

THE HIROTA GAMBIT

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INTRODUCTION

Since the early 1950s, federal courts have exercised jurisdiction over U.S. citizens' habeas corpus petitions asserting extraterritorial violations of constitutional rights.¹ Elaborated first by Justice Hugo Black in a four-Justice plurality in *Reid v. Covert*,² constitutional limits to executive action against citizens overseas received confirmation in post-war cases arising out of U.S. military operations in Europe and Japan.³ The scope of citizens' constitutional entitle-

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1. The first exercise of this jurisdiction occurred in the 1949 case of *In re Bush*, 336 U.S. 971 (1949); see also *In re Bush*, 84 F. Supp. 873 (D.D.C. 1949). Typically cited today for the availability of extraterritorial jurisdiction are *Burns v. Wilson*, 346 U.S. 137, 139 (1953), in which the Court exercised habeas jurisdiction on behalf of a serviceman detained in Guam, and *Wilson v. Girard*, 354 U.S. 524, 526 (1957) (per curiam), which involved the exercise of jurisdiction on behalf of a petitioner held in Japan. See generally Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 51-52 n.60 (1961) (collecting cases); *infra* notes 70-71.

2. See *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J., plurality opinion) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

3. See *id.* at 75 (Harlan, J., concurring in the result). Justice Harlan, casting the controlling vote in *Reid*, stated that the kinds of constitutional rights that extended overseas depended on "the particular local setting, the practical necessities, and the possible alternatives . . ." *Id.* Several cases after *Reid* limited the military's authority to try criminally non-military personnel through military justice mechanisms that lacked the full panoply of constitutional procedural protections. In some (but not all) of these cases, the habeas petitioner was still outside the United States at the time of the writ's filing. See, e.g., *Grisham v. Hagan*, 361 U.S. 278 (1960) (successful petitioner tried by U.S. court-martial in France, then incarcerated in Pennsylvania, from where he filed a habeas writ); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (petitioner filed writ challenging court-martial jurisdiction from Morocco before being transferred to detention in Pennsylvania); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (successful

ment overseas remains contested, but there is nevertheless little question that some measure of constitutional protection extends beyond U.S. borders to shelter citizens.⁴ Since then, such jurisdiction has rarely been exercised.⁵ But it also, as a practical matter, has rarely seemed in doubt—at least until now.

In recent habeas corpus proceedings concerning United States citizens seized and detained overseas, the Government has argued that habeas is unavailable to these citizens under certain conditions. Prerequisites for this purported exception to habeas jurisdiction are fuzzily defined. But, they seem to hinge on endorsement of the detention or its broader operational context by an international entity such as the United Nations Security Council. This proposed exception stands poised to swallow the rule. It creates an open-ended category of cases in which the government does not have to establish before an independent magistrate the legal authority or factual predicates for a citizen's extraterritorial detention. Moreover, since challenges to transfers between sovereigns are accomplished through habeas corpus review, U.S. citizens would also be barred from challenging their transfer to another sovereign's custody.⁶

This essay criticizes this purported exception, which is based on a rarely cited 1948 Supreme Court per curiam decision, *Hirota v. MacArthur*.⁷ It argues that the Government's *Hirota* gambit ought

petitioner arrested and tried in Germany, and then detained in West Virginia); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (habeas relief granted where petitioner, a former serviceman, was arrested in Pittsburgh and transported to Korea for court-martial); *cf.* Madsen v. Kinsella, 343 U.S. 341 (1952) (habeas review to ascertain whether the U.S. Court of the Allied High Commission for Germany had proper jurisdiction over petitioner, although petitioner had been transferred to West Virginia).

4. For an early effort to grapple with these questions, see *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977).

5. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is the key exception. See also United States *ex rel.* Keefe v. Dulles, 222 F.2d 390, 392-94 (D.C. Cir. 1955) (denying the writ when petitioner, detained by French government pursuant to a criminal conviction, could not show constitutional rights violated by U.S. action; also exercising mandamus jurisdiction, but denying extraordinary relief); Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 68-69 (D.D.C. 2004) (acknowledging the possibility of habeas jurisdiction for a U.S. citizen held overseas by a foreign sovereign at U.S. direction).

6. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 995 (1998) (habeas guarantees "inquiry into detention for the purpose of delivery to a foreign government" to examine its legality); see generally *Factor v. Laubheimer*, 290 U.S. 276 (1933); *Elias v. Ramirez*, 215 U.S. 398 (1910).

7. 338 U.S. 197 (1948) (per curiam).

not to succeed. There is no exception—and especially no open-ended one—to the principle that American citizens physically detained overseas by American officials may properly invoke habeas corpus jurisdiction to challenge the factual and legal bases of their detention.⁸

Much confusion arises from the opacity of the *Hirota* decision. *Hirota* involved a petition for a habeas writ filed directly in the Supreme Court by the former prime minister of Japan and others who had been tried in the International Military Tribunal for the Far East. Hirota was detained by General Douglas MacArthur—but, crucially, Hirota collaterally challenged the judgment and sentence of an *international* tribunal, rather than the authority of General MacArthur to detain him. The Supreme Court rejected Hirota's petition in a three-paragraph, citation-free per curiam opinion issued only three days after oral argument.⁹

The Government today argues that *Hirota* stands for the proposition that when United States forces act under the “auspices” of “multinational” authority—for example, pursuant to a resolution from the United Nations Security Council—no habeas relief is available.¹⁰ An officer of the United States Army operating under international authority may thus seize and hold an American citizen without answering for that detention in federal court. Simply by asserting multinational jurisdiction, indefinite detention of U.S. citizens would become feasible.

But *Hirota* has no such sweeping consequence. The case necessarily rests on a limited proposition concerning the boundaries of Supreme Court appellate jurisdiction. While its dicta sweep more broadly, this simply reflects the then-recently decided precedent of *Ahrens v. Clark*, which suggested that the territorial jurisdiction of a district court was strictly limited by the habeas statute to the geographic bounds of that court's district.¹¹ But this absolute limit on statutory jurisdiction is no longer good law.¹² Whatever *sui generis*

8. Cf. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (A habeas petitioner “may require his jailor to justify the detention under the law.”); *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (“[I]n the United States, the chief use of habeas corpus has been to seek the release of persons held in *actual, physical custody* in prison or jail.” (emphasis added)); *Wales v. Whitney*, 114 U.S. 564, 572 (1885) (Issuance of the writ requires “actual confinement or the present means of enforcing it.”).

9. See *Hirota*, 338 U.S. at 198.

10. See, e.g., Reply Brief for the Appellants at 2, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. July 21, 2006).

11. 335 U.S. 188, 192 (1948).

12. See *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *Rasul v. Bush*, 542 U.S. 466, 478-79 (2004).

limits still apply to Supreme Court appellate jurisdiction are not general bars on the proper exercise of *district court* habeas jurisdiction.¹³

The *Hirota* gambit has special salience today. Historian Arthur Schlesinger described America today as possessing “an informal empire—military bases, status-of-forces agreements, trade concessions, multinational corporations, cultural penetrations, and other favors.”¹⁴ The United States, moreover, is entangled in innumerable international alliances, from the United Nations to multinational agreements to fight financial crime, to bilateral agreements on narcotics interdiction.¹⁵ Despite America’s global presence, Congress does not always legislate with an eye across borders. Indeed, the Supreme Court has adopted a clear statement rule that, in practical effect, imposes additional decisional costs on legislators who wish to extend the reach of federal law across U.S. borders.¹⁶ The result is frequent ambiguity concerning overseas conduct rules that raises questions about the preservation of the rule of law for transnational executive action.

Statutory and treaty-based humanitarian laws of war, for example, contain significant gaps in the protection U.S. citizens enjoy from executive action. Two particular instances stand out. First, Americans detained in an area of armed conflict, such as Afghanistan and Iraq, are not protected by international humanitarian law in the same manner as the populations of the countries where conflict is occurring.¹⁷ Second, the legal status of American troops

13. I thus propose a narrower, less ambitious reading of *Hirota* than Professor Stephen Vladeck, who rests his admirably ambitious thesis on the structural qualities of Article III of the Constitution. Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L. J. 1497 (2007).

14. Arthur Schlesinger, Jr., *The American Empire? Not So Fast*, 22 WORLD POL’Y. J. 43, 45 (2005).

15. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 1-35 (2004).

16. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”) (internal quotation marks omitted); *Small v. United States*, 544 U.S. 385, 399 (2005); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-86 (1949). Since at least 1976, however, it has been clear that facile classifications of “domestic” and “foreign” are misleading. See Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 307-10 (1976-77); see also Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 177 (2004) (noting “heightened bargaining costs” of clear statement rules in legislative log-rolling).

17. The 1949 Geneva Conventions are designed principally for citizens of *other* powers who are swept up, as soldiers or as citizens, in the course of combat. Article 4 of the Geneva Convention IV protects persons who “at a given moment

overseas is sometimes hazardously ambiguous. Typically, the United States signs a “status of forces” agreement with another sovereign setting forth jurisdictional rules and rights.¹⁸ In some cases, however, U.S. forces are stationed overseas in the absence of a status-of-forces agreement. In 2007, as of this writing, this was the case in Yemen (where the assault on the U.S.S. Cole occurred) and Thailand.¹⁹ In the absence of enforceable legal protections, a U.S. citizen stationed among or working alongside U.S. forces in either of those countries would have no judicial protection from being seized and turned over to Yemeni or Thai authorities.

To begin, this essay places the *Hirota* gambit in context. Part I canvasses recent doctrinal moves by the Justice Department in Supreme Court briefs and in Office of Legal Counsel opinions aimed at shifting detention operations outside the aegis of the federal courts. The *Hirota* gambit is thus the latest in this series of doctrinal efforts to establish a law-free zone. Part II turns to *Hirota* and provides historical and jurisprudential context. In recent cases, one arising out of a detention in Saudi Arabia²⁰ and others arising out of Iraq operations, the Government has argued that *Hirota* ought to apply to citizens.²¹ Without contending that citizenship is irrelevant, I argue that *Hirota* in fact rests on an even narrower ground: the limits of Supreme Court appellate jurisdiction. Part III of the essay presents further extrinsic support for a narrow reading of *Hirota*.

and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added). *But see In re Territo*, 156 F.2d 142, 143-45 (9th Cir. 1946) (classifying a U.S. citizen, who had been fighting with Italian forces, as a POW). Instead, it appears the Conventions’ drafters presumed that “the safeguards of domestic law” would apply to these persons, obviating any need for international-law protection. *See* Major Richard R. Baxter, *So-Called ‘Un-privileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L. L. 323, 332 (1951).

18. Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2512 (2005) (“The United States, with its far-flung force commitments, relies upon these agreements extensively.”).

19. John W. Egan, Comment, *The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 *EMORY INT’L L. REV.* 291, 305-06 & n.110 (2006).

20. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 55 (D.D.C. 2004).

21. *See Omar v. Harvey*, 416 F. Supp. 2d 19, 24 (D.D.C. 2006), *aff’d* 479 F.3d 1 (D.C. Cir. 2007); *Munaf v. Harvey*, 456 F. Supp. 2d 115, 124 (D.D.C. 2006), *aff’d sub nom. Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007).

I.

WANTED: LAW-FREE ZONES

The *Hirota* gambit is the latest in a series of doctrinal sallies by the Government in terrorism-related cases aimed at establishing zones free of judicial supervision. Justice Department legal memoranda and opinions have argued toward the goal of ending judicial supervision of counter-terrorism operations. The Justice Department's arguments concerning Guantánamo and its argument in the first citizen enemy combatant case—both of which prefigure its deployment of *Hirota*—are data points in this trend.

A. *Guantánamo*

On December 28, 2001, Office of Legal Counsel (“OLC”) Deputy Assistant Attorneys General Patrick F. Philbin and John C. Yoo issued a legal memorandum to the General Counsel of the Defense Department asserting that “federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States,” and in particular at the Guantánamo Bay Naval Base in Cuba.²² Philbin and Yoo, though, noted some “litigation risk” of detainee lawsuits.²³ This term, and their concern that litigation might “interfere” with detention operations, suggests that their analysis was driven by the desire to avoid the costs of judicial supervision.²⁴

Other elements strengthen the impression that the Justice Department's goal was to establish a law-free zone for detention and interrogation operations. The OLC memo's analysis of Guantánamo's sovereignty, for example, is striking in its omission of salient facts. No mention is made of the historical circumstances of Guantánamo's occupation by the United States. The 1901 Platt Amendment reserved to the United States a “right to intervene in Cuba militarily and to control its economy and its relations with other countries”; subsequently, Guantánamo became a holding pen for

22. Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, General Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, 1 (Dec. 28, 2001), <http://www.texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf> [hereinafter Philbin-Yoo Memo].

23. *Id.*

24. *Id.* at 1, 8. For a theoretically sophisticated argument for judicial deference in the detention context, see ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS 252-57 (2007).

Haitian refugees.²⁵ Facts such as these run starkly counter to the flat denial of sovereignty proposed by the OLC memo, and at minimum merited some analysis, even if eventually determined to be irrelevant. By tearing their analysis of the United States-Cuba lease from historical context, Yoo and Philbin strengthened their claim that America lacked “sovereignty” over the base.²⁶

Philbin and Yoo also noted that a federal court exercising jurisdiction would not be able to grant any relief “other than to deny [a petitioner] habeas jurisdiction in the first place.”²⁷ They thus assumed the answer to a deeply unsettled constitutional question: the extension of constitutional rights to non-citizens outside the United States.²⁸ By assuming this question away, they fortified their contention that detention operations could proceed at Guantánamo unhindered by judicial scrutiny.

Further support for the inference that the Government sought a law-free zone comes from Yoo’s memoir. Yoo explains that the administration’s early focus on Guantánamo was motivated by the concern that “if federal courts took jurisdiction over POW camps [which Guantánamo was not, and was never meant to be], they might start to run them by their own lights, substituting familiar peacetime prison standards for military needs and standards.”²⁹ This points to a principled aversion to judicial oversight of any kind.³⁰

Government lawyers reprised the same argument, without avail, in a habeas challenge filed by Guantánamo detainees before the Supreme Court. Relying on the post-World War II precedent of

25. Amy Kaplan, *Where is Guantánamo?*, in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 239, 243, 247 (Mary Dudziak & Leti Volpp, eds., 2006).

26. Philbin-Yoo Memo, *supra* note 22, at 3-5.

27. *Id.* at 8.

28. See *Boumediene v. Bush*, 476 F.3d 981, 984, 994 (D.C. Cir. 2007) (holding that federal courts lack jurisdiction over habeas petitions filed by aliens captured abroad and detained as enemy combatants at Guantánamo), *cert. denied*, 127 S. Ct. 1478 (Apr. 2, 2007).

29. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 142 (2006). For some indication of what “military needs and standards” involved, see, for example, Jane Mayer, *The Experiment*, *NEW YORKER*, July 11, 2005, at 60; Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, *N.Y. TIMES*, Nov. 30, 2004, at A1.

30. See John Yoo, *Enemy Combatants and the Problem of Judicial Competence*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 69, 88 (Peter Berkowitz ed., 2005).

Johnson v. Eisentrager,³¹ the Solicitor General argued that habeas jurisdiction did not extend to Guantánamo, invoking, *inter alia*, the canon against extra-territorial application of statutes.³² Like the OLC memo, the Solicitor General provided little context for its reading of the Guantánamo lease.³³ Moreover, the Government's brief invoked separation-of-powers rationales to limit judicial supervision. It explicitly referred to the need to keep interrogations free of judicial supervision and claimed that a finding of jurisdiction "would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas."³⁴ This latter argument was especially striking since the Government never alleged that Guantánamo itself was the site of armed conflict.³⁵

B. *Hamdi: Enemy Combatant Determinations*

The Government again sought to establish a law-free zone with regard to designated individuals—rather than in a particular territory—in *Hamdi v. Rumsfeld*.³⁶ In *Hamdi*, the Government advanced no argument about *de jure* jurisdiction, but argued that the federal court's jurisdiction over the claims of a U.S. citizen detained on U.S. soil as an "enemy combatant" was a *de facto* hollow vessel. Such review, argued the Government, is "of the 'most limited scope,' and should focus on whether the military is authorized to detain an individual that it has determined is an enemy combatant."³⁷ As Justice Souter noted, the Government's focus on the aggregate detention scheme left the "judicial enquiry so limited" as to be "virtually worthless as a way to contest detention."³⁸ Whatever conces-

31. 339 U.S. 763 (1950) (rejecting habeas petitions from German citizens who were convicted by military commissions and detained in a military prison in Germany).

32. Brief for Respondents at 19, *Rasul v. Bush*, 542 U.S. 466 (2004), (Nos. 03-334, 03-343), 2004 WL 425739.

33. *See id.* at 21-23.

34. *Id.* at 43.

35. By relevant contrast, German POWs were also detained across the United States in the aftermath of World War II. *See, e.g.*, James E. Fickle & Donald W. Ellis, *POWs in the Piney Woods: German Prisoners of War in the Southern Lumber Industry, 1943-1945*, 56 J. So. Hist. 695 (1990).

36. 542 U.S. 507 (2004).

37. Brief for Respondents at 26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) [hereinafter *Hamdi* Brief].

38. *Hamdi*, 542 U.S. at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). A plurality of the Court held otherwise. *Id.* at 535-39 (O'Connor, J., plurality opinion). Professors Posner and Vermeule have argued that *Hamdi* was "a cheap victory for civil liberties." POSNER & VERMEULE, *supra* note 24, at 257.

sion of jurisdiction the Government had made was “more theoretical than practical, leaving the assertion of Executive authority close to unconditional.”³⁹

In support of its decision to detain Hamdi, the Government also offered a sworn declaration from the Special Advisor to the Under Secretary of Defense for Policy, Michael H. Mobbs, alleging various hostile acts on Hamdi’s part.⁴⁰ The Government argued that courts could not delve beyond the surface of Mobbs’ statement.

The Court however declined to accept the *ipse dixit* of this government official, and required a judicial hearing to examine the factual and legal bases of Hamdi’s detention.⁴¹ Rather than allow Mobbs’s factual allegations against Mr. Hamdi to be tested, the government released Hamdi in October 2004 without any criminal punishment for his alleged bad acts.⁴²

C. *The Hirota Gambit*

The *Hirota* argument for quashing jurisdiction is the successor of the Guantánamo and enemy combatant arguments. It too would carve out a zone free of judicial review. Like the Guantánamo argument, the *Hirota* gambit focuses on the *label* denoting sovereignty affixed to a particular circumstance.

39. *Hamdi*, 542 U.S. at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

40. *Hamdi* Brief, *supra* note 37, at 6-7, 27-29.

41. *Hamdi*, 542 U.S. at 526-27, 533 (O’Connor, J., plurality opinion). Key questions remain about the nature and mechanics of this proceeding. A recent judgment of the Canadian Supreme Court identifies with precision the elements of due process that are key to “fundamental justice” in the context of counterterrorism detentions. See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 S.C.C. 9, 30762, [2007] S.C.J. No. 9 QUICKLAW (Feb. 23, 2007). In paragraph 29 of that decision, Justice McLaughlin explained that due process at minimum “comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case.” *Id.* ¶ 29 (emphasis omitted).

42. See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 245 n.30 (2006). For more details on Michael Mobbs and why the Government might not have wanted his declaration scrutinized, see Robert O’Harrow Jr., *Waxman Raises New Questions on Cheney*, WASH. POST, June 14, 2004, at A4; see also Grif Witte, *Iraq Oil Pipeline Behind Schedule; Key Project Has Largely Gone Unmonitored, Report Says*, WASH. POST, Aug. 1, 2006, at A12.

The Government first deployed the *Hirota* argument in two cases: *Abu Ali v. Ashcroft* and *Omar v. Harvey*.⁴³ The first concerned a U.S. citizen detained by Saudi authorities in Saudi Arabia allegedly at the behest of the United States.⁴⁴ In the second case, a U.S. citizen was detained in Iraq under the authority of allegedly multinational forces.⁴⁵ In both, Government briefs focused on the non-U.S. aspect of the detention and attempted to analogize the case to *Hirota*, and thus to a purported gap in habeas review.

In *Abu Ali*, the Government, citing *Hirota*, contended that “habeas jurisdiction does not lie with respect to detention by foreign powers abroad.”⁴⁶ The Government argued that *Hirota* could be interpreted to limit the subject-matter jurisdiction of the district court, or could be read as an “inherent limitation on the Court’s habeas powers.”⁴⁷ The Government also invoked the act of state and political question doctrines as grounds for dismissal of the case.⁴⁸ Rejecting these arguments, the District Court for the District of Columbia distinguished *Abu Ali* from *Hirota* on citizenship grounds: “The United States can hardly rely on a decision involving *non-resident aliens* challenging the sentence of a foreign military tribunal as controlling precedent for a rule that *citizens* lack any rights in habeas to challenge their detention”⁴⁹

The *Hirota* argument in *Omar* was more complex. *Omar* involves a U.S. citizen seized by U.S. personnel in Baghdad, Iraq, in October 2004 and thereafter held without access to the federal courts.⁵⁰ The Government argued that *Hirota* does not allow habeas jurisdiction when petitioners’ actual captors, although U.S. personnel, are acting under the authority of a resolution from the U.N. Security Council. Summarizing its argument for the Court of Appeals, the Government explained:

43. *Omar v. Harvey*, 416 F. Supp. 2d 19, 24 (D.D.C. 2006), *aff’d* 479 F.3d 1 (D.C. Cir. 2007); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 55 (D.D.C. 2004). I do not discuss here another Iraq case that poses slightly different issues. See *Munaf v. Harvey*, 456 F. Supp. 2d 115, 124 (D.D.C. 2006), *aff’d sub nom.* *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007).

44. See *Abu Ali*, 350 F. Supp. 2d at 31-33.

45. See *Omar*, 416 F. Supp. 2d at 21.

46. See Response to Order to Show Case [sic] Supporting Dismissal of the Petition and Opposition to Petitioners’ Motion to Compel Discovery and Production at 1, 4-5, *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004) (No. 04-1258 (JDB)), available at <http://www.humanrightsusa.org/modules.php?op=modload&name=News&file=article&sid=13>.

47. *Id.* at 5 n.3.

48. *Id.* at 13-21.

49. *Abu Ali*, 350 F. Supp. 2d at 55.

50. *Omar*, 416 F. Supp. 2d at 21.

In *Hirota*, the Supreme Court held, because the petitioners' sentences had been imposed by an international tribunal, there was no habeas jurisdiction over a petition filed by Japanese prisoners held by (and some of whom were about to be executed by) United States military officers under a direct chain of command from the United States. The Court adhered to this view despite the fact[] that the international tribunal had been established by General Douglas MacArthur in his role as Supreme Commander of the Allied Powers

Here, the relationship between the United States and Omar's custody is directly analogous to that in *Hirota*. Omar is being held by United States military officers, but they are acting as part of an international body – the MNF-1 – which derives authority from United Nations Security Council resolutions issued at the request of the sovereign Government of Iraq.⁵¹

The same argument ran through the Government's *Omar* brief in different forms—as a contention about “the auspices”⁵² of the detention or an assertion that the detention was “in accordance with United Nations Security Council Resolutions.”⁵³

After a district court issued a preliminary injunction,⁵⁴ a panel of the D.C. Circuit affirmed that the federal courts properly exercised jurisdiction over Omar's habeas petition. The panel identified four factors in the *Hirota* decision and held that the absence of two of those factors, foreign citizenship and a criminal conviction, distinguished the case.⁵⁵ In the section of the opinion most relevant to the argument here, the D.C. Circuit concluded that *Hirota* was a jurisdictional rule that applied to the lower district courts as much as to the Supreme Court.⁵⁶

In sum, the lesson drawn by the Government from *Hirota* is simply this: *Hirota* “divests U.S. courts of habeas jurisdiction”⁵⁷ to review the claims of American citizens held directly by U.S. officials who act in accord with the mandate of an international organization. Like the *Hamdi* argument, this contention lacks geographic boundaries: it would apply with equal vigor to a detention con-

51. Brief for the Appellants at 15-16, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. June 2, 2006).

52. *Id.* at 2, 26.

53. *Id.* at 5.

54. *Omar*, 416 F. Supp. 2d at 21.

55. *Omar v. Harvey*, 479 F.3d 1, 7 (D.C. Cir. 2007).

56. *See id.* at 7-8.

57. Brief for the Appellants at 16, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. June 2, 2006).

ducted on United States soil as it would to one in Iraq or Afghanistan. A person (including a U.S. citizen) detained by a joint operation of the Washington, D.C. police and Saudi personnel guarding the Saudi embassy, for example, would not be entitled to habeas review. At least, there is no clear reason in any of the Government's formulations to distinguish between a detention overseas and one on American soil.

But does *Hirota*—a case that has been cited all of four times by the Supreme Court—even stand for a jurisdictional bar this wide? Is *Hirota* a case about the general scope of federal court power, or does it in fact stand for a much narrower proposition, a closely defined proposition commensurate to its thinly reasoned text?

II.

WHAT *HIROTA* MEANS

A. Hirota

On November 29, 1948, former Foreign Minister and Prime Minister of Japan Koki Hirota filed a motion for leave to file a habeas petition in the Supreme Court of the United States.⁵⁸ Hirota had been tried on nine counts, and convicted on three counts, in the International Military Tribunal for the Far East, or IMTFE, a tribunal of judges from several nations that opened its doors in May 1946.⁵⁹ Hirota had been Japan's Foreign Minister in 1937-38, during the Rape of Nanking.⁶⁰ In that regard, he was convicted of “[w]aging war against China” and “[d]isregard of duty to secure observance of and prevent breaches of Laws of War.”⁶¹

The IMTFE was created by General Douglas MacArthur, acting as Supreme Commander of the Allied Powers, on January 19, 1946.⁶² The tribunal was staffed by eleven judges from different Allied nations, all appointed by MacArthur. MacArthur's authority to establish and staff the IMTFE flowed from an agreement signed in Moscow in December 1945 by the United States, United King-

58. Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Koki Hirota and Petition for Writ of Habeas Corpus, at 36, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) [hereinafter *Hirota* Brief]; RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* 3-4 (1971).

59. MINEAR, *supra* note 58, at 3, 203.

60. *Id.* at 71.

61. *Id.* at 203; *see generally* SABURO SHIROYAMA, *WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI* (John Bester trans., Kodansha International Ltd. 1977) (1974).

62. HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE* 71, 77 (1999).

dom, and the Soviet Union with the concurrence of China.⁶³ The tribunal sat for more than two years deliberating on charges against twenty-eight men. It held 818 court sessions, heard 419 witnesses, took 7779 affidavits and declarations, and then took seven months to reach a verdict. Ultimately, three judges dissented from the judgment in its entirety and two others wrote concurrences.⁶⁴

Hirota lodged his habeas petition directly in the Supreme Court rather than in a district court. His was not the first habeas petition to be so filed in the High Court. During the 1946, 1947, and 1948 Terms, the Court confronted “a hundred-odd original cases from overseas” involving Germans and Japanese convicted of war crimes. On one day alone in May 1949, the Court received fifty-eight petitions from the Nürnberg trials.⁶⁵

This glut of High Court filings may be explained by the jurisdictional landscape of the day. At the time that Hirota filed his petition, it seemed almost certain that no district court had statutory jurisdiction to adjudicate a habeas petition filed by a citizen detained overseas. Six months prior to *Hirota*, the Supreme Court ruled in *Ahrens v. Clark* that a district court lacked habeas jurisdiction when a person was detained outside the court’s territorial jurisdiction and in another district court’s territorial jurisdiction. Justice Douglas’s majority opinion in *Ahrens* appeared to treat the statutory phrase “within their respective jurisdictions” in 28 U.S.C. § 2241 as an absolute bar to a district court’s oversight of detentions outside its territorial ambit.⁶⁶ Although a footnote in *Ahrens* seemed to leave open the question of the habeas statute’s extraterritorial reach,⁶⁷ district courts⁶⁸ and respected commentators⁶⁹ saw

63. The Secretary General, *Memorandum Submitted by the Secretary-General re: Historical Survey of the Question of International Criminal Jurisdiction, Delivered to the International Law Commission*, 23 U.N. Doc. A/CN.4/7/Rev.1 (1949).

64. BALL, *supra* note 62, at 79; *see also* LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 150-51 (2005); TIM MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* 120-38 (2001).

65. Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 600 (1949); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 316 (5th ed. 2003) (collecting cases).

66. *Ahrens v. Clark*, 335 U.S. 188, 190-93 (1948).

67. *Id.* at 192 n.4.

68. *See, e.g., Ex parte Flick*, 76 F. Supp. 979 (D.D.C. 1948), *aff’d*, 174 F.2d 983 (D.C. Cir. 1949).

69. Fairman, *supra* note 65, at 632 (“[I]f the *statute* makes the presence of the petitioner a requisite to *jurisdiction*, how can it make any difference whether the detention is in no district rather than in a different district?”).

no way to read the text of § 2241 as anything other than an absolute bar to federal court jurisdiction. Informed counsel, therefore, might wisely have directed urgent petitions, especially from unsympathetic petitioners who mere months ago had been waging war against the United States, to the High Court, where a different calculus of territorial jurisdiction might prevail.⁷⁰

But the Supreme Court gave habeas petitions filed from overseas a cold welcome. The first set of petitions were filed by American citizens, including both civilians and enlisted personnel. Leave to file the petitions was denied in a curt order denominated *Ex parte Betz* that pointed solely to the “want of original jurisdiction.”⁷¹ Subsequent petitions from non-American petitioners fared little better. They were dismissed with cursory orders with Justice Robert Jackson (formerly chief prosecutor at Nürnberg) not participating.⁷²

Hirota, joined by other petitioners convicted by the IMTFE, broke through this impasse. Professor Stephen Vladeck explains in a recent article how Justices Rutledge and Jackson were together responsible, perhaps inadvertently, for Hirota’s unusual procedural turn. As Vladeck explains, Hirota’s petition raised questions about the jurisdiction of the IMTFE and General MacArthur’s actions “in accepting an office, title and place of trust from ten (10) foreign governments without consent of the Congress”⁷³ According to Vladeck, an angry draft dissent by Justice Rutledge focused on these unusual separation of powers issues.⁷⁴ The possibility of public dissent from within the Court against official policy may have forced Justice Jackson’s hand (Jackson had until then recused him-

70. But as early as May 1949, the Supreme Court signaled that *Ahrens* was not the impermeable barrier Fairman thought. In the *Bush* case, the Court dismissed the original habeas petition of a U.S. serviceman detained in Japan “without prejudice to the right to apply to any appropriate court that may have jurisdiction.” *In re Bush*, 336 U.S. 971, 971 (1949). The petitioner took the hint. So did the District Court for the District of Columbia, which exercised jurisdiction over the petition. *In re Bush*, 84 F. Supp. 873 (D.D.C. 1949).

71. See Fairman, *supra* note 65, at 592; *Ex parte Betz*, 329 U.S. 672 (1946). Justices Black and Rutledge indicated that the petition ought to have been denied “without prejudice to [it] being filed in the appropriate District Court,” *id.*, a course later adopted in the *Bush* case. *In re Bush*, 336 U.S. at 971.

72. See, e.g., *In re Dammann*, 336 U.S. 922 (1949); *Everett v. Truman*, 334 U.S. 824 (1948).

73. *Hirota* Brief, *supra* note 58, at 27. Hirota also emphasized that the IMTFE departed from “basic, essential and fundamental rules of evidence, procedure and trial” *Id.* at 30.

74. Vladeck, *supra* note 13, at 20-21.

self from war crimes cases); the former war crimes prosecutor voted to set the case for oral argument.⁷⁵

The Supreme Court heard arguments on December 16 and 17, 1948, a Thursday and a Friday. On Monday, December 20, five Justices issued a three paragraph, nine-sentence, citation-free per curiam opinion, denying the motions for leave to file habeas petitions. Justice Rutledge did not vote and passed away shortly thereafter, Justice Murphy dissented without opinion, and Justice Jackson took no part in the merits decision.⁷⁶ The per curiam opinion's entire reasoning was as follows:

The petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgments of a military tribunal in Japan We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers. Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied.⁷⁷

In the early morning of December 23, Hirota and two other men were executed in Japan.⁷⁸ Ten days later, Hirota's petition for rehearing was denied.

Six months later, Douglas filed a more substantial concurrence in the judgment. In principal part, he addressed two issues. First, he rejected the idea that *Ahrens* compelled the conclusion that statutory jurisdiction was wanting when a petitioner was detained outside the United States. On this question, *Ahrens'* author predicted "grave and alarming consequences" if a U.S. citizen could be detained overseas and convicted in a military court with no judicial oversight.⁷⁹ By that time, as Douglas noted, the Court had already begun to indicate that citizens held overseas could file petitions for habeas review.⁸⁰ The second matter Justice Douglas addressed was

75. *Id.*

76. *Hirota v. MacArthur*, 338 U.S. 197, 198-99 (1948) (per curiam).

77. *Id.* at 198.

78. SHIROYAMA, *supra* note 61, at 297-98.

79. *Hirota*, 338 U.S. at 201-02 (Douglas, J., concurring).

80. *See In re Bush*, 336 U.S. 971, 971 (1949).

whether “[t]he fact that the tribunal had been set up by the Allied Powers should not of itself preclude [judicial] inquiry.” In Douglas’s view:

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.⁸¹

In an almost throwaway sentence at the end of his concurrence, Justice Douglas asserted, in stark contrast to everything that had come before, that establishment of the IMTFE was a “political” decision shielded from judicial review,⁸² hence obviating the need to consider whether the Court had erred by letting the petitioners’ executions proceed. This *post hoc* explanation is in some tension with Douglas’s other arguments, and the concurring opinion does not explore whether application of the political question doctrine would extend equally to citizens’ petitions. Whatever its strengths (including its accurate forecast of *Ahrens*’ scope), Justice Douglas’s concurrence does not provide a wholly satisfying resolution of *Hirota*’s logic.⁸³

Its reasoning charred by a literal rush to judgment, the *Hirota* per curiam opinion bears comparison to the Court’s hasty and results-orientated decision in *Ex parte Quirin*,⁸⁴ a case that Justice Scalia described with uncharacteristic understatement as “not this Court’s finest hour.”⁸⁵ *Quirin* endorsed the hasty, secretive trial by military commission of a group of alleged Nazi saboteurs captured along the eastern seaboard in 1941.⁸⁶ Yet, like *Quirin*, *Hirota* today assumes new significance as the Government attempts to carve out new zones of conduct free from judicial oversight. Indeed, *Hirota* is

81. *Hirota*, 338 U.S. at 204 (Douglas, J., concurring).

82. *Id.* at 208-09.

83. Jeffrey Rosen has commented on Justice Douglas’s “erratic” conduct in other, contemporaneous circumstances. See JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 150-53 (2007).

84. 317 U.S. 1 (1942); see generally LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 87-126 (2003).

85. *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

86. See generally FISHER, *supra* note 84, at 87-126.

just the latest in a sequence of post-World War II cases, including *Quirin* and *Johnson v. Eisentrager*,⁸⁷ that have been staples in Government briefs. It is perhaps ironic that post-war cases concerning justice for Nazis that were easy in their day (because of the clear balance of equities then) have become the difficult precedent for the counter-terrorism adjudications of today.

B. Hirota and the Supreme Court's Appellate Jurisdiction

The *Hirota* Court defined the pivotal question in the case before it as whether the Supreme Court had “power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners.”⁸⁸ In other words, it homed in on the *appellate* nature of the task at hand and the character of the judgments that Hirota and his co-petitioners sought to challenge in federal court. The first two paragraphs of the decision list factors that could potentially be relevant to the outcome, but the subsequent text narrows in on the nature of the “tribunal sentencing these petitioners.”⁸⁹ This focus on the nature of the appellate review sought is understandable for a simple reason: the Supreme Court’s power to provide relief—which was the sole jurisdictional question presented by the case because Hirota had chosen to forego lower court review—rested in the first instance on whether the high court had *appellate* jurisdiction under Article III of the Constitution. Under well-established case law, the Court lacked such power. This simple but oft-forgotten rule of decision comprises and exhausts *Hirota*’s holding.

The explanation of this point sheds rewarding light on the nebulous *Hirota* decision. In light of the Government’s recent aggressive use of *Hirota*, it merits detailed exposition.

The Supreme Court, under Article III, has two kinds of jurisdiction: original and appellate. Article III defines the Supreme Court’s original jurisdiction in exclusive terms. That Congress cannot add to this jurisdiction has been clear since *Marbury*.⁹⁰ Article

87. 339 U.S. 763 (1950) (concluding that the federal courts lacked jurisdiction over collateral challenges filed by convicted German war criminals held in the Landsberg prison in occupied Germany).

88. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam).

89. *Id.*

90. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803) (noting that Article III’s original jurisdiction is exclusive). There are arguments that this aspect of *Marbury* is wrong. See, e.g., Steven G. Calabresi and Gary Lawson, *The Unitary Executive: Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1036-42 (2007).

III also states that the Court's appellate jurisdiction depends wholly on "such regulations as the Congress shall make."⁹¹

The original jurisdiction of the Supreme Court as defined by Article III does not explicitly include the power to issue writs of *habeas corpus*. Original jurisdiction under Article III over a habeas writ is thus rare, available only when the action falls into one of the limited set of categories—such as "cases affecting ambassadors, public ministers and consuls, and [other] cases in which a State is a party"—enumerated in Article III.⁹² Accordingly, the exercise of Supreme Court jurisdiction over a habeas proceeding has generally been an exercise of appellate power over another tribunal's decision. In *Bollman*, Chief Justice Marshall thus explained that "[t]he decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore [is] *appellate* in its nature."⁹³

Nevertheless, a habeas petition filed in the first instance in the Supreme Court "is commonly understood to be 'original' in the sense of being filed in the first instance in [the Supreme] Court, but nonetheless for constitutional purposes [is] an exercise of th[e] Court's appellate (rather than original) jurisdiction."⁹⁴ Hirota's petition was thus "original," in the sense that it had not been filed in a lower federal court, but "appellate" in the sense that it sought to invoke the appellate (and not the original) jurisdiction component of Article III.

Compounding the nomenclatural confusion, a district court exercises *original* jurisdiction under 28 U.S.C. § 2241 over a habeas petition filed to challenge imprisonment without *any* judicial process.⁹⁵ In short, whether a habeas petition seeks to invoke "appel-

91. U.S. CONST. art. III, § 2, cl. 2; *see also Marbury*, 5 U.S. at 175-76.

92. *See Ex parte Siebold*, 100 U.S. 371, 374-75 (1879); *see generally Ex parte Hung Hang*, 108 U.S. 552 (1883).

93. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added).

94. *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring); *see generally* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 154-62.

95. *See Ex parte Yeger*, 75 U.S. (8 Wall.) 85, 96-97 (1868) (noting the gap between the Supreme Court's "appellate" habeas jurisdiction, and "that of the English courts," which "is original"); *cf. Ex parte Hayes*, 414 U.S. 1327, 1327-29 (1973) (Douglas, J., in chambers) (transferring application for writ of habeas corpus of American citizen in overseas military detention filed with Justice Douglas to the District Court for the District of Columbia).

late” or “original” jurisdiction in the first instance depends on the character of the tribunal being petitioned.⁹⁶

Hirota’s petitions, filed first in the Supreme Court, could have been only an exercise of Article III *appellate* jurisdiction because the *Hirota* petitioners could not lodge themselves within any of Article III’s grants of original jurisdiction. This is why the nature of the IMTFE was pivotal to the per curiam decision: the “essential criterion of appellate jurisdiction, [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.”⁹⁷ There must be some exercise of the “judicial power” as it is defined in the U.S. Constitution to superintend.⁹⁸

Precedent on precisely what constitutes an exercise of the “judicial power” is scattered and unclear. By 1948, a couple of data points were available. In 1863, in *Ex parte Vallandingham*, the Court held that it lacked appellate jurisdiction over the decisions of a military commission within the United States.⁹⁹ In *Ex parte Yerger*, however, the Court found appellate jurisdiction to review a specific military commission conviction because “a Circuit Court of the United States ha[d], in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and ha[d] after inquir[ed] into the cause of detention”—even though it declined to issue the writ.¹⁰⁰ The contrast between *Vallandingham* and *Yerger*—whether or not a lower court had, however fleetingly, examined the habeas petition—suggests a petitioner seeking to invoke Article III original jurisdiction has merely to touch first base in an inferior district court in order to satisfy the constitutional jurisdictional minimum.

The *Hirota* Court also had more recent guidance at hand. In 1943, the Court exercised appellate jurisdiction over a judgment

96. Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 637 (1970) (“[S]ection 14 [of the 1789 Judiciary Act] makes no distinction in terms of original and appellate jurisdiction . . . [T]he grant [of habeas jurisdiction] to the district court, where the jurisdiction could be only original, is included in the very same words.”); accord Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 283 (2005).

97. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1465-66 (2000) (explaining that petitioners must sue in inferior federal tribunals before obtaining review in the High Court).

98. See *In re Sanborn*, 148 U.S. 222, 224 (1893).

99. See *Ex parte Vallandingham*, 68 U.S. 243, 253-54 (1863) (concluding that the Supreme Court could not exercise appellate jurisdiction over a direct appeal from a military commission).

100. *Ex parte Yerger*, 75 U.S. (8 Wall.) at 103.

from the Supreme Court of the Philippines.¹⁰¹ And in *Quirin*, the challenge to the World War II military tribunals for Nazi saboteurs, a lower court denied the writ, creating a decision that could be reviewed by the Supreme Court in accord with *Yerger*.¹⁰² Subsequently, the Court would also exercise appellate jurisdiction over the non-Article III United States Court of Military Appeals without comment on the jurisdictional issue.¹⁰³

To be sure, the exact metes and bounds of High Court “appellate” jurisdiction, particularly in relation to military and territorial tribunals, remains incompletely theorized. Nevertheless, it was clear by 1948 that the IMTFE was not an exercise of the “judicial power” amenable to “appellate” review, and that Hirota and his co-petitioners sought “a forbidden exercise of its original jurisdiction.”¹⁰⁴ To be sure, the United States had a substantial role in the creation of the IMTFE.¹⁰⁵ But like the commission being chal-

101. See *In re Yamashita*, 327 U.S. 1 (1946). On a petition for certiorari, the Court initially issued a stay on Yamashita’s behalf after the Philippine Court proceedings had run its course. *In re Yamashita*, 326 U.S. 693, 693 (1945); see generally Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone’s Views*, 69 HARV. L. REV. 806, 831-38 (1956). This was, of course, not the first Supreme Court case that originated in the Philippine judicial system. See also *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that there was no right to a jury trial in the Philippine courts). Rather oddly, it has long been clear that territorial courts do not exercise the “judicial power.” In 1828, Chief Justice Marshall stated that the “jurisdiction with which they [in the case at bar, a territorial court in Florida] are invested, is not a part of the judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.” *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828). Uncertainty as to the precise bounds of Article III judicial power with respect to territorial courts does not equate to uncertainty with regard to a non-U.S. military tribunal.

102. *Quirin*, 317 U.S. at 2; accord *Ex parte Siebold*, 100 U.S. at 374-75; Oaks, *supra* note 94, at 161-71.

103. See, e.g., *Solorio v. United States*, 483 U.S. 435 (1987).

104. See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 517 (2006).

105. Alison Marston Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT’L L. 83, 88-89 (2005) (“The United States dominated all aspects of the IMTFE. Unlike the [post-war tribunal in Germany], the Tokyo Tribunal was not established by an international agreement hammered out by the victorious Allies. General Douglas MacArthur, the Supreme Commander of the Allied Powers in the Pacific, unilaterally established the IMTFE on January 19, 1946. At the same time, he promulgated its Charter, which had been written largely by U.S. officials and which set out the law that would be applied during its proceedings.”); accord BALL, *supra* note 62, at 77. However debatable the *Hirota* court’s description of the IMTFE might have been, its jurisdictional disposition nonetheless is wholly defensible on the basis of the limits on Article III jurisdiction.

lenged in *Vallandingham*, that body was military in nature, and as a military entity, *Vallandingham* forbade review. And because Hirota and his co-petitioner had not touched first base as the *Yerger* petitioners had—due to the *Ahrens* rule—their motions for leave to file could be rejected in short order.¹⁰⁶

The Justices were clearly aware of this limit on their power to adjudicate cases, because they applied it strictly both before and after *Hirota*. Two years before *Hirota*, the Court denied petitions from American citizens in *Betz* “for want of original jurisdiction.”¹⁰⁷ The Court declined to adopt the suggestion from Justices Black and Rutledge to indicate that re-filing in a district court was permissible. And in both the *Everett* case (decided seven months before *Hirota*) and the *Dammann* case (decided four months after *Hirota*), the Court dismissed petitions from petitioners similarly situated to *Hirota*, with four Justices invoking the provision of Article III that defined the Supreme Court’s original and appellate jurisdiction.¹⁰⁸ That is, four of the five Justices who composed the *Hirota* majority believed that no Supreme Court appellate or original jurisdiction existed at all in circumstances such as those presented in *Hirota*.¹⁰⁹ The other dissenting Justices did not explain what action they wanted, but later cases made plain that a petition incorrectly filed in the Supreme Court could be dismissed without prejudice for re-filing in the appropriate district court.¹¹⁰

In sum, *Hirota* was decided against the backdrop of a clear jurisdictional bar that had been invoked since *Bollman* in 1807. This bar squarely applied to Hirota’s request for collateral review of a final judgment of a military commission staffed by foreign judges.¹¹¹ This same bar was enforced mere months before and

106. Hirota and his co-petitioners, in other words, were caught in a jurisdictional Catch-22 caused in the immediate term by an expansive reading of *Ahrens*.

107. *Ex parte Betz*, 329 U.S. 672, 672 (1946).

108. *In re Dammann*, 336 U.S. 922 (1949); *Everett v. Truman*, 334 U.S. 824 (1948); *see generally* Pfander, *supra* note 104, at 517 nn.131-32. In dismissing these cases, the Court did not adopt a standard form order; its orders in different cases use different one-sentence formulations. The fact that the *Hirota* Court used nine sentences to accomplish what could have been done in one does not supply a reason to infer some additional reason for the dismissal: *Hirota*, after all, differed from the other cases in having proceeded to oral argument before dismissal.

109. The mystery here is Justice Black, who voted with the majority in *Hirota* and then with the dissenters in *Everett* and *Dammann*.

110. *See infra* notes 70-71.

111. The fact that Hirota attacked the jurisdiction of the IMTFE as well as the substantive fairness of his conviction—a challenge that was traditionally the sole ground for review in a collateral challenge to a military tribunal’s judgment—is of no relevance on this point. *See generally* *Dynes v. Hoover*, 61 U.S. (20 How.) 65

again mere months after the *Hirota* per curiam opinion issued, making it clear that the Justices were well aware of their obligation to examine the Article III *bona fides* of habeas petitions filed in the first instance in the High Court.

C. *Hirota's Dicta and Flick*

The *Hirota* Court did not merely answer the case before it; it also included dicta concerning the "power or authority" of all the lower federal courts. Subsequently, the Court of Appeals for the District of Columbia Circuit in *Flick v. Johnson* took the position that no habeas jurisdiction availed when a non-citizen sought habeas review of the final judgment of an international military tribunal in a federal district court.¹¹² In *Flick*, a German national challenged a judgment of a military commission convened in Germany. The Circuit Court held that the dispositive question under *Hirota* was "the source" of the commission's "power" and "whether it was a court of the United States."¹¹³ The Court of Appeals concluded that the tribunal that had sentenced Flick, while convened by a U.S. officer, was nonetheless non-U.S. in character because its "power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers," and so dismissed the petition.¹¹⁴ The *Flick* Court's characterization of the military commission at issue has been roundly criticized.¹¹⁵ More relevant here is the question whether *Flick's* analytic framework, and its reading of *Hirota*, is persuasive.

Flick's reasoning is not persuasive because the binding jurisdictional bar that dictated dismissal in *Hirota* has no application to federal courts of first instance. By extending the *Hirota* holding to the lower court context, the D.C. Circuit may have eased the case management problems presented by the influx of war-time prisoner cases, but it also broadened the *Hirota* holding beyond its tenable bounds.

Extension of *Hirota* is easy to understand under the circumstances in which *Flick* arose. The *Hirota* Court did not disaggregate

(1858); William F. Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals*, 10 OHIO ST. L.J. 271 (1949).

112. 174 F.2d 983, 984, 986 (D.C. Cir. 1949).

113. *Id.* at 984.

114. *Id.* at 985.

115. See Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 369 n.5 (1951) [hereinafter COLUMBIA Note]; see also Note, *Review of International Criminal Convictions*, 59 YALE L.J. 997, 999 n.3, 1001 n.12, 1003 (1949-50) (describing mixed U.S. and international authority for the court in *Flick*).

clearly which of the “circumstances” that the Court listed in the first two paragraphs of its decision best explained the jurisdictional holding, and it spoke about it as a bar on the (plural) “courts.” Nor did it explain whether its ruling found footing on statutory grounds (as *Ahrens* did) or on a more nebulous constitutional limit to the “Judicial Power” defined in Article III. And, compared to the Justices of the Supreme Court, judges of the D.C. Circuit may have had less reason to be familiar with the intricacies of the appellate/original distinction drawn by Article III.

The dicta about all federal courts in *Hirota* can, in any case, be explained in more tailored terms that are fully consonant with the jurisdictional principles then in play. The *Hirota* per curiam came hard on the heels of *Ahrens*, which seemed to limit statutory jurisdiction over petitions filed from overseas. The dicta in *Hirota* on which *Flick* rested can be better read as conveying the implication that *Ahrens*’s holding indeed extended to extraterritorial detentions. Justice Douglas certainly read the *Hirota* dicta in this way, and protested at his inchoate majority opinion in *Ahrens* being extended beyond its function as an inter-district allocative tool.¹¹⁶

This extension would not have been as surprising in 1949 as it is today. The idea that federal courts wholly lacked power in relation to extraterritorial detention decisions, even concerning U.S. citizens, was not an outlandish reading of the then-relevant precedent. Supreme Court precedent suggested that no extraterritorial jurisdiction for citizens existed.¹¹⁷ Both commentators and advocates saw colorable arguments for refusing any exercise of habeas jurisdiction beyond U.S. borders. Two years after *Hirota*, one commentator observed that a “writ of habeas corpus has never issued from a court of the United States on the petition of anyone, citizen or alien, held in American custody beyond the territorial limits of the United States.”¹¹⁸ And in 1950, the Solicitor General in *Eisen-trager* argued strenuously that federal courts entirely lacked habeas jurisdiction over challenges to *either* citizen or non-citizen detention.¹¹⁹

116. *Hirota v. MacArthur*, 338 U.S. 197, 201-02 (1948) (Douglas, J., concurring) (Douglas’ concurrence was filed in 1949, six months after the per curiam decision was issued). This was also the probable reason why *Hirota* did not, like the *Bush* petitioners a year later, simply refile in a federal district court.

117. See, e.g., *In re Ross*, 140 U.S. 453 (1891) (authorizing trial by consular court).

118. COLUMBIA Note, *supra* note 115, at 368.

119. See Brief for Petitioners at 14, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306).

The *Flick* decision, moreover, arose against a *sui generis* jurisdictional backdrop that existed for only a short window of time. On the one hand, it appeared at that moment the federal courts lacked any statutory jurisdiction over petitions challenging extraterritorial detention under *Ahrens*. But even as the *Flick* case was *sub judice*, the D.C. Circuit Court was hotly debating the scope of habeas jurisdiction compelled by the Constitution. Less than a month before *Flick*, a different panel of the D.C. Circuit handed down a decision in *Eisentrager v. Forrestal*, holding that although *Ahrens* had foreclosed statutory extraterritorial jurisdiction, the federal court's power to entertain a petition from German prisoners detained at the Landberg Prison in Germany could be derived "directly from fundamentals," that is, from the Constitution itself.¹²⁰ In other words, between April 1949 and June 1950 (when the Supreme Court reversed the D.C. Circuit in its *Eisentrager* decision),¹²¹ federal courts read the habeas statute to grant no extraterritorial jurisdiction, but read the Constitution to require some jurisdiction beyond this statutory grant. For the *Flick* Court, therefore, the question presented was the outer boundary of the Constitution's distribution of habeas rights to non-citizens outside the United States.¹²² The question before the *Flick* case was how far the Constitution *must extend*—and not where it *must stop*; *Flick* thus concerned the scope of a constitutional entitlement, and not a question of barriers to jurisdiction.

The D.C. Circuit's opinion in *Eisentrager v. Forrestal*¹²³ thus was a crucial part of the jurisdictional landscape when *Flick* was decided, less than a month later.¹²⁴ In this light, *Flick* and *Eisentrager* are best seen as companion cases presenting variants on the issue of the *limits* to the constitutionally compelled *availability* of collateral review for a narrow class of non-citizens detained overseas in the aftermath of a world war. Tellingly, the Supreme Court granted certiorari in *Eisentrager* and denied certiorari in *Flick* on the same day, November 14, 1949.¹²⁵

120. *Eisentrager v. Forrestal*, 174 F.2d 961, 963, 967 (D.C. Cir. 1949), *rev'd sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

121. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

122. Today, that question of constitutional entitlement is answered in a different register than the obdurate terms Justice Jackson invoked in *Eisentrager*. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004).

123. 174 F.2d 961 (D.C. Cir. 1949).

124. One of the judges who sat on the *Eisentrager* panel indeed wrote the *Flick* opinion. *Compare id. with Flick v. Johnson* 174 F.2d 983 (D.C. Cir. 1949).

125. I'm grateful to Steve Vladeck for pointing this out to me.

The Supreme Court's *Eisentrager* opinion no longer stands as an absolute limit to federal court jurisdiction over foreign-filed habeas petitions. As the Supreme Court explained in *Rasul*, "*Braden* overruled the statutory predicate to *Eisentrager*'s holding, [and thus] *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over" petitions filed for overseas detainees.¹²⁶ Like *Eisentrager*, *Flick* has been deprived of its "statutory predicate"; it is no longer the case that a court must inquire into the availability of constitutional habeas jurisdiction for petitions from U.S. citizens filed from overseas. This much has been clear since *Eisentrager*, which waxed lyrically that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."¹²⁷ Extraterritorial statutory habeas jurisdiction has been exercised on behalf of citizens since *Burns v. Wilson*,¹²⁸ and at least in some instances for non-citizens since *Rasul*.¹²⁹ In this regard, *Flick*'s use of *Hirota* to limit constitutional habeas has little practical consequence today.

Subsequent precedent supports this reading of *Flick*. In 1955, the Circuit Court in *United States ex rel. Keefe v. Dulles* examined a habeas petition from a U.S. citizen detained in France pursuant to a final criminal conviction from a French court.¹³⁰ Rather than invoking *Flick*, the Court reviewed the petition and concluded that it did not state a claim on its face because it did not allege U.S. "custody."¹³¹ That is, the Court passed beyond the jurisdictional threshold and looked at the statutory prerequisites for habeas jurisdiction. Further undermining the continuing validity of *Flick*, the Court conducted a merits inquiry into whether it should issue a writ of mandamus, finally concluding that no such remedy was war-

126. *Rasul*, 542 U.S. at 479.

127. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

128. *See Burns v. Wilson*, 346 U.S. 137, 138-39 (1953).

129. *But see* Military Commissions Act of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600 (2006) (limiting the availability of habeas for certain classes of non-citizens).

130. *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392-93 (D.C. Cir. 1955) (exercising habeas jurisdiction but denying the writ, when petitioner, detained by French government, could not show constitutional rights violated by U.S. action); *accord* *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 56-57 (D.D.C. 2004); *see also* *Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *3 (E.D. La. July 19, 1995) (to determine if petitioner was in U.S. "custody" while on trial in Bolivia, court inquired whether "the Bolivian government is acting as a mere 'puppet' of the United States.>").

131. *Keefe*, 222 F.2d at 392.

ranted.¹³² Seventeen years later, the Court of Appeals exercised merits jurisdiction a second time in a case involving petitioners who had been already convicted in a non-U.S. tribunal and who challenged their transfer to another sovereign.¹³³ These cases are ample demonstration of *Flick*'s limited salience today.

III. FURTHER EVIDENCE FOR *HIROTA*'S LIMITED REACH

Three categories of extrinsic evidence of *Hirota*'s circumscribed reach further undercut the ambitious reading of that decision attempted by the Government: first, the federal courts' treatment of other habeas petitions from the context of multinational military operations; second, post-1948 developments in the "state action" doctrine; and, finally and perhaps most fundamentally, the constitutional architecture of the separation of powers.

A. *Judicial Treatment of International Auspices: 1952-2004*

Between 1952 and 2004, the Supreme Court took jurisdiction of numerous habeas petitions from American citizens detained in U.S. military operations with multinational or U.N. complexions. Three cases in particular cast into doubt any reading of *Hirota* that finds a jurisdictional bar beyond its narrow holding.

First, *Madsen v. Kinsella* concerned Yvette Madsen, a U.S. citizen and civilian who committed homicide in occupied Germany in October 1949.¹³⁴ She was tried and sentenced by the "United

132. *Id.* at 394. In another set of cases, courts have examined habeas challenges to confinement on U.S. soil based on a foreign judgment. *See, e.g.*, *Bishop v. Reno*, 210 F.3d 1295 (11th Cir. 2000); *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980). *Bishop* and *Pfeifer* involve persons tried and sentenced for a criminal offense in another country. Under treaties and implementing legislation, both detainees were brought to the United States. In both cases, the detainees received a U.S. court hearing in which they voluntarily waived the right to challenge their sentences. Courts upheld this consensual arrangement, which had been conducted pursuant to a carefully negotiated treaty and under the close supervision of the federal judiciary. *See Bishop*, 210 F.3d at 1296-97; *Pfeifer*, 615 F.2d at 877. In both cases, the court examined closely the facts of the case, and the *Pfeifer* court closely looked at the factual question of whether the consent was voluntary. *Id.* The presence of an anterior foreign judgment did not strip the courts of jurisdiction.

133. *See Holmes v. Laird*, 459 F.2d 1211, 1212, 1218 (D.C. Cir. 1972) (reviewing contemplated transfer of American servicemen to West Germany following conviction there, and concluding transfer was "the precise response required of the United States by its treaty commitments . . .").

134. 343 U.S. 341, 342-43 (1952).

States Court of the Allied High Commission for Germany,” which was established for the American zone of occupied Germany by a law promulgated by the “Allied High Command.”¹³⁵ The Supreme Court addressed and decided the question of whether this tribunal had jurisdiction over Madsen, or whether courts-martial were the proper forum for adjudication of her offense. The Court concluded that the tribunal had plenary authority to try Madsen under the Articles of War.¹³⁶

Without question, the tribunal that convicted Madsen had authority under U.S. law. Yet it also traced roots back to a multi-national arrangement. After the German surrender in May 1945, the four Allied powers declared their supreme authority in Germany and agreed that “authority was to be wielded unilaterally by the Commanders-in-Chief in their respective zones of occupation”¹³⁷ In April 1944, the Combined Chiefs of Staff directed U.S. General Dwight Eisenhower “as Supreme Commander of the Allied Expeditionary Force” to establish tribunals for occupied Germany.¹³⁸ Entering Germany in September 1944, Eisenhower issued proclamations suspending operation of German courts and establishing new tribunals under the Allied forces.¹³⁹ In his capacity as “Supreme Commander, Allied Expeditionary Force,” Eisenhower issued Ordinance No. 2 establishing military occupation courts.¹⁴⁰ In short, the post-war occupation Allied regime for Germany was an

135. *Id.* at 343-44 & n.3.

136. *Id.* at 353-54 (finding concurrent jurisdiction).

137. ELMER PLISCHKE, HISTORY OF THE ALLIED HIGH COMMISSION FOR GERMANY: ITS ESTABLISHMENT, STRUCTURE AND PROCEDURES 1 (1951). This division of authority was confirmed by an agreement reached at the Potsdam conference in August 1945. See The Berlin (Potsdam) Conference, July 17-August 2, 1945: (a) Protocol of Proceedings, Aug. 1, 1945, reprinted in DEP'T OF STATE, A DECADE OF AMERICAN FOREIGN POLICY DOCUMENTS, 1941-1949 28, 30 (1985). The four Allied powers were the United States, the United Kingdom, France, and the Soviet Union. See W. FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 70-99 (1947).

138. See Eli E. Nobleman, American Military Government Courts in Germany: Their Role in the Democratization of the German People 43-44 (1950) (unpublished Ph.D. dissertation, New York University School of Law) (on file with the New York University School of Law Library); see also Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A.B.A. J. 777, 778-79 (1947).

139. Nobleman, American Military Government Courts, *supra* note 138, at 48-49. For more details of the courts thereby established, see John Raymond, Note, *Madsen v. Kinsella: Landmark and Guidepost in Law of Military Occupation*, 47 AM. J. INT'L L. 300, 300-02 (1953).

140. FRIEDMANN, *supra* note 137, at 300-03 (reproducing Ordinance No. 2).

explicit compound of American and international authority.¹⁴¹ Trying to classify the situation according to a binary of domestic/international obscures the complex facts at stake.¹⁴²

From their inception therefore, occupation courts for post-war Germany had an Allied, as well as an American, character. Even as the United States promulgated regulations (published in the Federal Register) for the establishment, jurisdiction, and management of courts in the U.S. zone,¹⁴³ occupation courts existed as a consequence of the condominium arrangement between the three Allied powers. Reflecting this complexity, the courts for the U.S. Zone were formally titled “United States Courts of the *Allied High Commission for Germany*” on April 7, 1950.¹⁴⁴ Hence, from beginning to end, courts in occupied Germany kept their allied, and not merely American, character.

Second, the Court in *United States ex rel. Toth v. Quarles* issued a habeas writ for a prisoner detained in the course of American military operations in Korea.¹⁴⁵ Arrested in Pennsylvania after his discharge from the service, the *Toth* petitioner was transferred back to Korea where his alleged crime had occurred and where the court-martial was to take place.¹⁴⁶ U.S. operations in the Korean conflict were authorized by a U.N. resolution.¹⁴⁷ Under an expansive reading of *Hirota*, the fact of U.N. authorization for the Korean action

141. For instance, the U.S. High Commission for Germany spoke of the “tripartite cooperation and fusion” involved in post-war governance. PLISCHKE, *supra* note 137, at 9. This included creation of a multinational Allied High Commission with substantial governance responsibilities. *Id.* at 9, 28-38.

142. See generally Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT’L L. 1075, 1091-100 (2004) (describing models of “shared sovereignty” that involve “the engagement of external actors in some of the domestic authority structures of the target state for an indefinite period of time”).

143. See *Military Government for Germany; United States Zone*, 12 Fed. Reg. 6997 (Oct. 29, 1947); *Madsen v. Kinsella*, 343 U.S. 341, 362 (1952).

144. Allied High Commission Documents, 15 Fed. Reg. 2086 (Apr. 13, 1950) (emphasis added).

145. 350 U.S. 11 (1955).

146. *Id.* at 13 & n.3.

147. See S.C. Res. 84, ¶¶ 3-5, U.N. Doc. S/RES/84 (July 7, 1950) (“3. *Recommends* that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States of America; 4. *Requests* the United States to designate the commander of such forces; 5. *Authorizes* the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating. . . .”); see also S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950); MAX HILAIRE, *UNITED NATIONS LAW AND THE SECURITY COUNCIL* 9, 186 (2005); LOUIS

should have shielded detention and trial decisions from federal court review. Clearly, it did not.

Finally, there is *Hamdi*. Yaser Hamdi was detained initially by Afghan forces fighting for the Northern Alliance.¹⁴⁸ This is hardly surprising since, as the State Department has explained of the U.S. invasion of Afghanistan, “Operation Enduring Freedom . . . [was] a *multinational* coalition military operation.”¹⁴⁹ In addition to the multinational character of the Afghan operation, military operations west of the Durand line also benefited from the United Nations’ blessing.¹⁵⁰ U.S. Ambassador to the U.N. John Negroponte explained that U.S. forces in Afghanistan acted “in accordance with the inherent right of individual and collective self-defence” granted in Article 51 of the U.N. Charter.¹⁵¹ After the close of initial military operations, the continued U.S. presence in Afghanistan also received further authorization from the U.N. Security Council.¹⁵²

In sum, the post-war history of the nation’s international entanglements is free of any mention of *Hirota* as an exception to the availability of habeas jurisdiction for those in U.S. custody.

B. Post-1948 Development of the “State Action” Doctrine

After *Hirota*, constitutional doctrine has evolved to make it clear that the government cannot avoid the costs imposed by consti-

HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 255 (2d ed. 1996) (noting “unified command” of multinational forces).

148. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (O’Connor, J., plurality opinion).

149. U.S. Department of State Fact Sheet, Operation Enduring Freedom (Jan. 31, 2006), www.state.gov/r/pa/prs/ps/2006/60083.htm (emphasis added); see also *Hamdi* Brief, *supra* note 37, at 2-3, (“U.S. and coalition forces have removed the Taliban from power. . .”); Henry J. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1, 9 n.36 (2004) (describing the “ad-hoc” international coalition that invaded Afghanistan).

150. See S.C. Res. 1707, ¶ 2, U.N. Doc. S/RES/1707 (Sept. 12, 2006); see also U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/PV.4370 (Sept. 12, 2001); S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning the “horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania”).

151. ALEX CONTE, SECURITY IN THE 21ST CENTURY: THE UNITED NATIONS, AFGHANISTAN AND IRAQ 43 (2005); cf. U.N. Charter art. 51, *reprinted in* THE CHARTER OF THE UNITED NATIONS: COMMENTARY 788 (Bruno Simma ed., Oxford Press 2002).

152. See S.C. Res. 1378, ¶ 4, U.N. Doc. S/RES/1378 (Nov. 14, 2001) (calling on U.N. member states to support the formation of a transition administration and new government, including “quick impact” projects and long-term social and economic assistance).

tutional norms by either collaboration with actors not directly covered by the Constitution or by assuming a new juridical form.

First crafted narrowly in *The Civil Rights Cases*, the “state action” doctrine focused the application of constitutional norms on wholly state actors, leaving non-state actors immune from constitutional rules.¹⁵³ In 1948, the Supreme Court was only just developing rules to regulate government collaboration with entities whose acts were not directly regulated by the Constitution.¹⁵⁴ The landmark ruling in *Terry v. Adams* and the development of rules to determine whether “state action” was present all came after *Hirota*.¹⁵⁵ In recent years, this “state action” doctrinal framework has been extended to federal action.¹⁵⁶ There is lower court precedent, moreover, for the proposition that “federal action” comprises action by other governments at the behest of the U.S. government. In one case, the Second Circuit Court of Appeals concluded that the freezing of bank assets by the Swiss government at the request of the American government met the state action standard.¹⁵⁷ And in *Abu Ali*, the Saudi government’s detention of a U.S. citizen at the direction of the United States was treated as a matter subject to habeas review.¹⁵⁸

This evolution of the “state action” doctrine follows Justice Holmes’s “bad man” theory of law,¹⁵⁹ a theory with equal application to the present international detention context. Despite its name, this theory requires no assumptions about the good faith (or

153. *The Civil Rights Cases*, 109 U.S. 3, 17 (1883).

154. *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (applying First Amendment rules to company-owned town).

155. *See Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (striking down a purely private association’s primary election that excluded African-Americans); *see generally* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 *HOUS. L. REV.* 333, 424 (1997) (noting beginning of “state action” doctrine).

156. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (describing federal action).

157. *Barr v. U.S. Dep’t of Justice*, 819 F.2d 25, 27-28 (2d Cir. 1987) (finding “federal action” in Swiss government’s freezing of bank deposits at U.S. request).

158. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 59-60 (D.D.C. 2004) (U.S. does not evade liability for constitutional violations by collaborating with foreign government); *cf. Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *3 (E.D. La., July 19, 1995) (to determine if petitioner was in U.S. “custody” in Bolivia, court inquired whether “the Bolivian government is acting as a mere ‘puppet’ of the United States.”).

159. *See Oliver Wendell Holmes, Jr., The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).

lack thereof) of actors subject to the law. Holmes made no claim about the moral content of law. Rather, he attempted “to eliminate a confusion within the concept of legal duty: a confusion between reading moral words appearing in legal texts in their moral sense, which suggests categorical obligations, and reading them in their legal sense, which (Holmes claims) implies only disjunctive obligations.”¹⁶⁰ Rational, cost-minimizing government actors, in this view,¹⁶¹ will seek to avoid costly obligations. State action doctrine simply accounts for this incentive by guarding against the displacement of unconstitutional behavior into the hands of non-state actors.

Courts explicitly endorse this logic in other applications of the state action doctrine. Assessing the coverage of federal corporations such as Amtrak by constitutional norms (in particular the First Amendment), Justice Scalia reasoned that “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”¹⁶² More salient here, Justice O’Connor deployed this same logic in *Hamdi* to caution against the crafting of jurisdictional lines that created incentives for circumvention. In her *Hamdi* plurality, Justice O’Connor repudiated a place-of-confinement limit for habeas jurisdiction that Justice Scalia intimated in dissent. Her anti-circumvention reasoning is telling, and applies with equal force to the question whether the U.S. military can escape constitutional obligations through international entanglements. Justice O’Connor explained that a territory rule would “creat[e] a perverse incentive. Military authorities faced with the stark choice of submitting to full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad.”¹⁶³

160. David Luban, *The Bad Man and the Good Lawyer*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 33, 40 (Steven J. Burton ed., 2000).

161. I express no opinion as to whether the Holmesian view of legal duties is correct, only that it underpins the development of state action doctrine.

162. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

163. *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (O’Connor, J., plurality opinion); see also *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 868 (1957) (“The congressional policy that habeas corpus should lie to challenge any illegal detention by a federal officer would be frustrated by an interpretation that would deny the writ on the irrelevant basis of the place of confinement, which can be changed almost at will by the officials having custody of the prisoner.”).

Since World War II, the United States has operated as part of multinational coalitions and under U.N. mandates as a matter of routine.¹⁶⁴ Precisely the same concern about circumvention of constitutional norms would be raised by a jurisdictional rule that depended on the sign on the U.S. military post's front door. Its inevitable consequence would be increased government use of "multinational" condominiums to shield controversial detention decisions from judicial scrutiny. Yet there is no support in case law for the proposition that an executive agreement can abrogate constitutional norms of personal liberty. Indeed, "[t]here is nothing in [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."¹⁶⁵

The historical roots of habeas provide further support for this idea. At common law, a court's power to issue a writ of habeas corpus turned on whether the crown exercised sufficient power and control to secure obedience to the writ's command.¹⁶⁶ Reflecting the writ's ultimately pragmatic remedial ends, British courts recognized that if "an alternative forum did not exist, adjudication by the superior courts at Westminster was seen as essential to prevent a failure of justice."¹⁶⁷ Hence, habeas has never been a matter of formalistic labels, but a deeply pragmatic inquiry into which actor was making detention decisions. Like state action doctrine, this pragmatic inquiry means that government action cannot be sheltered under a formalistic label of non-state action to prevent exercise of jurisdiction. This same anti-circumvention logic is a quality both of habeas jurisdiction and of the judicial review of other governmental action more generally.

164. See *supra* notes 14-15 and accompanying text.

165. *Reid v. Covert*, 354 U.S. 1, 16 (Black, J., plurality opinion); accord *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (rejecting the idea that a treaty can "authorize what the constitution forbids").

166. See, e.g., *King v. Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759) (there is "no doubt as to the power [of the court]" to issue writs of habeas corpus "where the place is under the subjection of the Crown of England . . .") (emphasis added).

167. Pfander, *supra* note 104, at 511; see also *Fabrigas v. Mostyn*, 20 Howell's St. Tr. 81, 231 (K.B. 1775) (sustaining action by alien from military colony of Minorca for false imprisonment and banishment without trial; explaining that "to lay down in an English court of justice such monstrous propositions as that a governor . . . can do what he pleases . . . and is accountable to nobody—is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere.").

C. Separation of Powers Principles

Finally, the *Hirota* gambit sits uncomfortably with the Constitution's separation of powers. The inevitable logic of reading *Hirota* as the Justice Department has is to carve an open-ended exception to habeas jurisdiction whenever the United States, by executive agreement, enters an accord with a foreign sovereign. Congress, therefore, need not have a role in the matter.

But the separation of powers aims, as James Madison explained, to prevent "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands."¹⁶⁸ This limited government principle finds embodiment in the Habeas Suspension Clause, which on its face restricts the circumstances in which the writ may be rendered unavailable.¹⁶⁹ The Suspension Clause arguably contains a second constraint—assigning the decision to withdraw judicial remedies for unlawful detention to Congress and Congress alone. The Supreme Court, to be sure, has never held as much. But a two-hundred-year old line of cases, linking Chief Justice John Marshall to the members of the 2006 Court, supports this proposition. In the *Bollman* case, which arose out of the Aaron Burr conspiracy, Marshall referred in dicta to the fact that "it is for the legislature" to suspend habeas (as if that proposition needed no further proof).¹⁷⁰ And in the *Hamdi* case, eight of nine Justices indicated that the Suspension Power lay with Congress.¹⁷¹ A constitu-

168. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

169. U.S. CONST. art. I, § 9, cl. 2.

170. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the public safety should require the suspension [of habeas], it is for the legislature to say so."); see also *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) ("The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.'"). Of course, Lincoln declined to obey the writ issued by Chief Justice Taney in *Merryman*. MARK NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 10 (1991).

171. "[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O'Connor, J., plurality opinion); see *id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting "the need for an assessment by Congress before citizens are subject to lockup"); *id.* at 562 (Scalia, J., dissenting) (stating that this Congressional assessment has historically been sought and obtained).

tional point so long treated as self-evident should not be lightly dismissed.

Nor does the involvement of the executive branch (by entering multinational agreements with foreign powers) suffice to quell separation of powers concerns. As Justice Souter observed in his *Hamdi* concurrence:

For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch. . . .¹⁷²

Moreover, reading *Hirota* to create an open-ended exception to habeas review has the practical consequence of assigning to a foreign entity the power to suspend the remedy of habeas corpus. There are strong structural reasons, however, for sustaining a reading of the Suspension Clause that distinguishes between Congress and a foreign sovereign:

[T]he Constitution nowhere permits the President, the treaty makers, or Congress to delegate federal power completely outside of the national government. . . . This law of conservation of federal power prevents the national government, as a whole, from concealing or confusing the lines of government authority and responsibility. When only US officers exercise federal power under federal law, the people may hold the actions of the government accountable.¹⁷³

Whatever the Habeas Suspension Clause means in the final analysis, then, it certainly does not permit the Executive branch, acting alone, to outsource the suspension power to a foreign power.

IV. CONCLUSION

Hirota provides no exception from the now five-decade-old rule that citizens overseas properly invoke the habeas writ to secure independent scrutiny of the legal and factual bases of their detention. Certainly, it does not stand for the proposition that multinational authorization frees an American official, who exercises rank and

172. *Id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

173. John C. Yoo, *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355, 367 (2000).

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prestige as a consequence of a commission from the President, from obeying constitutional norms. There is no “loaded weapon,” to use Justice Jackson’s famous phrase,¹⁷⁴ concealed in the intricate folds of Supreme Court jurisdictional doctrine, awaiting overzealous government counsel to wield it. Now, as in the past, international entanglements can provide no backdoor from the domestic obligations of the Constitution.

174. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

