

KENNEDY, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 03–1027

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,  
PETITIONER *v.* JOSE PADILLA AND DONNA R.  
NEWMAN, AS NEXT FRIEND OF JOSE  
PADILLA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 28, 2004]

JUSTICE KENNEDY, with whom JUSTICE O’CONNOR joins,  
concurring.

Though I join the opinion of the Court, this separate opinion is added to state my understanding of how the statute should be interpreted in light of the Court’s holding. The Court’s analysis relies on two rules. First, the habeas action must be brought against the immediate custodian. Second, when an action is brought in the district court, it must be filed in the district court whose territorial jurisdiction includes the place where the custodian is located.

These rules, however, are not jurisdictional in the sense of a limitation on subject-matter jurisdiction. *Ante*, at 5, n. 7. That much is clear from the many cases in which petitions have been heard on the merits despite their non-compliance with either one or both of the rules. See, e.g. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973); *Strait v. Laird*, 406 U. S. 341, 345 (1972); *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955); *Burns v. Wilson*, 346 U. S. 137 (1953); *Ex parte Endo*, 323 U. S. 283 (1944).

In my view, the question of the proper location for a habeas petition is best understood as a question of per-

KENNEDY, J., concurring

sonal jurisdiction or venue. This view is more in keeping with the opinion in *Braden*, and its discussion explaining the rules for the proper forum for habeas petitions. 410 U. S., at 493, 500 (indicating that the analysis is guided by “traditional venue considerations” and “traditional principles of venue”); see also *Moore v. Olson*, 368 F.3d 757, 759–760 (CA7 2004) (suggesting that the territorial-jurisdiction rule is a venue rule, and the immediate-custodian rule is a personal jurisdiction rule). This approach is consistent with the reference in the statute to the “respective jurisdictions” of the district court. 28 U. S. C. §2241. As we have noted twice this Term, the word “jurisdiction” is susceptible of different meanings, not all of which refer to the power of a federal court to hear a certain class of cases. *Kontrick v. Ryan*, 540 U. S. \_\_\_ (2004); *Scarborough v. Principi*, 541 U. S. \_\_\_ (2004). The phrase “respective jurisdictions” does establish a territorial restriction on the proper forum for habeas petitions, but does not of necessity establish that the limitation goes to the power of the court to hear the case.

Because the immediate-custodian and territorial-jurisdiction rules are like personal jurisdiction or venue rules, objections to the filing of petitions based on those grounds can be waived by the Government. *Moore, supra*, at 759; cf. *Endo, supra*, at 305 (“The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the proceedings and an appeal lies from denial of a writ without the appearance of a respondent”). For the same reason, the immediate-custodian and territorial rules are subject to exceptions, as acknowledged in the Court’s opinion. *Ante*, at 7, n. 9, 9–13, 16–18. This does not mean that habeas petitions are governed by venue rules and venue considerations that apply to other sorts of civil lawsuits. Although habeas actions are civil cases, they are

KENNEDY, J., concurring

not automatically subject to all of the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 81(a)(2) (“These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings”). Instead, these forum-location rules for habeas petitions are based on the habeas statutes and the cases interpreting them. Furthermore, the fact that these habeas rules are subject to exceptions does not mean that, in the exceptional case, a petition may be properly filed in any one of the federal district courts. When an exception applies, see, e.g., *Rasul v. Bush*, *post*, p. \_\_\_, courts must still take into account the considerations that in the ordinary case are served by the immediate custodian rule, and, in a similar fashion, limit the available forum to the one with the most immediate connection to the named custodian.

I would not decide today whether these habeas rules function more like rules of personal jurisdiction or rules of venue. It is difficult to describe the precise nature of these restrictions on the filing of habeas petitions, as an examination of the Court’s own opinions in this area makes clear. Compare, e.g., *Ahrens v. Clark*, 335 U. S. 188 (1948), with *Schlanger v. Seamans*, 401 U. S. 487, 491 (1971), and *Braden*, *supra*, at 495. The precise question of how best to characterize the statutory direction respecting where the action must be filed need not be resolved with finality in this case. Here there has been no waiver by the Government; there is no established exception to the immediate-custodian rule or to the rule that the action must be brought in the district court with authority over the territory in question; and there is no need to consider some further exception to protect the integrity of the writ or the rights of the person detained.

For the purposes of this case, it is enough to note that,

KENNEDY, J., concurring

even under the most permissive interpretation of the habeas statute as a venue provision, the Southern District of New York was not the proper place for this petition. As the Court concludes, in the ordinary case of a single physical custody within the borders of the United States, where the objection has not been waived by the Government, the immediate-custodian and territorial-jurisdiction rules must apply. *Ante*, at 23. I also agree with the arguments from statutory text and case law that the Court marshals in support of these two rules. *Ante*, at 5–6, 13–14. Only in an exceptional case may a court deviate from those basic rules to hear a habeas petition filed against some person other than the immediate custodian of the prisoner, or in some court other than the one in whose territory the custodian may be found.

The Court has made exceptions in the cases of non-physical custody, see, *e.g.*, *Strait*, 406 U. S., at 345, of dual custody, see, *e.g.*, *Braden*, 410 U. S., at 500, and of removal of the prisoner from the territory of a district after a petition has been filed, see, *e.g.*, *Endo*, 323 U. S., at 306; see also *ante*, at 11–12, 15–16. In addition, I would acknowledge an exception if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention. In cases of that sort, habeas jurisdiction would be in the district court from whose territory the petitioner had been removed. In this case, if the Government had removed Padilla from the Southern District of New York but refused to tell his lawyer where he had been taken, the District Court would have had jurisdiction over the petition. Or, if the Government did inform the lawyer where a prisoner was being taken but kept moving him so a filing could not catch up to the prisoner, again, in my view, habeas jurisdiction would lie

KENNEDY, J., concurring

in the district or districts from which he had been removed.

None of the exceptions apply here. There is no indication that the Government refused to tell Padilla's lawyer where he had been taken. The original petition demonstrates that the lawyer knew where Padilla was being held at that time. *Ante*, at 21, n. 17. In these circumstances, the basic rules apply, and the District of South Carolina was the proper forum. The present case demonstrates the wisdom of those rules.

Both Padilla's change in location and his change of custodian reflected a change in the Government's rationale for detaining him. He ceased to be held under the authority of the criminal justice system, see 18 U. S. C. §3144, and began to be held under that of the military detention system. Rather than being designed to play games with forums, the Government's removal of Padilla reflected the change in the theory on which it was holding him. Whether that theory is a permissible one, of course, is a question the Court does not reach today.

The change in custody, and the underlying change in rationale, should be challenged in the place the Government has brought them to bear and against the person who is the immediate representative of the military authority that is detaining him. That place is the District of South Carolina, and that person is Commander Marr. The Second Circuit erred in holding that the Southern District of New York was a proper forum for Padilla's petition. With these further observations, I join the opinion and judgment of the Court.