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## Finding National Security

John Greenman

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## FINDING NATIONAL SECURITY

JOHN GREENMAN\*

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\* Assistant Law Professor, University of Oregon Law School. I would like to thank the Stanford Law School faculty for supporting my work on this paper, and in particular professors Dick Craswell, Dan Ho, Larry Lessig, Jeanne Merino, Norman Spaulding, Helen Stacy and Bob Weisberg, who helped me a great deal. I would also like to thank the participants in the University of Texas Law School's 2009 National security-Law Workshop and the 2010 Law & Society Conference, where I presented early versions of this paper. My colleagues Stuart Chinn, Tom Lininger and Jennifer Reynolds all gave generously of their time. Thanks are also due to professors Ida Bostian, Keith Bybee, Bobby Chesney, Brooke Coleman, Charlton Copeland, Stephen Lee, Hillel Levin, Andrea Roth, Suzanne Rowe and Nirej Sekhon. Special thanks goes to my research assistants and my assistant Amy McDonald. Finally, thanks to Zahie El Kouri for always supporting me.



## I. INTRODUCTION

We are more than ten years past the 9/11 attacks. This is a long time. Long enough, I think, to look back and see where we are. In this article I try to do that, and also imagine where we will go.

I want to make a big claim. This claim is that, a decade after 9/11, the United States, for political reasons, does not have a *substantive* national security exception. Instead we have a *membership* based exception. The national security exception, as I define it, is the space in which the political branches can act without observing a suspect's individual constitutional rights.<sup>1</sup> This exception is not substantive because it does not depend on the threat posed to the nation's security. A substantive national security exception, in other words, would explain what national security is, distinguishing it from regular crime. The government could then set aside normal rights when national security—whatever it is—is at stake.

Instead of substance, I argue that the United States has chosen *membership* to define national security. Under membership, a suspect's rights depend not on what he has done, but on his connection to the United States. This connection is determined by nationality and location. U.S. citizens and people inside the country—people I call *members*<sup>2</sup>—get more rights, while aliens and people outside the country—*nonmembers*—get fewer rights. The membership model is not substantive because it does not define national security. Rather, it relies on the fact that nonmembers simply have fewer rights against U.S. power in every context.

To see the difference between models, consider a simple hypothetical: the Executive wants to detain someone without trial. The detainee allegedly threatens U.S. national security. Under a substantive model, the Executive agency would need to make a plausible allegation that the detainee threatens mass harm, or, perhaps, is working with a terrorist group.<sup>3</sup> Under the membership model, the President can detain the suspect if he is not a U.S. citizen, or is arrested outside the United States, or both.

My aim here is to prove that the United States has chosen the membership model, and explain why. Scholars have argued about what the substance of the national security exception should be.

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1 I mean the personal constitutional rights that constrain the government when it threatens, captures, detains or uses violence against people, such as the right to Due Process and Liberty. U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. XIV, §1 (highlighting respectively the right to be free from unlawful search and seizure; the right not to be deprived from life, liberty or property, without due process of the law; and these rights as applied to the states).

2 I have borrowed this definition of membership from Professor Gerald Neuman, whose work I address later. *See generally* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) [hereinafter Neuman, *Whose Constitution*]. Neuman's work is superb—it defines the field—but I do critique his treatment of the national security exception. *See infra* Part II.E.

3 There are other possible substantive models.



These arguments are usually endorsements of international law,<sup>4</sup> or proposals for new U.S. policies.<sup>5</sup> But no one has explained the political dynamic that is preventing these substantive proposals from becoming law. And while scholars have written about membership in extraterritorial rights,<sup>6</sup> no one has examined the relationship between membership and the national security exception.<sup>7</sup>

This article has five parts. The first shows that outsiders have fewer rights than insiders when the government acts in the name of national security. The second argues that there is no good theoretical reason for this difference. The third argues that, in choosing membership, we have avoided defining national security. The fourth explains the politics that have led us to choose membership over substance. The fifth explains how the courts can use equality to push the political branches back towards substance.

## II. MEMBERSHIP IN PRACTICE

The government, when acting in the name of national security, is more likely to recognize the rights of someone inside the country than outside it, and more likely to give rights to citizens than aliens. Congress does this either by passing laws that target only outsiders, or by delegating discretion to the Executive. The Executive, when exercising this discretion, has directed national security measures only at nonmembers. The courts, meanwhile, defer to the political branches' claimed national security power when it is used against outsiders.<sup>8</sup>

Before continuing, let me clarify terms. When I talk about people outside the country, I mean outside the territorial United States. In the national security context—which is the focus of this

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4 See, e.g., Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295 (2010) (offering that both international law and the U.S. Constitution constrains the jurisdiction of military commissions); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429 (2010) (reflecting on the different ways in which to evaluate threats of transnational networks through the international humanitarian law); David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957 (2009) (proposing that the observation of international standards of war is essential in sustaining the war on terror); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L L.J. 135 (2008) (criticizing the United States for not using international standards nor its own constitutional standards for treatment of detainees).

5 See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009) [hereinafter Cole, *Out of the Shadows*] (proposing a new preventive-detention law); Glenn Sulmasy, *The Need for a National Security Court System*, 23 ST. JOHN'S J. LEGAL COMMENT. 1007 (2009) (proposing a national security court).

6 See, e.g., Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307 (2011); *Developments in the Law—Extraterritoriality and the War on Terror*, 124 HARV. L. REV. 1258 (2011); Bruce Corey, Note, *At Writ's End: Using the Law of Nations to Decide the Extraterritorial Reach of the Suspension Clause*, 78 GEO. WASH. L. REV. 374 (2010); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010) [hereinafter Cleveland, *Embedded*]; Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005); Neuman, *Whose Constitution*, *supra* note 2.

7 See, e.g., Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, *supra* note 6.

8 The only exception is the recent policy-perfecting push by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), the most important Guantanamo case. E.g., *id.* at 766.



article—extraterritorial rights usually are rights against executive action. When the United States picks up a suspect in Macedonia—or any other foreign country—and imprisons him in Afghanistan, he can try to get into U.S. court with a habeas petition.<sup>9</sup> The question presented is whether he has a right to habeas relief, and if so, whether he has Due Process and Liberty rights, and then, finally, whether those rights were violated.<sup>10</sup> Here, I am concerned with the question of whether a suspect arrested abroad by U.S. forces has any rights under the U.S. constitution.<sup>11</sup>

I also use the terms “member” and “nonmember” (or, alternatively, “insider” and “outsider”). These terms combine two different legal concepts: nationality and territoriality. Treating them as a single category therefore obscures legal distinctions. A nonmember, as I use the term, might be a citizen abroad, or an alien at home, or a non-U.S. citizen abroad. So something is lost by using the word “member.” But membership is still useful; it helps explain the political dynamic behind our national security law, in which nationality and territoriality work the same way: as proxies for otherness. When the government decides not to recognize rights, it uses nationality and territoriality to convince citizens at home that they will not be targeted. Thus, when Congress approves of military detention,<sup>12</sup> the law only targets aliens. And when a court approves of targeted killing,<sup>13</sup> it limits its holding to U.S. action overseas even though there is no doctrinal reason to do so.<sup>14</sup>

Both nationality and territoriality determine a relationship to the United States, the relationship that, in turn, determines the availability of individual rights. One becomes a member—a party to the social contract with the United States—either by being a citizen or inside the United States, where the Constitution presumptively applies.<sup>15</sup> Both are also *extrinsic* to national security. Noncitizens get fewer rights solely by virtue of being noncitizens; the same is true of people, whether U.S. citizens or not, outside the country. Thus a membership-based national security exception will not define national security.

In making this point I discuss four national security practices: 1) targeted killing; 2) military detention and trial; 3) extraordinary rendition; and 4) nonmilitary preventive detention. Each tactic, I argue, is more likely to be used against nonmembers than members. I will also look at habeas corpus, the main vehicle for judicial review of national security detention.

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9 See *infra* Part II.E.

10 *Id.*

11 I would distinguish the extraterritorial application of constitutional rights against Executive action from the question of whether the U.S. can create laws that apply in other countries, an important but distinct question. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-59 (1991); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter THIRD RESTATEMENT].

12 See Military Commissions Act, 120 Stat. 2636 (2006) (codified as amended at 28 U.S.C.A. § 2241(e)(2)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008).

13 See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51 (D.D.C. 2010).

14 See *infra* Part II.A.

15 See *infra* Part III.A.



*A. Targeted Killing*

Targeted killing is the premeditated attempt to kill without trial.<sup>16</sup> The United States directs targeted killing at nonmembers by only targeting people outside the United States.<sup>17</sup> The United States has targeted people for some time—Fidel Castro, for instance<sup>18</sup>—and has killed an alleged terrorist and U.S. citizen in Yemen.<sup>19</sup>

That citizen was Anwar al-Aulaqi.<sup>20</sup> Al-Aulaqi was one of several citizens who, according to the Washington Post, was put on the targeted “capture or kill” list by the C.I.A and Air Force,<sup>21</sup> although he was the only named target.<sup>22</sup> He was implicated in several attacks on the United States, including encouraging Major Nidal Malik Hasan, the Army psychiatrist charged with killing 13 people at Fort Hood Army Base.<sup>23</sup> While it is clear that al-Aulaqi encouraged violence against the United States—he called Major Hasan a hero<sup>24</sup>—his family denied that he was a terrorist.<sup>25</sup> The C.I.A killed him with a Predator Drone.<sup>26</sup>

We know this in part because Al-Aulaqi’s father Nasser sued to stop the United States from kill-

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16 See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405 (2009).

17 The discussion regarding targeted killing within the United States remains in the hypothetical realm. See Jonathan Ulrich, *The Gloves Were Never on: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT’L L. 1029, 1059 (2005) (describing the effect of setting a precedent that extends executive power to order targeted killings to “any time, [sic] anywhere”); see also Mary Ellen O’Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT’L L. 325, 326 (2003) (arguing that the extension of allowing targeted killing anywhere in the world would allow targeted killing within the United States).

18 Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145, 149 (2010). Of course, the United States may have covertly targeted people in the United States without informing us.

19 See Mark Mazzetti et. al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1; see also Dana Priest, *U.S. Playing a Key Role in Yemen Attacks*, WASH. POST, Jan. 27, 2010, at A1 [hereinafter Priest, *U.S. Playing*] (describing the responsibility that the U.S. intelligence had in orchestrating the Yemen attacks).

20 Scott Shane, *Many Terrorism Suspects Linked to the Radical Cleric Awlaki*, N.Y. TIMES, November 19, 2009, at A1 [hereinafter Shane, *Many Terrorism*]. (stating that Al-Aulaqi was born in New Mexico but then moved to Yemen, later returning to the United States for college and graduate school).

21 Priest, *U.S. Playing*, *supra* note 19, at A1.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Obituary: Anwar al-Awlaki*, BBCNEWS (Sept. 30, 2011), <http://www.bbc.co.uk/news/world-middle-east-11658920>.

26 See Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 40. Predators are remote-controlled and unmanned. *Id.* The United States uses them for targeted killings in Iraq, Afghanistan and Pakistan. *Times Topics: Predator Drones*, N.Y. TIMES (Sept. 28, 2010), [http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned\\_aerial\\_vehicles/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html) [hereinafter *Times Topics: Predator Drones*]. There are currently two drone programs, one run by the military and the other by the C.I.A. Mayer, *supra* at 26. While the military releases information about its drone program, the C.I.A. uses drones covertly. Eric Schmitt & Mark Mazzetti, *In a First, U.S. Provides Pakistan with Drone Data*, N.Y. TIMES, May 14, 2009, at A14; David Zucchino, *Combat by Camera*, LOS ANGELES TIMES, July 6, 2010, at A1. The United States’ use of Predators is increasing; the Obama administration expanded the CIA program in late 2009. *Times Topics: Predator Drones*.



ing his son “unless he presents a concrete, specific, and imminent threat to life or physical safety,”<sup>27</sup> and “there are no means other than lethal force that could reasonably be employed to neutralize the threat.”<sup>28</sup> In other words, Nasser was pressing for a *substantive* national security test—one tied to the threat his son posed and the government’s ability to respond.

The court dismissed Nasser’s claim,<sup>29</sup> in part because it presented a political question<sup>30</sup> that is constitutionally committed to the political branches and therefore nonjusticiable.<sup>31</sup> The court was, in its view, incompetent to assess the use of “military force against a terrorist target *overseas*.”<sup>32</sup>

This holding is radical in its own way. No other modern court has held that the Executive can target a U.S. citizen on mere allegations of terrorism.<sup>33</sup> Indeed, it presents the Executive with a dangerous power (the court describes it as “unsettling”<sup>34</sup>).

Presumably, this is why the decision is limited to *overseas* targets. But—and this is the oddity of the decision—there is no doctrinal reason for this. In fact, doctrine suggests a different outcome. As Professor Kevin Jon Heller has noted,<sup>35</sup> U.S. law expressly provides that even the overseas killing of a U.S. national is murder.<sup>36</sup> Congress has made it perfectly clear that the law protects U.S. citizens when they go abroad. There is no precedent for the removal of rights of U.S. citizens on political-question grounds. No court has ever used the political-question doctrine to dismiss a citizen’s claim that his rights were violated by U.S. action abroad.<sup>37</sup> Moreover, the law of extraterritoriality—the doctrine that governs whether the Constitution applies abroad—dictates the opposite result. U.S. citizens abroad *do* have constitutional rights. There is no ambiguity about this: “When the Government reaches out to punish a citizen who is abroad . . . the Bill of Rights and other parts of the Constitution provid[ing] to protect his life and liberty should not be stripped away just because he

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27 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

28 *Id.*

29 The court held that 1) al-Aulaqi’s father lacked standing and 2) the case was barred by the political-question doctrine and 3) the threat of a future state-sponsored extrajudicial killing was not a cognizable tort under the Alien Tort Statute. *See generally Id.*

30 *Id.* at 52.

31 *See Baker v. Carr*, 369 U.S. 186, 208-38 (1962).

32 *Al-Aulaqi*, 727 F. Supp. 2d at 47 (emphasis added).

33 Courts have not even allowed surveillance of U.S. citizens on the grounds of suspicion of terrorism or national security threat. *See Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975) (holding that presidential directives do not overcome the requirement for a warrant in the domestic installation of wiretaps); *see also* *Amnesty Int’l U.S.A. v. Clapper*, 638 F.3d 118, 124 (2d Cir. 2011) (summarizing the amendments to the Foreign Intelligence Surveillance Act of 1978 which continue the prohibition of targeting those within the United States for surveillance in a manner inconsistent with the Constitution of the United States).

34 *Al-Aulaqi*, 727 F. Supp. 2d at 51.

35 Kevin Jon Heller, *Let’s Call Killing al-Awlaki What It Is — Murder*, OPINIO JURIS (April 8, 2010), <http://opiniojuris.org/2010/04/08/lets-call-killing-al-awlaki-what-it-is-murder/>.

36 “A person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States” shall be punished, if relevant, as murder. *See* 18 U.S.C. § 1119 (2006); *see also id.* § 1111 (2006).

37 *Al-Aulaqi*, 727 F. Supp. 2d at 49.



happens to be in another land.”<sup>38</sup> Citizens abroad have the right to jury trial.<sup>39</sup>

The political-question holding rests on the fact that the decision to kill Al-Aulaqi was a “military” decision (although technically this is wrong)<sup>40</sup> that related to “national security.”<sup>41</sup> But military and national security actions are not inherently territorial. There is no doctrinal reason that a decision authorizing targeted killing on the basis of national security should apply only overseas.

The holding makes sense, though, as a *political* story. The decision to use armed drones in Nevada would be more controversial than the decision to use them in Yemen. Presumably courts would be more likely to intervene—to actually enjoin the use of force—if it were on U.S. soil. So the Executive chooses not to target people in the United States, and the court refuses to authorize using drones in the United States.

This is not to say that the judgment was wrong.<sup>42</sup> It might be right for the wrong reason. A substantive definition might have allowed the government to target Al-Aulaqi. Al-Aulaqi was allegedly in a remote part of Yemen, outside of the official government’s control.<sup>43</sup> This changes the risk involved in capturing him. A substantive rule could take this risk into account, factoring location into a test based on threat posed, and the government’s capacity to respond. But if the government could have legally targeted Al-Aulaqi because 1) he posed an active threat and 2) it would have unduly risked U.S. lives to arrest him, *then that should be the test*. As with other national security issues, this question is not hypothetical. The government is now trying to kill three other unknown Americans<sup>44</sup> who might be protected under a substantive test.

### *B. Military Detention and Trial*

Perhaps because military detention is controversial, the Executive rarely uses it at home. Of all the post-9/11 detainees arrested in the United States, only two—Ali Saleh Kahlah al-Marri<sup>45</sup> and

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38 Reid v. Covert, 354 U.S. 1, 6 (1957).

39 *Id.* at 18-19.

40 As best we can tell, the CIA, not the Air Force, is running the operation, although they now work together. See Julian E. Barnes & Adam Entous, *Yemen Covert Role Pushed: Foiled Bomb Plot Heightens Talk of Putting Elite U.S. Squads in CIA Hands*, WALL ST. J. ONLINE (Nov. 1, 2010), <http://online.wsj.com/article/SB10001424052748704477904575586634028056268.html>. The CIA is not a military organization, but a paramilitary one. Still the CIA is an *extraterritorial* agency, limited in its domestic operations. 50 U.S.C. § 403-4a(d)(1) (2006) (denying any police, law enforcement, subpoena, or internal-security functions to the CIA). The same is true of the Air Force. See 18 U.S.C. § 1385 (2006) (describing the repercussions for employing any part of the Army or Air Force as a posse comitatus). A rule that says targeted killing is okay when done by the CIA or Air Force is thus a rule that keeps targeted killing outside the United States.

41 *Al-Aulaqi*, 727 F. Supp. 2d at 49-52.

42 For a good discussion see John C. Dehn, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. J. CONST. L. 175 (2010)..

43 Barnes & Entous, *supra* note 40.

44 Priest, *U.S. Playing*, *supra* note 19 at A1

45 For a partial history, see *al-Marri v. Pucciarelli*, 534 F.3d 213, 216-17 (4th Cir. 2008) (per curiam), *vacated and remanded* by *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).



Jose Padilla—were put into military detention.<sup>46</sup> Both challenged their detentions in court.<sup>47</sup> The President eventually chose to move them both into criminal detention rather than argue the military-detention issue in the Supreme Court.<sup>48</sup>

For people arrested within the United States, the Executive has chosen criminal detention. This is less true with people arrested abroad. Detainees picked up overseas were housed at Guantanamo<sup>49</sup> and Bagram Air Force Base.<sup>50</sup> Yaser Hamdi, a U.S. citizen picked up in Afghanistan, was also kept in military detention.<sup>51</sup> Courts have approved these detentions, subject to procedural requirements.<sup>52</sup>

Congress also directs military detention at outsiders. The portion of the Military Commissions Act (MCA) that creates a statutory framework for military trial applies only to alien unprivileged enemy belligerents.<sup>53</sup> The act sweeps very broadly, taking in people who have “purposefully and materially supported hostilities against the United States or its co-belligerents.”<sup>54</sup> This material-support provision seems at odds with international law.<sup>55</sup> The habeas-stripping provisions of the MCA also apply only to noncitizens.<sup>56</sup>

The targeting of outsiders is included in the most recent national-defense authorization, now approved in the House but not the Senate. The bill restricts detainee treatment and procedure, but only

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46 For a history of the proceedings see *Padilla v. Hanft*, 547 U.S. 1062, 1062-64 (2006) (Kennedy, J., concurring).

47 *Padilla v. Hanft*, 423 F.3d 386, 386 (4th Cir. 2005); *al-Marri*, 534 F.3d at 216-17.

48 After a complicated series of opinions giving conditional support for the Executive’s view, *see generally* *Padilla*, 423 F.3d 386 (4th Cir. 2005), *al-Marri*, 534 F.3d 213 (4th Cir. 2008), the Supreme Court granted certiorari to *al Marri*. *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008). Rather than argue at the Supreme Court, the Executive transferred *al Marri* to the criminal system. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). The President transferred *Padilla* into criminal custody before the Supreme Court reviewed his petition for certiorari. *Padilla v. Hanft*, 547 U.S. 1062, 1062-64 (2006) (Kennedy, J., concurring).

49 *Boumediene v. Bush*, 553 U.S. 723, 723 (2008).

50 *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

51 *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

52 *Boumediene*, 553 U.S. at 723; *Al Maqaleh*, 605 F.3d at 99; *Hamdi*, 542 U.S. at 516-24. It is important to distinguish between executive power to detain and the right to habeas. They are separate (although obviously closely linked) analyses.

53 Military Commissions Act, Pub. L. No. 109-366, § 948d, 120 Stat. 2600, 2603 (2006) (codified as amended at 28 U.S.C.A. § 2241(e)(2)) (defining jurisdiction of military commissions). This may leave the door open for military trial of citizens on other authority (based, for example, on executive power alone, or other statutes). For a fuller discussion *see* Jack Balkin, *Does the Military Commissions Act Apply to Citizens?*, BALKINIZATION (Sept. 29, 2006), <http://balkin.blogspot.com/2006/09/does-military-commissions-act-apply-to.html>.

54 Military Commissions Act, § 948a(1)(A)(i), 120 Stat. at 2601.

55 Which does not mean that it is unconstitutional or invalid. *See* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INTL L. 48, 60-62 (2009) (discussing the MCA and its definitions as they have been legally utilized).

56 Military Commissions Act, 120 Stat. 2636 (2006) (codified as amended at 28 U.S.C.A. § 2241(e)(2)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008). The MCA does contain some substantive provisions: it lists offenses triable by military commission. Military Commissions Act, § 950v(b), 120 Stat. at 2626. But it does not provide that it is the sole Congressional authority for military commissions. *See* Balkin, *supra* note 53 (explaining that Department of Defense determinations are not conclusive and the legality of detaining “enemy combatants” at Guantanamo should be reviewed by the courts). It is thus better read as an authorization of existing practices—specifically, the post 9/11 Bush detention policies—than as a limit on the national security power.



for noncitizen detainees (excluding alien members of the armed forces).<sup>57</sup> It prevents the Executive from transferring alien detainees to the United States.<sup>58</sup> The bill, if passed as is, would attempt to limit executive power. But this limitation does not prevent the executive from using military detention. Rather it *requires* military detention for some<sup>59</sup> terroristic offenses.<sup>60</sup> This substantive definition of national security applies, again, only to “any person who is not a citizen of the United States.”<sup>61</sup>

We can wonder, as with other national security laws, whether the MCA would be different if it applied to citizens. Certainly the law was sold as targeting outsiders. Senator Lindsey Graham, the bill’s sponsor, said that the MCA was needed to stop enemy aliens from having “an unlimited right of access to our federal courts like a U.S. citizen.”<sup>62</sup> Indeed, the MCA is rarely used against citizens due to the controversial nature of that application.

### C. Extraordinary Rendition

Extraordinary rendition is the transfer of someone, without due process, to another place where there is a risk of torture.<sup>63</sup> Every documented target of U.S. extraordinary rendition has been an outsider—an alien arrested abroad.<sup>64</sup> There is evidence that the United States uses extraordinary rendition for interrogation. The idea is to transfer a prisoner to an allied state, one where torture is routine, so that the United States need not torture directly.<sup>65</sup> As a government official said to the Washington Post, “We don’t kick the shit out of them. We send them to other countries so they can

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57 See H.R. 1540, 112th Cong. § 1031 (2011) (restricting the definition of an “individual detained at Guantanamo”).

58 *Id.* at § 1039.

59 The alleged crime also must be subject to trial by military commission under military law. *Id.* at § 1042.

60 *Id.*

61 *Id.*

62 Neil A. Lewis and Kate Zernike, *Measures Seek to Restrict Detainees’ Access to Courts*, N.Y. TIMES, September 21, 2006, at A22.

63 Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2007) [hereinafter Satterthwaite, *Rendered*].

64 As with other practices, there is always the chance that the United States has secretly rendered citizens and never been caught. But all the documented cases involve foreign nationals. See *id.* at 1338-43 (listing examples of extraordinary rendition of foreign nationals); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1217-18 (2007) (noting that the United States has not claimed the power to render a U.S. citizen to a foreign country for interrogation). We can distinguish the case of Ahmed Omar Abu Ali, a U.S. citizen arrested in Saudi Arabia who alleged he was tortured, in that Abu Ali was never transferred—he was arrested and detained in Saudi Arabia. *United States v. Abu Ali*, 528 F.3d 210, 224-26 (4th Cir. 2008), *appealed after new sentencing hearing* *United States v. Abu Ali*, 410 Fed. App. 673 (4th Cir. 2011). And, like all the other U.S. citizens captured in the “war on terror,” Abu Ali was eventually transferred into criminal custody. *Id.* at 226. Maher Arar, a Canadian citizen, was arrested by customs in JFK airport before he officially entered U.S. territory. COMM. ON INT’L HUMAN RIGHTS OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS,” 14-16(2004) [hereinafter TORTURE BY PROXY], available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

65 TORTURE BY PROXY, *supra* note 64, at 14-16.



kick the shit out of them.”<sup>66</sup>

Some alleged rendition victims have sued in U.S. courts. They all lost on the pleadings. In *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>67</sup> for instance, transferees sued Jeppesen, a private company that allegedly arranged air flights for the CIA.<sup>68</sup> Their stories are brutal:

- One plaintiff alleged the following: that Swedish authorities arrested him in Sweden.<sup>69</sup> He was handed over to the CIA and flown to Egypt.<sup>70</sup> He was held for five weeks “in a squalid, windowless, and frigid cell,” where he was beaten and shocked with electrodes on his ear lobes, nipples and genitals.<sup>71</sup> According to plaintiffs, “every aspect of [his] rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government.”<sup>72</sup>
- An Italian citizen was arrested and detained in Pakistan on immigration charges.<sup>73</sup> He alleged the following: that after several months in Pakistani detention, he was given to American officials.<sup>74</sup> They dressed him in a diaper and a torn t-shirt and shackled and blindfolded him for a flight to Morocco.<sup>75</sup> Moroccan security services beat him, denied him sleep and food, and threatened him with sodomy and castration.<sup>76</sup>
- An Ethiopian citizen was arrested in Pakistan on immigration charges.<sup>77</sup> He alleged the following: that he was flown to Morocco,<sup>78</sup> where Moroccan authorities beat him, breaking his bones.<sup>79</sup> Using a scalpel, they cut his penis and poured “hot stinging liquid” into the wounds.<sup>80</sup> He was later transferred to Guantanamo, where he was imprisoned for five years.<sup>81</sup> Eventually he was released to the United Kingdom.<sup>82</sup>

The CIA picked up another alleged victim, the German citizen Khaled el-Masri, in

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66 Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

67 614 F.3d 1070 (9th Cir. 2010).

68 *Id.* at 1073.

69 *Id.* at 1074-75.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1074-75.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1074-75.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*



Macedonia.<sup>83</sup> The CIA stripped, beat and shackled him, “dressed [him] in a diaper, injected [him] with drugs,” then flew him to Afghanistan and kept him for four months.<sup>84</sup> It was probably a case of mistaken identity.<sup>85</sup> The man who was actually arrested, however, was “an entirely innocent man.”<sup>86</sup> Eventually the CIA realized its mistake, dumped him in Albania, and admitted the error to Germany.<sup>87</sup> But when el-Masri sued the United States, the government invoked the state-secrets doctrine, allowing it to withhold the evidence he needed to make his case.<sup>88</sup> He lost.<sup>89</sup>

The state-secrets doctrine allows the government to privilege information in the “interest of national security.”<sup>90</sup> It has been used against U.S. citizens at home.<sup>91</sup> But, in those cases, there was no allegation of torture or other gross human-rights abuses.<sup>92</sup> We should wonder, again, if the public would allow this if the detainees were innocent U.S. citizens picked up at home. If the answer is no, we should then wonder what it is about el-Masri or the others that allows us to treat them differently.

If my thesis is correct—that the U.S. is avoiding dealing with the consequences of its national security practices by directing them at outsiders—then it would follow that extraordinary rendition, which is the most brutal national security practice, is also the most “outside.” Rather than directing it at aliens in the United States, or citizens abroad, extraordinary rendition is reserved for those who are least visible: aliens abroad. Indeed, the point of extraordinary rendition is to physically move torture somewhere far from the United States.

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83 See Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in ‘Rendition,’* WASH. POST., Dec. 4, 2005, at A1 [hereinafter Priest, *Wrongful*].

84 Khaled El-Masri, *I Am Not a State Secret*, L.A. TIMES, Mar. 3, 2007, at A14.

85 *Id.*

86 *Id.*

87 *Id.*; Priest, *Wrongful*, *supra* note 83, at A1.

88 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

89 *Id.* at 313.

90 *Id.* at 302.

91 See *United States v. Reynolds*, 345 U.S. 1, 3-4 (1953). When three civilians died in a military plane crash, for instance, the government invoked the privilege to protect the accident report from discovery. *Id.* And it has been used to stop discovery in contract claims between military contractors and the government, most recently in *General Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1910 (2011).

92 Professor Robert Chesney has written about the drift of the state-secrets privilege from a law that prevents civil recovery to a law that potentially obstructs public justice by protecting illegal government behavior. See Robert Chesney, *The Jeppessen Decision and the Issue of Good Faith in Asserting the State Secrets Privilege*, LAWFARE, Sept. 15, 2010, <http://www.lawfareblog.com/2010/09/the-jeppessen-decision-and-the-issue-of-good-faith-in-asserting-the-state-secrets-privilege/>. The cases from U.S. citizens alleged civil wrongs and unconstitutional surveillance. See *id.*; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007). Surveillance is an interesting test case for my hypothesis, because it has been applied to insiders. See *id.* At the same time, it is the least intrusive of the national security measures used by the government. It is telling that the one national security practice that is (sometimes) directed at insiders is the least disruptive. Even so, national security surveillance still targets outsiders more than insiders; FISA restricts the collection of foreign intelligence information in the United States, but not outside the United States. See Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801(f) (2000 & Supp. II 2002)).



### *D. Preventive Nonmilitary Detention*

By preventive detention, I mean detention—unjustified by normal criminal procedure—that is intended to stop a national security threat. There was a wave of preventive detentions after 9/11, but no preventive-detention statute authorized these detentions.<sup>93</sup> Rather, they were pretextual, justified by laws passed for other reasons.<sup>94</sup>

The burden of preventive detention fell hardest on noncitizens. The main source of post-9/11 preventive-detention authority was immigration law.<sup>95</sup> After 9/11, the Bush administration preventively detained over 5,000 foreign nationals, most of them Arab or Muslim.<sup>96</sup> Many were not charged with immigration violations, and some were held after judges had ordered them released.<sup>97</sup> But “not one of the more than 5,000 detained foreign nationals was convicted of a terrorist offense.”<sup>98</sup>

Along with immigration law, the other authority for the 9/11 detentions was the material-witness statute. This statute authorizes the detention of witnesses to secure testimony in a criminal proceeding, and is not limited to aliens.<sup>99</sup> Of the seventy or so people detained under the statute, only seventeen were U.S. citizens.<sup>100</sup>

The 9/11 attackers were noncitizens, so it makes sense that the government’s immediate response would target noncitizens. But we see the membership dynamic in play in the different remedies available after wrongful preventive detention. Members who were mistakenly detained were much more able to remedy this situation. Abdullah al-Kidd, for instance, was a U.S. citizen arrested in the United States.<sup>101</sup> He was held in terrible conditions, but released after sixteen days.<sup>102</sup> After release, al-Kidd sued Attorney General Ashcroft, two FBI agents, and the wardens who controlled his detention.<sup>103</sup> The wardens settled the case.<sup>104</sup> And while the Supreme Court dismissed the claim against Ashcroft,<sup>105</sup> the suit against the FBI agents is still pending.<sup>106</sup>

93 See Cole, *Out of the Shadows*, *supra* note 5 at 693.

94 *Id.* at 695.

95 Some preventive detentions were also military. I have already addressed military detention. See *supra* Part IB. Finally, other preventive detentions were accomplished through a pretextual use of criminal laws. See Cole, *Out of the Shadows*, *supra* note 5, at 703. For my purposes ordinary criminal prosecution, even if pretextual, is outside the national security exception because it affords ordinary rights and defenses.

96 See Cole, *Out of the Shadows*, *supra* note 5, at 703.

97 See Cole, *Out of the Shadows*, *supra* note 5, at 704.

98 Cole, *Out of the Shadows*, *supra* note 5, at 704.

99 18 U.S.C. § 3144 (2006).

100 HUMAN RIGHTS WATCH, WITNESS TO ABUSE (2005), available at <http://www.hrw.org/print/reports/2005/06/26/witness-abuse>.

101 Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079 (2011).

102 *Id.*

103 Al-Kidd v. Gonzales, 2006 WL 5429570, \*1 (D. Idaho 2006), *rev’d in part by* Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

104 Two of them agreed to reform their detention practices. See ACLU, ABDULLAH AL-KIDD V. JOHN ASHCROFT, ET AL., <http://www.aclu.org/immigrants-rights-national-security/abdullah-al-kidd-v-john-ashcroft-et-al>.

105 Ashcroft v. al-Kidd, 131 S. Ct. at 2085 (2011).

106 *Id.* (Kennedy J., concurring) (“The Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful.”).



Compare al-Kidd to el-Masri (or, for that matter, any of the extraordinary-rendition victims or Guantanamo detainees). Both were mistakenly perceived to be national security threats. But Al-Kidd was released after sixteen days; el-Masri after more than four months. Al-Kidd was shackled; el-Masri was beaten, injected with drugs, and dressed in a diaper. Al-Kidd won a monetary settlement, and still has a chance of winning on the merits. El-Masri has no such chance.

When it comes to laws that are designed for preventive national security detention, outsiders are also targets. Section 412 of the Patriot Act gives the Attorney General the power to remove or indefinitely detain aliens for national security reasons.<sup>107</sup> There are some restrictions: the Attorney General has to charge the alien within seven days and periodically certify that there are reasonable grounds to believe he or she is a national security risk.<sup>108</sup> Some applications of Section 412 may be unconstitutional;<sup>109</sup> perhaps for this reason it has never been used.<sup>110</sup> And the Enemy Alien Act, passed in 1798, provides that when the United States has declared war it can remove or detain unnaturalized citizens of the enemy state.<sup>111</sup> There need not be an individualized determination of hostility—it is enough that the detainee is a citizen of the enemy state.<sup>112</sup>

### *E. Habeas*

Habeas is at the heart of post-9/11 constitutional litigation. The Guantanamo detainees, imprisoned by the military, turned to the remedy of habeas corpus to challenge their detentions. This effort culminated in *Boumediene v. Bush*. In *Boumediene*, the Court ruled for the prisoners, holding that the Constitution grants courts jurisdiction to review their cases.<sup>113</sup>

The *Boumediene* detainees—the prisoners trying to get into federal court—were captured outside the United States. As the Court noted, they came from all over:

Some . . . were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda.<sup>114</sup>

Lakhdar Boumediene, the lead petitioner, lived in Bosnia and Herzegovina (Bosnia) when he was

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107 USA PATRIOT ACT of 2001 (Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001), codified at 8 U.S.C. § 1226 (2006)).

108 *Id.*

109 See Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act*, 55 STAN. L. REV. 1419, 1455 (2003).

110 Cole, *Out of the Shadows*, *supra* note 5 at 748.

111 50 U.S.C. § 21 (2006).

112 *See id.*

113 553 US 723, 766 (2008).

114 *Id.* at 724.



arrested.<sup>115</sup> He worked for the Red Crescent.<sup>116</sup> For reasons that are still unclear, the United States believed that Boumediene was planning to blow up the U.S. and British embassies in Sarajevo.<sup>117</sup> The United States then asked Bosnia to arrest Boumediene and five others, even though the Bosnian police had no independent reason to suspect them.<sup>118</sup> The Bosnians complied.<sup>119</sup> After the arrest, Bosnian police tried to verify U.S. claims, but could not.<sup>120</sup> The prisoners, arrested without evidence, petitioned the Bosnian courts.<sup>121</sup> The Bosnian High Court ordered them freed.<sup>122</sup> Then, according to Bosnian officials, the United States threatened to suspend diplomatic relations with Bosnia and remove the peacekeeping troops.<sup>123</sup> The United States denies this allegation, but does admit to using diplomatic pressure.<sup>124</sup> In response, Bosnia handed the prisoners to the United States.<sup>125</sup>

In Guantanamo, military commissions tried the detainees.<sup>126</sup> These tribunals found that the detainees were “enemy combatant[s],” which, according to the Executive, gave it authority to detain them.<sup>127</sup> But the evidence against Boumediene and the others was not strong. The following exchange, from the hearing of detainee Ait Idir, is typical.<sup>128</sup> Idir was accused of associating with an al Qaeda operative,<sup>129</sup> but he was never told who that person was:<sup>130</sup>

**Detainee:** Give me his name.

**Tribunal President:** I do not know.

**Detainee:** How can I respond to this?

**Tribunal President:** Did you know of anybody that was a member of Al Qaida?

**Detainee:** No, no.

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115 Edward Cody, *Algerian Lakhedar Boumediene Tells of Struggle After 7 Years at Guantanamo Bay*, WASH. POST., May 26, 2009, at A1.

116 *Id.*

117 *Id.*

118 Seema Jilani, *Algerians, Freed from Guantanamo, Still Paying the Price*, MCCLATCHY (Sept. 9, 2009), <http://www.mcclatchydc.com/2009/09/09/75134/algerians-freed-from-guantanamo.html>.

119 *Id.*

120 *Id.*

121 Cody, *supra* note 115, at A14.

122 Jilani, *supra* note 118.

123 *See id.* at 733-34.

124 *Id.*

125 *Id.*

126 *Boumediene v. Bush*, 553 U.S. 723, 734 (2008).

127 *See id.*

128 Brief for Boumediene Petitioners at \*4 *Boumediene v. Bush*, 553 U.S. 723 (2008), 2007 WL 2441590.

129 *Id.*

130 *Id.*



**Tribunal President:** No?

**Detainee:** No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

**Tribunal President:** We are asking you the questions and we need you to respond to what is in the unclassified summary.<sup>131</sup>

Boumediene eventually won in the Supreme Court, and his case was remanded to district court.<sup>132</sup> There, six years after his arrest, a court finally reviewed the evidence against him.<sup>133</sup> It was “contained in a classified document from a[] [single] unnamed source” that indicated Boumediene intended to go to Afghanistan and fight against the United States.<sup>134</sup> The Court concluded that classified report “was undoubtedly sufficient for the intelligence purposes for which it was prepared,” but insufficient “to protect petitioners from the risk of erroneous detention.”<sup>135</sup> The district court ordered Boumediene’s release,<sup>136</sup> and he was set free in the spring of 2009.<sup>137</sup>

The larger question was whether Congress could stop federal courts from hearing habeas petitions from prisoners in Boumediene’s position. To understand this larger issue, we need to look at habeas itself. The writ of habeas corpus provides collateral review of detention.<sup>138</sup> More simply, it allows a person detained *outside* the federal criminal system to argue their case *in* federal court. Once the writ<sup>139</sup> is granted, the detaining authority—in this case the U.S. military—must justify the detention to the court.<sup>140</sup> If the federal court does not find that the detention is justified, it can order the prisoner released.<sup>141</sup>

The right to habeas is part of the Constitution: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require

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131 *Id.* at 4-5.

132 *Boumediene v. Bush*, 579 F. Supp. 2d 191, 194 (D.D.C. 2008), *reversed as to another party by* *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

133 *Id.* at 193.

134 *Id.* at 197.

135 *Id.*

136 *Id.* at 198.

137 *Jilani*, *supra* note 118.

138 17B CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (2011)

139 The “writ” is the order from the court to the person detaining the prisoner. *Id.*

140 *Id.*

141 *Boumediene v. Bush*, 553 US 723, 779 (2008). There has been continuing controversy, though, about the power of federal courts to order the Executive to resettle Guantanamo detainees into the United States when other resettlement offers are available. *See, e.g., Kiyemba v. Obama*, 131 S. Ct. 1631 (2011) (Breyer, J., concurring).



it.”<sup>142</sup> However, the Bush administration moved the detainees in Guantanamo relying on the belief that, once placed in Guantanamo, the detainees would have no way to get into court.<sup>143</sup> Despite this belief, the Supreme Court held that courts *could* hear habeas petitions from Guantanamo.<sup>144</sup> But unlike in *Boumediene*, this first holding was based on the language of the federal habeas statute, not the Constitution.<sup>145</sup> Because this holding was based only on the statute, Congress had the power to change it, and did. In 2006, Congress rewrote the habeas law to take the power to hear habeas petitions from Guantanamo detainees away from federal courts. The new section provided that courts had no jurisdiction to hear habeas petitions from aliens who had been “determined . . . to have been properly detained as an enemy combatant.”<sup>146</sup>

One of the questions raised in *Boumediene*, then, was whether this law passed by Congress—a law that applied only to noncitizens—trumped the constitutional guarantee of habeas. Like many cases in the national security line, the question posed in *Boumediene* mixes up membership and national security. The question, as framed by the Court, was whether the court could deny habeas to people with the following attributes: 1) aliens; 2) arrested abroad; 3) detained abroad and 4) deemed enemy combatants by the military.<sup>147</sup>

The first three attributes go to membership; the last goes to substance. The Court could have used *Boumediene* to explain how substantive and membership factors interacted. In the end, though, the court did not separate membership from national security. Instead, the Court’s test took every factor into account, without explaining why they mattered or how to weigh them. In the Court’s words, the right to habeas depends on: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.<sup>148</sup>

Leaving aside the third factor, this test tells courts to look at both membership and national security. The nationality and location of detainees matters, but so does their status as enemy combatants. But the test does not explain how or why membership matters. Presumably, an alien is less likely to get habeas than a citizen. Also presumably, someone outside the country is less likely to win the right than someone inside.

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142 U.S. CONST. art. 1, § 9, cl. 2.

143 *Boumediene*, 553 US at 828 (Scalia, J., dissenting).

144 *Id.* at 734 (citing *Rasul v. Bush*, 542 U.S. 466, 473 (2004)).

145 *Id.*

146 See 28 U.S.C. § 2241(e)(2006), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008).

147 See *Boumediene*, 553 U.S. at 739 (2008). I should add two other criteria that could be relevant, but that the Court chose not to include in its holding: 1) whether the detainee was picked up on the battlefield; and 2) whether the status of the detainee as an enemy combatant is controverted. As noted, some detainees were picked up on the battlefield and some off. *Id.* The fact that some of the *Boumediene* detainees had colorable claims as noncombatants distinguishes them from petitioners denied habeas in World War II cases. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1 (1942).

148 *Id.* at 766.



This absence—this lack of a why—is telling.<sup>149</sup> It happens, I think, because membership theory pushes the law towards strict binaries. Either outsiders are not part of the social contract and get no rights, or they are part of the social contract and get full rights.<sup>150</sup> If one accepts that outsiders get some rights, it is very hard to explain why they should not get every right.

Using the three-part test, the Court concluded that 1) the military tribunals gave detainees relatively little due process;<sup>151</sup> 2) Guantanamo Bay was in every respect under the indefinite complete control of the United States;<sup>152</sup> and 3) Guantanamo was far from the battlefield and therefore habeas review was not an undue obstacle.<sup>153</sup>

Taking these facts into account, the majority held that the petitioners had the right to petition for habeas review.<sup>154</sup> The nationality of the detainees, once mentioned, thus disappears.<sup>155</sup> All of the detainees are foreign nationals, but all have the right to petition for habeas. And the particular nature of Guantanamo—the fact that it is, in every respect but technically, part of the United States—factors heavily.<sup>156</sup> Under the terms of its lease, the United States has complete control over Guantanamo for as long as it wants; there are no other military, police or legal forces within the jurisdiction.<sup>157</sup> As the Court noted, “in every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”<sup>158</sup>

This conclusion—that Guantanamo is a de facto part of the United States—shines light on the membership dynamic. One way to get membership is to be inside the United States. Knowing this, the Bush Administration put the prisoners in Guantanamo, physically close but nominally outside the United States.<sup>159</sup> One way to read *Boumediene* is as a repudiation not of the decision *to deny rights*, but of the choice to deny rights *somewhere close to the United States* (both literally and legally). If the politics of the membership dynamic push the most questionable national security practices away from the United States—if we are okay with the dark stuff, so long as we don’t have to see it—then the Court was correcting the Bush administration not for going to the dark side, but for doing it too close to home.

If this is true—if *Boumediene* endorses membership and not substance—then we will see that

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149 The *Boumediene* majority relies on history and doctrine—not theory—to support its holding. *Id.* at 727-59. As the majority writes, *Boumediene* is the first time the Court has held that aliens imprisoned abroad have any rights under the Constitution. *See id.* at 827 (Scalia, J., dissenting). *Boumediene* establishes that outsiders have access to habeas—a constitutional right—even when the political branches, acting together in the name of national security, seek to deny that right. *Id.* at 797.

150 *See infra* Part III.A.

151 553 U.S. at 767.

152 *Id.* at 768-69.

153 *Id.* at 769-70.

154 *Id.* at 771.

155 *Id.*

156 *Id.* at 768-69.

157 *Id.* at 770.

158 *Id.* at 69. (citing *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring)).

159 *Id.* at 828 (Scalia, J., dissenting).



endorsement going forward.<sup>160</sup> The key doctrinal question is whether habeas will be limited to the special—perhaps unique—circumstances of Guantanamo.<sup>161</sup> Here the most telling case so far is *Al Maqaleh v. Gates*.<sup>162</sup> The *Al Maqaleh* petitioners alleged they were captured outside of and then transported to Afghanistan’s Bagram Airfield Base.<sup>163</sup> The D.C. Circuit held that these petitioners had no constitutional right to petition for habeas.<sup>164</sup> While rejecting the position that *Boumediene* applied only to areas of de facto sovereignty—and hence probably only Guantanamo—the court held that because Bagram is in an active theater of war, it would be impracticable to allow habeas.<sup>165</sup> But the court held out the possibility that the detainees’ might have the right to habeas—if they could prove that the United States chose Bagram in order to “evade judicial review.”<sup>166</sup> Seizing on this argument, the detainees, with leave from the district court, have filed amended petitions arguing that they were detained in Bagram precisely for this reason.<sup>167</sup>

Assuming that the petitioners can prove this—and I don’t know if they can—the court’s response will tell us whether *Boumediene* is about membership or substance. If the real gist of *Boumediene* is that the national security exception applies outside the United States, then the fact that the United States is neither the de jure nor de facto sovereign of Afghanistan is enough to deny rights. But, if *Boumediene* is about substance—that is, if it requires the government to have a *good reason* to treat outsiders differently—then moving a detainee just to avoid court cannot justify denying habeas. No matter what the cost of providing habeas in Bagram is, the cost cannot justify denying rights when incurred for that reason.

### III. MEMBERSHIP AS THEORY

Giving fewer rights to nonmembers would be justified if there were a good reason to do so. In this section I look at the reasons to treat outsiders differently, and argue that none justify the difference that we actually see. In order to make this argument I use the literature on extraterritoriality, which directly engages membership as theory. In doing so, I adapt Gerald Neuman’s categorization of the theories of rights for nonmembers.<sup>168</sup>

The existing literature on extraterritoriality fails to take into account that national security law

160 Lower courts have thus far not been sympathetic to habeas petitions from national security detainees held abroad. See *Developments*, *supra* note 6, at 1260.

161 For a good discussion of de facto sovereignty see generally Anthony J. Colangelo, “*De facto Sovereignty*”: *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623 (2009) (explaining how the concept of de facto sovereignty was used in *Boumediene* and ways in which it may be used in future litigation involving noncitizens in other situations of extraterritorial detention).

162 605 F.3d 84 (D.C. Cir. 2010).

163 *Id.* at 87.

164 *Id.*

165 *Id.* at 96-98.

166 *Id.* at 98.

167 *Al Maqaleh v. Gates*, 2011 WL 666883, at \*1-2 (D.D.C. 2011). As of now, the court has not decided their petitions.

168 See generally Gerald L. Neuman, *Closing the Guantanamo Loop-hole*, 50 Loy. L. Rev. 1 (2004) [hereinafter Neuman, *Closing*].



and membership law are evolving together. Moreover, they influence each other. Because there is political incentive to direct national security only at outsiders, national security has become something that is defined by membership. In order to avoid this, the law of extraterritoriality should apply the same way to national security as anything else. There should be no carve-out of the kind seen in *al-Aulaqi* for national security actions abroad. In this section I make my case for this vision of equality, comparing it to other existing approaches.

### *A. Outsider as Nonperson: Membership*

One approach to the rights of outsiders is simply not to recognize them—to treat them as nonmembers. The membership approach treats places or individuals “as participating in a privileged relationship with the constitutional project, and therefore entitled to the benefit of constitutional provisions.”<sup>169</sup> It derives from the social-contract model.<sup>170</sup> Citizens and people within the United States are parties to the contract.<sup>171</sup> Nonmembers are not. Lacking a connection to the state, nonmembers have no rights against it.<sup>172</sup> For states slow to internalize natural rights or external constraints on their power—think the United States—the membership approach is Hobbesian in that it posits that states have no moral obligations to nonmembers.<sup>173</sup>

There is a lively historical debate about the membership approach and its role in U.S. history.<sup>174</sup>

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169 *Id.* at 6-7.

170 Social-contract theories—of which there are many—view the state as the product of agreements between people for mutual advantage. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION*, 6 (1996) [hereinafter NEUMAN, *STRANGERS*]. Individuals chose to leave nature and live under law in order to secure their rights. *Id.* at 9. Older scholars viewed these rights as natural, meaning inherent in personhood and thus pre-existing the creation of the state. *Id.* at 10. Hobbes did not see the state as a means to secure natural rights, but rather as the original source of rights. *Id.* at 12. The state is the “basic unit” of this contract—the parties to the contract are imagined as choosing principles for a state. *Id.* at 9. The legitimacy of the state’s exercise of power, and its monopoly on violence, is understood as a matter of agreement; because the parties to the social contract have—either actually or hypothetically—agreed to bind themselves to it, the state is justified in punishing them under the law. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002) [hereinafter Cleveland, *Powers*].

171 Neuman, *Whose Constitution*, *supra* note 2, at 917.

172 *Id.*

173 *Id.* at 923. Indeed, according to Hobbes, absent treaty obligations states may lawfully inflict any “evill soever” on nonmembers. *Id.* at 923 (quoting THOMAS HOBBS, *LEVIATHAN*, 360 (C.B. MacPherson ed. 1985)). In practice, application of the membership approach would turn on the definition of membership—and here there are different approaches. Membership could extend only to citizens in U.S. territory, or to citizens wherever they are, or to all persons legally (or perhaps illegally) inside U.S. territory, or to all persons inside the territory and to all citizens abroad. Additionally, instead of construing membership as an all-or-nothing proposition, one could see it as a spectrum, in which those at the edges of the polity gain rights as their affiliation with it increases. This approach was suggested most notoriously in *Johnson v. Eisentrager*, in which the Supreme Court stated that “The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.” 339 U.S. 763, 770. But whatever the criteria for membership is, under any membership approach some people will fail this criteria and be excluded.

174 Compare J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 485 (2007) with Cabranes *supra* note 6, Burnett *supra* note 6, and Cleveland, *Embedded*, *supra* note 6.



Because my interest is in politics, not history, I will defer to other scholars on this point. My main case against membership is simply a moral one. It seems wrong—deeply inconsistent with modern principles—to take most of humanity and say they have no rights against U.S. power. Conceiving of these aliens abroad as rightless, or possessing only those rights guaranteed by statute or treaty, leaves some large and important swath of state action unbounded by the protections available to citizens. Under a pure membership approach, nothing in the United States constitution would prevent the CIA from arresting or even killing foreign nationals abroad for merely criticizing United States foreign relations. It would allow a shadow-justice system in which foreign detainees were tried and executed on Navy ships and foreign army bases, regardless of whether they were captured on the battlefield or presented even a colorable threat to national security.<sup>175</sup>

I think this basic incompatibility with our other values is why the Supreme Court has not embraced a pure membership approach either in the War on Terror cases<sup>176</sup> or other contexts.<sup>177</sup> Indeed, it is rare to find someone willing to advocate pure membership—to say it would be okay for the United States to torture or kill aliens abroad because they simply have no rights. Instead, those who argue for maximum executive power, such as John Yoo, have argued that the ability of the President to treat aliens at his discretion derives from the Commander-in-Chief power, and not the simple fact that aliens abroad never have constitutional rights.<sup>178</sup>

Moreover, if rights under the social contract derive from voluntary affiliation with the state (either the choice to be a citizen or to move into the territory) then aliens abroad should have no constitutional rights when they are involuntarily transported to the United States.<sup>179</sup> Someone cap-

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175 See NEUMAN, STRANGERS, *supra* note 170, at 8 (“When the government acts outside the sphere of municipal law, it enters a field where its actions do not impose obligations.”).

176 See generally *Boumediene v. Bush*, 553 US 723 (2008) (finding that the Suspension Clause applies to the detainees held at Guantanamo Bay and that noncitizens detained there were thus entitled to raise habeas corpus petitions against the U.S. government to challenge the legality of their detentions).

177 In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the government did not need to comply with the Fourth Amendment warrant requirement when searching the house of a Mexican national in Mexico. The respondent, Verdugo-Urquidez, was alleged to have smuggled drugs into the United States. *Id.* at 262. At the behest of U.S. officials, he was arrested in Mexico by Mexican police and transported to the United States for detention. *Id.* U.S. officers then searched his house in Mexico without a warrant, finding evidence that the United States later wanted to use in its prosecution of Verdugo-Urquidez in federal district court in the United States. *Id.* The Court held that the evidence obtained in Mexico was admissible, but stopped short of holding that aliens abroad have no constitutional rights. Rather, Rehnquist’s majority opinion, which was joined by four judges, held simply that the Fourth Amendment did not apply in this case. *Id.* at 274-275. Justice Kennedy, who joined Rehnquist’s opinion while writing a separate concurrence justifying the holding, concluded that aliens abroad can possess constitutional rights, depending on the process due in a particular case. *Id.* at 278 (Kennedy, J., concurring). Kennedy explicitly rejected a membership approach by noting “that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.” *Id.* at 277.

178 See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1184 (2003). Yoo argues that the Commander-in-Chief clause vests “full control of the military operations of the United States to the President.” *Id.* at 1199. The Commander-in-chief powers thus “constitute[s] an affirmative grant of authority to the President to ‘dispose of the liberty’ of prisoners of war.” *Id.* at 1221.

179 NEUMAN, STRANGERS, *supra* note 170, at 8.



tured abroad and dragged to the United States does not consent to that exercise of power, even in a hypothetical sense.<sup>180</sup> But aliens captured abroad do have procedural rights—the right to an attorney, for instance—when tried in U.S. courts. We are not comfortable with the consequences of pure membership when we have to confront them.<sup>181</sup> This is why we try to push them away—to keep military detainees outside the United States, and to render suspects to other countries for torture.

### *B. Outsider as Enemy*

The outsider-as-enemy theory posits that loyalty and nationality run together. The theory suggests that since foreign nationals are loyal to different states, they do not have rights against the United States. The enemy theory explains older statutes like the Enemy Alien Act, which authorizes the removal and detention of foreign nationals of states at war with the United States.<sup>182</sup> It is consistent with the original constitutional vision of war as a battle between states, formalized by Congressional declaration.<sup>183</sup> Foreign nationals are loyal to their states, and when we are at war with a state, its foreign nationals are our enemies. As the Court explained about World War II detainees:<sup>184</sup>

It is war that exposes the relative vulnerability of the alien's status . . . disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage . . . the alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources.

The enemy theory, though, does not explain why outsiders receive fewer rights in post-9/11 national security practice. The era of declared wars is long gone; we now live in an era of unilateral Executive action and Congressional approval that is less than the previously requisite formal

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180 *See id.* Nor can the anti-subordination principle justify granting rights to someone who is in no way part of the community that she would be subordinated to.

181 There is an instrumental argument for granting aliens captured abroad procedural rights in U.S. courts without recognizing that aliens abroad have rights generally: that federal courts should not get into the habit of conducting trials without rights, lest that color their treatment of citizens. But if we accept this premise—that government bodies used to acting without constraint will do so even when acting against rights-bearers—then the instrumental argument pushes much more strongly in favor of requiring bodies that exercise *extraterritorial* authority to observe rights. This is because as the risk of terrorist attacks causing harm in the United States grows, so does the risk that these bodies will have an expanded domestic mandate. What happens, in other words, if there is another big attack, and the CIA or military is deployed domestically? (This would require modification of existing law. *See, e.g.*, Exec. Order 12,333, 3 C.F.R. 200, 200 (1982)). If that attack comes—if a dirty bomb goes off in New York—wouldn't it be better if the agencies that responded were used to observing some sort of human rights?

182 50 U.S.C. § 21 (2006).

183 U.S. CONST. ART. I § 8.

184 *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).



declaration of war.<sup>185</sup> Moreover, our enemies in the War on Terror are not states, but transnational organizations like al Qaeda.<sup>186</sup> The War on Terror has been waged against citizens of allied states.<sup>187</sup> Even if we accept that citizenship is relevant in a war against a non-state organization, the enemy theory does not explain differential treatment based on territoriality. Al-Aulaqi is dead despite being an American citizen.<sup>188</sup> If his citizenship somehow denoted his loyalty to the United States, then his rights should not have changed with his location.

The legal justification for the war-on-terror hinged on the continuity between declared war and war against non-state actors. Anything a President could do to the Nazis, he could also do to al Qaeda, or so the argument goes.<sup>189</sup> Taking this argument at face value, though, everything about it pushes *away* from membership, and *towards* substance. If we are fighting organizations that use citizens from many nations and that operate in different countries, then nationality and territory should matter less.

It is worth taking a moment here to think about the change from declared wars between states to the War on Terror. The shift is not caused by al Qaeda, or any other enemy. Rather the change is caused by new technology. New weapons—predator drones, dirty bombs, poisonous gases—have made it easier to kill. The Internet also makes it easier to cause harm.<sup>190</sup>

This new technology has made threat more diffuse. It comes from more people and places—not just states, but also small groups of people, and even individuals. And because threat is more diffuse, it is also less territorial. People can cause mass harm now without needing to control much territory. They can launch a devastating attack while living in the targeted country.

Consider these new threats. There is the risk of chemical attack, like the sarin gas used on the Tokyo subway by Aum Shinrikyo, a religious cult,<sup>191</sup> or a biological attack, like anthrax sent through the mail. The anthrax mailer might have been a scientist with access to U.S. weapons systems—offi-

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185 See generally Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1821-36 (2010).

186 See, e.g., the Authorization for Use of Military Force, 115 Stat. 224, codified at note following 50 U.S.C. §1541 (2006) (authorizing the Executive to use force against the perpetrators of the 9/11 attacks and associated forces).

187 See, e.g., Rachel Bronson, *Rethinking Religion: The Legacy of the U.S.-Saudi Relationship*, 28:4 WASH. Q. 121, 121 (2005) (explaining that fifteen of the nineteen 9/11 hijackers were Saudi Arabian nationals).

188 *Supra* Part II.A.

189 See, e.g., Authorization for Use of Military Force, 115 Stat. 224, codified at note following 50 U.S.C. §1541 (2006). The President reads the AUMF to include the right to detain those “who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.” Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re: Guantanamo Bay Detainee Litig., Misc. No. 08-442, (D.D.C. Mar. 13, 2009).

190 The Internet enables direct attacks on infrastructure—power grids and the like—but also allows people to share information, coordinate attacks over long distances, and encrypt communications.

191 Twelve people died. See Matthew E. Brown, *Reconsidering the Model State Emergency Health Powers Act: Toward State Regionalization in Bioterrorism Response*, 14 ANNALS HEALTH L. 95, 96 (2005). Another biological attack—less famous, but also frightening—occurred when the Rajneeshee cult in Oregon deliberately infected over 750 people with salmonella by sprinkling it on salad bars. See *id.* at 102.



cially are still not certain.<sup>192</sup> If so, he or she managed to terrify the United States using its own facilities.<sup>193</sup>

There is also the threat of a nonstate nuclear attack. This risk is very low, but it is not zero.<sup>194</sup> The international weapons market has become more commoditized.<sup>195</sup> While it is probably true that only a state (or a state-sponsored group) can build a nuclear weapon, it is not entirely clear that state-created nuclear weapons, and the ability to use them, will never fall into the hands of violent non-state actors.<sup>196</sup>

Beyond weapons proliferation, the simple fact of globalization changes the threat. Countries are now linked in new ways by electric grids, transportation technology, and the Internet. This infrastructure also presents new threats. The best examples are the 9/11 attacks, in which planes, not weapons, were used. Or rather, planes were used as weapons.

The state is therefore “losing its monopoly over the means of mass destruction.”<sup>197</sup> As Bruce Ackerman wrote:

The root of our problem is not . . . any ideology, but the free market in death. If the Middle East were . . . transformed into a[n] . . . oasis of peace and democracy, fringe groups from other places would rise to fill the gap . . . If a tiny band of extremists blasted the Federal Building in Oklahoma City, others will want to detonate suitcase A-bombs as they become available.<sup>198</sup>

These changes herald not only a shift away from war as a contest between states, but also as a shift away from war as a territorial phenomenon. In a conventionally waged war, the point was to control territory—to establish a local monopoly on the use of force (which, after all, is what governments do, according to Locke).<sup>199</sup> This is what World War II looked like. But if technology is changing so that controlling territory is less correlated with preventing mass harm—if chemical weapons can be made in basements as well as state laboratories,<sup>200</sup>—then national security will focus less on controlling territory. Imagine a set of threats to the United States, some real and some perceived, whose response is not control of enemy territory but rather a targeted use of force. Sometimes

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192 Pierre Thomas, et al., “*Anthrax Scientist Kills Himself as FBI Closes In*,” ABCNews (Aug. 1, 2008), <http://abcnews.go.com/TheLaw/story?id=5494971> (last visited November 12, 2011) [hereinafter Thomas, “Anthrax Suspect.”].

193 There is some evidence that the anthrax attacker was a U.S. employee. See *id.* This threat—of states losing control of the means of mass destruction—is one of the most acute posed in borderless conflicts. Indeed, A.Q. Kahn, the Pakistani scientist who trafficked nuclear-weapons technology to North Korea and Libya, may have acted without Pakistan’s consent. See PHILLIP BOBBITT, TERROR AND CONSENT at 73-80 (2008) (hereinafter BOBBITT, TERROR).

194 BOBBITT, TERROR, 98-124.

195 *Id.*

196 *Id.*

197 Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 478 (2006).

198 *Id.*

199 JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

200 See BOBBITT, TERROR, *supra* note 193 at 189-206.



the threat will come from inside the United States and sometimes from outside. But the hallmark of these threats will be the government claim that the stakes are as high as in territorial war—thousands (or more) will die if the government does not respond.

Every aspect of this change—the rise in threat from non-state actors, the decreased relevance of territoriality—pushes away from membership. If we are enemies with al Qaeda, then membership in al Qaeda, and not foreign citizenship, should make one subject to the national security exception. Jose Padilla, the alleged al Qaeda member and U.S. citizen, should have been shipped to Guantánamo.<sup>201</sup> And if the relevance of territoriality is diminished—if someone inside the United States can now cause as much damage as a foreign army, and the United States can now target individuals anywhere in the world with missiles—then it should matter *less* whether people are inside or outside the country.

### C. Universalism

Universalism is the view that rights should “be interpreted as applicable to every person and at every place.”<sup>202</sup> This does not mean that location should never be taken into account. Under a universalist approach, the difficulties of enforcing rights outside of the United States can be taken into account, but only in the same manner as pragmatic limitations inside the country.<sup>203</sup>

The fundamental proposition underlying universalism is simple. If we believe that human rights are inherent in the person, then it would be odd for these rights to disappear because of *place*. Indeed, it seems absurd that essential human freedoms should differ depending on where they are enforced.

The difference between universalism and the equality view that I endorse is that universalism suggests some minimal standard of treatment due all people, while equality demands only that people be treated the same wherever they are. In practice, universalism—which demands a set of minimal rights that applies to everyone everywhere—is tied to international law. It is only through a system of law that transcends state-based guarantees that universal minimums can be established. International humanitarian law and international human-rights law are both expressions of universal visions.

Both the theory and doctrine of universalism are well worked out.<sup>204</sup> But the politics are not. The world is still looking for a way to enforce universal norms against noncompliant states, includ-

201 See *Padilla v. Hanft*, 547 U.S. 1062, 1062-64 (2006) (Kennedy, J., concurring).

202 Neuman, *Whose Constitution*, *supra* note 2, at 916.

203 *Id.* Kal Raustiala has similarly expressed the view that there is no “*inherent* spatial dimension to the law.” Raustiala, *Geography*, *supra* note 6, at 2550 (emphasis added). I should add that Raustiala is not a universalist. His approach does “not demand that all rules apply identically on all places.” *Id.* at 2551. Instead, spatial distinctions apply when the legal text or reason clearly indicate that they should, or if the rule’s effect would otherwise be nullified or violate international comity. *Id.* In application, this approach would require a right-by-right inquiry into the appropriateness of extraterritorial application, but the party advocating for territorial limitations would bear the burden of proving their relevance. In this regard, Raustiala’s approach resembles that global due-process approach, except that it would shift the burden to make extraterritorial possession of rights the default.

204 See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* at 228-68 (2006).



ing the United States.<sup>205</sup> Universalism is thus a theory without an institutional structure to enforce it. In this context, we can consider calls for universalism, instantiated by the many arguments that U.S. courts should apply international humanitarian law to the war on terror, as another form of politics. In that light, the question is not their correctness, but their efficacy—whether they will get the results they want.

Equality presents itself as an alternative not because it is normatively better, but because it is the theory that is most likely to sway U.S. courts—the branch that is, in the near term, most likely to restrict the war power.

#### *D. Global Due Process*

Under the global-due-process approach, the government must observe “fundamental” rights when it acts abroad, but only when their application would not be “impracticable and anomalous.”<sup>206</sup> Global due process is a loose sort of pragmatism that recognizes the rights of aliens abroad when those rights seem important and the cost of recognizing them not unduly substantial.<sup>207</sup>

While there is a role for pragmatism in determining the rights of aliens abroad, the global-due process approach overemphasizes pragmatism by tying *the existence of the right* to pragmatic considerations. It would be better to recognize that aliens abroad always have rights against U.S. power, but that the possibility of enforcing those rights can be limited by pragmatic considerations in the same way that they can limit the possibility of enforcing rights at home. Just as Fourth Amendment rights may be waived when exigencies prevent obtaining a warrant,<sup>208</sup> so might the warrant requirement be waived because of the difficulty of finding a foreign magistrate when acting abroad.<sup>209</sup> This differs from the view that the Fourth Amendment simply does not apply to aliens or people abroad because it is not “fundamental.”

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205 See *infra* Part IV.B.

206 Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2076 (2005) [hereinafter Neuman, *Extraterritorial Rights*].

207 The idea that aliens abroad can enforce only their fundamental rights is derived from ideas contained in the Insular Cases, in which the courts considered rights of people in the United States territories acquired in the Spanish American War. See generally *Downes v. Bidwell*, 182 U.S. 244 (1901). The Insular Cases therefore do not concern the rights of aliens abroad, because the United States was sovereign over the territories in question, and some of the cases concerned citizens. *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922). Nevertheless, they introduced the idea that there is some class of people who are entitled to only fundamental rights. Applying this approach, the Supreme Court concluded that the right to jury trial was not fundamental. See *Dorr v. United States*, 195 U.S. 138, 148-49 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 309-311 (1922). But later cases considering territorial possessions have extended other rights, including Due Process and Equal Protection Rights. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (extending the constitutional right of due process to Puerto Rico); *Examining Bd. of Eng'rs v. Otero*, 426 U.S. 572, 600 (1976) (holding that a Puerto Rican law providing that only citizens could be engineers was unconstitutional). It is probably unwise to extrapolate too much from these cases, as each territory has a different relationship to the United States.

208 *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

209 See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279 (1989) (Stevens, J., concurring).



*E. Mutuality of Obligation*

Developed by Professor Neuman, the mutuality of obligation approach recognizes the rights of aliens abroad when they are subjected to U.S. power for violating existing law.<sup>210</sup> It is theoretically grounded in the view that “constitutional rights and limitations [are] necessary to justify the exercise of governing power.”<sup>211</sup> The U.S. must therefore recognize rights whenever there is an “assertion of an obligation to obey U.S. law.”<sup>212</sup>

The mutuality approach—and others that rely on it<sup>213</sup>—have the benefit of being theoretically continuous with social-contract theory. They are also more doctrinally consistent with U.S. law in that they recognize that the United States has never, before *Boumediene*, recognized the rights of aliens abroad against a claimed use of the war power. We can also take the mutuality approach, which Neuman has defended,<sup>214</sup> to be a concession to the political difficulty of securing rights for outsiders. The mutuality approach recognizes the rights of outsiders any time a claim is made under law. Given the increasing frequency of laws that have extra territorial application—under, for instance, environmental<sup>215</sup> and antitrust<sup>216</sup> law—recognition of rights for outsiders under claims of law would accomplish a lot.

The difficulty with the mutuality approach is its definition of “law.” This definition seems intended to exclude extraterritorial use of force grounded in the war power. In the national security context, rights claims are often asserted against Executive action. The military may arrest someone in Bosnia and imprison him in Bagram, or the CIA could admit that it is trying to kill someone in Yemen. The justification for using force under the war power is that the target is an enemy, not that he broke the law. So rights are not available against these actions.

This is problematic in the same way that the membership approach is. If the political branches choose to target outsiders under the national security power, the targets have no rights. With insiders, though, the political branches are bound to honor the Constitution, even if they choose not

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210 Neuman, *Extraterritorial Rights*, *supra* note 206, at 2077.

211 Neuman, *Closing*, *supra* note 168, at 7.

212 Neuman, *Extraterritorial Rights*, *supra* note 206, at 2077.

213 See, e.g., Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006); David R. Chludzinski, *A Most Certain Tragedy, but Reason Enough to Side-Step the Constitution and Values of the United States?*, 23 PENN ST. INT’L L. REV. 227, 246 (2004).

214 Neuman, *Extraterritorial Rights*, *supra* note 206, at 2076-77.

215 See generally Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87 (2006).

216 See generally John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813 (2008).



to claim that the suspects violated the law.<sup>217</sup> If, for instance, the military picks up a citizen in the United States and detains him or her indefinitely, the suspect need not prove that he is being held on a claim of violation of law. The Constitution applies presumptively.<sup>218</sup>

The mutuality approach thus gives the political branches discretion over the national security exception for outsiders, but not insiders. Like membership, then, the mutuality approach risks creating a national security exception that is directed *only* at outsiders.<sup>219</sup>

If mutuality<sup>220</sup> presents a trade, it is one that progressives should not take. Conceding that the value of securing rights against claims under the law is high, the cost of allowing the political branches free reign when claiming use of the war power abroad is higher. In part, this is because mutuality presumably envisions that international law will restrain extraterritorial use of the U.S. war power, when for the most part it has not.<sup>221</sup> But the bigger problem with creating a carve-out for the United States when it claims the war power abroad is that *we don't really know what that power is*.

The mutuality approach, in other words, would make sense if we knew the limits of the war power. But we do not. The national security exception is, in a deep sense, still up for grabs, even when applied to citizens at home. To the question of whether the Executive can detain a U.S. citizen captured in the U.S. under the AUMF, the answer is maybe.<sup>222</sup> To say that the Executive can do abroad what it can't do at home is to assume that we know what it can do at home. But we do not.

The laws of extraterritoriality and national security are not just evolving, but *coevolving*. Treatments of one that don't deal with the other are incomplete. In the real world, membership and national security come bundled. The question in *Boumediene* was whether habeas was available to alien

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217 In practice, this definition may have fuzzy boundaries. Neuman has argued that the Guantanamo detainees have constitutional rights, both because Guantanamo is entirely controlled by the United States, Neuman, *Closing*, *supra* note 168 at 39-40, and because they are entitled to it under the doctrinally prevalent global due-process approach. *Id.* at 44-51. But he has not argued that they have rights under a mutuality approach.

218 This does not mean that the citizen will win his release—that is still an open question—but rights would not turn on whether the Executive claimed that the detainee violated law. Instead it would turn on the substantive scope of the national security power.

219 One can imagine a system in which courts second-guessed the Executive decision not to justify the use of power by claiming that the subject of that power violated a law. But that system would inevitably devolve into one like the system I am proposing. If courts reviewed executive detention to determine whether the Executive was empowered to hold a particular detainee, and detention without charging a violation of law was only justified under the national security power, then courts would need to develop a substantive definition of national security.

220 In the same vein, Judge José A. Cabranes has argued that the availability of extraterritorial criminal-procedure rights should be tied to: “(1) whether the power exercised by the government is one that can only be exercised abroad; (2) the extent of the connection to the United States of those acted upon overseas; (3) whether the challenged government action presents a risk of irreparable injustice; (4) the practical limitations on enforcing the constitutional provision in question; and (5) the absence of any categorical rule to determine whether a particular provision of the Constitution should have extraterritorial force.” Cabranes, *supra* note 6, at 1698. One of the powers that “can only be exercised abroad” is the war power. *Id.* at 1700-1701. This approach is troubling in the same way that mutuality is: it creates too much judicial deference to use of the war power abroad.

221 See *infra* Part IV.B.

222 See Bobby Chesney & Benjamin Wittes, *Resolving Ambiguities? Yes. Dramatically Expanding Existing Detention Authority? No.*, LAWFARE (Sept. 20, 2010), <http://www.lawfareblog.com/2010/09/resolving-ambiguities-yes-dramatically-expanding-existing-detention-authority-no/>.



enemy combatants captured and detained abroad.<sup>223</sup> Congress, when passing a law justifying national security practices, can choose to target only aliens. The Executive, when exercising its considerable discretion, can choose to treat outsiders differently. The courts can choose to use other doctrines—like the political-question doctrine—as proxies for territoriality. And so on. In each of these cases, membership presents an *out*, a way to avoid defining national security.

### F. Equality

Courts should require the political branches to treat outsiders equally against the national security power. While there may be pragmatic reasons to treat outsiders differently—such as the inability to use normal criminal enforcement—the fact that someone is an alien or abroad should not, by itself, justify different treatment.

This is political-process argument. Political-process arguments are familiar in the domestic constitutional context. They posit that judicial review should be deployed against “systemic biases in legislative decision making rather than against the outputs of a properly functioning political system.”<sup>224</sup> One kind of bias justifying heightened judicial scrutiny is “prejudice against discrete and insular minorities.”<sup>225</sup>

This kind of discrimination signals problems with policy. A discriminatory law must be wrong to at least one party. If a law making it illegal to operate a laundry in a wooden building is only enforced against Chinese people, and not whites,<sup>226</sup> then it is suspect. If the law is a good one—if, say, it actually prevents fires—then it should be enforced against everyone. If it is bad—if it is only a pretext to target an unpopular group—then it should not have been passed at all. Either way, the differential treatment tells us something is wrong.

Similarly, we are either militarily detaining too many outsiders or too few insiders. The same goes for extraordinary rendition, preventive nonmilitary detention, and targeted killing. We either do it too little at home, or too much abroad. If this difference were explained by pragmatic reasons—if it were impossible to avoid national security measures against every outsider subject to the U.S. national security power—then there would be less cause for suspicion. But this is not the case. The United States had a legal pathway to go after Boumediene and his cohorts.<sup>227</sup> That pathway failed, so the country used national security measures. Six years later, when Boumediene made it out of the national security system, it became apparent that there was not a lot of evidence against him.<sup>228</sup> If he had been a U.S. citizen inside the United States, he would not have had to suffer for so long. Moreover, the flaws of the country’s military detention system would have become clearer sooner.

Political-process theory has its flaws. Suspicion of discrimination against only discrete and insu-

223 See *supra* Part II.E.

224 Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747 (1991); See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

225 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

226 See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

227 See *supra* Part II.E.

228 *Id.*



lar minorities misses discrimination against other groups, such as women (who are not minorities).<sup>229</sup> A commitment to fighting racism, sexism and other types of invidious discrimination requires some substantive commitment.<sup>230</sup>

I take these critiques to be correct. To the extent that invidious racial or religious discrimination infects national security law—say, in discriminatory Executive targeting of Arab or Islamic men<sup>231</sup>—my approach will not solve it. That said, a policy-perfecting approach can solve the problem of access to courts.

From a simple equity standpoint, this would be a good thing. It does not discount the problems of our criminal justice system to suggest that outsiders would do better in court than at the mercy of the political branches. The wrongfully imprisoned Al-Kidd, released after sixteen days, was better off than el-Masri, who was tortured and dumped on a hillside.

Equality is also the right policy response to the technological shifts that are pulling us from territorial war. When controlling territory is less linked to threat, legal status should be less linked to territory. If threat no longer comes just from enemy states, then nationality should matter less. There is a case that national security practices should change in response to new technologies (although I do not think this means we need to give up on civil liberties). The challenge is to fashion responses to new threats that protect rights while allowing the government to respond to the increased chance of mass harm. But with the partial exception of the PATRIOT Act, this has not happened.<sup>232</sup> Instead, we have decided to give few rights to outsiders without reconsidering the national security regime at home.

Equity offers to break this pattern. But for liberals (and I am one), equality is a risk. Leveling rights between outsiders and insiders could cause a leveling up for outsiders, but it also might level insiders down. Because my aim is to preserve (and limit) the war power not by unleashing it only against aliens abroad, but by finding its substantive contours, I am willing to contemplate some expanded use of the war power at home. This could be consistent with expanded executive power, although need not be. The most egalitarian vision of national security law yet offered was in the early days of the Bush Administration, when it proposed that the Constitution gave the Executive unilat-

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229 “Long after discrete and insular minorities have gained strong representation at the pluralist bargaining table, there will remain many other groups who fail to achieve influence remotely proportionate to their numbers: groups that are discrete and diffuse (like women), or anonymous and somewhat insular (like homosexuals), or *both* diffuse and anonymous (like the victims of poverty).” Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985).

230 “[T]here are constitutional values in our scheme of government even more fundamental than perfected pluralism—most notably, those that bar prejudice against racial and religious minorities.” *Id.* at 746; *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1076-77 (1980).

231 *See supra* Part II.D.

232 USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001), codified at 8 U.S.C. § 1226a (2006).



eral authority when using the Commander-in-Chief power.<sup>233</sup> Under the unitary-executive theory, the President could suspend the rights of citizens as well as aliens.<sup>234</sup>

This vision has not prevailed. Nor do I think it will. My hope is that, when faced with a choice between more or fewer rights, the public will choose the former. The more courts are empowered to look at Executive action abroad, the more it will become apparent that rights-based approaches are consistent with safety. But I could be wrong. That said, I do not see a better way forward.

#### IV. MEMBERSHIP AND SUBSTANCE

We have not developed a substantive vision of national security—one tied to the threat posed and appropriate responses. This is not to say that we have no definition of national security; there are two. The first is based on Congressional authorization; the second on international law. Neither substantively defines the U.S. national security exception. Congressional authorization does constrain U.S. action, but, as I argue, it is not substantive. And international law, while substantive, does not define the national security exception.

##### *A. Congressional Authorization Is Not Substantive*

To the extent that the United States has had an operative definition of national security, it is based on Congressional authorization. This practice is part of our constitutional architecture. Article I § 8 gives Congress the power to declare war.<sup>235</sup> This assignment of power works with the allocation of the Commander-in-Chief power, to the President<sup>236</sup> to split the war power between branches.

The main Congressional authority for post-9/11 national security practices is the Authorization for Use of Military Force (AUMF).<sup>237</sup> The AUMF authorizes the President to use “all necessary and appropriate force” against those who “planned, authorized, committed” the 9/11 terrorist attacks, as well as those who “aided or . . . harbored” the attackers.<sup>238</sup> Courts, for the most part, have accepted

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233 See The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560, at \*19 (Sept. 25, 2001) (“Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. . . . These decisions, under our Constitution, are for the President alone to make.”).

234 See generally *id.*

235 U.S. CONST. Art. I § 8.

236 U.S. CONST. Art. II § 2.

237 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

The President reads the AUMF to include the right to detain those “who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.” Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re: Guantanamo Bay Detainee Litig., Misc. No. 08-442, (D.D.C. Mar. 13, 2009).

238 AUMF, 115 Stat. at 224.



the AUMF as a justification for national security action.<sup>239</sup> The doctrinal question of whether military detention is justified thus turns, in practice, on whether the detainee has the relationship to the 9/11 terrorists required by the AUMF.<sup>240</sup> The same may be true with targeted killing.<sup>241</sup>

While the AUMF does provide some justiciable constraint on the Executive, these constraints are not substantive. The AUMF does not tell us what the Executive can or cannot do. It merely approves “all necessary and appropriate force.”<sup>242</sup> We can take this to mean that Congress has granted the Executive all the power Congress itself has. This delegation is constitutional,<sup>243</sup> but it would be more appropriate if Congress actually weighed in itself.

More at issue, the AUMF does not explain what kind of threat justifies national security treatment. Rather, it targets a particular set of enemies: the 9/11 attackers and those connected to them.<sup>244</sup> It is as if Congress authorized a particular topic of dubious constitutionality—say, warrantless wiretaps—against one drug cartel and no others. This does not tell us what can be done and why. It only tells us who we can do it to—not in general, forward-looking terms, but only in response to past attack.

This approach—of picking an enemy, instead of a threat—makes sense if we think of post-9/11 practices as war. Wars are waged against enemies. Congress could declare war against Germany, which would authorize military trial and detention of German enemy combatants.<sup>245</sup> Yet what is now occurring is not precisely war. Instead, we have the “war on terror,” a new hybrid. Unlike war, we do not know what the “war on terror” is. No constitutional framer asked whether the United States could use a drone to kill a suspected terrorist, who happens to be a U.S. citizen living in an allied country (but in a region that is not under allied control).<sup>246</sup> Even military detention—a traditional incident of the war power<sup>247</sup>—has not traditionally been applied to detainees who are 1) plausibly not affiliated with the enemy at all; 2) captured off the battlefield; 3) in the absence of a declared war; 4) and therefore potentially subject to indefinite detention because the “war” they are allegedly part of will never end.<sup>248</sup>

By ceding full discretion to the executive, Congress has decided not to define the war on terror.<sup>249</sup> The Executive—the body charged with enforcing the law, not making it—is constitutionally constrained from defining it. It is this body that needs to be restrained.

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239 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

240 See, e.g., Al Alwi v. Obama, No. 09–5125, 2011 WL 2937134, at \*10 (D.C. Cir. July 22, 2011).

241 See Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010); see also Bobby Chesney, *The AQ-AQAP Distinction, State Secrets, and the Al-Aulaki Suit*, LAWFARE (Oct. 12, 2010), <http://www.lawfareblog.com/2010/10/the-aq-aqap-distinction-state-secrets-and-the-al-aulaki-suit/>.

242 AUMF, 115 Stat. at 224.

243 Hamdi, 542 U.S. at 517-25.

244 See AUMF, 115 Stat. at 224..

245 See generally Ex Parte Quirin, 317 U.S. 1 (1942).

246 See *supra* Part II.A.

247 Hamdi, 542 U.S. at 517-25 .

248 This question is not hypothetical—it was the position of Boumediene. See *supra* Part II.E.

249 Both the AUMF and Military Commissions Act, as I have argued, are not limits on Executive Power but rather endorsements of them. See *supra* Part II.B.



This leaves the judiciary to police the war power. We should not be surprised that it has. There has to be *some* end to what the political branches can do in the name of war. The President cannot kill U.S. citizens on U.S. soil without due process on mere allegations of terrorism.<sup>250</sup> Or, to give a more far-fetched hypo, I do not think the President can constitutionally kill people for opposing the war.<sup>251</sup>

I do not think this point is doctrinally controversial.<sup>252</sup> The Court has long defined the outer limit of the war power.<sup>253</sup> This is consistent with its basic function. The Constitution limits the power of each branch of the government. The Court interprets the Constitution. This means, for instance, deciding what “commerce” is.<sup>254</sup> The Court will, and should, also decide what “war” is.<sup>255</sup> It would be strange if it did otherwise.

With Congress having dropped out of the debate, and the Supreme Court left to police the outer edges of the war power, the country is in a strange position. A few large cases—notably, *Hamdi* and *Boumediene*—raise foundational questions, but neither the Supreme Court nor Congress has stepped in to answer them. This has left the issue to the lower courts. As Benjamin Wittes, Bobby Chesney, and Rabea Benhalim have noted:

This peculiar delegation of a major legislative project to the federal courts arose because of the Supreme Court’s 2008 decision that the courts have jurisdiction to hear Guantánamo habeas cases . . . . [T]he justices . . . refused to define the contours of either the government’s detention authority or the procedures associated with the challenges it authorized. . . . Combined with the passivity of the political branches in the wake of the high court’s decision, this move placed an astonishing raft of difficult questions in the hands of the federal district court judges in Washington and the appellate judges who review their work.<sup>256</sup>

*Boumediene* has, in fact, been so difficult to implement that several judges have taken the unusual

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250 See *supra* Part II.A.

251 *C.f.*, *Cohen v. California*, 403 U.S. 15, 25-27 (1971) (holding that the First Amendment grants the right to criticize the draft even using offensive language). I am using a slippery-slope argument here—always a dubious tactic—but in response to an equally dubious premise: that the war power has no justiciable limit.

252 The Bush Administration disagreed. See The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560, at \*19 (Sept. 25, 2001).

253 See, e.g., *Ex parte Milligan*, 71 U.S. 2 (1866); *Hamdi v. Rumsfeld*, 542 U.S. 507, 525-39 (2004).

254 U.S. CONST. Art. I § 8.

255 *Id.*; see also *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

256 RABEA BENHALIM ET. AL., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 1 available at [http://www.brookings.edu/papers/2010/0122\\_guantanamo\\_wittes\\_chesney.aspx](http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx).



step of asking—both in opinions<sup>257</sup> and while off the bench<sup>258</sup>—for more guidance. But I do not think these requests will be answered. There is pressure to fight terrorism and to protect the nation. The political branches respond to this pressure by targeting outsiders. The risks of using those practices—of beating, killing or imprisoning without trial—fall mostly on aliens and people outside the country, who have little or no power to push back. The Supreme Court, meanwhile, does not want to provide substantive guidance either. This is consistent with a policy-perfecting role. The Court seeks not to create national security policy but rather to create the best conditions for Congress to create that policy.

Future events might change this political dynamic. A large terrorist attack by insiders might prompt Congress to reconsider the applications of national security practices at home. I hope this does not happen. But if it does, it would be better to have the legal architecture necessary to respond in place before it happens, and not after.

### *B. International Law Does Not Define the National Security Exception*

Congress's definition of the national security exception could constrain the United States, but it is not substantive. International law, conversely, is substantive,<sup>259</sup> but does not define the national security exception.<sup>260</sup> This is because international law lacks "a pervasive and effective enforcement mechanism."<sup>261</sup> Conceding this, international-law scholars argue that states comply with international law for other reasons, including moral suasion, the need for legitimacy, the habit of compliance,<sup>262</sup>

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257 See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J. concurring) ("[A]s other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of the petitioners and the safety of our nation.").

258 See, e.g., Judge A. Raymond Randolph, Speech to the Heritage Foundation: The Guantanamo Mess (Oct 20, 2010), *available at* <http://www.heritage.org/Events/2010/10/Guantanamo-Mess> (addressing the many questions still left unanswered by the *Boumediene* case).

259 See generally Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008) (discussing that international law offers three models for the detention of terrorism suspects each of which employs some level of human rights, criminal, and administrative law); Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*, 75 GEO. WASH. L. REV. 1105 (2007) (reasoning that the broad international laws of war established by the Geneva Conventions allow the law to adapt to the changed environment of terrorism).

260 I mean this descriptively, not normatively. I think it would be better—politically, prudentially and theoretically—if U.S. national security policy were more constrained by international law. This point is not novel—it is in fact very common—so I will not press the argument.

261 See Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321, 322 (2009) ("Lacking a pervasive and effective enforcement mechanism, scholars and policy makers have pondered whether international law is really binding law."). For an excellent summary of the "compliance debate" in international law, see *id.* at 322-41 (2009).

262 See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2614 (1997) (discussing the post-World War II move towards implementing international institutions based on multilateral treaties that allocated responsibility among the transnational members to construct international laws); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (stating nations' compliance with international law is greatly dependent on the legitimacy of the nations and their institutions).



reciprocity costs<sup>263</sup> and the prospects of prosecution for violating international law.<sup>264</sup> These pressures lead to the internalization of international law in U.S. decision makers.<sup>265</sup>

Even those who argue that states have reasons to comply with international law do not argue that the U.S. national security exception is defined by international law. Indeed, the general tenor of internationalist writing is to critique the United States for its failure to comply with international law.<sup>266</sup> And while the Executive purports to comply with international law (and has from the start of the war on terror),<sup>267</sup> a body charged with interpreting the law it enforces will not, in the long run, be a neutral arbiter of that law. The Bush Administration notoriously acted on its interpretation of international law to support waterboarding and other putatively unlawful treatment of detainees,<sup>268</sup> even though this interpretation was later repudiated by the U.N. Secretary-General, the U.N. Special Rapporteurs on Torture and Arbitrary Detention, the U.K. House of Commons, the International Committee of the Red Cross, and the Inter-American Commission on Human Rights, among others.<sup>269</sup>

Thus international law, even though it influences U.S. behavior,<sup>270</sup> does not constrain it as domestic law does. There was no international body stopping the U.S. from targeting al-Aulaqi. Nor does international law provide a simple way for those harmed by U.S. power to remedy that harm.

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263 Scharf, *supra* note 261, at 357 (“[C]oncern for prosecution in third States or international tribunals under the international law concept of universal jurisdiction . . . does suggest an exogenous influence of international law.”).

264 *Id.* (“[W]hen U.S. courts interpret international law as a limit to Executive Power . . . we are seeing the concrete effects of internalization of international law by a disaggregated State.”).

265 See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [hereinafter “Koh Speech”], (describing the efforts of the Obama Administration to support international courts and comply with the requirements of the law of war).

266 See, e.g., Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L. 359 (2009) (concluding the members of the Bush Administration responsible for the forced disappearance of persons and other war crimes should be held civilly liable for their actions); Mary Ellen O’Connell, *When Is a War Not a War? The Myths of the Global War on Terror*, 12 ILSA J. INT’L & COMP. L. 535, 538 (2006) (contending the Bush Administration’s policies were based on erroneous and contradictory legal analyses that abused international humanitarian law); Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005) (describing the Bush Administration’s application of wartime privileges in response to Al Qaeda attacks despite the fact that the conflicts did not amount to the international law’s definition of war).

267 See Jack Goldsmith, *Detention, the AUMF, and the Bush Administration—Correcting the Record*, LAWFARE (September 14, 2010), <http://www.lawfareblog.com/2010/09/detention-the-aumf-and-the-bush-administration-correcting-the-record/> (explaining that the Obama Administration’s legal rationale for military detention does not differ much from that of the Bush Administration because both administrations have derived their powers from the AUMF).

268 Scharf, *supra* note 261, at 344-45 (addressing findings of torture tactics used on detainees).

269 *Id.* at 356 (stating the named organizations all believed that the U.S. treatment of detainees was inconsistent with international law).

270 But see JACK GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing States’ comply with international law in an effort to preserve their interests in the international arena).



International law can become the law of the land.<sup>271</sup> But Congress has the power to alter domestic application of treaties and abrogate federal common law.<sup>272</sup> There are arguments that international law should apply domestically even against contrary congressional or executive action. But these arguments have failed in U.S. courts.<sup>273</sup>

If the political branches jointly find themselves in agreement with international law, then, they can change the law. This has already happened in the Guantanamo cases. In *Hamdan v. Rumsfeld*,<sup>274</sup> the Supreme Court held that the Geneva Conventions covered Guantanamo detainees because Congress had, by statute, incorporated them into U.S. law.<sup>275</sup> In response, Congress passed the Military Commissions Act, providing that alien unlawful enemy combatants tried under the statute may not use the Geneva Conventions in court.<sup>276</sup> There is an argument about whether Congress can lawfully do this,<sup>277</sup> but U.S. courts would likely take Congress's side in this argument.<sup>278</sup>

In addition to being law itself, international law can also guide the interpretation of U.S. law. Courts are required to interpret domestic law consistently with international law.<sup>279</sup> The Obama Administration has concluded that the AUMF should be interpreted in light of the laws of war.<sup>280</sup> No matter the interpretive impact of international law, though, its power to constrain the political branches is limited by the fact that they can alter its domestic application. This is why the most important case in the Guantanamo line—*Boumediene*—hinges on constitutional law rather than interna-

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271 See THIRD RESTATEMENT, *supra* note 11, at § 111 cmt. d (1987) (“Treaties made under the authority of the United States, like the Constitution and the laws of the United States, are expressly declared to be the ‘supreme Law of the Land’ by Article VI of the Constitution.”); § 115 cmt. e (1987) (“Since any treaty or other international agreement of the United States, and any rule of customary international law, is federal law (§111), it supersedes inconsistent State law or policy whether adopted earlier or later.”).

272 See *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); see also THIRD RESTATEMENT, *supra* note 11, at § 115(1) (the alteration of an international law’s domestic application does not affect the United States’ international commitments).

273 THIRD RESTATEMENT, *supra* note 11, at § 115(1) (delineating when an act of Congress may supersede an international agreement); see also Robert Delahunty & John Yoo, *Executive Power v. International Law*, 30 Harv. J. L. & Pub. Pol’y 73, 75 (2006) (“It appears that no federal court of appeals has ever held that customary international law limits presidential decisions.”).

274 548 U.S. 557 (2004).

275 *Id.* at 613, 628-32.

276 10 U.S.C. § 948b(e) (2006) (“No alien unprivileged enemy belligerent subject to trial under this chapter may invoke the Geneva Conventions as a basis for a private right of action.”). For an excellent discussion of the effect of this provision see Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322 (2006) (discussing the criticism the Military Commissions Act has drawn for its restriction on the habeas corpus review and its treatment of the Geneva Conventions).

277 See Bradley, *supra* note 276, at 337-41 (raising the question of whether the Geneva Conventions were intended to be judicially enforceable).

278 *Id.* at 337-44 (reaching the conclusion that Congress has the right to override treaties for purposes of U.S. law under the “last-in-time rule”).

279 *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

280 See Koh Speech, *supra* note 265, at B(1)(b) “[W]e are resting our detention authority on a domestic statute- the 2001 Authorization for Use of Military Force (AUMF)- as informed by the principles of the laws of war.”).



tional law.

International law *can* bind the political branches when used as a guide to interpreting the constitution.<sup>281</sup> It is in this role, as guide to the Constitution, that international law will most likely affect U.S. national security policy. This is not because it is theoretically sounder. Rather, it is pitched in a rhetoric that is more amenable to judiciary, the branch most likely to recognize outsiders' rights.

## V. MEMBERSHIP AS POLITICS

Here I want to make a political argument. I put it forth as conjecture. Hopefully it is useful even so. My claim is that without equalizing treatment across citizenship and territory, we will be hard pressed to define the national security exception. To make this case I will look at both public and judicial politics.

### A. Public Politics

As I have told the story so far, the political branches have, instead of substantively defining national security, simply decided that it is something we do to aliens and people outside the country. If this is true, it is hard to see why those branches would change.

Outsiders are politically less powerful than insiders. Aliens cannot vote in U.S. elections even when they reside in the United States. People outside the country are mostly noncitizens. And citizens outside the country, who retain the rights to vote, are not a politically united body in any way that would allow them to mobilize on issues relevant to them as a class. There is no natural constituency, in other words, that would have objected to the targeting of Al-Aulaqi, on the basis of "extra-territorial rights."

When it comes to national security, outsiders have less clout than in other contexts. The larger politics of immigration policy create proxies for the interests of noncitizens in the national debate. Noncitizens have family and financial ties to U.S. citizens, and there are ethnic voting blocks that can pressure Congress to consider the views of economic immigrants.<sup>282</sup> This representation is imperfect, but it is more than what outsiders subject to the national security power currently have. The

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281 The U.S. Constitution does not expressly require consultation with international law, unlike, for instance, the South African constitution. Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and Sovereignism of the Nation State*, 6 INT'L J. CONST. L. 33, 43-45 (2008) (comparing South Africa's implementation of international law to that of the U.S.); S. Afr. Const. (1996) pmb., ch. 2, § 39 (declaring courts must consider democratic society's values, international law; and may consider foreign law when interpreting the Bill of Rights). But, as Professor Sarah Cleveland has noted, international law is threaded through the Constitution. See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) [Hereinafter Cleveland, *International*]. Most obviously, "war" is a term of art in the Constitution. See *supra* Part IV.A. And international law has informed courts' reading of this term. Cleveland, *International*, at 20-27; see also Vladeck, *supra* note 4.

282 See, e.g., Victor C. Romero, *On Elián and the Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y, 343, 367-68 (2010) (stating Latinos and Asians will soon achieve the majority status in the U.S. and will then be able to effectively change immigration policy if they so choose).



largest single block subject to national security practices are Arab and Muslim men; they were overwhelmingly the subjects of preventive detention after 9/11.<sup>283</sup> But Arab and Muslim U.S. citizens are not a large enough voting block to influence domestic politics,<sup>284</sup> even assuming that they constitute a voting block for these purposes (and I do not know that they do).

As for people outside the country, there are obvious reasons that they won't form a cohesive political unit. They are divided by language and culture. Consider the actual targets of U.S. national security practices. There is no large domestic voting block whose interests are aligned with Khaled el-Masri—no U.S. voter whose fear of extraordinary rendition would make them insist on limiting government power. No citizen at home will be rendered to torture.

The relative powerlessness of outsiders also exacerbates the tendency of Congress to defer to the Executive in the use of the national security power. Some scholars argue that we are living in a “national security state” in which the Executive's power to act in the name of national security goes relatively unchecked by Congress.<sup>285</sup> Constitutional scholars have worried that Congress has not acted to restrain the Executive for violating the War Powers Act by bombing Libya.<sup>286</sup> But if Congress is not inclined to check the Executive in its pursuit of territorial war—the kind of thing we are doing in Iraq, Afghanistan, and Libya—there will be less incentive to do so in the nonterritorial interventions I am describing. Territorial wars, after all, take a significant commitment of national resources and draw public attention. This is less true for the targeted interventions typical of nonterritorial conflict.

Nor can we rely on the Executive to define national security. It is hard to see how there will be real political pressure on the President to protect outsiders. The same dynamics that prevent outsiders from influencing Congressional action apply to the Executive. Nor have we seen significant political pushback to the Executive's decisions to target outsiders. Consider the political response—or lack thereof—to the Obama Administration's decision to kill a U.S. citizen, or the failure of victims of extraordinary rendition to garner a political remedy.

There has been one exception—Guantanamo. Guantanamo became a political issue. But the political salience of Guantanamo was spurred on by the willingness of courts to take cases from Guantanamo detainees.

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283 DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM*, 22-46, 88-128 (2005) (discussing how the Department of Justice's detention tactics not only violated criminal and immigration law standards but also failed at actually capturing terrorists by basing their detention standards on race).

284 Less than 1% of the U.S. population is Muslim. Cathy Lynn Grossman, *Number of U.S. Muslims to Double*, USA TODAY (Jan. 26 2011), [http://www.usatoday.com/news/religion/2011-01-27-1Amuslim27\\_ST\\_N.htm](http://www.usatoday.com/news/religion/2011-01-27-1Amuslim27_ST_N.htm). As of 2008, there were an estimated 3.5 million self-identified Arab-Americans in the United States. See Scott Mcleod, *Where Arab Votes Could be Crucial*, MIDDLE EAST BLOG, TIME (September 18, 2008), [http://mideast.blogs.time.com/2008/09/18/will\\_the\\_arab\\_vote\\_count\\_for\\_o/](http://mideast.blogs.time.com/2008/09/18/will_the_arab_vote_count_for_o/).

285 See generally Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010).

286 Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 20, 2011, at A27.



### *B. Judicial Politics*

In the last decade or so, progressive scholars have argued that the political branches, and not the judiciary, are—for normative, historical and prudential reasons—the best guardians of the Constitution. They have proposed various versions of popular constitutionalism—some weak and some strong—all of which relegate the courts to a lesser role in constitutional interpretation.<sup>287</sup> This scholarship—which was prolific for a while<sup>288</sup>—has received some pushback.<sup>289</sup> Whatever one makes of popular constitutionalism, though, courts are the best near-term hope for outsiders against the national security power.

The national security power, on the other hand, operates in secret, both because there is a legitimate need for government secrecy and because the deference granted the Executive by other branches allows it to escape oversight. When outsiders are targets, the government has additional ways to limit their political power. Most outsiders are unable to vote. Nor can they generally bring their issues to the public. The U.S. media is less inclined to cover events in Bosnia-Herzegovina than in Kansas. When using the national security power, the political branches also have the power to *control* outsiders—to put someone where political recourse is unavailable to them. Most obviously, it can do this by operating covertly, by killing people without process or placing them in dark sites where they cannot access lawyers or reporters. Less drastically, it can move detainees out of the country, or, as it allegedly did in *al Maqaleh*, from their home countries into a theater of war.<sup>290</sup>

The inability to get into court creates its own invisibility. Adjudication fixes facts; it establishes a narrative that the media and politicians can refer to. Political awareness of extraordinary rendition would rise if one of the victimized transferees won a verdict—indeed, it would rise if the victims could reach the merits phase of a trial, which would allow for discovery and testimony. Indeed, the mere filing of a complaint forces a court to listen to the complainant. This does not mean that the complainant will win, or that the court will even have jurisdiction. But to someone who is pushed outside the legal system—to a detainee in Guantanamo or Afghanistan—the very ability to argue in court, even if only at the pleadings, is a way to demonstrate humanity. Outsiders, in literal terms, are asking to be “people”<sup>291</sup> under the Constitution.<sup>292</sup> Courts are the doorways to that personhood. The courts’ role as arbiter of personhood is consistent with policy perfection. Stated at this level of abstraction, the claim seems airy. But it presents itself tangibly. If the government is not able to kill people without trial because they are outside the United States, it must ask itself whether kill-

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287 See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); RICHARD D. PARKER, “HERE THE PEOPLE RULE”: A POPULAR CONSTITUTIONALIST MANIFESTO (1994).

288 See *id.*

289 See generally Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013 (2004).

290 *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

291 U.S. CONST. Am. IV (protecting the right of the “people”). See also U.S. CONST. Ams. V, XIV (protecting the rights of “person[s]”).

292 The judicial battle over personhood is jurisdictional, and jurisdiction has been the main sticking point in these cases—in the habeas claims of the Guantanamo and Bagram detainees, but also the political-question and state-secrets doctrines that prevent other outsiders from pressing their claims. See *supra* Parts II.A. and II.C.



ing people without trial is a good idea. If it cannot preventively detain people because they are not citizens, it must ask itself whether it should preventively detain citizens.

Indeed, *Boumediene* proves this claim. It establishes that noncitizens outside the country sometimes have the right to get into court.<sup>293</sup> Ultimately, this will push the issue of extraterritorial rights—and associated war-on-terror issues, back to Congress. Given its options, policy perfection is probably the Court’s best choice. The debate, as it is now structured, is between progressives who want the Court to adopt international law and more conservative scholars who are happier to leave total control with the political branches. But the Court will not take either choice. It is doctrinally and politically constrained from adopting international law.<sup>294</sup> Nor can the Court leave the war power entirely to the political branches.<sup>295</sup>

The Court thus faces a choice: it can define the national security exception itself, or it can try to push the issue back to the political branches. Believing itself unqualified to unilaterally define the national security exception, the Court has held that outsiders sometimes have rights, hoping that this will force Congress to instantiate them.

The Court’s desire to involve Congress is perfectly plain. As it explained in *Boumediene*:

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.<sup>296</sup>

## VI. SOLUTIONS

In this section I want to draw out the implications of my theory. First, I want to make some predictions about what will happen and then some loose recommendations about what we should do. I say “loose” because a mandate towards equality does not predict any single outcome, and cannot be effectuated through any single doctrinal pathway. That said, equality has consequences that are not captured by any other approach.

First, I do not think that the courts (or, for that matter Congress) will expressly rely on “equality” to guide their decisions about outsiders, except to the extent that the Equal Protection Clause requires equal treatment of noncitizens at home.<sup>297</sup> If the Court rejects membership, it will be

293 *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

294 *Supra* Part IV.B.

295 *See supra* Part IV.A.

296 *Boumediene*, 553 U.S. at 797-98; *See also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (“[J]udicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so.”).

297 *See generally* Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007).



through decisions that reduce the salience of citizenship and territory against applications of the national security power. Because the Court mostly uses doctrinal and originalist rhetoric to justify its decisions, future decisions will use these modalities, as *Boumediene* did.<sup>298</sup>

Second, the courts will not embrace international law as an independent restraint on the political branches. Rather, if the Supreme Court rejects membership, it will rely on the Constitution. Still, in the long run rejection of the membership model will push the United States towards international law even if international law does not form the basis of that rejection. If any branch is forced to substantively define national security, international law is the obvious source. The Court, for instance could use international law to determine the constitutional limit of the war power.<sup>299</sup> Or the judicial requirement that outsiders be treated equally might lead Congress to use international law to control and define national security.

Normatively, the membership theory suggests a political strategy for those who are interested in protecting outsiders' rights and fostering Congressional engagement with national security law. This strategy is to allow some domestic application of national security practices in exchange for equal treatment of outsiders. Progressives should be open to accepting a national security court if they can ensure it treats citizens, aliens, and people captured abroad equally, and, more importantly, that they are equally likely to end up in that court.

The same is true of preventive detention. Indeed, equality should be the price of admission for progressive involvement in the creation of new national security approaches. For preventive detention this would mean not just the creation of a preventive-detention law that applies to citizens at home but also changes to immigration law that prevent the Executive from using it as preventive detention.<sup>300</sup> Any such law would also have to provide that it was the exclusive means of preventive detention.<sup>301</sup>

For aliens inside the United States, the Equal Protection and Due Process clauses are the clearest pathways to equality against national security practices.<sup>302</sup> There is, for example, a case that the Military Commission Acts' differential treatment of territorial aliens violates Equal Protection.<sup>303</sup>

Rejection of membership suggests presumptive equality for extraterritorial recognition of rights against the war powers. This does not mean that location never matters. It means only that location matters only insofar as it relates to some other reason. It is more difficult for the United States to observe Constitutional rights in extraterritorial actions like the raid on Osama Bin Laden than it is when acting at home. But lumping the Bin Laden attack in with the rendition of el-Masri merely because both occurred overseas is foolish. Courts should be able to look past the categorization of "abroad" and see whether national security interests are actually at stake.

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298 *Boumediene*, 553 U.S. at 739-72. As someone who tends to think that these modalities produce indeterminate results, at least for these kinds of purposes, I am not worried that the Court will be unable to reject membership if it uses them. *C.f.* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

299 *See supra* Part IV.B.

300 *See* Cole, *supra* note 5, at 740-41.

301 *C.f. id.* at 748-50.

302 *See generally* Katyal, *supra* note 297.

303 *Id.*



This requires the disentangling of substantive and membership factors. The notion of a “battlefield,” which can exist either at home or abroad, should be differentiated from territoriality.<sup>304</sup> It seems plausible that people captured on a territorial battlefield should be treated differently than people simply captured abroad. Similarly, the site of capture, which can tell us something about the threat a target poses and the cost of capturing him, should be distinguished from the site of detention, which tells us where the Executive wants to keep someone. More broadly, the Executive should not be able to divest someone of rights by moving them. If there are extrinsic reasons to keep someone in a place where it is difficult to afford rights, this might justify differential treatment. But the mere decision to detain someone abroad—even in a theater of war—should not justify discrimination.

#### CONCLUSION

Equality is a risk. It ties the rights of the powerless to the powerful, trusting that the powerful will have the wisdom to govern themselves. I do not know that this trust is justified. But if there is a way forward for outsiders, it is this way, because it takes the body politic as it is. There are other, clearer visions of the good, but each relies on some structure that does not exist—an international body, committed to universal rights, that can bring the United States to heel, or a Congress inclined to care about what happens to aliens abroad. These visions are themselves a kind of politics, but they speak to a future time. Equality is a bridge to that time.

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304 Capture on the battlefield is a plausible factor in determining whether the national security exception applies in a particular case; the battlefield itself is limited in a way that constrains the national security power (assuming that the battlefield is a contiguous area). And “battlefield,” however defined, is distinct from membership in that there can be battlefields inside the country, as in the Civil War. In the modern context, imagine what would happen if there were another terrorist attack on the scale of 9/11. It could be plausible to treat people captured near the attack under a different set of rules. So long as citizens and noncitizens in the affected area were treated the same, this treatment would be substantive, not membership based.