

Citizenship, National Security Detention, and the Habeas Remedy

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INTRODUCTION

Four months into the convulsive aftermath of the September 11 attacks, the first George W. Bush Administration began to detain “enemy combatant” designees at the American military base in Guantanamo Bay, Cuba (GTMO).¹ With the exception of Yaser Hamdi, a man born in Louisiana but raised in Saudi Arabia,² GTMO received only noncitizens. Even Hamdi’s GTMO detention was a mistake; authorities transferred him to a Virginia naval brig after discovering that he was an American.³ GTMO was the executive’s attempt to exploit, in the interest of national security, under-developed legal distinctions between citizens and noncitizens, and between homeland custody and detention abroad. The salience of those distinctions has remained exquisitely uncertain, even after *Boumediene v. Bush*⁴—the landmark 2008 case declaring that the habeas privilege extended to noncitizens detained at GTMO.⁵

The post-*Boumediene* momentum for the extraterritorial application of constitutional rights in favor of noncitizens has largely dissipated. Justice Anthony Kennedy, who penned *Boumediene*, was replaced by Justice Brett Kavanaugh, whose decision making on the D.C. Circuit rejected, virtually without exception, the rights-bearing status of noncitizens abroad.⁶ Among

1. See Sue Ann Pressley, *Detainees Arrive in Cuba amid Very Tight Security*, WASH. POST (Jan. 12, 2002), https://www.washingtonpost.com/archive/politics/2002/01/12/detainees-arrive-in-cuba-amid-very-tight-security/8cc055c4-f065-4098-af72-b14313a1a63f/?utm_term=.68f2d348894c [https://perma.cc/K697-3T9J].

2. See Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

3. See *id.*

4. 553 U.S. 723 (2008).

5. *Id.* at 732.

6. See, e.g., Omar v. McHugh, 646 F.3d 13, 19–21 (D.C. Cir. 2011) (writing opinion holding that there was no statutory right to contest transfer to another country and that Congress could strip habeas privilege for any such statutory right); Uthman v. Obama, 637 F.3d 400, 403 (D.C. Cir. 2011) (writing opinion holding that national security detention was statutorily authorized even if detainee was not part of a terrorist organization’s command structure); Al-Bihani v. Obama, 619 F.3d 1, 9–53 (D.C. Cir. 2010) (mem.) (concurring in order refusing *en banc* rehearing and explaining why domestic law does not incorporate international law norms); Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010) (joining opinion expressing disapproval of preponderance-of-evidence standard for factual allegations, despite that being the standard favored by the government); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (joining opinion rejecting view that the laws of war constrained military detention authority); Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009) (joining opinion holding that there was no due process right to notice and hearing for a challenge to a government allegation that a country receiving a transferred detainee was “unlikely” to torture him); *id.* at 516–22 (Kavanaugh, J., concurring) (writing

intermediate federal appeals courts, the D.C. Circuit enjoys almost exclusive jurisdiction over national security detention;⁷ and, after 2008, it rejected almost every legal challenge to the lawfulness of GTMO detention.⁸ Nor is the next wave of national security detention litigation likely to center on GTMO, a facility sitting on land over which the United States is functionally sovereign, and which stopped receiving new detainees even before the Supreme Court decided *Boumediene*. As of early 2018, out of the 780 prisoners brought to GTMO during what is sometimes called the global “war on terror,”⁹ only forty remain.¹⁰

As America moves into another phase of post-September 11 national security detention, the content of the habeas privilege and who enjoys its protective umbrella remain surprisingly unclear. In order to facilitate a comparison with a newer academic theory of the privilege, I set forth a two-plank framework I call the “Remedy Model.” The “thickness plank” is the (first) principle that the privilege is “only” a transsubstantive entitlement to judicial review and, if the detention is determined to be unlawful, discharge. The habeas privilege, however, furnishes no substantive rules about *when* detention is unlawful; the content of those rules comes from extrinsic sources of law. The “coverage plank” is the (second) principle that, because habeas power has historically depended on personal jurisdiction over the jailer, the privilege should be interpreted—to the extent possible under existing legal precedent—to reach any prisoner held under color of American law.

separately to emphasize that executive’s allegation that torture is unlikely to occur in receiving country cannot be second guessed in a habeas proceeding).

7. See, e.g., *Boumediene*, 553 U.S. at 795–96 (2008) (suggesting that that appropriate rule is one of exclusive D.C. Circuit venue); Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1452 (2011) (collecting sources).

8. See, e.g., *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018) (rejecting the argument that the authority to indefinitely detain noncitizens had lapsed due to international changes in the scope of military operations); see also Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 555, 593–606 (2013) (arguing that the D.C. Circuit effectively gutted *Boumediene*); Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1669–75 (2013) (explaining D.C. Circuit’s government-friendly decision making in wake of *Boumediene*); Vladeck, *supra* note 7 (documenting decisions and explaining why the D.C. Circuit became the exclusive court of appeals responsible for deciding substantive national security detention law for noncitizens).

9. I personally disfavor this term (intensely), but yield to the reality that it is now a familiar way of describing loosely related military activity targeting terrorists and certain political regimes that support them.

10. See *The Guantanamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current> [https://perma.cc/PU3D-PLLN]. But see Jenna Consigli, *Prosecuting the Islamic State Fighters Left Behind*, LAWFARE (Aug. 1, 2018), <https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind> [https://perma.cc/A9CT-LDJ2] (reporting that American officials have considered sending foreign fighters captured in the Islamic State theatre to GTMO).

I sketch the Remedy Model as a response to a formidable theoretical competitor—what I call a “Hybrid Model”¹¹—that takes somewhat different positions on thickness and coverage. Berkeley Law professor Amanda Tyler’s exhaustively researched new book, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (“Wartime Habeas” or “the Book”),¹² provides a rich historical account that supports this framework. The Book contains a massive amount of new material and argumentation, and it also consolidates and refines several article-length treatments of the subject matter.¹³ *Wartime Habeas* is, along with the recent book by Professor Paul Halliday,¹⁴ one of the two most important historical works in the field. Professor Halliday’s work focused on the history of the English *common law* habeas writ, but Professor Tyler’s is the definitive account of how the English habeas *statute* influenced American law and practice.

Professor Tyler’s take on the privilege is idiosyncratic in one major respect that bears on thickness. In the view of most—including myself—the habeas privilege is a transsubstantive *remedy* for unlawful custody.¹⁵ The privilege entitles a prisoner to judicial process necessary to review custody and, if necessary, discharge; but questions about whether detention is lawful are resolved *by reference to some other substantive law*. Under the paradigm favored by Professor Tyler, however, the privilege is *itself* the source of certain substantive anti-detention rules—most importantly, a substantive rule that preventive military detention of privileged detainees is unlawful.¹⁶

Professor Tyler’s position on coverage is that, historically, the privilege worked in favor of any prisoner bound by allegiance to the United States¹⁷—thereby excluding noncitizens detained under color of American law but in places beyond its (formal or functional) sovereign control. One could theoretically favor the coverage plank without the thickness plank, but the two

11. I use the term “Hybrid Model” in the interest of explanatory simplicity, and in order to capture the idea that the privilege originates *both* a procedural remedy and substantive anti-detention law.

12. AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* (2017) [hereinafter *WARTIME HABEAS*].

13. See Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015) [hereinafter Tyler, *American Revolution*]; Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 903 (2012) [hereinafter Tyler, *Core Meaning*]; Amanda L. Tyler, *The Counterfactual that Came to Pass: What if the Founders Had Not Constitutionalized the Privilege of the Writ of Habeas Corpus?*, 45 IND. L. REV. 3 (2011) [hereinafter Tyler, *Counterfactual*]; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) [hereinafter Tyler, *Emergency Power*]; Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006) [hereinafter Tyler, *Political Question*].

14. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

15. See *infra* notes 60–61 and accompanying text.

16. See *WARTIME HABEAS*, *supra* note 12, at 139 (“[T]he Constitution’s habeas privilege encompasses more than simply a promise of access to judicial review of one’s detention, and instead imposes significant constraints on the power of the executive to detain . . .”).

17. See *id.* at 55–61, 108–11, 271; Tyler, *Core Meaning*, *supra* note 13, at 906.

seem conjoined in recognition of a basic reality: if the privilege entails a full-blown criminal trial for covered detainees, then there needs to be a workable limit on its coverage.

In this Article, I contend that the Remedy Model is the superior privilege framework. Specifically, I make descriptive and normative arguments that: (1) the privilege is “only” a procedural remedy and is not the source of distinct substantive anti-detention rules, and (2) it covers noncitizens, including enemy combatant designees, held under color of America’s laws but on land beyond its sovereign control. In Part I, I situate the Hybrid and Remedy Models in the broader debate over the government’s emergency powers. In Part II, I scrutinize the pre-constitutional history on which Professor Tyler largely relies, explaining why it may fit the Remedy Model at least as well as—and perhaps better than—the Hybrid Model. In Part III, I show how the Remedy and Hybrid Models produce different assessments of the presidential administrations that figure most prominently in the American story of wartime power. In Parts IV and V, I set out my normative arguments. In Part IV, and with respect to the thickness plank, I argue that a privilege entitling all covered detainees to criminal process would strike the wrong balance between safety and procedure during both the steady state of national security risk and during emergencies. In Part V, I provide non-historical arguments that, to the extent possible, the habeas privilege should be construed to cover noncitizens held on land beyond America’s sovereign control.

I.

SITUATING THE DEBATE

Using history to establish a legal rule’s “core” is a tried and true argumentative strategy for those of virtually all interpretive stripes.¹⁸ The ability to discern the underlying history, however, necessarily limits efforts to locate modern legal rules within the compass of historical practice. Notwithstanding broad awareness that the Founders loathed English suspensions,¹⁹ modern application of the privilege incorporates a shoddy historical understanding of the way the writ actually worked on both sides of the Atlantic. This deficit especially hounds those who—unlike Professor Tyler and myself—are devout originalists of one interpretive faith or another.²⁰ And that blind spot became quite consequential in the early days of the first George W. Bush Administration, after al-Qaeda operatives flew two planes into the World Trade Center and one into

18. See generally Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015) (surveying the various forms of historical inquiry that are accepted facets of constitutional decision making).

19. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 882 (1994).

20. See Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 625–27 (2012) (sketching and collecting sources supporting different threads of originalist thought). By declaring myself to be non-originalist, I do not mean to suggest that history does not matter—just that I regard it as one of several tools in a bigger interpretive box. See notes 52–56 and accompanying text.

the Pentagon. In the balance of Part I, I situate my differences with Professor Tyler—bigger disagreements over privilege thickness and smaller ones about coverage—in the broader academic, decisional, and operational context of modern national security detention.

A week after the September 11 attacks, Congress passed the Authorization for Use of Military Force (AUMF).²¹ The AUMF empowered the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²² The AUMF has been, and continues to be,²³ the source of authority for a broad spectrum of national security activity, including: surveillance, military operations, military trials, and detention.²⁴

Because the war on terror did not fit cleanly within a law-of-war framework set up to constrain nation-state conflicts and civil wars, it produced many novel questions about the executive’s power to detain prisoners and the judiciary’s power to review that detention. For most intents and purposes, when the United States first attacked Afghanistan, the operations could be analyzed as an “international armed conflict”²⁵—a traditional war between nation states governed by, among other things, the Third and Fourth Geneva Conventions protecting prisoners of war (POWs) and civilians, respectively.²⁶ Shortly after the invasion, however, the Bush Administration began to shed the limitations that such a conflict model entailed. It determined that members of the Taliban and al-Qaeda captured in Afghanistan were “unlawful combatants” who, when so designated, lost any right to contest combatant status and were excluded from laws providing for the treatment of POWs.²⁷

Which laws applied to national security detention in this new type of conflict became increasingly unclear. For example, the war on terror failed to classify neatly as a “noninternational armed conflict”—a conflict within the

21. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

22. *Id.*

23. The National Defense Authorization Act for Fiscal Year 2012 (“NDAA”) supplements AUMF authority. Pub. L. No. 112-81, 125 Stat. 1298 (2011).

24. See Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy*, 110 AM. J. INT’L L. 628, 630 (2016).

25. See *United States v. Hamidullin*, 888 F.3d 62, 69 (4th Cir. 2018) (“The conflict in Afghanistan began in 2001 as an international armed conflict arising between two or more Third Geneva Convention signatories . . .”).

26. See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

27. See generally Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1394–1405 (2007) (discussing the evolution of the Bush Administration’s legal position).

territorial borders of a single country (such as a civil war) and subject to distinct law-of-war rules.²⁸ The Bush Administration, for its part, prosecuted the AUMF-authorized conflict as something *sui generis*: an international conflict with a nonstate actor.²⁹ In such an environment, less judicial review meant more opportunity for the military to develop practices in the void, including indefinite wartime detention.³⁰ The presence of judicial review pursuant to a habeas corpus writ was regarded, in many quarters, as a threat to national security.³¹ At stake in such proceedings was not just the authority to detain prisoners seeking relief, but also vital procedural rights and the broader legality of the executive's preferred armed-conflict framework.

The Supreme Court was, during the seven years following the September 11 attacks, forced to decide a series of war-on-terror cases that touched on questions about the habeas privilege, including: *Rasul v. Bush*,³² *Hamdi v. Rumsfeld*,³³ *Rumsfeld v. Padilla*,³⁴ *Hamdan v. Rumsfeld*,³⁵ *Munaf v. Geren*,³⁶ and *Boumediene v. Bush*.³⁷ Some of these cases involved a remedial question about what judicial process had to be provided to test the lawfulness of detention, as well as a substantive question about whether the detention was in fact lawful.³⁸ Because the prisoners were taken pursuant to a new paradigm of indefinite wartime detention—and were usually held somewhere outside the homeland—lawyers, jurists, and scholars rushed to synthesize the relevant authority and historical practice into modern legal principles.

The war on terror produced a mountainous body of scholarship on the privilege,³⁹ which placed more emphasis on archival and other primary source

28. See Jens David Ohlin, *The Common Law of War*, 58 WM. & MARY L. REV. 493, 516 (2016).

29. See Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123 (2013).

30. See *id.* at 146–53.

31. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 826–28 (2008) (Scalia, J., dissenting) (arguing that extending the habeas privilege to GTMO detainees will “make the war harder on us”).

32. 542 U.S. 466 (2004) (deciding that the habeas statute extended the privilege to noncitizens detained at GTMO).

33. 542 U.S. 507 (2004) (deciding that the AUMF and Due Process Clause permitted an American citizen captured in Afghanistan to be detained indefinitely).

34. 542 U.S. 426 (2004) (deciding that the appropriate habeas respondent for citizens held in the United States was the commander of the brig detaining the prisoner and that the appropriate habeas venue was the federal district court with territorial jurisdiction over the detention facility).

35. 548 U.S. 557 (2006) (avoiding question of habeas jurisdiction but holding that the military commissions that the Bush Administration used to try war crimes at GTMO violated Common Article III of the Geneva Conventions).

36. 553 U.S. 674 (2008) (holding that habeas jurisdiction existed over US prison facility in Iraq, but determining that the Due Process Clause did not preclude transfer of American citizen to Iraqi authorities for the purposes of criminal prosecution).

37. 553 U.S. 723 (2008) (holding that the Constitution guaranteed the privilege to noncitizens at GTMO).

38. See, e.g., *Munaf*, 553 U.S. at 685–88 (habeas holding); *id.* at 692–705 (substantive holding).

39. See, e.g., Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585 (2010) (contemplating how *Boumediene* might be conceptualized as a non-delegation decision); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political*

material.⁴⁰ Most habeas scholarship before that point—at least habeas scholarship that had influenced courts—drew more from the characterizations that luminaries like William Blackstone and Edward Coke had made about English practice than from the practice itself.⁴¹ That state of affairs improved in the mid-2000s, as Professor Tyler and her academic cohort began to use history more rigorously in order to understand the way the privilege operated in England, the American colonies, and the United States.⁴² When the Supreme Court decided *Hamdi* in 2004, it did so at the zenith of a heated debate about wartime power to detain American citizens.⁴³ *Hamdi* held that, although the military could theoretically use preventive (homeland) detention to imprison an American caught fighting against the United States abroad, it could not do so without satisfying minimal due process requirements.⁴⁴

Science, 110 COLUM. L. REV. 352 (2010) (examining the war-on-terror cases from the perspective of a political scientist); Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009) (arguing that the legal duty of protection explains a variety of questions relating to wartime power); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013) (reconceptualizing the American habeas framework as a series of rules about judicial power rather than individual rights); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1 (2008) (generally charting the legal significance of *Boumediene*); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537 (2010) (arguing that *Boumediene* should be considered part of the American constitutional canon); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing HALLIDAY, *supra* note 14, and considering what the war-on-terror decisions mean for military detainees at GTMO and at other facilities).

40. Litigants actually began to use more extensive writ history to litigate habeas issues in the decade before the September 11th attacks. *See, e.g.*, Brief Amici Curiae Of Legal Historians Listed Herein In Support Of Respondent, *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767). *St. Cyr*, in turn, relied heavily on history. *See id.* at 301–08.

41. *See, e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1099 (1995) (relying heavily on Blackstone’s interpretation of the English Habeas Corpus Act); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1188 (2007) (“[T]he writ of habeas corpus protected by federal law in 1789 was the familiar writ described by Blackstone, and the standards and procedures for issuing habeas relief were well established”); Michael O’Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1498 (1996) (relying on Blackstone for proposition regarding justiciability of criminal custody); *see also* HALLIDAY, *supra* note 14, at 3 (“We read Coke, Blackstone, and a handful of printed reports, then claim that we know what the law ‘was’ in 1789 or some other moment. If we do that while countless parchment court records and case reports surviving only in manuscript lie unread in archives, then we have been derelict as historians.”).

42. *See* sources collected in *supra* notes 13 (Professor Tyler) and 39 (other authors).

43. *See* Charles Lane, *Justices Back Detainee Access to U.S. Courts*, WASH. POST (June 29, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A13350-2004Jun28.html?noredirect=on> [https://perma.cc/K3GR-UC28]; David Stout, *Supreme Court Affirms Detainees’ Right to Use Courts*, N.Y. TIMES (June 28, 2004), <https://www.nytimes.com/2004/06/28/politics/supreme-court-affirms-detainees-right-to-use-courts.html> [https://perma.cc/T2D4-XGQM]; *see also* Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST (Oct. 12, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html> [https://perma.cc/XYK2-X6NZ].

44. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). *Wartime Habeas* actually begins by recounting the reactions of Senators John McCain and Lindsey Graham to the citizenship status of Dzokhar Tsarnaev, the suspect in the Boston Marathon bombing. WARTIME HABEAS, *supra* note 12, at 1.

In the years after *Hamdi* and leading up to *Boumediene*, Professor Halliday produced an exhaustively researched empirical account of English writ practice. His archival work demonstrated that the availability of the common law privilege had far more to do with the identity of (and jurisdiction over) the jailer than it did with the status of the prisoner, and that the privilege ran in favor of anyone detained under color of English law.⁴⁵ *Boumediene*, decided in 2008 and generally considered the most important war-on-terror case, relied heavily on Professor Halliday's work.⁴⁶ *Boumediene* held that the Constitution guaranteed habeas process to noncitizen detainees held at GTMO.⁴⁷

Hamdi, *Boumediene*, and Professor Halliday's work are the three primary reference points for *Wartime Habeas* and the Hybrid Model. Whereas Professor Halliday's work emphasized the function of the English habeas privilege that was developed through the *common law* practice of judges, Professor Tyler focuses on the English *statutory* privilege, arguing that the 1679 Habeas Corpus Act ("the 1679 Act") is, ultimately, of greater interpretive significance to American institutions.⁴⁸ Professor Tyler's emphasis on the 1679 Act especially elevates the interpretive significance of that Act's § 7, which required that detainees held on suspicion of felony be indicted within two court terms (about six months) or released. The Hybrid Model's thickness plank traces to the presence of § 7, a substantive anti-detention rule that causes Professor Tyler to reject the plurality opinion in *Hamdi*—that there can be indefinite national-security detention of American citizens during periods of non-suspension.

Using the 1679 Act as her north star and aligning herself with Justice Scalia's powerful *Hamdi* dissent, Professor Tyler argues that, during periods of non-suspension, executive authorities must either submit American citizens for criminal trial in due course or release them.⁴⁹ In terms of coverage, she clearly favors the result in *Boumediene*, but because she places so much emphasis on the 1679 Act—as opposed to the common law privilege—she is reluctant to

45. See HALLIDAY, *supra* note 14, at 173–74. See also *Rasul v. Bush*, 542 U.S. 466, 478–79 (2004), *citing* *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494–95 (1973) ("Rather, because 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, a district court acts within its respective jurisdiction within the meaning of § 2241 as long as the custodian can be reached by service of process.") (internal alterations and quotation marks omitted).

46. Professor Halliday had yet to publish his research in book form, so the Court relied on a law review article he wrote with University of Virginia law professor G. Edward White. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008) (cited in *Boumediene v. Bush*, 553 U.S. 723, 740, 747, 752 (2008)).

47. See *Boumediene*, 553 U.S. at 798.

48. See WARTIME HABEAS, *supra* note 12, at 99, 273 (discussing Habeas Corpus Act 1679, 31 Car. 2, c. 2 (Eng.)).

49. See *id.* at 251–53, 260–62, 278–79, 280–81; see also Tyler, *Core Meaning*, *supra* note 13, at 906 ("[Examining the history] reveals that the outcome in *Hamdi* stands entirely at odds with what the Founding generation believed it was prohibiting when it adopted the Suspension Clause. In short, though in the minority in *Hamdi*, Justices Scalia and Stevens have volumes of history on their side.")

conclude that it can be supported categorically by references to pre-constitutional writ history.⁵⁰ Although I disagree with some of Professor Tyler's conclusions, I share the broadly held view that the Book is an important academic achievement.⁵¹ *Wartime Habeas* is, with little question, the definitive history on the operation and influence of the 1679 Act, which is in turn the legal artifact most central to the Hybrid Model. Any judge or academic taking an interpretive position that turns on such history will have to grapple with Professor Tyler's work showing that the English statutory privilege was intimately bound to rules for trying treason and felony. It is several *implications* of that history that I resist herein.

Readers are now better situated to understand the differences between the Remedy and Hybrid Models. With respect to the thickness plank, a hybridized habeas privilege originates substantive anti-detention rules. The Remedy Model, by contrast, treats the privilege as "merely" a procedural remedy through which a court reviews custody, the lawfulness of which is determined by reference to *external sources of law*. With respect to the coverage plank, the Hybrid Model generally extends the privilege only to those owing "allegiance:" citizens everywhere and aliens present (or detained) on land over which the United States exercises sovereign control, whether formal or functional. Under the Remedy Model, the habeas privilege extends to anyone held in custody under color of American law, because the salient question involves personal jurisdiction over the jailer.

I conclude Part I with a few words regarding interpretive method, which bear on material presented in Parts II through V. Although I fall within the mainstream view that history provides important information about constitutional meaning,⁵² I am not an originalist. But because I believe history to play an important role, I want to make several positions explicit. First, I believe that common law history is *especially important* when it is *especially clear* that it describes a common law "backdrop" that the Framers intended to incorporate.⁵³ And although Professor Tyler and I disagree about *what the specific backdrop was*, I share Professor Tyler's belief that we should care—a

50. In support of *Boumediene*, she observed that: the reach of modern constitutional rules is not geographically bounded by US borders; that certain characteristics of GTMO suggest that it should be treated as part of US territory and that no question of extraterritorial writ coverage is presented; that pre-constitutional history remained insufficiently determinate to resolve the GTMO coverage question; that, in any event, originalist inquiry turning on pre-constitutional writ coverage was not the appropriate method for making constitutional coverage determinations; and that *Boumediene* might be justified by reference to due process principles. See WARTIME HABEAS, *supra* note 12, at 268–76.

51. See, e.g., James E. Pfander, *The Habeas Privilege and Enemy Combatants*, LAWFARE (Dec. 5, 2017), <https://www.lawfareblog.com/habeas-privilege-enemy-combatants> [<https://perma.cc/HG2A-E7BA>].

52. See, e.g., Fallon, *supra* note 18.

53. See generally Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012) (coining the term backdrops and discussing the concept generally).

lot.⁵⁴ Second, I frequently regard constitutional text as highly indeterminate—even by reference to original intent or understanding—and therefore believe that subsequent activity of different American institutions constructs constitutional meaning.⁵⁵ In my view, not only has the Supreme Court affirmed the Remedy Model, but the behavior of the political branches has also liquidated, in ways that should be treated as authoritative, virtually all of the indeterminacy around thickness and some of it around coverage.⁵⁶

II.

PRE-CONSTITUTIONAL HISTORY

The pre-constitutional history upon which Professor Tyler relies fits the Remedy Model as well as—and perhaps better than—it fits the Hybrid Model. The American Constitution contains substantive constraints on detention, such as the rights to jury trials (Article III),⁵⁷ indictments and due process (Amendment V),⁵⁸ and speedy criminal proceedings (Amendment VI).⁵⁹ Under the Hybrid Model—specifically, its thickness plank—the status of detention under Article III and Amendments V and VI is oddly redundant, because the privilege originates substantive rules performing largely the same functions. Under the Remedy Model, by contrast, the habeas privilege “merely” guarantees a judicial forum necessary for judicial review and discharge, but extrinsic law determines the legality of detention. Indeed, this feature of the Remedy Model is the simple organizing principle for the habeas corpus casebook that I co-write with Professor Brandon L. Garrett.⁶⁰ Although the Supreme Court sometimes refers colloquially to habeas process as a “right” of access to judges, it has constructed habeas law in conformance with the Remedy Model.⁶¹ I do not

54. At times, it does seem like Professor Tyler and I might subscribe to a slightly different relationship between history and interpretation insofar as she places unusual emphasis on the passage of the 1679 Act and activity thereunder, rather than on habeas practice more broadly. *Cf. generally* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977 (2006) (discussing interpretive approach built not around longitudinally durable norms of common law practice, but around high-profile legal events).

55. Many readers will recognize the reference to constitutional construction as tracing to the work of political scientist Keith Whittington. *See, e.g.*, Keith E. Whittington, *Constructing A New American Constitution*, 27 CONST. COMMENT. 119 (2010) (providing a general overview of Professor Whittington’s theories about constitutional interpretation and construction). One can accept an interpretation-construction distinction without necessarily being an originalist. *See id.* at 120 n.3.

56. *See infra* notes 174–175 and accompanying text (explaining that the material in Part III sketches the process by which American legal institutions have constructed the meaning of the privilege out of otherwise indeterminate constitutional text).

57. U.S. CONST. art. III, § 2, cl. 3.

58. *Id.* amend. V.

59. *Id.* amend. VI.

60. *See* Brandon L. Garrett & Lee Kovarsky, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* (2013).

61. The thickness plank of the Remedy Model suffuses *Boumediene* itself. *See* *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (“Indeed, common-law habeas corpus was, above all, an adaptable remedy.”). *Boumediene* recited a lengthy collection of important Supreme Court precedent supporting

understand Professor Tyler to disagree with this description of American judicial authority; she argues, rather, that the Supreme Court's view sells the privilege short.

In the steady state of non-suspension, Professor Tyler argues, English and pre-Constitutional American law operated under a Hybrid Model—and there is some evidence consistent with that account. Most centrally, § 7 of the 1679 Habeas Corpus Act, which otherwise created statutory tools to supplement common law habeas practice,⁶² contains an important substantive rule restraining detention on suspicion of treason and felony.⁶³ But the set of common law practices that the 1679 Act supplemented were more consistent with a Remedy Model.⁶⁴ Furthermore, what we know about American constitutional framing and ratification further indicates that We the People distinguished between, on the one hand, the procedural right to have judges review custody and, on the

its characterization of the privilege as a remedy. *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (cited at *Boumediene*, 553 U.S. at 780, for the proposition that the habeas privilege “is, at its core, an equitable remedy”); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (cited at *Boumediene*, 553 U.S. at 780, for the proposition that the habeas privilege is not “a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose”). Chief Justice Roberts’s *Boumediene* dissent similarly relies upon the historical understanding that habeas is a remedy. *See, e.g.*, *Boumediene*, 553 U.S. at 813 (Roberts, C.J., dissenting) (“But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right.”). This view of the privilege as a remedy is consistent with the Court’s treatment of the concept over most of American history. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (“Habeas is at its core a remedy for unlawful executive detention.”); *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008) (“A decision by this Court that a new rule does not apply retroactively . . . does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts.”); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (referring to privilege as “extraordinary remedy”); *Withrow v. Williams*, 507 U.S. 680, 707 (1993) (“If the principles of federalism, finality, and fairness ever counsel in favor of withholding relief on habeas, surely they do so where there is no constitutional harm to remedy.”); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (“In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy[.]”); *Fay v. Noia*, 372 U.S. 391, 401–02 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977), *and abrogated by Coleman v. Thompson*, 501 U.S. 722 (1991) (“Although in form the Great Writ is simply a mode of procedure, . . . its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”); *Smith v. Bennett*, 365 U.S. 708, 712 (1961) (“Ever since the Magna Charta, man’s greatest right—personal liberty—has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment.”); *Ex parte Tom Tong*, 108 U.S. 556, 560 (1883) (“This petitioner claims that the constitution and a treaty of the United States give him the right to his liberty, . . . and he has obtained judicial process to enforce that right.”); *Holmes v. Jennison*, 39 U.S. 540, 564 (1840) (“If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy.”).

62. The 1679 Act, for example, gave judges authority to issue habeas writs while courts were in vacation. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 185 (1980).

63. *See* Habeas Corpus Act 1679, 31 Car. 2, c. 2, § 7 (Eng.).

64. *See infra* Part A.

other, the substantive rights that they must apply when determining whether that custody is lawful.⁶⁵

Indeed, throughout her recitation of English and American habeas history, Professor Tyler squeezes a bit too much meaning out of abstract statements, made by legally influential figures, along the lines of: “habeas was necessary to guarantee [Right X],” or that “without habeas, [Right X] would be useless.”⁶⁶ Establishing the legal nexus between the privilege and a substantive anti-detention right, however, does not suggest that the privilege *originates* the right. Statements about the relationship between the privilege and substantive anti-detention rules are better interpreted as propositions that the procedural remedy (the privilege) is necessary to the enforcement of the underlying substantive rule, rather than as propositions that the privilege is the rule’s source. Right and remedy are braided, but ultimately capable of being disentangled.

I devote Part II to the pre-constitutional history bearing on the contrast between the Hybrid and Remedy models. The bulk of my discussion focuses on the thickness plank, but I conclude with a discussion of the historical material relating to coverage. In contrast to the Remedy Model’s thickness plank, which I believe the history to support quite strongly, pre-constitutional practice supports its coverage plank more equivocally. Nevertheless, it is more than fair to read pivotal pre-constitutional case law to support an extraterritorial privilege for noncitizens detained under color of state law—even those not bound by allegiance to the United States, and even those detained on territory over which the United States lacks sovereign control.

A. *The English Experience*

Professor Tyler’s argument in favor of the Hybrid Model centers on the presence of § 7 in the 1679 Act, ultimately treating its role in pre-constitutional writ practice—as opposed to that of the common law privilege—as of superior interpretive significance for American legal institutions. The nature of the relationship between statutory and common law habeas process is therefore a critical datum for evaluating the Hybrid and Remedy Models. Although pre-statutory, common law habeas process permitted King’s Bench to exercise some discretion in discharging prisoners accused of treason and felonies,⁶⁷ section 7

65. See *infra* Part II.B. Also, *Boumediene* noted that, in Federalist No. 84, Alexander Hamilton described the 1679 Habeas Corpus Act as “a remedy for [arbitrary confinement].” 553 U.S. at 744 (THE FEDERALIST NO. 84, at 575 (Alexander Hamilton)). In other work, Professor Tyler has invoked as support for her position that, in Federalist 83, Hamilton stated that “trial by jury in criminal cases, aided by the habeas corpus act . . . [is] provided for, in the most ample manner . . .” See Tyler, *Counterfactual*, *supra* note 13, at 8 n.30 (citing THE FEDERALIST NO. 83 (Alexander Hamilton)). Indeed, that quote would support Professor Tyler’s interpretation were the Sixth Amendment the only source of a jury trial right; but Hamilton’s reference was almost certainly to the jury-trial right in Article III, in which case the quotation is perfectly consistent with the Remedy Model.

66. See, e.g., WARTIME HABEAS, *supra* note 12, at 42 (Robert Cotton); *id.* at 52–53 (William Blackstone); *id.* at 131 (Alexander Hamilton).

67. See HALLIDAY, *supra* note 14, at 49, 59, 74, 103, 110–11, 117–18, 148–49, 155.

of the 1679 Act more specifically provided that, if a prisoner were committed to custody on suspicion of “High Treason or Felony,” he had to be indicted within two court terms (three to six months) or discharged.⁶⁸ Professor Tyler argues that, in an act of legal fusion, section 7 “both connected the writ of habeas corpus with the criminal process and placed specific limits on how and when the executive could lawfully detain the most serious of criminals—even alleged traitors.”⁶⁹ Professor Tyler believes that, in translating the meaning of section 7 for modern legal questions, the provision should not be treated as an external anti-detention rule for which the privilege may serve as a remedy, but should instead be considered an intrinsic part of the privilege itself.⁷⁰ In light of how the 1679 Act and the common law privilege continued to divide labor after Parliament weighed in, however, I find that position more difficult to accept.⁷¹

1. *The English Privilege*

Professor Halliday’s work solidified the academic foundation necessary to analyze common law habeas process, which seventeenth century English judges used to wrest power from monarchs who were a touch too fond of jail as a political strategy.⁷² In fact, common law habeas process predates the 1679 Act by several centuries. There were many different types of habeas writs used to move prisoners through legal process,⁷³ but the writ of *habeas corpus ad subjiciendum* eventually evolved into what we call the “Great Writ,” which allows a court to review the legality of custody.⁷⁴ In its early iterations, *habeas corpus ad subjiciendum* was only a means by which judges made sure that jailers were properly acting under color of the Crown’s authority.⁷⁵ Before the middle of the seventeenth century, then, the *ad subjiciendum* writ was still little more than a form of royal brand management.⁷⁶ A document showing that the King had in fact ordered the detention was almost always sufficient to terminate the proceeding.⁷⁷

68. Habeas Corpus Act 1679, 31 Car. 2, c. 2, § 7 (Eng.).

69. WARTIME HABEAS, *supra* note 12, at 29.

70. See Tyler, *Core Meaning*, *supra* note 13, at 907.

71. The 1679 Act operated alongside and in addition to the existing habeas process. The type of common law process that “survived” the 1679 Act, then, is not a question about the degree to which the statute should be interpreted to achieve the objectives of its drafters, or preexisting common law goals.

72. See generally HALLIDAY, *supra* note 14 (basing history off of review of writs issuing from King’s Bench every fourth year between 1500 and 1800).

73. See R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 1–2 (1976).

74. See GARRETT & KOVARSKY, *supra* note 60, at 13–14.

75. See *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (“Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power.”).

76. See Kovarsky, *supra* note 39, at 761.

77. See *id.* at 764 (explaining that royal say-so was sufficient “in early cases of Crown-ordered detention”); see also Halliday & White, *supra* note 46, at 620 (discussing decisive moment at which this rule changed in early modern England).

The seventeenth century Justices of King's Bench, however, turned the common law writ against the Crown, subverting the royal prerogative and establishing that custody was not lawful simply because the King said so.⁷⁸ Professor Halliday explained that, at the center of common law habeas practice “stood the idea that the court might inspect imprisonment orders made at any time, anywhere, by any authority.”⁷⁹ Common law habeas process facilitated review of, among other things, detention on suspicion of felony.⁸⁰ Although frequently referenced as though it were the font of the privilege, the 1679 Act supplemented—albeit meaningfully—the habeas power already being exercised under the common law.⁸¹ In fact, by 1679, the common law privilege had moved *far* beyond treason and felony—the two forms of custody mentioned in the Act.⁸² Even after 1679, most habeas writs issued under authority of the common law, not the statute.⁸³

Although the statute was supposed to “cut only one way,” some English authority did read statutory specification to have a second edge—interpreting the 1679 Act to exhaust the meaning of the privilege. Even *those* authorities, however, did not seem to suggest that the privilege was something other than a remedy. Moreover, the notion that the 1679 Act defined the entirety of the privilege lost the contest for the English legal imagination. The double-edged reading of the Act prompted Giles Jacob, in his 1729 law dictionary, to write: “The Writ of *Habeas Corpus* was originally ordained by the Common Law . . . , as a remedy for such as were unjustly imprisoned . . . ; and it is a mistaken notion that this Writ is of a modern date, and introduced with the reign of King Charles 2.”⁸⁴ In 1758, when judges denied discharges to conscripted soldiers, members of Parliament introduced a bill to make explicit that the privilege was not just a remedy for felony and treason.⁸⁵ The bill's supporters introduced it not because they actually believed that the privilege specified in the 1679 Act disabled common law process, but because they thought the 1679 Act was being misinterpreted. Parliament eventually rejected the bill because it worried that the statutory enumeration of custody categories would exacerbate the erroneous sense that the scope of the privilege was statutorily specified.⁸⁶ No less a figure than Lord Mansfield aggressively derided the theory that the 1679 Act carried some negative implication, and Lord Chancellor Hardwicke agreed with

78. See Kovarsky, *supra* note 39, at 765–68.

79. HALLIDAY, *supra* note 14, at 160.

80. See *id.* at 74, 103, 117–18, 148–49, 155.

81. The 1679 Act mostly augmented and codified features of the common law writ, providing for things like vacation process and penalties against jailers who refused to discharge prisoners. See Neuman, *supra* note 39, at 568.

82. See HALLIDAY, *supra* note 14, at 245.

83. See Kovarsky, *supra* note 39, at 768 n.75 (collecting authority).

84. See HALLIDAY, *supra* note 14, at 246 (citing GILES JACOB, A NEW LAW-DICTIONARY 348 (1729)).

85. See *id.* at 245.

86. See *id.*

Mansfield: “all the advantages proposed by [the 1758 bill] were already secured by the common law.”⁸⁷

The view that the 1679 Act was at best a complement to common law habeas process prevailed just as war broke out in the American colonies.⁸⁸ The breadth of common law habeas process cuts against the idea that section 7 of the 1679 Act is the “core” of the privilege, and even more strongly against the idea that the core privilege originates a substantive constraint on detention. Given the role of the common law, contemporaries of the 1679 Act would not have thought that the presence of section 7 made the privilege into something other than a powerful remedy.⁸⁹ King’s Bench had used common law habeas process to police felony detention both before the 1679 Act and after it. Section 7 simply set forth more stringent rules for processing habeas petitions challenging two forms of custody (felony and treason) that were already the subject of challenges under the common law privilege.⁹⁰ Although Professor Tyler successfully makes the question closer, no seventeenth or early-eighteenth century English authority seems to have explicitly argued that section 7 made the privilege itself into a font of substantive anti-detention rules. If the jailer broke a substantive rule—including a substantive rule specified in section 7—then habeas procedure would secure the prisoner’s liberty.

2. *English Suspension*

When habeas process, as bolstered by the 1679 Act, frustrated the Crown’s ability to effectively manage emergencies, Parliament would “suspend” the privilege rather than repeal the Act.⁹¹ The suspension statutes became necessary when the Crown needed to put down invasion, rebellion, insurrection, and other forms of resistance that Parliament feared. The most famous suspensions were Parliamentary responses to the Jacobite uprisings against William and Mary and

87. See *id.* at 245–46 (citing to Mansfield’s position and quoting Hardwicke’s).

88. This understanding accorded with a more general view that the common law was far more authoritative than statute law; in the words of Professor Farah Peterson, early judges and lawyers thought what early legislatures did was “not law.” Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 721 (2018).

89. Ambiguous rhetoric notwithstanding, some of the most influential authorities to which Professor Tyler sourced her argument appear to, as an analytic matter, observe the Remedy Model—even if they champion the role of the statute over the common law. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *135 (explaining that preservation of the habeas privilege is a question of “personal liberty” that is necessary to avoid the “end of all other rights and immunities”).

90. See Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2523 n.108 (1998).

91. See HALLIDAY, *supra* note 14, at 247–56 (discussing English suspension statutes and practice); WARTIME HABEAS, *supra* note 12, at 35–61 (same). See generally Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 ENG. HIST. REV. 613 (1915) (examining the 1689 habeas suspension statutes); Halliday & White, *supra* note 46, at 644–48 (discussing the 1777 English Suspension Act); Kovarsky, *supra* note 39, at 770–73 (discussing English Suspension statutes before the American Revolution); Tyler, *Core Meaning*, *supra* note 13, at 934–54 (presenting material related to parliamentary suspension from 1689 to 1783).

to the rebellion in the American colonies.⁹² Professor Tyler argues that these episodes “illuminat[e] the Act’s core protections through its relationship with suspension, [showing] that the writ of habeas corpus promised by the Act encompassed far more than merely access to judicial process.”⁹³ Suspensions indeed disclose quite a bit about wartime power and judicial process under English law, and those disclosures indeed underscored the link between the privilege and substantive anti-detention rules, but none of this history excludes the Remedy Model.

For example, the typical structure of the suspension statutes was not inconsistent with the Remedy Model. Every English suspension statute detailed in *Wartime Habeas* includes at least two broad sets of provisions: (1) provisions that disabled judicial review of detention, including such review available under common law; and (2) provisions that declared certain detention lawful.⁹⁴ If Parliament believed that the “privilege” included the subject matter of section 7, then why include the second type of provision? It does not follow, merely because Parliament authorized detention that would otherwise violate section 7, that the privilege was more than what it had always been: a right to judicial review of detention and, if necessary, to a discharge from custody.

Throughout the *Wartime Habeas* chapter on the Jacobite suspensions, Professor Tyler uses the rhetorical strategy mentioned above: showing the “coreness” of substantive constraints on detention by emphasizing the intimate relationship between those constraints and the privilege that secured them.⁹⁵ But a judicial remedy can be crucial to the enforcement of an anti-detention rule without actually being its originating source. For example, she explains that Blackstone “reinforced that the power of the executive to arrest persons

92. Parliament suspended the privilege three times immediately after William and Mary seized the throne. See 1 W. & M., c. 19 (1688) (Eng.); 1 W. & M., c. 7 (1688) (Eng.); 1 W. & M., c. 2 (1688) (Eng.). It suspended it nine more times as part of the Hanovarian line’s effort to put down Jacobite support of the Stuart line (specifically, James II). See 17 Geo. 3, c. 9 (1777) (Eng.); 19 Geo. 2, c. 1 (1745) (Eng.); 17 Geo. 2, c. 6 (1744) (Eng.); 9 Geo. 1, c. 1 (1722) (Eng.); 1 Geo. 1, c. 8 (1714) (Eng.); 7 & 8 Will. 3, c. 11 (1696) (Eng.); 1 W. & M., c. 19 (1688) (Eng.); 1 W. & M., cc. 2, 7 (1688) (Eng.). It suspended it six times during the American Revolution. See 22 Geo. 3, c. 1 (1782) (Eng.) (renewal); 21 Geo. 3, c. 2 (1781) (Eng.) (renewal); 20 Geo. 3, c. 5 (1780) (Eng.) (renewal); 19 Geo. 3, c. 1 (1779) (Eng.) (renewal); 18 Geo. 3, c. 1 (1778) (Eng.) (renewal); 17 Geo. 3, c. 9 (1777) (Eng.).

93. WARTIME HABEAS, *supra* note 12, at 54.

94. See *id.* at 39 (discussing the first English suspension statute, which can be found at 166, 1 W. & M., c.2 (Eng.), 47 (discussing English suspension statutes from 1708, 1715, 1722, 1744, and 1745, the citations of which may be found in *supra* note 92).

95. See, e.g., *id.* at 36 (“Correspondingly, studying this period highlights that in the absence of suspension, the Act’s seventh section was understood to demand that suspects . . . be timely tried on criminal charges or else released.”); *id.* at 54 (“By illuminating the Act’s core protections through its relationship with suspension, this period shows that the writ of habeas corpus promised by the Act encompassed far more than merely access to judicial process. Indeed, not only did the evolving understanding of the Act place specific limitations on what would be deemed legitimate ‘cause’ for detention and therefore dramatically constrain the executive’s authority, it embodied and made real a host of specific procedural rights later enshrined in the American Bill of Rights, including the right to bail and speedy trial.”).

suspected of treasonous activities outside the criminal process followed exclusively from the invocation of the suspension authority and the displacement of the protections inherent in the Habeas Corpus Act.”⁹⁶ What Blackstone said is consistent with a hybridized privilege, but it also works under a Remedy Model.

Professor Tyler’s discussion of English suspension during the Revolutionary war exhibits the same tendency to equate (1) the proposition that suspension was *sufficient* to lawfully detain those suspected of treason with (2) the proposition that suspension was *necessary* to lawfully detain such prisoners. (The difference between the two logical relationships is important; sufficiency suggests that, by disabling the privilege, Parliament disabled the substantive rule.) For example, Professor Tyler discusses Lord North’s suspension practices in the American colonies—practices that ultimately had enormous influence on the construction of the American Constitution.⁹⁷ The “entire purpose” of the 1777 legislation authorizing Lord North’s suspension was indeed to “permit the detention of prisoners during the war outside the normal criminal process.”⁹⁸ As with predecessor suspension statutes, however, the authorizing legislation did not just include provisions suspending the judicial powers to review custody and, if necessary, to order discharge; it also contained distinct provisions authorizing detention of putative traitors that section 7 of the 1679 Act would have forbidden.⁹⁹ These provisions show that Parliament felt that statutory language stating no more than that the privilege was suspended did not amount to a declaration that the underlying detention was legal.

In short, the history shows that the suspension statutes both empowered the executive to arrest and detain under circumstances that would otherwise violate section 7, and also that they paused the judicial power to review that detention. That the statutes performed both functions, however, does not mean that those functions should be treated as conceptually indistinct when transplanted to an American legal framework that involves written constitutional restrictions on the legislature.

B. *The American Experience*

Under some theories of constitutional interpretation, how the English privilege *actually* worked might be less significant than how the Framers and ratifiers *thought* it worked. Although she does not subscribe to originalism, Professor Tyler builds her case in part around the idea that the statutory privilege

96. *Id.* at 53 (citing 1 BLACKSTONE, *supra* note 89, at *135–36).

97. *See generally* Tyler, *American Revolution*, *supra* note 13, 669–88 (discussing the role of Lord North in forging the American experience with suspension).

98. *See* WARTIME HABEAS, *supra* note 12, at 83.

99. *See* 22 Geo. 3, c. 1 (1782) (Eng.) (renewal); 21 Geo. 3, c. 2 (1781) (Eng.) (renewal); 20 Geo. 3, c. 5 (1780) (Eng.) (renewal); 19 Geo. 3, c. 1 (1779) (Eng.) (renewal); 18 Geo. 3, c. 1 (1778) (Eng.) (renewal); 17 Geo. 3, c. 9 (1777) (Eng.).

was first and foremost on the minds of the founding generation—*viz.*, that (1) debate and ratification usually referred to the privilege as though it were an artifact of the 1679 Act, rather than of the common law; and (2) the emphasis on the Act necessarily meant that the Framers proposed and States ratified a hybridized privilege. Professor Tyler proves the first proposition, but I have doubts about the second. After all, the Framers took the basic guarantees in section 7 of the 1679 Act and turned them into features of distinct constitutional provisions. They appear in the language of Article III, as well as in that of the Fifth and Sixth Amendments: impartial juries, due process, indictments, and speedy trials.¹⁰⁰

When early lawmakers or revolutionary figures talked about the privilege, they indeed did so, more often than not, using references to the 1679 Act.¹⁰¹ And for good reason. When under English rule, many of the American colonies tried to incorporate the 1679 Act, whether by express legislation or informal practice.¹⁰² After the Declaration of Independence, many of the independent States adopted the privilege, with the 1679 Act in mind.¹⁰³ The focus on the Act persisted throughout debates over the placement, wording, and ratification of the Suspension Clause.¹⁰⁴ Professor Tyler summarizes her premise: “[T]he English Habeas Corpus Act remained a central and profoundly influential part of the development of American habeas law during the founding period, and proved to be the reference point for the protections enshrined in the Suspension Clause.”¹⁰⁵ She concludes, therefore, that “[The American privilege] encompasses more than simply a promise of access to judicial review of one’s detention, and instead imposes significant constraints on the power of the executive to detain persons within protection.”¹⁰⁶ Once again, I agree with the premise, but not the conclusion.

100. See Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 628 (1990) (right to a speedy trial); Matthew J. Hegreiness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 954 (2013) (right to be informed about the nature and cause of an accusation); see also *Petition of Provoo*, 17 F.R.D. 183, 197 (D. Md.), *aff’d sub nom. U.S. v. Provoo*, 350 U.S. 857 (1955) (*per curiam*) (explaining that virtually every ratifying convention understood the speedy trial right ultimately included in the Sixth Amendment to derive from the 1679 Act).

101. See, e.g., THE FEDERALIST NO. 83, *supra* note 65 (“The trial by jury in criminal cases, aided by the habeas-corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.”); 2 THOMAS JEFFERSON, MEMOIRS: CORRESPONDENCE AND PRIVATE PAPERS 346–47 (Thomas Jefferson Randolph, ed., 1829) (“Why suspend the habeas corpus in insurrections and rebellions? . . . Examine the history of England. See how few of the cases of the suspension of the habeas corpus law, have been worthy of that suspension. . . . Yet for the few cases, wherein the suspension of the habeas corpus has done real good, that operation is now become habitual, and the minds of the nation almost prepared to live under its constant suspension.”).

102. See WARTIME HABEAS, *supra* note 12, at 102–08.

103. See *id.* at 116–21.

104. See *id.* at 124–40.

105. *Id.* at 139.

106. *Id.*

First, the importance of section 7 to the Framers ultimately cannibalizes a theory of hybridized privilege. Section 7 *was* important to the Framers—so much so, in fact, that they ratified most of its central tenets in other constitutional text. Recall that the basic function of section 7 was to require formal indictment of, and speedy trial for, those detained on suspicion of “Treason or Felony.” Along with the Due Process Clause, the formal requirement that those suspected of treason and felony (“infamous crimes”) be indicted appears in the Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”¹⁰⁷ The formal requirement that the state get on with the criminal process quickly appears in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹⁰⁸ It is unthinkable that the Framers passed these provisions believing that they described functions that were already being performed by the privilege. Plenty of legal naturalists thought the textual specification of rights in the Bill of Rights was unnecessary because the rights preexisted constitutional text purporting to create them,¹⁰⁹ but nobody seemed to believe that they were unnecessary because the habeas privilege was already doing the work.

Second, questions about what type of privilege the Suspension Clause “creates” are incorrectly formulated, because the Suspension Clause does not create the privilege. It is unambiguously written as a limit on a legislative suspension power—a suspension power that the Framers presumably thought necessary and proper to some other authority enumerated in Article I, section 8.¹¹⁰ The Framers not only refused to include text defining the privilege, they refused to include language creating it. The reason for that omission could have been the same reason they omitted language expressly creating so many entitlements that they believed to be natural rights—they believed such rights passed into American constitutional law as defined by the accumulated practice under English common law and statutes.¹¹¹ Professor Tyler correctly observes that the 1679 Act and subsequent suspension statutes were central to the understanding of the Suspension Clause, because those statutes modeled legislative suspension and defined some of the judicial power suspended.¹¹² But

107. U.S. CONST. amend. V.

108. *Id.* amend. VI; *see also supra* note 100 (collecting sources demonstrating nexus between the British Habeas Act and the Sixth Amendment).

109. *See* Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 147–56 (1998).

110. *See* Kovarsky, *supra* note 39, at 790 n.212 (speculating on the set of enumerated powers to which the suspension power might be necessary and proper).

111. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1197 n.89 (1996).

112. These suspension statutes in the Independent States did precisely the same thing that the English suspension statutes did. They included two distinct types of provisions: (1) language necessary to suspend the habeas privilege (involving the availability of bail and judicial review); and (2) language necessary to authorize the underlying custody. *See* WARTIME HABEAS, *supra* note 12, at 114.

one can assume the centrality of those statutes to the definition of *suspension* without believing that they are equally helpful in defining the content of the *privilege*. Indeed, there is a really good reason to believe that the framers wrote the Suspension Clause to fix only *suspension* parameters: because each of the thirteen American colonies actively used a *common law* habeas privilege.¹¹³

Third, the fact that pivotal figures discussed the privilege by references to the 1679 Act reflects convenience more than it does a shared sense of what the 1679 Act did. Many leaders—and therefore many different constituencies—understood different aspects of privilege and suspension differently. Founders and state ratifying conventions appeared to share no clear consensus about: whether the privilege was a natural right that preexisted the Constitution and could be protected merely by restricting suspension, or whether it required an affirmative grant of judicial power in the instrument;¹¹⁴ whether the privilege was a right to judicial review of custody in national courts or those of the states;¹¹⁵ whether the wording of the Suspension Clause permitted geographically restricted suspensions;¹¹⁶ and how the Suspension Clause would work in a constellation of constitutional law that did not initially include a Bill of Rights.¹¹⁷ If what matters to interpreters is some meeting of minds involving a string of constitutional text, then there was certainly no shared understanding that references to the 1679 Act were endorsements of the Hybrid Model. The references to the Act were general expressions of support for the privilege, not considered judgments that the Act forged a substantive anti-detention right out of what the common law had always treated as a remedy.

Furthermore, that an important connection between right and remedy exists does not establish that the American privilege originates substantive constraints on detention.¹¹⁸ Professor Tyler’s abstract claim is true; the Framers did “[le]ave] a trail of evidence suggesting that they recognized an important connection among habeas corpus, suspension, and criminal prosecution.”¹¹⁹ But virtually all of the quotations offered in support of the proposition that the Framers and contemporary authorities understood the privilege to encompass the substantive

113. See DUKER, *supra* note 62, at 115.

114. See WARTIME HABEAS, *supra* note 12, at 137; Kovarsky, *supra* note 39, at 780–81.

115. Compare, e.g., DUKER, *supra* note 62, (arguing that the Framers might have understood the privilege to involve a state judicial forum) with Kovarsky, *supra* note 39 at 789–92 (disagreeing with the Duker hypothesis).

116. See WARTIME HABEAS, *supra* note 12, at 139.

117. See *id.* at 132–33.

118. The particulars of this trail do not do much more than suggest an atmospheric relationship between the privilege and textual strings creating particular substantive constraints on detention. The placement of the Suspension Clause in Article III, next to the jury-trial right, suggests an important relationship between right and remedy, but not a hybridized privilege. *But see id.* at 129 (suggesting that the placement supports that Hybrid Model). The ultimate proximity of the Suspension Clause next to the prohibition on bills of attainder likewise speaks to how suspension and attainder were both viewed as threats to process in due course, but that status does not suggest that the privilege was itself anything other than a remedy. *But see id.* (same).

119. *Id.* at 128.

rights in section 7 are better understood as more banal statements in support of a Remedy Model.¹²⁰ With one exception, the various references to the habeas privilege as a “bulwark” of liberty,¹²¹ a “partial bill of rights,”¹²² or a “limitation[] intended to be imposed on the powers of the general government”¹²³ are all consistent with a view of the privilege as “only” the procedural right to judicial review and, if necessary, discharge.¹²⁴

C. The Coverage Rule

With respect to coverage, and although she does not ultimately regard history as dispositive of the modern constitutional issue,¹²⁵ Professor Tyler questions whether pre-constitutional history can be squared easily with a privilege that runs in favor of noncitizens abroad—including enemy combatant designees.¹²⁶ Whereas I believe that the pertinent pre-constitutional history supports coverage for anyone detained by a jailer who is subject to the

120. These appear in WARTIME HABEAS at 130–36.

121. See *id.* at 132. Specifically, Alexander Hamilton quotes Blackstone referring to the 1679 Act as “the BULWARK of the British Constitution.” The full quotation, however, suggests that Hamilton seemed to have a Remedy Model in mind. The full quote from Hamilton reads: “[A]s a remedy for [the most formidable instruments of tyranny, Blackstone] is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one case he calls the bulwark of the British Constitution.” THE FEDERALIST NO. 84, *supra* note 65 (emphasis added). Although Hamilton clearly believed that the Constitution as a whole enshrined much of the 1679 Habeas Corpus Act, the material does not seem to support the more specific claim that the privilege mentioned in the Suspension Clause originates the substantive constraints on custody in section 7.

122. WARTIME HABEAS, *supra* note 12, at 132. Mentioned in support of Pennsylvania ratification, this phrase can mean either a hybridized privilege or, more simply, a “right” to the exercise of judicial power to review detention and, if necessary, discharge.

123. *Id.* at 132. Article I, section 9, contains a laundry list of provisions prohibiting certain legislative powers that might have otherwise been necessary and proper to legislative authority enumerated in Article I, section 8. Here, Professor Tyler quotes Chief Justice John Marshall remarking that the entirety of section 9 is “in the nature of a bill of rights, [insofar as it enumerates] the limitations intended to be imposed on the powers of the general government.” *Id.* All Marshall was saying was that the restrictions in section 9—including the restriction on Congress’s authority to suspend the privilege—restrain lawmaking power. He was not taking a position on the content of the privilege, either directly or incidentally.

124. The one exception is from James Iredell, cited in WARTIME HABEAS at 133, and who does appear to believe that the privilege originates the substantive restrictions on custody: “As to criminal cases, I must observe that the great instrument of arbitrary power is criminal prosecutions. By the privileges of the *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged.” *Id.* at 133 (quoting James Iredell, *Remarks at the North Carolina Ratifying Convention* (July 29, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 171 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1891)).

125. See *supra* note 50 (explaining the grounds for Professor Tyler’s support for the result in *Boumediene*).

126. Because noncitizens present within the territorial borders of the United States owe local allegiance to it, they enjoy its protection and, in Professor Tyler’s view, the benefit of the habeas privilege. See WARTIME HABEAS, *supra* note 12, at 270–71.

sovereign's personal jurisdiction,¹²⁷ Professor Tyler believes that the pre-constitutional history captures a rule that limits coverage to prisoners with allegiance to the detaining sovereign.¹²⁸ The coverage principles that Professor Tyler and I endorse differ nontrivially, but each also differs from a maximally strict originalist coverage rule—or more precisely, the prominent originalist coverage rule endorsed by Justice Scalia in his *Boumediene* dissent.

The originalist argument tracks, roughly, the following syllogism: (1) English prisoners of war (POWs) were alien enemy combatants who were not discharged through habeas process; and (2) modern noncitizen combatants detained abroad are similar to POWs insofar as they have no local allegiance to the detaining sovereign;¹²⁹ so (3) their entitlement to the privilege is in doubt.¹³⁰ Professor Tyler would largely agree with the major premise,¹³¹ but not the minor premise or the conclusion. By contrast, I disagree with all three propositions that make of the originalist syllogism. Questions about authority to detain modern enemy combatant designees do naturally invite comparisons to the treatment of POWs. The implications of English POW detention, however, are not nearly as clear as the pithy syllogism suggests.

127. See *Boumediene v. Bush*, 553 U.S. 723, 745–46 (2008), *citing* *In re Jackson*, 15 Mich. 417, 439–40 (1867) (Cooley, J., concurring) (“The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer.”) (alterations in original); *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494–95 (1973) (“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.”); *Habeas Corpus Procedure in Developments — Federal Habeas Corpus*, 83 HARV. L. REV. 1154, 1166 (1970) (“Historically the courts provided habeas relief by obtaining personal jurisdiction over the jailer and ordering him to bring the prisoner before the court.”); Halliday & White, *supra* note 46, at 713 (“[Extending the privilege widely] is not only because some American courts granted habeas writs to resident aliens in the early nineteenth century, but because, more fundamentally, the central concern of Anglo-American habeas cases had been with the status of the incarcerating official, not that of the prisoner. As a writ originating in the prerogative, habeas corpus was concerned with jailers more than with prisoners. Therein lay its utility for the widest array of prisoners.”); Kovarsky *supra* note 39, at 757 (“A durable function of common-law habeas process was to allow judges to determine the extent to which a custodian over which a court had personal jurisdiction could show lawfulness by proxy of prior process.”) (emphasis in original); *Cf. also* Diller, *supra* note 39, at 607 (explaining that habeas is better conceptualized as a private-law action against a jailer).

128. See WARTIME HABEAS, *supra* note 12; see also Tyler, *Core Meaning*, *supra* note 13.

129. See, e.g., Brief for the Respondents at 37–40, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195) (making the representative analogy between POWs as enemy combatants); Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 178–88, 250–53 (2013) (discussing history of English POW cases to express skepticism about modern coverage rules) hereinafter Kent, *Judicial Review for Enemy Fighters*].

130. The analogy between POW status and enemy combatants is often one used to argue against a privilege that runs in favor of noncitizens abroad. See, e.g., *Boumediene*, 553 U.S. at 841 (Scalia, J., dissenting).

131. See, e.g., Tyler, *American Revolution*, *supra* note 13, at 644–45 (“Suspension was not viewed . . . as a necessary predicate to hold persons classified as [POWs]. This is because, as Hale instructs, such persons were understood to fall outside the application of the Habeas Corpus Act.”).

1. *The major premise*

Although Professor Tyler resists other parts of the originalist syllogism, she appears more comfortable with the major premise—that POWs could not avail themselves of habeas process.¹³² I consider the history to be considerably more ambiguous. English judges *did use* common law habeas process, which worked hand-in-glove with supplemental provisions in the statute, to scrutinize POW status determinations.¹³³ In other words, judges may not have used habeas process to discharge a prisoner properly designated as a POW, but they did use habeas process to review whether the detainee was properly labeled. Although some passages in famous English authority can be read to exclude POWs from the privilege because they lacked allegiance to the Crown,¹³⁴ those passages can bear other interpretations, and they are inconsistent with habeas cases where courts *in fact* reviewed POW status determinations.¹³⁵

In one of the two most high-profile English cases bearing on whether the privilege covered POWs,¹³⁶ *Three Spanish Sailors*,¹³⁷ many scholars misread the failure to discharge POWs as evidence that they were unprivileged.¹³⁸ But the habeas privilege *was* at work; the court simply used *nisi* process.¹³⁹ In other words, instead of actually sending the writ to the jailer and forcing the prisoner to be produced in court, the court dispensed with the formality and issued an order for the jailer to show cause as to why the habeas writ should not issue.¹⁴⁰ Habeas process was still facilitating review of the custody, and discharge was still in the offing when that review was taking place; the only difference was that

132. See WARTIME HABEAS, *supra* note 12, at 271 (stating that prisoners properly labeled as POWs never received discharge).

133. See HALLIDAY, *supra* note 14, at 168–74; see also *id.* at 171 (“[U]pon receiving a return stating that a prisoner was a POW, the court explored the evidence supporting the captive’s assignment to that category. The court never released a person it concluded had been properly designated as a POW. But the justices did release those who were discovered to be something else.”).

134. The Case of Three Spanish Sailors, (1779) 2 Black. W. 1324, 1325, 96 Eng. Rep. 775, 776 (K.B.), has language supporting this position, albeit language at odds with what the court actually did in the case: “upon their own shewing, [the prisoners] are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus.” 96 Eng. Rep. at 776 (citing R v. Schiever, (1759) 2 Burr. 764, 766, 97 Eng. Rep. 551, 551–52 (K.B.)). See also, Kent, *supra* note 129, at 181–83 (collecting authority).

135. Brief of Legal Historians as Amici Curiae in Support of Petitioners at 5–7, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195) [hereinafter *Boumediene* Historian’s Brief]; Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 20–22, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) [hereinafter *Rasul* Historian’s Brief]; See HALLIDAY, *supra* note 14, at 32.

136. See, e.g., Hamburger, *supra* note 39, at 1891 n.222 (referring to the two cases discussed in this paragraph as “the leading eighteenth-century” authorities on the question); Kent, *supra* note 129, at 180–81 (relying on Hamburger, *supra*, for this argument).

137. *Three Spanish Sailors* (1779) 96 Eng. Rep. at 776 (K.B.).

138. See *infra* note 145.

139. Courts exercising habeas power often used *nisi* process (process preceding issuance of the writ itself) to decide questions in ways that did not require custodians to produce prisoners. See HALLIDAY, *supra* note 14, at 112–13. A court using *nisi* process was still, in every meaningful sense, exercising habeas power to make the status determination. See *id.* at 173.

140. See *id.* at 172–73 (discussing use of *nisi* process in POW cases).

the detainees were not standing in court.¹⁴¹ In the other influential English decision, *Schiever's Case*,¹⁴² many scholars have interpreted the court's decision not to review POW status as a jurisdictional bar, but the court failed to scrutinize the status question because the prisoner *simply pled POW status on the face of his petition*.¹⁴³ *Schiever's Case* was therefore closer to a judgment on the merits of the pleading than the application of a jurisdictional rule.¹⁴⁴ *Three Spanish Sailors* and *Schiever's case*, then, are miscast as meaningful historical data points in favor of more restrictive coverage.¹⁴⁵

A more abstract historical argument not necessarily rooted in *Three Spanish Sailors* and *Schiever's case* is that the privilege extended only to those bound by allegiance to the Crown, and that POWs lacked such allegiance.¹⁴⁶ The concept of allegiance, however, also fails to neatly resolve historical questions about POW access to habeas process. Professor Tyler notes that a duty of royal protection flowed to everyone with allegiance to the Crown, and that those within protection were entitled to the privilege.¹⁴⁷ That proposition is true, but potentially under-inclusive; many believed that a protective duty *also* flowed to POWs, by reason of the prisoners' temporary submission.¹⁴⁸

Professor Halliday showed that complex coverage of the English privilege is better explained by reference to subjecthood than to allegiance—and English subjecthood was a *notoriously* fluid concept.¹⁴⁹ Indeed, the privilege *did* allow POW designees to challenge their status determinations,¹⁵⁰ no matter what the allegiance the POW designee was alleged to have been. Such was the elasticity of “subjecthood;” kings and queens might not have owed a duty of protection to

141. See *Boumediene* Historian's Brief, *supra* note 135, at 25–26; *Rasul* Historian's Brief, *supra* note 135, at 20–21.

142. *R v. Schiever*, (1759) 2 Burr. 764, 766, 97 Eng. Rep. 551, 551–52 (K.B.).

143. See HALLIDAY, *supra* note 14, at 172.

144. See *Boumediene* Historian's Brief, *supra* note 135, at 6; *Rasul* Historian's Brief, *supra* note 135, at 20.

145. Academics misinterpret them because those cases decided the status question without actually sending the writ to the jailor. See, e.g., Hamburger, *supra* note 39, at 1890–91 (characterizing *Schiever* and *Three Spanish Sailors* this way); *id.* at 1890 (“But if they suggest anything, they at least offer a glimpse of how courts used pre-habeas proceedings to try to avoid giving habeas to persons outside allegiance.”).

146. A number of academics, including Professor Tyler, have argued that the privilege tracks allegiance, which means that the privilege follows citizens abroad and, through the construct of “local allegiance,” is available to aliens within the territorial boundaries of the sovereign. See, e.g., WARTIME HABEAS, *supra* note 12, at 55–60, 270; see also, e.g., Hamburger, *supra* note 39, at 1873 (arguing that “traditional” understanding of habeas privilege was that it only covered those having allegiance to the Crown).

147. See Tyler, *Core Meaning*, *supra* note 13, at 902.

148. See HALLIDAY, *supra* note 14, at 172. Indeed, Professor Tyler's reliance on the concept of “allegiance” creates the impression that duties of protection (including the privilege) did not extend to POWs, but the protected status of such people was one reason why the term “submission” could be used as a substitute for allegiance. See Hamburger, *supra* note 39, at 1835.

149. See Halliday, *supra* note 14, at 173.

150. See *id.* at 172–73.

all noncitizens abroad, but extraterritorial POWs would fall within the scope of royal protection when they were held in royal custody.¹⁵¹

It is true, as Professor Tyler has observed, that those lacking allegiance “could not invoke the benefits of the Habeas Corpus Act before the English courts”¹⁵²—at least insofar as they could not invoke the benefits of section 7, which required that prisoners *suspected of treason or felony* be charged or released within the specified timeframe. But, as Professor Halliday’s research showed, that they were ineligible for protection under section 7 did not mean that they lacked the common law privilege. Although allegiance might shed light on English habeas practice during the pertinent period, and although allegiance certainly constrained the set of prisoners that section 7 covered, Professor Tyler has too hastily extracted the allegiance-based limitations on the pre-constitutional privilege.

2. *The minor premise*

Equally (or more) troublesome is the originalist syllogism’s minor premise—that English habeas process for POWs is the right comparator for enemy combatant process. POW and noncitizen enemy combatant status actually differ significantly, and so the historical data has less interpretive significance than meets the eye.¹⁵³ Although Professor Tyler and I read the habeas treatment of POWs differently, we join in skepticism of the POW-enemy combatant analogy.¹⁵⁴

The enemy combatant category is a new one largely invented for the purposes of war-on-terror detention, and originally designed to place the detainee outside the protection of domestic law and the Geneva Conventions.¹⁵⁵ The functional purpose of that detention is to hold the prisoners indefinitely, so that detainees may not return to the battlefield.¹⁵⁶ POW detention was, by contrast, extremely short.¹⁵⁷ The value of a POW was entirely transactional, as England detained POWs only so long as was necessary for an exchange to secure their

151. *See id.* at 173, 206.

152. WARTIME HABEAS, *supra* note 12, at 55.

153. *See generally* Geoffrey S. Corn, *Enemy Combatants and Access to Habeas Corpus: Questioning the Validity of the Prisoner of War Analogy*, 5 SANTA CLARA J. INT’L L. 236 (2007) (criticizing casual analogy between POWs and enemy combatants).

154. *See* WARTIME HABEAS, *supra* note 12, at 270–71, 272 n.139.

155. *See* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1705 (2009). After *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), however, the military applied Common Article 3 of the Geneva Conventions, which governed conflicts other than those between nation states, to the conflict with Al Qaeda. *See* Gordon England, *Memorandum re: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense* (July 7, 2006), <https://archive.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf> [<https://perma.cc/U7T2-UFPP>].

156. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

157. *See* HALLIDAY, *supra* note 14, at 168.

own soldiers.¹⁵⁸ Actual POWs did not seek habeas relief because they did not want a criminal trial; they could be home within four weeks.¹⁵⁹

The differences matter; the very attributes of POW status that made it the subject of so little habeas process also distinguish it from enemy combatant status.¹⁶⁰ For example, the clandestine qualities of international terrorism often produce mistaken identifications: affiliated personnel can be citizens of allies; operatives do not openly bear arms, wear insignias, or even recognize the requirement that they distinguish themselves from civilians; and there is no incentive for those captured to admit their status.¹⁶¹ POW detention produced none of these complications. POWs wanted to be identified as enemy belligerents and afforded the legal protections of that belligerency.¹⁶² Indefinite detention of noncitizen combatant designees is *sui generis*, but cannot be resolved by casual analogy to POW status.

3. *The conclusion, and the history of which privilege?*

Professor Tyler supports the result in *Boumediene* in spite of—not because of—the relationship she posits between allegiance and pre-constitutional coverage. She is perhaps more hesitant to hitch her wagon to the pre-constitutional history because she views the 1679 Act as the primary source of meaning for the modern privilege, thereby effacing the interpretive significance of common law habeas process.¹⁶³ For someone like myself, who attributes more significance to a common law privilege that reached anyone detained under color of state law,¹⁶⁴ the fact that section 7 of the 1679 Act covered only citizens (and noncitizens with local allegiance) poses fewer problems. Indeed, the greater the interpretive significance of the common law privilege, the stronger the historical case for the Remedy Model. Under a Remedy Model calibrated by reference to the common law privilege, the availability of habeas process turns not on the citizenship or allegiance of the prisoner,¹⁶⁵ but on whether *in personam* jurisdiction can be exercised over the jailer.¹⁶⁶

158. See PAUL J. SPRINGER, AMERICA'S CAPTIVES: TREATMENT OF POWS FROM THE REVOLUTIONARY WAR TO THE WAR ON TERROR 41 (2010); see also HALLIDAY, *supra* note 14, at 169 ("Every POW had a cash value, according to rank, in order to simplify the accounting required for swapping them and bringing them home as quickly as possible.")

159. See HALLIDAY, *supra* note 14, at 172.

160. I am speaking specifically in reference to POWs in pre-revolutionary England. I am not, for example, characterizing the experience of World War II POWs detained in the American interior.

161. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099–100 (2008).

162. See *id.* at 1099.

163. See WARTIME HABEAS, *supra* note 12, at 273–76. But see *id.* at 24–25 (observing that “the Act complemented the common law writ of habeas corpus, using the preexisting writ as a vehicle for enforcing its terms.”)

164. See Halliday & White, *supra* note 46, at 631, 641 n.192, 642 n.197, 657–58.

165. See WARTIME HABEAS, *supra* note 12, at 251–53, 260–62, 278–79, 280–81; see generally Tyler, *Core Meaning*, *supra* note 13 (providing an account turning largely on citizenship and allegiance).

166. See source cited *supra* note 127.

The common law privilege, which operated in England and in each of the first thirteen American states,¹⁶⁷ remains an important interpretive artifact because (as explained above) the 1679 Act did not displace common law habeas process.¹⁶⁸ It augmented the common law by, among other things, cloaking *judges* with additional authority to issue habeas writs in circumstances under which that process was previously constrained.¹⁶⁹ To the extent Professor Tyler views pre-constitutional writ practice as questionable historical support for *Boumediene*, she does so (at least in part) because she relegates the common law privilege to a status of secondary interpretive significance.

* * *

The pre-constitutional history favors a Remedy Model—especially its thickness plank. With respect to Professor Tyler’s proposition that the privilege originates anti-detention law, the historical data is at best unclear and at worst inconsistent with her position. The arguments in favor of the Hybrid Model’s thickness plank ignore the robust operation of the common law privilege,¹⁷⁰ suppress the significance of the fact that several noncriminal citizen detention categories were perfectly lawful,¹⁷¹ assume that the privilege was the primary means by which the Framers incorporated the anti-detention rules from section 7 of the 1679 Act,¹⁷² and attribute ultra-technical meaning to gauzy, general statements about the privilege from the likes of Hamilton, Coke, and Blackstone.¹⁷³ On coverage, the history is less clear, although Professor Tyler’s focus on allegiance short-changes the significance of two important cases in which English habeas process was used to review POW classifications, and also side-steps more general principle that the decisive feature of English habeas

167. See DUKER, *supra* note 62, at 115.

168. See Halliday & White, *supra* note 46, at 631; *supra* notes 81–87 and accompanying text.

169. See Brief Amici Curiae Of Legal Historians Listed Herein In Support Of Respondent, *supra* note 40.

170. *But see supra* Part 1.

171. For example, quarantines and the preventative detention of those with mental illness. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) at 555–56 (Scalia, J., dissenting). Professor Tyler must explain how preventative national security detention violates substantive anti-detention law springing from the privilege, but preventative public and mental health detentions do not. She squares her thickness plank with the presence of public and mental health detention categories by characterizing them as “well-recognized exceptions” to the privilege. See Tyler, *Core Meaning*, *supra* note 13, at 916–17 (internal quotation marks and citations omitted). But invoking a “well recognized exception” status only works in favor of the thickness plank if public and mental health detentions were well-recognized exceptions to the privilege. In his *Hamdi* dissent, however, Justice Scalia treated these as well-recognized exceptions to a due process rule against noncriminal detention. See *Hamdi*, 542 U.S. at 555–57 (Scalia, J., dissenting). Even for Justice Scalia—the Justice with whom Professor Tyler most associates the Hybrid Model—the legality of any detention was determined by reference to due process, and not to the habeas remedy.

172. *But see supra* Part B.

173. Whatever these statements do, they do not meaningfully parse the source of the (sort-of) constitutionally specified privilege, as between the common law and the 1679 Act. That legal rule is, I submit, something that had to be constitutionally constructed. See *supra* note 55.

practice was not some attribute of the prisoner, but power to order coercive relief against the jailer.

III.

VERDICTS ON HISTORY

Even though she is not an originalist,¹⁷⁴ Professor Tyler's project (the Book and her related articles) is clearly motivated by her interest in using history to influence constitutional interpretation and construction. If Part II reconsiders the pre-constitutional history central to disputes about thickness and coverage, then Part III involves the next logical step: exploring what, if anything, we might learn from the wartime presidencies of Presidents Jefferson, Lincoln, (Franklin) Roosevelt, and (George W.) Bush. In so doing, Part III serves a subtle interpretive purpose. Indeterminate constitutional text often requires that its meaning be "liquidated" through subsequent, largely nonjudicial, construction. That process of liquidation also favors the view that habeas corpus is a transsubstantive remedy unalloyed by substance. Whereas Professor Tyler sees two centuries of unlawful practice, I see a messy, iterative process by which the three branches settled largely on a Remedy Model, whatever indeterminacy lingered in the immediate aftermath of 1787.¹⁷⁵

I have less to say about President Jefferson than I do about the others, in part because I am in complete agreement with Professor Tyler. Jefferson's understanding of the privilege and suspension power was quite sophisticated. Jefferson opposed the Framers' decision to include conditions for suspension because he believed the privilege should be categorically inviolable.¹⁷⁶ Shortly after his presidential inauguration, however, Jefferson requested that Congress exercise its suspension power so that he could put down the Burr-Wilkinson plot to create a distinct country from pieces of the Louisiana Territory and Mexico.¹⁷⁷ When Congress refused to suspend the privilege so that the Jefferson administration could detain the plot's principals, Jefferson largely resigned himself to the fact that he would be unable to keep the prisoners in jail without charges.¹⁷⁸ In many ways, Jefferson's strict adherence to the English suspension framework—acquiescing to the principle that Congress must suspend—is the foil for the transgressions of subsequent administrations.

174. See, e.g., WARTIME HABEAS, *supra* note 12, at 252, 272–73 (presenting originalist positions without endorsement or criticism); Tyler, *Core Meaning*, *supra* note 13, at 920 (“Even putting to the side the doctrinal importance of the original meaning of the clause, the historical evidence brought to light in this Article should be of interest to anyone who cares about text, structure, and history in constitutional interpretation.”).

175. For an influential discussion of the conditions under which acquiescence should be interpretively persuasive, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

176. See WARTIME HABEAS, *supra* note 12, at 135–36, 146–47, 164; Tyler, *Political Question*, *supra* note 13, at 343.

177. See DUKER, *supra* note 62, at 135; Halliday & White, *supra* note 46, at 685.

178. See WARTIME HABEAS, *supra* note 12, at 153–54.

A. *President Lincoln and the Civil War*

Presidents Jefferson and Lincoln differed in their views of the executive's authority to suspend. Simply put, Lincoln (the "Great Suspender")¹⁷⁹ believed that the presidency entailed executive suspension power, and Jefferson did not. On this score, Professor Tyler and I are in lockstep: Lincoln was wrong. Professor Tyler's historical account demolishes the argument that a president's wartime power includes the power to suspend.¹⁸⁰ Lincoln is a recurring vehicle for discussing presidential suspension power because he is the only president to have unilaterally declared a suspension—in 1862, during the Civil War.¹⁸¹ The Supreme Court never got a chance to weigh in on the question because Congress legislatively authorized the suspension *nunc pro tunc*, in 1863.¹⁸² As no other American commander in chief has attempted a unilateral suspension, the American presidency appears to have acquiesced in the view that the suspension power belongs to Congress, and Congress alone.

Professor Tyler's rejection of executive suspension power is centered largely on history, but that history reinforces a structural argument that I have made elsewhere.¹⁸³ The "Suspension Clause" appears in Article I, section 9. Article I, of course, deals with legislative power, and section 9 is a list of constitutional restrictions on it. Sticking a clause that limits *executive* wartime authority in a constitutional section otherwise devoted to restrictions on *legislative* power would be odd, to say the least. A theory of presidential suspension power must anchor to some provision in Article II, and one would have to believe that Congress simultaneously (1) imposed severe restrictions on Congress's wartime suspension power and (2) left the executive free to suspend unconditionally.¹⁸⁴

President Lincoln's unilateral suspension was one of the two most pivotal events in the development of American habeas law during the Civil War. The

179. Chapter 7 of WARTIME HABEAS is entitled "Civil War and the 'Great Suspender.'" The nickname appears to have originated in the work of Professor Saikrishna Prakash. See Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575, 600 (2010) [hereinafter Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*].

180. See WARTIME HABEAS, *supra* note 12, at 165–67.

181. Sitting as a Circuit Judge, Chief Justice Roger Taney rejected Lincoln's assertion of authority to suspend the privilege and issued an order to discharge John Merryman from military custody, which Lincoln promptly ignored. See *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2569, 2571 (2003).

182. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, 755 (amended 1866 & 1867).

183. See Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 616 (2014) (arguing that the clearest attribute of the Suspension Clause is that it is a restriction on what should be treated as a legislative power).

184. Professor Tyler nonetheless forgives Lincoln, as well she should: "[I]n analyzing Lincoln's actions during the Civil War, his [defense] should give pause to any critic, as should the argument that although Lincoln's actions may not have been strictly legal, they could easily be defended on moral grounds." WARTIME HABEAS, *supra* note 12, at 167.

other was a case called *Ex parte Milligan*.¹⁸⁵ Lambdin Milligan, an American citizen, was an Indiana Copperhead Democrat favoring immediate reconciliation with the South. He was arrested in Indiana and tried before a military commission for violating the laws of war.¹⁸⁶ After General Lee surrendered at Appomattox, Lincoln had actually decided against the military trial, but Lincoln was assassinated shortly thereafter.¹⁸⁷ President Johnson was dealing with the aftermath of the assassination, and was not about to relent on the military trial under such circumstances.¹⁸⁸

Milligan actually arose out of the 1863 legislation authorizing Lincoln to suspend (1863 Act),¹⁸⁹ and it is perhaps the piece of legal authority that most decisively favors the Remedy Model. Broadly speaking, the Court held that, because Milligan was an American citizen held in Indiana—which was not in rebellion and maintained functioning civilian courts—he could neither be held indefinitely nor tried before a military commission. Although the privilege had been suspended as to certain prisoners, the terms of the 1863 Act had actually required the government to respond to the writ, so the precise issue centered on whether the indefinite detention and military trial were lawful.

Milligan seems to exclude the theory that the privilege originates substantive rights.¹⁹⁰ When discussing the originating source of rules requiring that a citizen prisoner be tried in due course, *Milligan* relied on the textual guarantees in the Fourth, Fifth, and Sixth Amendments—that is, on guarantees external to the habeas privilege—and not on the Suspension Clause or the writ generally.¹⁹¹ The Court stated that the detention violated rights that the Constitution was “amended to embrace,”¹⁹² and the reference to rights contained in amendments appears inconsistent with the proposition that substantive content can be attributed to the privilege. Of course, many of the rights that the Constitution was “amended to embrace” include the substantive guarantees that had appeared in section 7 of the 1679 Habeas Corpus Act.¹⁹³

Milligan’s discussion of *suspension* also conforms to a Remedy Model. According to *Milligan*, a citizen’s right to trial in due course persists even when the privilege is disabled: “The Constitution] does not say after a writ of *habeas*

185. 71 U.S. (4 Wall.) 2 (1866).

186. Milligan was a member of an organization called the “Sons of Liberty,” a secessionist organization with activity and influence across a number of states now considered part of the Midwest. Milligan and several other Sons had been accused of trying to seize weapons caches, free prisoners held by the Union, and take some sort of control over Indiana. See GARRETT & KOVARSKY, *supra* note 60, at 543.

187. See *id.* at 543–44.

188. See *id.*

189. See Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, 755 (amended 1866 & 1867).

190. See *Milligan*, 71 U.S. at 130–31.

191. See *id.* at 119–20 (specifically listing the Amendments and excluding the privilege from the list).

192. *Id.* at 120.

193. See *supra* notes 107–109 and accompanying text.

corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it.”¹⁹⁴ Because the privilege does not originate these substantive rights, suspension did not extinguish them: “The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”¹⁹⁵ The above-cited passages casting the privilege as a remedial device were not incidental. Chief Justice Chase, joined by three associate justices, wrote separately on precisely this point. The Chief argued that, during periods of suspension, Congress could not only eliminate judicial review of executive detention, but also that it could convert otherwise unlawful process into a legal proceeding.¹⁹⁶

The most obvious point is that Chief Justice Chase wrote for a Justice coalition that lost; *Milligan* held that suspension does not authorize detention, because the thing suspended (the privilege) is not a substantive restriction on custody. Lurking in Chase’s opinion is a subtler point. Even Chase’s concurrence is consistent with the Remedy Model. Chase believed that the suspension power referenced in the Suspension Clause included a power to indemnify military officials involved in the pertinent military trials. But there was no indication that the otherwise unlawful activity being indemnified was a violation of *the privilege*, as opposed to a violation of other enumerated rights. Chase argued that jailers could be indemnified for any rights violations, but was silent as to the underlying source of the constitutional rule violated. It might be the privilege, but it is more likely to have been the same suite of Fourth, Fifth, and Sixth Amendment rights that are specified by the majority opinion. In short, at least five *Milligan* justices endorsed the Remedy Model, and the text of Chief Justice Chase’s opinion is inconclusive as to the position of the other four.

B. President Roosevelt and World War II

Professor Tyler argues that President Roosevelt’s racist internment of Japanese Americans during World War II (WWII)¹⁹⁷ violated the Suspension Clause itself, calling the detention “the most egregious violation of [the Clause] in history.”¹⁹⁸ Under a Remedy Model, the detention is conceptualized

194. *Milligan*, 71 U.S. at 126.

195. *Id.* at 115.

196. Specifically, the Chief believed that Congress had the authority to indemnify military commissioners against damages suits on the courts that the indemnification provision would be authorizing lawful detention. He contended: “[T]here are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.” *Id.* at 137 (Chase, C.J., concurring).

197. There is little doubt that President Roosevelt’s racial animus was lurking below otherwise neutral phrasing of the rules. See WARTIME HABEAS, *supra* note 12, at 167; see also generally GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 110–23 (2001) (providing in-depth explanation of the racism towards Japanese people that motivated Roosevelt).

198. WARTIME HABEAS, *supra* note 12, at 222.

differently, and there is nothing noteworthy about the failure of American institutions to phrase internment as a violation of the privilege. Although the detention violated *other* constitutional provisions, it did not violate the privilege because the interned Americans were not denied access to the courts. Instead, the courts simply made the wrong—and reviled¹⁹⁹—decisions about substantive anti-detention law.

Japan bombed Pearl Harbor on December 7, 1941, forcing the United States off the sidelines of World War II. President Roosevelt signed Executive Order 9066 on February 19, 1942, which authorized the War Secretary to specify military zones from which any persons could be “excluded” and authorized terms for entry, presence, and exclusion.²⁰⁰ Order 9066 was facially neutral with respect to race, but the racial animus behind it is well documented²⁰¹ and it culminated in the forced detention of over 120,000 people of Japanese ancestry and over 70,000 Japanese-American citizens.²⁰²

Attorney General Francis Biddle initially expressed deep concerns about Executive Order 9066.²⁰³ Like others, he sometimes expressed these concerns by remarking that the detention could not proceed without suspending the privilege: “[U]nless the writ of habeas corpus is suspended, I do not know any way in which Japanese born in this country, and therefore American citizens, could be interned.”²⁰⁴ Reading Biddle’s statement as consistent with a Hybrid Model—which Professor Tyler does—exemplifies what I highlighted at the beginning of Part II.²⁰⁵ Biddle’s belief that internment required suspension does not mean that the privilege originates the substantive anti-detention rules, which derive from other parts of the Constitution.

199. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history and . . . has no place in law under the Constitution.”) (internal citations and quotation marks omitted).

200. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (“I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.”).

201. See Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1344 (2010).

202. See Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 106 (2011); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 688–89 (2019).

203. See Memorandum from Francis Biddle, Attorney General, to Franklin Roosevelt, President of the United States (Feb. 17, 1942), <http://www.fdrlibrary.marist.edu/archives/pdfs/internment.pdf> [<https://perma.cc/4ZSK-7BF6>].

204. Letter from Attorney Gen. Francis Biddle to Representative Leland Merritt Ford (Jan. 24, 1942), in DOCUMENTS OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 5739, 5740, reel 5, at 417–18 (Frederick, Md., University Publications of America 1983) (cited with alterations in WARTIME HABEAS, *supra* note 12, at 224).

205. See *supra* note 66 and accompanying text.

In sections entitled “*The Forgotten Suspension Clause*” and “*The Constitution Has Never Greatly Bothered a Wartime President*,”²⁰⁶ Professor Tyler expresses some dismay at the tendency of history to assess “the government’s treatment of Japanese Americans during World War II [only through the lens of] the racial and ethnic discrimination that drove the government’s actions.”²⁰⁷ She believes that the privilege was “forgotten” because World War II Japanese internment violated the Suspension Clause.²⁰⁸ I suspect that the legal literature is largely devoid of thusly-phrased condemnation because most people, even if they do so subconsciously, have acquiesced to a Remedy Model. After all, the dominant understanding of the privilege, especially post-*Milligan*, was as a privilege to the judicial process to review detention and, if necessary, order discharge. In all of the decisions that produce her frustration—*Korematsu v United States*,²⁰⁹ *Ex parte Endo*,²¹⁰ and *Hirabayashi v. United States*²¹¹—detainees had access to courts. And in 1942, the Supreme Court permitted an American citizen charged with law-of-war offenses to petition for habeas review; but on the merits, it permitted him to be prosecuted before a military commission, rather than in a civilian court.²¹²

World War II detention therefore brings my disagreement with Professor Tyler into clearest focus. She writes:

[T]he inescapable fact is that [1] the mass detention of U.S. citizens during World War II without criminal charges and in the absence of a valid suspension violated the Suspension Clause . . . [2] By design, the Suspension Clause recognizes a privilege born out of a judicial writ and made all the stronger by the English Habeas Corpus Act, the entire purpose of which was to arm the judiciary to constrain executive excess at the expense of individual rights, *even in wartime*.²¹³

I have interposed [1] and [2] so that the fault line is clear. I agree with proposition [2], but not [1]. The purpose of the privilege is to constrain unlawful detention, and the privilege is especially powerful during wartime periods that create the greatest temptation to detain unlawfully. But [1] does not follow necessarily from [2]. Japanese-American internment sits in a dark corner of the wartime experiment not because prisoners were denied the privilege to test the lawfulness of custody, but because American institutions lost track of what lawful custody was.

206. See WARTIME HABEAS, *supra* note 12, at 237.

207. *Id.* at 229.

208. See *id.* at 230; see also *id.* at 237 (referring to the failure to frame judgment in Suspension-Clause terms as “profoundly regrettable”).

209. 323 U.S. 214 (1944).

210. 323 U.S. 283 (1944).

211. 320 U.S. 81 (1943).

212. See *Quirin*, 317 U.S. at 1. I mention *Quirin* separately because it was not a Japanese internment case.

213. WARTIME HABEAS, *supra* note 12, at 242 (emphasis in original).

C. *President George W. Bush and the War on Terror*

Much of Professor Tyler's Hybrid Model aligns with Justice Scalia's position in *Hamdi v. Rumsfeld*. Both theorize that, during periods of non-suspension, the privilege compels the national government to either release American citizens or charge them with crimes in a civilian court.²¹⁴ I discussed *Hamdi* briefly in Part I; after *Boumediene*, it remains the most important war-on-terror case decided by the Supreme Court. Broadly speaking, *Hamdi* held that wartime citizen detainees were due some process, even if it failed to establish that the process due had to be in a civilian court.²¹⁵

Hamdi fought with the Taliban against the United States in Afghanistan, but he was captured and eventually turned over to American military authorities in 2001.²¹⁶ He was transferred to GTMO, and then, when authorities learned that he was an American citizen, to various brigades on the mainland.²¹⁷ The federal government classified him as an "enemy combatant" and asserted authority to detain him indefinitely without charges or further process.²¹⁸ In court, the government argued that the AUMF, signed a week after the September 11 attacks, legislatively authorized the Bush administration's indefinite detention of enemy combatants like Hamdi.

A fractured Supreme Court held that a prisoner challenging his combatant status designation was entitled to some measure of process.²¹⁹ Writing for the *Hamdi* plurality, Justice O'Connor reasoned that the AUMF had authorized indefinite detention of American enemy combatant designees—at least during the period of active American military presence in Afghanistan.²²⁰ In a portion of the opinion commanding a Court majority, *Hamdi* explained that citizens retained the habeas privilege, but could be held if military authorities complied with a set of rules previously specified in procedural due process cases—i.e., by providing him a sufficiently fair opportunity to test his combatant status.²²¹ Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part. Justices Souter and Ginsburg agreed that courts had habeas jurisdiction, but

214. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 573 (2004) (Scalia, J., dissenting); WARTIME HABEAS, *supra* note 12, at 251–53, 260–62 (expressing support of the Scalia position); see also Tyler, *Core Meaning*, *supra* note 13, at 906 ("In short, though in the minority in *Hamdi*, Justices Scalia and Stevens have volumes of history on their side."). Notably, by its own terms, Justice Scalia's *Hamdi* position actually reaches only American citizens *detained in America*. See *Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting).

215. See *Hamdi*, 542 U.S. at 509 (plurality opinion) ("We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.").

216. See *id.* at 510.

217. See *id.*

218. See *id.* at 510–11.

219. See *id.*

220. See *id.* at 517.

221. See *id.* at 533–34.

argued that the AUMF did not authorize indefinite detention of citizens.²²² Justice Thomas dissented, arguing in all respects that the indefinite detention was lawful.²²³

Justice Scalia's dissent, joined by Justice Stevens, is Professor Tyler's primary object of decisional interest, and has generally been lauded as the most rights-protective of the *Hamdi* opinions.²²⁴ Justice Scalia argued that, "[a]bsent suspension, . . . the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."²²⁵ Professor Tyler reads Justice Scalia's opinion to embrace the Hybrid model, and to endorse the proposition that the Suspension Clause creates substantive rights, enjoyed by citizens, to be free of detention outside criminal process in due course.²²⁶

I believe that reading to be incorrect and Justice Scalia's opinion to be consistent with the Remedy Model's thickness plank. Extolling the wisdom of Blackstone at the very beginning of the opinion, Justice Scalia wrote, "The two ideas central to Blackstone's understanding—*due process as the right secured*, and *habeas corpus as the instrument by which due process could be insisted upon* by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses."²²⁷ Reading much of the historical data discussed above, Justice Scalia clearly believed that suspension was necessary to detain citizens outside of ordinary criminal process.²²⁸ But he thought suspension necessary not because the privilege originated substantive anti-detention rights—he thought it was necessary because the discharge remedy *literally* prevented detention classified as unlawful under external strictures of due process.

In tracing to the privilege a substantive right against citizen detention outside due course, Professor Tyler places particular emphasis on this passage, from Justice Scalia's *Hamdi* dissent:

But even if [the AUMF did statutorily authorize citizen detention], I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully

222. See *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

223. See *id.* at 579 (Thomas, J., dissenting).

224. See, e.g., Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1055 (2005) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)) ("Scalia took the view, which was joined by Justice Stevens, that enemy combatants who are citizens must always be either charged with treason or released, unless Congress has suspended the writ of habeas corpus. This is a strikingly libertarian position and one that I must say I agree with."); Daniel R. Williams, *After The Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN ST. L. REV. 341, 349 (2007) (describing the dissent as embodying the "absolutist civil libertarian stance that restricts the power of the executive to detain enemy combatants to that extraordinary situation where the Great Writ has been suspended").

225. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

226. See WARTIME HABEAS, *supra* note 12, at 274–75.

227. *Hamdi*, 542 U.S. 555–56 (Scalia, J., dissenting) (emphasis added).

228. At least with respect to citizens detained within American territory. See *id.* at 577.

circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.²²⁹

On its own, the passage supports the Hybrid Model, at least equivocally. Closer inspection of Justice Scalia's opinion, however, reveals that his position is consistent with the Remedy Model. The italicized text recalls an earlier passage from the dissent that makes his meaning clearer: "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those *common-law procedures* traditionally deemed necessary before depriving a person of life, liberty, or property."²³⁰ In other words, Justice Scalia appeared to believe—consistent with my reading of *Milligan*, Article III, and the Bill of Rights—that substantive anti-detention rules spring from the Due Process Clause, not the privilege.

* * *

In sum, American post-Revolutionary history is consistent with the Remedy Model. The descriptive fit between the Model and the history should come as little surprise. Professor Tyler's argument, after all, is that American institutions have erroneously acquiesced to thin process for covered detainees, and that the privilege needs to be, in some sense, reclaimed.²³¹ But nothing about the operation of the American privilege is particularly inconsistent with the pre-Revolutionary practice. The work of section 7 of the 1679 Act was carried forward not as a feature of the privilege, but as a set of substantive anti-detention rules distributed across other parts of the federal constitution. Even Justice Scalia's *Hamdi* dissent—the singular decisional authority invoked as support for the Hybrid Model—is easily squared with a habeas paradigm under which the privilege is "only" a right of access to judicial process.

IV.

THE THICKNESS PLANK

Whereas Parts II and III argue that the history better fits the Remedy Model's thickness plank, Part IV explains the other, subtler reasons to be concerned about recognizing the Suspension Clause as a source of substantive anti-detention rights for American citizens. First, the need to constitutionalize a

229. *See id.* at 574–75 (emphasis added).

230. *Id.* at 556 (emphasis added).

231. *See* Tyler, *Core Meaning*, *supra* note 13, at 1001.

guarantee to criminal process in citizen detention scenarios is—at least in terms of raw numbers—quite small. Second, because it eliminates excess detention capacity, the Hybrid Model over-constrains military flexibility during periods of non-suspension. Third, the theory that the privilege originates substantive anti-detention rights is inextricably linked to a theory of suspension that under-protects subjects of wrongful detention.

A. *The Extent of Citizen Detention*

A detainee's access to a habeas forum is obviously an enormous advantage, but the number of citizens the executive has subjected to indefinite national security detentions is negligible. In the years immediately following the September 11 attacks, military authorities detained exactly two American citizens as enemy combatants: Yaser Hamdi and Jose Padilla.²³² Although political support for national security detention of American citizens is real,²³³ the government almost never detains citizens indefinitely. Even in polarized political climates humid with tough-on-terror rhetoric, American citizens accused of terrorism and related activity almost always receive a criminal trial.

I. Hamdi and Padilla

Even in the cases of Hamdi and Padilla, the executive eventually decided against a national security detention strategy. Hamdi, an American citizen, was ultimately released from custody entirely.²³⁴ After the Supreme Court held that he must be permitted to challenge the factual predicates of his national security detention, the two sides worked out a deal. He forfeited his American citizenship, renounced terrorism, and agreed not to sue the government on the basis of his captivity.²³⁵ In return, he was discharged and flown to Saudi Arabia.²³⁶

Padilla was also transferred from military custody, although he was eventually convicted in a civilian court and sentenced to a term of years. He was apprehended in Chicago, and accused of plotting to detonate a “dirty bomb.”²³⁷

232. See Tung Yin, *Justice Scalia as Neither Friend nor Foe to Criminal Defendants*, 50 AKRON L. REV. 269, 283 (2016). John Walker Lindh had been preventatively detained by military authorities until they realized that he was an American citizen. See Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255, 1262–64 (2006). Additionally, the United States detained a small number of American citizens as part of its role in the Multinational Force-Iraq (“MNF-I”). Pursuant to a United Nations mandate, MNF-I detained “individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.” *Munaf v. Geren*, 553 U.S. 674, 674 (2008). Among these detainees were Shawqi Omar and Mohammad Munaf, the detainees whose cases were decided in *Munaf*.

233. See sources cited *supra* note 44.

234. See Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 806 (2011) [hereinafter Chesney, *Habeas Lens*].

235. See Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST (Sept. 23, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A42198-2004Sep22.html> [https://perma.cc/434X-GW3K].

236. See *id.*

237. See *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

Initially, he was detained as a material witness,²³⁸ but he was eventually designated as an enemy combatant and transferred to military custody.²³⁹ As the prospect of Supreme Court review of his detention loomed, however, the military transferred Padilla to civilian custody for a criminal trial.²⁴⁰

Hamdi was released in late 2004 and Padilla was transferred to civilian custody to face charges in early 2006.²⁴¹ Over a decade would pass before the next American was indefinitely detained by the military.²⁴² That development may have been partially attributable to the decision in *Hamdi*, which permitted American citizens to use habeas process to challenge their combatant status determinations.²⁴³ The transition from the second Bush to the first Obama Administration in 2009 also contributed, as the Democratic president attempted to modify the detention practices inherited from his Republican predecessor.²⁴⁴

But perhaps the biggest reason the American military stopped detaining American citizens was because criminal law enforcement became a viable substitute. When the September 11 attacks happened, Title 18 of the U.S. Code contained two different offenses that punished “material support” of terrorism, but the substantive and territorial scope of those provisions was limited.²⁴⁵ Shortly after September 11, however, Congress amended the definition of material support to include “expert advice or assistance.”²⁴⁶ In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), again expanding the substantive definition of material support to include “services.”²⁴⁷ IRTPA also extended the *geographic* scope of the broader provision to reach conduct taking place entirely overseas.²⁴⁸ In *Holder v. Humanitarian Law Project*,²⁴⁹ the Supreme Court upheld the modified material support provisions against a pre-enforcement constitutional challenge from

238. See *id.* Material-witness detention is available to ensure that the detainee testifies in a criminal proceeding. See 18 U.S.C. § 3144 (2012).

239. See *Padilla*, 542 U.S. at 431.

240. See Chesney & Goldsmith, *supra* note 161, 1104–05.

241. See Markon, *supra* note 235; David Stout, *Justices, 6-3, Sidestep Ruling on Padilla Case*, N.Y. TIMES (Apr. 3, 2006), <https://www.nytimes.com/2006/04/03/us/03cnd-scotus.html> [<https://perma.cc/27Z5-XFL4>].

242. See *infra* Part IV.A.2 (detailing national security detention of John Doe).

243. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 423 (2010).

244. Even though the Obama Administration retained a number of Bush-era detention policies, it generally sought criminal prosecution when such a strategy was a viable alternative to military detention. See generally Alexander, *supra* note 8, at 570–85 (detailing the Obama Administration’s mixed record in this regard).

245. See 18 U.S.C. § 2339A–B (2012).

246. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, § 805(a)(2)(B), 115 Stat. 272, 377 (2001).

247. See Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762 (2004) (amending 18 U.S.C. § 2339A(b)(1)).

248. See IRTPA § 6603(d) (amending 18 U.S.C. § 2339B(d)).

249. 561 U.S. 1 (2010).

American citizens.²⁵⁰ Although the case did not involve an as-applied challenge, *Humanitarian Law Project* eliminated much of the uncertainty surrounding the enforcement of the new material support offenses.

Indefinite military detention is one tool in the national security arsenal,²⁵¹ but the military's need to use it was dramatically reduced when it became possible to prosecute, in Article III courts, American citizens accused of aiding the enemy. The efficacy of these prosecutions is difficult to overstate: the United States has obtained convictions in *every single case* brought against a defendant alleged to be part of ISIS.²⁵² For example, in the first instance where American authorities detained an American citizen in the Islamic State theatre—Mohamad Khweis—they transferred him to civilian custody for a material support prosecution in the United States.²⁵³

2. *John Doe*

One might reasonably object that any executive commitment to a particular detention strategy is necessarily temporary; administrations change. But even the Donald Trump Administration seems to be wary of subjecting American citizens to indefinite military detention. Ironically, that preference was slowly revealed in the first case of such detention since Jose Padilla was transferred out of military custody. Sometime in September 2017, the Syrian Defense Force took “John Doe,” an unnamed person having dual American and Saudi citizenship,²⁵⁴ into custody as an enemy combatant.²⁵⁵ Doe was detained for fighting against the United States and transferred to US custody in Iraq.²⁵⁶

250. *See id.* at 8.

251. *See* Jonathan Hafetz, *Military Detention in the “War on Terrorism”: Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 44 (2012); Hathaway et al., *supra* note 29, at 168.

252. *See The American Exception: Terrorism Prosecutions in the United States: The ISIS Cases March 2014–August 2017*, CENTER ON NATIONAL SECURITY, 1, <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/59cf980ae45a7c855f673bca/1506777101200/The+American+Exception+9-17.pdf> [<https://perma.cc/8DXG-4JNZ>].

253. *See* Matthew Barakat, *Jury Convicts Virginia Man who Traveled to Islamic State*, ASSOCIATED PRESS (June 7, 2017), <https://www.apnews.com/46d6b09147d44dbcb7de6bed7cc9d7aa> [<https://perma.cc/CCY8-FGRB>].

254. During this Article's editorial process, it was revealed that John Doe's name was actually Abdulrahman Ahmad Alsheikh. *See* Robert Chesney, *Doe v. Mattis Ends with a Transfer and a Cancelled Passport: Lessons Learned*, LAWFARE (Oct. 29, 2018), <https://www.lawfareblog.com/doe-v-mattis-ends-transfer-and-cancelled-passport-lessons-learned> [<https://perma.cc/Q5PL-T94X>] [hereinafter Chesney, *Lessons Learned*].

255. *See* Robert Chesney, *Primer: Can the Trump Administration Transfer an American Citizen Enemy Combatant to Iraqi Custody*, LAWFARE (Sept. 29, 2017), <https://www.lawfareblog.com/primer-can-trump-administration-transfer-american-citizen-enemy-combatant-iraqi-custody> [<https://perma.cc/EYB7-3MY3>].

256. *See* Respondent's Factual Return at 2, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069 (TSC)).

Doe v. Mattis, the closely watched case involving this prisoner,²⁵⁷ had potentially significant implications for the 250 or so American citizens fighting against the United States in the Islamic State theatre. The military held Doe without access to a lawyer until, in late December 2017, a federal judge ordered that they provide him unmonitored access to the ACLU attorneys who had filed a habeas petition on his behalf.²⁵⁸ The American military appeared unwilling to bring Doe to the United States for a criminal trial, but the Trump Administration seemed to lack any interest in detaining him under color of military authority. Instead, it repeatedly tried to transfer him to the custody of Middle Eastern allies or to release him somewhere in Syria.²⁵⁹ The episode finally concluded in October 2018, with American military authorities transferring Doe to Bahrain and the State Department canceling his American passport.²⁶⁰

The United States clearly seemed to be ducking merits consideration of military authority to operate in the Islamic State theatre.²⁶¹ Had it forced a court to consider the legality of Doe's indefinite military detention, the Department of Defense would have risked a ruling on whether the AUMF can serve as a basis for authority to conduct military operations against ISIS.²⁶² It would also have forced a ruling on whether there was statutory authority to detain an American citizen captured abroad, in light of Non-Detention Act of 1970.²⁶³ The chance that the Trump Administration would have actually lost a fight on those

257. See 889 F.3d 745 (D.C. Cir. 2018).

258. See Robert Chesney & Steve Vladeck, *A Primer on the Merits Issues in ACLU v. Mattis (the U.S. Citizen Enemy Combatant Case)*, LAWFARE (Jan. 9, 2018), <https://www.lawfareblog.com/primer-merits-issues-aclu-v-mattis-us-citizen-enemy-combatant-case> [<https://perma.cc/5DTN-L7BS>].

259. See *Doe*, 889 F.3d at 748 (affirming district court order refusing transfer to Saudi Arabia); Notice, *Doe*, 288 F. Supp. 3d at 195 (No. 1:17-cv-2069 (TSC)) (notifying district court that military intended to release Doe into Syria).

260. See Chesney, *Lessons Learned*, *supra* note 254.

261. I infer this intent because every avenue the military seems to pursue involves a transfer that would prevent them from having to identify the constitutional and statutory authority for holding citizens captured there. See *id.* (“The government wanted to dodge this bullet, and it has succeeded in doing so.”).

262. See Chesney & Vladeck, *supra* note 258; Chesney, *Lessons Learned*, *supra* note 254.

263. Even if the AUMF were construed to authorize military operations in the Islamic State theatre, it might not be read to authorize detention of American citizens there. The Non-Detention Act of 1970 would bar such detention unless displaced by a clear statutory provision, and the clarity with which the pertinent statutory provisions speak to military authority to detain Doe in Iraq would be hotly contested. See Chesney & Vladeck, *supra* note 258.

questions is small,²⁶⁴ but avoiding any such risk was quite rational.²⁶⁵ The Department of Defense seemed especially loath to incur that risk in order to detain Doe, who appears to have been an operationally insignificant figure of which the military simply wanted to rid itself.

Doe therefore reinforces the point that flows from the stories of Hamdi and Padilla: even in extreme political environments, ours is not a legal regime that is very interested in the indefinite military detention of American citizens. Whether because of norms or legal incentives, when confronted with a set of alternatives that includes indefinite citizen detention, military authorities do something else.

B. *Wartime Flexibility and Incapacitation Strategies*

During periods of non-suspension, the Hybrid Model would bar indefinite citizen detention undertaken outside of Article III criminal process. The suspension criteria—rebellion or invasion coupled with jeopardy to public safety—do not, however, exhaust the conditions under which the federal government will be faced with national emergencies.²⁶⁶ The desirability of the Hybrid Model’s categorical rule turns at least in part on the effect it has on state responses to such national security threats. By stamping out what amounts to a venue choice for detaining citizens, the Hybrid Model would alter the payoff matrix for decision-makers thinking about whether to incapacitate a threat, whether to use detention or lethal force in order to do so, and, if appropriate, which detention strategy to use.²⁶⁷

The Hybrid Model will force the government to choose between elevated national security risk and other incapacitation strategies that present their own problems. First, the restriction on venue choice for American citizens may simply result in less incapacitation, creating significant security risk *at moments*

264. Whether I agree with it or not, I believe that the Trump Administration would likely win using the line of analysis summarized in Robert Chesney, *A Primer on the Legal Dispute in Doe v. Mattis*, LAWFARE (Mar. 9, 2018), <https://www.lawfareblog.com/primer-legal-dispute-doe-v-mattis> [<https://perma.cc/5R8T-4279>]. See also Jack Goldsmith, *Analysis of Lawsuit Challenging War Against ISIL*, LAWFARE (May 4, 2016), <http://lawfareblog.com/analysis-lawsuit-challenging-war-against-isil> [<https://perma.cc/3B3E-5XQL>] (predicting that the military would win on the merits); Marty Lederman, *Why Captain Smith’s Suit to Enforce the War Powers Resolution Won’t Be a Big Deal*, JUST SECURITY (May 9, 2016), <https://www.justsecurity.org/30949/captain-smiths-suit-enforce-war-powers-resolution-big-deal> [<https://perma.cc/AQ88-NKP2>] (same).

265. Judicial review of Doe’s military detention would also have implicated the sufficiency of factual predicates (and the process for determining them), although I suspect this issue is not driving the avoidance strategy. Cf. Chesney & Vladdek, *supra* note 258 (discussing need to resolve sufficiency-of-process issues under *Hamdi*).

266. Suspension power only kicks in when there is a “Rebellion or Invasion,” and when the “public Safety requires it.” U.S. CONST. art. I, § 9, cl. 2.

267. Somewhat relatedly, the availability of habeas review for national security detention of noncitizens did not seem to suppress targeted killings, as the targeted-killing program ramped up in 2008–2009, just after *Boumediene*. See generally Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499 (2017).

of heightened national vulnerability.²⁶⁸ Second, venue-choice restriction may increase the use of less desirable incapacitation strategies, such as lethal targeting and irregular rendition.

If one understands the frequency of pre-Revolutionary English suspensions as a rational response to the limited criminal-prosecution options, the potential effects of the Hybrid Model's venue restriction come into clearer focus. Under the Remedy Model, the universe of possible national security responses is fairly broad. If the government decides to take action, then it need not choose an incapacitation strategy at all, and it may instead elect to monitor the threat for the purposes of intelligence gathering.²⁶⁹ Even if the government selects an incapacitation strategy, it would choose between lethal force and custody.²⁷⁰ Only after deciding that detention is appropriate must the government select a form of detention and the adjudicative process that it entails. For example, if the United States takes custody of an American threat, it may decide to hold them as a material witness,²⁷¹ transfer them to civilian custody for trial before an Article III Court,²⁷² try them before a military commission (theoretically),²⁷³ transfer them to the custody of another sovereign,²⁷⁴ or preventively detain them.²⁷⁵ Under the Remedy Model, venue selection is constitutionally constrained primarily by the Fifth Amendment's Due Process Clause, which has been construed *not* to require Article III criminal process for all citizen detainees.²⁷⁶

268. I add the emphasis to clarify that the pertinent loss of detention capacity likely makes no difference during the steady state of security threats. For example, the detention of Ali Saleh Kahlah Al-Marri was almost certainly undertaken for no reason other than to extract information via abusive interrogation and without having to deal with lawyers. See Marty Lederman, *al-Marri Reactions I—The Hidden Alternative Holding (Surprise—It's About Abusive Interrogation!)*, BALKINIZATION (June 11, 2007), <https://balkin.blogspot.com/2007/06/al-marri-reactions-i-hidden-alternative.html> [<https://perma.cc/G4TZ-RZBX>].

269. Cf. Amos N. Guiora, *Not "By All Means Necessary": A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 CASE W. RES. J. INT'L L. 273, 277 (2009) (discussing substitutability in context of Israel response).

270. See James B. Steinberg & Miriam R. Estrin, *Harmonizing Policy and Principle: A Hybrid Model for Counterterrorism*, 7 J. NAT'L SECURITY L. & POL'Y 161, 191 (2014); see also *Serdar Mohammed v. Ministry of Defense*, [2017] UKSC 2, 8 ("The availability of detention as an option mitigates the lethal character of armed conflict and is fundamental to any attempt to introduce humanitarian principles into the conduct of war. In many cases, the detention of an enemy fighter is a direct alternative to killing him, and may be an obligation, for example where he surrenders or can be physically overpowered.")

271. See *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (holding that arrest and detention of a material witness, pursuant to a validly obtained warrant, is not unconstitutional).

272. This is the basic requirement of the Hybrid Model and the rule that Professor Tyler prefers.

273. The current statute authorizes military commission trials only for "aliens," see 10 U.S.C. § 948b(a) (2012), but *Ex parte Quirin*, 317 U.S. 1 (1942), held that the *Constitution* permits at least some military commission treatment of citizens accused of law-of-war crimes.

274. The transfer can be for the purposes of facing a criminal prosecution, as was the case in *Munaf v. Geren*, 553 U.S. 674 (2008). If the transfer is not for trial, but to effectuate interrogation in the receiving country, it is referred to generally as "extraordinary rendition." See generally Satterthwaite, *supra* note 27 (contesting legal justifications for extraordinary rendition policy).

275. Preventative detention is the type contemplated in *Hamdi*.

276. See notes 286–298 and accompanying text.

A sense prevails, especially among civil libertarians, that the option of subjecting American citizens to indefinite military detention is inherently undesirable because it affords the executive too much power to undertake factually under-supported custody.²⁷⁷ Nonetheless, over time and in light of how infrequently the past three presidential administrations have actually attempted such detention,²⁷⁸ I submit that the benefits of such flexibility probably outweigh the costs. In terms of benefits, the availability of multiple and potentially redundant detention options allows a government facing emergencies to venue shop among different adjudication formats.²⁷⁹ By contrast, the cost of flexibility is low, as reflected by the miniscule use of citizen detention during steady-state threat levels.

Venue shopping is the means by which the government can engage in what Professor Aziz Huq has called “jurisdictional arbitrage”—roughly, the practice of selecting an adjudicative format with the lowest cost necessary to secure detention.²⁸⁰ For example, when evidence is collected from the battlefield or furnished by a foreign country wishing to preserve its anonymity, the government can seek detention without jeopardizing national security interests—by protecting sources and methods, as it were.²⁸¹ Most importantly, jurisdictional redundancy in the form of multiple litigation venues creates excess detention capacity that remains largely untapped during the steady state of relative safety, but which might prove essential to national security during emergencies.²⁸² The story of potentially redundant litigation venues, in this respect, is consistent with more generalized organizational theory about the role of reserve capacity during unanticipated events.²⁸³ Under the potentially contestable assumption that the military is doing something other than selecting low-process detention venues because it decided not to expend effort collecting evidence,²⁸⁴ the presence of alternative detention pathways allows the executive to route detainees to the

277. See David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 527–28 (2006); Alec Walen, *Transcending, but Not Abandoning, the Combatant-Civilian Distinction: A Case Study*, 63 RUTGERS L. REV. 1149, 1162 (2011); cf. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 727 n.164 (2009) (collecting sources favoring try-or-release rule for noncitizens, too).

278. At least with respect to American citizens, there does not seem to be any history of regularly funneling weak cases away from Article III courts to low-process adjudicative venues. See *supra* Part A.

279. Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1454 (2012). Professor Huq argues—correctly, in my view—that redundancy does have both negative and positive consequences. See *id.* at 1464–65.

280. See *id.* at 1460.

281. See *id.* at 1460–61.

282. See *id.* at 1461.

283. See *id.* at 1463 (citing Martin Landau, *On Multiorganizational Systems in Public Administration*, 1 J. PUB. ADMIN. RES. & THEORY 5, 12 (1991)).

284. See *id.* at 1464.

venue with the least social cost—both the costs of getting the detention authorized and the costs of letting dangerous threats go free.²⁸⁵

Hamdi preserves this flexibility under the Remedy Model. To understand why, we can line the four *Hamdi* opinions up on a continuum ranging from the least-to-most rights-protective. On the rights-*un*protective end of the spectrum, Justice Thomas believed that the executive had largely unfettered discretion to detain, and was unencumbered by the privilege.²⁸⁶ On the rights-protective end, Justice Scalia argued that, because Hamdi was being detained during a period of non-suspension, his citizenship status meant that he had to be either tried or released.²⁸⁷ The opinions of Justices O'Connor and Souter sat somewhere in the middle of the spectrum and unambiguously adopted a Remedy Model—albeit with different degrees of tolerance for the underlying detention. Justice O'Connor believed that the AUMF had authorized indefinite detention but that the military process for determining the combatant status violated due process.²⁸⁸ Although Justice Souter agreed that the combatant status determination did not comport with due process, he did not formally reach that question because he believed that the AUMF failed to authorize indefinite detention.²⁸⁹ Because he did not join Justice Scalia's opinion, Justice Souter apparently believed that there were scenarios in which something short of a criminal trial in due course could satisfy the Fifth Amendment's Due Process Clause.²⁹⁰

Counting the vote of Justice Thomas alongside those cast with Justices O'Connor and Souter, seven of the nine Justices in *Hamdi* expressed the view that the Fifth Amendment Due Process Clause permitted at least some preventative citizen detention—even during a period of non-suspension. Rejecting a central tenet of the Hybrid Model, Justice O'Connor's plurality opinion forthrightly states, citing *Ex parte Quirin*,²⁹¹ that “[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant.”²⁹² Although Justice Souter formally refused to reach the underlying *constitutional* questions because he believed that the detention was simply not authorized by the *statute* (the AUMF),²⁹³ he clearly signaled agreement that—pursuant to some sort of

285. See *id.* at 1460–61.

286. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

287. See *id.* at 554 (Scalia, J., dissenting).

288. See *id.* at 509 (plurality opinion).

289. See *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

290. Justice Scalia's opinion appears to entirely exclude wartime executive authority to detain citizens without criminal trial. As I have mentioned, he takes this position not because he has a hybridized view of the privilege, but because he thinks due process originates that constraint. See *supra* notes 224–229 and accompanying text. Justices Souter and Scalia differ, then, in the reading of the due process requirements, not over the operation of the privilege.

291. 317 U.S. 1 (1942).

292. *Hamdi*, 542 U.S. at 519 (plurality opinion).

293. See *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

process and under extenuating circumstances—the executive could lawfully detain a citizen without a full-blown criminal trial.²⁹⁴ In extremely limited situations, where detention in all respects satisfies due process, American legal institutions have acquiesced to a Remedy Model under which the military may detain serious threats without encountering a separate obstacle in the form of the privilege.

Six of those votes (everyone minus Justice Thomas) expressed the view that, although the Due Process Clause permitted the preventive detention of citizens, it meaningfully constrained the process by which such detention was imposed. Justice O’Connor’s *Hamdi* opinion—which is generally treated as controlling²⁹⁵—itself contains many examples of the limits on citizen detention. For example, and as discussed at length above, it imposed due process requirements on combatant status determinations.²⁹⁶ Moreover, it expressly held that “indefinite detention for the purpose of interrogation is not authorized,”²⁹⁷ and rejected the proposition that such detention might otherwise be justified as an act of vengeance or punishment.²⁹⁸

Therefore, under the Remedy Model as refined through *Hamdi*, American citizens can be detained without criminal process before an Article III court. And if the military detains them indefinitely, the detention can only be for the purposes of preventing enemy combatants from returning to the battlefield, it must be based on certain factual predicates established by reliable procedure, it can last no longer than the duration of specifically identified hostilities, and an Article III court can review compliance with these constraints.²⁹⁹ Under this framework, pertinent decision makers can select a decision-making venue that appropriately suits national security needs.³⁰⁰

The Hybrid Model would change things. Under the Hybrid Model, the habeas privilege requires that, if authorities want to use detention to incapacitate citizen threats, they must use criminal process before an Article III tribunal. During true emergencies, the relative social cost of high-process incapacitation strategies rises because criminal prosecution requires disclosure of information

294. See, e.g., *id.* at 553–54 (“I [do not] disagree with the plurality’s determinations . . . that someone in Hamdi’s position is entitled at a minimum to notice of the Government’s claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; . . . nor [do] I disagree with the plurality’s affirmation of Hamdi’s right to counsel. . . . On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, . . . or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.”).

295. See William R. Payne, *Cleaning Up “The Mess”: The D.C. Circuit Court of Appeals and the Burden of Proof in the Guantanamo Habeas Cases*, 36 HARV. J.L. & PUB. POL’Y 873, 874–75 (2013) (referring to O’Connor’s plurality opinion as “controlling”).

296. See *Hamdi*, 542 U.S. at 533 (plurality opinion).

297. *Id.* at 521.

298. *Id.* at 518.

299. See *id.* at 521 (plurality opinion).

300. Huq, *supra* note 279, at 1461.

and risks expending additional resources in cases of false negatives. The Hybrid Model is therefore likely to force decision makers away from citizen detention during periods of national security vulnerability that do not trigger suspension.³⁰¹

Eliminating the military's ability to indefinitely detain citizens might play out in one of three broad ways. First, by increasing the cost of citizen detention, the Hybrid Model might cause authorities to move away from incapacitation strategies altogether. They might, for example, decide that more social welfare is created through surveillance strategies. Or they might forgo any intervention whatsoever and let the threat walk. Such decisions would obviously amplify national security risk during emergencies, as threats that the government might otherwise neutralize are permitted to continue operations.

Second, the government might simply substitute incapacitation strategies—and some of the options might worry civil libertarians more than preventive American military detention. For example, the military may choose to use lethal force,³⁰² as it did against Anwar al Awlaki, an American al-Qaeda operative assassinated by an American drone strike in Yemen.³⁰³ Or military authorities might look to other countries to incapacitate American threats. *Munaf v. Geren* establishes that the military authorities are permitted, in at least certain circumstances, to transfer American citizens to other countries for criminal proceedings.³⁰⁴ The D.C. Circuit has interpreted *Munaf* to say that the Due Process Clause permits transfer as long as the government *alleges* that it is more likely than not that the receiving country won't torture the prisoner.³⁰⁵ And *Doe v. Mattis* became, at least in part, a case about the authority of the United States to transfer citizen enemy combatants to allied powers or to release them into combat zones where they have little chance of surviving.

Third, the government might simply comply with the requirement by moving to civilian custody all citizen detainees who would otherwise be held under military authority. For the reasons set forth in the discussion of the Remedy Model above, such a requirement runs a higher risk of false negatives—more process and high evidentiary burdens would invariably produce not-guilty verdicts in cases where threats should be incapacitated—and jeopardizes detention capacity that might be necessary during moments of extreme security vulnerability.³⁰⁶

301. Relatedly, it would also increase the incentive to suspend, at least where there is a colorable case that the suspension conditions are satisfied.

302. See generally Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1568–96 (2013) (discussing the evolution of rules for targeting killing in an advanced technological environment).

303. See Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html> [<https://perma.cc/P9CQ-V7T3>].

304. 553 U.S. 674, 700 (2008).

305. See *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009).

306. See Huq, *supra* note 279, at 1461.

In sum, the Hybrid Model creates stark choices between national security risks and substitute incapacitation strategies that are quite problematic in their own right. Faced with a restricted set of venue options, the national security apparatus will simply incapacitate less, or differently. If it incapacitates less—either because it attempts no incapacitation or because it loses criminal trials against serious threats—then the Hybrid Model will have amplified American vulnerability during emergencies. And if it incapacitates differently, it will necessarily resort to strategies that might seem, from the perspective of most civil libertarians, to be worse than the status quo: lethal targeting or transfer to other countries less constrained by norms against harsh treatment.

C. *Suspension-as-Authorization*

The Hybrid Model also entails a rule for what happens when Congress suspends the privilege: that a congressional suspension does double duty as authorization to detain any privileged prisoner.³⁰⁷ In other words, suspension not only extinguishes the discharge remedy, but also converts any detention of a privileged prisoner from unlawful to lawful (“suspension-as-authorization”). Suspension-as-authorization theory was fully developed about a decade ago—before the proposition that the privilege originated substantive anti-detention law—and was hotly contested in the academic literature then.³⁰⁸ The notion that the privilege originates anti-detention rights operates analytically as the mirror image of suspension-as-authorization theory, so objections to the one double as objections to the other.³⁰⁹

I cannot canvass the entire suspension-as-authorization debate here,³¹⁰ but a short summary is at this point necessary. After *Hamdi*, several scholars, including Professor Tyler, began to argue that the power to suspend entailed the power to legalize otherwise unlawful detention to which the suspension

307. See, e.g., WARTIME HABEAS, *supra* note 12, at 51 (“[English suspensions] altered the underlying law of detention by bestowing expanded powers upon the executive during periods of instability and war.”). Professor Tyler has taken this position in one of her important articles on the suspension power. See Tyler, *Emergency Power*, *supra* note 13, at 603–05.

308. See *infra* notes 310–314.

309. See, e.g., Tyler, *Emergency Power*, *supra* note 13, at 618 (“Further, the two primary influences on the Framers regarding the English conception of suspension reinforce the conclusion that the Founding generation viewed the protections embodied in the Great Writ and the effects of a suspension as mirror opposites.”); see also David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 87 (2006) (referring to “the availability of the writ” and “the lawfulness of detention” as “two sides of the same coin”).

310. That debate includes the sources cited in notes 311–314, *infra*, and also Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 725 (2010). See also Hamburger, *supra* note 39, at 1905–10; Klein & Wittes, *supra* note 202, at 112–14; Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, *supra* note 179 at 577 n.5; Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1339 n.15 (2015) [hereinafter Prakash, *Sweeping Domestic War Powers of Congress*].

applied.³¹¹ (On this account, suspension authorizes detention only—it does not authorize otherwise forbidden methods of interrogation, conditions of confinement, or judicial process.³¹²) No less a titan of federal jurisdiction than Professor David Shapiro weighed in to support that position, albeit on more pragmatic than historical grounds.³¹³ Professor (now Dean) Trevor Morrison, by contrast, argued that suspension power merely entails authority to extinguish the habeas remedy and that it has no effect on the authority to legalize custody.³¹⁴

As one might suspect, I agree largely with Dean Morrison, although I regard at least some of the historical material inconclusive. For example, the significance of the indemnity and immunity statutes that followed both English and American suspensions—the mere existence of which might (but do not necessarily) undermine the position that an act of suspension alone legalized the detention—remains unclear.³¹⁵ Not all history is indeterminate, however. Much of the historical case for suspension-as-authorization consists of quotations about the kinship between habeas and lawful custody³¹⁶—a relationship that exists even if suspensions are not sufficient to authorize detention. Prisoners detained during suspensions might simply retain non-discharge remedies.³¹⁷ Moreover, I

311. See, e.g., WARTIME HABEAS, *supra* note 12, at 167 (“Lincoln . . . appreciated the dramatic nature of suspension and understood its necessity as a means of legalizing arrests that otherwise would be unconstitutional in the ordinary course.”); Tyler, *Emergency Power*, *supra* note 13, at 605 (“This Article contends that the narrow view is overwhelmingly at odds with the historical understanding of suspension in this country and is both theoretically untenable and functionally undesirable as a matter of constitutional interpretation.”).

312. See WARTIME HABEAS, *supra* note 12, at 180.

313. See Shapiro, *supra* note 309, at 61.

314. Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1541 (2007) [hereinafter Morrison, *Extrajudicial Constitution*]; Trevor W. Morrison, Hamdi’s *Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 415 (2006).

315. See Vladeck, *supra* note 39, at 958 n.63 (arguing that interpretation of indemnity statutes “clearly figures into the contemporary debate over whether a valid suspension of habeas corpus does not in fact *authorize* detention, but merely displaces judicial review for the duration of the suspension.”) (emphasis in original). Professor Tyler argues that the pre-1801 indemnity statutes were passed for reasons other than for the purpose of establishing the lawfulness of the underlying detention. See Tyler, *Emergency Power*, *supra* note 13, at 617 (arguing indemnity legislation before the Founding was insufficiently precise to be inconsistent with suspension-as-authorization and that only inconsistent legislation came later). *But see* Morrison, *Extrajudicial Constitution*, *supra* note 314, at 1548–51 (interpreting pre-1801 indemnity statutes to establish the lawfulness of detention). Professor Halliday sides decisively with Professor Tyler, explaining that the 1801 statute and dicta from A.V. Dicey—the authority upon which Professor Morrison heavily relied—did not accurately capture the operation of the eighteenth century English immunity statutes. See HALLIDAY, *supra* note 14, at 431 n.168.

316. See, e.g., Tyler, *Emergency Power*, *supra* note 13, at 615–16 (collecting quotations).

317. See Morrison, *Extrajudicial Constitution*, *supra* note 314, at 1584–90 (explaining that the Suspension Clause does not implicate damages actions). *But see* Tyler, *Emergency Power*, *supra* note 13, at 669–70 (arguing that damages liability for unlawful detention during periods of suspension was something the Framers would have never envisioned). The 1863 Congress that suspended the privilege during the Civil War evidently rejected suspension-as-authorization, because the suspension statute included immunity provisions that would have been unnecessary if the suspension actually authorized the underlying detention. See Act of Mar. 3, 1863, ch. 81, §§ 1, 4, 12 Stat. 755, 755–56 (amended 1866 & 1867) (delegating suspension power to the president and immunizing officials acting pursuant to that power); see also Adrienne Lee Benson, *Routine Emergencies: Judicial Review, Liability Rules, and the*

question the cross-applicability of the English suspension framework to American constitutional questions. English suspension statutes mooted the operation of substantive anti-detention rules from other *statutes*, whereas American suspension statutes would have to overcome anti-detention rules *from the Constitution*. The historical argument undersells how difficult it is to translate English suspension practice, under which Parliamentary suspension disabled legislatively created detention power,³¹⁸ into rules for American emergency power, which entail constitutional limits on detention authority.³¹⁹

Professor Shapiro has made a more pragmatic case for suspension-as-authorization, although he did sound historical notes. In Professor Shapiro's view, the Suspension Clause means little if suspension does not establish the legality of the underlying detention.³²⁰ Post-suspension suits for damages would, on this theory, moot or degrade the wartime suspension power. But there is no reason to presume national security risks would be affected by the decision making of frontline officers in charge of custody determinations. First, any suspension would have to occur during a period of "rebellion or invasion" and the triggering emergency would have to gravely risk "public safety." Under such circumstances, the scope of executive authority to detain—and legislative authority to authorize detention—would certainly be greater than it would be during periods of non-suspension.³²¹ (In short, the very conditions that permitted suspension would simultaneously expand the constitutional berth for Congress to authorize detention.³²²) Second, and perhaps even more importantly, even if

Habeas Corpus Act of 1863, 90 N.Y.U. L. REV. 1662, 1685 (2015) (pointing out inconsistency between suspension-as-authorization theory and the immunity provisions of the 1863 Suspension Act). Senator Lyman Trumbull was a staunch and influential supporter of the 1863 Act, and he clearly believed that suspension was not in and of itself sufficient to extinguish a damages remedy for constitutional violations absent the suspension: "When a man is arrested in ordinary times, he may apply for a writ of *habeas corpus*; and if he can show that his arrest is illegal and improper, he will be discharged; but he does not recover damages in that proceeding. He may then institute his suit for damages; and that is a different matter entirely. So, if the writ of *habeas corpus* was suspended by act of Congress with the concurrence of the President, both acting together, there would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests." CONG. GLOBE, 37th Cong., 3d Sess. 534 (1863). *But see* Tyler, *Emergency Power*, *supra* note 13, at 639–51 (disputing this inference from § 4 of the 1863 Suspension Act).

318. For example, Professor Tyler underscores that pre-Revolutionary English suspension statutes had language that both suspended remedial process and empowered detention. *See, e.g.*, Tyler, *Emergency Power*, *supra* note 13, at 617. That a suspension statute could overcome a statutory detention power sheds little light on whether a legitimate American suspension could overcome a constitutional limit on detention power.

319. *See* Morrison, *Extrajudicial Constitution*, *supra* note 314, at 1602–15 (arguing that due process would continue to constrain executive detention power even during suspensions).

320. *See* Shapiro, *supra* note 309, at 92–93.

321. *See generally* Prakash, *The Sweeping Domestic War Powers of Congress*, *supra* note 310 (detailing wartime legislative power).

322. This position is not particularly pro-detention. In fact, it is recognized by some of the most visible champions of the idea that the state remains constrained even when confronted with exigencies. *See, e.g.*, Cole, *supra* note 277, at 707–14 (explaining that due process permits some national security

any detention were ultimately adjudicated to be unlawful, Congress can pass laws indemnifying or immunizing executive officials from damages liability.³²³ For at least these reasons, custodians acting under color of wartime detention power would perceive no threat of personal liability,³²⁴ and could proceed in their emergency obligations unthreatened by the specter of damage claims.

I regret the necessity of an abridged discussion, but the detail provided here suffices to make the important point: the Hybrid Model appears to entail a suspension-as-authorization rule. Suspension-as-authorization, in turn, leaves certain rights against detention unprotected during emergencies that satisfy the suspension conditions. Specifically, suspension-as-authorization gratuitously extinguishes a damages remedy.³²⁵ If wartime exigency prevents the executive from immediately coming to court and presenting sensitive evidence, then the suspension power allows it to conduct its military operations unencumbered by detainee litigation. But after the threat dissipates, a wrongfully detained prisoner need not be deprived of all relief. A law-and-economics observation might feel out of place here, but the immense damage inflicted by wrongful detention counsels in favor of a rule of liability, not property.³²⁶

* * *

The first major difference between the way Professor Tyler and I see the privilege turns on whether it originates substantive anti-detention law. Setting aside the problem of fitting historical data to the Hybrid Model—content canvassed in Part II—there are other reasons to worry that her Model miscalibrates legal protection in both times of war and peace. A rule requiring that citizens be prosecuted in Article III courts seems largely unnecessary during the steady state of national security threat, during which the incidence of attempted citizen detention is almost zero. At other times, however, this rule is both over- and under-protective. During extreme emergencies that *do not satisfy* the

detention in extreme situations, provided there is fair process); cf. *also id.* at 714 (expressing view that the privilege is purely a right to access of judicial process).

323. See generally Morrison, *Extrajudicial Constitution*, *supra* note 314, at 1595–1602 (discussing the various ways for Congress to use immunity and indemnity doctrines to insulate officials from liability).

324. See also Benson, *supra* note 317, at 1685 (surveying empirical literature of government indemnification and immunization practices and concluding that, “[b]y preserving judicial review and applying liability rules, judges and legislatures need not sacrifice these worthwhile remedial values in order to avoid overdeterrence of executive actors in exigent circumstances”).

325. A separation-of-powers problem also lurks on the outskirts of the Hybrid Model. Given that most suspension legislation is formally a delegation of authority to the executive, the suspension-as-authorization theory effectively endorses *executive* power both to suspend and to redefine lawful custody. If separation-of-powers principles do anything during wartime, then they likely foreclose the possibility that the executive gets to decide, in all cases of detention, what detention is lawful.

326. Professor Eugene Kontorovich has discussed the value of using liability rules for constitutional violations during periods during which national security is threatened. See Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 760 (2004).

constitutional suspension criteria, its effect on venue choice would shift the military towards other problematic responses, including some that might substantially elevate national security risk. During extreme emergencies that *do satisfy* suspension criteria, the suspension-as-authorization corollary gratuitously excludes compensatory remedies.³²⁷

V.

THE COVERAGE PLANK

The second plank of Professor Tyler's model is a rule about whom the privilege covers. Under a Remedy Model, the privilege is a transsubstantive detainee right to court access and to a discharge remedy, and—because it operates on the jailer *in personam*—is available to anyone detained under color of American law.³²⁸ The Hybrid Model, by contrast, contemplates a thicker privilege that might be withheld from certain noncitizen detainees overseas—even if that detention is under color of American law. Professor Tyler endorses the result in *Boumediene*,³²⁹ but her account produces unnecessary ambivalence about whether writ history is consistent with coverage that extends to land beyond sovereign control,³³⁰ or to noncitizens lacking local allegiance.³³¹ The significance of this disagreement plays out in the form of different rules for analyzing habeas access for a certain detainee category: noncitizen enemy combatants detained in places over which the United States lacks sovereign control.

I made the historical case for extending coverage to enemy combatants in Part C. (Recall that Professor Tyler and I both reject the attempt to analogize between enemy combatants and prisoners of war.³³²) For at least three *other* reasons, American institutions should resist any attempt to restrict coverage on the basis of citizenship or allegiance—even if the prisoner is held in a place beyond American sovereign control. First, the Hybrid Model's coverage plank and the suspension-as-authorization rule combine to produce an absurd result: that suspension power authorizes otherwise unlawful detention of Americans, but not otherwise unlawful detention of noncitizens abroad. Second, reduced coverage would increase the incidence of “grey holes”—custody that violates

327. In making my argument, I have assumed the validity of the suspension. Although Professor Tyler theorizes a particularly thick suspension power, she also envisions stronger-than-average judicial checks on that power—policing of both internal and external limits on the Clause. See Tyler, *Political Question*, *supra* note 13, at 412–13.

328. See Kovarsky, *supra* note 39, at 756.

329. See *supra* note 50.

330. One of the several reasons that Professor Tyler provides in support of *Boumediene* is that there was a historical precedent for extending coverage to land over which the United States had “total control” and that was used “for a quintessentially sovereign function.” See WARTIME HABEAS, *supra* note 12, at 270.

331. See, e.g., *id.* at 271; see also Pfander, *supra* note 51 (“Tyler sees *Boumediene* as a tougher case for an assured right to habeas review.”).

332. See *supra* Part 2.

substantive anti-detention law but that triggers no remedy. Third, habeas proceedings involving noncitizen detainees are an essential channel for transmitting legal rules to other actors throughout the national security apparatus.

A. *Relationship to Suspension-as-Authorization*

One problem with the Hybrid Model's coverage plank involves how it fits with the suspension-as-authorization rule. The suspension-as-authorization rule is like a switch; it means that the power to suspend the privilege is also the power to legalize otherwise unlawful custody. The scope of otherwise unlawful custody subject to the switch is logically coextensive with coverage. In other words, suspension authorizes otherwise unlawful custody of those to whom the privilege ordinarily belongs.

The combination of the Hybrid Model's coverage plank with the suspension-as-authorization rule produces an anomaly. During suspensions, Congress would be capable of flipping the switch for Americans (and noncitizens with local allegiance), but not for noncitizens abroad, whose custody would theoretically continue to be constrained—albeit only very loosely—by the Due Process Clause and other substantive sources of anti-detention law. Counterintuitively, then, the suspension power would allow Congress and the executive to circumvent otherwise-applicable constraints on citizenship detention, but could not disable similar constraints on foreigners held in overseas custody—constraints imposed by, among other things, the Due Process Clause, treaties, statutes, the law of war, and international law. Such a result seems internally inconsistent, because it produces a framework in which suspension is uniquely disadvantageous for American citizens, as compared to those lacking allegiance. Either the coverage plank or suspension-as-authorization theory must be wrong; they cannot coexist.

B. *Increased Detention of Noncitizens*

Perhaps the most dramatic effect of restricting the coverage of a constitutional habeas guarantee is the most intuitive: it would invite more unlawful detention of noncitizen combatant designees held abroad. Such people have virtually no chance of securing protection through the political process, so a hybridized privilege would eliminate the most meaningful remedy for enforcing pertinent anti-detention rules, including individual rights and structural limits on executive detention power. Even without a distinct coverage principle, a hybridized model would *still* create incentives for courts and Congress to restrict its coverage. If the privilege guarantees thick process before an Article III court, then courts and legislatures would share a healthy interest in scaling back the set of covered detainees.

1. Grey Holes

As noted throughout, Professor Tyler herself supports a coverage rule that reaches GTMO, and other detention facilities located on land that is functionally subject to complete American control.³³³ Nevertheless, the Remedy Model's coverage plank reaches further—because its touchstone is personal jurisdiction over the jailer, it runs in favor of any prisoner detained under color of American law.³³⁴ Although there are other sources of law that theoretically constrain detention falling outside the Hybrid Model's coverage rule, the absence of a habeas remedy is especially consequential.

Noncitizens living abroad cannot protect themselves through the political process,³³⁵ so the Hybrid Model degrades the most institutionally viable means for uncovered combatant designees to enforce what substantive rights they do have; the writ. On this score, past is almost certainly prologue. Congress did not pay much attention to the privilege's extraterritorial application in the immediate aftermath of the September 11 attacks. Legislators may have assumed that enemy combatant designees had no constitutional rights when they were outside the territorial jurisdiction of the United States, or, even if they had such rights, that neither the Constitution nor statute required that they be permitted to assert those rights in habeas proceedings. After *Hamdi* created a perceived risk that due process rights might be extended to noncitizen enemy combatant designees,³³⁶ and after *Rasul v. Bush* interpreted the habeas statute to guarantee habeas review to GTMO detainees,³³⁷ Congress responded by simply stripping habeas jurisdiction over custody exercised on the military base.³³⁸ (*Boumediene*, of course, invalidated the jurisdiction-stripping statute.³³⁹).

Within the category of those held under color of American law, any restriction on coverage—including a restriction excluding detainees held on land outside of American control—creates a “grey hole.” Whereas a “black hole”

333. See *supra* note 50.

334. See *supra* note 127.

335. The only case in which the United States has attempted to preventatively detain a noncitizen enemy combatant *who was a lawful resident* involves Ali Saleh Kahlal al-Marri. In *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2009) (*en banc*), a divided en banc panel of the Fourth Circuit held that the Fifth Amendment's Due Process Clause protected lawful resident aliens present in the United States, but that the Clause permitted that they be subject to indefinite military detention. See *id.* at 216–17. The en banc panel disagreed over what those conditions were, and the Supreme Court granted certiorari. See 555 U.S. 1066, 129 S. Ct. 680 (Mem). While certiorari was pending, however, the government transferred al-Marri to civilian custody to face criminal charges. See *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

336. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).

337. See *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

338. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742–44 (2006); Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600 (2005).

339. *Boumediene v. Bush*, 553 U.S. 723 (2008). In *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), however, the D.C. Circuit applied the *Boumediene* framework and determined that the privilege did not extend to the Bagram Airfield Military Base in Afghanistan. See *id.* at 94.

describes institutional spaces that are entirely ungoverned by law,³⁴⁰ a grey hole describes spaces in which state conduct is nominally-but-not-practically constrained because, among other things, there is no meaningful remedy for legal violations.³⁴¹ With respect to unlawful detention activity, non-habeas mechanisms are virtually useless enforcement vehicles. For example, under *Bivens v. Six Unknown Agents*,³⁴² a noncitizen detainee will almost certainly fail to state a cause of action for damages against a federal custodian.³⁴³ Even if a *Bivens* claim did exist, qualified immunity would almost always bar judicial proceedings and recovery. Nor are diplomacy or transactional exchange between geopolitical antagonists likely to do the trick; allegiance binds POWs to a protective sovereign, but enemy combatant designees lack a national patron.

Grey holes fare poorly in any consequentialist assessment of national security detention.³⁴⁴ They produce the “façade” of legality for state lawlessness³⁴⁵—permitting the executive to violate legal rules without consequences, because there is no judicial review and no discharge remedy. The military may exercise custody that is in derogation of constitutional rights,³⁴⁶ facilitate or direct torture and other “enhanced interrogation,”³⁴⁷ and engage in

340. An extensive literature deals with black holes. See generally Cooper Alexander, *supra* note 8, at 575 (discussing concept as a “law free zone”); Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1029 (2015) (making descriptive claim that black holes are disappearing); Robert Knowles & Marc D. Falkoff, *Toward A Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 637 (2007) (using concept to argue in favor of extensive extraterritorial application of American Constitution).

341. David Dyzenhaus coined this term. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006); see also David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 Cardozo L. Rev. 2005, 2018 (2006) [hereinafter, Dyzenhaus, *Schmitt v. Dicey*] (“A grey hole is a legal space in which there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”) The term appears across objects of legal study, including national security detention. See, e.g., Ben-Asher, *supra* note 310, at 706 (national security detention); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (administrative law).

342. 403 U.S. 388 (1971).

343. A *Bivens* action seeks damages when a federal official violates one of a very limited number of constitutional provisions, in a limited number of ways. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 1859 (2017); Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1125–28 (2014). For an example of a failed *Bivens* claim in Padilla’s case, see *Lebron v. Rumsfeld*, 670 F.3d 540, 547–56 (4th Cir. 2012). See also *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015) (rejecting *Bivens* remedy for claim that FBI agents violated rights of detainee when they detained, interrogated, and tortured him in three African countries); *Vance v. Rumsfeld*, 701 F.3d 193, 198–203 (7th Cir. 2012) (rejecting *Bivens* remedy for mistreatment of detainees).

344. Adrian Vermeule has argued that grey holes are an inevitable part of the administrative state, and I suspect strongly that he believes that they can have substantial benefits. See Vermeule, *supra* note 341, at 1097.

345. See Dyzenhaus, *Schmitt v. Dicey*, *supra* note 341, at 2038.

346. See Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2189 (2016).

347. See Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1618 (2011).

patterns of rendition and transfer that that violate domestic and international law.³⁴⁸ There is ample evidence that, in the early years of post-September 11 counterterrorism operations, the military actively pursued all of these strategies.³⁴⁹ There are serious risks of sub-constitutional illegality as well, including detention that Congress has either forbidden or failed to authorize.³⁵⁰ Such gaping grey holes entail a relationship with the rule of law that is, to put it gently, fraught.³⁵¹ In fact, grey holes might represent greater threats to the rule of law than black holes precisely because they operate to disguise official illegality.³⁵²

2. *The Black-Hole Rejoinder*

The “no-rights” rejoinder is that this grey hole is *supposed* to be black—i.e., there is no remedial deficit because there are no rights to protect.³⁵³ I offer two responses. First, as a *doctrinal* matter, theories that noncitizens lack rights-bearing status outside American territory tend to misinterpret justificatory authority. Second, as an *institutional* matter, a hybridized privilege would lock American law into a particularly extreme view of extraterritoriality espoused by the D.C. Circuit.

Doctrine. There can be no grey hole disguising official lawlessness if there is no lawlessness to disguise. There is a persistent post-*Boumediene* view that noncitizen combatant designees cannot contest detention because constitutional rules, including rights, do not “apply” to noncitizens abroad. Although Professor Tyler does not herself take this position, I offer these responses because its advocates would prefer her coverage theory. Even in responding to those favoring coverage restrictions on the ground that there are no substantive rights to protect, however, I cannot canvass the massive literature regarding the constraints on state action abroad.³⁵⁴ I therefore offer only an abbreviated

348. See Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1618 (2016).

349. See Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1209 (2007).

350. I have in mind, for example, the set of questions associated with requirements like that in the 2012 NDAA, *supra* note 23, which authorized detention only for those who “*substantially supported* al-Qaeda, the Taliban, or *associated forces that are engaged in hostilities against the United States or its coalition partners*” (ambiguous terms emphasized).

351. See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 316 (2010); Dyzenhaus, *Schmitt v. Dicey*, *supra* note 341, at 2018.

352. See David Dyzenhaus, *The Rule of Law Project*, 129 HARV. L. REV. F. 268 (2016).

353. To be clear, Professor Tyler does not take this position. She expressly acknowledges that substantive anti-detention law is capable of reaching noncitizens abroad. See, e.g., WARTIME HABEAS, *supra* note 12, at 262 (law of nations); *id.* at 275–76 (due process). I discuss this issue because others advocating restrictive coverage take this position, and to emphasize the need to guarantee remedies.

354. See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996) [hereinafter, NEUMAN, STRANGERS] (making a book-length case that anyone subject to state action should be able to invoke the Constitution); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985) (arguing

defense of the assumption that noncitizen enemy combatant designees can have anti-detention claims to enforce.

As a prefatory matter, the historical function of the privilege is not to vindicate individual rights; it is to check sovereign power.³⁵⁵ Even a detainee lacking the benefit of rights-originating provisions of the Constitution can use the habeas privilege as a vehicle to argue that the controlling matrix of constitutional and statutory law does not authorize their detention.³⁵⁶ There is no standing problem; the *sine qua non* of habeas jurisdiction is custody. “Rights” or not, the no-rights rejoinder needs no further answer.

Setting aside the privilege of lodging structural objections to state action, I still reject the theory that rights-bearing status is presumptively restricted to those located in the sovereign United States and to citizens abroad. This theory evolved from a severe territorial paradigm under which the Constitution was deemed to have no effect outside of the United States—even for American citizens.³⁵⁷ The Court ultimately rejected strict territoriality in *Reid v. Covert*,³⁵⁸ when it held that American citizens who killed servicemember-spouses abroad were constitutionally entitled to charging by way of indictment and a trial by jury.³⁵⁹ Because of *Reid*, and for other reasons, the pure territorial paradigm is an awful descriptive theory.³⁶⁰ Both domestic and international law have rather

for robust extraterritorial constitutional application based on holistic reading of Constitution, the political theory it embraced, and function it serves in American governing institutions); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) [hereinafter Kent, *Against a Global Constitution*] (contending that there is little originalist support for “globalist” Constitution); Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the *Insular Cases*, 97 IOWA L. REV. 101 (2011) [hereinafter Kent, *Insular Cases*] (arguing that *Munaf* and *Boumediene* drew the wrong extraterritoriality inferences from the *Insular Cases*); Lobel, *supra* note 8 (exploring the implications of the modern distinction between rights and structure for the extraterritoriality inquiry); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (defending what is termed the “municipal” model of extraterritorial application); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (supporting a rebuttable presumption that constitutional rights apply to anyone abroad whenever there is an exercise of legal power); Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT’L L. 777 (1980) (arguing against extraterritoriality with rendition as case study); Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987) (arguing against extraterritoriality in terrorism context).

355. See HALLIDAY, *supra* note 14, at 7; Goldstein, *supra* note 41, at 1180–97 (2007); Kovarsky *supra* note 39, at 754.

356. Cf., e.g., 28 U.S.C. § 2241(c) (2012) (specifying structural errors for which habeas relief may be awarded).

357. See Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2030–31 (2005). The early variants of the position even excluded citizens abroad from the protection of American law. See Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 45 (2004). In *In re Ross*, 140 U.S. 453 (1891), the Supreme Court held that an American citizen, convicted by a Japanese consular court for a murder committed on an American ship harbored in Japan, did not have Sixth Amendment indictment and jury trial rights. *Id.* at 464. It stated, rather bluntly: “The Constitution can have no operation in another country.” *Id.*

358. 354 U.S. 1 (1957).

359. *Id.* at 32.

360. See Roosevelt, *supra* note 357, at 2039.

definitively embraced the possibility of extraterritorial legislative power.³⁶¹ And if the state can project power abroad, then a person's spatial coordinates cannot alone determine rights-bearing status.

Once it became clear that that borders alone did not determine rights-bearing status under the Constitution, the next set of phase of Supreme Court decision making focused on citizenship. In *Johnson v. Eisentrager*,³⁶² the Supreme Court held that hostile Germans detained by American authorities in Germany had no habeas privilege and no due process right against a Chinese military trial.³⁶³ Although it certainly used some categorical language hostile to the rights-bearing status of noncitizens abroad,³⁶⁴ *Eisentrager* decided the case using a multifactor test without specifying the importance or interplay of the various considerations.³⁶⁵ Nonetheless, writing for the Court in *United States v. Verdugo-Urquidez*,³⁶⁶ Chief Justice William Rehnquist described *Eisentrager* as having “emphatic[ally]” rejected the extraterritorial application of due process rights.³⁶⁷ Justice Kennedy provided the fifth vote, but concurred separately to reject the categorical reading of *Eisentrager*.³⁶⁸

After *Verdugo-Urquidez*, the Supreme Court nevertheless repeated Chief Justice Rehnquist's gloss on *Eisentrager*³⁶⁹—not as a functional rule for the habeas privilege, or as a due process rule about the rights of German nationals against military trials in China—but as a holding that the “Fifth Amendment's protections do not extend to aliens outside the territorial boundaries.”³⁷⁰ Through *Eisentrager*, itself filtered through a cramped reading of *Verdugo-Urquidez*, the territorial paradigm morphed into something that excluded noncitizens abroad from the scope of constitutional protection. The problematic language from Chief Justice Rehnquist's *Verdugo-Urquidez* opinion is still cited favorably by some judges,³⁷¹ even though (1) the Court's decisive Justice (Kennedy) rejected a categorical approach to territoriality and even though (2) it relies on an

361. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 21–22 (1992) (international law); Roosevelt, *supra* note 357 (domestic law).

362. 339 U.S. 763 (1950).

363. *Id.* at 790–91.

364. See *id.* at 776 (“[T]he nonresident enemy alien . . . does not have even this qualified access to our courts . . .”); *id.* at 784 (“[A] resident [alien enemy] may be deprived of liberty by Executive action without hearing.”).

365. See *id.* at 768–77; cf. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1306 n.174 (2002) (“The opinion is unclear about which of two rationales justified its holding that no habeas review was permissible . . . The Court mentioned both factors and did not get into the tricky business of which was doing the work.”).

366. 494 U.S. 259 (1990).

367. *Id.* at 269.

368. See *id.* at 275–76 (Kennedy, J., concurring).

369. See Roosevelt, *supra* note 357, at 2039.

370. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

371. See *infra* notes 383–403 and accompanying text.

interpretation of *Eisentrager* that *Boumediene* and its decisive Justice (Kennedy, again) foreclosed.³⁷²

The proposition that noncitizens abroad lack rights-bearing status is descriptively inaccurate. (To be fair, the Supreme Court's inconsistent approach to the question dooms *any* descriptive theory). The poor descriptive fit between the theory and the authority is evident, for example, in the set of Supreme Court cases recognizing that noncitizens abroad can assert Fifth Amendment rights to just compensation for takings,³⁷³ and invoke due-process protections that constrain the exercise of personal jurisdiction.³⁷⁴ Moreover, *Boumediene* itself expressly rejected the categorical reading of *Eisentrager* in holding that the habeas privilege protected noncitizens outside American borders.³⁷⁵ Finally, the position is descriptively inconsistent with the broadly shared international law (and conflict of laws) maxim that a sovereign has legislative jurisdiction that extends beyond its boundaries.³⁷⁶

Third, the proposition that noncitizens abroad lack rights-bearing status has major conceptual problems. For starters, there is an analytic inconsistency between the two rights-bearer models that are synthesized to produce the citizenship limitation: a territoriality theory that would include all noncitizens present in the United States, and a social-compact theory that would not.³⁷⁷ Setting the coherency issues aside, the citizenship limitation is sometimes supported on originalist grounds,³⁷⁸ combined with Chief Justice Rehnquist's

372. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 242–43 (2010).

373. See *United States v. Pink*, 315 U.S. 203, 228, (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491–92, (1931); *Sardino v. Fed. Reserve Bank*, 361 F.2d 106, 111 (2d Cir. 1966) (Friendly, J.).

374. In general, American law moved from a territorial to a due process model of personal jurisdiction. Compare *Pennoyer v. Neff*, 95 U.S. 714 (1877) (territorial) with *Int'l Shoe Co. v. Washington*, 362 U.S. 310 (1945) (due process). The Supreme Court has repeatedly constrained personal jurisdiction over foreign defendants by reference to due process rights. See, e.g., *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 109–09 (1987); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982). Sovereignty concerns have returned in personal jurisdiction cases, but this development does not suggest that foreign defendants lack due process rights. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (“And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”).

375. See *Boumediene v. Bush*, 553 U.S. 723, 762–63 (2008); see also Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 272 (2009) (“*Boumediene* provides a long overdue repudiation of Rehnquist’s opinion in *Verdugo-Urquidez*, which Kennedy had nominally joined, while sharply limiting it in his concurrence.”).

376. See sources cited *supra* note 361.

377. The social compact models generally restrict rights-bearing status to “members” of the imagined social contract, which usually means citizens. See Roosevelt, *supra* note 357, at 2046–49. Professor Neuman called these same theories “membership models.” See NEUMAN, STRANGERS, *supra* note 354, at 6–7.

378. The argument tends to center on scattered references to domestic affairs, particularly the Constitution’s Preamble, which generally emphasizes that the founding charter exists for the benefit of the covered political community. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265; Kent,

opinion in *Verdugo-Urquidez*. These arguments fail to (1) explain strings of constitutional text showing that the Founders did limit rights-bearing status in some contexts and not others,³⁷⁹ (2) surmount evidence that specifying the extraterritorial application of the Constitution was simply something that the Framers did not think about at all,³⁸⁰ (3) sufficiently deal with originalist data that cuts the other way.³⁸¹ Moreover, the position relies far too heavily on Chief Justice Rehnquist's *Verdugo-Urquidez* opinion, which contained an untenable reading of *Eisentrager*, had overly-categorical language rejected by the decisive voter in the case, and was rejected by *Boumediene*.³⁸² Thus, the no-rights position fails to provide a satisfactory answer to the grey-hole problem.

Institutions. Another problem centers not on the correctness of the no-rights rejoinder, but on the institution that should decide it. Although authority is arrayed against the rejoinder, the D.C. Circuit—which is effectively the exclusive venue for extraterritorial detention litigation³⁸³—has developed a thread of precedent largely embracing Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*.³⁸⁴ A model that impairs habeas litigation for certain noncitizen combatant designees detained under color of American law, as

Against a Global Constitution, *supra* note 354, at 489–90, 509–13. The Preamble makes precisely this cameo in Chief Justice Rehnquist's *Verdugo-Urquidez* opinion. *See* 494 U.S. at 265. The preambular text does not prove nearly as much as those preferring a restrictive view of rights-bearing status would like, however. That a charter exists for the benefit of a particular community says nothing about the territorial scope of the rules that produce the domestic benefit. (Rights might be distributed for the benefit of members, but that does not mean that they are held only *by members*.) One need only imagine simple scenarios where recognizing the rights-bearing capacity of outsiders promotes domestic interests to understand the limits of the preambular text.

379. The Privileges and Immunities of Article IV, section 2, for example, singles citizens out as the bearers of the pertinent rights. By contrast, under the Fifth Amendment, all “persons” can bear a due process right. *See also* NEUMAN, STRANGERS, *supra* note 354, at 5 (“From its inception the very text of the Constitution has suggested inconsistent readings of its intended scope.”); Henkin, *supra* note 354, at 32 (“The choice in the Bill of Rights of the word ‘person’ rather than ‘citizen’ was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.”). For another example, the impost clause applies only to taxes “throughout the United States.” U.S. CONST. art. I, § 8.

380. *The rights-bearing capacity* of noncitizens was underspecified because, at the turn of the eighteenth century, the world was in fact governed by a territorial paradigm of legislative authority under which such a question would have never arisen. *See* NEUMAN, STRANGERS, *supra* note 354, at 7; Neuman, *Whose Constitution?*, *supra* note 354, at 973; Neuman, *supra* note 357, at 7–8. *But see* Kent, *Against a Global Constitution*, *supra* note 354, at 491–99 (disputing premise of this argument).

381. For example, Professor Kent's originalist account erred with respect to the territorial scope of the habeas privilege. He has repeatedly asserted that the habeas privilege was unavailable to noncitizens abroad, which is false. *See* Kent, *Judicial Review for Enemy Fighters*, *supra* note 129, at 175 n.95. He excluded his own position because he has identified cases that refused habeas relief to noncitizens abroad *on the merits* and has misread them to jurisdictionally exclude noncitizens abroad from the privilege. *See* Kent, *Insular Cases*, *supra* note 354, at 139 n.157. He also confuses the conditions for *suspending the privilege*, which involve danger to the homeland, with the reach of the privilege itself. *See* Kent, *Against a Global Constitution*, *supra* note 354, at 523–24.

382. *See supra* notes 362–372 and accompanying text.

383. *See* Vladeck, *supra* note 7, at 1452.

384. *See infra* notes 386–390 and accompanying text.

Professor Tyler’s Hybrid Model does, runs the risk of locking in the anti-detention precedent of the D.C. Circuit, immunizing it from future habeas litigation before the Supreme Court.³⁸⁵

To illustrate the problem, take basic questions about detention authority *simpliciter*. In *Kiyemba v. Obama* (“*Kiyemba I*”),³⁸⁶ the D.C. Circuit held—citing Chief Justice Rehnquist’s discredited gloss on *Eisentrager* from *Verdugo-Urquidez*—that “[d]ecisions of the Supreme Court and of this court . . . hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”³⁸⁷ In *Rasul v. Myers* (“*Rasul II*”),³⁸⁸ the circuit again cited Chief Justice Rehnquist in affirming the holding of *Rasul I*,³⁸⁹ in which the panel had held that “courts did not bestow constitutional rights on aliens located outside sovereign United States territory.”³⁹⁰ *Boumediene*, however, expressly rejected the categorical reading of *Eisentrager* that Chief Justice Rehnquist’s *Verdugo-Urquidez* opinion embraced. Even setting *Boumediene* aside, *Kiyemba* and *Rasul* rely primarily on cases about the due process rights of noncitizens *seeking entry into the United States*—i.e., the due process law of immigration—in formulating a proposition about national security detention.³⁹¹

The D.C. Circuit has also decided a number of ancillary issues that would become more difficult to review if Professor Tyler’s preferred coverage rule were adopted.³⁹² In *al-Bihani v. Obama*,³⁹³ for example, it held that the category of indefinitely detainable noncitizens had to be at least as broad as the category of noncitizens triable by military commission.³⁹⁴ Its *Kiyemba* decisions established that there was virtually no constitutional right to contest

385. As mentioned above, Professor Tyler does suggest that there might be other domestic and international constraints on detention. See *supra* note 353. To the extent that these are sources of substantive anti-detention rules and have to be raised using a habeas mechanism, however, they are subject to the same lock-in effects as are any other substantive anti-detention rule litigated exclusively in a federal habeas proceeding. The only way to avoid the lock-in effect would be to identify another procedural vehicle capable of presenting the Supreme Court with the *merits* of a substantive anti-detention rule.

386. 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010), *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).

387. *Kiyemba*, 555 F.3d at 1026. The *Kiyemba I* panel explained that *Boumediene* established nothing more than the narrow proposition that the *habeas privilege* ran in favor of noncitizens abroad. *Id.* at 1029, 1032.

388. 563 F.3d 527 (D.C. Cir. 2009).

389. *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

390. *Id.* at 666.

391. See *Kiyemba*, 555 F.3d at 1026–27 (quoting *Galvan v. Press*, 347 U.S. 522 (1954); citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)).

392. These issues *could be* reviewed if they arose out of GTMO litigation, which involves detainees to whom Professor Tyler’s preferred coverage rule would extend the privilege. As indicated above, however, virtually all litigation involving the detention of noncitizen combatant designees held abroad will involve noncitizens held at a facility that—unlike GTMO—does not sit on land subject American sovereign control, either formal or functional. See *supra* note 10 and accompanying text.

393. 590 F.3d 866 (D.C. Cir. 2010).

394. See *id.* at 872.

transfers³⁹⁵—holding that, as long as the government *alleges* that the transferred detainee is “likely” to avoid torture in the receiving country, the detainee lacks even rights to notice or a hearing.³⁹⁶ In *Mohammed v. Obama*,³⁹⁷ the circuit determined that a probability of torture at the hands of a non-state actor did not distinguish *Kiyemba II*.³⁹⁸ In *Omar v. McHugh*,³⁹⁹ the panel reasoned that there was no constitutional barrier to legislation that stripped habeas jurisdiction over statutory rights because Congress could have simply repealed the statutory right itself.⁴⁰⁰ The circuit’s decisions regarding evidentiary burdens and presumptions conform to the same pattern of extreme deference to facts alleged by the military.⁴⁰¹

Academic work criticizing the D.C. Circuits’ post-*Boumediene* national security detention cases is easy to find.⁴⁰² No matter how one extracts a rule of extraterritoriality from doctrine, the controlling synthesis should not come from an intermediate appeals court—it should come from the Supreme Court, whose essential function is to superintend the resolution of federal questions in federal courts.⁴⁰³ By withholding a habeas remedy from the category of noncitizen enemy combatant designees detained in non-sovereign territory, the Hybrid Model would risk cementing D.C. Circuit precedent as controlling law on the pertinent questions.

C. Under-Specified National Security Law

To the extent that its coverage plank excludes detainees held outside functionally sovereign territory, the Hybrid Model would also extinguish the role that habeas proceedings play in specifying ambiguous areas of national security law. That is, habeas decisions about *detention* also transmit, to the national

395. In *Kiyemba I*, the D.C. Circuit held that seventeen Uighurs detained at GTMO had no right to release if the United States was unable to find some other country to accept them. *Kiyemba*, 555 F.3d at 1026. The Supreme Court granted certiorari review of *Kiyemba I*, *Kiyemba v. Obama*, 558 U.S. 969 (2009), but dismissed the proceeding once the Obama Administration averred that it had located a country willing to accept the Uighurs. *Kiyemba v. Obama*, 559 U.S. 131 (2010).

396. See *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (“*Kiyemba II*”).

397. See Order, *Mohammed v. Obama*, 2010 U.S. App. LEXIS 16023 (D.C. Cir. July 8, 2010).

398. See *id.* (citing *Kiyemba II*).

399. 646 F.3d 13 (D.C. Cir. 2011).

400. *Id.* at 22–23. Then-Judge Kavanaugh seemed to see no constitutional problem with stripping a habeas remedy as long as Congress would have the power to pass a statute authorizing the detention. *Id.* at 24.

401. See, e.g., *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (government records in GTMO proceedings entitled to presumption of regularity); *al-Bihani v. Obama*, 590 F.3d 866, 877–78 (D.C. Cir. 2010) (preponderance-of-evidence rule is appropriate for military detention); *id.* at 879 (hearsay evidence can be admitted to prove factual basis for custody). Even though the Department of Defense argued that the preponderance standard was appropriate, a D.C. Circuit panel *still* complained that it was too prisoner-friendly. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010).

402. See *supra* note 8 (collecting sources).

403. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (exploring the deeply-ingrained view that lower courts have obligation to faithfully apply rules of courts with revisory jurisdiction).

defense bureaucracy, *non-detention* rules about military operations. Military judge advocates advise commanders in the field, government attorneys advise the civilians who make policy,⁴⁰⁴ and recipients of that advice act on an understanding of substantive law specified largely through habeas proceedings.⁴⁰⁵ Take the habeas proceeding away, and lose the means of specification.

Consider this basic question: are US military operations against ISIS authorized?⁴⁰⁶ The executive claims statutory authorization from a combination of the AUMF and NDAA, under which the military may act against people or entities that were “part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”⁴⁰⁷ ISIS would therefore have to qualify as an “associated force[] that [is] engaged in hostilities against the United States.” Does it?

The question almost certainly won’t be litigated by a *citizen* held under color of the AUMF and NDAA. Recall that the only two pre-*Doe* citizens that the military knowingly subjected to preventative detention were Hamdi (released) and Padilla (criminally sentenced).⁴⁰⁸ Doe himself was eventually transferred to Bahrain.⁴⁰⁹ Indeed, the machinations either to release John Doe in a Middle-East war zone or to transfer him to custody of a Middle-East ally were quite likely motivated by the desire to avoid the risk of a judicial ruling that the AUMF does not actually cover IS-theatre operations.⁴¹⁰ If the relationship between the putative authorization and the putatively authorized operation is ever to be decided by a court, then it will be decided in a noncitizen detention case.

Because the Hybrid Model would treat noncitizen combatant designees as unprivileged, habeas proceedings would become similarly incapable of producing an answer to the IS-theatre question.⁴¹¹ To be clear, there is a

404. See Chesney, *Habeas Lens*, *supra* note 234, at 851.

405. See generally *id.* at 848–53 (exploring how the transmission mechanism works across multiple channels).

406. See Oren Gross, *Unresolved Legal Questions Concerning Operation Inherent Resolve*, 52 TEX. INT’L L.J. 221 (2017) (discussing legal questions and justifications surrounding the United States’ military operations in Syria, Libya, and Iraq in the war against ISIS); Stephen W. Preston, *Reflections of a Wartime General Counsel*, 48 TEX. TECH L. REV. 375, 380–82 (2016) (transcribing a speech by the former General Counsel to both the CIA (2009–2013) and Department of Defense (2013–2015) discussing authority for United States military actions abroad).

407. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1296, 1562 (2011).

408. See *supra* Part 1.

409. See Chesney, *Lessons Learned*, *supra* note 254.

410. See *id.*

411. There are, theoretically, other ways to present the question, but as a practical matter, these vehicles are extremely unlikely to be justiciable. See, e.g., Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J.F. 86, 102 (2016) (describing litigation initiated by army captain alleging that unauthorized military operations force him to violate his oath of allegiance); see also Goldsmith, *supra* note 264 (questioning justiciability of alternative litigation vehicle). The case precipitating the previously cited discussion,

reasonable argument that any executive overreach should be corrected by Congress, and Congress alone. But, in order to be untroubled by the complete unreviewability of the executive's determination that Congress has authorized war making in the IS theatre,⁴¹² someone has to be zealously committed to that specific separation-of-powers principle. That principle, moreover, draws only questionable decisional support after *Zivotofsky v. Clinton*,⁴¹³ which implies that traditional nonjusticiability rules may not apply when the issue involves a clash between the foreign affairs powers of the executive and legislative branches.⁴¹⁴ Furthermore, that separation-of-powers principle cannot do the same work when the executive is asserting not delegated authority under a statute, but inherent authority under Article II of the Constitution.⁴¹⁵

Indeed, the IS-theatre example usefully illustrates several important transmission functions that the pertinent habeas process performs. First, habeas proceedings can specify law governing the detention of a detainee category writ large—thereby producing a remedy not only for a specific prisoner, but also a substantive anti-detention rule for those who are detained under the same authority. Second, questions about noncitizen detention reach well beyond particular detainee-theatre combinations. Interpreting the military authority to detain noncitizens in the IS theatre, for example, would almost certainly require a court to interpret what, under the 2012 NDAA, it means to offer “substantial support” to a declared enemy, as well as what types of due process constraints apply. Third, and as *Doe* suggests, a habeas case can involve important legal questions that go well beyond whether a particular prisoner is entitled to a discharge remedy. For instance, if a court excludes a particularly expansive reading of “substantial support,” then that reading might also constrain the use of lethal force against that same threat.⁴¹⁶ Or, as the IS-theatre example demonstrates, a habeas case can facilitate an authoritative declaration about whether the executive is authorized by Congress to use its war-making power.

Smith v. Obama, was dismissed on justiciability grounds. See *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. Nov. 21, 2016) (mem.). Alternately, someone might challenge the national security surveillance undertaken by reference to the AUMF, although such a claimant would face similar justiciability problems. Cf. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (barring suit to interrupt surveillance activity on standing grounds).

412. In this context, Professor Bruce Ackerman has called judicial review the only thing preventing the “transformation of the president into a latter-day King George III.” Bruce Ackerman, *Can the Supreme Court Force Congress to Own the War on ISIS?*, THE ATLANTIC (Aug. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/08/supreme-court-and-isis/402155> [https://perma.cc/J62K-BX27].

413. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (“*Zivotofsky I*”).

414. See *id.* at 196.

415. Although the Obama administration relied entirely on the AUMF as the source of authority for IS-theatre operations, there is no reason why a different administration would be foreclosed from making an argument under Article II of the Constitution. See Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 174 (2013).

416. See Chesney, *Habeas Lens*, *supra* note 234, at 851–52.

* * *

There are non-historical grounds for remaining skeptical of a coverage rule that restricts the habeas remedy by reference to the sovereign status of the detention site or the allegiance of the prisoner. First, the Hybrid Model's coverage plank combines with suspension-as-authorization to form an implausibly bifurcated detention power—during suspension, covered detainees (Americans and noncitizens with local allegiance) can be subject to otherwise unlawful detention, but uncovered detainees (noncitizens detained outside of functionally sovereign territory) cannot. Second, the inability of noncitizens to protect themselves in the political process means that the Hybrid Model's coverage plank jeopardizes remedies for illegal detention, producing grey holes that preserve only a façade of legality. Third, to the extent that noncitizens detained outside of functionally American territory cannot bring questions about substantive detention law in a habeas proceeding, the Hybrid Model's coverage plank also degrades a crucial means of specifying law for the national security apparatus.

CONCLUSION

Whatever problems there are with the Remedy Model, it represents a simple, elegant privilege framework. It contemplates a powerful transsubstantive remedy that requires judicial review of custody and, if that custody is illegal, discharge. The legality of the detention is determined not by reference to intrinsic anti-detention rules, however, but instead by reference to extrinsic substantive law. The thickness plank of the Hybrid Model necessitates a coverage restriction, lest anyone in American custody be entitled to Article III criminal process. The Remedy Model, on the other hand, entails no such compromise. Instead, the privilege should be available, to the extent possible under existing precedent, to anyone detained under color of federal law.

Insofar as the two Models present a choice, the legal history remains, to some degree, indeterminate. In terms of thickness, the pertinent pre-constitutional history confirms the crucial linkage between the privilege and substantive anti-detention rules, but it is less clear as to the nature of that linkage. In fact, the history is often *more* consistent with the thickness plank of the Remedy Model, which has also prevailed during previous American episodes pitting national security and liberty against one another. In terms of coverage, the history is closer, although—and as I have argued elsewhere—because the writ operated on the jailer *in personam*, the privilege should be understood as having been available to anyone detained under color of state law.

Even aside from the pre-constitutional history, there are other reasons to resist what amounts to the fairly significant reinterpretation of privilege thickness that the Hybrid Model entails. It is largely unnecessary during the steady state of national security risk, but saps the national government of reserve detention capacity it might need to respond effectively to emergencies. During

emergencies sufficient to trigger suspension, it gratuitously extinguishes compensatory remedies for wrongful detention. Moreover, the coverage plank under-protects noncitizens detained under color of American law but beyond its territory, which will invariably result in more unlawful detention and the loss of an important channel for specifying national security law.