



Matters of Debate

The Scope of the Suspension Clause By Amy Barrett

THE SCOPE OF THE SUSPENSION CLAUSE

By Amy Barrett

American citizens held by the United States have the right to seek the writ of habeas corpus whether they are held at home or abroad. Noncitizens held within the United States also have a right to seek the writ. *Boumediene v. Bush* (2008) extends the right to a third category of detainees: noncitizens held outside the territorial jurisdiction of the United States. The case is controversial because its holding, which has significant implications for national security, is contrary to precedent and unsupported by the Constitution's text and

MENU
history.

Article I

▼ RESOURCES



Boumediene was not the first case in which the Supreme Court confronted the argument that a noncitizen enemy held abroad is entitled to seek a writ of habeas corpus in an American court. In *Johnson v. Eisentrager* (1950), a case decided in the wake of World War II, twenty-one German citizens held in an American military facility in Germany petitioned for the writ, maintaining that their detentions violated both the United States Constitution and international law. The Supreme Court held that American courts lacked authority to entertain these petitions. It observed that the constitutional text did not expressly confer such a right, and that no court in history had ever issued a writ of habeas corpus on behalf of a noncitizen held captive outside the territorial jurisdiction of the United States.

ANOTHER PERSPECTIVE

This essay is part of a discussion about the Suspension Clause with **Neal K. Katyal**, Paul and Patricia Saunders Professor of National Security Law, Georgetown University Law Center. [Read the full discussion here.](#)

[MENU](#)

Article I

▼ [RESOURCES](#)

Boumediene abandoned *Eisentrager*'s bright-line test based on sovereignty and citizenship in favor of a multi-factor test that extends habeas jurisdiction to locations where courts think it reasonable to do so. In *Boumediene*, the Court asserted that the U.S. Constitution grants noncitizens imprisoned in Guantanamo Bay, which is in the sovereign territory of Cuba, the right to seek habeas corpus in federal court. Its conclusion rested on three considerations: (1) the fact that the detainees disputed their status as enemy combatants; (2) the Court's determination that the United States has functional control over Guantanamo Bay; and (3) its judgment that forcing the military to participate in habeas proceedings would not compromise national security. It then held that the Military Commissions Act, which permitted petitioners to challenge the legality of their detention in military tribunals but not federal habeas proceedings, was unconstitutional.

Reasonable people disagree about the wisdom of empowering the judiciary to second-guess the military's decision, often made on the battlefield, to classify a prisoner as an enemy combatant. *Boumediene*, however, was not about choosing sides in that policy debate; it was about determining what the Suspension Clause required. The Court struggled to justify its new rule as one imposed by the

MENU

Article I



RESOURCES



Constitution. Because the text of the Suspension Clause does not specify the scope of the protected habeas right, the Court has always defined it with reference to history. And the *Boumediene* Court conceded that the historical record fails to establish that courts had ever entertained habeas petitions filed by noncitizens held in other countries. The dissenters, who maintained that the Suspension Clause did not override Congress's choice to deny federal jurisdiction, had the better of the argument.

Whether *Boumediene* is right or wrong, it dealt with the core office of the writ: testing the legality of executive detention. The application of the Suspension Clause in the post-conviction context is much less certain. Because habeas was not a tool for obtaining post-conviction relief at the time the Constitution was ratified, the founding generation could not have understood the Clause to protect this use of the writ. Congress made post-conviction relief for state prisoners available in the late nineteenth century. Even if legislative expansions of the writ ratchet up the protection offered by the Clause—a proposition that the Court has never squarely embraced—Congress surely has more flexibility to shape jurisdiction here than it does in the executive detention context.

[MENU](#)[Article I](#)[▼ RESOURCES](#)



Amy Barrett

Diane and M.O. Miller, II Research
Chair in Law, Professor of Law, The
Law School, University of Notre Dame

[COMMON INTERPRETATION](#)

[NEXT PERSPECTIVE](#)

[ARTICLE II](#)

[MENU](#)

Article I

∨ [RESOURCES](#)

