

CASE COMMENTS

Constitutional Law—Writ of Habeas Corpus Available to Alien Detainees Held Outside the United States—*Rasul v. Bush*, 124 S. Ct. 2686 (2004)

The jurisdictional limits of federal courts are defined by Constitution and statute and may not be expanded by judicial decree.¹ Accordingly, the habeas corpus statute confers jurisdiction upon federal courts to review the legality of executive detentions of detainees held within their respective districts.² In *Rasul v. Bush*,³ the Supreme Court of the United States considered whether the habeas statute provided federal courts with jurisdiction to entertain challenges from petitioners captured abroad and held in territories in which the United States commands plenary and exclusive jurisdiction, but not ultimate sovereignty.⁴ The Court concluded that federal courts possess jurisdiction and may consider legal challenges from detainees captured and held in such territories.⁵

Captured abroad during a military campaign waged by the United States in response to the al Qaeda terrorist attacks of September 11, 2001, the petitioners in *Rasul* (Petitioners) were transported to Guantanamo Bay Naval Base where they were incarcerated.⁶ Although the United States exercises jurisdiction within the confines of the naval base, the land remains part of the sovereign territory of the Republic of Cuba.⁷ Petitioners alleged that, during their two-

1. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (discussing judiciary's strict adherence to jurisdictional limits of federal courts).

2. 28 U.S.C. § 2241 (2000) (granting federal courts jurisdiction examine complaints regarding legality of detention). Section 2241(a) mandates that federal courts may grant writs of habeas corpus only within their respective jurisdictions. *Id.* § 2241(a). The statute further requires circuit judges to enter the order into the records of the court of the district wherein the alleged illegal detention occurred. *Id.*

3. 124 S. Ct. 2686 (2004).

4. *Id.* at 2690-91 (articulating question presented). Specifically, the Court considered whether the District Court for the District of Columbia possessed jurisdiction to consider legal challenges from foreign nationals captured abroad during military campaigns against Taliban and al Qaeda forces and held at Guantanamo Bay Naval Base in Cuba. *Id.*

5. *Id.* at 2699 (holding district court possesses jurisdiction to consider petitioners' claims regarding legality of their executive detentions).

6. *Id.* at 2690 (discussing reasons for capture and incarceration). The United States conducted the military campaign pursuant to a joint resolution of Congress that authorized the use of "all necessary and appropriate" military force against organizations responsible for the terrorist attacks. *Id.* Twelve of the petitioners were Kuwaiti nationals, while two were Australian citizens. *Id.*

7. 124 S. Ct. at 2690-91. The United States possesses forty-five square miles of Cuban soil pursuant to a lease agreement with the Republic of Cuba. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. The lease will remain in effect as long as the United States continues to occupy the land. Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683.

year detention, the United States neither charged them nor provided them with legal counsel.⁸

In 2002, Petitioners sought relief from their detention by filing petitions for habeas corpus and asserting other causes of action in the United States District Court for the District of Columbia.⁹ The court interpreted each action as a petition for a writ of habeas corpus and dismissed them, holding that it lacked jurisdiction to consider petitions from foreign detainees held outside the nation's sovereign territory.¹⁰ The District of Columbia Circuit affirmed, reasoning that aliens captured and held beyond the nation's sovereign holdings lack the right to litigate in its courts.¹¹ The Supreme Court granted certiorari and reversed, concluding that neither the habeas statute nor any prior Supreme Court holding prevented the district court from exercising jurisdiction over Petitioners' claims.¹²

The writ of habeas corpus was developed by British judges to serve as a means for reviewing the legality of executive detention.¹³ Thus, the jurisdictional reach of the habeas statute rests upon a foundation of British common law.¹⁴ For centuries, British courts have exercised jurisdiction over habeas petitions filed from beyond its national borders.¹⁵ Consistent with the

8. 124 S. Ct. at 2691 (describing Petitioners' allegations); *see also* Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 267 (2004) (characterizing Guantanamo Bay Naval Base as "legal black hole" where detainees lack basic rights).

9. 124 S. Ct. at 2691 (alleging illegality of detention). Petitioners, through relatives acting as their next friends, filed habeas petitions and other statutory-based claims in the United States District Court for the District of Columbia. *Id.*

10. *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)), *rev'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The district court reasoned that only a writ of habeas corpus could provide the Petitioners with relief because they sought a release from custody. *Id.* at 62.

11. *Al Odah v. Bush*, 321 F.3d 1134, 1144 (D.C. Cir. 2003) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)), *rev'd sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Through its interpretation of *Eisentrager*, the court of appeals concluded that Fifth Amendment rights are not available to aliens captured and detained outside of the sovereign territory of the United States. *Id.* at 1140-41. The detainees possess no right to habeas relief, which ordinarily serves to protect due process rights, because constitutional rights do not apply to them. Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 977 (2003) (interpreting conclusion of court of appeals with respect to Petitioners' entitlement to habeas relief).

12. 124 S. Ct. at 2699 (reversing judgment of court of appeals and remanding to district court).

13. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (reflecting upon protection afforded by habeas writ); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J. concurring) (identifying historic purpose of habeas writ as means of protection against unlawful executive detention).

14. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (highlighting common law heritage of habeas statute); *Williams v. Kaiser*, 323 U.S. 471, 484 (1945) (quoting *Sec'y of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609 (appeal taken from Eng. C.A.)) (describing influence of British common law on modern iteration of habeas writ); *see also* Limin Zheng, Note, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2109 (2002) (noting common law writ of habeas corpus accompanied British settlers to United States). *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) (illustrating common-law evolution of habeas writ).

15. *Compare Ex parte Mwenya*, 1 Q.B. 241, 303 (Eng. C.A. 1960) (confirming reach of habeas writ not dependent upon limits of territorial sovereignty), and *King v. Earl of Crewe*, 2 K.B. 576, 606 (Eng. C.A. 1910) (stating Crown extended power to issue habeas corpus writ beyond its sovereign territories), with *In re Ning*

historic use of the writ, United States courts possess jurisdiction to consider habeas petitions within their respective jurisdictions.¹⁶ Balancing their reliance on common-law developments, federal courts remain faithful to the doctrine that domestic statutes presumably lack extraterritorial effect.¹⁷ In addition to habeas relief, however, the United States provides aliens with other means to access its courts.¹⁸

For over fifty years, the United States judiciary has relied upon the Supreme Court's decision in *Johnson v. Eisentrager*¹⁹ for the rule that federal courts lack jurisdiction to consider habeas petitions brought by detainees captured and held outside the nation's sovereign territory.²⁰ In *Eisentrager*, the Court held that the detainees at issue lacked constitutional entitlement to habeas corpus writs because they were aliens, had never entered the United States, were held at all times on foreign soil, and were convicted by a military tribunal of offenses committed outside of the United States.²¹ The Court also ruled that the detainees lacked statutory entitlement, although it provided very little reasoning for its conclusion.²²

Yi-Ching, 56 T.L.R. 3, 4-6 (Vacation Ct. 1939) (concluding writ of habeas corpus traditionally available only to aliens held outside sovereign territory).

16. See, e.g., *In re Yamashita*, 327 U.S. 1, 4-6 (1946) (considering habeas petition filed by enemy alien detained in insular possession of United States); *Ex parte Quirin*, 317 U.S. 1, 9 (1942) (determining entitlement of alien detained in United States to petition for habeas relief); *Ex parte Milligan*, 71 U.S. 2, 8-9 (1866) (considering habeas petition of American citizen involved in attacks against military installations).

17. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (observing high degree of difficulty in overcoming presumption against extraterritorial application of domestic statute); see *Argentine Republic v. Amereda Hess Ship'g Corp.*, 488 U.S. 428, 440 (1989) (explaining Congress may extend statute to high seas when it wishes to do so); see also James T. Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 366-67 (2003) (citing instances when United States courts adhered to presumption against extraterritorial application of statutes).

18. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) (summarizing policy of United States courts in allowing aliens access to its judicial system); see also Marisa A. Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 212 (2004) (suggesting national policy providing aliens access to courts initiated to prevent international crises). In addition, 28 U.S.C. § 1350 expressly confers upon aliens the right to sue for actionable torts in United States federal courts. 28 U.S.C. § 1350 (2000).

19. 339 U.S. 763 (1950).

20. See Seth J. Hawkins, Comment, *Up Guantanamo Without a Paddle: Waves of Afghan Detainees Drown in America's Great Habeas Corpus Loophole*, 47 ST. LOUIS U. L.J. 1243, 1263-64 (2003) (reviewing major decisions concerning territorial limitations of habeas statute).

21. *Johnson v. Eisentrager*, 339 U.S. 763, 780-81 (1950) (overruling decision of court of appeals regarding petitioners' entitlement to habeas petitions). The District of Columbia Circuit had held that, although federal courts lacked statutory jurisdiction over the petitioners' case, they must possess jurisdiction as a part of their judicial power. *Eisentrager v. Forrestal* 174 F.2d 961, 966-67 (D.C. Cir. 1949) (holding petitioners possessed right to habeas relief), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950). In examining the holding of the court of appeals, the Court weighed the circumstances of the petitioners' detention in accordance with its traditional responsibility of protecting persons from illegal military incarceration. *Eisentrager*, 339 U.S. at 780-81.

22. *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950) (briefly noting absence of statutory authority supporting petitioners' claims for habeas relief). In addressing the lack of statutory authorization, the *Eisentrager* Court merely declared that it failed to locate any statute that conferred jurisdiction upon federal

Two years earlier, however, the Court had presented a detailed analysis of the jurisdictional reach of the habeas statute in *Ahrens v. Clark*²³ when it concluded that a district court's jurisdiction is limited to habeas petitions filed by persons detained within its jurisdictional territory.²⁴ The Court later departed from this holding in *Braden v. 30th Judicial Circuit Court of Kentucky*²⁵ and declared that a court may possess jurisdiction over habeas petitions filed by individuals residing outside its district.²⁶ The Court cited numerous instances where it had implicitly held that a petitioner's absence from the subject court's district did not create a jurisdictional defect in his claim.²⁷ The Court also reasoned that the wartime considerations that drove the *Ahrens* decision were no longer applicable.²⁸ Lastly, the Court noted that the habeas corpus writ acts upon the detainee's custodian.²⁹ Thus, a district court possesses jurisdiction if the custodian can be reached by service of process.³⁰

courts to entertain habeas petitions from detainees captured and held outside of the United States. *Id.* The *Eisenrager* Court, however, expressly distinguished the status of United States citizens from foreign nationals and excepted United States citizens from any application of its holding. *Id.* at 769.

23. 335 U.S. 188 (1948).

24. See *Ahrens v. Clark*, 335 U.S. 188, 190-91 (1948) (deriving interpretation of habeas statute through analysis of statute's language), *overruled by* *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484 (1973). The *Ahrens* Court observed that historical interpretations of the statute supported its conclusion. See *In re Bickley*, 3 F. Cas. 332, 333 (D.C.N.Y. 1865) (No. 1387) (recognizing district court lacks habeas jurisdiction over prisoner detained outside court's jurisdictional territory); *United States v. Davis*, 25 F. Cas. 775, 775-76 (C.C.D.C. 1839) (No. 14,926) (considering habeas writs from petitioners enslaved within district court's jurisdictional territory). As a result of the petitioners being detained within the United States, the *Ahrens* Court expressly reserved the issue of what process a detainee may assert when held beyond the jurisdictional boundaries of every district court. *Ahrens*, 335 U.S. at 193 n.4.

25. 410 U.S. 484 (1973).

26. See *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 499-500 (1973) (concluding petitioner's absence from district court's jurisdictional territory did not deprive court of jurisdiction).

27. *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 498 (1973) (noting decisions regarding jurisdictional limits of habeas statute since *Ahrens*); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (ruling ex-servicemen entitled to benefits of safeguards afforded to citizens tried in civilian courts). The *Braden* Court emphasized recent cases involving American prisoners held overseas, and thus beyond the jurisdictional territory of any district court. *Braden*, 410 U.S. at 497; see *Burns v. Wilson*, 346 U.S. 137, 139-40 (1953) (concluding federal courts may review military's consideration of soldiers' habeas claims); *Hirota v. MacArthur*, 338 U.S. 197, 197-98 (1948) (per curiam) (denying detainees' motion for leave to file writs of habeas corpus).

28. See *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 496 (1973) (observing *Ahrens*' reliance upon perceived risk and expense of transporting military prisoners over great distances). Specifically, the *Braden* Court viewed the *Ahrens* decision as a response to Congress' concern that the process of transporting war prisoners to the United States would provide them with possible means to escape. *Id.*

29. See *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 494-95 (1973) (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)) (observing habeas corpus writ acts upon individual detaining petitioner in alleged unlawful custody); *In re Jackson*, 15 Mich. 417, 419 (1867) (illustrating habeas corpus writ acts upon custodian instead of upon prisoner).

30. See *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 499-500 (1973) (establishing reach of district court's habeas jurisdiction); see also Megan A. Ferstenfeld-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Alien Habeas Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 438 (2003) (describing reasoning of *Braden* Court in determining jurisdictional reach of habeas statute).

In *Rasul v. Bush*, the Supreme Court considered whether federal courts possess jurisdiction to hear claims from foreign nationals captured abroad and held at Guantanamo Bay Naval Base, in Cuba.³¹ The Court found little guidance in *Eisentrager*, observing the decision's brief analysis regarding jurisdictional limits of the habeas statute.³² The Court thus reasoned that the *Eisentrager* decision rested upon the statutory predicate established in *Ahrens* that required a petitioner's presence within the court's district.³³ It ultimately concluded, however, that the *Braden* Court overruled *Eisentrager's* statutory predicate by declaring that federal court jurisdiction extends to habeas petitioners through their custodians.³⁴

The Court also concluded that the presumption against extraterritoriality did not apply in this case because the United States held complete jurisdictional control over Guantanamo Bay Naval Base.³⁵ The Court additionally observed that the habeas statute draws no distinctions between Americans and aliens, thereby concluding that aliens may invoke the same habeas relief as their American counterparts.³⁶ According to the Court, Petitioners' ability to access habeas relief remains consistent with the historical reach of the writ.³⁷ With respect to Petitioners' remaining claims, the Court concluded that the district court possessed jurisdiction because United States courts have traditionally remained open to nonresident aliens.³⁸

As Justice Scalia adamantly noted in his dissent, the Court essentially

31. 124 S. Ct. at 2693 (considering whether habeas statute confers right to review legality of Petitioners' executive detention).

32. *Id.* at 2694 (observing *Eisentrager* Court's lack of analysis regarding habeas statute); *see also supra* notes 20-21 and accompanying text (illustrating *Eisentrager* Court's brief analysis of habeas statute). *But see* 124 S. Ct. at 2703 (Scalia, J., dissenting) (stressing brevity of statutory analysis signifies nothing more than obvious nature of statute's jurisdictional reach).

33. 124 S. Ct. at 2694 (reflecting upon statutory analysis rendered by *Ahrens* Court only two years prior to *Eisentrager*). *But see id.* at 2702 (Scalia, J., dissenting) (recalling *Ahrens* decision solely addressed detainees held within United States, reserving issue regarding foreign detainees).

34. *Id.* at 2695 (describing effects of Court's holdings in *Braden* and *Eisentrager* decisions). *But see id.* at 2704 (Scalia, J., dissenting) (stressing *Braden* distinguished *Ahrens* merely with respect to petitioners detained in multiple federal jurisdictional territories).

35. *Id.* at 2696 (citing terms of lease agreement between United States and Cuba in finding extraterritoriality doctrine inapplicable). In addition to the lease, the Court based its reasoning upon the United States' subsequent treaty with Cuba that allowed the United States to control the leased land indefinitely. *Id.*

36. *Id.* at 2696 (comparing statutory entitlement of Americans with rights of nonresident detainees). The Court relied heavily upon the Solicitor General's concession that the habeas statute would create federal court jurisdiction over habeas petitions filed by American citizens detained at the base. *Id.* *But see id.* at 2708 (Scalia, J., dissenting) (refuting majority's reliance on Solicitor General's concession by providing context). Justice Scalia stressed that the Solicitor General based his admission upon the possibility that United States citizens may possess greater habeas rights due to their United States citizenship. *Id.* (Scalia, J., dissenting).

37. 124 S. Ct. at 2696-97 (noting common law decisions extending habeas jurisdiction to aliens detained beyond realm's sovereign territory). *But see id.* at 2709-10 (Scalia, J., dissenting) (highlighting contradictory holdings regarding historical jurisdictional reach of habeas statute).

38. *Id.* at 2698 (observing long-standing policy of United States courts). The Court also noted that 28 U.S.C. § 1350 explicitly confers upon aliens the right to sue for actionable torts in United States courts. *Id.* at 2699.

reinterpreted the habeas statute without basing significant reliance upon its language.³⁹ The majority similarly disregarded the holding of the *Eisentrager* Court on the grounds that it failed to provide substantial reasoning for its decision.⁴⁰ In its stead, the majority precariously relied upon *Ahrens* even though that decision dealt solely with aliens held within the nation's sovereign territory.⁴¹ Furthermore, in reasoning that the *Braden* Court overruled the statutory predicate to *Eisentrager's* holding, the Court disregarded the fact that the *Braden* decision dealt exclusively with American citizens confined overseas.⁴² The *Eisentrager* holding allowed a similar exception for such cases.⁴³ In fact, each historical common-law decision relied upon by the Court for its conclusion that habeas relief extended beyond the realm's sovereign territory falls victim to this distinction.⁴⁴

The Court's disregard for this distinction also weakens its reasoning that foreign detainees may utilize the writ of habeas corpus because American detainees held abroad possess access to habeas relief.⁴⁵ As the dissent noted, however, the strength of this distinction relies upon a strained atextual reading of the habeas statute.⁴⁶ Lastly, the Court failed to explain why mere jurisdiction and control converts Guantanamo Bay into an enclave of the United States.⁴⁷

39. *Id.* at 2701 (Scalia, J., dissenting). Justice Scalia criticized the Court for failing to rely upon the language of the habeas statute. *Id.* (Scalia, J., dissenting); *see supra* note 2 and accompanying text (summarizing applicable text of habeas statute).

40. 124 S. Ct. at 2702 (Scalia, J., dissenting) (criticizing Court for looking beyond *Eisentrager*). Justice Scalia stressed that the *Eisentrager* Court provided an unmistakably on-point holding regarding the jurisdictional reach of the habeas statute. *Id.* at 2703 (Scalia, J., dissenting).

41. *Id.* at 2702-06 (Scalia, J., dissenting) (indicating *Ahrens* decision addressed Court's jurisdiction over petitions filed by prisoners held in New York); *see supra* note 24 and accompanying text (revealing scope of *Ahrens* extended only to detainees held within sovereign territory of United States).

42. 124 S. Ct. at 2705-06 (Scalia, J., dissenting) (noting Court limited *Braden* holding to American citizens confined beyond sovereign territory of United States); *see supra* note 24 and accompanying text (illustrating *Braden* Court relied solely upon holdings involving American citizens held outside nation's sovereign territory).

43. 124 S. Ct. at 2705-06 (Scalia, J., dissenting) (reasoning *Braden* did not impugn *Eisentrager* holding because *Eisentrager* Court made exception for American citizens); *see supra* note 21 and accompanying text (illustrating *Eisentrager* Court's reliance upon United States citizenship in limiting its holding to nonresident detainees).

44. 124 S. Ct. at 2708-09 (Scalia, J., dissenting). Justice Scalia stressed that the historical reach of the common law writ of habeas corpus extended beyond the borders of the realm's sovereign territory only in instances involving subjects of the monarch. *Id.* (Scalia, J., dissenting); *see supra* note 15 and accompanying text (comparing decisions cited by Court in deriving historic reach of habeas corpus writ).

45. *See supra* note 33 and accompanying text (noting American citizens may possess greater habeas rights with respect to statute's jurisdictional reach).

46. 124 S. Ct. at 2706 (Scalia, J., dissenting). Justice Scalia conceded that if United States citizens possess greater access to habeas relief, such increased access likely results from their rights under the Constitution. *Id.* (Scalia, J., dissenting).

47. *Id.* at 2708 (Scalia, J., dissenting) (reflecting upon brevity of Court's analysis of lease agreement between United States and Cuba). As Justice Scalia noted, the lease agreement and subsequent treaty distinctly recognized Cuba's continuing sovereignty over the leased area. *Id.* (Scalia, J., dissenting); *see supra* note 7 and

In providing habeas relief to aliens who completely lacked any form of basic legal protection, the Court's opinion possesses merit.⁴⁸ The Court's holding, however, also creates automatic statutory authority to adjudicate claims filed by persons detained outside of the United States, including openly hostile enemies.⁴⁹ Fortunately, it ultimately relieves the Judiciary and Executive of any uncertainty when determining the statutory entitlement of habeas relief for a foreign detainee.⁵⁰

In *Rasul v. Bush*, the Court considered whether federal courts possess jurisdiction to consider habeas petitions from detainees captured and held outside the nation's sovereign territory. Looking beyond the *Eisentrager* decision and the text of the habeas statute, the Court conferred jurisdiction upon federal courts to consider habeas claims from nonresident aliens hostile to the United States. Although this holding may confer greater habeas protection upon wartime prisoners and terrorists than upon domestic detainees, it nonetheless preserves one of our nation's most vital traditions by allowing potentially innocent individuals to challenge the legality of their seemingly indefinite detentions.

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accompanying text (summarizing lease and treaty between United States and Republic of Cuba).

48. 124 S. Ct. at 2701 (Kennedy, J., concurring) (noting Petitioners lacked same basic rights provided to detainees in *Eisentrager*). Justice Kennedy indicated that the *Eisentrager* decision requires the Court to ascertain the general circumstances of a petitioner's confinement and determine the jurisdictional reach of the habeas statute accordingly. *Id.* at 2700 (Kennedy, J., concurring).

49. *Id.* at 2701 (Kennedy, J., concurring) (describing effect of Court's holding upon jurisdictional reach of United States courts). Given that domestic detainees may challenge their incarceration only within the district that they remain physically confined, the majority's decision seems to provide greater rights to foreign detainees by allowing them to choose among all federal districts. *See id.* at 2711 (Scalia, J., dissenting) (citing *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004)).

50. *Id.* at 2704 n.4 (Scalia, J., dissenting) (articulating negative consequences of allowing jurisdiction to turn upon circumstances of confinement). Justice Scalia contended that the Executive and the Judiciary require a clear and definite conception of the jurisdictional reach of the habeas statute during times of war. *Id.* (Scalia, J., dissenting).