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ARTICLE

HABEAS CORPUS JURISDICTION, SUBSTANTIVE RIGHTS, AND THE WAR ON TERROR

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## HABEAS CORPUS JURISDICTION, SUBSTANTIVE RIGHTS, AND THE WAR ON TERROR

Richard H. Fallon, Jr.\* & Daniel J. Meltzer\*\*

*This Article provides a broad-lens, synoptic perspective on war-on-terrorism questions arising within the habeas corpus jurisdiction of the federal courts. Analytically, it develops a clear framework for sorting out the tangle of jurisdictional, substantive, procedural, and scope-of-review issues that habeas cases often present. Methodologically, it champions a common law-like approach to habeas adjudication under which courts must exercise responsible judgment in adapting both statutory and constitutional language to unforeseen exigencies.*

*The Article also takes substantive positions on a number of important issues. In the jurisdictional domain, it defends the Supreme Court's controversial decision in *Rasul v. Bush*, which interpreted the habeas statute as it then stood to authorize inquiry into the lawfulness of detentions at Guantánamo Bay. The Article also argues, however, that a court would overstep if it read the Constitution as mandating review of detentions of aliens in such wholly foreign locales as Afghanistan or Iraq. Scrutinizing post-*Rasul* legislation that eliminates habeas for alien detainees and substitutes more limited review in the D.C. Circuit, the Article argues that the resulting scheme is constitutionally valid as applied to most cases in which the D.C. Circuit can exercise review, but invalid insofar as it entirely precludes detainees in the United States or at Guantánamo Bay from challenging their detention or conditions of confinement before a civilian court.*

*With respect to substantive rights, the Article argues that American citizens seized outside of battlefield conditions have a right not to be detained indefinitely without civilian trial. It explains why the constitutional rights of noncitizens are more limited, but argues that existing statutes should not be read to authorize aliens' detention as enemy combatants when they are seized in the United States, away from any theater of combat. Finally, the Article analyzes some of the most important procedural and scope-of-review questions likely to come before habeas courts.*

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We also owe debts of gratitude to innumerable scholars whose work has informed us but who will not in every case be cited, due to our commitment to keep the Article within a prescribed word limit.

## INTRODUCTION

During wars and emergencies, Presidents claim extraordinary authority, and the exercise of executive power leads to asserted violations of constitutional rights and other legal norms. As disputes come to court, cries echo from one side that a ruling for the challengers would imperil national security and from the other that courts must hold our nation to the ideals that make its security worth preserving.

In the context of war or quasi-war, separation-of-powers issues have most often come before the courts in their habeas corpus jurisdiction. The Great Writ of habeas corpus is the procedural mechanism through which courts have insisted that neither the King, the President, nor any other executive official may impose detention except as authorized by law. Where the writ runs, courts have the power and responsibility to enforce the most basic requirements of the rule of law, even in wartime.

But where does the writ run? And how far do executive powers to detain expand, and do ordinary rights to freedom from restraint shrink, in times of emergency? Although grants of habeas corpus jurisdiction require the courts to decide these questions, the range of possible answers is broad and the correct answer often far from obvious. This much is evident from history, but confirmation, if needed, comes from the Supreme Court's four decisions to date in war-on-terrorism cases. In one of those decisions, *Rumsfeld v. Padilla*,<sup>1</sup> the Court's dismissal on jurisdictional grounds of a petition from a citizen seized and detained in the United States provoked four dissenters to charge that the majority had needlessly permitted technicalities to impede the vindication of rights marking "the essence of a free society."<sup>2</sup> The other three decisions scrutinized aspects of military detention that the Executive had claimed should not be reviewed by the courts. In two of these decisions, the Court held executive action unlawful, prompting dissents accusing the majority of overreaching in second-guessing the President's judgments of military necessity<sup>3</sup> and of creating "a monstrous scheme in time of war."<sup>4</sup> In *Hamdi v. Rumsfeld*,<sup>5</sup> the majority also drew fire from the other direction, with Justice Scalia complaining that the Court had gone too far in permitting the military to detain an American citizen.<sup>6</sup>

To some extent, such disagreements reflect the ordinary indeterminacy of legal materials. A further cause of division, however, involves

<sup>1</sup> 542 U.S. 426 (2004).

<sup>2</sup> *Id.* at 465 (Stevens, J., dissenting).

<sup>3</sup> *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823 (2006) (Thomas, J., dissenting).

<sup>4</sup> *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting).

<sup>5</sup> 542 U.S. 507 (2004).

<sup>6</sup> *See id.* at 554 (Scalia, J., dissenting).

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a widely shared belief that the present situation urgently demands legal and constitutional adaptation. Some, perhaps influenced by reported abuses in detention facilities in Iraq and Guantánamo Bay, argue for extending habeas corpus jurisdiction and for enforcing substantive rights not previously enforced on foreign shores. In stark contrast, others maintain that terrorists are too dangerous, or the evidence of their conduct too sensitive, for them to receive the protections historically afforded criminal suspects or prisoners of war. Notably, though, partisans on both sides reason from the shared premise that present circumstances demand legal adaptation.

If both habeas corpus jurisdiction and the substantive rights asserted by detainees should be adapted, however, two questions arise. First, what adaptations should occur? Second, who — judges, legislators, or executive officials — ought to make them? Our aim in this Article is to examine questions of the first kind, involving the content of jurisdictional and substantive law, through the lens provided by questions of the second kind, involving the appropriate role of courts in our constitutional order. More particularly, we address how courts should resolve the questions that come before them in habeas corpus cases after the Executive has detained someone without judicial trial.

In framing the issues that courts confront in habeas corpus cases involving suspected terrorists, we develop two models of the judicial role — an Agency Model and a Common Law Model. According to the Agency Model, courts should regard themselves as the agents of those who enacted, or ratified, pertinent statutory or constitutional provisions; they should assume that those provisions were framed to be as determinate as possible; and they should minimize judicial creativity. The Agency Model seeks to restrict courts to applying the law, not making it. By contrast, the Common Law Model views courts as having a creative, discretionary function in adapting constitutional and statutory language — which is frequently vague, and even more frequently reflects imperfect foresight — to novel circumstances. On this view, judges remain agents, but, absent contrary evidence, they assume their principals invested them with bounded authority to interpret legal mandates in light of considerations of fairness, policy, and prudence.

Looking at a broad range of cases involving federal habeas corpus jurisdiction, we shall show that the Common Law Model has historically dominated. We shall also explain our sympathy with the courts' characteristic approach of interpreting statutory and constitutional provisions as permitting gradual, policy-driven, common law-like adaptation.

Loosely speaking, we write in the Legal Process tradition.<sup>7</sup> In broad outline, this post-Realist tradition recognizes that courts must inevitably make substantive judgments, but it also takes seriously, and indeed emphasizes, issues involving the distinctive competences of diverse governmental institutions.<sup>8</sup> The issues arising in habeas cases generated by the war on terrorism are good candidates for illumination by a Legal Process perspective. Executive detention cases typically involve plausible claims, on the one hand, that executive officials possess special expertise, which judges lack, to address extraordinary challenges to national security,<sup>9</sup> and, on the other hand, that courts have special responsibilities for safeguarding basic freedoms. Such cases also implicate the powers and competences of Congress, both because the reach of habeas corpus jurisdiction frequently has statutory as well as constitutional dimensions and because Congress plays an important role in fashioning the substantive and procedural entitlements that courts enforce. In addition, the Constitution gives Congress an unusual emergency power to suspend the privilege of the writ.<sup>10</sup>

Besides framing habeas corpus issues in a broad institutional context, this Article aims to show the utility of a number of analytical distinctions that bear on cases involving executive detention. In establishing a framework for considering the issues that arise in war-on-terrorism cases, we distinguish three types of questions: (1) jurisdictional questions, involving the authority of a court to entertain a detainee's petition at all; (2) substantive questions, involving whether the Executive has lawful authority to detain particular categories of prisoners in the absence of trial before an ordinary civilian court; and (3) procedural questions, involving both (a) the lawfulness of the administrative procedures followed by the Executive in classifying particular individuals as subject to detention or in trying them for war crimes, and (b) the appropriate scope of judicial review of decisions by executive officials or military tribunals.

Although it is important to distinguish these questions, it is also important to recognize their interconnections. As we shall emphasize, the correct decision with respect to one issue will frequently depend on the appropriate resolution of another. For example, the interpretation of statutes conferring or restricting habeas jurisdiction often has been

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<sup>7</sup> This is admittedly a loose term subsuming otherwise disparate scholars and approaches. For useful discussions in the secondary literature, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *VAND. L. REV.* 953 (1994).

<sup>8</sup> See Fallon, *supra* note 7, at 964–66.

<sup>9</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 4–5 (2007).

<sup>10</sup> See U.S. CONST. art. I, § 9, cl. 2.

and should be informed by whether petitioners possess substantive rights. Moreover, even when both jurisdiction and rights exist, the most practically important question will often involve the scope of habeas review of prior executive determinations.<sup>11</sup> Understanding the analytical framework that underlies habeas litigation is essential to resolving the legal questions, whether or not everyone will be persuaded by the resolutions we advance.

Because this Article surveys a broad terrain, seeking to trace the relationships among issues of jurisdiction, substance, and procedure while also examining the respective roles of the three branches, it touches on a large number of issues, each of which could merit a separate article. Accordingly, our discussions cannot be comprehensive. Nevertheless, we believe that our synoptic perspective will cast fresh light on, even if it does not resolve, a number of debates.

The Article unfolds as follows. Part I offers a primer on the writ of habeas corpus. It distinguishes the jurisdictional, substantive, and procedural questions that habeas courts confront. It also develops the Agency and Common Law Models in greater detail and begins to describe the historical dominance of the latter in habeas practice.

Part II briefly discusses the four war-on-terrorism cases that the Supreme Court has decided so far. These decisions illustrate, and in some cases establish, many of the principles that subsequent Parts of the Article will address.

Part III discusses the jurisdiction of the federal courts to entertain habeas corpus petitions. In doing so, it emphasizes the crucial point, sometimes overlooked, that the existence of *statutory* jurisdiction often is and should be determined in light of concerns about whether the Constitution mandates the availability of habeas corpus review. Part III also examines current law in light of a number of distinctions embedded in traditional habeas corpus practice, especially distinctions between detentions of citizens and of aliens and between detentions occurring in the United States and detentions occurring abroad.<sup>12</sup> This Part defends the Supreme Court's controversial decision in *Rasul v. Bush*<sup>13</sup> interpreting the habeas statute, as it then stood, to authorize inquiry into the lawfulness of detentions of aliens at Guantánamo Bay, but it argues that a court would overstep if it were to read the Constitution as mandating review of the detention of aliens held in such

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<sup>11</sup> Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that rights depend on remedies not merely for their real world enforcement but for their very existence and content).

<sup>12</sup> See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 18–19 (2004) (articulating similar distinctions).

<sup>13</sup> 542 U.S. 466 (2004).

wholly foreign locales as Afghanistan or Iraq. We also discuss post-*Rasul* legislation that eliminates habeas for alien detainees and substitutes a more limited judicial review mechanism. This legislation, we conclude, is constitutionally valid as applied to most cases in which the substitute review mechanism is available, but invalid insofar as it deprives detainees of any opportunity to bring their complaints of unlawful detention or unconstitutional treatment before any civilian court.

Part IV turns to questions of substantive rights. Tracking historical practice, it emphasizes that citizens have more extensive rights than aliens to be free from executive detention. It then develops separate frameworks for analyzing when executive detention of citizens and of aliens is lawful. Both frameworks emphasize the importance of congressional authorization, and sometimes the clarity of such authorization, in determining the lawfulness of detention. Part IV also argues, however, that American citizens have broad but not unlimited constitutional rights to be free from executive detention except in connection with trial before an ordinary criminal court. Although we approve of the Supreme Court's decision in *Hamdi v. Rumsfeld*, which upheld presidential authority to detain an American citizen apprehended on an Afghan battlefield without civilian trial, we argue that citizens seized outside of battlefield conditions have a right not to be held indefinitely without a trial before a civilian court. If Congress concludes that enforcement of citizens' rights would imperil national security, its recourse is to suspend the writ. Finally, Part IV addresses the rights of aliens. It argues that existing statutes should not be read to authorize their detention as enemy combatants when seized in the United States, away from any theater of combat, but recognizes that if Congress should authorize such detention, its constitutional power to do so is far broader than with respect to citizens.

Turning from substantive to procedural rights, Part V offers a broad-brush sketch of some of the most important procedural and scope-of-review issues arising from executive detention in the war on terror. In general, Part V applauds the approach of the plurality opinion in *Hamdi*, which used a balancing analysis to determine the requisites of procedural due process in cases in which detention is in principle lawful. Part V also lays out general principles for analyzing the appropriate and constitutionally necessary scope of judicial review of executive determinations that particular individuals can be lawfully detained.

## I. HABEAS CORPUS: A PRIMER AND METHODOLOGICAL OVERVIEW

Understanding the issues in habeas corpus cases involving the war on terror requires some knowledge of the historical office of the Great

Writ, the rules and procedures governing its availability, and the legal and policy issues surrounding its administration.

*A. The Nature of the Writ and the Mechanics of Its Administration*

The English writ of habeas corpus ad subjiciendum has long played a central role in protecting individual liberty. American lawyers who came of age since World War II may associate the writ with federal court relitigation of constitutional issues raised by prisoners convicted in state courts. The historic use of habeas corpus, however, was more basic: to protect those detained by the Executive without previous judicial involvement.<sup>14</sup>

The mechanics of the writ's administration have changed little over the centuries. A representative of the detainee petitions a court to issue a writ directing the prisoner's custodian (the "respondent") to appear and to show lawful authority for the detention.<sup>15</sup> If the court finds the detention contrary to law, it can order the prisoner's release.

*B. Habeas and the Constitution*

As a safeguard against unlawful executive detention, habeas corpus enjoyed an honored reputation among the Founding generation. Indeed, the writ is almost the only remedy mentioned in the Constitution<sup>16</sup>: Article I, Section 9, Clause 2 provides that "[t]he 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." Although the Suspension Clause signals the historic importance of habeas corpus, just what it protects is a difficult puzzle.<sup>17</sup> For now, the key point is that Congress unquestionably may confer broader jurisdiction than the Constitution requires.

*C. Issues Presented in Habeas Actions*

Habeas actions in federal court frequently present at least three sets of questions, involving jurisdiction, substantive rights, and procedural rights.

*1. Jurisdiction.* — In habeas as in other actions, the threshold question goes to jurisdiction. Since 1789, the federal courts have possessed statutory jurisdiction to review the lawfulness of federal executive detention.<sup>18</sup> The current statute, 28 U.S.C. § 2241, though broad,

<sup>14</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result).

<sup>15</sup> See 28 U.S.C. §§ 2242–2243 (2000).

<sup>16</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 & n.244 (1991).

<sup>17</sup> See *infra* Section III.A, pp. 2050–55.

<sup>18</sup> See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

limits courts to acting “within their respective jurisdictions.”<sup>19</sup> Moreover, Congress, in the Detainee Treatment Act of 2005<sup>20</sup> (DTA) and the Military Commissions Act of 2006<sup>21</sup> (MCA), has restricted jurisdiction over alien detainees who are determined by executive officials to be enemy combatants (or who are awaiting such a determination). These enactments give rise to a number of issues that we discuss below.<sup>22</sup>

In contrast with most other grants of subject matter jurisdiction, which do not themselves confer rights to the award of remedies,<sup>23</sup> a grant of habeas jurisdiction not only authorizes courts to hear cases, but also confers on those who can invoke the jurisdiction a right to the remedy of release unless the custodian can show that detention is lawful.<sup>24</sup> The decision in *Hamdan v. Rumsfeld*<sup>25</sup> exemplifies the quasi-substantive significance of a grant of habeas jurisdiction: the Court nowhere identified any constitutional or statutory “right” that the government had violated, but said only that the Executive’s effort to subject Hamdan to a war crimes trial before a kind of military tribunal that Congress had prohibited was not lawfully authorized.<sup>26</sup>

Although the existence of habeas jurisdiction is initially a statutory question, limits on statutory jurisdiction sometimes present constitutional questions. To some extent, the reach of the constitutional guar-

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<sup>19</sup> 28 U.S.C.A. § 2241(a) (West 2006).

<sup>20</sup> Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified primarily at 42 U.S.C. §§ 2000dd to 2000dd-1).

<sup>21</sup> Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>22</sup> See *infra* Sections III.B.4, V.A.2, V.B.3, pp. 2060–64, 2090–95, 2099–111.

<sup>23</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (emphasizing that federal question jurisdiction does not automatically confer a private right of action for relief from an alleged violation of federal law).

<sup>24</sup> Justice Scalia’s dissent in *Hamdi v. Rumsfeld* may view habeas corpus jurisdiction differently, requiring that a petitioner’s claim to relief rest on rights grounded in particular sources of law — perhaps most commonly the Due Process Clause. His dissent stressed that due process protects a citizen suspected of a crime from a deprivation of liberty except by criminal charge and trial — a protection traditionally vindicated by habeas corpus. See 542 U.S. 507, 556–57 (2004) (Scalia, J., dissenting).

This view captures the evolution through which habeas corpus and due process became intertwined. See generally DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA* (1966). Ordinarily, Justice Scalia’s formulation and the one that we employ above will produce identical results: absent valid authority to detain, the writ will issue, either for that reason alone or because, on Justice Scalia’s view, detention denies due process. But imagine that Congress extended federal habeas corpus jurisdiction to aliens detained abroad. Our formulation would imply that such petitioners were entitled to a determination whether their detention was legally valid, and if legal validity requires affirmative authorization, release might be ordered. By contrast, on Justice Scalia’s view, the crucial initial questions are whether such aliens possess rights under the Due Process Clause or any other enactment, and, if not, whether a court with jurisdiction could deny the writ (because no law confers substantive rights on the petitioner) without addressing whether the Executive’s detention was affirmatively authorized by law.

<sup>25</sup> 126 S. Ct. 2749 (2006).

<sup>26</sup> See *id.* at 2775–85.

antee of habeas jurisdiction may simply be a function of historical practice. But a distinct argument for the necessary availability of habeas corpus review, famously advanced by Professor Henry Hart, asserts that premises implicit in the Constitution's structure require that some court be available to determine whether the Constitution and laws create substantive rights to judicial relief from executive detention.<sup>27</sup> If the Executive could bypass courts and detain individuals without judicial inquiry, government under law would exist only at the sufferance of the executive branch.<sup>28</sup> Like most scholars of federal jurisdiction, we find Hart's argument persuasive. The Supreme Court's leading decisions are nearly all consistent with Hart's position as well, even though the Court has never ruled squarely on its validity.

2. *The Substantive Lawfulness of Detention.* — In challenging the legality of detention, habeas petitioners can raise three kinds of questions. The first kind focuses on separation-of-powers matters: does the Executive possess authority — either with or without congressional authorization, or in the teeth of a congressional prohibition — to detain? The second involves claims of protected constitutional rights: for example, even with congressional authorization, the Executive could not detain a citizen merely for voicing opposition to a war. The third involves claims of subconstitutional rights — in statutes or treaties — to be free from detention in specified circumstances.

3. *Procedural Questions.* — Distinct from substantive issues are questions involving the procedures used to determine whether a detainee falls within a category of persons whose detention without criminal trial, or whose criminal punishment by a military commission, is lawful. One set of questions concerns the procedures used in making an initial administrative determination. For example, although the Court held in *Ludecke v. Watkins*<sup>29</sup> that the Constitution permits the detention of "alien enemies" during wartime,<sup>30</sup> it is a separate question whether the Executive followed constitutionally adequate procedures in finding that a particular detainee is in fact an alien enemy. In *Hamdi*, too, the plurality, while finding substantive authorization for detaining "enemy combatants" seized on Afghan battlefields, also specified procedures required to make legally valid an executive determination that someone like Hamdi truly is an enemy combatant.<sup>31</sup>

A distinct cluster of procedural questions pertains to a habeas court's review of the Executive's determination of legal and factual

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<sup>27</sup> See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953).

<sup>28</sup> See *id.* at 1390–96.

<sup>29</sup> 335 U.S. 160 (1948).

<sup>30</sup> *Id.* at 171 & n.17.

<sup>31</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 524–39 (2004) (plurality opinion).

questions underlying its decision to detain. The Supreme Court has sometimes held that continuing detention is lawful if, but only if, a habeas corpus court independently determines some issues or engages in sufficiently searching review. Thus, in *Ludecke*, the Court required judicial review of executive determinations that particular detainees really were alien enemies — even on the assumption that the processes followed by the Executive in detaining them on that basis provided due process.<sup>32</sup>

#### D. *The Agency and Common Law Models*

Courts can adopt quite different methodological stances in resolving the questions presented in habeas corpus cases. Here, we sketch more fully the contrasting approaches of the Agency Model and the Common Law Model.

1. *The Agency Model.* — In slightly caricatured form, one judicial stance is that of an agent striving to carry out as precisely as possible the mandate of a principal, which might be the Constitution's Framers or the Congress that enacted particular legislation. The Agency Model assumes that judges, insofar as possible, should apply rather than make law. This model can embrace a variety of specific views about constitutional and statutory interpretation, including originalist, intentionalist, and textualist methodologies, and it does not necessarily lead to "liberal" or "conservative" outcomes.<sup>33</sup> But in determining, for example, whether the Executive has unilateral power to which the judiciary should defer, or whether unilateral executive power is limited but executive action authorized by Congress should rarely be overturned, this model would instruct judges to presume that an answer can be found in sources thought to constrain judicial latitude. Overall, the Agency Model reverberates with mistrust of any dynamic or creative judicial role.

A range of normative commitments underlies this model. With respect to constitutional issues, a central premise is that judicial review is legitimate only when decisions are attributable to choices made by the Founders rather than the Justices. With respect to statutory issues, adherents of the Agency Model stress that legislation may reflect compromises necessary to ensure passage and that courts must respect what was, and was not, enacted by constitutional processes.<sup>34</sup> More flexible interpretive approaches are said to confer excessive latitude on

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<sup>32</sup> See *Ludecke*, 335 U.S. at 171 n.17.

<sup>33</sup> For a summary of agency approaches to statutory interpretation, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 705–07 (5th ed. 2003) [hereinafter *HART & WECHSLER*].

<sup>34</sup> For a summary of criticisms of the Agency Model in statutory cases, see *id.*

politically unaccountable judges and to invite Congress improperly to leave difficult questions to the courts, rather than to shoulder the responsibility for resolving them. This problem is compounded, adherents say, insofar as judges seek to further what they take to be general statutory purposes, for such purposes can be difficult to ascertain and are likely to be multiple, conflicting, and capable of being described at varying levels of generality.

2. *The Common Law Model.* — A contrasting view, also overdrawn but heuristically useful, sees courts as retaining many of the prerogatives of common law judges in construing constitutional or statutory language in light of history and current needs. Under the Common Law Model, courts remain agents, but agents with more leeway. The model's underlying assumption is that those who adopted open-ended constitutional or statutory provisions, aware of their limited foresight, would not have wanted to bind the courts or the country too rigidly.<sup>35</sup> In the case of statutory interpretation, courts play the role of junior partners to Congress by fleshing out legislative enactments and sometimes presuming that Congress would not have wanted to run up against possible constitutional prohibitions.<sup>36</sup> Courts following this approach, as we understand it, may also refuse to interpret statutes as trenching on traditionally recognized but not constitutionally absolute rights unless Congress makes its intent to do so unmistakably clear.<sup>37</sup> Nevertheless, when Congress wants the last word, it can have it by enacting a more specific statute — provided, of course, that the question is solely one of statutory interpretation. In the constitutional domain, the Common Law Model emphasizes that much of the Constitution was written in vague language and intended to be adaptable to crises in human affairs. More generally, the Common Law Model views constitutional interpretation as appropriately dynamic.

Although the Common Law Model requires courts to make judgments of fairness, policy, and prudence, it does not incorporate clear standards that courts ought to follow in making those judgments. It dictates no choice between substantive approaches to terrorism-related issues that are deferential to claims of executive authority and those that are libertarian, nor does it embrace or reject the equally familiar view that courts should look skeptically at executive unilateralism but

<sup>35</sup> For discussion of this approach to statutory interpretation, see *id.* at 707–08.

<sup>36</sup> See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 378–408.

<sup>37</sup> See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (arguing that the avoidance canon is “designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to certain normative values”).

routinely uphold executive responses to perceived emergencies that enjoy congressional authorization.<sup>38</sup> As a result, by itself, the Common Law Model cannot resolve many of the central judicial questions raised by the war on terror. Rather, a court within the Common Law Model must make case-by-case judgments that are subject to evaluation on moral, pragmatic, and prudential grounds.<sup>39</sup> In view of the importance of context and exigency, courts proceeding within the Common Law Model will frequently, although not always, want to decide issues narrowly and leave interpretive options open for future cases. The Common Law Model also includes a Burkean preference for gradual rather than dramatic change.

3. *The Models in Historical and Contemporary Contexts.* — Although no broad-brush account could be entirely uncontroversial, the Supreme Court historically has approximated the Common Law Model much more nearly than the Agency Model, both in interpreting the statutory grant of habeas jurisdiction and in defining the rights assertable in habeas proceedings.<sup>40</sup> Indeed, on the statutory side, the Court, noting that habeas is a common law writ (the only one enshrined in the Constitution), held long ago that “resort may unquestionably be had to the common law” in construing the statutory jurisdiction.<sup>41</sup> Common law-like evolution has been especially visible in cases involving review of state criminal convictions: the scope of review underwent an accordion-like expansion following the Civil War and through the Warren Court era<sup>42</sup> before contracting under the Bur-

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<sup>38</sup> See generally Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 4–5 (2004) (identifying these three possible approaches to issues pitting claims of national security against claims of individual liberty in times of war and emergency). Although Professors Issacharoff and Pildes describe the third of these approaches as “process-based [and] institutionally-oriented,” *id.* at 5, terms similar to those that we have used in identifying our own general outlook with the Legal Process tradition, see *supra* p. 2034, we do not believe that courts operating within the Common Law Model should routinely uphold any form of executive detention that Congress might explicitly authorize — just as we reject any categorical commitment either to deference to the Executive or to civil libertarianism. Although congressional authorization will often be a pertinent factor, the courts’ role in administering the writ of habeas corpus as a safeguard of individual liberty sometimes requires them to insist that even congressionally authorized detentions are unlawful in the absence of a judicial trial.

<sup>39</sup> For a summary of criticisms of this approach in the statutory context, see HART & WECHSLER, *supra* note 33, at 707–08.

<sup>40</sup> See MEADOR, *supra* note 24, at 82–83 (stressing the evolutionary nature of the writ in England and the United States).

<sup>41</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

<sup>42</sup> See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463–99 (1963); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 596–629 (1993). Leading Warren Court decisions interpreting the jurisdiction broadly include *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Jones v. Cunningham*, 371 U.S. 236 (1963); and *Brown v. Allen*, 344 U.S. 443 (1953).

ger and Rehnquist Courts<sup>43</sup> even though the underlying statute remained essentially unchanged.<sup>44</sup> But the phenomenon is visible elsewhere; a notable example, discussed below, involves jurisdiction over citizens detained by the military overseas.<sup>45</sup>

The statutory incorporation of a common law writ could be thought to blur any distinction between the Agency and Common Law Models, as an adherent of the former might contend that Congress has expressly authorized the exercise of common law powers in this domain. But while Justices usually associated with the Agency Model have joined decisions reflecting broad interpretive latitude with respect to the habeas statute,<sup>46</sup> adherence to the core presumptions of the Agency Model has remained in evidence, especially in opinions interpreting the elaborate amendments enacted by Congress in 1996<sup>47</sup> and, as we shall see, in the interpretation of the Suspension Clause.<sup>48</sup> Nevertheless, the Common Law Model has generally dominated.

Characterization of the judicial approach in defining substantive rights enforced by habeas courts is more difficult, for many such rights can be litigated by other means. Plainly, however, many of the doctrines defining substantive constitutional rights have evolved over time, most often in response to perceived changes in circumstances or apprehensions of justice.<sup>49</sup>

4. *A Brief Preliminary Defense of the Common Law Model.* — In thinking about habeas corpus issues generated by the war on terrorism, our sympathies lie with the Common Law Model, and nearly all of our analysis will reflect its defining assumptions. We shall not fully defend the common law approach — a Herculean task that would require engagement in nearly all of the leading debates surrounding constitutional and statutory interpretation. For the most part, our aspiration will instead be to demonstrate the Common Law Model's

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<sup>43</sup> See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>44</sup> The minor statutory changes during this era, prior to enactment of significant restrictions in 1996, are summarized in HART & WECHSLER, *supra* note 33, at 1288–89.

<sup>45</sup> See *infra* Section III.A.2, pp. 2053–55.

<sup>46</sup> See, e.g., *Teague*, 489 U.S. at 307–10 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (establishing a jurisdictional limitation not articulated in the statute's text).

<sup>47</sup> See, e.g., *Dodd v. United States*, 125 S. Ct. 2478, 2482–83 (2005) (taking a textually based agency approach in interpreting the interaction of two provisions regarding the limitations period for post-conviction relief); see also *INS v. St. Cyr*, 533 U.S. 289, 337–38 (2001) (Scalia, J., dissenting) (advocating a literal reading of provisions in the immigration statute that appeared to strip all courts of jurisdiction, despite their departure from traditional practices of judicial review).

<sup>48</sup> See *infra* Section III.A.1.a, pp. 2050–51.

<sup>49</sup> See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). The Common Law Model is also pertinent to and prominent in cases interpreting substantive statutes. See *infra* Section IV.B.2.b, pp. 2073–81 (discussing Justice Souter's interpretation of the Non-Detention Act).

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attractiveness through our discussions of relevant history and through our account of how the Common Law Model ought to be employed to reach fair and prudent results in future cases. In the most general terms, however, our preference for the Common Law over the Agency Model rests on two foundations.

The first is a Burkean recognition of the wisdom of adhering to traditional practices of decisionmaking and allocations of power that have worked well. As we shall attempt to demonstrate, a common law approach to habeas corpus issues has been not only historically dominant, but also, for the most part, historically successful. In the main, courts have managed to adapt generally stated norms of positive law to evolving notions of fairness, while also accommodating the imperatives of national security and practical governance. Much of the most important jurisdictional and substantive doctrine has been and remains judge-made. Any effort to reform existing practice in light of the tenets of the Agency Model would require dramatic change<sup>50</sup> that holds more peril than promise.

Also supporting our embrace of the Common Law Model is a set of assumptions that helps to explain the model's historic success in the area of habeas corpus law. Because unfolding history invariably mixes change with continuity, law, to be successful, must blend change with continuity as well. Lawmaking authorities necessarily anticipate continuity; in its absence, lawmaking would be futile. But prudent lawmakers also know that they can anticipate the future with imperfect foresight at best. Moreover, those charged with applying legal norms must inevitably exercise judgment in determining how past utterances should be *interpreted* in light of current circumstances — an enterprise inevitably fraught with concern about consequences. As important and unforeseen issues arise, we think it better for courts to accept responsibility for thinking through the problems of justice and sound practice that those issues present, within the bounds established by the norms of interpretive practice that constitute the Common Law Model, than to insist on viewing all of those issues as having been specifically resolved by past lawmakers.

With respect to statutory issues, we think that the interpretive latitude traditionally exercised by courts, which is by no means unbounded, is sufficiently subject to democratic control through Congress's ability to overturn judicial decisions with which it disagrees. Common law-like constitutional interpretation, though in many ways the norm, is often viewed as especially problematic given that Congress may not override constitutional decisions.<sup>51</sup> But the open-ended

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<sup>50</sup> See Meltzer, *supra* note 36, at 389.

<sup>51</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962).

character of central constitutional guarantees frequently necessitates creative interpretation, as we shall illustrate in our discussion of the Suspension Clause. Moreover, in the case of judicial interpretation of rights to freedom from military detention, levers of democratic influence come into the picture in at least two ways. First, war powers, by practical if not logical necessity, diminish constitutional rights, and those powers rise to their zenith when the Executive acts with congressional authorization.<sup>52</sup> Room thus exists for legislation sometimes to modify the substantive and procedural rights invoked by habeas petitioners contesting wartime executive detention. The second lever of congressional power involves the Suspension Clause. The primary constitutional provision expressly addressed to emergencies, it permits Congress, in cases of rebellion or invasion when the public safety so requires, to suspend the privilege of the writ of habeas corpus and thereby forestall judicial enforcement of rights.<sup>53</sup>

Even apart from these express levers of control, we believe — and shall attempt to demonstrate — that the scope of appropriate judgment within a Common Law Model is bounded by commonly held substantive values and by similarly shared assumptions about the judicial role. In other words, although we shall not offer further explicit defense of the Common Law Model, we hope to demonstrate that it can be used wisely.

## II. THE WAR ON TERRORISM IN THE SUPREME COURT

Understanding the jurisdictional, substantive, and procedural issues that courts will confront in habeas corpus cases arising from the war on terror requires a brief review of three decisions from June of 2004, as well as the more recent decision in *Hamdan v. Rumsfeld*.

### A. Hamdi v. Rumsfeld

Yaser Hamdi, an American citizen, was seized on an Afghan battlefield and detained by the American military as an “enemy combatant,” first at Guantánamo Bay and then in American naval brigs.<sup>54</sup> When Hamdi’s father filed a federal habeas corpus petition, the government did not contest jurisdiction. Instead, it maintained, substantively, that

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<sup>52</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>53</sup> In putting the point as we do, we reject the view, advanced in Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006), and persuasively rebutted in David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 80–95 (2006), that a valid suspension merely withdraws the privilege of the writ — one particular remedy for unlawful detention — while leaving detainees free to seek other remedies, such as damages.

<sup>54</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

it could lawfully detain enemy combatants without preferring criminal charges, and, procedurally, that its decision to hold Hamdi was adequately supported by the declaration of a Defense Department official that he was generally familiar with Hamdi's situation and that "U.S. military screening team[s]" had concluded that Hamdi met the "criteria for enemy combatants."<sup>55</sup>

The Supreme Court divided sharply on the legality of Hamdi's detention and on the appropriate scope of habeas review. Justice O'Connor's plurality opinion (joined by Chief Justice Rehnquist and Justices Kennedy and Breyer) found legal authority for Hamdi's detention in the Authorization for Use of Military Force (AUMF) passed by Congress three days after 9/11, which empowered "the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11 . . . attacks."<sup>56</sup> In the view of the plurality, the authorization to fight an enemy implicitly authorized the detention of enemy combatants — defined by the plurality as including at least those "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there<sup>57</sup> — as a "fundamental and accepted . . . incident to war."<sup>58</sup> Justice Thomas provided a fifth vote for this reading of the AUMF.<sup>59</sup> Justice Souter (joined by Justice Ginsburg) and Justice Scalia (joined by Justice Stevens) disagreed, concluding that the Non-Detention Act, which states that "[n]o citizen shall be imprisoned or otherwise detained . . . except pursuant to an Act of Congress,"<sup>60</sup> actually prohibited Hamdi's detention.<sup>61</sup>

The plurality next reasoned that the Constitution permits executive detention, without resort to the ordinary criminal process, of enemy combatants. Justice Thomas again provided the fifth vote for the conclusion.<sup>62</sup> On this point, Justice Scalia dissented, arguing that absent a suspension of the writ of habeas corpus, the government must either bring criminal charges against an American citizen de-

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<sup>55</sup> *Id.* at 512–13 (alteration in original) (quoting the official's declaration) (internal quotation marks omitted).

<sup>56</sup> *Id.* at 518 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001)).

<sup>57</sup> *Id.* at 516 (quoting Brief for the Respondents at 3, *Hamdi* (No. 03-6696)). The boundaries of this category are quite uncertain, see *infra* Section V.B.3.c, pp. 2108–11, but on the facts alleged by the government, Hamdi undoubtedly fell within it.

<sup>58</sup> *Id.* at 518.

<sup>59</sup> See *id.* at 587 (Thomas, J., dissenting).

<sup>60</sup> 18 U.S.C. § 4001(a) (2000).

<sup>61</sup> See *Hamdi*, 542 U.S. at 541–52 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 573–74 (Scalia, J., dissenting).

<sup>62</sup> See *id.* at 589 (Thomas, J., dissenting).

tained in the United States or release him.<sup>63</sup> (Finding Hamdi's detention to be statutorily barred, Justice Souter did not address its constitutionality.<sup>64</sup>)

Finally, the plurality came to procedural issues. Judging the military's proceedings to be deficient, the plurality concluded that due process entitled Hamdi to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>65</sup> It further determined that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand."<sup>66</sup> But the plurality stated that the government could employ hearsay evidence and that credible evidence of enemy combatant status could trigger a presumption that Hamdi would have to rebut.<sup>67</sup> Finally, the plurality noted "the possibility" that due process could be afforded by a properly authorized military tribunal rather than an Article III court.<sup>68</sup> In a partial dissent, Justice Souter, declaring that Hamdi was entitled to at least the procedural rights recognized by the plurality, joined in its outcome to permit a majority disposition.<sup>69</sup> Justice Scalia objected to the plurality's specification of procedures that might render lawful a detention that, as the plurality acknowledged, was unjustified on the basis of government procedures to date.<sup>70</sup> Justice Thomas, by contrast, found no procedural defect, arguing that the courts should not review executive determinations that a particular detainee was actually an enemy combatant.<sup>71</sup>

### B. *Rumsfeld v. Padilla*

*Rumsfeld v. Padilla* presented the question whether the Constitution permits indefinite military detention of an American citizen seized as an enemy combatant in the United States (not, as Hamdi was, on a foreign battlefield). Jose Padilla was seized in Chicago's O'Hare Airport after arriving from Pakistan and was detained initially on a material witness warrant in connection with a New York grand jury investigation of the 9/11 attacks. He was then taken to New York. While motions challenging Padilla's detention were pending in New York,

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<sup>63</sup> *Id.* at 572 (Scalia, J., dissenting).

<sup>64</sup> *Id.* at 551–52 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>65</sup> *Id.* at 533 (plurality opinion).

<sup>66</sup> *Id.* at 539.

<sup>67</sup> *See id.* at 533–34.

<sup>68</sup> *Id.* at 538.

<sup>69</sup> *Id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>70</sup> *See id.* at 575–77 (Scalia, J., dissenting).

<sup>71</sup> *Id.* at 589 (Thomas, J., dissenting).

the government declared him an enemy combatant and, in an ex parte proceeding, had the material witness warrant vacated. Padilla was then taken to a military facility in South Carolina. Two days later, his counsel filed a habeas corpus petition in a federal court in New York City.<sup>72</sup>

Dividing 5–4, the Supreme Court ordered dismissal of Padilla’s petition on the ground that statutory jurisdiction lay in South Carolina, not New York.<sup>73</sup> That decision thus left unresolved whether *Hamdi*’s validation of executive detention of an American citizen extended to those seized in the United States, far from any battlefield. For Justice Breyer, the difference between the two cases was significant. A member of the *Hamdi* plurality, he joined the *Padilla* dissent, which, after concluding that jurisdiction existed, reasoned that the AUMF does not authorize, and the Non-Detention Act prohibits, “the protracted, incommunicado detention of American citizens arrested in the United States.”<sup>74</sup> In 2004, then, five Justices — the four *Padilla* dissenters (Justices Stevens, Souter, Ginsburg, and Breyer) and Justice Scalia (in his *Hamdi* dissent) declared that the military could not lawfully detain a citizen like Padilla as an enemy combatant without affording him a criminal trial in a civilian court.

### C. Rasul v. Bush

The last of the 2004 decisions involved habeas petitions filed in the District of Columbia by noncitizens captured in Afghanistan and Pakistan and detained as enemy combatants at Guantánamo Bay. Overturning the lower courts, the Supreme Court ruled, 6–3, that the federal courts’ statutory habeas corpus jurisdiction had expanded so as to embrace these petitions.<sup>75</sup> While stressing Guantánamo Bay’s special status as an enclave under long-term and exclusive American control, the Court left unclear whether its jurisdictional ruling extended more broadly to detentions of aliens throughout the world. Nor did the Court determine what substantive rights the Guantánamo petitioners might possess.

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<sup>72</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 430–32 (2004).

<sup>73</sup> *Id.* at 451.

<sup>74</sup> *Id.* at 464 n.8 (Stevens, J., dissenting).

<sup>75</sup> *Rasul v. Bush*, 542 U.S. 466, 470–73, 480–84 (2004). A footnote did state that the petitioners’ allegations — that they had been held for over two years without charges or access to counsel, despite having engaged in no combat or terrorism against the United States — “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” *Id.* at 484 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)).

#### D. Hamdan v. Rumsfeld

Exercising the jurisdiction upheld in *Rasul*, the Court two years later, by a vote of 5–3, held in *Hamdan v. Rumsfeld* that federal statutes impliedly precluded the trial of an alien, detained at Guantánamo Bay, for war crimes before a military commission that departed from the international laws of war and from procedural requirements governing courts martial. Justice Stevens’s opinion rested entirely on statutory interpretation and the separation of powers: Congress, in the Uniform Code of Military Justice, had forbidden the use of military tribunals on the terms proposed by the Administration, and the President lacked authority to contravene that prohibition.<sup>76</sup>

Dissenting opinions, in addition to questioning jurisdiction,<sup>77</sup> argued that the applicable statutes gave the President broad discretion to determine when military tribunals are appropriate.<sup>78</sup> The dissenters further asserted that the Court’s lack of deference to executive determinations recklessly disregarded presidential expertise and prerogatives.<sup>79</sup> Responding to these attacks, two concurring opinions emphasized that the Court held only that the President could not employ the challenged tribunals without further authorization that Congress was free to grant<sup>80</sup> — as Congress, in the Military Commissions Act of 2006 (MCA), subsequently did.

### III. HABEAS CORPUS JURISDICTION

In this Part, we examine the reach of habeas corpus jurisdiction under the Constitution and laws of the United States. Jurisdiction is a threshold issue that functions as an on-off switch. The meaning of the “off” position is clear: the petition must be dismissed. But the meaning of the “on” position can vary greatly: review can range from de novo judicial decision of all pertinent questions of fact and law to a highly deferential inquiry into only some aspects of prior, nonjudicial determinations. We focus here on the question of “on” versus “off” and leave for Part V discussion of the appropriate scope of review when the switch is on.

Whether jurisdiction exists is initially a question of statutory interpretation. But a finding that no statute confers jurisdiction may require a court to confront a second question, which can be more or less serious: does the Constitution give the detainee a right of access to

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<sup>76</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785–86 (2006).

<sup>77</sup> See *id.* at 2810–19 (Scalia, J., dissenting).

<sup>78</sup> See *id.* at 2823–25 (Thomas, J., dissenting).

<sup>79</sup> *Id.* at 2826, 2828, 2846.

<sup>80</sup> *Id.* at 2808 (Kennedy, J., concurring in part); *id.* at 2799 (Breyer, J., concurring).

some court? Jurisdictional questions frequently have been, and should continue to be, resolved in light of constitutional concerns.

*A. Jurisdiction To Review Detentions of Citizens*

1. *Citizens Detained in the United States.* — (a) *The Statutory and Constitutional Framework.* — Since the Judiciary Act of 1789,<sup>81</sup> one or another federal court has always possessed statutory habeas jurisdiction to review the federal government's detention, on American soil, of American citizens — absent suspension of the writ. Although the Supreme Court has, therefore, never had to decide whether the Constitution guarantees a citizen, detained in the United States for purposes other than a judicial trial, access to habeas corpus, it has strongly signaled that the answer is yes. In *INS v. St. Cyr*,<sup>82</sup> the government argued that amendments to the immigration statutes had withdrawn all federal court jurisdiction to review a statutory issue bearing on the lawfulness of the Executive's detention of an alien. Although the text of the amendments strongly supported the government's position, Justice Stevens's opinion relied on a series of interpretive presumptions in ruling that the district courts' habeas corpus jurisdiction remained unimpaired.<sup>83</sup> More important for present purposes, the Court stated flatly — though it stopped just short of holding — that the Suspension Clause mandates that the federal courts exercise a habeas jurisdiction at least as broad as the scope of the writ in 1789. Finding that the writ was available in 1789 to test the lawfulness of executive detention of nonenemy aliens within the United States, the Court held that in order to avoid “substantial constitutional questions,” it would not interpret the amendments as precluding habeas review.<sup>84</sup>

*St. Cyr* is important not only because of its strong dictum about the scope of a constitutionally protected right to habeas — a right enjoyed, a fortiori, by citizens if it is enjoyed by aliens — but also because it illustrates the Court's common law approach to habeas cases. From one perspective, the *St. Cyr* opinion was disingenuous, resting on a tortured interpretation of statutory language. From another perspective, however, the Court displayed appropriate common law caution, refusing to dig in unnecessarily on the difficult questions whether and, if so, in what respects the Suspension Clause restricts Congress from limiting the habeas jurisdiction of the federal courts.

<sup>81</sup> See ch. 20, § 14, 1 Stat. 73, 81–82.

<sup>82</sup> 533 U.S. 289 (2001).

<sup>83</sup> *Id.* at 298–300.

<sup>84</sup> *Id.* at 300, 314.

Despite their fundamental character, those questions had never been squarely presented and resolved. Uncertainty persists partly because the Suspension Clause, though it does not affirmatively and expressly guarantee habeas corpus jurisdiction, does presuppose that it will exist, and Congress acted consistently with that presupposition in 1789 by conferring such jurisdiction on the federal courts. In *St. Cyr*, the Supreme Court, operating in a common law–like fashion, essentially treated that presupposition, together with the clause’s concern about unwarranted suspension, as precluding the possibility that the writ would be unavailable, whether through congressional action or inaction — unless, of course, Congress had properly invoked its power to suspend.<sup>85</sup>

*St. Cyr* typifies the common law–like prerogatives historically exercised by the Supreme Court in construing the habeas jurisdiction, not only to avoid constitutional difficulties, but also simply to achieve sensible results in circumstances that Congress might not have foreseen. For example, in *Braden v. 30th Judicial Circuit Court*,<sup>86</sup> the Court relaxed some historic limits on habeas jurisdiction to preserve the opportunity for timely review. In *Braden*, Kentucky officials had filed a detainer to ensure that an Alabama prisoner would be handed over to them to face criminal trial when his Alabama sentence expired. When the prisoner filed a habeas petition in federal court in Kentucky, alleging a denial of his right to a speedy trial on the Kentucky charge against him, the Court ruled that statutory language authorizing federal courts to issue the writ only “within their respective jurisdictions” did not bar review.<sup>87</sup> Sharply limiting an earlier decision that had required *the petitioner* to be located within the federal district,<sup>88</sup> the Court upheld jurisdiction based on *the respondent’s* presence in Kentucky. Stressing what it took to be Congress’s general policy of channeling habeas cases into districts with close connections to the underlying controversies, the Court refused to “assume that Congress intended to require . . . Kentucky to defend its action in a distant State.”<sup>89</sup>

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<sup>85</sup> That interpretation leads to a second question, not discussed by the majority: must the habeas jurisdiction guaranteed by the Suspension Clause be exercised by a federal rather than a state court? See generally HART & WECHSLER, *supra* note 33, at 356–57, 1291. Whatever the answer in general, *St. Cyr’s* preservation of federal court jurisdiction was sensible, both because of lingering questions whether state courts have power to issue the writ against federal officials and because there was no reason to attribute to Congress, if it could not preclude all judicial review of immigration matters, the purpose of shifting the historic locus of review from federal to state courts.

<sup>86</sup> 410 U.S. 484 (1973).

<sup>87</sup> *Id.* at 494 (quoting 28 U.S.C. § 2241(a) (2000)) (emphasis omitted) (internal quotation mark omitted).

<sup>88</sup> See *Ahrens v. Clark*, 335 U.S. 188, 190 (1948).

<sup>89</sup> *Braden*, 410 U.S. at 499.

(b) *The War on Terror Decisions*. — In both *Hamdi* and *Padilla*, there was no question that the citizen-detainee could seek habeas review in the federal courts. In *Padilla*, however, the Court ordered dismissal on the ground that the petition had been filed in the wrong federal court. Chief Justice Rehnquist's opinion stressed that the habeas statute established that the proper respondent is "the" custodian, not "a" custodian, of the detainee.<sup>90</sup> Relying on the "default rule . . . that the proper respondent is the warden of the facility where the prisoner is being held, not . . . some . . . remote supervisory official,"<sup>91</sup> the Chief Justice reasoned that federal jurisdiction lay only in South Carolina, where both *Padilla* and his immediate custodian were located when the habeas petition was filed.

This conclusion was not inevitable. As the four dissenters emphasized, the default rule was hardly unbending; *Braden*, for example, reflected a flexible, functional approach to determining what was essentially a venue issue; and the circumstances in *Padilla* presented colorable arguments for taking this more flexible approach.<sup>92</sup> The dissenters objected to the government's litigation tactics in having moved, on the eve of a scheduled hearing in New York, to vacate the material witness warrant on which *Padilla* was being held in order to transfer him from civilian to military custody and move him to South Carolina — all before notifying his counsel. They protested that *Padilla*'s lawyer, if notified, would surely have filed a petition in New York while *Padilla* remained there and that the government should not be able "to obtain a tactical advantage as a consequence of an *ex parte* proceeding"; therefore, they thought, the petition filed after the transfer should be treated "as the functional equivalent of one filed two days earlier."<sup>93</sup>

Taken in isolation, the jurisdictional question in *Padilla* was close. A variety of concerns relating to judicial administration supports the general requirement that petitioners file in the district of confinement, naming their immediate custodians as respondents. Moreover, most of the prior decisions relaxing the general requirements had done so when a petitioner would not otherwise have had access to any court at all.<sup>94</sup> In such circumstances, the call to cut through form to assure the writ's effectiveness is compelling; serious constitutional questions would otherwise arise. By contrast, the denial of jurisdiction in *Padilla* merely postponed federal habeas review, as the petitioner could refile his action in South Carolina. Still, there was considerable force to the dissent's argument that courts should not countenance what appeared to

<sup>90</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (citing 28 U.S.C. § 2242 (2000)).

<sup>91</sup> *Id.* at 435.

<sup>92</sup> *See id.* at 462–64 (Stevens, J., dissenting).

<sup>93</sup> *Id.* at 459.

<sup>94</sup> *See infra* Section III.A.2, pp. 2053–55.

be efforts by the government to delay review of the lawfulness of Padilla's detention, or at least to shift the dispute from the Second to the Fourth Circuit, which the government may have expected to be a more hospitable forum.

With the factors directly bearing on jurisdiction close to equipoise, a court in the Common Law Model is entitled to peek at the substantive question and consider whether it is easy or hard — and, if the question is hard, whether postponing resolution would be desirable. In *Padilla*, the majority Justices, all but one of whom thought Yaser Hamdi's detention was lawful, might have thought it a hard and uncertain question whether the Constitution permitted the detention of Jose Padilla — an American citizen seized in the United States, far from any theater of combat. If so, the interest in postponing the issue could properly have influenced their decision whether to develop a highly fact-bound exception (involving the government's apparent scheming for procedural advantage) to a sensible but not unyielding jurisdictional rule.

We put the point conditionally because, as we discuss below, we agree with the dissenters that Padilla's detention was unlawful,<sup>95</sup> and we do not think that that question required additional illumination. For now, however, the key point is that at least some members of the majority might have thought otherwise — and, if so, a decision to resolve a close jurisdictional question in a way that postponed a decision on the merits would have been permissible, not discreditable, within the Common Law Model. To say that courts should construe the habeas corpus statutes in common law-like ways is not to say that petitioners should always prevail.

2. *Citizens Detained Abroad.* — There is little doubt today that some federal district court has statutory jurisdiction to review the lawfulness of the detention of citizens held abroad. The results of the Court's decisions are far clearer than the reasons underlying them, but the law reflects a mixture of jurisdictional and substantive constitutional concerns and is almost entirely the product of common law-like evolution.

The habeas statutes, in addition to limiting courts to acting “within their respective jurisdictions,” provide that the writ “shall be directed to the person having custody of the person detained.”<sup>96</sup> Petitions on behalf of citizens detained abroad test the limits of these provisions, for in such cases both the petitioner and the most natural candidate to count as “the person having custody of the person detained” — the of-

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<sup>95</sup> See *Padilla*, 542 U.S. at 464 n.8 (Stevens, J., dissenting).

<sup>96</sup> 28 U.S.C. §§ 2241(a), 2243 (2000).

ficial exercising immediate physical control — lie beyond the territorial jurisdiction of any federal court.

In a pair of decisions in the 1950s, however, the Court broadened habeas jurisdiction to embrace actions brought by Americans held overseas. In *Burns v. Wilson*,<sup>97</sup> American soldiers, confined in Japan following their convictions and death sentences by courts martial, filed petitions in federal court in the District of Columbia, naming as respondent the Secretary of Defense and alleging that the court-martial proceedings denied due process. In reaching the merits of their claims, the Supreme Court simply assumed, without explanation, that the federal courts possessed extraterritorial habeas corpus jurisdiction.<sup>98</sup> Only upon a petition for rehearing did Justice Frankfurter question that conclusion, objecting that the Court had passingly, and erroneously, resolved an important jurisdictional issue.<sup>99</sup> Without responding to those objections, the other Justices voted to deny rehearing. Two years later, in *United States ex rel. Toth v. Quarles*,<sup>100</sup> the Court again upheld habeas jurisdiction when an American citizen held abroad named as the respondent a high-ranking official, the Secretary of the Air Force.<sup>101</sup> Again, the opinion lacked extensive discussion of jurisdiction, but in view of Justice Frankfurter's opinion urging rehearing of *Burns*, the Court surely realized the significance of its decision.

Although the opinions in *Burns* and *Quarles* undoubtedly should have explained their jurisdictional rulings, the Court's conclusions seem to us to be correct — and, more generally, to illustrate the virtues of a common law-like approach to the habeas jurisdiction. To be sure, the statutory language had to be stretched to fit the cases, but the Court was not overstepping its bounds, for it seems unlikely that Congress, when it enacted the pertinent language, focused on its implications for Americans detained abroad. Moreover, the legal situation of such petitioners was in flux: only two years after *Quarles*, the Court held that citizens retain constitutional rights even when tried abroad by a military tribunal.<sup>102</sup> If the Constitution demands that some court have jurisdiction to hear constitutional claims asserted by citizens subject to executive detention (as we explained above that we believe to be the case), then the Court's decisions were not merely statutory adjustments but performed a deeper function of avoiding the serious con-

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<sup>97</sup> 346 U.S. 137 (1953).

<sup>98</sup> See *id.* at 138–39 & n.1 (plurality opinion).

<sup>99</sup> See *Burns v. Wilson*, 346 U.S. 844, 851–52 (1953) (Frankfurter, J., dissenting from denial of rehearing).

<sup>100</sup> 350 U.S. 11 (1955).

<sup>101</sup> *Id.* at 23.

<sup>102</sup> *Reid v. Covert*, 354 U.S. 1, 14 (1957).

stitutional question that a contrary ruling would have raised. Had Congress responded with an amendment seeking to overturn these decisions, the constitutional question would have been presented inescapably. But as long as the statute remains unamended, it is clear that *some* federal court — typically the United States District Court for the District of Columbia<sup>103</sup> — has statutory jurisdiction to review the detention of citizens held by executive officials abroad.

### B. Habeas Jurisdiction and Alien Petitioners

In this Section, we discuss the evolution of habeas jurisdiction to review challenges to the executive detention of aliens. After examining the judicially developed law up through the *Rasul* decision in 2004, we consider the effect and constitutionality of statutes enacted by Congress in 2005 and 2006 that eliminate habeas jurisdiction for aliens (but not citizens) detained as enemy combatants.

1. *Aliens Detained in the United States.* — The habeas jurisdiction that Congress conferred on the federal courts in 1789 extended to aliens held in the United States, and such jurisdiction, or some substitute therefor, has existed continuously ever since.<sup>104</sup> Indeed, the *St. Cyr* decision suggested that such jurisdiction is constitutionally mandated.<sup>105</sup> That habeas jurisdiction should traditionally have extended as fully to noncitizens as to citizens detained in the United States is striking. As we discuss below, in a variety of contexts noncitizens do not enjoy the same constitutional rights as citizens. But under the constitutional reasoning, if not the holding, of *St. Cyr*, noncitizens detained in the United States have the same right as citizens to assert in court such rights as they do possess, at least with respect to claims at the core of the historic understanding of habeas corpus.

2. *Detention of Aliens Outside the United States: The Traditional Approach.* — Before *Rasul v. Bush*, the leading decision on the availability of federal habeas corpus jurisdiction to noncitizens detained abroad was *Johnson v. Eisentrager*.<sup>106</sup> The petitioners there were German nationals convicted by a U.S. military commission in China of violating the laws of war by continuing military action against the United States after Germany's surrender in 1945. The federal district court for the District of Columbia dismissed their petition for lack of territorial jurisdiction, but the court of appeals reversed on what amounted to constitutional grounds. Anticipating the argument that we have attributed to Henry Hart, the court reasoned that the peti-

<sup>103</sup> See *Gherebi v. Bush*, 338 F. Supp. 2d 91, 96 (D.D.C. 2004).

<sup>104</sup> *INS v. St. Cyr*, 533 U.S. 289, 305–06 (2001). See generally Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 989–1020 (1998).

<sup>105</sup> See *St. Cyr*, 533 U.S. at 304.

<sup>106</sup> 339 U.S. 763 (1950).

tioners possessed, or at least arguably possessed, constitutional rights assertable against federal officials; that the Constitution therefore required the availability of habeas jurisdiction in some court to entertain their claims; that no state court could exercise jurisdiction; and that the federal habeas statute must therefore be construed to extend jurisdiction, other obstacles to that conclusion notwithstanding.<sup>107</sup>

The Supreme Court reversed in an opaque opinion. Much of its language suggested that the federal courts categorically lacked jurisdiction over aliens detained abroad.<sup>108</sup> Other language, however, can be read as ordering dismissal because, on the merits, the petitioners lacked any constitutional rights.<sup>109</sup> An alternative interpretation is that since the petitioners' constitutional rights had not been violated — possibly because they had none — the Court saw no constitutional difficulty in dismissing on jurisdictional grounds.

In our view, the best interpretation of *Eisentrager* is that § 2241 did not confer federal habeas jurisdiction and that the Constitution did not compel the extension of jurisdiction because the petitioners, given their limited contacts with the United States, enjoyed no constitutional rights. On this reading, *Eisentrager* suggests that aliens detained abroad generally have no constitutional right to habeas, but leaves open the possibility that a small subset of aliens might have sufficient contacts with the United States to possess both substantive constitutional rights and a constitutional right of access to a court to assert those rights.

If *Eisentrager* is so interpreted, we would regard it as both rightly decided and soundly reasoned. On any reading, *Eisentrager* avoided — appropriately, in our view — a bold extension of jurisdiction into a foreign and military domain that traditionally has been the exclusive preserve of the political branches. In upholding statutory jurisdiction over the petitions in *Burns* and *Quarles*, the Court took a modest step at a time when constitutional understandings were evolving to extend substantive protection to *citizens* detained abroad. In that setting, the Court could have attributed to Congress the desire not to deny citizens,

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<sup>107</sup> See *Eisentrager v. Forrestal*, 174 F.2d 961, 962, 965–66, 968 (D.C. Cir. 1949).

<sup>108</sup> See *Johnson v. Eisentrager*, 339 U.S. at 777–78 (“We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.”).

<sup>109</sup> See *id.* at 770–71 (“The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . . But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”); *id.* at 785 (“We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”).

who have distinctive claims on their government,<sup>110</sup> the basic protection of liberty afforded by the Great Writ. The Court could have appropriately considered, as well, the colorable argument that the Constitution mandates the availability of jurisdiction in some court to entertain claims of constitutional rights and attendant claims of rights to judicial relief. In addition, recognizing jurisdiction over military detention abroad is less likely to be disruptive in the case of citizens than in the case of noncitizens: experience has shown that habeas review of court-martial decisions can be accommodated within the normal routine of military practice, and that when hostilities break out, few citizens are likely even to be alleged to be acting in concert with the enemy overseas.

By contrast, if habeas were available to noncitizens worldwide, it could in theory (if not always in practice) be pressed both in conventional wars, in which there might be thousands of alien captives, and with respect to such sensitive activities as foreign espionage.<sup>111</sup> Moreover, efforts even to entertain petitions by aliens abroad would present practical problems. We have no constituted courts (other than military tribunals) that sit abroad. Notwithstanding modern transportation and communications, there could be considerable difficulties in litigating, in the United States, claims pertaining to detentions in distant areas over which American control rests on a temporary and possibly fragile military balance. (Imagine moving detainees, witnesses, or lawyers around in Baghdad today to develop evidence for a habeas proceeding.) Under these circumstances, with the jurisdictional question being one of statutory policy rather than possible constitutional mandate, we think that the Court correctly refused to extend habeas jurisdiction to the generality of cases involving aliens abroad.<sup>112</sup>

Nevertheless, in keeping with our embrace of the Common Law Model, we would read *Eisentrager* as having reserved the possibility, however unlikely, that different circumstances would call for a different result.<sup>113</sup> To be sure, from the perspective of providing maximal clarity, discouraging future litigation, and keeping courts out of dis-

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<sup>110</sup> See *id.* at 769–70 (“Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. . . . [T]he Government’s obligation of protection is correlative with the duty of loyal support inherent in the citizen’s allegiance . . .”).

<sup>111</sup> Petitions in espionage cases would frequently run up against judicial doctrines broadly protecting against the disclosure of confidential information. See, e.g., *Tenet v. Doe*, 125 S. Ct. 1230, 1236 (2005).

<sup>112</sup> For a thoughtful argument that habeas jurisdiction should extend (albeit on a deferential basis) to aliens detained abroad, see David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125 (2005). Insofar as the argument is one of jurisdictional policy rather than constitutional entitlement, it has been overridden by subsequent jurisdictional amendments.

<sup>113</sup> See *Eisentrager*, 339 U.S. at 777–79.

putes that they may little understand, the best reading of *Eisentrager* would be a categorical one, denying that aliens detained abroad ever have either a constitutional right to habeas corpus relief or any constitutional rights for a habeas court to vindicate. But such a categorical approach could have harsh repercussions. It would imply, for example, that a longtime resident alien who temporarily leaves the United States has no due process right to challenge a denial of the opportunity to return,<sup>114</sup> or that, hypothetically, a resident alien who ventured abroad to serve the United States as a military translator and was detained on allegations of complicity with terrorists has no right to contest the allegations. A court should not unnecessarily leap to endorse the constitutionality of a preclusion of jurisdiction in such cases.

More recently, Congress has made clear in the Military Commissions Act of 2006 (MCA) that it wants to bar the door to all petitions filed by aliens detained abroad as enemy combatants. We discuss the MCA below. For now, it suffices to say that we think the Court was wise in *Eisentrager* not to try to foreclose, once and for all, the possibility that an alien might have a right of access to a court to assert constitutional rights against the United States.

3. *Jurisdiction over Aliens Detained at Guantánamo Bay: Rasul v. Bush.* — The *Rasul* decision, upholding federal court jurisdiction to entertain habeas petitions by aliens detained at Guantánamo Bay, rivals *Eisentrager* in opacity. Justice Stevens's majority opinion rejected the government's view that *Eisentrager* foreclosed jurisdiction, arguing that that decision, whatever its reasoning about constitutional issues, had assumed a lack of statutory jurisdiction under § 2241. Subsequent developments, including decisions such as *Burns*, *Quarles*, and *Braden*, had altered this statutory "predicate" and established that habeas jurisdiction may exist even when the petitioner lies outside the court's territorial jurisdiction and the only respondent within its territorial jurisdiction is a supervisory official rather than the immediate custodian.<sup>115</sup> Curiously, however, Justice Stevens offered little affirmative argument for extending these decisions, all involving detentions of *citizens*, to noncitizens held at Guantánamo Bay.

Moreover, the *Rasul* opinion failed to make clear whether its rationale was limited to Guantánamo Bay or instead implied that federal habeas jurisdiction existed to review the detention of noncitizens held by the United States anywhere in the world. There is surely nothing wrong with leaving open whether a decision might be extended in the future — indeed, the Common Law Model frequently encourages this

<sup>114</sup> Cf. *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) (permitting lawful permanent resident alien, stopped at the border when seeking to reenter the United States, to assert a due process claim).

<sup>115</sup> See *Rasul v. Bush*, 542 U.S. 466, 475–79 (2004); see also *supra* Section II.C, p. 2048.

approach. But questions about the reach of the *Rasul* decision derive in part from doubt over whether the Court had a coherent rationale at all, as some bits of language seem to point in one direction while other passages point in the other.<sup>116</sup>

Whatever *Rasul*'s shortcomings in explanation, its specific outcome seems entirely plausible and normatively defensible within the Common Law Model, based on the special status of Guantánamo Bay. Under a lease permanently renewable at its sole discretion, the United States exercises complete control there,<sup>117</sup> to the exclusion of Cuban or any other law. In these circumstances, a denial of jurisdiction could have established Guantánamo Bay as a permanent law-free zone, where the writs of no country's courts would run — in contrast with the traditional situation in which American military detentions abroad occurred during wars or occupations with anticipated end points.<sup>118</sup> Moreover, courts and lawyers can safely obtain access to detainees at Guantánamo Bay without the risks, described above, that recognition of a global habeas jurisdiction over aliens would present.<sup>119</sup> With the writ long having been available to aliens detained within the United States, it was a modest and sensible step for the Court to hold as a matter of *statutory* construction that federal courts can entertain peti-

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<sup>116</sup> Supporting the broader reading are the fact that, of the numerous bases given to distinguish *Eisentrager*, only one was related to Guantánamo Bay's features, see *Rasul*, 542 U.S. at 475–76; the conclusion that *Eisentrager*'s statutory predicate had been overruled, *id.* at 479; and the unqualified conclusion that “the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more.” *Id.* at 483–84 (footnote and citation omitted).

Supporting the narrower reading is the framing of the issue both in the opinion's first sentence — whether habeas jurisdiction extends to aliens “captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba,” *id.* at 470 — and at the end of the introductory section — “whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty,’” *id.* at 475 (quoting 1903 Lease Agreement with Cuba).

<sup>117</sup> See *id.* at 487–88 (Kennedy, J., concurring in the judgment).

<sup>118</sup> See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 511 (2006) (noting the British tradition of ensuring that areas in which the military operated were not law-free enclaves).

<sup>119</sup> To be sure, drawing this distinction could give the Executive an arguably perverse incentive to detain aliens overseas, rather than bringing them to Guantánamo (or the United States), where habeas jurisdiction lies. But some such set of incentives is inevitable unless jurisdiction and substantive rights do not depend on where aliens are seized or detained. We have discussed already the weighty reasons why jurisdiction should not extend worldwide, and we discuss in Section IV.C.2, *infra* pp. 2087–88, how the reach of substantive rights depends on an alien's location. And even a worldwide jurisdiction exercised by American courts over custody by the United States would not exclude perverse incentives, for the government could still remove individuals from the reach of habeas jurisdiction by transferring them to other nations for detention.

tions from aliens detained in a location that, for functional purposes, might as well be American territory.

Once again, however, a difficult jurisdictional question is intertwined with questions on the merits. There is a colorable argument (with which we agree, for reasons explained below) that aliens detained at Guantánamo Bay possess at least “fundamental” constitutional rights<sup>120</sup> and that those rights include the right to some judicial inquiry into deprivations of liberty by the Executive. A decision in *Rasul* refusing jurisdiction would have required the Court to confront difficult questions about what constitutional rights, if any, Guantánamo detainees possess and whether the absence of habeas jurisdiction was itself unconstitutional. *Rasul*’s modest extension of jurisdiction avoided or at least postponed this welter of difficulties.

4. *Jurisdiction-Stripping and the Rights of Aliens: The DTA and the MCA.* — Congress responded to *Rasul* and to the subsequent decision in *Hamdan v. Rumsfeld* by stripping the federal courts of the habeas jurisdiction that *Rasul* had upheld. There are two pertinent statutes. The Detainee Treatment Act of 2005 (DTA) amended 28 U.S.C. § 2241 to eliminate habeas corpus jurisdiction, and virtually any other form of judicial review, for aliens held in military custody at Guantánamo Bay.<sup>121</sup> A year later, the MCA went further by eliminating habeas corpus jurisdiction (and, again, other forms of review) for any alien, wherever seized or held, who has “been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”<sup>122</sup>

Significantly, however, the DTA, as amended by the MCA, does not leave alien detainees wholly without judicial remedies insofar as they wish to challenge the fact — rather than the conditions — of their detention. In place of habeas corpus jurisdiction, the DTA confers on the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review at least some military decisions underlying the detention of aliens. One provision authorizes judicial review of the decisions of Combatant Status Review Tribunals (CSRTs),<sup>123</sup> administrative bodies that the Defense Department established in the

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<sup>120</sup> See *infra* Sections IV.C.3, V.A.2, pp. 2088–95. . We refer to “fundamental” rights because of precedent suggesting that in some contexts only such rights are judicially enforceable outside the United States and its “incorporated” territories. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 311–12 (1922) (discussing “the guaranties of certain fundamental rights declared in the Constitution”).

<sup>121</sup> Pub. L. No. 109-148, div. A, § 1005(e)(1), 119 Stat. 2739, 2742 (to be codified as amended at 28 U.S.C. § 2241(e)(1)).

<sup>122</sup> Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2636 (to be codified at 28 U.S.C. § 2241(e)(1)). In addition, section 7(b), 120 Stat. at 2636, specifies that the DTA’s elimination of federal habeas jurisdiction applies to all post-9/11 cases, pending or otherwise, thus overriding a contrary holding in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006).

<sup>123</sup> DTA § 1005(e)(2)(A), 119 Stat. at 2742.

aftermath of *Rasul* to determine whether detainees held at Guantánamo Bay really are enemy combatants.<sup>124</sup> (The Executive would seem to have the same authority to establish CSRTs for aliens held either in the United States or abroad, although no statute mandates such action.) A parallel provision of the DTA, as amended, authorizes judicial review by the D.C. Circuit of a final executive branch decision upholding a conviction and sentence by a military tribunal of an alien prosecuted for a war crime.<sup>125</sup> By contrast, neither the DTA nor the MCA authorizes the D.C. Circuit to entertain challenges from aliens detained as enemy combatants to the conditions of their confinement, including alleged mistreatment or abuse (except insofar as the admissibility of evidence before a military tribunal or CSRT depends on whether it resulted from coercive interrogation).

In considering the constitutionality of the DTA and MCA, a crucial starting point is that neither the Suspension Clause nor the Due Process Clause forbids Congress from withdrawing federal habeas jurisdiction as long as it provides a constitutionally adequate alternative form of judicial review.<sup>126</sup> Nor do statutes limiting jurisdiction to a particular federal court, such as the D.C. Circuit, pose constitutional difficulty.<sup>127</sup> Accordingly, insofar as the DTA and the MCA do not preclude altogether the exercise of federal jurisdiction to review an alien's military detention, the constitutional questions that they present may be less stark than some reports have suggested.

In ascertaining whether a substitute mechanism is adequate, we focus here on whether the jurisdictional switch remains on, even if the light is somewhat dimmed by restrictions on the scope of review. (We consider in Part V whether limitations on the scope of review present constitutional difficulties.)

(a) *Aliens Detained in the United States.* — Under the DTA and MCA, any alien convicted of a war crime by a military commission may seek review in the D.C. Circuit. By contrast, the mechanism that those statutes establish for judicial review of military decisions to detain aliens as enemy combatants, in the absence of a trial for war crimes, has some obvious gaps. The MCA provides that “[n]o court . . . shall have jurisdiction to . . . consider an application for a writ of habeas corpus filed by or on behalf of an alien” who is awaiting an

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<sup>124</sup> See Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004) [hereinafter Wolfowitz Memorandum], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (regarding an “Order Establishing Combatant Status Review Tribunal”).

<sup>125</sup> DTA § 1005(e)(3), 119 Stat. at 2743, amended by MCA sec. 3, §§ 950g(a)(1), 950j(b), 120 Stat. at 2622–24.

<sup>126</sup> See *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

<sup>127</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (citing cases).

administrative adjudication of enemy combatant status,<sup>128</sup> and neither it nor the DTA confers jurisdiction on the D.C. Circuit to review a decision to detain until after a CSRT has reached a final determination.<sup>129</sup> If this statutory scheme were read literally, no court would have jurisdiction to entertain the claims of an alien detainee who was held indefinitely without being brought before a CSRT — a result that would contravene the principles on which the Supreme Court appeared to rely in *INS v. St. Cyr*.<sup>130</sup> But the statute need not and should not be read so literally, especially when such a reading would not only produce a harsh result but also give rise to serious constitutional issues. The statutory framework appears to presuppose, although it does not guarantee, that the government will, in due course, bring before a CSRT aliens whom it wishes to detain without trial either within the United States or at Guantánamo Bay.<sup>131</sup> And although the military order establishing CSRTs applies only to aliens detained at Guantánamo Bay, it is hard to believe that Congress intended that aliens detained in the United States would not have at least as much opportunity to challenge their detention, or that the Executive would fail to provide such an opportunity. Accordingly, we think the MCA's displacement of habeas jurisdiction should be read as operative only insofar as the Executive convenes and concludes proceedings before a CSRT within a reasonable time — an approach similar to one the Court has taken elsewhere when otherwise lawful detention might raise constitutional questions if executive authority were subject to no time limit.<sup>132</sup> If the statutory scheme were interpreted otherwise, we think it would be unconstitutional as applied to an alien who was detained indefinitely in the United States without opportunity for judicial review of the lawfulness of the detention.<sup>133</sup>

<sup>128</sup> Sec. 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241(e)(1)).

<sup>129</sup> See DTA § 1005(e)(2)(B)(ii), 119 Stat. at 2742.

<sup>130</sup> See 533 U.S. 289, 304–05 (2001). The same problem, in theory, could affect an alien who was held for a long period in anticipation of being tried before a military commission.

<sup>131</sup> A contrary but isolated snippet of legislative history, see 152 CONG. REC. S10404 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions) (“We ensure that, if need be, we can again hold enemy soldiers in prison camps inside our country if we need to, without becoming embroiled in a tempest of litigation.”), should not suffice to displace this conclusion.

<sup>132</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 688–702 (2001) (finding that the immigration statutes permit the continued detention of an alien, following entry of a removal order, for only a reasonable period of time necessary to effect deportation, and reading into the statute a presumptive six-month limitation on the period of authorized confinement).

<sup>133</sup> Other gaps in the statutorily authorized jurisdiction might materialize. If, after the D.C. Circuit had concluded its review, it came to light that a determination of enemy combatant status, or a conviction for war crimes, rested on testimony that the government had known to be perjured, the detainee might have no court in which to raise this constitutional claim unless the D.C. Circuit were viewed as having power to reopen its earlier proceedings. In those circumstances, the courts would have to confront whether an alien detainee has a constitutional right to habeas review (or some adequate substitute therefor) of a constitutional claim of that nature.

With respect to claims alleging torture or other forms of unconstitutional mistreatment, the DTA and MCA create a gap in the statutory jurisdiction of the federal courts that cannot be bridged by statutory interpretation. Those statutes turn the jurisdictional switch wholly off with respect to challenges to the constitutionality of the conditions in which an alien is detained — for the exclusive review procedure in the D.C. Circuit embraces only challenges to final decisions of a CSRT or a military commission, with all other forms of judicial review having been abolished entirely.

We believe that this total preclusion of judicial review of challenges to conditions of confinement is unconstitutional. It is difficult to ascertain whether it runs afoul of the *St. Cyr* opinion, which says flatly, albeit in dictum, that aliens detained within the United States have a constitutional right to habeas review at least as broad as that which existed in 1789. We have been unable to find decisions from the early Republic on the availability of habeas to challenge conditions of confinement, in part because the pertinent substantive constitutional principles were not yet developed.<sup>134</sup> Whether or not the writ as of 1789 is thought to have embraced such cases, *St. Cyr*'s statement that the Suspension Clause protects, "at the absolute minimum,"<sup>135</sup> the scope of habeas corpus in 1789 leaves open the possibility that the clause today guarantees jurisdiction over an expanded set of claims based on expanded understandings of substantive constitutional rights.

Whatever the contemporary reach of the Suspension Clause as construed in *St. Cyr*, we believe that the total preclusion of review in the DTA and MCA is unconstitutional because it contravenes a broader postulate of the constitutional structure of which the Suspension Clause forms a part: that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation.<sup>136</sup> That principle applies whether the remedy sought is habeas relief, an injunction against unconstitutional conditions of confinement, or some other constitutionally required remedy. In the end, the individual's substantive constitutional claim to the remedy requested may or may not prevail, but the foreclosure of jurisdiction cannot, by itself, bar all courts even from considering whether the Constitution gives aliens detained in the United States a right to judicial relief from ongoing violations of constitutional rights involving conditions of confinement.

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<sup>134</sup> Modern federal decisions are divided on whether habeas corpus is the appropriate vehicle for pressing constitutional challenges to the conditions of confinement. See, e.g., Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 150 & n.394 (1988).

<sup>135</sup> *St. Cyr*, 533 U.S. at 301.

<sup>136</sup> See HART & WECHSLER, *supra* note 33, at 345–57; Hart, *supra* note 27, at 1372.

(b) *Aliens Abroad*. — The statutory scheme appears to make no provision for habeas corpus jurisdiction, or any substitute therefor, over challenges of any kind to the detention of aliens abroad. Harsh though this state of affairs might be in some cases, habeas jurisdiction has never generally extended to aliens detained abroad under *Eisen-trager* (which *Rasul* did not clearly displace). The preclusions of review contained in the DTA and the MCA thus introduce no constitutional difficulty, at least in ordinary cases, for they essentially only ratify the constitutionally acceptable status quo ante for aliens detained abroad. As we have signaled before, however, a small qualification is necessary to account for the possibility that an alien's contacts with the United States would be sufficient to call for recognition of substantive constitutional rights implicated by military detention. In such a case, rare as it may be, we think the total preclusion of habeas jurisdiction over petitions filed by aliens abroad would violate the Constitution.

(c) *Aliens Detained at Guantánamo Bay*. — Under the DTA and the MCA, the switch governing access to habeas corpus has been turned off for aliens detained at Guantánamo Bay to the same extent as for aliens detained in the United States. We have argued that the DTA and MCA are unconstitutional insofar as they foreclose jurisdiction over petitions from aliens in the United States that raise constitutional challenges to detention that could not be brought within a reasonable time within the statutory review mechanism now established in the D.C. Circuit, or that allege that the conditions of confinement are unconstitutional. As our argument relies in part on the reasoning in *St. Cyr* and in part on a broader principle concerning the right of access to a court in order to assert a constitutional right to judicial redress, the obvious question is whether the rights of aliens at Guantánamo Bay are as broad in relevant respects as those of aliens in the United States. We would answer this question in the affirmative, based in part on the distinctive features of Guantánamo Bay noted above and in part on the closely related view, defended below,<sup>137</sup> that aliens detained at Guantánamo Bay possess at least “fundamental” constitutional rights and thus a right to claim judicial redress for violations of those rights.<sup>138</sup>

<sup>137</sup> See *infra* Section V.A.2, pp. 2090–95.

<sup>138</sup> In *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), the D.C. Circuit concluded otherwise, ruling that the DTA and MCA, in eliminating jurisdiction over habeas petitions from detainees at Guantánamo Bay, do not violate the Suspension Clause. Judge Randolph's opinion (joined by Judge Sentelle) reasoned, *inter alia*, that *Eisen-trager* established that habeas jurisdiction need not extend to aliens held outside the sovereign territorial jurisdiction of the United States. *Id.* at 990–92. Brusquely dismissing arguments, like the one we have advanced, that emphasize the special status of Guantánamo Bay and maintain that aliens detained there possess fundamental constitutional rights, see *id.* at 992, the court held that the detainees possess no con-

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#### IV. LEGALLY AUTHORIZED DETENTION AND SUBSTANTIVE RIGHTS

This Part considers the “merits” determination in executive detention cases: whether detention is authorized by law and consistent with the petitioner’s substantive rights. We focus on only the most fundamental issue in such cases — whether a claim that a detention is not authorized by law can be defeated on the ground either (1) that executive officials have determined the petitioner to be an enemy combatant under the laws of war, or (2) that the petitioner is being held for trial before, or has been convicted of war crimes by, a military commission. (To keep the inquiry within manageable proportions, we put to one side challenges based on the conditions of detention, even though we believe, as noted above, that the DTA and MCA are unconstitutional insofar as they preclude all judicial review of claims by aliens held in Guantánamo or the United States that their conditions of confinement violate the Constitution.)

Our ambitions in this Part are several. We hope to clarify some of the issues that courts will confront — first by disentangling the conceptual elements of an inquiry into the lawfulness of detention and then by showing the pertinence of distinctions between citizens and aliens and, in the case of both, between detentions at home and abroad (as well as at Guantánamo Bay). We also hope to establish that courts have little choice but to make their decisions about substantive rights, as about jurisdiction, within the Common Law Model rather than the Agency Model. Finally, we offer views about how some central substantive issues should be resolved within the Common Law Model (although the value of our analytical framework is substantially independent of the conclusions and normative arguments that we present).

##### A. *Conceptual Review of the “Merits” Inquiry in Habeas Cases*

Notwithstanding the centrality of constitutional rights in our legal culture, the original office of habeas corpus was to ask whether — even in the absence of constitutional rights in the modern sense — a petitioner’s detention was authorized by law. The decision in *St. Cyr* turned on this basic question of lawful authorization; the alien petitioner did not claim a constitutional immunity from deportation, but instead contended that the decision to deport him violated statutory

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stitutional rights that could be the basis for contesting their custody, *id.* at 990–94. Judge Rogers’s dissent also paid little attention to the special status of Guantánamo, and appeared not to dispute the majority’s conclusion that the detainees there lack even fundamental constitutional rights, *see id.* at 1004, 1011 (Rogers, J., dissenting), maintaining instead that the MCA violates the Suspension Clause by withdrawing the preexisting statutory jurisdiction to conduct habeas inquiries that would have lain within the scope of the writ in 1789, *id.* at 1007.

law.<sup>139</sup> The *Hamdan* decision similarly rested on a lack of authorization; ruling that Congress had forbidden the form of military commission that the Executive had established,<sup>140</sup> the Court did not reach the question whether Hamdan would have a constitutional right not to be tried by such a commission had Congress authorized its use.

In emphasizing the statutory basis for these decisions, we do not mean to downplay the role of habeas courts in considering questions of individual rights. Rather, our point is that a habeas court can sometimes conclude that detention is not authorized, and that the writ should therefore issue, without deciding whether a statute purporting to authorize detention would violate the Constitution.

The *Hamdan* decision also illustrates that habeas inquiries sometimes focus on the nature of or purposes underlying a petitioner's custody. Hamdan did not contest his detention *simpliciter* or seek outright release while hostilities continued.<sup>141</sup> Rather, he challenged only the government's decision to subject him to custody for purposes of military trial, and the Court decided the case accordingly, holding only that Hamdan could not be tried for war crimes before military tribunals constituted in violation of statutory requirements.

### B. *The Right of Citizens To Be Free from Executive Detention*

It would be impossible to provide a general account of when executive detention of American citizens is authorized by law and consistent with all constitutional guarantees. Instead, we begin by introducing general principles to guide the analysis of particular cases. We then apply those principles to the facts of the Supreme Court's two war-on-terrorism decisions in cases brought by citizens: *Hamdi*, involving a citizen seized on an Afghan battlefield, and *Padilla*, involving a citizen apprehended in the United States, far from any theater of combat. To presage our conclusion: seizing citizens on fields of battle and detaining them as enemy combatants is presently authorized by statute and violates no constitutional guarantee (as long as the detainees have adequate opportunities to challenge the factual bases for their detentions); by contrast, seizing citizens outside of battlefield conditions and detaining them indefinitely without judicial trial is not presently authorized and would violate the Constitution even if Congress purported to authorize it.

1. *An Analytical Framework.* — In seeking principles to guide analysis of cases involving executive detentions of U.S. citizens, we operate at a high level of generality, trying to identify precepts that could

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<sup>139</sup> See *St. Cyr*, 533 U.S. at 315.

<sup>140</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785–86 (2006).

<sup>141</sup> See *id.* at 2798.

command broad assent even though specific applications will inevitably occasion controversy. Our proposed framework consists of five guiding principles, several of which are mutually reinforcing. Although none of these principles is necessarily determinative, collectively they reflect our legal tradition's presumptive rejection of executive authority to deprive citizens of bodily liberty, without wholly closing the door to urgent exceptions.

(a) *The Criminal Law Model as a Normative Baseline.* — Entrenched historical practices reflect the assumption that protracted detention of citizens can normally be justified only pursuant to the substantive and procedural safeguards of the criminal law. This historical baseline possesses continuing normative resonance. To be sure, our legal tradition has accepted, sometimes uneasily, a significant number of exceptions to this baseline principle.<sup>142</sup> These include pretrial preventive detention,<sup>143</sup> quarantine of persons with communicable diseases,<sup>144</sup> civil commitment of the mentally ill,<sup>145</sup> detention of material witnesses,<sup>146</sup> and civil detention of “sexually violent predators” following completion of their sentences.<sup>147</sup> In addition, the Supreme Court has upheld wartime practices that would almost certainly be impermissible during peacetime. During World War II, *Korematsu v. United States*<sup>148</sup> notoriously upheld the exclusion from the West Coast of American citizens, as well as aliens, of Japanese ancestry.<sup>149</sup> And *Ex parte Quirin*<sup>150</sup> found no constitutional defect in prosecuting a citizen before a military commission for violating the laws of war.<sup>151</sup> We discuss these decisions below. For now, the pertinent point is that all of these cases have rightly taken for granted that the Criminal Law Model furnishes a normative baseline and that departures from it require forceful justification.

(b) *Skepticism of Claims of Unilateral Executive Power To Detain.* — At the highest level of generality, the proposition that courts should look skeptically on claims of unilateral executive power to detain citizens without trial should provoke little controversy, though disagreement will exist about how deep the skepticism should be. It is for good reason that the fundamental historical office of habeas corpus is

<sup>142</sup> See generally Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 85–100 (2005).

<sup>143</sup> See *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>144</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 29–30 (1905) (dictum).

<sup>145</sup> See *Addington v. Texas*, 441 U.S. 418, 432–33 (1979).

<sup>146</sup> See 18 U.S.C. § 3144 (2000).

<sup>147</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 350, 368–69 (1997).

<sup>148</sup> 323 U.S. 214 (1944).

<sup>149</sup> *Id.* at 223–24.

<sup>150</sup> 317 U.S. 1 (1942).

<sup>151</sup> *Id.* at 48.

to protect against executive detention. Such detention undermines the separation of powers as a safeguard of liberty by excluding courts from their adjudicative role and, sometimes, Congress from its legislative role in defining punishable offenses.<sup>152</sup> To put a familiar point bluntly, human nature makes the executive branch all too likely to favor security over liberty in times of crisis. The Executive's unity and energy, which are often virtues in responding to crises, can also lead to decisions that are hasty or ill-considered,<sup>153</sup> and an Executive with primary responsibility for national security may incline to err in that direction — especially when those subject to detention are unlikely to muster support among the populace at large.<sup>154</sup>

As Justice Jackson famously observed in the *Steel Seizure Case*,<sup>155</sup> the powers of the Executive reach their apex when the President acts with congressional authorization.<sup>156</sup> Although Justice Jackson was not speaking explicitly about powers to restrict fundamental liberties, much of his analysis carries over — both because governmental powers and individual rights are conceptually interconnected, mediated by notions of compelling governmental interests,<sup>157</sup> and because the separation of powers serves more generally to promote liberty.<sup>158</sup>

In resolving hard questions about individual rights and executive power in times of war and emergency, courts have frequently framed their rulings to ensure that the proper political actors, particularly Congress, take responsibility for decisions. Indeed, Professors Issacharoff and Pildes maintain that courts' wartime rulings on executive acts and legislation have more often focused on second-order questions involving the locus of decisionmaking authority than on first-order questions about the content of substantive rights.<sup>159</sup> Today, this pat-

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<sup>152</sup> For a discussion emphasizing the importance of congressional participation in authorizing military tribunals, see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

<sup>153</sup> See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 69–70.

<sup>154</sup> Although history offers examples not only of overreaction to perceived threats but of failure to apprehend serious threats, see RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 298–99 (2003), and although fear may sometimes improve rather than distort cognition, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in THE CONSTITUTION IN WARTIME 55, 72–77 (Mark Tushnet ed., 2005), the view expressed in the text is the standard, and we think the largely correct, perspective.

<sup>155</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>156</sup> *Id.* at 635–36 (Jackson, J., concurring).

<sup>157</sup> See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993).

<sup>158</sup> See THE FEDERALIST NOS. 47, 51 (James Madison).

<sup>159</sup> See Issacharoff & Pildes, *supra* note 38, at 7–8. Undoubtedly, in matters of war and emergency Congress is especially likely to defer to the Executive, and hence may provide a less effective counterweight. See POSNER & VERMEULE, *supra* note 9, at 47–48. But the value of the counterweight may vary by issue, may depend on whether the same party controls the Presidency

tern of close attention to congressional authorization is part of the tradition that defines the Common Law Model, and we think that it should be extended into the future — even though we believe, contra Issacharoff and Pildes,<sup>160</sup> that even congressionally authorized executive detentions should trigger searching judicial scrutiny.

(c) *An Interpretive Presumption Against Restraints on Bodily Liberty.* — In the first flush of war or emergency, Congress has frequently responded by enacting potentially open-ended authorizations of executive action.<sup>161</sup> In assessing the permissibility of intrusions on traditionally fundamental rights, a vague and hasty mandate to the President, though undoubtedly significant, should not carry the same weight as would a sober, specifically considered judgment that extraordinary circumstances justify extraordinary deprivations of citizens' liberties.<sup>162</sup> This presumption applies with particular force in the war on terrorism, which potentially knows no bounds of location or time.<sup>163</sup>

Nor should the administrative law principles that frequently call for judicial deference to executive branch interpretations of statutory mandates automatically apply. Cases involving executive detention pose the most basic threats to personal liberty. Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ.

We do not suggest that judicial interpretation of statutes empowering the Executive should always be grudging in habeas cases. Some measures may appropriately be interpreted as conferring broad authority even without a clear statement that particular actions are authorized. For example, a declaration of war suggests that Congress means to confer the vast executive powers exercised in past wars, along with

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and Congress, and may shift over time. Moreover, the very need to obtain acquiescence from another branch, even if rarely difficult to secure, is itself a constraint.

<sup>160</sup> See Issacharoff & Pildes, *supra* note 38, at 35 (arguing that judges “should focus on ensuring whether there has been bilateral institutional endorsement”).

<sup>161</sup> See POSNER & VERMEULE, *supra* note 9, at 47 & 280 n.53.

<sup>162</sup> For a similar argument in favor of a “presumption of liberty,” see Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2668–70 (2005). Although Professors Posner and Vermeule raise serious questions about Congress’s capacity to improve upon judgments made by the Executive, see POSNER & VERMEULE, *supra* note 9, at 170, we read constitutional guarantees as embodying presumptions in favor of liberty that were intended to be, and should be, difficult to overcome. Outside the context of war or emergency, this claim would be uncontroversial: no one thinks that the Bicameralism and Presentment Clauses of Article I and the guarantees of the Bill of Rights should generally give way whenever the executive branch believes that the detention of citizens would strike the optimal tradeoff between interests in liberty and security. Invocation of the exigencies of war or emergency, though surely pertinent to assessing the constitutionality of executive action, should not trigger a categorical change in judicial analysis.

<sup>163</sup> See David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 325–27 (2004).

bounded discretion to take further actions that context and exigency may require; a formal declaration also triggers many statutes that confer additional powers on the Executive.<sup>164</sup> By contrast, more limited authorizations of the use of force do not necessarily call for the same interpretive latitude.<sup>165</sup>

Also relevant to the interpretation of congressional authorizations are the nature of the executive action in question and the liberty that it curtails. In *Hamdi*, for example, the plurality reasoned persuasively that detention of enemies captured in battle, though not expressly mentioned in the Authorization for Use of Military Force (AUMF), “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”<sup>166</sup> Other claims of statutorily conferred power less closely linked to making war and less plainly supported by claims of exigency may require more specific textual authorization. Thus, our position is similar to but distinct from a “clear statement” requirement, as is suggested by our endorsement of *Hamdi*’s interpretation of the AUMF, which did not expressly authorize the detention of enemy captives. Determining how much clarity is required for a statutory authorization to overcome a presumption in favor of liberty depends on a complex of factors, including exigency, the nature of the enactment, history, and context.

(d) *A Rebuttable Presumption that Even Congressionally Authorized Executive Detention of Citizens Is Constitutionally Impermissible.* — Even in cases of congressionally authorized detention, our proposed framework includes a rebuttable presumption that executive detention of citizens is constitutionally impermissible, in wartime as well as peacetime, as long as the ordinary courts are open. This presumption rests partly on a normative judgment about the fundamental importance of liberty from bodily restraint in a society committed to the ideal of freedom under law. But it also rests on the traditions of habeas corpus and on the structural role of the Suspension Clause within the Constitution.

<sup>164</sup> Some of these provisions directly implicate liberty interests. See, e.g., 42 U.S.C. § 266 (2000 & Supp. III 2003) (authorizing quarantine of persons with a communicable disease); 50 U.S.C. § 21 (2000) (authorizing detention of alien enemies); *id.* §§ 1811, 1829 (authorizing specified electronic surveillance and physical searches without court order for a fifteen-day period after Congress declares war). Others provide broad powers over property and the economy, such as restrictions on the types of transactions banks may engage in, 12 U.S.C. § 95a (2000), or expropriations of property, 50 U.S.C. § 82 (2000), although similar powers are granted in some statutes triggered by declared emergencies or when war is imminent, see, e.g., 10 U.S.C. § 2538 (2000), 10 U.S.C.A. § 2663 (West 1998 & Supp. 2006), amended by John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. B, § 2821, 120 Stat. 2473, 2473–74 (2006).

<sup>165</sup> Cf. Katyal & Tribe, *supra* note 152, at 1275–76; J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1425–27 (1992).

<sup>166</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting the AUMF).

In assessments of whether constitutional guarantees can be overridden in times of war and emergency, the Suspension Clause has a dual significance. First, its limitation of the suspension power to situations of invasion or rebellion suggests, if it does not explicitly affirm, the presumptive rule that when the civilian courts remain capable of dealing with threats posed by citizens, those courts must be permitted to function. Second, the Suspension Clause suggests that Congress's *ultimate* emergency power, when faced with rebellion or invasion, is not to narrow or abolish fundamental rights but to suspend the courts' jurisdiction to enforce these rights. This distinction possesses considerable symbolic importance. Among other things, it seems — by wise design, we think — to permit the courts to exercise substantial independence of judgment in interpreting the Constitution even during wartime, while leaving an escape hatch to the political branches under conditions of utmost exigency. To say this is not to deny that courts should sometimes defer to congressional judgments in authorizing executive action, nor is it to maintain that they should wholly ignore the costs of potentially provoking Congress into a categorical suspension of the writ. Nevertheless, courts should not render the Suspension Clause wholly irrelevant by acceding to all congressionally authorized infringements on fundamental liberties even in the absence of a suspension. Accordingly, our proposed framework includes a *presumption* that as long as the ordinary courts are open, even in a time of war, executive detention of citizens, whether or not authorized by Congress, is constitutionally impermissible.

It is a hallmark of the Common Law Model, however, that it never quite says never — or, perhaps more accurately, that any statement of “never” may be distinguished when a new factual situation arises. Although congressionally authorized detention of citizens is presumptively impermissible without the safeguards of a criminal trial, the prohibition is not categorically unyielding.

(e) *The Ultimate Need for Normative Judgment.* — Any fair account must recognize the irreducible murkiness of the boundaries of the Executive's power to detain and punish citizens as enemy combatants or war criminals. Relevant legislation is likely to be general, leaving courts considerable interpretive latitude. The constitutional precedents, as we discuss below, are hard to reconcile and sometimes infirm. In the end, courts must frequently shoulder the burden of normative judgment.

2. *The Framework Applied: Hamdi, Padilla, and Beyond.* —  
(a) *Hamdi: A Citizen Seized on a Foreign Battlefield.* — Measured against our framework, the plurality opinion in *Hamdi* — which was very much in the adaptive, common law mode — reasoned to a central conclusion that we think correct: the AUMF authorized the continuing detention of a citizen seized on a battlefield in Afghanistan, without criminal trial, as long as he received adequate opportunity to challenge

the factual predicate for his detention. The crucial fact is Hamdi's seizure on a foreign battlefield. Certainly the AUMF authorized battlefield operations in Afghanistan and the capture of those fighting against American forces there, even if it turns out that one of the captives is an American citizen. The only real question is whether the AUMF, having authorized so much, should be read not to permit the continued detention of citizens seized on foreign battlefields unless those citizens are convicted of crimes in a civilian court.

Such an interpretive line would not be impossible to draw, as Justice Souter's *Hamdi* opinion demonstrated: taking an Agency approach to statutory interpretation, he found a violation of the Non-Detention Act, which bars detention of American citizens unless authorized by statute, and in doing so refused to read the AUMF as implicitly authorizing Hamdi's detention.<sup>167</sup> In our view, however, the *Hamdi* plurality was justified in reading the AUMF more broadly. A battlefield is no place to collect the evidence and establish the chains of custody necessary to prove guilt beyond a reasonable doubt. Furthermore, the government, to have any chance of meeting that burden of proof, would need to take soldiers away from their duties on foreign battlefields so that they could provide testimony in courtrooms as far as halfway around the world.<sup>168</sup> We doubt that Congress would have wanted to necessitate such action. Nor do we think that detention without criminal trial of a citizen seized in combat against allied forces violates his substantive constitutional rights, as long as an adequate procedure exists to determine enemy combatant status.

Justice Scalia, writing within the Agency Model, protested forcefully in his *Hamdi* dissent that executive detention of American citizens within the United States, even if they were seized abroad, is impermissible absent either an ordinary criminal trial or congressional suspension of the writ.<sup>169</sup> The core purpose of the constitutional guarantee of habeas corpus, in his view, is to preclude the government from detaining citizens without the safeguards of the criminal process.<sup>170</sup> He contended that if emergency necessitates an exception, the only constitutionally available mechanism is suspension.<sup>171</sup>

As the plurality noted, however, the historical and precedential support for Justice Scalia's position is inconclusive.<sup>172</sup> His categorical stance is difficult to reconcile with an overall body of law authorizing

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<sup>167</sup> See *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>168</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 778–79 (1950).

<sup>169</sup> See *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

<sup>170</sup> See *id.* at 564–65.

<sup>171</sup> *Id.* at 554.

<sup>172</sup> *Id.* at 516–24 (plurality opinion).

the noncriminal detention of various categories of individuals — for example, sexually violent predators, material witnesses, and persons whose mental illness poses serious threats. Moreover, although it has been argued that the Treason Clause specifies the only constitutionally permissible terms for punishing or indefinitely detaining citizens as enemy combatants,<sup>173</sup> authority supporting that position is scant, with historical practice during the Civil War and World War II indicating the contrary.<sup>174</sup> And on the precise question whether citizens seized on a battlefield as enemy combatants may be detained without criminal trial, Justice Scalia could point to no decision upholding his view. Under these circumstances, *Hamdi* required a substantive judgment whether sufficient reason existed to justify an exception to the presumption that executive detention of citizens is constitutionally impermissible. Because the exigencies of seizure on a battlefield make the demands of the ordinary criminal process too unyielding, we think the plurality judged wisely in holding that Hamdi's detention was authorized by the AUMF and comported with the Constitution.

There remains a difficult question about the constitutionally permissible length of such detention. As the *Hamdi* plurality noted, detention is permitted under the laws of war for only as long as active hostilities continue. This understanding, however, imposes no effective limitation on the war on terror. We have no ready solution to this vexing problem — vexing because wartime detention has not traditionally been indefinite, because terrorists dangerous today may remain dangerous indefinitely, and because absent a clear termination to the war on terror, there is no obvious point at which to conclude that any lawful basis for detention no longer exists. We suspect, however, that a case-by-case approach over time may provide the best framework through which to address this difficult set of issues.

(b) *Padilla: A Citizen Seized in the United States*. — The practical significance of *Hamdi* is probably slight. The government subse-

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<sup>173</sup> See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 867 (2006).

<sup>174</sup> One World War II precedent, *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946), upheld the detention, as a prisoner of war, of an American citizen serving in a foreign army and captured on a foreign battlefield. See also *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (holding, in denying a challenge to the legality of a conviction by a military commission for violation of the laws of war, that an unlawful combatant's American citizenship did not afford him "any constitutional rights not accorded any other belligerent under the laws of war"); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES* app. at 265 (1971) ("There have also . . . been many trials by military tribunals on charges amounting to treason."); MARK E. NEELY, JR., *THE FATE OF LIBERTY* 38 (1991) (discussing Civil War detentions); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2106 n.271 (2005) (discussing World War II practice).

quently released Hamdi from custody,<sup>175</sup> and few other Americans are likely to be seized as enemy combatants on foreign battlefields. Much more important is the question presented but not resolved in *Padilla* — the lawfulness of the seizure and detention within the United States of an American citizen alleged to be an enemy combatant. Of the Justices on the Court when *Hamdi* and *Padilla* were decided, only Justice Breyer indicated that the factual differences between the two cases called for different outcomes.<sup>176</sup> We think Justice Breyer was correct.

On the initial question whether *Padilla*'s detention was statutorily authorized, the Court should demand a clearer, more deliberative statement than one finds in the AUMF before attributing to Congress the purpose of authorizing the indefinite detention, without criminal trial, of citizens seized within the United States and not on a battlefield. The Non-Detention Act reflects a congressional starting point: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."<sup>177</sup> Whereas the AUMF is properly read to authorize battlefield seizures and subsequent detentions of citizens, much of the congressional debate over the AUMF refers to using force overseas.<sup>178</sup> Nothing in the legislative history appears affirmatively to contemplate the use of force against citizens within the United States, outside any theater of combat.<sup>179</sup>

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<sup>175</sup> See Abigail d. Lauer, Note, *The Easy Way Out?: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927, 936–37 (2006).

<sup>176</sup> Compare *Hamdi*, 542 U.S. at 517 (plurality opinion, joined by Breyer, J.) (finding that the AUMF authorized Hamdi's detention), with *Rumsfeld v. Padilla*, 542 U.S. 426, 464 n.8 (2004) (Stevens, J., dissenting, joined, inter alios, by Breyer, J.) ("Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act prohibits — and the [AUMF] . . . does not authorize — the protracted, incommunicado detention of American citizens arrested in the United States." (citation omitted)).

It is doubtful that the *Padilla* dissenters' conclusion depended on the incommunicado nature of detention, to which neither the AUMF nor the Non-Detention Act refers. Indeed, the court of appeals' judgment that Justice Stevens deemed "consistent" with his own contained no such qualification. See *Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003).

<sup>177</sup> 18 U.S.C. § 4001(a) (2000). Others have argued that the Act does not apply to citizens who are enemy combatants, see Bradley & Goldsmith, *supra* note 174, at 2106 n.271, in part because the primary impetus for its enactment was the internment during World War II of citizens of Japanese descent who were not combatants, and in part because citizens have often been detained during previous wars. On the latter point, most citizen combatants detained in prior wars have been detained overseas, and most detained in the United States were seized in a theater of combat. More generally, neither the text nor the legislative history of the Non-Detention Act suggests that it excludes combatants.

<sup>178</sup> See, e.g., 147 CONG. REC. H5671 (daily ed. Sept. 14, 2001) (statement of Rep. Leach); *id.* at H5640 (statement of Rep. Paul); *id.* at H5639 (statement of Rep. Lantos).

<sup>179</sup> The legislative record is not altogether illuminating. The Democratic Chief Counsel of the House Committee on International Relations reports that staff members considered authorizing only the use of force abroad, but viewed that limitation (perhaps mistakenly) as unnecessary in light of references to the War Powers Act. David Abramowitz, *The President, the Congress, and*

Admittedly, the distinction between seizures on and off the battlefield finds no textual support in the AUMF. It is also true, as Professors Curtis Bradley and Jack Goldsmith have noted, that the AUMF, unlike some prior force authorizations, contains no geographic limitation, was adopted in response to an attack within the United States, and recites as one purpose the protection of citizens at home.<sup>180</sup> Nevertheless, a court in the Common Law Model has abundant reason to pause before concluding that Congress, in hastily drafted legislation, meant to authorize the indefinite detention of American citizens seized literally anywhere in the United States. We say anywhere in the United States because the areas attacked on 9/11 are not battlefields today any more than any other locale in the United States, and thus the question is whether the AUMF, without more, should be understood to have treated the entire country as effectively a war zone whenever the Executive contends that a suspect is linked to those responsible for 9/11.

For reasons that are easy to understand, the “laws of war” applicable to battlefields have always authorized a kind of rough justice, far removed from the ordinary criminal process. But the considerations that justify this relaxation of legal protections typically are absent in domestic contexts, at least when battles, in a more conventional sense, are not raging. Accordingly, the need to recognize military authority is far more limited in a situation like that in *Padilla* than it was in *Hamdi*. American law enforcement agencies, which do not police Afghan battlefields, continue to operate within the United States. These agencies have a powerful set of legal tools, adapted to the criminal process, to deploy within the United States against citizens who are suspected enemy combatants,<sup>181</sup> and the civilian courts remain open to impose criminal punishment.

One might object that our approach, which permits an alleged terrorist like *Padilla* to be detained and charged only in a civilian court, could impede the government’s capacity to extract information from terrorist suspects and to protect intelligence sources. Indeed, the evidence justifying detention of an enemy combatant may more often risk the disclosure of sensitive information when individuals are seized in the United States than when they are apprehended on battlefields abroad (when the evidence would often be personal observations of American soldiers or their allies). But these risks, real as they are, are not entirely discontinuous from similar risks regularly encountered in

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*Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 75 (2002).

<sup>180</sup> See Bradley & Goldsmith, *supra* note 174, at 2117–18.

<sup>181</sup> For one summary of such tools, see Brief of Janet Reno, et al., Amici Curiae in Support of Respondents at 3–21, *Padilla*, 542 U.S. 426 (No. 03-1027), 2004 WL 782374.

Article III courts. Cases charging other acts of domestic or international terrorism, espionage or unauthorized disclosure of classified information, or participation in international drug cartels or organized crime often rest on confidential information and sensitive techniques that might be imperiled by disclosure. The Classified Information Procedures Act,<sup>182</sup> while it does not make these difficulties disappear, at least provides a framework for dealing with them. Moreover, with respect to obtaining information from suspected terrorists in order to forestall future threats, the availability of “ordinary” legal processes — for example, detention under the material witness statute<sup>183</sup> — furnishes at least some significant opportunities for the government, as would the authorization of more extended, though not indefinite, pre-trial detention under limited conditions.<sup>184</sup>

Under these circumstances, our interpretive presumption in favor of liberty argues against reading the AUMF as authorizing the seizure, indefinite executive detention, and trial by military commission of citizens not seized on battlefields. To uphold executive detention of citizens as a routine exercise of the war powers, in the context of what threatens to be a war whose duration knows no bounds, and without a demonstrably urgent need to replace civilian law enforcement with military action, would validate a principle that would thereafter, to quote Justice Jackson’s dissent in *Korematsu*, “lie[] about like a loaded weapon” prone to misuse.<sup>185</sup> (Consider, in this respect, that the AUMF, if it permits the military to do within the United States all that it may do abroad, could be read to authorize the army to shoot American citizens thought to be associated with al Qaeda, in the same way that the military may shoot associates of al Qaeda in Afghanistan.<sup>186</sup>) We acknowledge that the line between seizures on and off the battlefield will not always be easy to draw. But the line seems important enough, and the alternative — treating every square inch of the United States as equivalent to a battlefield, perhaps forever — seems sufficiently troublesome to merit accepting the inevitable line-drawing problems.

So far our arguments have concerned the proper interpretation of the AUMF. If Congress were clearly to authorize the indefinite executive detention or military trial of citizens seized other than on a battlefield, a difficult constitutional question would be presented. As we have acknowledged, a court sensitive to Legal Process concerns should

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<sup>182</sup> 18 U.S.C. app. 3, §§ 1–16 (2000 & Supp. IV 2004).

<sup>183</sup> See 18 U.S.C.A. §§ 3142–3144 (West 2000 & Supp. 2006).

<sup>184</sup> See HEYMANN & KAYYEM, *supra* note 12, at 36–38.

<sup>185</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

<sup>186</sup> See Bradley & Goldsmith, *supra* note 174, at 2120 n.325 (noting some qualifications to any grant of authority to engage in targeted killings, without disputing the basic proposition).

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hesitate before rejecting the joint judgment of Congress and the Executive on a national security matter, but it should not regard the protection of fundamental liberties as solely or even principally the responsibility of the political branches in times of crisis.

In our view, even congressionally authorized executive detention of citizens seized in the United States, remote from any battlefield, should be deemed unconstitutional (except in very narrow circumstances discussed below) when the ordinary courts are open and the processes of the criminal law available. To a large extent, this conclusion rests on the same arguments that we advanced in urging a relatively narrow interpretation of the AUMF. Justice Jackson's concern about the political branches' retention of a "loaded weapon" acquires enhanced resonance when one imagines that an extraordinary, emergency-based validation of executive detentions might endure throughout a metaphorical war with no currently imaginable end. The war powers limit, but do not eviscerate, the fundamental right of a citizen not to be deprived indefinitely of liberty, or even life, without judicial trial.

Among the considerations that fortify us in this conclusion is that the political branches, if they believe executive detention or military trial of citizens seized within the United States to be a practical imperative, still have a final power to deploy — to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it" and to stand directly on extraconstitutional necessity. Although the judiciary should not lightly create a situation in which Congress and the President might think suspension necessary, neither should the judiciary, given its responsibilities to maintain civil liberty and the rule of law, render that emergency power essentially redundant by upholding congressionally authorized detention of citizens without criminal trial in cases not involving battlefield exigencies.

There is, admittedly, a forceful precedent-based argument against this conclusion. To begin with, there is *Korematsu*, which upheld the emergency expulsion from the West Coast of persons of Japanese descent, including citizens. But *Korematsu* is a tainted precedent, more reviled than respected. In addition, in the companion case of *Ex parte Endo*,<sup>187</sup> the Court avoided a square holding on the constitutionality of the forced detention of excluded citizens in relocation centers, ruling that Congress had not authorized detention of a citizen whose loyalty the government did not dispute.<sup>188</sup>

A different set of precedents concerns the use of military tribunals to convict citizens of war crimes committed within the United States, for, as the *Hamdi* plurality suggested, if the Executive can try citizens

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<sup>187</sup> 323 U.S. 283 (1944).

<sup>188</sup> *Id.* at 302.

for war crimes before military tribunals, then authority to detain without trial may be viewed as a lesser and included power.<sup>189</sup> But the leading cases are nearly impossible to reconcile. Strong support for our position comes from *Ex parte Milligan*,<sup>190</sup> decided just after the Civil War, in which the Court held unconstitutional a citizen's conviction by a military tribunal "under the 'laws and usages of war.'"<sup>191</sup> Such laws and usages, the five-Justice majority held, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."<sup>192</sup>

By contrast, in the World War II case of *Ex parte Quirin*, the Court unanimously upheld the military trial of an American citizen (Haupt) seized after he, along with a group of German soldiers, had infiltrated the United States. *Quirin* found that the laws of war permit the capture and detention of lawful combatants (today called prisoners of war) and the capture, detention, and military trial of unlawful combatants such as those in the case before it.

*Quirin* purported to distinguish *Milligan* on the ground that *Milligan* was not an enemy combatant under the laws of war.<sup>193</sup> That asserted distinction is flimsy, however, as *Milligan* allegedly had communicated with and aided the Confederacy and was, accordingly, charged specifically with violating "the laws of war."<sup>194</sup>

If *Quirin* and *Milligan* cannot easily be reconciled, there is force to the argument of the *Hamdi* plurality that *Quirin*, the more recent decision, should control,<sup>195</sup> despite our suggestion that *Milligan* reached the more normatively attractive position. But even if *Quirin* states the applicable law within the reach of its precedential authority, it remains an open question how broadly *Quirin* should be read. Not all Supreme Court decisions have equal authority,<sup>196</sup> and if some show the deliberative process at its finest, *Quirin* lies at the other end of the spectrum and for several reasons should be construed as narrowly as traditional techniques of legal reasoning permit.

To start with, the oral argument before the Supreme Court in *Quirin* occurred only two days after review was granted. The day after the argument, the Court issued a per curiam order denying the writ

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<sup>189</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

<sup>190</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>191</sup> *Id.* at 121.

<sup>192</sup> *Id.* Four Justices concurred on the narrower ground that the detention lacked congressional authorization, while indicating their disagreement with the majority's constitutional reasoning. *Id.* at 132-42 (Chase, C.J., concurring).

<sup>193</sup> *Ex parte Quirin*, 317 U.S. 1, 45-46 (1942).

<sup>194</sup> *Milligan*, 71 U.S. (4 Wall.) at 6.

<sup>195</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004) (plurality opinion).

<sup>196</sup> See *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

(and thus authorizing continuation of the military proceedings).<sup>197</sup> Swift trials led to the saboteurs' executions, and by the time the Court issued its opinion more than eleven weeks later, a change of view could have deeply embarrassed both the President and the Court.

A second reason to limit *Quirin's* force is that the opinion gives little attention to whether citizens should be treated differently from aliens. The government even argued that Haupt, a naturalized citizen of German birth, had effectively renounced his American citizenship by serving in the German armed forces.<sup>198</sup> In the end, the Court did not rely on that argument. But given that Haupt's citizenship was in question, that he was undeniably serving in the German army, and that he and the other German soldiers were jointly represented and jointly tried, the case is a weak reed on which to predicate broad military power to detain American citizens.<sup>199</sup> This is not a small point, for as Professor Bruce Ackerman has put it, "Only a very small percentage of the human race is composed of recognized members of the German military, but anybody can be suspected of complicity with al Qaeda."<sup>200</sup>

If more reason still were needed to read *Quirin* narrowly, it comes from accounts of the proceedings in the case. There were questionable informal meetings between the lawyers and individual Justices before the argument. At least one Justice (Frankfurter) had privately advised the Department of War to try the saboteurs before a military commission.<sup>201</sup> And the entire Court was aware of the prospect, communicated ex parte by the Attorney General, that President Roosevelt would execute the saboteurs whatever the Court decided.<sup>202</sup>

In light of all these considerations, *Quirin* should be limited essentially to its facts: the Constitution should permit executive detention of citizens for alleged violations of the laws of war only when the citizens are seized on a battlefield or — as in *Quirin* — bear unchallenged indicia of enemy combatant status. In *Quirin*, unlike *Milligan* and *Padilla*, facts either appearing in the habeas petitions or stipulated by the petitioners established that all had committed offenses punishable under the laws of war. Thus, the question whether citizens have a right not to be detained by the executive branch unless their unlawful

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<sup>197</sup> *Quirin*, 317 U.S. at 18 (reproducing the per curiam opinion in an unnumbered footnote).

<sup>198</sup> Brief for the Respondent at 86–91, *Quirin* (Nos. 1–7).

<sup>199</sup> Notably, two American citizens who collaborated with the *Quirin* saboteurs were prosecuted for treason in civilian courts. See *Haupt v. United States*, 330 U.S. 631 (1947); *Cramer v. United States*, 325 U.S. 1 (1945).

<sup>200</sup> Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1033 (2004).

<sup>201</sup> See David J. Danelski, *The Saboteurs' Case*, 1996 J. SUP. CT. HIST. 61, 69.

<sup>202</sup> See *id.*

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combatant status, if contested, has been determined by a civilian (rather than a military) court simply was not presented.

As we have stated repeatedly, our arguments ultimately rest on normative premises, which might be resisted not only on normative grounds, but also on the basis of the Agency Model's tenet that courts should avoid judgments of this kind. More specifically, a defender of the Agency Model might contend that except in cases governed by entrenched precedent, courts should adhere as closely as possible to the original understanding of constitutional language. We find this suggestion unpersuasive, however, for reasons that the dueling dissents of Justices Scalia and Thomas in *Hamdi* help to illustrate.

These dissents, especially when viewed in light of their respective authors' opinions in other cases, resonate strongly with the Agency Model. Yet the two opinions came to diametrically opposed conclusions. Justice Scalia concluded that the government, absent suspension of the writ, cannot detain a citizen as an enemy combatant without holding a criminal trial.<sup>203</sup> By contrast, Justice Thomas found that historical materials, among others, established a very broad executive prerogative to protect national security by detaining enemy combatants, subject to only minimal judicial oversight.<sup>204</sup>

Not being historians, we find it hard to judge the debate in purely historical terms. The more telling question, we think, is how judges should decide between nearly polar alternatives in a matter of high consequence if they believe that the evidence tips slightly (or even more than slightly) in favor of an outcome they consider to be deeply misguided on normative or prudential grounds. If the evidence were precisely in equipoise, surely a judge should be able to take practical considerations into account. Yet it seems almost equally clear to us that a judge should be able to take such considerations into account if the historical probabilities were 51–49 or 60–40 in favor of a position that seems currently unworkable or unwise — or even 70–30 or 80–20 if the better supported but not indubitably correct interpretation of the historical materials seems normatively or practically disastrous.

In the end, judges should acknowledge the inescapable burden of making normative judgments in assessing the constitutional validity of executive detentions of citizens seized other than on battlefields — unless and until Congress invokes its power to suspend the writ of habeas corpus. That Congress might do so is by no means unthinkable, but the conclusion that Congress has done so through apparently ordinary legislation should not be reached lightly. So solemn and momentous an act should be signaled by a clear congressional statement.

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<sup>203</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 510, 554–72 (2004) (Scalia, J., dissenting).

<sup>204</sup> See *id.* at 579–95 (Thomas, J., dissenting).

Were Congress to enact legislation suspending the writ, the question would arise whether the constitutional requisites for suspension were satisfied. In addressing that question, a court should proceed with cautious deference. Dissenting in *Hamdi*, Justice Scalia, joined by Justice Stevens, said that whether the events of 9/11 constitute an invasion and whether they justify suspension “are questions for Congress rather than this Court.”<sup>205</sup> Acceptance of this view would not necessarily place all questions relating to suspension outside of judicial bounds, as courts might still review (1) whether the branch that purported to suspend the writ possesses constitutional authority to do so, (2) whether a measure asserted to be a suspension actually is one, and (3) whether a suspension that is limited in scope (for example, in time or geography) extends to the habeas petition at issue.<sup>206</sup> Nevertheless, on the particular questions highlighted by Justice Scalia, given that the Suspension Clause contemplates legislative authority to curtail judicial power and that the justifications for suspension are necessarily military, not legal, we think that a court should intervene only in clear cases of ultra vires action.<sup>207</sup>

(c) *The General Pertinence of the Battlefield/Nonbattlefield Distinction.* — The range of possible detentions reaches beyond the facts of *Hamdi* and *Padilla*. For example, American citizens suspected of terrorism might be apprehended abroad, but away from any battlefield — on the streets of London or Damascus, for example. Without attempting to anticipate every imaginable scenario, we would follow this general principle: the central distinction for purposes of appraising the legality, and ultimately the constitutionality, of executive detentions of American citizens is between battlefield and nonbattlefield contexts, not between seizures at home and those abroad.<sup>208</sup> In all nonbattlefield cases, seizure and detention of citizens should rest on evidence that has been carefully assembled and is reasonably capable of being maintained. Accordingly, we would not read the AUMF as authorizing the indefinite executive detention of an American citizen seized anywhere other than on a battlefield. Even if Congress were plainly to

<sup>205</sup> *Id.* at 578 (Scalia, J., dissenting).

<sup>206</sup> See generally HART & WECHSLER, *supra* note 33, at 151–53 (Supp. 2006).

<sup>207</sup> For an excellent discussion, see Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

<sup>208</sup> See HEYMANN & KAYYEM, *supra* note 12, at 45. Although members of the American military can be detained based on their convictions by courts martial rather than by ordinary criminal courts, the rights of those indisputably subject to military jurisdiction are not necessarily the appropriate baseline for judging the rights of citizens suspected of terrorist activity who are neither part of the military nor seized on the battlefield. See *infra* Section V.B.3, pp. 2099–111. And because the point of the criminal process is to ascertain guilt, it is circular to argue that alleged combatants have no rights to the ordinary criminal process because they are unusually dangerous.

state its intention to authorize a broader range of executive detentions, we believe that the purported authorization should be deemed unconstitutional absent a valid suspension of the writ.

*C. The Rights of Aliens To Be Free from Executive Detention*

For a variety of reasons, the legality of military detention may depend on whether the detainee is an alien rather than a citizen. Also relevant are the locations of an alien's seizure and detention. In considering the role of habeas courts in examining the detention of aliens, we therefore examine three paradigmatic situations: seizures and detentions within the United States, seizures and detentions in foreign locales, and, finally, detention at Guantánamo Bay of aliens seized abroad.

1. *Seizures and Detentions in the United States: An Analytical Framework.* — In considering executive detentions of aliens within the United States, we begin with the framework we developed in connection with the detention of citizens. Courts should remain skeptical of claims of unilateral executive power to detain and should require strong reasons to read hasty and broadly worded legislation authorizing the use of military force as overcoming a liberty-favoring presumption. Nevertheless, a central element of our framework requires qualification in cases involving aliens: the insistence that the Criminal Law Model furnishes the primary normative as well as empirical baseline from which to assess the permissibility of executive detentions. Because the rights of aliens are in some respects less broad than those of citizens, historical practice has accepted the detention of aliens pursuant to two additional, noncriminal models to which citizens are not subject. The first of these, which might be called the Immigration Law Model, embodies the assumption that the exclusion or removal of noncitizens is a regulatory function not subject to the Criminal Law Model, and that aliens have few substantive constitutional (as opposed to statutory) rights against deportation.<sup>209</sup> As an ancillary matter, the

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<sup>209</sup> The so-called plenary power doctrine initially suggested that the decision to deport was entirely a political one, immune from judicial review. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1633–36 (1992). Over time, the Court held that aliens already in the United States possess procedural due process rights in connection with deportation proceedings. See *id.* at 1637–56.

As to aliens excluded from entry, the Supreme Court has said, somewhat notoriously, that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), and has barely retreated from that statement, see *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (reaffirming *Knauff* as to aliens seeking initial entry, while permitting a lawful permanent U.S. resident, stopped at the border after a visit to Mexico, to raise a due process claim).

Supreme Court has upheld broad governmental power to detain aliens during the pendency of proceedings to deport them.<sup>210</sup>

Second, there is the Wartime Detention Model. The Alien Enemy Act, which has been in force since 1798, provides that “[w]henver there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government,” citizens of the hostile nation may be “apprehended, restrained, secured, and removed,” and the President may determine “the manner and degree of the restraint to which they shall be subject.”<sup>211</sup> One could read the Act as little more than a specialized immigration statute, authorizing detention of alien enemies only in preparation for their deportation. In practice, however, the government has detained alien enemies under the Act at least until the termination of hostilities. As the Supreme Court noted in *Ludecke v. Watkins*, in upholding the Act as it had been enforced during World War II (when detention for periods of years was typical),<sup>212</sup> “deportations are hardly practicable” during wartime.<sup>213</sup>

We have accepted, based on our reading of pertinent precedents, that aliens have less extensive rights than citizens. But we recognize that we must assume a burden of normative persuasion to justify accepting rather than resisting that tradition. Our acceptance reflects an assumption that the Constitution is a continuing compact among the American people, established and accepted principally for the benefit of Americans. A constitution under which the government owes special obligations to its citizens can of course grant rights to noncitizens, as ours does and should. But the moral foundations for the rights of aliens are different in kind from the moral foundations of citizens’ rights, because aliens are by definition outsiders to the fair scheme of social cooperation and mutual advantage that the Constitution aims to establish among the American people. The rights of aliens, resting as they do on a different basis, can accordingly be narrower in scope.<sup>214</sup>

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<sup>210</sup> In *Demore v. Kim*, 538 U.S. 510 (2003), a closely divided Court upheld a statute providing that aliens who are removable because they have been convicted of specified crimes shall be detained during their removal proceedings and not provided an individualized hearing about dangerousness or risk of flight. The opinion’s reasoning endorsed the broader view that the government may generally detain aliens pending deportation proceedings without providing for individualized hearings. *See id.* at 526, 528, 531.

<sup>211</sup> 50 U.S.C. § 21 (2000).

<sup>212</sup> *See Sidak*, *supra* note 165, at 1422–23.

<sup>213</sup> 335 U.S. 160, 166 (1948).

<sup>214</sup> In identifying constitutional rights, our colleague Gerry Neuman argues, to the contrary, that the touchstone, in cases involving citizens and aliens alike, should be one of mutuality of obligation, and that noncitizens on whom the United States attempts to impose legal obligations should presumptively enjoy the same rights as citizens. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 990 (1991). We think it better to root thought about the rights of aliens

Although the scope of governmental authority recognized under the Immigration Law and Wartime Detention Models may have changed over time, both models have long authorized the executive detention of aliens without proof of crime and without the protections of the criminal process. These models by no means wholly displace the Criminal Law Model in assessing aliens' rights in connection with the war on terrorism. But especially in light of the Wartime Detention Model, the scope of any presumption against the constitutionality of congressionally authorized executive detention is considerably narrower for aliens than for citizens.

It is important to stress that both the Immigration Law and Wartime Detention Models depend upon congressional action. Whether an alien is subject to nonpunitive detention under either model is, accordingly, initially a question of statutory construction, which should be resolved in light of a presumption of liberty in cases involving aliens just as in cases involving citizens.<sup>215</sup>

Questions about the legality of the executive detention of aliens apprehended within the United States, as part of the fight against terrorism, are likely to arise in two contexts. One involves assertions of authority to detain aliens indefinitely as enemy combatants or to try them before military commissions. The other involves the government's regulation of immigration.

(a) *Trials by Military Commission and Indefinite Detention for Purposes Other than Deportation.* — The Military Commissions Act of 2006 (MCA) expressly authorizes the trial of aliens as war criminals before military commissions.<sup>216</sup> *Ex parte Quirin*, among other authorities, supports the validity of this provision of the MCA. Although we have criticized *Quirin* and advocated a narrow reading of its holding, contrasting it with *Milligan*, one basis of our criticism involved *Quirin*'s inadequate attention to the distinction between aliens and citizens. In addition, *Milligan*'s key passage, quoted earlier,<sup>217</sup> explicitly discusses the rights of *citizens*, to whom the Immigration Law and Wartime Detention Models do not apply. Accordingly, we believe that Congress did not act unconstitutionally in providing that aliens apprehended in the United States may be tried before military commissions for alleged war crimes.

The MCA, although concerned primarily with establishing procedures for military trials, also withdraws habeas jurisdiction over ac-

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in basic notions of decency as illuminated by our moral and legal traditions than to focus on mutuality of obligation as the invariant foundation for constitutional rights.

<sup>215</sup> See, e.g., *Barber v. Gonzales*, 347 U.S. 637, 642–43 (1954) (strictly construing a statute in order to preserve aliens' liberty interests).

<sup>216</sup> See Pub. L. No. 109-366, sec. 3, § 948d(a), 120 Stat. 2600, 2603.

<sup>217</sup> See *supra* note 192 and accompanying text.

tions by aliens whom the Executive has determined to be enemy combatants or who are awaiting such a determination — including aliens seized and detained within the United States.<sup>218</sup> In view of our presumption in favor of liberty, we would not read the MCA's *jurisdictional* limitation as an implicit *substantive* authorization for indefinite detention of aliens seized in the United States away from any battlefield.<sup>219</sup> Among other pertinent considerations, although the MCA expressly authorizes the military detention of noncitizens in connection with trials and convictions for war crimes, the Act contains no parallel authorization for simple detention of aliens within the United States as enemy combatants.

Nor do we believe that the AUMF, enacted five years before the MCA, provides the necessary statutory authorization for the indefinite detention of aliens apprehended within the United States. It might be suggested that the authorization to deploy force against terrorist groups primarily located abroad implies an authorization to detain supporters or at least members of those groups seized in the United States. This is a plausible reading of the AUMF, but not a necessary one, and it should be rejected under our framework's presumption against reading statutes to authorize restrictions of liberty. Acceptance of our view would leave the government with at least two options: criminal trial, which could occur before a military commission, or deportation.<sup>220</sup>

A clear congressional authorization of executive detention of aliens as enemy combatants would be a different matter. If, under *Ludecke*, the Constitution permits the wartime detention of aliens based only on their citizenship and their presumed allegiance to a hostile nation, it should also permit detention of aliens who have been individually determined to be enemy combatants.<sup>221</sup> Because deportation would not prevent an enemy combatant from engaging in further hostilities against the United States, it would not be an adequate substitute for detention.

<sup>218</sup> Sec. 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)(1)).

<sup>219</sup> There are, admittedly, some contrary indications in the legislative history of the MCA. *See, e.g.*, 152 CONG. REC. S10419 (daily ed. Sept. 28, 2006) (statement of Sen. Reid); 152 CONG. REC. S10364 (daily ed. Sept. 28, 2006) (statement of Sen. Gordon Smith); 152 CONG. REC. S10270 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl); 152 CONG. REC. S10256 (daily ed. Sept. 27, 2006) (statement of Sen. Leahy).

<sup>220</sup> On this view, were the United States unlawfully to detain an alien seized in the United States away from a battlefield, the question would arise where, in light of the DTA and MCA, the alien could obtain judicial review of the unlawful detention. For discussion, see *supra* Section III.B.4.a, pp. 2061–63.

<sup>221</sup> *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 223 (1953) (Jackson, J., dissenting) (“If due process will permit confinement of resident aliens friendly in fact because of imputed hostility, I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us.”).

But congressional power to authorize the detention of enemy aliens, even if clearly exercised, is subject to two conditions. First, the determination that a particular alien in fact is an enemy combatant must occur under constitutionally adequate procedures and must be subject to judicial review — matters we discuss in Part V. Second, the definition of “enemy combatant” must be reasonable as measured against traditional practices.

The MCA defines an “unlawful enemy combatant,” for purposes of the jurisdiction to prosecute war crimes, as:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant . . . ; or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>222</sup>

On first glance, the absence in subsection (ii) of any limit on the definition employed by a CSRT is troublesome and, indeed, might be read as depriving subsection (i) of any real bite. However, the entire definition applies only “in this chapter,” the stated purpose of which is to “establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.”<sup>223</sup> A subsequent provision of the MCA tracks subsection (ii) of the definition, providing that “[a] finding . . . by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.”<sup>224</sup> Thus, when subsection (ii) is read in light of the statute as a whole, it appears only to preclude a challenge before a military commission to its authority to conduct a trial when a CSRT has previously determined that the defendant is an enemy combatant. Although the Act could be clearer, its requirement that the commission members find guilt beyond a reasonable doubt<sup>225</sup> presumably extends to enemy combatant status as defined by subsection (i). On this interpretation, subsection (ii) would appear to be constitutional.

As for the definition’s subsection (i), constitutional difficulties would arise only if the government, in a war crimes prosecution,

<sup>222</sup> Sec. 3, § 948a(1)(A), 120 Stat. at 2601.

<sup>223</sup> *Id.* § 948b(a), 120 Stat. at 2602.

<sup>224</sup> *Id.* § 948d(c), 120 Stat. at 2603.

<sup>225</sup> *See id.* § 949(c), 120 Stat. at 2616.

adopted an overly broad interpretation of what counts as “purposefully and materially support[ing] hostilities against the United States.” We would not assume, however, that the government will do so, and it would be impossible to anticipate every issue of line-drawing to which a broad interpretation might give rise.

(b) *Detention Pursuant to the Immigration Function.* — In the aftermath of 9/11, the government detained more than a thousand aliens while it conducted investigations, purportedly of immigration violations.<sup>226</sup> This use of the immigration power is troubling,<sup>227</sup> but, as noted, the Constitution and immigration laws permit noncriminal, nonpunitive detention of aliens as part of the deportation process.<sup>228</sup> Even within the criminal process, governmental actions that are objectively reasonable for one purpose generally are not invalid because the true purpose of officials was different,<sup>229</sup> and there is little basis for thinking that the Constitution imposes greater motive-based restrictions on enforcement of the immigration laws than criminal laws.<sup>230</sup>

Following the conclusion of an investigation, the government may detain an alien pending deportation, but serious constitutional issues arise when such detention threatens to extend beyond the ordinary course — as when no other country will accept a deportable alien, making detention pending deportation effectively permanent. In *Zadvydas v. Davis*,<sup>231</sup> the Court, operating very much in the common law mode, ruled that Congress had authorized detention pending deportation only for a reasonable length of time, not indefinitely — even though the statute included no time limit.<sup>232</sup> Prudently, however, *Zadvydas* reserved the question whether the balance of interests would differ in the case of a terrorist.<sup>233</sup> In such a case we think that the balance would indeed be different and that indefinite detention should be permissible, provided that fair procedures for assigning the “terrorist” label were provided.

2. *Aliens Seized and Held Outside the Territorial Jurisdiction of the United States.* — However one resolves the difficult question of the extent to which aliens outside U.S. territory possess constitutional

<sup>226</sup> DAVID COLE, ENEMY ALIENS 22–26 (2003).

<sup>227</sup> See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–65 (2002) (describing incommunicado detentions, secret adjudicative proceedings, and some instances of detention without charges or continuing detention when deportation was feasible); Martin, *supra* note 163, at 310–18 (same).

<sup>228</sup> See *supra* pp 2082–83.

<sup>229</sup> See, e.g., *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

<sup>230</sup> See Martin, *supra* note 163, at 309. We put to one side issues about how long an alien may be detained in connection with an investigation of violations of the immigration laws.

<sup>231</sup> 533 U.S. 678 (2001).

<sup>232</sup> See *id.* at 689.

<sup>233</sup> See *id.* at 696.

rights, it is clear that the Constitution does not protect them from executive detention as enemy combatants or from military trial for war crimes. This conclusion follows from *Ludecke*, which suggested that aliens have no substantive constitutional right to be free from detention pursuant to the Wartime Detention Model.<sup>234</sup> It emerges even more unmistakably from *In re Yamashita*,<sup>235</sup> which upheld the use of a military commission to try an alien for war crimes even after the cessation of hostilities.<sup>236</sup>

3. *Aliens Seized Outside the United States and Held at Guantánamo Bay.* — In *Hamdan*, the Supreme Court conducted a classic habeas corpus inquiry into whether executive detention was authorized by law. The narrow question was whether an alien seized outside the United States and detained at Guantánamo Bay could be tried for war crimes before a military commission. The Court ruled that Congress had not authorized trial before the kind of tribunal established by the military but, on the contrary, had prohibited it.

Although the Court had to resolve a number of questions, many of which were extremely difficult,<sup>237</sup> to reach that outcome, the decision's thrust — upholding the petitioner's claims based on an absence of congressional authorization for the challenged detention — finds support within our framework and, more generally, within the Common Law Model of habeas corpus adjudication. Consistent with our interpretive presumption against infringements of liberty,<sup>238</sup> the *Hamdan* Court refused to read the general language of the AUMF as overriding other statutes regulating the use of military commissions.<sup>239</sup> At the same time, however, the Court appeared to assume that the AUMF did authorize the nonpunitive detention of Hamdan as an enemy combatant.<sup>240</sup> On that assumption, no serious exigency argued against the Court's insistence on clearer evidence of statutory authorization for a

<sup>234</sup> See *supra* Section IV.C.1, pp. 2082–87.

<sup>235</sup> 327 U.S. 1 (1946).

<sup>236</sup> *Id.* at 25.

<sup>237</sup> See Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. (forthcoming 2007) (manuscript at 17), available at [http://ssrn.com/abstract\\_id=922406](http://ssrn.com/abstract_id=922406).

<sup>238</sup> Although *Hamdan* was not detained within the fifty states, at least some form of the presumption of liberty appropriately extends to territories under permanent American control. In *Duncan v. Kahanamoku*, 327 U.S. 304, 319–24 (1946), the Supreme Court relied on general principles and practices drawn from our cultural and political institutions in holding that a statutory authorization of martial law in Hawaii, which was then a territory, should not be read to permit the military trial for routine crimes of individuals who were neither connected with the military nor alleged to be enemies.

<sup>239</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774–75 (2006).

<sup>240</sup> See *id.* at 2798. The Court's approach in *Hamdan* might have invited arguments that Congress authorized the detention of enemy combatants only in accordance with international law, but Congress has since foreclosed jurisdiction over claims based on the Geneva Convention. See MCA, Pub. L. No. 109-366, sec. 5(a), 120 Stat. 2600, 2631 (2006).

military trial, for that insistence did not require Hamdan's release.<sup>241</sup> In addition, the decision left open the possibility that Congress could change the outcome if it so desired. Justice Breyer's concurring opinion well described both *Hamdan's* effect and its Legal Process aspirations:

Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine — through democratic means — how best to do so.<sup>242</sup>

The President and Congress accepted Justice Breyer's invitation, and the MCA now provides the statutory authorization for trials of aliens before military commissions that the *Hamdan* Court had found lacking. That statutory authorization raises no constitutional issue on its face. As we have noted, aliens have no general constitutional immunity from congressionally authorized detention as enemy combatants or from trials by military commission for war crimes, either within the United States or in American-occupied territory abroad. There is no reason why a different rule should apply at Guantánamo Bay.

## V. PROCEDURAL RIGHTS

In this Part we discuss two clusters of procedural questions. First, when the executive branch conducts an inquiry into whether an individual is subject to detention as an enemy combatant or is guilty of war crimes, and imposes detention or punishment accordingly, what procedural protections must the Executive provide? Second, when a habeas court (or a court exercising a jurisdiction that Congress has substituted for habeas corpus) reviews a determination already made by the Executive, what is the appropriate scope of review?

In addressing these questions, we paint with an especially broad brush. It would be impossible to deal with every procedural issue that might arise within the myriad categories of cases that our prior analysis distinguished. Although those categories remain relevant, our discussion in this Part is more thematic and illustrative than comprehensive.

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<sup>241</sup> See *Hamdan*, 126 S. Ct. at 2785, 2793 (stressing lack of military necessity); Sunstein, *supra* note 237, at 24.

<sup>242</sup> *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

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A. *Procedural Rights Before Administrative Decisionmakers*

1. *A Conceptual Introduction.* — As our earlier discussion suggested, a person subjected to executive detention or to trial by a military commission can claim procedural rights from various sources. First, statutes, treaties, or executive orders may confer procedural rights. To take just one example, although we have discussed *Hamdan* as a substantive holding about the legality of detention, one could assign *Hamdan* to the procedural category, as the Supreme Court did not hold that *Hamdan* was immune from military prosecution, but only that the commission established by the Executive failed to provide congressionally mandated procedural protections. Second, a detainee may possess constitutional rights to fair procedures. Determining the scope of those constitutional rights is a complex challenge in view of the large range of potentially pertinent variables, some of which we noted in our earlier discussion of substantive rights. Those variables include:

- whether a detainee is a citizen or an alien;
- whether an alien detained and held abroad has significant contacts with the United States that might justify recognition of constitutional rights;
- where the seizure was effected — in the United States or abroad, and on or off a battlefield;
- where a petitioner is currently detained — in the United States, in another nation, or at Guantánamo Bay; and
- whether the claimed rights find support in historical practice, precedent, or the due process balancing framework of *Mathews v. Eldridge*.<sup>243</sup>

2. *Hamdi and Hamdan.* — In both *Hamdi* and *Hamdan*, the Supreme Court considered detainees' procedural rights. Each decision furnishes a case study of the application of the Common Law Model in light of concerns involving comparative institutional expertise.

In *Hamdi*, after upholding the legality of the military detention of an American citizen seized on an Afghan battlefield, the plurality considered what procedures the government must follow in order to establish that the detainee really was an enemy combatant — rather than, for example, a relief worker unconnected to the Taliban or al Qaeda (as *Hamdi's* father claimed). With no statute or precedent furnishing a clear answer, the *Hamdi* plurality deployed the balancing framework of *Mathews v. Eldridge*. Justice O'Connor's opinion first emphasized

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<sup>243</sup> See 424 U.S. 319, 347–49 (1976).

the “elemental” nature of a citizen’s interest in freedom from indefinite military detention and noted that “an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present” any national security hazard.<sup>244</sup> But the opinion also took account of competing governmental interests not only in detaining enemy combatants but also in avoiding trial-like processes that would distract military officers engaged in distant battles and “intrude on sensitive secrets of national defense.”<sup>245</sup> Rejecting the rudimentary process previously provided by the government as insufficient, the plurality concluded that due process requires that “a citizen-detainee . . . receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>246</sup> It further held, however, that hearsay evidence could be admitted and that in some circumstances the detainee could have the burden of rebutting the government’s evidence.<sup>247</sup>

In dissent, Justice Scalia sharply disagreed with the Court’s approach. Deriding the plurality’s “Mr. Fix-it Mentality,”<sup>248</sup> he argued that the Court, after finding that the Executive had failed to afford due process to Hamdi, should simply have ordered Hamdi’s release. According to Justice Scalia, the plurality overstepped when it outlined an alternative process that would pass constitutional muster.

His view was too cramped. Had the Court simply ordered Hamdi’s release, executive officials could have rearrested him immediately and then put a new procedural scheme into place. Were that second scheme also found deficient, the government could have repeated the exercise as often as necessary until it developed an acceptable set of procedures. That scenario would have disserved both the government and Yaser Hamdi. Instead, the Court appropriately assumed a responsibility to apprise the President and Congress of what the Constitution minimally requires, while leaving the political branches considerable room for maneuver.<sup>249</sup>

Although we thus approve of the plurality’s basic approach in *Hamdi*, its opinion is regrettably unclear on crucial points, including the burden of persuasion that the government must meet to justify detaining an American citizen as an enemy combatant. The ambiguity

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<sup>244</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–30 (2004) (plurality opinion).

<sup>245</sup> *Id.* at 531–32.

<sup>246</sup> *Id.* at 533.

<sup>247</sup> *Id.* at 533–34.

<sup>248</sup> *Id.* at 576 (Scalia, J., dissenting).

<sup>249</sup> In a similar fashion, federal habeas courts, after ruling that constitutional errors infected a state prisoner’s trial, typically do not order immediate release but instead permit the state to maintain custody in order to hold a retrial. *See, e.g., Fay v. Noia*, 372 U.S. 391, 440 n.45 (1963).

arises from the assertions that there could be “a presumption in favor of the Government’s evidence” and that “once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut the evidence with more persuasive evidence that he falls outside the criteria.”<sup>250</sup> If the reference to “credible evidence” requires the government to present evidence that, standing alone, makes it more likely than not that the petitioner was an enemy combatant, then what the plurality labels a presumption would not ultimately affect the burden of persuasion. Authorizing detention on the basis of proof by a mere preponderance is not untroubling, especially when the detention may be indefinite and prolonged, but in the end detention on that basis seems to us to be acceptable in view of the difficulties of collecting and preserving evidence in battlefield conditions.

But a competing interpretation would make “the presumption in favor of the Government’s evidence” more significant and, in our judgment, legally objectionable. On this view, once the government puts forth credible evidence establishing, for example, a thirty-percent likelihood that a citizen was an enemy combatant, the citizen could be presumed to fit within that category, and the presumption would stand unless the citizen could offer more persuasive evidence to the contrary. Such an approach might be permissible in the midst of battle; the military might legitimately detain persons on the battlefield in the face of considerable uncertainty about whether they were responsible, for example, for a recent attack on American forces. But when an American citizen initially detained on the battlefield is eventually brought before a military tribunal for a determination of the justifiability of detention that may extend for years, the balance is quite different. Indeed, given the normative pull of the criminal law baseline, it remains unsettling to uphold detention when it is only barely more likely than not that the citizen is an enemy combatant.<sup>251</sup> We would accordingly read *Hamdi*’s discussion of evidentiary presumptions and shifting burdens of proof as holding that due process forbids the government to detain an American citizen as an enemy combatant unless its evidentiary showing, when combined with whatever inference might reasonably be drawn from the petitioner’s inability to rebut the government’s proof,

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<sup>250</sup> *Hamdi*, 542 U.S. at 534 (plurality opinion).

<sup>251</sup> When persons are detained for potentially long periods outside of the criminal process, courts have often insisted on proof by at least clear and convincing evidence. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 427, 433 (1979) (civil commitment of the mentally ill); *see also* *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (invalidating detention of insanity acquittees who are no longer mentally ill because the statute provided no adversary hearing at which the individual’s dangerousness must be established by clear and convincing evidence); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (stressing the statutory requirement of proof by clear and convincing evidence in upholding preventive pretrial detention of criminal defendants).

establishes that the petitioner is more likely than not to be an enemy combatant. Anxiety about the permissibility, even under this standard, of prolonged detention of citizens fortifies our judgment, expressed above,<sup>252</sup> that the Constitution should not permit the noncriminal detention of citizens as enemy combatants, absent proof that they were in fact seized under battlefield conditions. Actual (rather than presumed) proof of enemy combatant status, by a preponderance of the evidence, thus seems to us the minimum necessary.<sup>253</sup>

*Hamdan* also exemplifies the Common Law Model's approach to procedural questions. The decision's principal effect was to invite Congress to determine whether to authorize military trials that depart significantly from procedural norms that the Court understood to have been incorporated into statutes governing military commissions. Unlike in *Hamdi*, the Court could rest on a statutory ground, and with *Hamdan* securely in lawful detention in any event, there was less need for immediate guidance and therefore greater benefit in deferring potentially difficult questions that might arise in future litigation. One such question concerned whether the Geneva Conventions, which plainly constitute promises by their signatories to other signatory nations, also create individual rights enforceable in American courts.<sup>254</sup> Another looming question at the time of the *Hamdan* decision involved the procedural rights, if any, that Guantánamo detainees possess under the Due Process Clause.

Congress's subsequent enactment of the Military Commissions Act of 2006 (MCA) answers the first question and partially reframes the second. The MCA's section 5(a) provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto [as a source of rights] in any habeas corpus or other civil action . . . to which the United States [or any current or former official or agent] is a party."<sup>255</sup> As

<sup>252</sup> See *supra* pp. 2077–81.

<sup>253</sup> It is not clear that the government would follow the more troublesome interpretation of the language in *Hamdi*. Although neither the Executive's orders nor the congressional legislation adopted after 9/11 established procedural rules governing the detention of *citizens* as enemy combatants, such rules have been put in place for *aliens*. The Defense Department's rules for CSRT proceedings establish a more limited kind of presumption — that the government's evidence of enemy combatant status is "genuine and accurate." Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al., Enclosure 1, para. G(11) (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (regarding "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants" detained at Guantánamo Bay).

<sup>254</sup> *Hamdan* did not hold that the Geneva Conventions *directly* create rights cognizable in an American court, but only that congressional statutes authorizing the use of military commissions had incorporated limitations drawn from the Geneva Conventions into American law. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006).

<sup>255</sup> Pub. L. No. 109-366, sec. 5(a), 120 Stat. 2600, 2631 (2006). A different provision of the MCA precludes "alien unlawful enemy combatants subject to trial by military commission" from invoking the Geneva Conventions as a source of rights. See *id.* sec. 3, § 948b(g), 120 Stat. at 2602.

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a matter of U.S. domestic law, Congress unquestionably may limit or preclude judicial enforcement of rights under international conventions.

The MCA also establishes a framework, including a number of statutory rights, to govern trials of alien detainees as war criminals before military commissions. Only after the applicable statutory provisions have been interpreted will any questions arise about whether the Constitution mandates further procedural safeguards.

The MCA does not, however, create a similar procedural regime for administrative determinations of whether an alien detainee is in fact an “enemy combatant” subject to nonpunitive detention. To date, the procedures followed by Combatant Status Review Tribunals (CSRTs) depend principally on the executive orders constituting them.

It is impossible to anticipate all of the issues of statutory interpretation that might arise under the MCA and all of the constitutional procedural issues that may present themselves either in war crimes trials before military commissions or in proceedings to determine whether particular aliens may be detained as enemy combatants. Although we recognize the vast potential importance of those questions, we put all but the largest of them to one side. It does, however, lie within the scope of our project to say a few words about the largest impending question: do the Guantánamo detainees possess any procedural rights at all under the Constitution, and, if so, are they coextensive with the rights that aliens possess in proceedings within U.S. territory?

In addressing this question, we begin by recalling the established law that citizens enjoy due process rights whether their seizures and detentions occur at home or abroad<sup>256</sup> and that aliens enjoy such rights when seized or detained within the United States.<sup>257</sup> We have also argued, however, that an alien seized and detained abroad ordinarily does not possess any constitutional rights, at least absent more extensive contacts with the United States than result merely from detention.<sup>258</sup> If this last conclusion is correct, the question becomes whether an alien seized abroad acquires procedural due process rights as a result of being relocated to Guantánamo Bay.

As we signaled in arguing that the Suspension and Due Process Clauses mandate the availability of habeas corpus jurisdiction for Guantánamo detainees, we believe that Guantánamo Bay is sufficiently similar, functionally, to American territory that at least *fundamental* constitutional rights extend to all who are held there. We put the point in this qualified way because of a traditional understanding,

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<sup>256</sup> See *supra* Section III.A.2, pp. 2053–55.

<sup>257</sup> See *supra* Section IV.C.1, pp. 2082–87.

<sup>258</sup> See *supra* Section IV.C.2, pp. 2087–88.

associated with the *Insular Cases*,<sup>259</sup> that in territory subject to the sovereign authority of the United States but not marked for subsequent incorporation as a state, only “fundamental” constitutional rights apply. So long as that understanding prevails, it would be hard to defend a broader extension of constitutional rights to alien detainees at Guantánamo Bay — though it would be similarly unacceptable, we think, for the government to be wholly free from constitutional restraint in its treatment of aliens whom it has transported to a locale over which it exerts exclusive and apparently permanent control. If we are right, it will fall to the courts to identify “fundamental” rights to fair administrative procedures before both military commissions and CSRTs at Guantánamo Bay.

*B. The Scope of Habeas Corpus Review of Executive Determinations*

A different kind of procedural question arises in habeas actions challenging the prior determination of executive officials that the petitioner is an enemy combatant subject to detention or is properly subject to trial or punishment for war crimes. Within a familiar typology, the executive determinations may include (1) pure questions of constitutional or subconstitutional law, (2) issues of fact, and (3) “mixed” questions involving the application of legal principles to the facts as found.<sup>260</sup> Although this typology draws categorical distinctions among issues more properly arrayed along a continuum, it is nonetheless useful in organizing thought, and we shall structure much of our discussion around it.

With respect to any issue that executive officials have decided within any of these categories, a court exercising habeas jurisdiction immediately confronts a “scope of review” question: it could, for example, make an independent determination with no deference to the prior executive judgment, exercise review but exhibit some deference, or defer completely by withholding review of the issue altogether. It was with scope-of-review questions such as these in mind that we said, in Part III, that whereas a determination that a court lacks jurisdiction functions as an “off” switch, the meaning of the corresponding “on” position is less categorical, for a habeas court possessing jurisdiction must still determine how searchingly to examine the various issues that a petition presents.

The appropriate scope of review on any particular issue depends in the first instance on what the habeas statute requires. But absent clear statutory guidance, habeas courts have mostly operated within the Common Law Model, fusing a commitment to the protection of liberty

<sup>259</sup> See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 311–12 (1922).

<sup>260</sup> See generally HART & SACKS, *supra* note 7, at 350–51.

with a flexible spirit attentive to institutional realities and the balance of equities.<sup>261</sup> Congress has occasionally responded by specifying either broader or narrower review than the courts had previously extended.<sup>262</sup> The Detainee Treatment Act of 2005 (DTA) is a recent congressional intervention in this mode. Among other provisions, it specifies that the scope of judicial review applicable to the decisions both of CSRTs and of military commissions following criminal trials “shall be limited to” whether the challenged decision was consistent with applicable statutory and administrative standards and, to the extent that it applies, the Constitution.<sup>263</sup> Even when Congress intervenes, however, its interventions require interpretation. And as we have suggested, statutory interpretation is often informed by constitutional questions about the minimum scope of judicial review required by the Suspension and Due Process Clauses.

We begin this Section by extracting from historic practice a set of themes that should, we argue, guide the analysis of scope-of-review questions. We then apply those principles in discussing the appropriate scope of review, within the current statutory framework, of pure questions of law, questions of fact, and mixed questions of law and fact.

1. *The Lessons of Traditional Habeas Practice.* — We have already noted the Supreme Court’s dictum in *St. Cyr* that the Suspension Clause requires the federal courts to exercise a habeas jurisdiction at least as broad as that which existed in 1789.<sup>264</sup> But efforts to reconstruct historical practice with respect to most kinds of habeas proceedings founder quickly, for surviving records are fragmentary and practices were not consistent<sup>265</sup> and shifted over time. In an otherwise variegated historical practice, one repeatedly encounters the theme that habeas review is limited to questions of jurisdiction.<sup>266</sup> Yet the notion of jurisdiction reflected in many decisions is barely recognizable to a modern lawyer. In *Ex parte Quirin*, for example, the review of the military commission’s “jurisdiction” encompassed whether the prosecu-

<sup>261</sup> See, e.g., *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“[H]abeas corpus is, at its core, an equitable remedy . . .”).

<sup>262</sup> See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 302, 310 (codified at 8 U.S.C.A. § 1252(a)(5) (West 2005)) (eliminating federal habeas corpus jurisdiction in immigration cases and instead providing for limited review of removal decisions in the courts of appeals); *Brown v. Allen*, 344 U.S. 443, 499 (1953) (opinion of Frankfurter, J.) (arguing, albeit controversially, that Congress’s 1867 amendment of the habeas jurisdiction broadly expanded the scope of review of petitions by persons in custody pursuant to criminal convictions).

<sup>263</sup> Pub. L. No. 109-148, div. A, § 1005(e)(2)(C), 119 Stat. 2739, 2742.

<sup>264</sup> See *supra* Section III.A.1.a, pp. 2050–51.

<sup>265</sup> See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 98–115 (1980).

<sup>266</sup> See, e.g., *Whelchel v. McDonald*, 340 U.S. 122, 123–24 (1950); *Ex parte Reed*, 100 U.S. 13, 21–23 (1879).

tion had been authorized by the President under authority vested in him by Congress; whether the commission's power to try violations of the laws of war extended to the circumstances presented; and whether the right to trial by jury applied.<sup>267</sup> Over time, "jurisdictional" questions have become increasingly difficult to distinguish from simple questions of legal correctness.<sup>268</sup> This is not to say that the jurisdictional theme has no importance; habeas courts have found numerous claims of violation of federal law not to be cognizable on the basis that they are not jurisdictional.<sup>269</sup> Nevertheless, incantation of the jurisdictional limitation, without more, furnishes a misleading guide to historical practice.

It would be more accurate to say that courts have traditionally pursued a pragmatically adaptive approach and have sometimes, pursuant to the jurisdictional label, limited the bases for habeas relief to those that are fundamental. Although that approach has not always resulted in clear rules, patterns are nevertheless discernible. Among these patterns, detentions not justified by any real hearing (for example, pursuant to a simple arrest) have generally been subject to more searching inquiry than detentions attended by more procedural safeguards.<sup>270</sup> Even when detentions were premised on prior judicial action, the scope of review, though hard to summarize, has depended upon the nature of the earlier adjudicative proceeding: challenges to pretrial detention in criminal cases, in which only a magistrate had decided the factual issue, have received more searching review than challenges after a full trial had resolved the contested issues.<sup>271</sup> Similarly, review of challenges to the "jurisdiction" of an inferior court, which had a limited statutory authority and did not necessarily follow common law procedures, has often approached review of the merits and thus has been more intensive than the review of the "jurisdiction" of superior courts.<sup>272</sup>

In modern habeas practice, too, the scope of review has often turned on the quality of the prior proceeding. In review of state

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<sup>267</sup> 317 U.S. 1, 29-48 (1942); see also, e.g., *McClaghry v. Deming*, 186 U.S. 49, 53-54 (1902) (treating as jurisdictional the petitioner's objection to the composition of a court martial entirely of officers of the regular army to try a defendant from the volunteer army, in violation of the Articles of War).

<sup>268</sup> See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 389-90 (1965). Review of detentions arising from ordinary criminal convictions witnessed a similar expansion of the jurisdictional concept. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045-55 (1970) [hereinafter *Developments*].

<sup>269</sup> See, e.g., *Developments*, *supra* note 268, at 1212 n.20.

<sup>270</sup> See Neuman, *supra* note 104, at 985.

<sup>271</sup> See Dallin H. Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451, 456-57 (1965).

<sup>272</sup> See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 204, 209 (1830); see also Neuman, *supra* note 104, at 981-84; Woolhandler, *supra* note 42, at 589.

criminal convictions, federal habeas jurisdiction follows a state court trial that is presumptively full and fair. Nonetheless, the degree of deference that judges have accorded to prior state determinations has frequently depended on the quality of the state proceedings.<sup>273</sup>

2. *An Analytical Framework.* — Although cases involving the scope of habeas review resist summarization in clear rules, they suggest the recurring pertinence of factors that collectively furnish the foundations for an analytical framework. As with our proposed framework for considering whether the Constitution permits executive detention at all, none of the relevant factors will necessarily prove determinative in a particular case. The need for context-sensitive judgments remains unavoidable. Nonetheless, general precepts can usefully frame analysis. Pertinent factors include:

- *Quality of the proceeding of which review is sought.* As just noted, the appropriate scope of review often depends on the nature of the prior executive proceeding, which may be quite rudimentary (a decision by a law enforcement or military official in the field, without opportunity for the detainee to participate) or relatively elaborate (the judgment of a military commission after an adversarial trial, with further review by executive officials or military courts).

- *Comparative judicial expertise in resolving particular kinds of questions.* In general, judicial expertise is especially strong in resolving pure questions of constitutional and statutory law<sup>274</sup> (although claims that courts should defer to executive interpretations of statutes sometimes have considerable force). As to factual disputes not inherently bound up with law, generalizations are difficult. The comparative competence of courts and the Executive may vary based on the nature of the issue. In addition, ancillary concerns such as the need to preserve the confidentiality of classified information may come into play.

- *The nationality of the petitioner.* Supreme Court precedents suggest that rights to review on habeas, presumably including rights to review of a particularly searching scope, are sometimes broader for citizens than for aliens.<sup>275</sup>

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<sup>273</sup> See HART & WECHSLER, *supra* note 33, at 1353–55. This analogy is only suggestive, as few believe that post-conviction federal review is constitutionally necessary, *see id.* at 1291–92, whereas federal administrative determinations often are viewed as constitutionally legitimate only if sufficient review in an Article III court is available, *see* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

<sup>274</sup> See, e.g., BERNARD SCHWARTZ, ADMINISTRATIVE LAW 634 (3d ed. 1991).

<sup>275</sup> Compare *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding that an alien detained abroad has no right to habeas corpus), with *Burns v. Wilson*, 346 U.S. 137 (1953) (exercising habeas jurisdiction to entertain claims brought by a citizen detained abroad).

• *Exigency.* Especially when detention is undertaken on battlefields or otherwise as a part of military action, exigency matters. No one believes that there is a constitutional right to habeas review before a soldier captures a suspected enemy combatant in a theater of combat, even though the captive might not be a combatant in fact.

3. *The Appropriate Scope of Review.* — (a) *Pure Questions of Constitutional and Subconstitutional Law.* — In *St. Cyr*, the Court came close to holding that the petitioner, an alien seized and detained within the United States, was constitutionally entitled to review not merely of constitutional but also of statutory questions underlying his claim of unlawful detention.<sup>276</sup> And in *Hamdi*, although the Court divided on whether the petitioner's detention was authorized by the AUMF (or instead forbidden by the Non-Detention Act) and on whether detention, if authorized, comported with the Constitution, all of the opinions presupposed that a habeas court should analyze those questions de novo.<sup>277</sup> *St. Cyr's* understanding that the core function of habeas review is to ensure judicial determination of fundamental legal issues — statutory as well as constitutional — is not unique. In *Ludecke*, for example, the Court indicated that a petitioner detained under the Alien Enemy Act could litigate the statute's validity and construction in a habeas corpus proceeding.<sup>278</sup>

One possible exception to this pattern involves habeas review of court-martial determinations. In a 1953 decision, *Burns v. Wilson*,<sup>279</sup> a plurality of four Justices suggested that habeas review of constitutional challenges to court-martial proceedings extends only to ensuring that the military court “fully and fairly” considered the challenge,<sup>280</sup> while Justice Minton opined that the habeas court should limit itself to determining the court martial's jurisdiction, narrowly conceived.<sup>281</sup> With *Burns* the last Supreme Court decision directly to address this question,<sup>282</sup> lower courts have interpreted the scope of review in a va-

<sup>276</sup> See *INS v. St. Cyr*, 533 U.S. 289, 304–14 (2001).

<sup>277</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 573–74 (Scalia, J., dissenting). Even Justice Thomas, who alone would have upheld *Hamdi's* detention without further proceedings, agreed that the Court must ascertain whether the Executive was lawfully authorized to detain. See *id.* at 585–89 (Thomas, J., dissenting).

<sup>278</sup> *Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

<sup>279</sup> 346 U.S. 137 (1953).

<sup>280</sup> *Id.* at 142 (plurality opinion).

<sup>281</sup> *Id.* at 147 (Minton, J., concurring in the result).

<sup>282</sup> *Middendorf v. Henry*, 425 U.S. 25 (1976), did review and reject a claim that denial of counsel in a summary court martial violated the Sixth Amendment, *id.* at 33–42, but the very absence of counsel at issue may have brought the case outside of the scope of *Burns*. *Parker v. Levy*, 417 U.S. 733 (1974), rejected on the merits a First Amendment challenge to a court-martial conviction, adding that other issues, “to the extent that they are open on federal habeas corpus review of court-martial convictions under *Burns*,” should be considered by the courts below, *id.* at 762.

riety of ways, with some circuits providing less than de novo review of legal issues.<sup>283</sup> But even if that approach were deemed appropriate, three considerations distinguish the court-martial setting from executive detention in connection with the war on terrorism.

First, by the time of the *Burns* decision, the Uniform Code of Military Justice had established a rather elaborate adversary process: “Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused’s own choosing, and the right to secure witnesses and prepare an adequate defense.”<sup>284</sup> Since *Burns*, protections have broadened further, including initial review of judgments by military courts of criminal appeals and then discretionary review before the Court of Appeals for the Armed Forces, an independent court staffed by civilian judges.<sup>285</sup> No military tribunal to be used in connection with the war on terror provides as broad a set of safeguards. The procedural protections afforded in connection with the decision to detain someone as an alien combatant are rudimentary at best,<sup>286</sup> while under the MCA, military commissions provide some, but not all, of the protections afforded in court-martial proceedings.<sup>287</sup>

Second, courts martial are part of a distinctive system mixing punishment with the maintenance of military discipline, in which civilian interference may pose a special threat.<sup>288</sup> Finally, judicial review has been narrower when an individual is concededly under military con-

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<sup>283</sup> See John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387, 1399–1402 (2004).

<sup>284</sup> *Burns*, 346 U.S. at 141 (plurality opinion).

<sup>285</sup> See 10 U.S.C. § 867 (2000).

<sup>286</sup> The Defense Department Order provides detainees with a military officer (who need not be a lawyer) as a personal representative, permits that representative access only to information that is “reasonably available,” denies the detainee the right to review classified information, does not protect the members of the CSRT from command influence, provides no basis for challenging members for cause, does not require the government to disclose exculpatory evidence, permits exclusion of the detainee from the hearing when national security so requires, permits the detainee to call witnesses only “if reasonably available” within the judgment of the tribunal (and to call members of American armed forces only if their commanders determine that their presence would not impede military operations), declares that no rules of evidence apply, creates a rebuttable presumption in favor of the government’s evidence, requires proof only by a preponderance of the evidence, and authorizes no appeal. See Wolfowitz Memorandum, *supra* note 124.

<sup>287</sup> For example, hearsay evidence is admissible unless the defendant can show that the evidence is unreliable. Pub. L. No. 109-366, sec. 3, § 949a(b)(2)(E), 120 Stat. 2600, 2608–09 (2006). Evidence obtained by testimony coerced before December 30, 2005 (the date of enactment of the Detainee Treatment Act) is admissible if reliable and if admission is in the interest of justice. *Id.* § 948r, 120 Stat. at 2607. Disclosure of classified information to the defendant is limited. *Id.* § 949d, 120 Stat. at 2611–13. As will be discussed below, appellate review of facts is restricted, while the scope of judicial review is otherwise somewhat uncertain. See *infra* pp. 2102–11.

<sup>288</sup> See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-1, at 4–7 (6th ed. 2004).

trol than when the very question presented on habeas is whether the individual is properly subject to military rather than civilian jurisdiction.<sup>289</sup> Thus, the court-martial cases do not undercut but rather stand apart from the general pattern we have described.

Against this background of precedent and policy, we would interpret § 2241 — which continues to govern habeas review for *citizens* — as permitting de novo review of issues of constitutional and statutory law. The DTA and the MCA — which, in challenges to the detention of *aliens* as enemy combatants, substitute appellate review in the D.C. Circuit for habeas corpus jurisdiction — both invite similar interpretations, for neither purports to limit review of legal issues, save for a proviso in the MCA that a commission's finding or sentence "may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."<sup>290</sup> De novo judicial determinations of legal questions should occasion relatively little ongoing disruption of military or related operations. In addition, a small number of rulings should suffice to clarify the law that executive officials can thereafter apply.

Opposing de novo review of questions of law, Justice Thomas argued in *Hamdan* that the deference due to administrative decision-makers under ordinary administrative law doctrines<sup>291</sup> and due to executive officials in the foreign affairs arena should carry over into habeas corpus.<sup>292</sup> On this view, a habeas court (and presumably the D.C. Circuit in affording the substitute judicial process under the MCA and DTA for alien detainees) should hesitate to second-guess executive determinations that federal statutes authorize executive detention and military trial. Although there is weight to this argument, the core concern of habeas corpus — to protect the right to freedom from bodily restraint — differs not only from the concerns applicable to routine administrative law cases, but also from those relevant to the great bulk of foreign affairs matters in which courts often defer. To put the point bluntly, the values that underlie habeas corpus jurisdiction are both more venerable and more vulnerable than those that operate in routine administrative law cases, and courts should not subordinate the former to the latter in the absence of a plain legislative mandate.<sup>293</sup>

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<sup>289</sup> See JAFFE, *supra* note 268, at 367.

<sup>290</sup> Sec. 3, § 950a(a), 120 Stat. at 2618.

<sup>291</sup> In modern administrative law, judicial deference to the Executive's legal interpretations is commonplace and is generally thought to raise no constitutional difficulty. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>292</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823–25 (2006) (Thomas, J., dissenting).

<sup>293</sup> See, e.g., Sunstein, *supra* note 162, at 2669.

If Congress amended the jurisdictional statutes to narrow or eliminate the courts' review of issues of law, its action would present serious constitutional issues. *St. Cyr* suggests that a complete withdrawal of jurisdiction over such issues would violate the Suspension Clause. A limitation of review to some legal issues (for example, those deemed "fundamental") but not others would raise harder questions. As a matter of precedent, in both *Quirin* and *Yamashita* the Supreme Court reached some statutory issues while expressing uncertainty about its power to reach other, less basic, ones. In addition, a restriction of review to fundamental legal questions would resonate with the historical limitation of habeas to "jurisdictional" issues.<sup>294</sup> Thus, we conclude that Congress could eliminate review of less-than-fundamental legal questions arising in connection with military detention if it made its intent to do so sufficiently clear, although we would view such a limitation as ill-advised.

A clear congressional mandate that courts defer to reasonable executive interpretations of applicable statutes would also seem constitutionally permissible, even with respect to fundamental questions of statutory law. Numerous statutes impose criminal penalties for violating administrative regulations, even when the statutory question of the regulation's validity is subject to deferential judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>295</sup> Insofar as *Chevron* is conceptualized as a form of delegation, we see no barrier to delegations to the President in this arena.<sup>296</sup>

(b) *Questions of Fact.* — Habeas courts once barred petitioners from introducing evidence to contest the facts presented by a custodian in a return to the writ.<sup>297</sup> But the early practice was not consistent: courts occasionally permitted factual inquiries when no other opportunity for judicial review existed.<sup>298</sup> The tradition precluding factual challenge eroded in the antebellum period<sup>299</sup> and was eliminated by an

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<sup>294</sup> See HART & WECHSLER, *supra* note 33, at 1297 n.2, 1403–04 (discussing post-conviction review).

<sup>295</sup> 467 U.S. 837; see also Dan M. Kahan, *Is Chevron Relevant to Criminal Law?*, 110 HARV. L. REV. 469, 492 (1996).

<sup>296</sup> See Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 40 (1996). The MCA declares that the President has the authority to interpret the Geneva Conventions, but that nothing in its authorization shall derogate from the functions of Congress and the judiciary. Pub. L. No. 109-366, sec. 6(a)(3), 120 Stat. 2600, 2632 (2006). This provision raises no independent constitutional question because the Act — permissibly in our view — forecloses alien detainees, and habeas petitioners in general, from relying on the Conventions as a source of judicially enforceable rights in any event. *Id.* sec. 5, 120 Stat. at 2631–32.

<sup>297</sup> See Oaks, *supra* note 271, at 454 & n.20.

<sup>298</sup> See *id.* at 457.

<sup>299</sup> See Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 14–33, 42–59 (1995).

1867 amendment to the habeas statute.<sup>300</sup> Nevertheless, review of factfinding has remained highly deferential in many contexts, often limited to whether “some evidence” exists to support a factual determination.<sup>301</sup> “Some evidence” review was the historic norm in immigration cases, which of course involve aliens, not citizens — although recently lower courts have upheld statutory amendments that preclude even this limited judicial scrutiny of administrative factfindings.<sup>302</sup> In addition, numerous decisions apply “some evidence” review, or adopt similarly narrow standards, in selective service cases challenging the factual findings of draft boards in entering conscription orders.<sup>303</sup>

These cases, as well as the limited reviewability of convictions by courts martial,<sup>304</sup> generate some gravitational force for the conclusion that, under the current statutory framework, habeas review must be limited to determining whether some evidence supports executive findings of fact that underlie a decision to detain a citizen as an enemy combatant. However, more recent authority in other contexts supports a somewhat more searching judicial inquiry. In *Jackson v. Virginia*,<sup>305</sup> a habeas challenge to the constitutionality of a state court murder conviction, the Supreme Court began its analysis by emphasizing the constitutionally required burden of proof beyond a reasonable doubt in criminal cases.<sup>306</sup> It then interpreted the habeas statute as authorizing a judicial inquiry framed in light of that constitutional standard. Under *Jackson*, a habeas court presented with a challenge to the sufficiency of the evidence in a criminal case will determine whether “upon

<sup>300</sup> See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

<sup>301</sup> See generally Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 SAN DIEGO L. REV. 633 (1988).

<sup>302</sup> On immigration cases, see, for example, *INS v. St. Cyr*, 533 U.S. 289, 306 & n.27 (2001), and *United States ex rel. Vajtauer v. Commission of Immigration*, 273 U.S. 103, 106, 110 (1927) (dictum). See also *Bakhtriger v. Elwood*, 360 F.3d 414, 417–20 (3d Cir. 2004) (discussing historical evolution of judicial review of immigration decisions).

In the *St. Cyr* decision, the Court reiterated that “the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA.” 533 U.S. at 312. And following *St. Cyr*, the circuit courts, while upholding review of issues of law and application of law to fact in immigration matters, held that the statutorily authorized scope of review does not include inquiry into whether factual findings were supported by the weight of evidence. See *Bakhtriger*, 360 F.3d at 424–25, and cases cited therein.

<sup>303</sup> On selective service cases, see *Dickinson v. United States*, 346 U.S. 389, 394 (1953), and *Parisi v. Davidson*, 405 U.S. 34, 35 (1972). Review of selective service decisions also has not been static: a restrictive standard adopted in the wake of broad mobilization for World War II was later relaxed. See JAFFE, *supra* note 268, at 366–69. Moreover, the meaning of the “some evidence” standard is neither literal nor obvious. See Neuman, *supra* note 301, at 678 (arguing that the standard is violated “when the discrepancy between the findings on which it rests and the evidence of record is so great as to indicate clearly that the findings were not in fact derived impartially from the record” (emphasis omitted)).

<sup>304</sup> See *supra* pp. 2099–101.

<sup>305</sup> 443 U.S. 307 (1979).

<sup>306</sup> See *id.* at 313–16.

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the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt<sup>307</sup> — even though the petitioner already had the benefit of review of his conviction by a state court.

In our view, a habeas court reviewing executive detention of a citizen as an enemy combatant should adopt an approach similar to that used in *Jackson*, but adjusted to a context in which, as we suggested earlier, the appropriate minimum standard of proof for the initial determination is by a preponderance rather than beyond a reasonable doubt. More specifically, a habeas court should interpret § 2241 as authorizing the court to ask whether a rational military decisionmaker could have found by a preponderance of the evidence that the citizen-detainee is an enemy combatant.

Several considerations impel us to conclude that a habeas court, operating in the Common Law Model, should favor this adaptation of the *Jackson* standard over the more relaxed “some evidence” approach. First, if citizens are subject to military proceedings modeled on CSRTs (which at present apply only to alien detainees), the procedural protections available at the administrative level are full of shortcomings.<sup>308</sup> Second, the deprivation of liberty involved when someone is detained as an enemy combatant is considerably more serious than that involved in the kinds of detention in which the “some evidence” standard has been deployed — deportation and military induction. Detention as an enemy combatant does not leave one at liberty abroad, or merely subject to the rigors of military service; instead, the individual is removed from civil society and subjected to the nearly total isolation and deprivation of freedom that imprisonment imposes, potentially for a prolonged period without an obvious endpoint. In light of these considerations, a more protective standard than “some evidence” review seems to strike an appropriate balance between deferring to the Executive and ensuring that a citizen-detainee has been treated with fundamental fairness. And because so few citizens are likely to be detained on battlefields as enemy combatants, there seems to be little risk that review of this scope would prove disruptive to military or national security operations.

Were Congress to make clear its intent to restrict more narrowly the scope of habeas review of factual determinations, the resulting constitutional question would be a hard one. In *Ex parte Quirin*, the Court stated flatly that it was not concerned with guilt or innocence, thereby suggesting that factual issues resolved by a military tribunal

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<sup>307</sup> *Id.* at 324.

<sup>308</sup> See *supra* note 286.

were not subject to habeas review.<sup>309</sup> But in addition to the reasons previously noted for not treating *Quirin* as a robust precedent, the case's procedural context — involving not only nearly conclusive evidence of guilt, but also habeas review prior to any conviction — gives further grounds for not reading this statement too broadly. Also arguably relevant is *In re Yamashita*, in which the Court, exercising post-conviction review, stated that the writ will not issue “merely because [the military tribunal has] made a wrong decision on disputed facts.”<sup>310</sup> The Court added, however, that “[t]here is no contention that the present charge . . . is without the support of evidence.”<sup>311</sup> In addition, the petitioner in *Yamashita* was not a citizen.

In our view, when an American citizen challenges the factual predicate for detention as an enemy combatant, at least as determined by a tribunal that affords no more procedural protections than do the CSRTs, the constitutionally controlling consideration should be *Jackson's* linkage of the scope of habeas review to the constitutionally required burden of proof. Thus, absent unusually exigent circumstances, a citizen has a constitutional right to habeas review of whether, based on the record evidence, the citizen's due process rights have been infringed by a factual determination that no reasonable trier of fact could have made.

When one turns to the detention of noncitizens who fall within the scope of the habeas jurisdiction and who possess substantive rights to be free from detention, many of the same considerations remain relevant. However, where aliens are concerned, the appropriate scope of review turns initially on interpretation of the DTA and the MCA. With respect to aliens tried for war crimes, the MCA not only substitutes appellate review in the D.C. Circuit for habeas review, but also limits review to matters of law.<sup>312</sup> The DTA, governing the review of decisions by CSRTs to detain aliens as enemy combatants, limits the D.C. Circuit to considering whether a decision “was consistent with the standards and procedures specified by [the military] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence),” and, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States.”<sup>313</sup>

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<sup>309</sup> 317 U.S. 1, 25 (1942).

<sup>310</sup> 327 U.S. 1, 8 (1946).

<sup>311</sup> *Id.* at 16.

<sup>312</sup> Pub. L. No. 109-366, sec. 3, § 950g, 120 Stat. 2600, 2622 (2006).

<sup>313</sup> Pub. L. No. 109-148, div. A, § 1005(e)(2)(C), 119 Stat. 2739, 2742 (2005).

Whereas we have argued that citizens may be detained as enemy combatants without trial in a civil court only if they are apprehended on battlefields, many noncitizen detainees will presumably have been apprehended in other locales, sometimes based on information from sensitive intelligence sources. In some habeas actions brought by non-citizens, there is, accordingly, a pragmatic argument for limiting factual inquiry in order to prevent the disclosure of classified information. This problem strikes us as real and vexing, bound up with the question whether, or in what circumstances, the government may constitutionally refuse at an initial administrative hearing to disclose to detainees classified information that supplies the basis for their detention or military trial. In addressing these issues with respect to war crimes trials, the MCA authorizes the presiding judge of a military commission to delete classified information from documents introduced at trial and to substitute a summary of the information or a statement of the facts that the classified information would prove.<sup>314</sup> It also precludes defense counsel from disclosing classified information to defendants.<sup>315</sup> Although the balance thus struck between concerns for security and fairness is not obviously impermissible as judged by historical practice, the combination of limited disclosure in the military process and total foreclosure of fact-based review by a civil court does not obviously satisfy the Suspension and Due Process Clauses. And it is relevant in this regard that some military lawyers have questioned the judgment that protection of classified information requires denying detainees charged with war crimes access to the evidence against them.<sup>316</sup> We note, moreover, that even if nondisclosure is permitted in proceedings before military tribunals, that mode of procedure need not preclude a reviewing court and the petitioner's lawyer (assuming proper security clearance) from examining the evidence.

In the end, all we can say with confidence is that with respect to aliens detained in the United States or at Guantánamo Bay who have been convicted of crimes by military commissions, the best reading of the Suspension Clause would make the permissibility of precluding judicial review of factual determinations depend on such context-specific factors as the nature and reliability of the administrative process and perhaps the credibility of the government's claim of exigency.<sup>317</sup> In light of that general standard, the MCA's preclusion of factual review

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<sup>314</sup> Sec. 3, § 949d(f)(2), 120 Stat. at 2612.

<sup>315</sup> *Id.* § 949c(b)(4), 120 Stat. at 2610.

<sup>316</sup> See R. Jeffrey Smith, *Top Military Lawyers Oppose Plan for Special Courts*, WASH. POST, Aug. 3, 2006, at A11.

<sup>317</sup> We refer to Article III review of a factual determination already made. Different concerns are implicated if a detainee seeks to present new factual evidence to support a constitutional challenge to detention that could not have been raised before. See *supra* note 133.

finds some support in the *Yamashita* decision and might be defended on the ground that the statutorily prescribed procedures for war crimes trials provide relatively robust, albeit far from perfect, guarantees of factfinding accuracy. These guarantees include reasonably strong protections of adjudicatory independence from command influence, the right to challenge a commission member for cause, limits on the closure of hearings, the right to counsel, the right to compulsory process similar to that in civilian courts, exclusion of hearsay evidence deemed to be unreliable, the right to obtain exculpatory evidence, and the requirement of proof beyond a reasonable doubt.<sup>318</sup>

Although the rules governing proceedings before CSRTs also sharply limit detainees' access to information on which the lawfulness of their detentions may depend, the DTA appears to authorize judicial review by the D.C. Circuit of the question whether the CSRT properly found enemy combatant status to have been established by a preponderance of the evidence.<sup>319</sup> That provision of the DTA strikes us as important, for the preclusion of all review of the factual determinations made by CSRTs would be constitutionally troublesome, given that those tribunals lack the procedural guarantees<sup>320</sup> afforded by the MCA in trials for war crimes. Although complete preclusion of factual review by habeas courts has recently been upheld by a number of lower federal courts in proceedings brought by aliens challenging administrative determinations of deportability, these precedents are distinguishable, for indefinite confinement as an enemy combatant is a far more serious deprivation of liberty than deportation.<sup>321</sup>

It is a further question, of course, how searching the D.C. Circuit's review of CSRT determinations should be. The DTA does not indicate how much deference the court of appeals should accord to the military's determination that an individual is an enemy combatant. Given the high stakes involved for the petitioners and the procedural limitations of CSRT proceedings, we would construe the statute as requiring the D.C. Circuit to ascertain whether a rational trier of fact could have found by a preponderance of the evidence that a petitioner was an enemy combatant.

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<sup>318</sup> See, e.g., sec. 3, §§ 949a(b)(2)(E), 949b, 949f(a), 949j(b), (d), 120 Stat. at 2608–10, 2613–15.

<sup>319</sup> We say "appears to authorize review" because one could interpret the DTA narrowly as permitting the D.C. Circuit to review only whether the CSRT purported to apply the preponderance standard but not whether that standard had been properly applied. Such an interpretation does not, however, seem to us to be the most natural reading of the language, especially in light of the constitutional concerns that it would raise.

<sup>320</sup> See Martin, *supra* note 163, at 323–24.

<sup>321</sup> Compare *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the World War II "deportation" of persons of Japanese descent from the West Coast), with *Ex parte Endo*, 323 U.S. 283 (1944) (invalidating the detention of such persons).

One other fact-related issue requires consideration. For both constitutional and statutory purposes, the right to habeas or some substitute form of review, as well as underlying substantive claims to relief, may depend on the predominantly factual question whether a petitioner is a citizen or an alien. For half a century, the answer to that question has controlled the right to habeas review for persons detained outside the United States and Guantánamo Bay.<sup>322</sup> Similarly, under the MCA, only aliens, wherever located, are subject to trial for war crimes and to the displacement of habeas jurisdiction by more limited judicial review in the D.C. Circuit. The question thus arises whether a detainee who disputes the Executive's determination of noncitizenship has a right to judicial review of the underlying facts. In immigration cases, the Supreme Court has given a bifurcated answer: in deportation proceedings, an individual determined by the Executive to be an alien has a constitutional right to de novo judicial review, at least if there is substantial evidence of citizenship,<sup>323</sup> but an individual denied entry into the United States has no right to judicial review of the factual basis for the Executive's determination of noncitizenship.<sup>324</sup>

Quite apart from whether the latter holding, now a century old, continues to deserve adherence, the case for judicial review of an administrative determination of noncitizenship seems stronger when a petitioner is detained or prosecuted by the military than when he or she is excluded from the United States. As we have noted already, executive detention and military punishment are even more serious restrictions of liberty than is exclusion. Moreover, disputed claims of citizenship by persons held by the military are unlikely to arise often, and military officials (unlike immigration officials) have no plausible comparative advantage over courts in ascertaining citizenship.<sup>325</sup> Accordingly, we conclude that a total preclusion of judicial review of the factual underpinnings of a determination of noncitizenship, at least as to an individual detained in the United States or at Guantánamo Bay, would violate the Constitution, even when bars to the review of other fact-based claims would be permissible. In light of this judgment, we would not interpret the DTA and MCA as seeking to depart from the tradition of de novo judicial review of claims of citizenship.

(c) *The Application of Law to Fact.* — At least absent specific congressional direction to the contrary, we believe that habeas courts should review mixed questions de novo, as should the D.C. Circuit in exercising its appellate jurisdiction under the DTA and MCA. Mixed

<sup>322</sup> See *supra* Section III.B.2, pp. 2055–58.

<sup>323</sup> See *Ng Fung Ho v. White*, 259 U.S. 276, 282–85 (1922).

<sup>324</sup> See *United States v. Ju Toy*, 198 U.S. 253, 261–63 (1905).

<sup>325</sup> Nor does the fact that the question of citizenship may be presented in a military setting mean that information bearing on that question possesses any special sensitivity.

questions seem likely to have large and frequently dispositive significance in war-on-terror cases. As the *Hamdi* plurality noted, the category of “enemy combatants” properly subject to detention lacks clear definition.<sup>326</sup> The government asserted that Hamdi was an enemy combatant because he “was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan” and he had ““engaged in an armed conflict against the United States” there.”<sup>327</sup> By contrast, the order establishing CSRTs to determine the lawfulness of ongoing detentions at Guantánamo Bay uses a far broader definition, not limited to Afghanistan or other battlefields and not requiring engagement in armed conflict:

[An enemy combatant is] an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>328</sup>

The MCA, which applies directly only to trials of aliens before military commissions, contains still another formulation of the enemy combatant category, defining it to include a person who (1) has “purposefully and materially supported hostilities against the United States,” if not a lawful enemy combatant, or (2) has been determined by a CSRT to be an unlawful enemy combatant.<sup>329</sup>

Even when no factual dispute exists, the notion of an enemy combatant remains ineluctably hazy. Who or what exactly is al Qaeda? What forces are associated with its members?<sup>330</sup> What constitutes “direct” or “material” support?<sup>331</sup> In a CSRT proceeding, must support

<sup>326</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion).

<sup>327</sup> *Id.* (quoting Brief for the Respondents at 3, *Hamdi* (No. 03-6696)).

<sup>328</sup> Wolfowitz Memorandum, *supra* note 124, at 1.

<sup>329</sup> Pub. L. No. 109-366, sec. 3, § 948a(1), 120 Stat. 2600, 2601 (2006). The Act defines a lawful enemy combatant as:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

*Id.* § 948a(2), 120 Stat. at 2601.

<sup>330</sup> See Bradley & Goldsmith, *supra* note 174, at 2109 (noting that since 9/11, al Qaeda is less hierarchical and centralized and has become “the leader of a more loosely connected, global movement of Islamic terrorism against the United States and other nations[,] . . . [acting] through a confederacy of affiliated terrorist organizations”).

<sup>331</sup> For commentary, written prior to enactment of the MCA, arguing that the term “enemy combatant” draws content from the law of war but disagreeing about the meaning of its direct participation standard, compare *id.* at 2115–16, with Ryan Goodman & Derek Jinks, Reply, *In-*

be shown to be material and/or purposeful? Is an alien who sends money to what purports to be (and may in part be) a charity, but which provides funds to others alleged to be linked to al Qaeda, an enemy combatant? These questions, however military decisionmakers might resolve them, highlight the importance of review of the application of law to fact as the critical means of fleshing out uncertain legal boundaries.<sup>332</sup> In construing open-ended jurisdictional language, a court operating within the Common Law Model is entitled to consider how crucially the resolution of mixed questions will affect liberty interests of detainees. Moreover, the military has no special expertise in determining the boundaries of the concept of enemy combatant, which is not primarily a military term but rather a legal category, formulated for the purpose of ascertaining the scope of the military's authority to detain.<sup>333</sup>

Other troubling features of the MCA also seem likely to generate important issues involving the application of law to fact about which the courts possess pertinent expertise. For example, in dealing with coerced confessions, the Act rejects traditional Fifth Amendment standards<sup>334</sup> and provides that statements not induced by "torture" may be admitted as long as "(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence."<sup>335</sup> The legality of military procedures could easily depend on the application of these open-ended criteria.

Were Congress to enact unmistakably clear language limiting or even precluding judicial review of applications of law to fact, the resulting questions would seem to us too difficult to permit categorical resolution. *INS v. St. Cyr* states that the writ, in 1789, embraced inquiries into the "erroneous application" as well as the erroneous interpretation of statutes.<sup>336</sup> Insofar as this dictum speaks to review of mixed questions, we view it as relevant, though not dispositive, in stressing that such review is often consequential. Mixed questions

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*International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2655-58 (2005).

<sup>332</sup> See Bradley & Goldsmith, *supra* note 174, at 2107-16 (acknowledging the difficulties of defining enemy combatants); *cf.* Ornelas v. United States, 517 U.S. 690, 697 (1996) (upholding de novo review of the meaning of "reasonable suspicion" and "probable cause" under the Fourth Amendment in part because these general terms "acquire content only through application"); JAFFE, *supra* note 268, at 549 (suggesting that a reviewing court should accept administrative resolution of a mixed question when "the conclusion to be drawn from the facts involves no more than applying the statute with no further and explicit question raised as to its 'meaning'").

<sup>333</sup> See generally JAFFE, *supra* note 268, at 576-85 (discussing comparative expertise as a factor defining the appropriate scope of review).

<sup>334</sup> See sec. 3, § 949a(2)(C), 120 Stat. at 2608.

<sup>335</sup> *Id.* § 948r(c), 120 Stat. at 2607.

<sup>336</sup> 533 U.S. 289, 302 (2001).

cannot always be sharply distinguished from questions of law, on the one hand, or questions of fact, on the other. In addition, not all mixed questions are equally important or open-ended. Under these circumstances, a categorical determination that the Constitution does, or does not, require habeas review of mixed questions is too rigid. Rather, as with other difficult questions presented by statutory limitations on the scope of review, pertinent factors include the degree of exigency supporting the limitation or withdrawal, the quality of the proceeding of which review is sought, the comparative competence of administrators and judges with respect to the issue at hand, the nature of the individual interest, and the burden on the government that more intensive review would impose.<sup>337</sup>

### CONCLUSION

Habeas corpus challenges to executive detentions arising from the war on terrorism will continue to present difficult issues that the courts must resolve. Taking a synoptic view of such questions, this Article has advanced analytical, methodological, and normative claims.

Analytically, we have sought to distinguish and clarify the three types of issues that habeas courts must address in assessing the lawfulness of executive detentions: (1) jurisdictional, (2) substantive, and (3) procedural issues, with the last category subdivided into questions of (a) the adequacy of the procedures provided by executive decisionmakers and (b) the scope of judicial review of particular executive determinations. Although we have insisted on distinguishing these issues for some purposes, we have also emphasized the important interconnections among them and have highlighted the relationship between their statutory and constitutional dimensions.

Methodologically, we have argued that courts exercising habeas corpus jurisdiction have traditionally rejected an Agency Model of the judicial role in favor of a Common Law Model and have adapted the controlling jurisdictional and substantive law in light of evolving norms of fairness, practical concerns, and perceived constitutional imperatives. We have argued that courts should continue to follow this common law approach, although with insistent sensitivity to the competencies and prerogatives of Congress and the President.

Acknowledging that the resolution of hard interpretive questions almost always requires normative judgments, we have also presented normative arguments for resolving a number of specific questions in

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<sup>337</sup> Notably, following the *St. Cyr* decision, several circuit courts took the view that (1) the scope of habeas review of immigration decisions was that required by the Constitution, and (2) review extended to application of law to fact. *See, e.g.,* *Bakhtriger v. Elwood*, 360 F.3d 414, 424–25 (3d Cir. 2004), and cases cited therein.

particular ways. Among other conclusions, we have argued that American citizens not apprehended on battlefields have very broad rights, not yet expressly acknowledged by the Supreme Court, to be free from detention as enemy combatants or punishment as war criminals without opportunity for trial before civilian courts; that Congress ordinarily has the power to preclude jurisdiction over habeas petitions filed by aliens detained abroad but not to preclude all review in the cases of aliens detained at Guantánamo Bay; that the due process rights of those who are in principle subject to executive detention as enemy combatants vary with context and exigency as well as with citizenship; and that the ultimate potency of the constitutional guarantee of the “Privilege of the Writ of Habeas Corpus” will often depend on technical issues involving the statutorily authorized and constitutionally mandated scope of review of executive determinations.

With respect to no issue do we delude ourselves that we have spoken the last word. It will be enough if our survey has helped to put war-on-terror issues that arise in habeas corpus cases into a new, broader, and illuminating perspective.