CUSTODIAL AND COLLATERAL PROCESS: A RESPONSE TO PROFESSOR GARRETT

Lee Kovarsky†

INTRODUCTION

In *Habeas Corpus and Due Process*, Professor Brandon Garrett disentangles two threads of decisional law knotted in the federal courts' post-9/11 national-security detention cases.[1] Such cases can be fish-in-barrel targets for withering criticism, but Professor Garrett makes the novel argument that they reflect confusion about subtle differences between due process and habeas corpus. His thesis centers on the misguided response of the inferior federal courts to two Supreme Court cases: *Hamdi v. Rumsfeld*[2] and *Boumediene v. Bush*.[3] Specifically, Professor Garrett argues that *Hamdi* posits a rule of due process that should draw from one body of authority and that *Boumediene* posits a rule of habeas privilege that should draw from another.[4] When the federal courts allow one concept to bleed into the other, he observes, they confuse their Article III responsibility to supervise certain kinds of custody.[5]

I agree almost entirely with the descriptive and normative content of Professor Garrett's insights. Due process and the habeas privilege are distinct constitutional phenomena, federal courts almost pathologically confuse them, and the confusion makes it impossible to achieve any decisional equilibrium. My primary quarrel with Professor Garrett's critique is that he, perhaps reluctantly, embraces

† Assistant Professor, University of Maryland Francis King Carey School of Law.

1 *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47 (2012).

2 542 U.S. 507 (2004).

3 553 U.S. 723 (2008).

4 *See* Garrett, *supra* note 1, at 51–53.

5 *See id.*

the idea that habeas process and due process can be partial substitutes; I regard them more as complements. For Professor Garrett, "habeas corpus begins where due process ends[,]"[6] and "[t]he [Constitution's] Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process, particularly in the context of indefinite detentions."[7] I am more of a habeas absolutist. The habeas privilege and the dictates of the Due Process Clause should be operative at all times, and the amount of one process should not affect the amount of the other. Rather than assessing whether there is a habeas "right" to certain process, I suggest that the better paradigm for thinking about habeas process is as a feature of judicial power. That is, the habeas privilege, guaranteed against suspension in Article I, Section 9, secures a *judicial* remedy, not an individual right.

Hamdi and *Boumediene* are complicated cases and cracking their decisional code requires me to introduce terms that differ from Professor Garrett's favored due process–habeas nomenclature. I distinguish "custodial process," the process used to determine whether to subject someone to custody in the first place, from "collateral process," the process used to determine whether that custody is lawful. Lawful custody requires sufficient custodial process, but it also requires the custodian to have regulatory, statutory, and constitutional power to detain the prisoner. The process required to subject a prisoner to custody in the first place (due process) and the process required to review it collaterally (usually habeas process) are separate questions. Professor Garrett sometimes seems to accept that more collateral process can sometimes make up for less custodial process; I don't. To crib the quotation that begins Professor Garrett's article: "The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal."[8]

I won't devote much space to issues on which Professor Garrett and I are of the same mind. Instead, I will focus on several elements of Professor Garrett's descriptive account and normative recommendations that I would alter. In Part I, I emphasize the Supreme Court's role in promoting chaotic judicial review of national security detention. In Part II, I explain that the easiest way to honor the distinction between custodial and collateral process is to treat habeas process as a feature of judicial power. In Part III, I argue that procedural due process is the best mode for dealing with "freestanding innocence" challenges—challenges by postconviction

---

6 *Id.* at 47.

7 *Id.* at 124.

8 *Id.* at 48 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting)).

claimants who argue that they are entitled to discharge from custody based on new evidence and irrespective of whether any constitutional violation has occurred.

I
CUSTODIAL VERSUS COLLATERAL PROCESS IN *HAMDI* AND *BOUMEDIENE*

Professor Garrett and I basically agree on the principle that custodial process and collateral process are different concepts that derive from different constitutional provisions. I have the luxury of a responsive platform, so I will rely on Professor Garrett's exhaustive account of the habeas privilege and due process right.[9] Unlike Professor Garrett, however, I would lay the blame for the confused judicial review of military detention squarely on the Supreme Court. To be more precise, *Hamdi* badly confused the requirements of custodial and collateral process, and *Boumediene* needlessly equivocated when an opportunity to clarify the differences arose.

The first thing to understand is how *Hamdi* unnecessarily introduced collateral-process rules into a case about custodial process. The military took custody of Yaser Esam Hamdi after he was captured in Afghanistan by the Northern Alliance, "a coalition of military groups opposed to the Taliban government."[10] The United States initially interrogated Hamdi at Guantánamo Bay Naval Base in Cuba, but transferred him to a Virginia naval brig when officials learned that he was a U.S. citizen.[11] The military wanted to detain Hamdi indefinitely by designating him as an "enemy combatant," a label that remains fraught with confusion. Suffice it to say, designation as an enemy combatant vitiates a number of procedural protections, and, before *Hamdi*, such a designation had been reserved almost exclusively for noncitizens.[12]

In a habeas proceeding that challenged the Department of Defense's executive custody, the United States supported Hamdi's designation as an enemy combatant with a declaration from Michael Mobbs, a Special Advisor to the Under Secretary of Defense for Policy (Mobbs Declaration). Only a portion of the Mobbs Declaration, which was all hearsay, was specific to Hamdi's custody. It stated that Hamdi "affiliated with a Taliban military unit and received weapons

---

9 *See* Garrett, *supra* note 1, at 74–79 (discussing *Hamdi*); *id.* at 79–87 (discussing *Boumediene*).

10 *Hamdi*, 542 U.S. at 510.

11 *Id.*

12 I say "almost exclusively" because, in *Ex parte Quirin*, the Supreme Court did not treat American citizenship as incompatible with enemy-combatant status. *See* 317 U.S. 1, 37–38 (1942) ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

training."[13] It also stated that Hamdi "remained with his Taliban unit" when the Northern Alliance was "engaged in battle with the Taliban."[14] Mobbs further alleged that once Hamdi's unit surrendered, Hamdi "surrender[ed] his Kalishnikov assault rifle" to the Northern Alliance forces.[15] Mobbs explained that a military screening team designated Hamdi as an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban."[16] The Fourth Circuit held that the Constitution required no other procedural protections, including an evidentiary hearing, which might have given Hamdi the opportunity to contest his designation as an enemy combatant.[17] The Fourth Circuit reasoned that, because Hamdi was captured in an active combat zone of a foreign military theatre, the military could detain him indefinitely without further process.[18]

The Supreme Court reversed, but the problems with the decision, and with the plurality opinion, are legion. The three Justices joining Justice Sandra Day O'Connor's plurality opinion—Chief Justice William H. Rehnquist and Associate Justices Anthony M. Kennedy and Stephen G. Breyer—believed that Congress had authorized indefinite detention of enemy combatants, but that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."[19] More precisely, *Hamdi* incorporated the procedural due process test from *Mathews v. Eldridge* to determine whether the government had provided sufficient process.[20] Under *Eldridge*, a court decides whether a party is entitled to a particular procedure by evaluating (1) the private interest at stake in the requested procedure, (2) the risk of error that the requested procedure eliminates, and (3) the government interest in the existing procedure.[21] *Hamdi* borrowed *Eldridge* as a test for the liberty interest of a prisoner designated as an enemy combatant.[22] Justices David Souter and Ruth Bader Ginsburg

---

13 *Hamdi*, 542 U.S. at 513 (quoting Declaration of Michael H. Mobbs, Special Advisor to the Under Sec'y of Def. for Policy, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) [hereinafter Mobbs Declaration]).

14 *Id.* (quoting Mobbs Declaration).

15 *Id.* (quoting Mobbs Declaration) (alteration in original).

16 *Id.* (quoting Mobbs Declaration) (alteration in original).

17 *See* Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2003).

18 *See id.*

19 *Hamdi*, 542 U.S. at 509.

20 *See id.* at 528–29 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

21 *See Eldridge*, 424 U.S. at 335.

22 Modifying *Eldridge* for a combatant status case, the three variables are: (1) the liberty interest of the prisoner, (2) the risk of error in the status determination, and (3) the Defense Department's interest in the existing procedures for making the status determination.

agreed that Hamdi was entitled to the process that the O'Connor plurality described, but would have held—even assuming the truth of the Mobbs Declaration—that Congress had not authorized indefinite detention of citizens.[23] Justice Antonin Scalia, joined by Justice John Paul Stevens, dissented; he would have reversed the Fourth Circuit and ordered Hamdi's release on the ground that the United States could never indefinitely detain its own citizens without criminal process absent a statute suspending the habeas privilege.[24] Only Justice Clarence Thomas would have affirmed, on the grounds that Congress had authorized indefinite detention and that the process Hamdi received was sufficient.[25] Because Justice O'Connor's opinion was both that of a plurality and that of the median Justice, subsequent federal courts have treated it as controlling.[26]

One of the hiccups in *Hamdi*—and the one to which Professor Garrett's article relates—is Justice O'Connor's equivocal sourcing of the requirement for additional process. Was a meaningful opportunity to be heard before a neutral decision maker a requirement of custodial process or collateral process? Different portions of the opinion support different interpretations.[27] Quite a bit rides on the answer to that question because the variables that are material to the sufficiency of each process category are different. As a consequence, lower federal courts after *Hamdi* did not know whether they should provide a certain process or review whether some other entity did.[28]

---

23 *See Hamdi*, 542 U.S. at 541 (Souter, J., concurring).

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

25 *See id.* at 594 (Thomas, J., dissenting).

26 Aligning the Justices' opinions on a spectrum with the most favorable to the government's position on the left and least favorable to the government's position on the right, the leftmost opinion on the spectrum would be Justice Thomas's opinion, which held that Congress had authorized indefinite detention and that the procedural safeguards were sufficient. Justice O'Connor's opinion would be the next one to the right; she would have held that Congress had authorized indefinite detention but that procedures were insufficient for sustaining the enemy-combatant designation. To the right of Justice O'Connor's opinion would be Justice Souter's opinion, which held that Congress had not authorized the indefinite detention of prisoners like Hamdi. The most rightward opinion on the spectrum would be Justice Scalia's dissenting opinion, which held that Congress could never authorize indefinite detention of American citizens.

27 *Compare, e.g.*, *Hamdi*, 542 U.S. at 509 ("We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."), *with id.* at 525 ("Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance."), *and id.* at 536–37 ("Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to [due] process.").

28 A clever advocate might observe that, although the habeas privilege operates only on the required collateral process, the concept of procedural due process is not so

The Court decided *Boumediene* four years later, after Congress had tried to strip habeas jurisdiction over Guantánamo prisoners designated as enemy combatants.[29] *Boumediene* did a lot of smart things, and, along with *Ex parte Bollman*[30] and *Brown v. Allen*,[31] it is one of the three most important habeas decisions in American history. Most concretely, *Boumediene* affirmed that a self-executing habeas privilege extended to Guantánamo detainees.[32] More abstractly, it held that the Constitution foreclosed Congress from statutorily withdrawing federal habeas jurisdiction where judicial review might be inconvenient or otherwise undesirable. There are many Article III and separation-of-powers propositions nested in *Boumediene*, and the Court generally resolved them in favor of judicial review. Nevertheless, there are places where the opinion equivocates unnecessarily, and one of those places is the custodial-versus-collateral-process issue that *Hamdi* complicated.

Lakhdar Boumediene was one of several noncitizens apprehended abroad and detained indefinitely at Guantánamo Bay. Having determined that enemy combatants were the only prisoners that it could detain indefinitely, the Department of Defense established Combatant Status Review Tribunals (CSRTs) to allow the military to adjudicate enemy-combatant status in conformance with *Hamdi*.[33] In 2006, Congress passed the Military Commissions Act (MCA) and, in section 7, stripped federal habeas jurisdiction over noncitizens detained at Guantánamo Bay and designated as enemy combatants after CSRT process.[34] The military classified Boumediene as an enemy combatant, which would mean that he had no habeas privilege and that federal courts lacked jurisdiction to review his

---

constrained. Due process might, the argument would go, constrain not only custodial process, but collateral process as well. Although appealing, this position is probably wrong for two reasons. First, a fair reading of the opinion probably does not admit to such a nuanced relationship between the two constitutional concepts. Second, to the extent that courts have interpreted the Due Process Clause to constrain collateral procedures, it imposes a pretty lax constraint—that the procedures not be arbitrary.

29 *See* Boumediene v. Bush, 553 U.S. 723, 723–24 (2008).

30 8 U.S. 75 (1807). In *Ex parte Bollman*, the Supreme Court decided whether it could exercise its "original" habeas jurisdiction in order to review the lawfulness of a treason charge against prisoners accused of aiding Aaron Burr in a plot to mount a rebellion in several southern states. *See id.* at 85–86. *Bollman* remains so important because Chief Justice John Marshall discusses, at length, the relationship between the privilege and the structure of judicial power contemplated in Article III.

31 344 U.S. 443 (1953) (deciding that, under the federal habeas statute, federal courts had collateral jurisdiction to decide issues that were fully litigated in state courts).

32 *See Boumediene*, 553 U.S. at 732–33 (2008).

33 *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy 1–2 (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf

34 *See* 28 U.S.C. § 2241(e) (2006); Military Commissions Act of 2006, Pub. L. No. 109-366, § 7,120 Stat. 2600, 2635–36.

custody through any process other than the procedures specified by the Detainee Treatment Act (DTA).[35]

Boumediene argued that Section 7 was unconstitutional because the Suspension Clause applied at Guantánamo Bay and, because he was constitutionally entitled to the habeas privilege, the DTA review process was an inadequate and ineffective collateral substitute for habeas review.[36] Cumulative process under the MCA and DTA—a CSRT determination followed by highly-circumscribed D.C. Circuit review—made it more difficult for Guantánamo detainees to enjoy the benefits of zealous advocacy,[37] to confront witnesses against them,[38] to obtain review of their status as enemy combatants, and to challenge executive authority to detain them indefinitely.[39] The last question, which involved generalized military authority to detain noncitizen enemy combatants, goes to the collateral question of whether custody is lawful, but does not go to a process issue at all.

Boumediene held that the federal government could not undertake indefinite detention by curtailing collateral review of insufficient custodial process.[40] In and of itself, the holding that there had to be some collateral process to test the lawfulness of the custody was momentous. *Boumediene* not only declared the habeas privilege available to Guantánamo detainees, but it also ruled on the scope of process to which the privilege entitles a prisoner.

Although Professor Garrett presents the Court's rule that Congress might circumscribe habeas review where the custodial process is robust as intuitively desirable, I remain concerned that *Boumediene* did not resolve the issue of custodial-versus-collateral-process that *Hamdi* complicated. All nine *Boumediene* Justices seemed to botch the two categories of process. In a dissent joined by Justices Scalia, Thomas, and Alito, Chief Justice Roberts argued that CSRT process was collateral:

---

35 *See Boumediene*, 553 U.S. at 771–72.

36 *See id.* at 739, 783–84.

37 *See id.* at 767 ("Although the detainee is assigned a 'Personal Representative' to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his 'advocate.'").

38 *See id.* at 784 ("The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence 'relevant and helpful[]'—the detainee's opportunity to question witnesses is likely to be more theoretical than real.") (internal citations omitted).

39 *See id.* at 777 ("The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful.").

40 *See id.* at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. . . . The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.").

> [The majority wrongly characterizes] the CSRTs as part of that initial determination process. They are instead a means for detainees to *challenge* the Government's determination. The Executive designed the CSRTs to [embody] the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas court. The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. If the CSRT finds a particular detainee has been improperly held, it can order release.[41]

Rather than arguing that the sufficiency of CSRT procedure *was* custodial process and should be analyzed under procedural due process cases—a pretty easy lift relative to the more difficult issues the case presented—Justice Kennedy instead responded, for the majority:

> Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.[42]

I suspect Professor Garrett and I differ somewhat in our respective assessments of Justice Kennedy's response. Whereas Professor Garrett reasonably believes *Boumediene* to be a practical rule about the sum total of the process that a prisoner must have, I take a more rigid view of the difference between custodial and collateral process. In short, I believe both Chief Justice Roberts and Justice Kennedy were wrong. Chief Justice Roberts is wrong insofar as he treats the CSRT proceeding as part of collateral process; Justice Kennedy is wrong insofar as he says that the distinction doesn't matter.

In order to classify Boumediene's CSRT proceeding as collateral, the Chief Justice does considerable violence to the ordinary understanding of habeas process. The CSRT process was no more collateral review of a battlefield determination than a probable cause hearing is collateral review of a police arrest. In fact, a CSRT proceeding was not even conducted before a judicial officer; the status determination was made by the same entity that made the battlefield determination. Moreover, the CSRT panel did not have discharge authority and could not adjudicate quintessential issues of lawfulness. Habeas process, by contrast, is *judicial* review of unlawful

---

41 *Id.* at 809–10 (Roberts, C.J., dissenting) (citations omitted).

42 *Id.* at 783.

confinement, and requires judicial authority to discharge the prisoner invoking the privilege.[43]

Justice Kennedy, however, blows off the distinction between custodial and collateral process. Perhaps the distinguishing oddity of Justice Kennedy's head-scratching response to Chief Justice Roberts is that Justice Kennedy seems to have appreciated the problem: "True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's Due Process rights begins."[44]

Boumediene affirmed that the habeas privilege is self-executing for certain forms of custody. Where the privilege is available, however, the Court refused to specify two things: (1) the minimum cumulative process to which the privilege entitles prisoners, and (2) the mix of custodial and collateral form that the process is to take. As a result, federal courts were *still* stuck with roughly the same problem that they had after *Hamdi*: are they providing process or reviewing for it?

II
THE PROBLEMS WITH FUNGIBLE PROCESS

The result following *Boumediene* has been unfortunate and predictable: a marbled review procedure that haphazardly borrows the most deferential elements of custodial and collateral processes. I agree with Professor Garrett on the general nature of the problem, and I devoted Part I only to explaining a slight difference in our descriptive accounts; namely, I believe the Supreme Court deserves more blame for the current state of affairs. In Part II, I want to make a normative point about how post-*Boumediene* process should reflect the fact that habeas process is an Article III power of judges over jailors and not an individual right of prisoners.[45]

Professor Garrett captures how the D.C. Circuit has imposed the most deferential features from both habeas and due process law, thereby forging an almost unitary review process through which indefinite custody is usually sustained.[46] For example, in *Al-Bihani v. Obama*,[47] the D.C. Circuit affirmed an extraordinarily deferential burden-shifting scheme for collateral review, even though that

---

43 I briefly explain more about the traditional habeas power in Part II.

44 *See id.* at 784.

45 A full-length treatment of this theory is forthcoming. *See* Lee B. Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2061471. The historical work in support of this paradigm is most closely associated with Paul Halliday. *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

46 *See* Garrett, *supra* note 1, at 94–100.

47 590 F.3d 866 (D.C. Cir. 2010).

scheme derives from procedural due process rules inherited from rules for custodial determination.[48] The selective borrowing occurs both ways. *Al Bihani* also concluded that a privileged national security detainee was not entitled to an evidentiary hearing, thus incorporating a postconviction rule applicable only to prisoners convicted of a crime after full process in state courts.[49]

I will represent the collateral-versus-custodial-process problem a little more formally so that I can explain the precise senses in which, in Professor Garrett's phrasing, habeas "begins where due process ends."[50] Consider the yes/no decision about whether to indefinitely detain a category of prisoners as a function of several different variables. Let *ID* represent a binary indefinite detention outcome, where *N* (binary) represents noncitizenship status, *E* (binary) represents enemy-combatant status, and *L* represents the location of custody. Assume for the moment that *N*, *E*, and *L* are the only variables that determine *ID*. We could represent the *ID* function as follows:

$$ID = f(N, E, L).$$

The straightforward holding in *Hamdi* should have been that, in order to determine *ID*, there had to be procedural due process afforded in determining the predicates, specifically, in determining *E*—enemy-combatant status.

The major objective of habeas review, however, is different. At common law, English subjects enjoyed the privilege of litigating the lawfulness of custody in a royal court. *Habeas corpus ad subjiciendum* was originally a "prerogative" writ that the King used to police official exercise of the royal franchise and to review custody exercised under color of crown authority.[51] King's Bench wrested the power from the Stuart Monarchs during the bloody civil wars of the seventeenth century.[52] When the American colonies declared independence and drafted the Constitution, the habeas privilege guaranteed judicial review of a prisoner's custody. The essential element of habeas process was the judicial officer's power to review the lawfulness of any custody for which the court had personal jurisdiction over the jailor, and to order discharge under appropriate circumstances.[53]

---

48 S*ee* Garrett, *supra* note 1, at 95.

49 *See id.* at 98–99.

50 *See id.* at 47.

51 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *131. The royal prerogative involved a suite of authority that the Crown alone could wield in court. Prerogative writs issued in the name of the monarch and to the Crown's courts. *See id.*

52 *See id.* at *134–35; Kovarsky, *supra* note 45, at 12–16.

53 *See* Kovarsky, *supra* note 45, at 17.

The paradigm habeas questions are not just whether *N*, *E*, and *L* are consistent with judicial process, but also whether the custodian is appropriately exercising power under pertinent regulations, statutes, and constitutional provisions.[54] Consequently, let *R* (binary) represent the idea that custody is authorized by regulations, *S* (binary) represent that custody is authorized by statutes, and *C* (binary) represent that custody is authorized by the Constitution. Our full *ID* function is now:

$$ID = f(C, S, R, N, E, L).$$

Procedural due process (custodial process) and habeas process (collateral process) are directed at different things. Due process requires that the procedure for deciding *N*, *E*, and *L* be calibrated to sufficiently minimize cost and error. Conversely, the classic function of habeas process is to challenge *C*, *S*, and *R*: the constitutional, statutory, and regulatory authority for indefinite detention. Collateral process was initially developed to facilitate those challenges—not because habeas power is necessarily restricted to those questions, but because the definition of lawful custody used to be much broader.

The issue gets trickier because judges also use collateral process to review the procedural predicates of custody: *N*, *E*, and *L*. To understand why such double duty presents thorny questions of collateral versus custodial process, consider the enemy-combatant status, *E*. *E* is actually a function of other factual predicates, which we might think of as *e1*, *e2*, and *e3*. Those predicates might be basic questions of historical fact, such as whether the prisoner had a weapon, whether he was captured while engaged in a particular activity, or the contents of his mobile phone. The relevant functions are now represented as:

$$E = f(e1, e2, e3); \text{ and, substituting for E,}$$
$$ID = f(C, S, R, N, e1, e2, e3, L).$$

To the extent that it applies, the Fifth Amendment Due Process Clause requires that predicates *N*, *E*, and *L*—and therefore predicates *e1*, *e2*, and *e3*—each be determined through constitutionally sufficient procedure. Habeas process, by contrast, traditionally ensured that *C*, *S*, and *R* support custody: in this example, indefinite detention. This division of labor best explains how habeas corpus, as Professor

---

54 Indeed, as a historical matter, the latter set of questions dominated habeas litigation.

Garrett describes it, "begins where due process ends."[55]

If only it were that easy. In some instances, custodial and collateral reviews will scrutinize the same elements. The idea of "constitutional authority," embedded in the concept of lawful custody, might entail more than the fact that a regulation, a statute, or the Constitution permits a custodian to undertake detention. A prisoner may raise a habeas challenge because consideration of predicate facts was constitutionally defective, or because those predicate facts were, in a more epistemologically absolute sense, not "true." In short, the neat division of labor I described above fails to capture the overlap between custodial and collateral processes in the real world. Both due process and habeas process constrain procedures for adjudicating custody. The overlap causes two distinct problems, both of which Professor Garrett identifies, albeit with a slightly different diagnostic explanation.

The first problem arises when courts use collateral process to review custody of prisoners with diminished due process rights. Put pithily, collateral process reflects a paradigm of judicial power, whereas custodial process reflects a paradigm of individual liberty. Unfortunately, the Supreme Court has routinely referred to "habeas rights" created by the Suspension Clause.[56] Professor Garrett would parse the due process rights from habeas rights and determine which are applicable for given values of *C*, *S*, *R*, *N*, *e1*, *e2*, *e3*, and *L*. The Suspension Clause, however, reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[57] Read literally, the Clause creates neither a suspension power nor the privilege that is guaranteed against suspension. Rather, Article I, Section 9 has a number of clauses that limit congressional power under Article I, Section 8, and the suspension authority that the Clause limits is probably necessary and proper to some power enumerated there.[58]

---

55 *See* Garrett, *supra* note 1, at 47.

56 *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring) (describing habeas as an individual right); Boumediene v. Bush, 553 U.S. 723, 826 (2008) (Scalia, J., dissenting) ("[T]he Court confers a constitutional right to habeas corpus on alien enemies . . . ."); Rasul v. Bush, 542 U.S. 466, 477–78 (2004) (repeatedly describing the Suspension Clause as securing a right to federal habeas review); INS v. St. Cyr, 533 U.S. 289, 311–12 (2001) (describing habeas corpus as a right following immigration orders) (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

57 U.S. CONST. art. I, § 9.

58 If Article I, Section 8 does create a power to suspend the habeas privilege, then that power would probably have to come from Congress's authority to enact laws necessary and proper to provide for the common defense, control naturalization, or govern the land and naval forces. *See* U.S. CONST. art. I, § 8, cls. 4, 12–16, & 18; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a

Although the Suspension Clause is merely a limit on Congress's power to impair a habeas privilege that the Constitution does not define, a fair reading of the habeas privilege is as a guarantee of a judicial remedy for unlawful confinement. Because the habeas privilege entails the benefit of a particular judicial process, we ought to consider habeas process as a feature of judicial power rather than as an individual right. Habeas power involves in personam jurisdiction over the jailor, not the jailed. The power-versus-rights distinction accounts for the different threads of authority in habeas and due process, and it also explains the problem with incorporating due process rules into constitutionally-required collateral review. Due process rights are dictated by the attributes of the prisoner; habeas process turns on the identity of the custodian. Therefore, the judicial deference built into the due process paradigm is not part of the habeas paradigm, which is bottomed on muscular judicial review of custody.

The second problem involves the question of habeas jurisdiction itself. After the Guantánamo Bay cases, the military began to classify certain prisoners as "unprivileged enemy belligerents"—combatants without a habeas privilege.[59] In essence, the military started double counting variables. The determinants of combatant status became the determinants of habeas jurisdiction. In other words, if *HJ* (binary) represents habeas jurisdiction and *HR* (binary) represents habeas relief:

$$HJ = f(e1, e2, e3); \text{ and}$$
$$HR = f(HJ, ID).$$

The first-order problem with this formulation is that, under a paradigm of habeas power, the pertinent question should involve in personam jurisdiction over a *custodian*. A *prisoner*'s combatant status should matter to *ID*, not to *HJ*. Assume, however, that *e1*, *e2*, and *e3* become factual predicates for both the custodial outcome (*ID*) and for the scope of collateral process (*HJ*). To which process model, custodial or collateral, should review of the combatant-status determination conform? The answer should be both. The collateral function of the predicates requires a reviewing court to make the combatant-status determination using process necessary to resolve applicability of the privilege, whereas the custodial function of the predicates requires that the status determination satisfy a prisoner's

---

legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I.").

59 *See* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 948a–d, 123 Stat. 2574, 2575–76 (defining "unprivileged enemy belligerent" and outlining military commission procedures and jurisdiction).

due process rights. Any "unitary review" is constitutionally sufficient only if it satisfies both collateral and custodial requirements.

III
INNOCENCE ANALYSIS

One of Professor Garrett's insights relates to *Boumediene*'s implications for freestanding claims of innocence, which are litigated on collateral review of criminal convictions. The custodial-versus-collateral-process distinction can help with some of the toughest freestanding innocence questions. A freestanding innocence claim alleges nothing other than the factual innocence of the prisoner. Under 28 U.S.C. § 2241, the writ of habeas corpus extends to prisoners "in custody in violation of the Constitution or laws or treaties of the United States."[60] Although the idea that custody is unlawful if exercised over an innocent prisoner enjoys intuitive appeal, the Constitution does not make guilt a straightforward condition of criminal custody. Instead, the argument goes, the Constitution embraces a more nuanced epistemology of fact, specifying a set of procedural requirements for exercising custody that must be satisfied before such custody is lawful. Indeed, the Supreme Court has never held that a freestanding innocence challenge states a claim that is cognizable under the Constitution;[61] it has only entertained the concept for the sake of argument.[62]

For Professor Garrett, lurking in the combatant-status cases are principles supporting the plausibility of a freestanding innocence claim, and his insight has considerable merit. In essence, Professor Garrett contemplates a scenario in which *e1*, *e2*, and *e3* are not factual predicates of a combatant-status determination, but elements of a crime. Because *Boumediene* held that combatant-status review had to allow for *independent* evaluation of the combatant-status predicate, Professor Garrett reasons, the Constitution might require independent evaluation, in cases of criminal confinement, of a guilt predicate:

> What *Boumediene* and executive detention jurisprudence highlight

---

60 28 U.S.C. § 2241(c)(3) (2006).

61 *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation . . . .").

62 *See id.* at 417 ("We may assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . ."); *see also* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72 (2009) ("In this case too we can assume without deciding that [a freestanding innocence] claim exists, because even if so there is no due process problem."); House v. Bell, 547 U.S. 518, 555 (2006) ("We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.").

> is that habeas at its core is centrally preoccupied with examining facts or questions of innocence. Justice Lewis Powell wrote, "[H]istory reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt." That is incorrect. In detention cases, judges must examine innocence or guilt absent any "constitutional claim" at all when performing the core of their habeas function. As Gerald Neuman has suggested, following *Boumediene*, the Court's failure to recognize a freestanding claim of innocence may stand on weaker constitutional ground. A claim of innocence could be grounded in the Due Process Clause, its "natural foundation," whether a court uses a *Mathews* balancing approach concerned with risk of error, or a fundamental fairness approach under which an innocent prisoner has a "powerful and legitimate interest in obtaining his release from custody." *Boumediene* suggests that a claim of innocence could be grounded in the Suspension Clause (perhaps informing a due process claim, if a federal question claim could not be premised directly on the Suspension Clause). If no prior court adequately examined new evidence of innocence, perhaps courts should mandate federal habeas review.[63]

I am reluctant to begin with the observation that Professor Garrett undertheorizes the analogy between combatant status and guilt, for two reasons. First, he is plainly focusing his efforts elsewhere. Second, although I will treat the topic in slightly greater depth, I will fall short of what many consider to be a sufficiently robust account of a freestanding innocence theory.

I nonetheless want to express a particular preference, among the options that Professor Garrett specifies, for developing freestanding innocence law. In particular, I would not base a constitutional right to a freestanding innocence challenge on anything in the Suspension Clause. Doing so undermines the distinction between custodial and collateral process. My position is partially a gripe about properly treating the habeas privilege as a remedy, and partially a desire to ensure that freestanding innocence challenges reflect changes in substantive law that are amenable to *other types* of remedial vehicles. Consider the various ways one might conceptualize the freestanding innocence challenge: (1) that the Eighth Amendment's Cruel and Unusual Punishment Clause would render custody of an "actually innocent" prisoner unlawful; (2) that substantive due process's "shock the conscious" standard would render custody of an actually innocent prisoner unlawful; (3) that procedural due process would render custody of a prisoner with new, unadjudicated evidence of innocence unlawful; (4) that custody of an actually innocent prisoner is unlawful under the Constitution generally, but no provision

---

63 *See* Garrett, *supra* note 1, at 122–23 (alteration in original) (citations omitted).

specifically; (5) that some custody is unlawful even if there is no constitutional violation;[64] or (6) that the habeas privilege permits judges to terminate custody because of some error in process that does not render the custody itself unlawful. For a variety of reasons, including an interest in incrementalism,[65] I incline to the procedural due process model. My preference should come as little surprise in that the procedural due process model conforms to a preferred paradigm of habeas power and observes the strict dichotomy between custodial and collateral process that flows from it.

Freestanding innocence law should remain faithful to a traditional distinction between right and remedy. I would favor a freestanding innocence rule honoring the principle that, at least for custody exercised in spite of a constitutional defect in criminal process, judges have a constitutionally protected power to provide habeas review. Recent Supreme Court opinions are littered with allusions to habeas rights, but such terminology seems to be attributable, more than anything else, to sloppy drafting.[66] To my knowledge, no decision has ever treated habeas as a right in the sense that it could form the basis of a suit for some other remedy.[67] Even Professor Garrett seems skeptical that the habeas privilege really has substantive content resembling what is usually called a right. Although the habeas privilege guarantees a federal judicial forum to challenge sovereign custody, prisoners should look to other constitutional provisions as sources of substantive law.

The really thorny question is what constitutional provision provides the source of substantive law. At this point, the epistemology of guilt becomes pretty central to the resolution. Readers may have noticed that I do not use "actual" as a synonym for "freestanding" when discussing innocence claims. Freestanding innocence claims are frequently described with a heuristic involving someone who is actually innocent of the crime—but innocence is a probabilistic phenomenon. There are certainly cases where new

---

64 Elsewhere, I have expressed a view that habeas power is, as a matter of history and original constitutional structure, consistent with this description. In other words, the habeas privilege reserves a judicial remedy for the purposes of deciding how lawful custody is defined. *See* Kovarsky, *supra* note 45, at 4.

65 As I indicate above, there is a strong argument to be made that Article III vests courts with the power to discharge a prisoner from unlawful custody, and that the definition of lawful custody is something that judges have power to define. *See supra* note 64. The legal changes that flow from that theory, however, are far more sweeping than the solution I suggest here. I suggest simply that judges have power to grant relief for custody that violates a specific constitutional provision.

66 *See supra* note 56 and accompanying text.

67 A prisoner seeking relief under 42 U.S.C. § 1983, for example, cannot realistically state a claim for damages associated with a habeas violation. Rather, 42 U.S.C. § 1983 creates a remedy for violations of federal rights by state officials. The same could be said for claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

evidence of innocence will make factual guilt extraordinarily unlikely, but the fairest phrasing of the freestanding innocence question should reflect the probabilistic nature of any guilt determination: in light of new evidence that makes guilt less likely, should a federal court grant relief because the resulting probability of guilt drops below an acceptable threshold? We describe as "actually innocent" prisoners who come forward with evidence that reduces the probability of guilt to near-zero levels. In such situations, we may be comfortable with constitutional doctrines that treat innocence as "actual"—with, for example, Eighth Amendment "cruel and unusual punishment" or substantive due process "shocks the conscience" doctrine. The mine-run cases, however, involve new evidence that does not push the innocence claim to extreme registers on the probability spectrum. In such cases, thinking about relief in terms of anything "actual" is unhelpful.

Of course, a federal court could short circuit what one might call the epistemic problem of factual certainty by finding predicate facts *and then* assessing whether the prisoner is innocent. In this sense, freestanding innocence claims resemble the combatant-status determinations at issue in *Boumediene*. I submit, however, that the analogy breaks down in mine-run cases. There is a cart-before-horse quality to the idea that a federal court determines whether custody of an actually innocent person is unconstitutional *after* determining predicate facts and a person's guilt.[68] In such cases, actual innocence would (ironically) be completely artificial. In addition, such a view of collateral factfinding power is, to say the least, in tension with modern ideas about finality in criminal cases and deference owed to outcomes of state criminal process.[69]

If the Supreme Court constitutionalizes new-evidence law, the

---

68 The clever advocate might point out that *Boumediene* instructed lower courts to perform their analyses in precisely this way: to make a contested combatant-status determination *and then* decide the case on that basis. First, although the Court does not articulate the distinction particularly well in *Boumediene*, I sense that it required certain collateral factfinding *because* it determined that the custodial process was procedurally insufficient. Second, upsetting the custodial outcome in national security cases does not implicate the same comity and finality interests that collateral attacks of state criminal convictions implicate.

69 Many argue that the Constitution does not require that state prisoners have a habeas forum to challenge their convictions collaterally. If the Constitution does guarantee a habeas forum in such situations, that guarantee probably comes by way of the Fourteenth Amendment. Professor Paul Bator most famously argued that federal habeas relief should not issue for convictions resulting from competent state process. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963). The idea that adequate state process should usually be honored in federal habeas proceedings is central to modern day habeas law. *See* Duncan v. Walker, 533 U.S. 167, 178 (2001) ("Petitioner's interpretation of the statute is consistent with 'AEDPA's purpose to further the principles of comity, finality, and federalism.'") (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

Court should do so in a way that reflects the mine-run case. In the mine-run case, freestanding innocence claims should focus on a defect in the *custodial* procedure at trial, on direct review, and during state postconviction process. Specifically, that procedural defect might be a due process violation attributable to state procedures that fail to accommodate new evidence of innocence. Because the Constitution specifies procedures necessary for a finding of criminal guilt, the better rule for determining habeas relief would center on a defect in the process for reviewing that determination, rather than on a tougher constitutional argument—an unstated rule against ongoing custody of someone adjudicated innocent under federal habeas process.

One particularly vexing issue involves the fact that state postconviction review is, from the vantage point of the state, collateral process. The argument that a procedural due process right requires collateral process is not nearly as strong as the argument that it requires custodial process. Whatever the formal denomination of state postconviction review, it is the process by which states consider new evidence of innocence. If procedural due process is the most appealing doctrine for dealing with the vast majority of freestanding innocence claims, then the question becomes whether state postconviction review should be considered part of the custodial process that is assessed for lawfulness in a habeas proceeding. The merits of applying the Due Process Clause to state postconviction proceedings are hotly contested,[70] but it is the least disruptive way to accommodate the interest in innocence that a mine-run case involves. Further, treating state postconviction review as custodial proceedings keeps federal courts out of the business of assessing innocence and keeps them in the business of doing something for which they have superior institutional capacity: deciding whether state new-evidence review is sufficient to satisfy due process.

CONCLUSION

Although we disagree on some particulars, Professor Garrett and I share the basic belief that everyone is better off observing a clear distinction between custodial and collateral process requirements. Custodial-review entities know the procedures they must use and

---

70 *See, e.g.*, Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1408–16 (1999) (arguing that the Due Process Clause requires the appointment of counsel in postconviction proceedings for capital cases); Geraldine S. Moohr, Murray v. Giarratano*: A Remedy Reduced to Meaningless Ritual*, 39 AM. U. L. REV. 765, 788–803 (1990) (same); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 519 n.49 (1982) ("Although the due process clause remains applicable after conviction, courts have often held that postconviction liberty interests are not subject to the full requirements of due process.") (citations omitted).

know that they cannot foist them on collaterally-engaged federal courts. In addition, federal courts do not have to figure out how much collateral process compensates for a defect in custodial process, and vice versa. Prisoners are guaranteed discharge for the violation of any right that affects any federal custody, something that the founders almost certainly intended the Suspension Clause and Article III to guarantee.