon which Rasul was decided, and yet absent any analogous common law precedent approximating either the unique subject of the enemy combatant, or the novel, extra-territorial space of Guantanamo Bay, the Court reaches out for an additional categorical determinate in which to ground its judgment.

Historically, the Court has held that in wartime states of emergency, a constitutional entitlement to habeas review is neither predicated on the length of detention, nor the timeliness of due process, but rather is objective, concrete, and atemporal. That is to say, the question of wartime habeas corpus has always been an ontological question, exclusively determined by the corresponding categories of subject and space. However, a surreptitious precedent buried inside the ostensible precedent of Boumediene v. Bush should not be overlooked, for the ruling signals the inaugural moment whereby the length and indefinite duration (i.e. the time) of an alien petitioner’s wartime, extraterritorial confinement becomes dispositive for the Court. No longer are the twin categories of subject and space of exclusive relevance for determining wartime habeas corpus—rather, in 2008, some 6+ years after Boumediene petitioners’ capture and detention, and 7+ years after the declaration of a global war of indefinite duration, it’s also now about time.

II. A Brief Overview of Wartime Habeas
A. The War on Terror as State of Emergency

13 The ambiguous language of the 1903 Lease Agreement between the United States and Cuba is the source of at least some of the debate over the proper spatial status of the naval facility at Guantanamo Bay, which grants that “[w]hile on the one hand United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba… on the other hand the Republic of Cuba consents that… the United States shall exercise complete jurisdiction and control over and within said areas”, Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, February 23, 1903

14 While prior to the enemy combatant cases of 2004-2008 there was no common law precedent for the exceptional subject and space of the war on terror, one must credit Carl Schmitt for anticipating the conceptual phenomena at root herein. See his “Theory of the Partisan: A Commentary/Remark on the Concept of the Political”, trans. A. C. Goodson, Michigan State University, (1962). For a broader historical analysis of the conceptual origins of the legal category of hostis injustis, see his Nomos of the Earth in International Law and the Jus Publicum Europaeum, Telos Press Ltd. (2003).

15 The concept “subject” is here defined as the total collection of facts comprising the individual citizen or alien, any of which may be considered dispositive, and are as follows: friend/enemy; civilian/soldier; lawful/unlawful; age; mental disposition, etc.

16 The concept “space” is here defined as the total collection of facts comprising the territorial or extraterritorial coordinates of the subject, any of which may be considered dispositive, and are as follows: place of (alleged) crime, capture, detention, (possible) trial; custodial jurisdiction, etc.
The perceived exigency accompanying wartime states of emergency is an uncontested fact, whether one regards its formal invocation as credible and necessary, remains suspicious of the resulting political gains accrued by government, or proceeds agnostically to better study its performative impact.

In the immediate aftermath of the traumatic event of 9/11, the political branches of the United States began to prosecute a “new war” of indefinite duration as a state of emergency. The President issued Executive Proclamation 7463: Declaration of a National Emergency By Reason of Certain Terrorist Attacks, and declared a global war on terror. Congress followed suit, issuing the AUMF, authorizing the President to use ‘all necessary and appropriate force’ to wage such war, without going so far as to restrict its specific geographical application. And as US and Allied troops began culling suspected enemy combatants off foreign territories, the President issued Military Order of Nov. 13th 2001, providing the terms of Detention, Treatment, and Trial of Non-Citizens in the War Against Terrorism.

One need not indulge here in normative political claims on the beneficence/malignity, or necessity/superfluity of the manner of governmental responses to the ostensible threat of global terrorism to acknowledge a certain inevitability to the ensuing dialectic of federal republican power witnessed throughout the course of the past 7 years; empirical claims here will do. Indeed, to assert that, from the very beginning up to the present day, the war on terror has been defined by the dual qualities of (1) a

22 Federal Register: Nov. 16, 2001 (Vol. 66, No. 2), Presidential Documents Page 57831-57836. The Order defines ‘[t]he term “individual subject to this order” [as]…any individual who is not a United States citizen’ and determined to be an enemy combatant, and stipulates that ‘[a]ny individual subject to this order shall be…detained at an appropriate location…outside or within the United States….and shall not be privileged to seek any remedy or proceeding …in any court of the United States.’
23 As I have noted elsewhere (“A Limited Constitution: Publius, the State of Emergency and ‘One Supreme Tribunal’”, forthcoming, boundary2,(Spring 2010)), to map the trajectory (1) from Executive Proclamation 7463: Declaration of National Emergency By Reason of Certain Terrorist Attacks to the Supreme Court’s ruling in Hamdi and Rasul in 2004, and then (2) from the Detainee Treatment Act in 2005 to the Hamdan ruling in 2006, and then again (3) from the Military Commissions Act in late 2006 to the Boumediene ruling in 2008, is to map an intra-state dialectic on the nature of federal republican power of the finest order.
perceived exigency posed by the subject of the enemy combatant and (2) the overlapping territorial and extraterritorial space of its prosecution, is but to state the obvious.²⁴

Of course, logical concerns with subject and space are neither monopolized by the political branches, nor unique to the present emergency paradigm. When considering questions of the scope of constitutional rights amidst the exigencies of traditional wars, federal courts have often applied these categorical determinates. And while the weight given to their formal content has enjoyed an oscillating and only occasionally consistent trajectory, they have nonetheless historically remained the sole standard instruments capable of mitigating the claims of wartime Executive prerogative.²⁵ Available examples are legion.

B. Emergency, Subject, Space

Subject: Citizen. Space: Territorial.

Unsurprisingly, constitutional entitlement claims have been most extensive for citizen-subjects detained in the space of US territory—although, as we will see, wartime security concerns often negate the protection even citizenship affords.

The comedy of a Constitutional “tug-of-war” in 1814 between President Jackson and District Judge Dominick A. Hall—who granted Louallier’s writ of habeas corpus, and was subsequently imprisoned for doing so—provides an early example of judicial skepticism that a declared emergency demands absolute deference.²⁶

At the outset of the Civil War, Chief Justice Taney stood equally as poised, though politically more impotent than Judge Hall, issuing a writ of habeas for the

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²⁴ By far the clearest, if most pedantic, articulation of this basic fact—convoking the state of emergency of the war, the subject of its enemy, and extraterritorial space of its prosecution—was rendered by President Bush on Sept. 12ᵗʰ, 2001: ‘The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack. The American people need to know that we’re facing a different enemy than we’ve ever faced. The enemy hides in shadows, and has no regard for human life. This is an enemy who preys on innocent and unsuspecting people, then runs for cover. But it won’t be able to run for cover forever. This is an enemy that tries to hide. But it won’t be able to hide forever. This is an enemy that thinks its harvests are safe. But they won’t be safe forever. This enemy attacked not just our people, but all freedom-loving people everywhere in the world.’ http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html

²⁵ The basic mode of habeas challenge in federal courts is often understood as threefold: jurisdiction, substantive rights, and procedural rights (For instance, see Fallon and Meltzer, “Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror”, 120 Harv. L. Rev., 2029, 2037 (2007)). The essay herein operates under the assumption that an even more fundamental categorical division is possible—that of subject and space—insofar as jurisdiction is a subset of factors included in the category of space, and substantive and procedural rights are determined by the respective factors of subject-status.

²⁶ During the War on 1812, with the threat of British invasion at its apex, Jackson issued an order of martial law in New Orleans. When the order was not immediately lifted (even as peace negotiations proceeded at Ghent), a local newspaper published an article by citizen and New Orleans resident, Louis Louallier, criticizing the President’s policy. Jackson had Louallier arrested, upon which the latter filed for a writ of habeas corpus. U.S. District Judge Dominick Augustin Hall granted Louallier’s writ on the explicit grounds that because the emergency had passed, martial law was no longer justifiable. Subsequently, President Jackson ordered the Judge’s arrest. For a good synopsis of this comedy, see Louis Fisher, Military Tribunals & Presidential Power: American Revolution to the War on Terrorism, Univ. of Kansas Press (2005), esp. 25-28; also, Jonathan Turley, “Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy”, 70 Geo. Wash. L. Rev. 649, 725-730 (2002).
infamous Marylander secessionist, John Merryman. And while the explicit and unmistakable emphasis in *Ex parte Merryman* is a condemnation of President Lincoln’s unconstitutional suspension of the writ, both the citizenship of the prisoner and jurisdiction of his detention were not unnoticed by the Chief Justice.

At the peak of wartime hostilities, in *Ex parte Vallandigham*, the Court exemplified more deference to constitutionally-suspect Executive decision, ruling that it lacked jurisdiction over the appeals filed by Democratic Senator Clement L. Vallandigham of Ohio, who was protesting the unconstitutionality of his trial and conviction by a military commission in Cincinnati.

But the habeas petition filed by Indiana Democrat, Lambdin P. Milligan, which reached the Supreme Court after the close of war, provided a timely opportunity to diminish the force of accusations of undue deference invited by the Court’s dismissal of Vallandigham’s claims. The ruling of the 5-justice majority in *Ex parte Milligan* was clear: no citizen of the United States, in the United States, may be tried by military commission where civil courts are open. And though the 4 dissenters in *Milligan* disagreed with the majority that inoperative civil courts were a prerequisite for the establishment of military tribunals, it’s worth noting that all 9 Justices agreed that federal courts have jurisdiction to grant writs of habeas for citizens held in detention in the United States for violations of the law of war.

If, at the close of the Civil War, operational civil courts in US territory were considered an adequate preemptive for trial by military commission of US citizens, by the outbreak of WWII the Court had substantially modified its position.

In July, 1942, mere days after General Eisenhower arrived in London to assume Command of American forces in Europe, eight Nazi saboteurs were captured on US soil, whereupon a military commission was established to try them in violation of the law of


28 ‘The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus….The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.’ Ibid 147

29 68 U.S. 243 (1863). Vallandigham had been tried and convicted of violating Army orders against giving public speeches in support of the Confederacy. Upon conviction, President Lincoln banished him to rebel territory, at which time he petitioned the Supreme Court for a writ of certiorari. David Glazier has observed that ‘[t]his refusal to hear the case was completely consistent with the Court’s [deferential] approach to military justice as a whole in that era. ‘“Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission”, *Virginia L. Rev.*, Vol. 89, No. 8, 2038 (2003).’

30 *Ex parte Milligan*, 71 U.S. 2, 121 (1866). (‘[Military trials for violations of the laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that, in Indiana, the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life in nowise.’)

31 (‘We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of habeas corpus.’) Ibid 132
war. With some difficulty and in a rather peculiar manner, the prisoners filed petitions for a writ of certiorari. In *Ex parte Quirin*, the Court upheld the right of aliens detained in US territory to petition for writs of habeas, but nevertheless denied motions for leave to file such petitions. As the Court explained, wartime exigencies demand judicial deference on occasions where ‘clear conviction’ of unconstitutionality is lacking:

‘We are not here concerned with any question of the guilt or innocence of petitioners…[For] the detention and trial of petitioners -- ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger -- are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.’

Although all eight German saboteurs, at some point prior to their crime, capture, and detention had resided in the United States, and Burger and Haupt were American citizens, the Court explicitly rejected the relevance of citizenship, rather, stressing the importance of petitioners’ status as unlawful enemies. As for the space of crime, capture, trial, and detention, the Court explained how the very presumption of territoriality, typically so favorable for habeas corpus, might also in this instance work against its access. As the Court put it: ‘We have no occasion now to define with meticulous care the boundaries of the jurisdiction of military tribunals to try persons according to the law of war. *It is enough that the petitioners here…entered or after entry remained in our territory without uniform—an offense against the law of war.*’

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33 317 U.S. 1, 25 (1942).
35 The government argued that by invading the United States as belligerents, any claim to citizenship had been renounced (‘Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia’, reprinted in 39 Landmark Briefs and Arguments of the Supreme Court of the United States 296 (1975)). The Court held that, at any rate, ‘[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.’ 317 U.S. 1, 37-38 (1942). It’s also worth observing that already in the *Prize Cases*, 67 U.S. 635, 674 (1862) the Court had clarified that citizenship did not exclude application of the label of enemy (‘All persons residing within [Southern] territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not as foreigners. They have cast off their allegiance and made war on their Government, and are nonetheless enemies because they are traitors.’).
36 Ibid 45-46 {my emphasis}. The Court attempted to distinguish its ruling from *Milligan*’s holding that military trials can never be applied to citizens where civil courts are open, by pointing out that ‘[Milligan] had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents.’ As Fallon and Meltzer have observed, ‘[t]his distinction is flimsy…[since] Milligan allegedly had communicated with and aided the Confederacy and was, accordingly, charged specifically with violating the “laws of war”.’ *Supra note 25*, 2078 (2007)
**Subject: Citizen. Space: Extraterritorial.**

During the Mexican War (1846-1848), the Court used an otherwise particular holding on the collection of customs duties on goods brought from occupied Mexico to Philadelphia to establish an early oppositional principle to the extraterritorial jurisdiction of US law.\(^{37}\) Admittingly, the doctrinal logic articulated in *Fleming v. Page*, founded on the categorical determinates of subject and space, interests us far more than the ruling itself:

‘While [Tampico, Mexico] was occupied by our troops, they were in an enemy’s country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign, nor did our laws extend over it.’\(^{38}\)

Chief Justice Taney’s opinion in *Fleming* unequivocally voiced the Court’s original sentiment that jurisdiction did not accompany extraterritorial government ventures, and in turn presupposed a clear conception of national geography. Perhaps less clear, however, was whether citizens carried with them inherent constitutional rights when exiting US sovereign territory, as well as how an unraveling of the traditional understanding of territoriality might affect this question. Of course, 19\(^{th}\) century jurisprudence entertained no such future ambiguity, and thus early Court presumptions against extraterritoriality were the rule, citizenship notwithstanding.\(^{39}\) For instance, in *In re Ross* the Court clearly delineated constitutional entitlement along the lines of territorial sovereignty when it tersely asserted, ‘[t]he Constitution can have no operation in another country.’\(^{40}\)

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\(^{37}\) *Fleming v. Page*, 50 U.S. 603 (1850)

\(^{38}\) Ibid 614-615.

\(^{39}\) For a good discussion of this historical development of this presumption, see William S. Dodge, “Understanding the Presumption Against Extraterritoriality”, 16 Berk. J. Int’l L. 85 (1998); and Gerald A. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*, Princeton Univ. Press (1996). Also, in the context of Neuman’s discussion of the four phases of doctrinal development of the extraterritorial extension of the Constitution, as applied to a consideration of the proper spatial status of GTMO, see “Closing the Guantanamo Loophole”, 50 Loy. L. Rev. 1, 2 (2004) (arguing for ‘the constitutional status of Guantanamo as a nonsovereign territory subject to complete US territorial jurisdiction, the extraterritorial application of due process rights, and the availability of federal habeas corpus to foreign nationals detained at Guantanamo.’). Compare with J. Andrew Kent, “A Textual and Historical Case Against a Global Constitution”, 95 Geo. L. J. 463 (arguing, in the context of government detention policies in the war on terror, that historical evidence suggests a constitutional right to habeas review is only available within US territory.)

\(^{40}\) *In re Ross*, 140 U.S. 453, 464 (1891). John M. Ross was an American crewman aboard the American ship *Bullion*, stationed in Japanese waters, when he stabbed and killed second mate, Robert Kelly. Subsequent to his conviction by US consular court in Japan, Ross filed for a writ of habeas corpus for discharge, alleging his unlawful trial and imprisonment on the grounds that, as an American citizen, he was constitutionally guaranteed a right to trial by jury. To this claim the Court responded: ‘The deck of a private vessel, it is true, in considered for many purposes, constructively as territory of the United States; yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke protection of the provisions referred to until brought within the actual territorial boundaries of the United States.’
Of course, in ten years’ time (and coincidentally, at the cusp of the colonial era), the *Insular Cases* somewhat modified this doctrine.\(^{41}\) In *Downes v. Bidwell*, for instance, the Court first distinguished “fundamental” from “nonfundamental” constitutional entitlements, based on whether a foreign territory was either “incorporated” or “unincorporated” US territory.\(^{42}\) *Downes* clarified that even in unincorporated territories some constitutional limitations on government power are ineliminable.\(^{43}\) Of course, it’s worth noting that whether or not these limitations hinged on subject or space remained a source of difference amongst the various members of the Court.\(^{44}\) As war became increasingly global, questions of the Constitution’s pursuit of the flag inevitably acquired complexity and nuance,\(^{45}\) though it often remained the case that habeas’ proximity to the flag was influenced by the perception of exigency accompanying wartime security concerns.\(^{46}\)

If *Quirin* had meant that when the citizen-petitioner is an enemy, the latter status negates the broad latitude for habeas traditionally enjoyed by the former, nowhere was


\(^{42}\) Justice White’s concurring opinion in *Downes* would acquire majority adherence by the time of *Dorr v. United States*, 195 U.S. 138 (1901).

\(^{43}\) 182 U.S. 244, 290-291 (1901) (“While…there is no express or implied limitation on Congress in exercising its power to create local governments for any and all territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, though unexpressed, principles which are the basis of all free government which cannot be with impunity transceded…. [For] there may nevertheless be restrictions so fundamental a nature that they cannot be transgressed although not expressed in so many words in the Constitution.’)

\(^{44}\) While the *Insular Cases* doctrine pivots on location (space), rather than citizenship (subject), already in *Downes* Justice Fuller’s dissent criticized the notion that ‘Congress has the power to keep [an acquired territory] like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period…irrespective of constitutional provisions…. [For the] Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of government in order to meet what some may suppose to be extraordinary emergencies.’ 182 U.S. 244, 372, 385 (1901) (C.J. Fuller, dissenting)

\(^{45}\) See Charles Fairman, “Some New Problems of the Constitution Following the Flag”, *Stan. L. Rev.*, Vol. 1, No. 4, 587-645 (June 1949). Fairman surveys the post-war habeas applications of a hundred odd original cases, considered by the Court throughout its 1946, 1947, and 1948 terms, and highlights the fact that, as late as 1948, the Court was consistently split on the question of its extraterritorial jurisdiction.

\(^{46}\) The peak of judicial deference is merely one point along the cycle of deference and oversight. Seth Waxler has aptly termed this procedural oscillation of judicial review “the Brennan/Rehnquist cycle”, in honor of two of its most thoughtful proponents. See “The Combat Detention Trilogy Through the Lenses of History”, in *Terrorism, the Laws of war, and the Constitution: Debating the Enemy Combatant Cases*, ed. Peter Berkowitz, Hoover Inst. Press (2005) 3-12. For reasons explained below, I have labeled the Court’s traditional approach specifically to wartime habeas corpus inquiries the “Ludecke-Eisentrager approach”.
this clearer than the 9th Circuit’s dismissal of Gaetano Territo’s petition for a writ of habeas corpus.\(^{47}\) Despite that Territo had always been a US citizen (though as an adult he had not resided therein), had been in detention for over three years, and hostilities had ceased between the United States and Italy (of whose army he was in service when captured), the Court noted the ‘obvious practical implication inherent in the question’ of Territo’s ongoing detention and right to habeas review—which was, namely, the immediate demands of wartime security concerns, a determination of which was naturally the prerogative of the Executive.\(^{48}\) For this reason, the Court held, ‘it is immaterial to the legality of petitioner’s detention…whether petitioner is or is not a citizen of the United States.’\(^{49}\)

Of course, given the very limited recourse to habeas review in wartime for citizens detained in US territory, one expects its extraterritorial availability to be even more diminished. And while generally it is, here too inconsistencies abound. In *Burns v. Wilson*,\(^{50}\) for instance, whereby petitioners were convicted by courts-martial on the Island of Guam, the Court acknowledged that although the scope of review for military habeas corpus is necessarily more restricted than in civil cases, by no means is federal court jurisdiction over citizens therein negated.\(^{51}\) And while earlier holdings had signaled an ostensible depreciation in value for citizenship when seeking constitutional limitations extraterritorially,\(^{52}\) *Reid v. Covert* clarified that—at least absent the exigencies of war—either this was mere appearance or no longer the case.\(^{53}\) In fact, contrary to the

\(^{47}\) *In re Territo*, 156 F.2d 142 (1946). Territo was born to Italian nationals in West Virginia, but resided in Italy from the age of 5, in 1920, until his battlefield capture in 1943 by US forces in Sicily. Also see *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), whereby the prisoner’s habeas petition is denied, citing the immateriality of citizenship (‘And petitioner’s citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war.’). 156 F.2d 142, 145-146 (1946)

\(^{48}\) (‘The obvious practical implication inherent in the question, as it seems to us, directs its solution. The object of capture is to prevent the captured individual from serving the enemy. He is disarmed, and from then on he must be removed as completely as practicable from the front…[I]t is proper to note that petitioner was brought to this country under a war measure by orders of military authorities as a prisoner of war.’) 156 F.2d 142, 144.

\(^{49}\) Ibid 144.

\(^{50}\) *Burns v. Wilson*, 346, U.S. 137 (1953), concerned the habeas petitions of US soldiers tried and convicted by courts-martial in Guam for murder and rape. Petitioners alleged that they had been denied due process of law (e.g. illegal detention, coerced confession, denial of effective representation, suppression of favorable evidence, perjured testimony) during their courts-martial hearings.

\(^{51}\) Ibid 139, 142. (‘[I]n military habeas corpus, the inquiry, the scope of matters open for review, has always been more narrow than in civil cases…[and yet] this does not displace the civil courts’ jurisdiction over an application for habeas corpus from the military prisoner.’) Also see *United States ex. rel. Toth v. Quarles*, 350 U.S 11, 12, 22 (1955) (further restricting the authority of military justice for civilians abroad).

Petitioner in *Toth* had been honorably discharged from the army, but five months later was arrested in Pennsylvania and deported to Korea to stand trial by court-martial of murder and conspiracy to commit murder. The Court held that ‘[e]x-servicemen, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.’ The Court further noted the absence of wartime exigencies that so often accompanies the circumscribed proceedings of a military court (‘It is impossible to think that the discipline of the Army is going to be disrupted, its moral impaired, or its orderly processes disturbed by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians.’)

\(^{52}\) 156 F.2d 142 (1946); 235 F.2d 429, 432 (10th Cir. 1956). *Supra note 47.*

\(^{53}\) *Reid v. Covert*, 354 U.S. 1 (1957). *Reid* concerned the consolidated cases of two women found guilty for the murder of their servicemen spouses in England and Japan. They filed petitions for habeas corpus,
presumption against extraterritoriality articulated in Fleming, practiced in Ross,\textsuperscript{54} and given nuance by the Insular Cases, the Court’s ruling in Reid held subject, not space, as the more relevant categorical determinant.\textsuperscript{55} Indeed, the finding in Reid asserted that where the citizen goes, the Constitution follows; on this the Court was as unequivocal as it had been some 65 years earlier in Ross, albeit now holding the diametric opposite:

‘When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government…[C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home.’\textsuperscript{56}

**Subject: Alien. Space: Territorial.**

The holding in Reid concerned US citizen-civilians and, occurring in the 1957 term, lacked the force of exigency accompanying World War II. A similar circumstance was not enjoyed by the petitioner in Ludecke v. Watkins, a German national who filed for a habeas proceeding during WWII in order to secure his release from a government detention and removal order, pursuant to the statutory authority of the Alien Enemy Act of 1798.\textsuperscript{57}

Six years earlier, Quirin had signaled the Court’s belief that when a citizen is also an unlawful enemy, the subject-status of the latter neutralizes the constitutional rights otherwise enjoyed by the former. It may thus comes as no surprise that a habeas petition filed by a foreign national of a country with whom the US was at war received less deference still. The Ludecke Court denied petitioner’s writ, upheld the constitutionality of

charging that their trials by court martial were without jurisdiction on the grounds that they were American civilian-citizens. The Court heard the case twice: after initially holding the constitutionality of petitioners’ trials by military authorities, the Court ultimately granted rehearing and reversed.\textsuperscript{54} In Reid, the Court makes explicit reference to Ross’s sweeping claim that ‘the Constitution can have no operation in another country’, noting that ‘[the Ross] approach is obviously erroneous….’ Ibid 12.

\textsuperscript{55} The Reid opinion cites key rulings from the Insular Cases when clarifying that if earlier Court rulings ‘have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States…we find no warrant, in logic or otherwise, for picking and choosing from the remarkable collection of “Thou shalt nots…”’ Ibid 8-9. While the Court would go on to attempt to distinguish the Insular Cases doctrine from the present ruling, Gerald Neuman has pointed out that ‘[t]he combination of the Reid holding and the Insular Cases is paradoxical, if not contradictory.’ Neuman 12 (2004). For a discussion of Reid, situated within the historical trajectory of Court rulings on the extraterritorial reach of the Constitution that culminate in the enemy combatant cases, see Kermit Roosevelt, “Guantanamo and the Conflict of Laws: Rasul and Beyond”, 153 U. Pa. L. Rev. 2017 (2005), pg. 2036-2037 (noting that ‘in Reid v. Covert, the Court slipped the bonds of territoriality’).

\textsuperscript{56} 354 U.S. 1, 6-7 (1957)

\textsuperscript{57} 335 U.S. 160 (1948). The Alien Enemy Act provides that in emergencies the Executive can detain and order the removal of enemy aliens (‘Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized…to establish any other regulations which are found necessary in the premises and for the public safety.’). 40 Stat. 531, 50 U.S.C. § 21
the statutory preclusion of judicial review, and pointed out that inquiries into the date of the cessation of hostilities were best left to the political branches of government.\(^{58}\) It was enough for the Court that (1) a state of war existed between Germany and United States, (2) the petitioner was a German national, and (3) had been deemed a threat by the Attorney General (acting on behalf of the Executive). Satisfaction of these jurisdictional questions foreclosed subsequent inquiries into the issue of his detention, or consideration of any other substantive claims.\(^{59}\)

The *Ludecke* ruling testifies to the difficulty of overstating the extent to which – when considering the constitutional claims of alien subjects detained in the space of US territory – perceptions of wartime exigency have historically engendered great judicial deference to Executive prerogative. Two modern day counterexamples of extending non-wartime constitutional entitlements to alien subjects testify to this logic.

First, in *INS v. St. Cyr* – mere months before 9/11 and subsequent state of emergency of the war on terror – the Court rededicated the historical sanctity of the Suspension Clause for citizens and aliens alike:

> ‘At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in this context that its protections have been strongest…In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.’\(^{60}\)

Construing key provisions of 1996 immigration legislation to *not* eliminate the availability of habeas review for Enrico St. Cyr, a resident alien whose prior criminal conviction rendered him subject to removal,\(^{61}\) the Court clarified that ‘some judicial intervention in deportation cases is unquestionably required by the Constitution.’\(^{62}\)

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\(^{58}\) The Court considered Mr. Ludecke’s ‘claim that while the President had summary power under the Act, it did not survive the cessation of actual hostilities’ (since Germany had surrendered 8 months prior). Speaking for the majority, Justice Frankfurter responded that ‘[i]t is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.’ 335 U.S. 160, 170 (1948). For a good example of this principle made explicitly by the Court, see the *Prize Cases*, 67, U.S. (2 Black), 635, 670 (1863) and *Three Friends*, 166, 1, 63 (1897) (‘it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intentions expressed’). For a good example of this principle made implicitly, see *In re Yamashita*, 327 U.S. 1 (1946).

\(^{59}\) As the Court put it: ‘The Founders, in their wisdom, made [the President] not only the Commander in Chief, but also the guiding organ in the conduct of our foreign affairs. He who is entrusted with such vast powers in relation to the outside world was also entrusted by Congress…with the disposition of alien enemies during a state of war.’ 335 U.S. 160, 173 (1948). For a discussion of *Ludecke*’s departure from earlier case law holdings, see Stephen Vladeck, “*Ludecke*’s Lengthening Shadow: Limits on the War Powers When Wars Don’t End”, *Jour. of Nat. Sec., Law, & Policy*, No.3 (2006).


\(^{61}\) The majority opinion rejected the government’s argument that statutory amendments made to the Immigration and Nationality Act precluded federal court jurisdiction, elaborating on ‘[why] a construction
Secondly, in *Zadvydas v. Davis* the Court exercised a similar logic, finding that a post-removal-detention statute\(^{63}\) permitting the indefinite detention of an alien without access to judicial review ‘would raise a serious constitutional problem.’\(^{64}\) It’s worth observing, however, that the Court explicitly reserved judgment on circumstances of exigency, such as in the case of a terrorist.\(^{65}\) As the Court clarified, ‘justification [for] protecting the community…does not diminish over time.’\(^{66}\)

The conclusion that follows isn’t difficult to reach: in *Zadvydas*, as in *Ludecke* and all other case law concerning the jurisdiction of federal courts to entertain constitutional entitlement claims brought by aliens as a challenge to their ongoing detention, the Court emphasizes that *subject* and *space* are the categorical determinants capable of mitigating Executive prerogative. However, as the Court makes explicit in *Ludecke* (and implicitly concedes in *Zadvydas*), likewise is it the case that any consideration of the *time* of detention during wartime states of emergency only acts in the service of the Executive’s monopoly on decision. For the logic goes: when crises strike and exigencies abound, it falls to the ‘guiding organ in the conduct of our foreign affairs…[to determine] the disposition of alien enemies.’\(^{67}\)

**Subject: Alien. Space: Extraterritorial.**

And so while it may be the case that competing polemics comprise the zigzagging historical narrative of the Constitution’s territorial and extraterritorial extension to US citizens, the general due process rights of aliens in US territory, or the authority of the Executive to establish military tribunals for subjects –both citizens and aliens alike– in violation of the law of war, it is no less true that government allegations of absolute immediacy have traditionally been given overwhelming deference by the Court when considering *wartime habeas petitions filed by aliens held in military detention abroad*. Here, the trajectory is consistent: The Court has always held that in wartime states of

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\(^{63}\) 8 U.S.C. §1231(a)(6). The statute provides that an alien who falls into one of three categories (either inadmissible, removable (due to status or entry violations), or dangerous) ‘may be detained beyond the removal period, and if released, shall be subject to [certain] terms of supervision.’ The government had argued that the statute permitted indefinite detention beyond the post-removal period, exclusively subject to their discretion.

\(^{64}\) 533 U.S. 678, 689 (2001) (‘the statute, read in light of the Constitution's [Due Process] demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.’)

\(^{65}\) Ibid 695-696 (’[T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States…. [T]he cases before us do not require us to consider the political branches’ authority to control entry into the United States. Hence we leave no “unprotected spot in the Nation's armor”…*Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.*’) (my emphasis)

\(^{66}\) (my emphasis) The Court would go on to tautologically elaborate: ‘[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.’ Ibid 690-691

\(^{67}\) 335 U.S. 160, 173 (1948)
emergency, petitioners’ subject-status as alien enemies, combined with the extraterritorial space of detention, renders irrelevant any subsequent considerations.

If we understand Ludecke to represent the territorial scope of wartime judicial deference, the most famous (if sometimes ambiguous) extraterritorially counterpart to this approach is the Court’s 1950 ruling in Johnson v. Eisentrager.\(^68\) Dismissing the habeas petitions of German nationals who had been captured, tried, and convicted for violations of the law of war by military commission in China, and subsequently incarcerated in occupied Germany, the Court established a precedent of restricted wartime habeas corpus for aliens detained abroad.

Petitioners alleged that their trial, conviction, and imprisonment violated both Articles I and III of the Constitution, as well as their 5\(^{th}\) Amendment due process rights. Initially, the District Court dismissed their petitions for lack of jurisdiction, based on the Ahrens v. Clark interpretation of the habeas statute.\(^69\) However, ignoring the question of statutory jurisdiction, the Court of Appeals for the District of Columbia reversed the dismissal, ruling that ‘any person, including an enemy alien deprived of his liberty anywhere under any purported authority of the United States, [is] entitled to the writ.’\(^70\) The Supreme Court then reversed the D.C. Circuit’s ruling, flatly stating that ‘[a] nonresident alien has no access to our courts during wartime.’\(^71\)

Other ambiguities of the holding notwithstanding, the force behind the Court’s reasoning appears clear enough: at the closing moments of war and (implicit) threat to the body politic posed therein, outstanding exigencies demand judicial deference to the political branches of government.\(^72\) Justice Jackson, speaking for the majority, reaffirmed the logic we have hitherto been mapping –namely, that judicial determinations of habeas availability have historically relied on the categories of subject and space– evidenced by his list of the six critical factors taken into account by the Court when determining the constitutional reach of habeas corpus.

It was relevant for the Court that petitioners (a) were enemy aliens; (b) had never been or resided in the United States; (c) were captured outside of US national territory and there held in military custody; (d) were tried and convicted by military commission operating outside the United States; (e) for offenses against the laws of war committed outside the United States; (f) and were at all times imprisoned outside the United States.\(^73\)

Jackson articulated the historical consistency of the Court when applying these categorical determinates in times of war:

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\(^{68}\) 339 U.S. 763 (1950)

\(^{69}\) The habeas statute (28 U.S.C. §2241) provides US courts with the statutory authority to grant writs of habeas corpus ‘within their respective jurisdictions.’ Ahrens v. Clark (335 U.S. 188, 190 (1948)) established an inflexible jurisdictional rule by interpreting the phrase ‘within their respective jurisdictions’ to limit judicial power to grant habeas inquiries to the territorial jurisdiction of the court itself, rather than merely requiring federal custody simplicitor (‘It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction.’).

\(^{70}\) 339 U.S. 763, 764 (1950)

\(^{71}\) Ibid 764

\(^{72}\) Ibid 789 (‘Certainly it is not the function of the judiciary to entertain private litigation—even by a citizen— which challenges the legality, wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad to any particular region.’)

\(^{73}\) Ibid 777
‘In extending certain constitutional protections beyond the citizenry, this Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act…Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security.’

It is not superfluous to observe that, as with all previously cited instances of wartime habeas cases, noticeably absent is any concern given by the Court to the time of detention—neither the length nor anticipated duration of petitioners’ confinement, nor the timeliness of their due process. Rather, as in *Ludecke*, any temporal considerations only served Government claims of ‘Executive power’ over ‘wartime security’ (i.e. so that ‘[e]xecutive power over enemy aliens’ will remain ‘undelayed and unhampered’).

Because the *Eisentrager* petitioners were enemy aliens, and the site of their detention was extraterritorial, the Court held that no further consideration was required. Simply put: jurisdiction was lacking; no right to the writ existed.

The spatial synchronicity of the rulings in *Ludecke* (territorial) and *Eisentrager* (extraterritorial) confirm the argument made herein of the conditional prerequisites for judicial deference over habeas entitlement claims, when petitioners are aliens held in military detention during wartime states of emergency. The systematicity of Court’s approach, then, warrants the attachment of a theoretical label, insofar as it will inform our analysis of the *Boumediene* precedent later on: we will henceforth refer to this approach as the *Ludecke-Eisentrager* approach – the practice of which begins with the axiom that wartime states of emergency lend the Executive a monopoly of decision on both the duration and demands of potential threats (*Ludecke*), and when the subject is detained extraterritorially (*Eisentrager*), any consideration of time will only act in the service of Article II claims of Executive prerogative.

**III. Eisentrager v. Johnson, from 1950 to 2008**

**A. From Johnson v. Eisentrager to Rasul v. Bush**

Understanding the legal significance of *Eisentrager* depends on the resolution of two difficult questions:

1. First, was the *Eisentrager* ruling (that aliens detained abroad lack any recourse to habeas review) premised, in the first instance, on constitutional grounds, and only secondarily, on Ahrens’ statutory interpretation of the habeas statute? Or is it the case, as Justice Stevens opined during the Oral argument in *Rasul*, that ‘[*Eisentrager*] assumed the statute was inapplicable and concluded that the Constitution was not a substitute for

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74 Ibid 771, 776
75 Ibid 765, 771 (‘[Petitioners] exact affiliation is disputed, and for our purposes, immaterial.’ And yet while the assessment of petitioner’s status may in fact be inaccurate, Jackson conceded, lamentably, ‘it is war that exposes the relative vulnerability of the alien’s status.’)
76 Ibid 768 (‘We are cited to no instance where a court….has issued [a writ of habeas] on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.’)
77 Ibid 764 (‘[N]onresident aliens, captured and detained abroad have no right to a writ of habeas corpus in a court of the United States.’)
the statute’? If the latter question is answered affirmatively—as the Court confirmed in Rasul—one should further observe that a subsequent line of cases eroded Ahrens’ strict territorial limitation on the spatial extension of the habeas statute, and finally in Braden v. 30th Judicial Circuit of Ky. explicitly overruled its ‘inflexible jurisdictional rule.’

(2) However, resolving the issue of statutory access to habeas corpus for aliens detained abroad does not eliminate the question of why the Eisentrager Court rejected petitioners’ request for review on constitutional grounds. Was the case decided on its merits, as the Court implied in certain passages? Or, did the holding establish an a fortiori absence of constitutional entitlement, as other passages equally indicate, insofar as, at the time of the Eisentrager ruling, there was no statutory basis to habeas corpus for aliens detained abroad?

In two enemy combatant cases—Rasul v. Bush in 2004 and Boumediene v. Bush in 2008—the Court seized the opportunity, when considering the legal novelties of the subject and space of the war on terror, to address its understanding of the Eisentrager precedent.

In 2002, 12 Kuwaitis and 2 Australians detained at Guantanamo Bay applied for writs of habeas corpus, alleging they had never been engaged in enemy combatancy against the United States, had never engaged in unlawful activity against the United States, and had been detained for over 2 years without formal accusation by any court or tribunal of any wrongdoing.

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78 542 U.S. 466 (2004) Oral Arg. 46:52 {my emphasis}
79 410 U.S. 484, 495 (1973). In Braden the Court clarified the statutory extension of habeas corpus by (re)interpreting the meaning of the habeas statute’s (§2241) phrase ‘within their respective jurisdictions’ to endorse ‘traditional principles of venue’ (‘The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.’). However, as the dissent in Rasul argues (and Justice Kennedy’s concurring opinion concedes), ‘Braden did not overrule Ahrens; it distinguished Ahrens…. Braden was careful to distinguish that situation from the general rule established in Ahrens.’ 542 U.S. 466, 494 (2004) (J. Scalia, dissenting). For an illuminating historical account of the legislative backdrop to the limits placed on the power of district courts to issue writs of habeas ‘within their respective jurisdictions’, see James Pfander “The Limits of Habeas Jurisdiction and the Global War on Terror”, Corn. L. Rev., Vol. 91, 497 (2006), esp. 530-533 (Rather than a strict presumption against extraterritoriality, ‘[t]he 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.’)
80 It remains a puzzle why the Court found it necessary to list its six critical meritorial factors while establishing that petitioners’ applications were dismissed on jurisdictional grounds. 339 U.S. 763, 777, 790-791 (1950). Citation of three instances from Rasul’s Oral argument suffices to elaborate the Rasul Court’s ambivalence toward Eisentrager: (1) Amidst her discussion of the meaning of the Eisentrager ruling with counsel for respondent (Sol. Gen. Olsen), Justice Ginsburg despairs: ‘[Eisentrager] is a very difficult decision to understand. I would say that it’s at least ambiguous.’ 542 U.S. 466 (2004), Oral Arg. 36:41-36:47. (2) Later on, Justice Breyer interjects into an contentious exchange between Gen. Olsen and Justice Stevens on the meaning of Eisentrager, saying: ‘It’s obvious [Gen. Olsen] that there’s language in Eisentrager that supports you…and there’s also language, as you’ve heard, that’s against you…It’s very hard to interpret Eisentrager.’ Ibid 47:29-47:53. (3) Lastly, Justice Scalia protests to Mr. Gibbons, ‘we’re not talking about the merits right now; we’re talking about jurisdiction. Certainly jurisdiction doesn’t turn on the merits, [on] whether you’re an enemy alien or not.’ Ibid 10:02-10:10. Fallon and Meltzer have aptly described the Eisentrager ruling as ‘opaque’, since ‘[m]uch of its language suggested that the federal courts categorically lacked jurisdiction over aliens detained abroad [while] [o]ther language…can be read as ordering dismissal because, on the merits, the petitioners lacked any constitutional rights.’ (2007) 2056.
The District Court had dismissed the petitions for lack of jurisdiction, explicitly relying on *Eisentrager’s* holding that aliens (subjects) detained extraterritorially (space) lack any entitlement to habeas review. The Court of Appeals agreed, insisting that *'[Eisentrager clarified that] the privilege of litigation does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign.'* The Supreme Court then granted writs of certiorari, and reversed.

Petitioners in *Rasul* had prudently restricted their claims to the statutory authority for jurisdiction, reserving any request for ruling on constitutional grounds. As the *Rasul* Court understood it:

> ‘The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty”.’

The Court’s answer to this question was, in short – “yes, it does”. The *1903 Lease Agreement* grants ‘complete jurisdiction and control’ of Guantanamo Bay to the United States; the habeas statute authorizes federal courts to grant habeas inquiries; and as the Court emphasized, *'[w]hatever traction the presumption against extraterritoriality might have in other contexts…. [because the habeas] statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.'*

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83 321 F. 3d 1134, 1144 (CADC 2003). As noted earlier (supra note 13) there has been extensive commentary on the contested meaning of “sovereignty” as it relates to Guantanamo Bay, Cuba, the debate of which stems at least in part from the somewhat contradictory language of the *1903 Lease Agreement* with Cuba, stipulating that *'[while] the United States recognizes continuance of the ultimate sovereignty of the Republic of Cuba over [the leased areas]…the United States shall exercise complete jurisdiction and control over and within said areas.'* In *Rasul*, for instance, Mr. Gibbons points out that ‘Cuban law has never had application within that base. A stamp with Fidel Castro’s picture on it wouldn’t get a letter off the base!’, to which Justice Scalia rejoins, ‘we couldn’t sublease GTMO, could we?!…And we couldn’t sell any of GTMO to a foreign country…And why not? Because Cuba is sovereign!’ 542 U.S. 466 (2004) Oral Arg. 26:05-26:24. However, one need neither fetishize the (false) performative impact of a signifier for its concrete signification, nor attempt to conclusively assign a territorial status to something that resists preexisting spatial categories. For on the one hand, whether the United States merely maintains ‘complete jurisdiction and control’ and yet treats GTMO as an exceptional space, or is ‘sovereign’ and yet treats GTMO as an exceptional space, does nothing to the fact that the Government has sought to establish GTMO as an exceptional space – i.e. (what Giorgio Agamben has described as) a paradoxical sphere of the juridical wherein no law applies. *State of Exception*, University of Chicago Press, trans. Kevin Attell, 2005. On the other hand, while there are those who regard GTMO as properly foreign territory (e.g. John Yoo, *War By Other Means: An Insider’s Account of the War on Terror*, Atlantic Monthly Press (2006); “Courts at War”, 91 *Corn. L. Rev.* 573 (2006)), there are also those who argue that it establishes an unjustifiable lawless enclave that is properly US territory (e.g. Neuman (2004), supra note 39). We can best assess the debate by setting aside the analytical merits of each side’s arguments, observing that there would be no such debate over its murky territorially status if its spatiality was clear and distinct. Indeed, the space of GTMO is, as Justice Ginsburg has appropriately observed, ‘an animal, there is no other like it.’ 542 U.S. 466 (2004) Oral Arg. 58:00-58:04
84 Ibid 475
85 Ibid 481
Of course, the question must be answered here: how, then, did the Court distinguish Rasul from Eisentrager without overturning the latter? Other ambiguities in its terminology notwithstanding, the Eisentrager ruling had stated in no uncertain terms that ‘nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States.’ Yet in Rasul, the Court simultaneously extends writs of habeas to nonresident enemy aliens who were captured and imprisoned abroad, while contending that ‘nothing in Eisentrager…categorically excludes aliens detained in military custody outside of the United States from the privilege of litigation in US courts.’ And so putting aside for a moment the statutory issue of what Braden does to Ahrens, how are these two rulings—otherwise seemingly at odds—reconciled? How does the outside observer resolve the assertion made by Justice Kennedy, when concurring with the judgment of the Court, that ‘the correct course of action is to follow the framework of Eisentrager’, with Scalia’s complaint that ‘[t]oday’s opinion, and today’s opinion alone, overrules Eisentrager’?

Ostensibly, the categorical determinates of subject and space are dispositive for the Court when considering access to habeas review for petitioners in Rasul, as they had been for the Eisentrager Court some 50 years earlier. However, the logic behind the different outcomes of the two rulings—i.e. in favor of petitioners in Rasul, but against petitioners in Eisentrager— is less obvious, and therefore worth considering in more depth.

Eisentrager and Rasul petitioners shared subjective similarities in their mutual disputation of any unlawful enemy status, and spatial similarities in that they had never resided in the United States, had been captured outside US territory, and had been detained for allegedly committing violations of the laws of war outside US territory. However, in Rasul the Court also observed that the two sets of petitioners differed in several essential subjective and spatial respects as well. For instance, the Rasul petitioners: (1) were not nationals of an enemy country; (2) they denied any engagement or intention to engage in aggressive actions against the United States; (3) they had not been charged or convicted of any wrongdoing; (4) and lastly (and as we will see,

\[86\] 339 U.S. 763, 764, 777-778. ('We have pointed out that the privilege of litigation has been extended aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.'

\[87\] 542 U.S. 466, 484 (2004)

\[88\] This question might initially appear beside the point, insofar as, lacking statutory access to habeas review, Eisentrager turned on a constitutional issue, while Rasul explicitly ruled on a statutory question (Or as Justice Stevens speculates in the Rasul Oral Arg. (40:48-40:58): '[Eisentrager was] decided at a time when Ahrens v. Clark was the law, and if the dissenting opinion in Ahrens v. Clark had been the law, [Eisentrager] would have been decided differently.' However, by temporarily bracketing Justice Stevens’ equation that Braden – Ahrens + Eisentrager = Rasul, one can better observe the surreptitious baseline approach to the question of habeas corpus entitlement, first devised by the Court in Rasul, which it would ingeniously exploit for constitutional purposes in the Boumediene ruling, some 4 years later.

\[89\] 542 U.S. 466, 485 (2004) (J. Kennedy, concurring)

\[90\] Ibid 497 (J. Scalia, dissenting)

\[91\] The Eisentrager Court made note of ‘[petitioners’ allegation] that their employment [in China] was by civilian agencies of the German Government…[and that] their exact affiliation is disputed’. 339 U.S. 763, 765.
importantly), they had been imprisoned for two years without access to any neutral tribunal to determine their status.\textsuperscript{92} Herein lay an important difference for the Court.

The opinion observed in passing that ‘for more than two years [petitioners] have been imprisoned’ without ever being ‘afforded access to any tribunal, much less charged with and convicted of wrongdoing’; and so for the Court, petitioners’ subject-status remained an open question. However, in the end, the ruling granted petitioners’ right to habeas corpus on jurisdictional grounds. When petitioners’ subject-status (i.e. either lawful or unlawful) lay in question, it was enough for the majority that the geographical application of the habeas statute extended to the space of Guantanamo Bay, however unique or radically extraterritorial it may have been.

The dissent focused on the shortcomings of this mode of legal reasoning, pointing out that the text of the habeas statute ‘could not be clearer that a necessary requirement for issuing the writ is that some federal district court have territorial jurisdiction over the detainee.’\textsuperscript{93} And the simple fact remained, the space of Guantanamo Bay lay outside the jurisdiction of any federal court.

Remarkably, (and importantly, as we will see) Justice Kennedy’s concurring opinion concedes the accuracy of the dissent’s remonstration of the majority’s reasoning, but ‘reach[es] the same conclusion’ as the majority by ‘follow[ing] a different course.’\textsuperscript{94} For Kennedy, the radically novel space of Guantanamo Bay may have implied some jurisdiction, albeit not—as the majority led by Justice Stevens had held—on statutory grounds. However, in \textit{Rasul} the jurisdiction of the habeas statute was the only question available to the Court. Kennedy thus reasoned that (a) the practical matter of the extended, indefinite duration of petitioners’ detention, combined with (b) the absence of any neutral forum for an administrative determination of their subjective status, was sufficient cause for jurisdiction.\textsuperscript{95}

The majority, dissent, and concurrence are united in their consensus that, as the counsel for \textit{Rasul} petitioners had conceded, ‘habeas corpus…has never run to the battlefield.’\textsuperscript{96} The crux of the dispute, however, resides in an equation of surprising simplicity: For the majority, the \textit{habeas statute} obligates the custodian of the detainee to provide some neutral process for the determination of their subject-status; and so long as

\textsuperscript{92} 542 U.S. 466, 476 (2004) (‘Petitioners in these cases differ from the \textit{Eisen
trager} detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.’)

\textsuperscript{93} Ibid 490 (J. Scalia, dissenting). Scalia’s objection finds textual support in §2242, which provides that “[a petition] addressed to the Supreme Court, a justice thereof or a circuit judge…shall state the reasons for not making application to the district court of the district in which the applicant is held’, therein implying that jurisdiction is found in some court.

\textsuperscript{94} Ibid 485 (J. Kennedy, concurring) (‘While I reach the same conclusion [as the majority], my analysis follows a different course. Justice Scalia exposes the weakness in the Court’s conclusion that \textit{Braden} v. 30\textsuperscript{th} Judicial Circuit Court of Ky.…”overruled the statutory predicate \textit{Eisen
trager}’s holding”…As he explains, the Court’s approach is not a plausible reading of \textit{Braden} or \textit{Johnson v. Eisentrager}.’) Justice Kennedy thus finds it unnecessary to defend the majority’s reading of \textit{Braden} against Scalia’s critique of its ‘weakness’, rather choosing to delineate \textit{Rasul} from \textit{Eisen
trager} on temporal grounds—an approach that will be fully exploited by the majority in \textit{Boumediene}.

\textsuperscript{95} Ibid 487-488 (J. Kennedy, concurring)

\textsuperscript{96} Ibid Oral Arg. 20:55-21:06
the government of the United States maintains territorial jurisdiction over the area of detention (except in the battlefield instance), the statute (Title 18 §2241) requires some type of process. For the concurrence, without a time allotted for some type of neutral process, no concrete subject-status can even be adequately determined; thus lacking such process, statute or no statute, habeas corpus is the suitable remedy. And for the dissent, the exigencies of war (whose determination is the exclusive prerogative of the Executive) override the demand for any such determination of subject-status, and thus consistent with the Ludecke-Eisentrager approach, no time for such process is required.

There is little dispute that the ostensible outcome of *Rasul* hinged on a determination by the Court of how *Braden* affected the statutory predicate to *Eisentrager*’s holding, and therefore the proper extension of the habeas statute to entertain petitioners’ challenge to their detention. On this the majority was clear: because §2241 draws no distinction between alien and citizen, aliens detained in a space over which the US maintains ‘complete jurisdiction and control’ are equally entitled to invoke federal court jurisdiction to apply for habeas review.97

And yet, while an assertion that temporal considerations in *Rasul* were dispositive for the Court will no doubt warrant accusations of exaggeration, it would be equally incorrect to say that conceptions of time were of no relevance whatsoever, at least as it pertains to the concurring opinion. As Justice Kennedy (whose vote is so notoriously the grain that tips the scale in either direction) explains, when bringing his concurrence to a close:

‘Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.’98

In 2004, how much weight one ought to attribute to Justice Kennedy’s closing rumination on the time of detention for future rulings on constitutional entitlement claims brought by aliens detained abroad, was admittingly unclear.99 What remains undeniable in *Rasul*,

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97 Ibid 481 (‘Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.’)

98 Ibid 488. A genealogy of this line of thinking –i.e. that the length and duration of military detention may be dispositive for the determination of wartime habeas corpus –can be traced back to April 28th, 2008, wherein the Court heard Oral Argument in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Here, both Justice Souter and Justice Kennedy already begin to wonder aloud whether the AUMF provides perpetual statutory authority for the Executive’s monopolization of the time of the war on terror: (‘I will concede for the sake of argument that [the AUMF] did [authorize the detention of enemy combatants] in the early stages of the period, starting with Sept. 11th…But it doesn’t follow that the President’s authority to do that is indefinite for all time.’ (J. Souter, Oral. Arg. 32:22-33:01). (‘I’m taking away from the argument the impression, and please correct me if I’m wrong, that you think there is a continuing role for the courts to examine the reasonableness of the period of detention?’) (J. Kennedy Oral Arg. 55:03-55:17).

99 David Martin is commended for accurately projecting in 2005 that Justice Kennedy’s concurrence in *Rasul* ‘probably reflects more candidly the considerations that are likely to govern when the Court confronts petitions filed by detainees at other overseas bases’, rather than Justice Stevens’ suggestion to evaluate the extent of jurisdiction and dominion. “Offshore Detainees and the Role of the Courts After *Rasul v. Bush*: The Underappreciated Virtues of Deferential Review”, *B.C. Third World L. Journ.* 125, 135
However, is an inauguration of the concept of time into the terminology of the Court (if not yet its categorical logic), pursuant to considerations of subject and space in wartime states of emergency. Moreover, today it’s not difficult to see that Justice Kennedy’s approach in Rasul established the necessary grounds for a future potential conflict with the ideological prerequisites of the Ludecke-Eisentrager approach and the more general belief that the Executive both maintains an absolute monopoly on the time of the state of emergency, and is therefore the sole branch of government capable of deciding exceptions to the applications of law required therein. In Rasul, the majority, under the direction of Justice Stevens, narrowly focused on the fate of the inflexible jurisdiction rule, subsequently delaying the Court’s confrontation with the Ludecke-Eisentrager approach. Scalia’s dissent –consistent with the Court’s traditional practice– sought to uphold this approach. It was thus left to the Justice Kennedy’s concurrence to begin the categorical shift that would be completed in Boumediene v. Bush.

**B. From the MCA to Boumediene v. Bush**

However much Rasul’s statutory extension of habeas jurisdiction may have temporarily postponed the ‘welter of difficulties’ surrounding questions of whether, and to what extent, a political determination that ongoing exigencies of a war on terror warrant the indefinite deprivation of constitutional rights for aliens detained abroad, two key legislative enactments subsequently altered the terms of debate.

In 2005, the Detainee Treatment Act (DTA) amended the habeas statute –on which the Rasul majority had relied– by stripping federal courts of jurisdiction over future habeas corpus review for aliens detained at Guantanamo Bay. The following year, enactment of the Military Commissions Act (MCA) further truncated habeas jurisdiction over subjects detained in the space of the war on terror. However, the

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100 542 U.S. 466, 506 (2004) (J. Scalia, dissenting) (‘Departure from our rule of stare decisis in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation’s conduct of a war.’)

101 Fallon/Meltzer 2060 (2007) (‘Rasul’s modest extension of jurisdiction avoided or at least postponed this welter of difficulties.’)

102 For a good discussion of this issue, see Amanda Tyler, “Is Suspension a Political Question”, 59 Stanford L. Rev. 333, 337 (arguing that suspension should not strictly be perceived as a political question, insofar as ‘the internal predicates required for a valid suspension…are inextricably intertwined with the core due process right to seek impartial review of the Executive’s justification for a prisoner’s detention.’


104 Pub. L. No. 109-366, §7(a)-7(b), 120 Stat. 2600, 2636, provides that ‘[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been properly detained as an enemy combatant or is awaiting such determination.’ In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Court had rejected the government’s argument that the DTA also stripped federal courts of jurisdiction to hear pending habeas challenges filed by aliens detained at Guantanamo Bay. The Court interpreted the jurisdiction-stripping provisions of the DTA (§1005(e)) to exclusively limit its jurisdiction over future habeas inquiries, citing principles of constitutional avoidance. The Congressional response to Hamdan was the further truncation of court jurisdiction, enacted by the MCA, which now extended ‘[application] to all cases, without exception,
MCA also expanded DTA provisions to provide limited collateral judicial remedy for enemy combatants to challenge their detention. Conceived as a substitute for habeas review (i.e. as applied for, granted by, and pursued in a federal district court under §2241), the MCA conferred exclusive jurisdiction to review the legality of military commission proceedings to the US Court of Appeals for the District of Columbia. Notably, neither the DTA nor the MCA authorized the DC Circuit to inquire into the conditions of confinement, nor, in the event that a prisoner is indefinitely detained absent the issuance of formal charges, did they authorize its jurisdiction for review over substantive claims, such as due process, etc.105

The obvious and therefore common question—namely, of how the Court would respond to a legislative enactment that effectively legalized that which the Rasul holding had established as unlawful, at the same time that an additional provision now stripped the Court of any future opportunity to review legal challenges brought by subjects detained in the space of the war on terror?—is perhaps not so much unwarranted as it is premature. Because subject and space are the two categorical determinants on which the Court has historically relied when assessing the scope of constitutional entitlement claims, any attempt to map this trajectory in the enemy combatant cases—from the statutory predicate of Rasul’s holding, to its substitutive removal by the MCA, and finally to the constitutional holding of Boumediene—is better placed under such auspices.

After all, there is little controversy over Congress’ authority to provide flexible substitutes for traditional habeas oversight, so long as those substitutive procedures conform to the core features of habeas review.106 Nor is it constitutionally problematic for Congress to enact legislation restricting jurisdiction to a specific venue, such as the D.C. Circuit Court of Appeals.107 However, when interpreting statutory substitutes to habeas pending on or after the date of…enactment.’ The MCA further expands the review provisions of the DTA by extending them to all alien enemy combatants in US detention anywhere in the world.

105 §950g(a)-(c) provides that ‘the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of final judgment rendered by a military commission’, but restricts the scope of that review to ‘whether the final decision was consistent with the standards and procedures specified in this chapter.’

106 At common law a variety of remedial substitutes for traditional habeas corpus were considered adequate. The Court has followed this tradition, accordingly: for instance, in the United States v. Hayman, 342 U.S. 205, 219 (1952), the Court held that Congress could provide a flexible substitute for habeas review so long as it did not ‘impinge upon prisoners’ rights of collateral attack’ (i.e. ‘the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum’). Both Hill v. United States, 368 U.S. 424, 427 (1962) and Swain v. Pressley, 430 U.S. 372, 381 (1977) have reaffirmed Hayman’s pragmatic approach of an ‘adequate’ and ‘effective’ substitutive remedy (‘[t]his Court held in Hayman, as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.’). Moreover, in Hamdi v. Rumsfeld, 542 U.S. 507, 533-534 (2004), the Court explicitly endorsed the possibility of a remedial substitutive process for enemy combatants (‘The exigencies of the circumstances may demand that, aside from the core elements of due process, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict…[T]he United States Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.’)

review that it perceives as either inadequate or ineffective, the Court has often (and
sometimes creatively) construed such provisions to avoid constitutional problems that
otherwise might arise.\textsuperscript{108}

The proper formal inquiry for the Court in \textit{Boumediene} was thus threefold:
\textit{1. First, was a constitutional ruling unavoidable?}

\textsection7 of the MCA had effectively negated the statutory predicate on which \textit{Rasul} had stood,
and clarified any structural ambiguity in the DTA that had allowed pending habeas
petitions (such as \textit{Hamdan's}) to proceed. The Court thus answered this 'threshold
question' in the affirmative.\textsuperscript{109} As the Court understood it, ‘if the statute [MCA \textsection7] is
valid, petitioners’ cases must be dismissed.’\textsuperscript{110}

questions, provide an adequate substitute through the court of appeals.’).}

\textsuperscript{108} A self-conscious principle of constitutional avoidance has been well documented by the Court.
Beginning with \textit{Fletcher v. Peck}, 10 U.S. 87, 128 (1810) (‘The question, whether a law be void for its
repugnancy to the constitution, is…a question of much delicacy, which ought seldom, if ever, to be decided
in the affirmative, in a doubtful case… The opposition between the constitution and the law should be such
that the judge feels a clear and strong conviction of their incompatibility with each other.’), \textit{Burton v. United
States}, 196 U.S. 283, 295 (1905) (‘It is not the habit of the court to decide questions of a
constitutional nature unless absolutely necessary to a decision of the case.’), cases concerning questions of
the availability of wartime habeas corpus, as \textit{Ex parte Endo}, 323 U.S. 283, 299 (1944) (‘this Court has
consistently given a narrower scope for the operation of the presumption of constitutionality when
legislation appeared on its face to violate a specific prohibition of the Constitution’) and up through recent
habeas corpus immigration cases, e.g. \textit{INS v. St. Cyr}, 533 U.S. 289, 301 fn.13 (2001) (‘The fact that this
Court would be required to answer the difficult question of what the Suspension Clause protects is in and of
itself a reason to avoid answering the constitutional questions that would be raised by concluding that
review is barred entirely.’), and \textit{Zadvydas v. Davis}, 533 U.S. 678, 682 (‘[because the] indefinite detention
of aliens…would raise serious constitutional concerns, we construe the statute to contain an implicit
the Court creatively drew a negative inference through its contextual reading of the statutory language of
the DTA (i.e. based on the structural tension between \textsection1005(e) and \textsection1005(h) and in light of its legislative
history), thus avoiding any ruling on the constitutionality of the DTA’s habeas provisions. Citing \textit{Lindh v.
Murphy}, 521 U.S. 320, 327, the \textit{Hamdan} Court argued that ‘the fact that the amendments at issue [in \textit{Lindh}]
“affected substantive entitlement to relief”, warranted drawing a negative inference. A like inference
follows \textit{a fortiori} from \textit{Lindh} in this case.’\textsuperscript{109}

\textsuperscript{109} (‘As a threshold matter, we must decide whether MCA \textsection7 denies the federal courts jurisdiction to hear
habeas corpus actions pending at the time of its enactment.’) 128 S. Ct. 2229, 2242 (2008)

\textit{Ibid 2242. Boumediene} petitioners had argued that the Court could avoid a constitutional ruling by
following \textit{Hamdan’s} negative inference approach (‘The Court may avoid this outcome by holding that the
MCA does not repeal habeas jurisdiction in cases pending when the MCA was enacted, in accordance with
well-settled rules of statutory construction….For [t]he MCA does not provide—much less contain an
“unmistakably clear statement” \textit{(Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764 (2006))—that section 7(a)
repeals jurisdiction in habeas cases pending on the date of enactment.’) 128 S. Ct. 2229 (2008), Pet. Brief
10 n6. Although this was the very approach in \textit{Hamdan} that had prevented the forced choice of either (a)
summary dismissal of Hamdan’s habeas petition, or (b) a constitutional ruling on the statutory provisions of
the DTA, the Court neglected to take this route in \textit{Boumediene}, asserting, [t]here is little doubt that the
effective date provision applies to habeas corpus actions….If the ongoing dialogue between and among the
branches of Government is to be respected, we cannot ignore that the MCA was a direct response to
\textit{Hamdan’s} holding that the DTA’s jurisdiction stripping provision had no application to pending cases.’
\textit{Ibid 2242-2243
2. Secondly, then, was the constitutional question itself: Are subjects detained in the space of the war on terror constitutionally entitled to habeas corpus?

Both parties to the ruling provided detailed historical narratives, supporting their respective positions of whether the writ runs to aliens detained abroad in wartime states of emergency. The Government argued that a historical investigation of both US and British common law confirmed that the writ has only ever extended to territories over which the Nation was sovereign. Petitioners contrarily argued that the majority dicta in Rasul had acknowledged that common law habeas jurisdiction followed the Crown’s officers, and at any rate, by 1789 there were already ‘settled precedents… regarding the extraterritorial scope of the writ.’

We have prefaced our own encounter with this query by observing the existence of a certain line of consistency threading its way through a fabric of ostensible inconsistency. While even a cursory historical evaluation of US common law will observe a rather uneven trajectory of Court holdings on the extraterritorial reach of the Constitution for citizens and aliens alike, we have likewise observed the deference given by the Court to the Executive branch when considering constitutional entitlement claims by alien subjects detained abroad in wartime states of emergency. The reasoning behind this discrepancy is as elegantly simple as it is unquestioned and tautological: exigency demands immediacy of action, immediacy of action requires a singularity of decision; along with the power of decision comes a monopoly on the determination of the time of the exigency, which subsequently explains the judicial deference to such exceptional measures taken therein. When concerning issues of wartime detention for aliens, we have labeled the Court’s practical application of this logic the Ludecke-Eisentrager approach – “Ludecke”, inasmuch as the Executive is given a monopoly on the concept of time, and thus readily negates any territorially-based constitutional limitations; and “Eisentrager”, inasmuch as the extraterritorial space of detention, when combined with the perceived exigencies of a wartime state of emergency, preempts the jurisdiction required for satisfaction of constitutional entitlement claims.

It may come as a surprise, then, that in Boumediene the Court breaks with this approach by answering this second question in the affirmative, holding, ’[p]etitioners… are entitled to the privilege of habeas corpus to challenge the legality of their detention.’

111 (‘The text and history of the Suspension Clause demonstrate that it does not confer rights on enemy combatants seized by our military and held abroad, and this Court’s precedents confirm that such aliens have no constitutional right to petition our courts for a writ of habeas corpus…. At common law, the writ of habeas corpus was not available outside the sovereign territories of the Crown.’) Ibid Govt. Brief 14, 27. Also see Brief Amicus Curiae of the Criminal Justice Legal Foundations in Support of Respondents, Oct 9th 2007; Brief of Legal Historians as Amici Curiae in Support of Petitioners, Aug. 24th 2007.

112 (‘There is no reason to reconsider Rasul’s well-supported conclusion that the common law writ was available in 1789 to aliens in territory (sovereign or not) under the King’s control. The Guantanamo Bay Naval Station is under the “complete jurisdiction and control” of the United States…. It follows that Petitioners’ right to habeas is protected by the Suspension Clause.’) Ibid Pet. Brief 15. Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners, Aug. 24th 2007; Brief of Legal Historians as Amici Curiae in Support of Petitioners, Aug. 24th 2007.

113 128 S. Ct. 2229, 2244 (2008)

114 128 S. Ct. 2229, 2262 (2008)
3. And thirdly—insofar as the MCA had not explicitly invoked the Suspension Clause, but merely revoked statutory jurisdiction of habeas corpus from federal courts, thereby transferring authority over the substitutive procedures to the D.C. Circuit Court of Appeals—the question arose: Are the collateral review procedures adequate and effective in preserving the core features of habeas review?

A determination of what exactly is an ‘adequate’ or ‘effective’ substitute for wartime habeas that yet preserves its ‘core features’ for aliens detained abroad is, perhaps unsurprisingly, an object of some contention.

One the one hand, the Government argued that the multi-tiered review procedures established by the DTA were both adequate and effective: Its first procedural substitution provided for a Court of Military Commission Review (CMRC), a review body to which a detainee may appeal a final decision by a military commission on an issue of law. If that appeal failed, the detainee had yet another opportunity to appeal the final decision to the DC Circuit Court of Appeals. And finally, the Appeals Court decisions could be reviewed by the Supreme Court under a writ of certiorari.

Indeed, the Government argued, ‘[e]ven if this Court determines that petitioners have Suspension Clause rights…[it] should not attempt to evaluate the adequacy of the DTA until the District of Columbia Circuit has had an opportunity to construe the statute and this Court can examine its operation in a concrete setting.’ To act otherwise would be to act in haste, for as they remind the Court, ‘[t]he settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted.’

On the other hand, petitioners argued that the DTA review provisions lacked ‘the essential procedures and protections of the writ…provided by the Suspension Clause.’

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115 ‘Petitioners, along with the other enemy combatants being held at Guantanamo Bay, enjoy more procedural protections than any other captured enemy combatants in the history of warfare.’ 128 S. Ct. 2229 (2008), Govt. Brief 9. ‘If you compare what these detainees have under the DTA, in terms of judicial review, to what would have been available to them at common law in 1789, it is not even close. This is a remarkable liberalization of the writ, not some retrenchment or suspension of the writ.’ Ibid Oral Arg. (Clement) 43:50-44:02.

116 §950f(a) (‘for the purpose of reviewing military commission decisions under this chapter’)

117 §950g(a) (‘the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of final judgment rendered by a military commission.’)

118 §950g(d) (‘The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals…’)

119 128 S. Ct. 2229 (2008), Govt. Brief 41

120 Ibid 42. (Citing Rose v. Lundy, 455 U.S. 509, 515-516 (1982); United States v. Hayman, 342 U.S. 205, 219 (1952); Clinton v. Goldsmith, 526 U.S. 529, 537 n.11 (1999); Noyd v. Bond, 395 U.S. 683, 693-699 (1969); cf. Schlesinger v. Councilman, 420 U.S. 738 (1975). Supra note 106. The Government further argued, ‘[t]he comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war.’ 128 S. Ct. 2229 (2008), Govt. Brief 42. The Government’s mode of argument herein is best understood as a reminder to the Court of its historical practice of what we have labeled the Ludecke-Eisentrager approach, whereby wartime exigencies produce great judicial deference to the Executive’s exceptional measures and his ostensible monopoly on time (i.e. decisions on the length of detention, access to due process, duration of the conflict, etc.).

121 128 S. Ct. 2229 (2008), Pet. Brief 19. ‘Instead of a searching and independent review of the facts and law bearing on the petitioner’s detention, the DTA provides only a truncated and deferential survey of the faulty CSRT process and the preordained results it yielded.’ Ibid 26. For an analysis of the procedural rules
The Military Commission Rules of Evidence provides no opportunity to conduct a searching factual review,\(^{122}\) potentially preempts defendant’s access to exculpatory evidence,\(^{123}\) allows for the admission of hearsay evidence,\(^{124}\) provides inadequate counsel,\(^{125}\) and generally maintains a prejudiced assumption of prisoner’s guilt.\(^{126}\)

Moreover, no meaningful opportunity for collateral attack on a detainee’s verdict is provided.\(^{127}\) The limited scope of review for detainees is made available only after an administrative (CSRT) determination of their subject-status, and excludes challenges relating to any aspect of their detention, transfer, treatment, trial, or conditions of confinement.\(^{128}\) Any legal challenges to detention are thus dependent on an administrative determination of subject-status; and yet because the MCA provides no time limit on pre-administrative detention, there is no bar to the indefinite confinement of a prisoner awaiting the determination of his/her status.\(^{129}\)

Petitioners thus urged the Court to act with immediacy, given their ongoing and indefinite detention, the lack of access to any neutral tribunal to contest the factual basis of that detention, and an otherwise complete absence of any judicial determination of their proper subject-status.\(^{130}\)

IV. Boumediene v. Bush: A Time for Habeas Corpus

A. The Logic of the Ruling: In Murky Space and Wanting Subject…

Having already established the three-tiered nature of the Boumediene holding, we can thus move straight to an examination of its logic. The Court inaugurates its investigation of the military commissions, see CRS Report RL33688, The Military Commission Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice, Sept. 27th 2007.

\(^{122}\) (‘the DTA prevents the court of appeals from conducting anything like the kind of searching factual review that would have been customary at common law.’) 128 S. Ct. 2229 (2008), Pet. Brief 27

\(^{123}\) Mil. R. Evid. 505. (‘The bulk of the government’s information [is] classified, so the prisoner could not know what was alleged against him, let alone offer explanations or evidence in rebuttal.’) 128 S. Ct. 2229 (2008), Pet. Brief 27

\(^{124}\) Mil. R. Evid. 801-807 (allows for the admission of hearsay evidence unless opposing party ‘clearly demonstrates that the evidence is unreliable or lacking in probative value.’)

\(^{125}\) (The Defense Department’s rules [limit] Petitioners to assistance from a ‘Personal Representative,’ who [is] not an attorney, [is] not bound to keep Petitioners’ communications confidential, and [is] not permitted to serve as the detainee’s “advocate.”) 128 S. Ct. 2229 (2008), Pet. Brief 32

\(^{126}\) (‘The prejudice of this systematically biased record is compounded by the court of appeals’ inability to act as an independent decisionmaker under the DTA, which instead places a heavy thumb on the scale in favor of the government’, citing §1005(e)(2)(C)(i), providing for ‘a rebuttable presumption in favor of the Government’s evidence.’) Ibid 32

\(^{127}\) §950g(b) (‘no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever…relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.)

\(^{128}\) MCA §7(a) amending DTA §1005(e)(2).

\(^{129}\) (‘the government has failed to provide Petitioners with any hearing remotely approaching the basic due process requirements of meaningful notice and opportunity to be heard.’) 128 S. Ct. 2229 (2008), Pet. Brief 48.

\(^{130}\) (‘After nearly six years of unjustified imprisonment, the government’s failure to comply with rudimentary due process deserves no further indulgence… The Court need not decide whether different procedures, if offered “at a meaningful time and in a meaningful manner…”might satisfy due process in some future case. With Petitioners’ unconstitutional imprisonment now approaching six years, no further procedural tinkering is justifiable.’) Ibid Pet. Brief 45,49
of the constitutional question by committing itself to a categorical analysis of subject and space:

‘In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their [subject] status, i.e. petitioners’ designation by the Executive Branch as enemy combatants, or their physical location [space], i.e. their presence at Guantanamo Bay.’\(^{131}\)

On the one hand, as the Court observed, ‘[w]e know that at common law a petitioner’s status as an alien was not a categorical bar to habeas corpus relief.’\(^{132}\) And yet, on the other hand, it nonetheless remained for the Court to distinguish *Eisentrager’s* ruling that aliens detained abroad during wartime lack recourse to habeas review\(^{133}\) from *Boumediene’s* constitutional holding, extending habeas review to aliens detained abroad during wartime. And so, thrust back to a precedent that Justice Ginsburg had earlier labeled ‘at least ambiguous’, and ‘a hard opinion to fathom’,\(^{134}\) the Court once more revisited *Eisentrager’s* six critical factors.

Recall that the *Rasul* Court had puzzled over *Eisentrager’s* observation that each petitioner:

(a) was an enemy alien; (b) had never resided in the United States; (c) was captured outside of US territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and was at all times imprisoned outside the United States.’\(^{135}\)

It’s worth noting that of the six factors ((a)-(f)), only factor “(a)” concerned the subject-status of petitioner (i.e. ‘an enemy alien’), with “(b)-(f)” concerning spatial factors (i.e. the place of (b) residence, (c) capture, (d) conviction, (e) unlawful behavior, and (f) incarceration). It’s also worth recalling that in *Rasul*, Justice Kennedy had understood *Eisentrager’s* ruling against petitioners’ claims as the specific reason for why the *Rasul* petitioners’ were entitled to habeas review.\(^{136}\)

Thus resuming its interpretation of the *Eisentrager* precedent precisely where Kennedy’s concurrence in *Rasul* had left off, the *Boumediene* Court condensed *Eisentrager’s* six critical factors down to three factors, stressing their relevance in all three cases (*Eisentrager, Rasul, and Boumediene*) for determining the constitutional reach of the Suspension Clause:

\(^{131}\) Ibid 2244 {my emphasis}
\(^{132}\) Ibid 2248
\(^{133}\) 339 U.S. 763, 764 (1950) (‘A nonresident alien has no access to our courts during wartime.’)
\(^{134}\) 542 U.S. 466 (2004), Oral Arg. 35:04-35:06. Supra note 80
\(^{135}\) 339 U.S. 363, 377 (1950)
\(^{136}\) 542 U.S. 466, 487 (2004) (J. Kennedy, concurring) (‘A faithful application of *Eisentrager*…requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.’)
1. **Subject**: The legal status of petitioner, and the adequacy of the process of its determination.
2. **Space**: The zone of capture and detention.
3. **Practical considerations**: Any withstanding obstacles or constraints to satisfying constitutional necessities.\(^{137}\)

The question for the Court, then, in distinguishing *Eisentrager* from *Boumediene* (without overturning the former), was what, if anything, differentiates the subject, space, and practical considerations of the *Eisentrager* petitioners (aliens detained abroad amidst wartime exigencies) from those of the *Boumediene* petitioners (also aliens detained abroad amidst wartime exigencies)?

The Court first turned to the spatial question – i.e. of the proper legal status of GTMO, and the common law extension of federal court jurisdiction to grant habeas inquiries therein.\(^{138}\) Weighing the broad historical narratives presented in the briefs provided by both petitioners and respondent, the Court found ‘the evidence as to the geographical scope of the writ at common law informative, but not dispositive.’\(^{139}\)

Indeed, both parties to the dispute had conceded that no available common law precedent is comparably analogous to the radically unique space of Guantanamo Bay.\(^{140}\) Rather, the Court focused on the basic fact that these competing polemics on the proper spatial status of Guantanamo Bay were united in their concession of the very lack of precedent:

> ‘Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used

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\(^{137}\) 128 U.S. 2229, 2259 (2008) (‘Based on this language from *Eisentrager*… at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.’)

\(^{138}\) Ibid 2248-2258

\(^{139}\) Ibid 2249. Petitioners had argued that detention facility at GTMO was approximately analogous to two territories outside England to which the writ had run (the Channel Islands and India). Respondents had contrarily argued that GTMO was more approximately analogous to territories wherein the writ had not run (Scotland and Hanover). *Supra note* 111

\(^{140}\) Ibid 2251 (‘Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction….Both arguments are premised, however, upon the assumption that the historical record is complete and that common law, if properly understood, yields a definite answer to the question [of the proper spatial status of GTMO]….There are reasons to doubt both assumptions.’) The Court proceeded to observe that if the touchstone of jurisdiction turns on “sovereignty” (as the Government had argued), the matter is only complicated by the ambiguous meaning of this term: while the United States maintains ‘complete jurisdiction and control’ (i.e. *de facto* sovereignty) over the leased territory, the lease terms also grant that the Republic of Cuba maintains ‘ultimate sovereignty’ (i.e. *de jure* sovereignty). (‘[F]or purposes of our analysis, we accept the Government’s position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay….[H]owever, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty.’) Ibid 2253. *Supra note* 83.
in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

Spatial distinctions, then, were not dispositive. After all, the Court reasoned, ‘[these] detainees…are similarly situated to the Eisentrager petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States’. Indeed, the Court conceded, this factor actually ‘weighs against finding they have rights under the Suspension Clause.’

However, practical considerations were also not dispositive. The Court allowed that there may in fact be some difficulties to surmount in obtaining adequate judicial process for detainees held at GTMO, just as there had been for petitioners at Landsberg prison (e.g. wartime security concerns, disbursement of resources, etc.). But the Court also noted that ‘at the time Eisentrager was decided…[we were] right to be concerned about judicial interference with the military’s efforts to contain “enemy elements, guerrilla fighters, and were-wolves”…[but] [s]imilar threats are not apparent here.’

And so in light of the Government’s ability to surmount any practical obstacles to satisfying habeas, but given the murky and indeterminate spatial status of GTMO, the Court then turned to the question of subject-status. But here too, a dispositive categorical determination foundered –albeit for a different reason than the previous two factors. The reason, we should observe here, was as important for the Court as it is for our grasp of the manner by which the Boumediene precedent categorically departs from the Ludecke-Eisentrager approach: It may be the case that of the three relevant factors culled from Eisentrager and employed as standards of comparison in Boumediene, factors (2) and (3) are either practically indistinguishable, or at least not dispositive. However, while Boumediene petitioners, like those of Eisentrager, were aliens detained abroad amidst wartime exigencies –and in this respect, petitioners in both cases were ostensibly analogous– several critical aspects of factor “(1)” are notably dissimilar. For instance:

141 Ibid 2248. The Court would go on to elaborate the radical novelty of the case before it (‘given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.’) Ibid 2251
142 Ibid 2260
143 (‘Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks.’) Ibid 2261
144 Ibid 2261. The willingness by the Court to even indulge in a determination of the absence of any imminent threat that otherwise might prove too great an obstacle for the satisfaction of constitutional necessities (and thus, to engage in the adjudication of a matter that can only be properly described as a military matter) indicates the extent to which the Court departs from the Ludecke-Eisentrager approach in Boumediene. Indeed, the Court’s determination that [u]nder the facts presented here…there are few practical barriers to running the writ’ (Ibid 2262), and later, that ‘there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions’ (Ibid 2275), already begs the question of what was the nature of this ‘showing’ of ‘the facts presented’? The answer can only be a ‘showing’ of ‘the facts’ of a military nature –that is, ‘facts’ of which, under the Ludecke-Eisentrager approach, are the proper Article II domain of the Executive, and would otherwise prove sufficient grounds to summarily dismiss the petitions for lack of jurisdiction (i.e. what the Ludecke Court had called ‘matters of political judgment for which judges have neither technical competence nor official responsibility’). 335 U.S. 160, 170 (1948)). In short, the determination of ‘practical considerations’ either providing or barring wartime habeas corpus, as is affirmed in both Ludecke (territorially) and Eisentrager (extraterritorially), have always been monopolized by the Executive.
a. The Eisentrager petitioners had been provided the opportunity to contest the determination of their subject status as unlawful, while the Boumediene petitioners had not.\textsuperscript{145}

b. The Eisentrager petitioners had enjoyed ‘a rigorous adversarial process to test the legality of their detention’, while the Boumediene petitioners had not.\textsuperscript{146}

c. The Eisentrager petitioners had received adequate counsel, while Boumediene petitioners had not.\textsuperscript{147}

d. The Eisentrager petitioners had enjoyed the procedural protections of the presumption of innocence, while Boumediene petitioners had not.\textsuperscript{148}

In Boumediene, then, the Court attempts to pursue its ordinary categorical analysis of subject and space for an adjudication of the constitutional question of habeas entitlement for aliens detained abroad amidst the exigencies of a war on terror. The traditional conception of space as unambiguous, concrete, and clearly delineated by geographies of national sovereignty allows that when an adequate judicial determination of subject-status is wanting, the Court may defer to jurisdictional determinations founded on distinctions of territoriality/extraterritoriality.\textsuperscript{149} Historically, where the sovereign flag flies, the Constitution follows, and the great writ runs; where sovereignty ends, so too does federal jurisdiction over constitutional entitlement claims. Conversely, in cases where the proper legal status of the space of capture and detention is indistinct, so long as the judicial process is adequate to determine petitioner’s status as lawful/unlawful, such as in Eisentrager, the Court may defer to subject-status,\textsuperscript{150} when minimally adequate judicial process adjudicates that status as both alien and unlawful, no further constitutional inquiry is required, and to such subjects no writ runs. But where the legal status of a space is murky (as it is at GTMO), and when no adequate process for subjective

\textsuperscript{145} 128 U.S. 2229, 2259 (2008) (‘the petitioners in Eisentrager did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants.’)

\textsuperscript{146} Ibid 2259-2260 (‘[In Eisentrager] there had been a rigorous adversarial process to test the legality of their detention. The Eisentrager petitioners were charged by a bill of particulars that made detailed factual allegations against them.... In comparison, the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.’) Ibid 2259-2260

\textsuperscript{147} Ibid 2260 (‘Although the detainee is assigned a “Personal Representative” to assist him…the Secretary of the Navy’s memorandum makes clear that the person is not the detainee’s lawyer or even his advocate.’)

\textsuperscript{148} Ibid 2260, 2269 (‘[Eisentrager petitioners were] allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses…[while in Boumediene] the Government’s evidence is accorded a presumption of validity….and] the detainee’s opportunity to question witnesses is likely to be more theoretical than real.’)

\textsuperscript{149} For instance, In re Territo, 156 F.2nd 142, 144 (1946) (noting that ‘[while] the basis of the claimed illegal detention and restraint rests upon the allegation that petitioner was born in the United States…it is immaterial to the legality of petitioner’s detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States.’) Most famously, Johnson v. Eisentrager, 339 U.S. 763, 765, 768 (1950) (noting that ‘[petitioners'] exact affiliation is disputed, and for our purposes, immaterial…We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.’)

\textsuperscript{150} (‘the detainees here are similarly situated to the Eisentrager petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States.’) 128 U.S. 2229, 2260 (2008)
determination has been afforded (as alleged by the 37 petitioners in *Boumediene*), the sole standard instruments historically used by the Court to check Executive prerogative lose their ability to function as categories of justiciability.\(^{151}\) The question for the Court is then what should be done?

In this respect, it’s somewhat unsurprising that following it’s exposition of the categorical dissimilarities between *Eisentrager* and *Boumediene*, the Court is moved to itemize the radical novelty of the precedent before it:

‘It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.’\(^{152}\)

The Court’s ruling in *Boumediene* is plain: subjects detained in the space of the war on terror have a constitutional entitlement to habeas corpus. If the government’s procedural substitutes to the writ are inadequate to achieve concrete judicial process, they are in violation of the Suspension Clause.\(^{153}\) Because the Court found inadequate the substitutive process provided by the DTA, no further inquiry is required; a right to the writ exists.\(^{154}\)

The logic of the holding is equally plain: the space of GTMO is murky, and insufficient judicial process has rendered the means to determine petitioners’ subject-status wanting. Thus lacking categorical recourse to both subject and space, the *Boumediene* Court is pressed to invoke an additional determinant in order to realign its analytical coordinates back to objective, concrete, and otherwise familiar common law grounds. Unfamiliar and radically precedential as it may be, the additional categorical determinate used by the Court is that of time.

As Justice Kennedy emphasizes when bringing his written opinion for the majority to a close: the ontology of habeas corpus must now give way to temporal considerations. Eight years after the declaration of a war of potentially indefinite duration, and six years after petitioners’ capture, detention, and persistent lack of any

\(^{151}\) It is for this very reason that as early as the *Rasul* Oral Argument, Justice Souter alludes to the fact that ‘[the Court] cannot stand for the proposition that it cannot even inquire [into petitioners’ legal status].’ Oral Arg. 10:48-10:50. The Court consistently pursues this logic in *Boumediene*; for example, citing *Hamdan’s* citation of *Schlesinger v. Councilman* (‘[A]bstention is not appropriate in cases…in which the legal challenge “turn[s] on the status of persons as to whom the military has asserted its power”).’ 128 S. Ct. 2229, 2262 {my emphasis}

\(^{152}\) Ibid 2262 {my emphasis}

\(^{153}\) ‘We hold that Article I §9 cl.2 of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.’ Ibid 2262

\(^{154}\) Ibid 2269, 2270 (‘Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant…. [G]iven that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.’)
adversarial judicial process in order to achieve adequate subjective determination, it’s now about time:

‘In considering both procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches… [But] some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.’

B. An Exceptional Circumstance
A question remains here that has yet to be addressed: Why was the majority ruling in Boumediene v. Bush 48 pages long, rather than a mere 33 pages? That is, why did the holding move to include within its scope an interpretation and subsequent assessment of the adequacy of the DTA review procedures as a substitute for habeas corpus? 156

The Court admits that ‘in the ordinary course’ it would have simply found §7 of the MCA unconstitutional (in light of its holding that alien enemies at GTMO are constitutionally entitled to habeas corpus), and then remanded the case back to the Court of Appeals, so that it might decide the withstanding issue of whether the appeals procedures provided in §1005(e)(2) of the DTA were an adequate substitute for habeas corpus. 157 After all, as both the Government had argued 158 and the Court has traditionally conceded, it’s common judicial practice to leave unresolved issues best dealt with in future rulings by lower courts. 159 Indeed, because the rule of judicial minimalism provides that the scope of review remains on all possible occasions restricted, prudent, or otherwise specific, the Government had urged adherence to this institutional principle a fortiori insofar as the legislatively-enacted collateral procedures (of the DTA) had not yet been exhausted. 160 ‘[H]owever’, the Court reasons, ‘[o]ur practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule. Departure from this rule is appropriate in “exceptional” circumstances.’ 161

155 Ibid 2277, 2278
156 This inquiry becomes all the more fascinating in light of the fact that this additional step by the Court in Boumediene could have been addressed in Hamdan v. Rumsfeld, insofar as the only substantive change to the habeas statute, effected by §7 of the MCA, was the disambiguation of §1005(e) and (h) of the DTA over pending cases. Therefore, by the time Hamdan reached the Supreme Court in March of 2006, the writ of habeas corpus had been suspended for detainees at GTMO; it only remained for the practical consequence of its pending application to take effect.
157 Ibid 2262-2263.
158 Supra note 120
160 Govt. Brief 15 (‘The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted.’) Citing Rose v. Lundy, 455 U.S. 509, 515-516 (1982). Chief Justice Roberts grounds his dissent in this remonstration of haste (‘Given the posture in which these cases came to us, the Court should have declined to intervene until the D.C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee’s case.’). 128 S. Ct. 2229, 2280 (C.J. Roberts, dissenting).
161 Ibid 2263. The two cases cited by the Court in support of its claim of an ‘exceptional circumstance’ that warrants its departure from ‘the rule’ (Duignan v. United States, 274, U.S 195, 200 (1927), and Cooper
The question, then, must be asked here: what are these ‘exceptional circumstances’ in *Boumediene v. Bush* that warrant such a radical ‘departure from this rule’? What exigency, what pressing issue has been revealed to the Court, thus demanding its immediate judgment? Why was the Court moved to make an instant ruling on the issue of the adequacy of the DTA review procedures, therein consciously departing from the time-tested, normal institutional order of the federal judiciary?162

Consistent with the approach first outlined in his *Rasul* concurrence,163 Justice Kennedy answers this question by pointing out the length of petitioners’ detention, now amounting to an exigency for the vindication of petitioners’ rights:

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all likelihood a remand simply would delay ultimate resolution of the issue by this Court.164

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162 *Industries, Inc. v. Aviall Services*, Inc., 543 U.S. 157, 169 (2004) require brief consideration here. It is difficult to overstate an assertion that the subject matter of either ruling was anything but comparatively trivial; and neither case concerned habeas corpus, due process rights, or issues of Executive power over military detention in wartime states of emergency. For instance, *Duignan* concerned the abatement of a liquor nuisance under § 22 of Title II of the Prohibition Act, wherein the Court declined to adjudicate the constitutionality of the forfeiture of a lease under §23 of the Act (‘We do not consider the constitutionality of the forfeiture under §23…It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed’, citing *Montana Ry. Co. v. Warren*, 137 U. S. 348, 137 U. S. 351; *Old Jordan Mining Co. v. Societe Anonyme Des Moines*, 164 U. S. 261, 164 U. S. 264-265; *Magruder v. Drury*, 235 U. S. 106, 235 U. S. 113; *Gila Valley Ry. v. Hall*, 232 U. S. 94, 232 U. S. 98; *Grant Bros. v. United States*, 232 U. S. 647, 232 U. S. 660; *Ana Maria Sugar Co. v. Quinones*, 254 U. S. 245, 254 U. S. 251. Cf. *West v. Rutlege Timber Co.*, 244 U. S. 90, 244 U. S. 99, 100; *United States v. Tennessee & Coosa R. Co.*, 176 U. S. 242, 176 U. S. 256. Likewise, in *Cooper Industries*, which concerned the issue of whether a private party who had not been sued under a federal environmental tax law could seek contribution from other liable parties, the Court neglected to cite any exceptional circumstance in declining to hear claims (‘Although we have deviated from this rule in exceptional circumstances, the circumstances here cut against resolving [the additional] claim.’).

163 When first granting certiorari of *Boumediene*, the Court clarified its intention to consult the ruling by the DC Circuit on the DTA review procedures, which were pending at the time (‘As it would be of material assistance to consult any decision in *Bismullah, et al., v. Gates*, No. 06-1197, and *Parhat, et al., v. Gates*, No. 06-1397, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.’). 127 S. Ct. 3078 (2007). And during Oral Argument (3:20-3:26) Justice Ginsburg asks Mr. Waxman: ‘So shouldn’t we, if we agree with you[,] [and] that there is authority in the DC Circuit, send it back to them to make the determination, whether, habeas being required, this is an adequate substitute?’ However, by the time of the ruling announcement, as Justice Kennedy points out in his opinion, ‘[a]lthough the Court of Appeals has yet to complete DTA review…five separate statements from members of the court [have] offer[ed] differing views as to the scope of the judicial review Congress intended these detainees to have. Under the circumstances, we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.’ 128 S. Ct. 2229, 2263 (2008) (my emphasis).


164 128 S. Ct. 2229, 2263 (2008)
Kennedy concedes that ‘in most federal habeas cases, considerable deference is owed to the court that ordered confinement’ because ‘in the usual course, a court of record provides defendants with a fair, adversary proceeding.’ However, he observes, ‘[t]he present cases fall outside these categories…for here the detention is by executive order’; and in such circumstances, there always persists the risk of an absence of adequate process, which in turn will render impotent petitioners’ ability to rebut the Government’s designation of their subject-status.

The Supreme Court’s exodus from ‘the ordinary course’, then, pivots on the following ‘exceptional circumstance’:

(1) the proper delineation of judicial power in republican government, (i.e. ‘the gravity of the separation-of-powers issues’), wartime notwithstanding, combined with the issue of
(2) the length of petitioners’ wartime detention. (i.e. ‘the fact’ that they had ‘been denied meaningful access to a judicial forum for a period of years.’).

The Court ‘weighs’ the ‘benefits’ gained from awaiting the announcement of, and then consulting, a future Court of Appeals ruling, against the potential ‘harm’ endured from ‘additional delay’, and decides that a necessary vindication of petitioners’ rights has acquired an exigency that simply cannot wait. The radical novelty of the issues before the Court, combined with the exigency of satisfying petitioners’ rights, renders the circumstances so ‘exceptional’ that a singular and immediate decision is now required. Rather than merely ruling on the matter of the constitutional extension of the Suspension Clause, thus delaying adjudication on the adequacy of the collateral review process on behalf of the wartime state of emergency of the war on terror, in Boumediene the Court instead invokes a constitutional state of emergency for the vindication of petitioners’ rights. And as the Court clarifies, neither traditional wartime deference to the Executive (i.e. what we have labeled here the Ludecke-Eisentrager approach), nor observance of the normal institutional order of the federal judiciary, are practicable so long as the exigent threat to constitutional rights remains outstanding:

165 Ibid 2268
166 Ibid 2269
167 (‘Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry.’) Ibid 2269 {my emphasis}.
169 128 S. Ct. 2229, 2263 (2008) (‘Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.’). In other words, and quite remarkably, the Court is articulating its deliberate departure from the standard institutional order of the federal judiciary, citing ‘the exceptional circumstance’ of ‘the costs of further delay’, and therein flipping on its head the standard trope (no less at the locus of the Ludecke-Eisentrager approach) that emergencies require immediate action by the Executive, rather, declaring an emergency for the vindication of petitioners’ constitutional rights that requires immediate action by the Court.
‘Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.’

C. Conclusion
Perhaps it could not be otherwise that, as Justice Kennedy has observed in passing, ‘there is a realm of political authority over military affairs where the judicial power may not enter.’ For neither a sophisticated knowledge of the history of wartime states of emergency, nor any commitment to the particulars of a given theory of its occurrence, is required to readily grasp the obvious fact that because time has first and foremost always been a concept endemic to the declaration of a national emergency, and because the Executive is the one tasked with the management of its duration, the Court has historically deferred to the political branches when in the midst of wartime states of emergency.

Indeed, whether one chooses to cite instances endorsing the principle that a decision of the nature and demands of a threat falls to the Executive (which the Court held as the Nation was literally tearing-in-two), the belief that mere uncertainty of the gravity of an emergency suffices to negate the timely opportunity for vindication of constitutional rights (as the Court held when in the midst of world war), or the notion that even the prospect of indefinite detention for a US citizen poses no immediate constitutional problems so long as it’s authorized by congressional statute (as the Court held at the onset of a war on a tactic and of indefinite duration), over and again the result is the same: the irremediable union of time, emergency, and Executive prerogative remain an uncontestable fact, derogated only in Boumediene v. Bush.

170 Ibid 2277
172 Prize Cases, 67 U.S. 635, 670 (1862) (‘Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such an armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by [his] decisions and acts.’) {my emphasis}.
173 Korematsu v. United States, 323 U.S. 214, 220 (1944) (noting that ‘[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.’) For a defense of Korematsu as a decision made under conditions of uncertainty when in a wartime state of emergency, see Mark Tushnet, “Defending Korematsu? Reflections on Civil Liberties in Wartime”, in M. Tushnet (ed.), The Constitution in Wartime: Beyond Alarmism and Complacency, Duke Univ. Press, Durham, 2005.
174 542 U.S. 507, 520-521. In Hamdi, the Court entertains the notion of an indefinite war, without addressing its potential legal consequences. (‘If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then… Hamdi’s detention could last for the rest of his life…. [However, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.’).
For shorthand, we have labeled the manifest application of the Court’s historical practice of judicial deference to the Executive’s monopoly on time, and in cases specifically concerning wartime habeas corpus for aliens held in military detention, the Ludecke-Eisentrager approach. It’s unsurprising, then, that the Court’s departure in Boumediene from this time-honored approach provides the rhetorical force for Justice Scalia’s and Chief Justice Roberts’ dissents, both of which, one might add, cite ample case law testifying to the Court’s historical belief that exigency requires a singularity of decision, and with the power decision comes a monopoly on the time of the emergency\footnote{128 S. Ct. 2229, 2286, 2297. Justice Scalia cites Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (‘The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference’), Dept. of Navy v. Egan, 484 U.S. 518, 529-530 (1988) (‘unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs’), and Regan v. Wald, 468 U.S. 222, 243 (1984) (noting ‘the traditional deference to executive judgment ”[i]n this vast external realm,” citing United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 299 U. S. 319 (1936)’). Chief Justice Roberts (perhaps more relevantly) cites case law whose subject-matter specifically concerns the circumscribed nature of habeas review when in wartime military detention: Burns v. Wilson, 346 U.S. 137, 139 (1953) (‘In military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases’), In re Yamashita, 327 U.S. 1, 8 (1946) (‘The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide, and condemn, their action is not subject to judicial review’), and Ex parte Quirin, 317 U.S. 1, 25 (1942) (noting that ‘[i]n light of our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners [there is] therefore no occasion to decide contentions of the parties unrelated to this issue’).}—especially in cases involving habeas entitlement claims whereby congressional statute has deliberately circumscribed its access.

We have observed that the sole categorical determinates of subject of and space, historically used by the Court to check Executive prerogative, while operational and dispositive in times of order and calm, are inconsistently applied and/or often weakened in wartime states of emergency. It may be therefore be obvious to the careful reader of Boumediene v. Bush that insofar as §7 of the MCA, combined with the collateral review procedures provided by the DTA, render obsolete the justiciable capacities of the Court’s traditional analytical coordinates, the majority ruling signals the Court’s attempt to reclaim them, as such. What remains less obvious, however, is the radical shift in methodology effected in Boumediene v. Bush, whereby the Court rends from the Executive his previous monopoly on wartime military detention, thereby providing proof to the claim forwarded herein of the true precedent of the ruling—which is, namely, that given both its deprivation of categorical recourse to subject and space and the facts of the length and indefinite duration of petitioner’s detention without access to due process, a state of emergency now exists for the vindication of petitioners’ rights. This is the meaning of our thesis that, for the Court in Boumediene v. Bush, it’s now about time.