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## Given an Inch, the Detainee Effort to Take a Mile: The Detainee Legislation and the Dangers of the "Litigation Weapon in Unrestrained Enemy Hands"

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1. *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

## I. INTRODUCTION

In March 2004, twenty-nine-year-old Pakistani citizen Abdullah Mesud was released from Guantanamo Bay.<sup>2</sup> Despite being captured while fighting for the Taliban in northern Afghanistan, American military authorities determined that Mesud's artificial leg made him a low-risk security threat.<sup>3</sup> After his release, Mesud made his way to Waziristan, a lawless region in Pakistan known as a terrorist haven.<sup>4</sup> There Mesud planned and orchestrated the kidnapping of two engineers working on a dam site, one of whom was killed in the ensuing rescue attempt.<sup>5</sup> Before fleeing the area, Mesud told journalists, "We will fight America and its allies until the end."<sup>6</sup> Mesud later chose to kill himself with a grenade rather than surrender to Pakistani authorities.<sup>7</sup> He is just one of the many detainees that have resumed waging terror against innocents following release from Guantanamo.<sup>8</sup>

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2. Tim McGirk, *Out of Captivity*, TIME, Oct. 18, 2004, available at <http://www.time.com/time/magazine/article/0,9171,725179,00.html>.

3. *Id.*

4. See James Rupert, *Where the Taliban Still Rule: Movement Controls Areas Out of Pakistani Government's Reach*, NEWSDAY, Feb. 9, 2006, available at <http://www.newsday.com/news/world/world/wotai054618726feb09,0,4795733.story>.

5. See McGirk, *supra* note 2.

6. *Id.*; see also Robert Burns, *Joint Chiefs Chairman: Close Guantanamo*, THE ASSOCIATED PRESS, Jan. 14, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/14/AR2008011400210.html> ("After the terrorist attacks of Sept. 11, 2001, the Bush administration considered Guantanamo Bay a suitable place to hold men suspected of links to the Taliban and al-Qaida, contending that U.S. laws do not apply there because Guantanamo is not part of the United States. Lawyers for the detainees have challenged that interpretation ever since."). It is noteworthy that several of the detainees that have been released from Guantanamo have rejoined the fight, and this problem has caused many people to wonder whether a speedy detention and processing system is warranted in light of this reality. As Joint Task Force Guantanamo has said, "At least 29 of those detainees released or transferred from Guantanamo have been confirmed or are suspected of returning to the battlefield." See Joint Task Force Guantanamo, <http://www.jtftgmo.southcom.mil/about.html#gtmo> (last visited Sept. 16, 2008); see also Jack Spencer, Ariel Cohen, Ph.D., Jim Phillips & Alane Kochems, *No Good Reason to Close Gitmo*, Heritage Foundation, June 14, 2005, [http://www.heritage.org/Research/HomelandSecurity/wm763.cfm#\\_ftn3](http://www.heritage.org/Research/HomelandSecurity/wm763.cfm#_ftn3) ("Mullah Shahzada, a former Taliban field commander who apparently convinced officials at Guantanamo that he had sworn off violence, was freed in 2003, and immediately rejoined the Taliban. He was subsequently killed in battle in the summer of 2004 in Afghanistan. Maulvi Ghafar, a Taliban commander captured in 2001, was released in February 2004. He was subsequently killed in a shootout with Afghan government forces in September 2004.").

7. See *Gitmo and Al Qaeda*, WALL ST. J., July 26, 2007, available at [http://online.wsj.com/article/SB118541055463578360.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB118541055463578360.html?mod=googlenews_wsj).

8. See *supra* note 6 and accompanying text; see also Mike Mount, *Pentagon: Ex-detainees Returning to Fight*, CNN.COM, May 7, 2008, <http://edition.cnn.com/2008/WORLD/meast/05/07/gitmo.bomber/index.html?er> ("A Kuwaiti man released from U.S. custody at the Guantanamo Bay Naval Base in 2005 blew himself up in a suicide attack in Iraq last month, Pentagon officials said Wednesday. Abdullah Saleh al-Ajmi was one of two Kuwaitis who took part in a suicide attack in Mosul on April 26, the officials said. Records show that an attack in Mosul that day targeted an Iraqi police patrol and left six people dead, including two police officers. An announcement on a jihadist Web site earlier this month declared that al-Ajmi was one of the 'heroes' who carried out the

The United States is now in the seventh year of Operation Enduring Freedom in Afghanistan,<sup>9</sup> and the fifth year of Operation Iraqi Freedom.<sup>10</sup> Together these operations are known as the Global War on Terrorism (war on terror).<sup>11</sup> The war on terror began following the terrorist attacks of September 11, 2001, and is currently being waged by the United States and its allies<sup>12</sup> against the Al Qaeda network and its worldwide affiliates.<sup>13</sup>

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Mosul operation. A second man from Kuwait also took part in the suicide attack, the Web site said. Pentagon officials who had been keeping track of al-Ajmi said they were aware he had left Kuwait for Syria, a launching ground for terrorists into Iraq. A video posted on various jihadist Web sites shows a number of images of al-Ajmi, followed by text reading, 'May God have mercy on you Abdullah al-Ajmi. I send you a warm greeting O you martyr, O you hero, O you, a man in a time where only few men are left.'").

9. See *infra* note 134 and accompanying text; see also United States Central Command, History, <http://www.centcom.mil/en/about-centcom/our-history/> (last visited Oct. 21, 2008) ("The terrorist attacks on American soil on September 11, 2001 led President George W. Bush to declare a war against international terrorism. USCENTCOM soon launched Operation Enduring Freedom to expel the Taliban government in Afghanistan, who were harboring Al Qaida terrorists and repressing the Afghan population.").

10. See *infra* note 135 and accompanying text; see also Multinational Force Iraq, Operation Iraqi Freedom, Background, [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=16&Itemid=5](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=16&Itemid=5) (last visited Sept. 20, 2008) ("Continued Iraqi noncompliance with the Security Council resolutions over a period of 12 years led to the US-led invasion of Iraq in March 2003 and the ouster of the Saddam Hussein regime. Coalition forces remained in Iraq, helping to establish the secure rule of law and restore the country's degraded infrastructure.").

11. See Donna Miles, *Petraeus Explains Stance on Iraq's Link to U.S. Security, Responds to Criticism*, AMERICAN FORCES PRESS SERVICE, Sept. 12, 2007, available at <http://defenseink.mil/news/newsarticle.aspx?id=47418> ("I was trying very hard yesterday to avoid becoming more than the MNFI commander," he said. "And so when I was asked about the global war on terrorism, I thought that that perhaps is a question for those who are carrying out the global war on terrorism. I'm carrying out one piece of that, which is the part that is prosecuted inside Iraq.").

12. See United States Department of Defense, *International Contributions to the War on Terrorism*, available at <http://www.defenselink.mil/news/May2002/d20020523cu.pdf> (last visited Sept. 20, 2008) ("The United States began building the military coalition on September 12, 2001, and there are currently 68 nations supporting the global war on terrorism. To date, 20 nations have deployed more than 16,000 troops to the U.S. Central Command's region of responsibility. This coalition of the willing is working hard every day to defeat terrorism, wherever it may exist. In Afghanistan alone, our coalition partners are contributing more than 7,000 troops to Operation Enduring Freedom and to the International Security Assistance Force in Kabul—making up more than half of the 14,000 non-Afghan forces in Afghanistan. The war against terrorism is a broad-based effort that will take time. Every nation has different circumstances and will participate in different ways. This mission and future missions will require a series of coalitions ready to take on the challenges and assume the risks associated with such an operation."); see also International Security Assistance Force (ISAF), Mission, <http://www.nato.int/issues/isaf/index.html> (last visited Oct. 21, 2008) ("On 5 October 2006, in another landmark step for NATO, NATO-ISAF took command of the international military forces in eastern Afghanistan from the US-led Coalition. Now, some 52,700 troops (including National Support Elements) are providing support to the Afghan authorities throughout the country, with the aim of boosting efforts to provide reconstruction and development.").

13. The Al Qaeda terrorist network has claimed responsibility for bombings in Indonesia,

Shortly after the war on terror began, the military established the United States Naval Base at Guantanamo Bay, Cuba as the holding place for Al Qaeda and Taliban fighters captured in the war.<sup>14</sup> Since then, many prisoners (detainees) have attempted to challenge their detentions in federal courts by arguing that habeas corpus rights entitle them to a meaningful review process to contest their detentions.<sup>15</sup> These suits have posed unique legal challenges that reflect the novel nature of the war.<sup>16</sup> Contrary to past state-based wars such as World War I and World War II, the current war is in large part being waged against a stateless network of terrorists whose practice of dressing as and targeting civilians makes it difficult to distinguish between lawful and unlawful combatants.<sup>17</sup> As a result, the laws designed to accommodate conflicts between belligerent nations do not provide easily applicable processes to resolve the legal status of stateless, unlawful combatants.<sup>18</sup>

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England, Spain, Jordan, Africa, and Turkey. See GLOBAL SECURITY, Al Qaeda General Overview, available at <http://www.globalsecurity.org/military/world/para/al-qaida.htm> (last visited Nov. 19, 2008).

14. See *infra* note 137 and accompanying text.

15. See generally 151 Cong. Rec. S12731 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (“A Canadian detainee who threw a grenade that killed an American Army medic in a firefight and who comes from a family of longstanding Al Qaida ties, moves for preliminary injunction forbidding interrogation of him or engaging in cruel, inhuman, or degrading treatment of him.”). This is an example of a habeas petition filed on behalf of Guantanamo Bay detainees, introduced by South Carolina Republican Senator Lindsey Graham during the Congressional debate on the passage of the Military Commissions Act, available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005\\_record&page=S12731&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=S12731&position=all) (last visited Nov. 19, 2008).

16. See Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully,"* 53 DRAKE L. REV. 851, 860 (2005).

17. *Id.* at 862; see also Lieutenant Colonel Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F.L. REV. 1, 15 (2004) (“The unconventional operations and attacks of al-Qaeda and the Taliban in armed conflict are much more dangerous and lethal to protected noncombatant civilians than has been seen historically with saboteurs, spies, guerillas, and other typical unlawful combatants who mask themselves perfidiously as protected civilians. In contrast to merely hiding among protected civilian noncombatants illegally, al-Qaeda has squarely targeted them and has attempted to maximize civilian casualties with the apparent approval of the Taliban. Nonetheless, al-Qaeda and Taliban behavior of exploiting civilian disguise in armed conflict unlawfully is related closely to the conduct of the types of civilian-attired unlawful combatants referenced above. Neither group is entitled to POW status upon capture.”).

18. See Bialke, *supra* note 17, at 15 (“Admittedly, the 1949 Geneva Conventions, and other international laws of armed conflict, do not specifically envisage an armed conflict resembling the armed conflict against al-Qaeda continuing in Afghanistan and elsewhere across the globe. An asymmetric international armed conflict where one party (the Taliban, a *de facto* state) sponsors and partially incorporates members of a global stateless organization (the al-Qaeda) that directs relatively independent factions to engage in massive and worldwide suicidal terrorism against protected civilian populations, is a fairly new paradigm. Regardless of these atypical attributes of *de facto*-state sponsored international terrorism, determining the legal status of captured combatant Taliban and al-Qaeda members in accordance with existing LOAC remains a matter of relatively simple analogy.”).

The United States government has attempted to fashion a response to these challenges that is legally and militarily feasible. Congress enacted and President Bush signed the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA),<sup>19</sup> attempting to clarify the habeas rights to which these noncitizen detainees are entitled.<sup>20</sup> The Supreme Court has issued four detainee-related rulings since 2004, and a decision in *Boumediene v. Bush* was issued on June 12, 2008.<sup>21</sup> Yet despite the Court's rulings and Congressional legislation, many constitutional questions persist.<sup>22</sup> A common theme underlying these questions is whether the Constitution applies to detainees, and if so, how.<sup>23</sup> Furthermore, the flurry of Legislative and Executive branch activity has led many to question whether the separate co-equal branches of government are observing their proper boundaries as they work to resolve the legal issues arising from detainee detentions.<sup>24</sup>

This Comment addresses one of the most fundamental questions in the debate over detainee rights: whether the DTA/MCA review process is a proper exercise of congressional authority to determine the habeas rights of detainees in light of the habeas statute, the Constitution, and the Geneva Convention.<sup>25</sup> This Comment will argue that the statutory review process

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19. See *infra* note 20.

20. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, §1005(e), 110 Stat. 2680, 2742-44; Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

21. See *Boumediene v. Bush*, No. 06-1195 (June 12, 2008). This decision is discussed in the Postscript. See *infra* Part IX.

22. A comprehensive discussion delineating the applicability of each constitutional provision to the detainees is beyond the scope of this article, but in light of recent Supreme Court decisions, questions have been raised regarding the possible reach of constitutional protections such as Fourth Amendment search and seizure and Fifth Amendment due process to detainees, not only in Guantanamo, but in battlefields across the globe. Such extraterritoriality is far beyond the scope of the Constitution's traditional limits, especially for alien enemies detained abroad. See *infra* notes 103-16 and accompanying text.

23. See *infra* notes 348-55 and accompanying text.

24. See *infra* note 413 and accompanying text. Foreign affairs have traditionally been the realm in which the Executive branch enjoys its greatest freedom from the checks and balances inherent in domestic governance. However, the Bush Administration's robust interpretation of the President's Article II commander-in-chief authority did not go unaddressed by the Supreme Court, especially when the Court viewed the President asserting broad executive authority at a moment of perceived political weakness. *Id.*; see also *infra* note 414 and accompanying text.

25. Whether those statutes are constitutional exercises of congressional authority hinges on two factors. The first factor is the rights to which the Court determines detainees are entitled. If the Court finds, as is argued here, that detainees have no statutory or constitutional right to habeas, then Congress's enactment of the DTA and MCA were proper exercises of Congress's constitutional authority. Conversely, if the Court finds the detainees have a constitutional or statutory right to habeas, then the DTA and MCA would be unconstitutional abridgments of those rights. A short

was a proper exercise of congressional authority and will address the relevant issues as follows.

Part II will provide a general background of the writ and examine its historical origins, its incorporation into the Constitution, the operation of the writ in federal court, and the Court's habeas jurisprudence prior to the war on terror.<sup>26</sup> Part III will detail the system of executive detention against which the writ has been asserted, focusing on the Naval Base at Guantanamo Bay, Cuba.<sup>27</sup> Part IV will analyze judicial and congressional responses to legal challenges brought by citizen and noncitizen detainees against that system of executive detention.<sup>28</sup> Part V will discuss the unresolved questions regarding the nature and breadth of detainee legal challenges.<sup>29</sup> Part VI will evaluate the review process provided under the Detainee Treatment Act of 2005 and Military Commissions of 2006 in light of habeas obligations under domestic and international law.<sup>30</sup> Part VII will consider the implications of the legal debate on the larger war effort.<sup>31</sup> Part VIII will conclude the Comment, and Part IX discusses the *Boumediene* decision.<sup>32</sup>

## II. BACKGROUND

In order to understand the relevance of habeas corpus to detainees imprisoned in the war on terror, it is beneficial to develop a basic knowledge of the writ's historical development and practical function. The writ as originally construed in medieval England bears little resemblance to its contemporary understanding as a check on unlawful executive detention.<sup>33</sup> Yet the contemporary understanding was incorporated into the Constitution,<sup>34</sup> and since then the Supreme Court has wrestled with defining

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discussion of the implications of the *Boumediene* decision is presented *infra* in the Postscript. *See infra* Part IX. Second, the scope of review in the D.C. Circuit Court of Appeals is dictated by what Congress intended in the DTA/MCA, and a broad appellate review that infringes on the President's wartime authority would be seen as an improper exercise of congressional authority. Recent detainee litigation has focused on what habeas rights the detainees do or do not possess, and therefore the Comment couches the discussion accordingly. A short analysis of the second factor and why a robust appellate review does not violate the President's wartime prerogatives is included *infra* in Part VI.D.5.

26. *See infra* notes 33–131 and accompanying text.

27. *See infra* notes 132–51 and accompanying text.

28. *See infra* notes 152–279 and accompanying text.

29. *See infra* notes 280–309 and accompanying text.

30. *See infra* notes 310–403 and accompanying text.

31. *See infra* notes 404–26 and accompanying text.

32. *See infra* note 427 and accompanying text. This article was written prior to the Court's decision in *Boumediene*. Hence, the Postscript discussing *Boumediene* follows the Conclusion. *See infra* Part IX.

33. *See infra* notes 36–54.

34. *See infra* note 57 and accompanying text.

the scope of the writ's application to citizens and aliens.<sup>35</sup> The discussion that follows describes the evolution of the writ, both in terms of its meaning and its application, and the ways in which the Court has applied it to those seeking to assert it against executive detention.

### A. *Origin and Evolution of the Writ in England*

Known as the "Great Writ," the writ of habeas corpus ad subjiciendum<sup>36</sup> originated in medieval England.<sup>37</sup> Its origins are believed to date back to the Magna Carta<sup>38</sup> and perhaps even to William the Conqueror.<sup>39</sup> Originally conceived as a legal means of ensuring an individual's in-court appearance before the King's judgment was issued against him,<sup>40</sup> the writ gradually developed into a tool for the King's courts to establish jurisdiction over independent local courts.<sup>41</sup> This was accomplished by requiring "widely dispersed and fiercely independent local courts to subjugate their judgments concerning a prisoner to those of the Crown's courts."<sup>42</sup> Further legal evolution occurred<sup>43</sup> as the writ was used to compel various state actors to

35. See *infra* notes 91–131 and accompanying text.

36. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2036–37 (2007).

37. See William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983, 992 (1978).

38. See Muhammad Usman Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(d)(1) Violates the Constitution*, 19 ST. THOMAS L. REV. 361, 366 (2006). The author notes that "[h]abeas corpus has its roots in the thirteenth century English charter Magna Carta, which provides that a person cannot be imprisoned 'save by lawful judgment of his peers or by the law of the land.'" *Id.*

39. See Duker, *supra* note 37, at 987–88. As Duker notes:

When the Normans arrived in England in 1066, they found no central court system. Even the "national system of local courts" was largely overshadowed by small private franchise units. The absence of a central administration was discordant with the Norman notion that justice flowed from the king. To implement this notion, William the Conqueror introduced the *Curia Regis* (king's council) and the royal *missi* (itinerant justices), but left the local courts standing . . . For William's centralization of the court system to be effective, uniform procedures, including a standard form of precept to compel a defendant's appearance, were necessary.

*Id.*

40. *Id.* at 992.

41. John A. Sholar, Jr., *Habeas Corpus and the War on Terror*, 45 DUQ. L. REV. 661, 667 (2007).

42. *Id.* at 667.

43. See Duker, *supra* note 37, at 1004.

By the middle of the fourteenth century, the use of habeas corpus in response to petitions on behalf of prisoners so that they might be presented before the court was sufficiently common to take on the status of a distinct form of habeas corpus: *habeas corpus cum*



present alleged defendants for trial before common law courts.<sup>44</sup> This transformation continued until the mid-seventeenth century when the writ, given greater force through judicial and legislative pronouncements,<sup>45</sup> appeared in its modern role as a judicial check against unlawful executive detention.<sup>46</sup> What began as a means of consolidating the Crown's jurisdictional control quickly became the principal legal remedy for contesting unjust executive detention; the Monarchy was now required to justify its detentions in common law courts.<sup>47</sup>

English political developments of the mid-seventeenth century solidified the legal development of the writ. The political upheavals of the Interregnum period—beginning with the beheading of King Charles and culminating in the reign of Oliver Cromwell<sup>48</sup>—occasioned the end of the monarchy's secret convictions outside of common law courts.<sup>49</sup> Parliament's 1641 vote to eradicate the Court of the Star Chamber<sup>50</sup> demonstrated its intent to end the Crown's private show trials and bring all judgments resulting in government detention within the purview of the common law courts.<sup>51</sup> Some have argued that such legal and political transformation served to institutionalize the new understanding of the writ as a fundamental check on executive detention.<sup>52</sup> This argument is likely correct. If the writ was so understood, then the Framers, as heirs and

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*causa, or simply, corpus cum causa.*

*Id.*

44. See Sholar, *supra* note 41, at 667–68 (“The Writ continued to evolve throughout the years, and by the sixteenth century, the first (unsuccessful) interaction between the Admiralty and the courts over Habeas was documented in *Dolphyn v. Shutford*. Eventually, in *Thomilson’s Case* and *Hawkridge’s Case*, the Writ was put successfully to the Admiralty, forcing it to deliver prisoners to the common law courts. By forcing the Admiralty to obey the Writ, the courts were able to show their primacy over the actions of an agent of the Monarch.”).

45. See *id.* at 668. Two pivotal events occasioned this transformation. In 1620, a court case known as *Chamber’s Case* was the first instance where a court “used Habeas Corpus to free a prisoner who had been unlawfully jailed by the Monarch’s Privy Council, rather than using it as a means of protecting jurisdiction.” *Id.* at 668. Also, in 1641 Parliament passed the Habeas Corpus Act, which did away with the much-maligned Court of the Star Chamber. *Id.* at 669. Habeas corpus now stood as an effective means with which to seek judicial redress for unlawful executive detention. See also Duker, *supra* note 37, at 1035. Duker verifies this development, noting that “*Chamber’s Case* confirmed that the writ of habeas corpus had assumed a new role. No longer was it primarily an instrument employed by the common-law courts to protect their jurisdiction. The questioning of the validity of commitments, previously an incidental effect of the writ, now became the major object.” *Id.*

46. See Sholar, *supra* note 41, at 668.

47. See Duker, *supra* note 37, at 1036.

48. See History of the Monarchy, The Stuarts, Charles I, <http://www.royal.gov.uk/output/page76.asp> (last visited Sept. 17, 2008).

49. See Sholar, *supra* note 41, at 669.

50. *Id.*

51. *Id.*

52. See Duker, *supra* note 37, at 1037.

students of the common law, would have ensured its inclusion in America's founding documents.<sup>53</sup> Indeed, the Framers' appreciation of the writ is demonstrated by the fact that it is specifically provided for in the Constitution.<sup>54</sup>

### B. Constitutional Incorporation of the English Common Law Writ

Despite the federalism concerns raised by some delegates,<sup>55</sup> the writ was recognized by the Founders and was, as noted above, of sufficient importance to warrant inclusion in the constitutional text.<sup>56</sup> Article I, Section 9, Clause 2 of the Constitution provides that the "privilege of the writ of habeas corpus shall not be suspended, unless when in cases of

53. See *Rasul v. Bush*, 542 U.S. 466, 473–74 (2004) ("Habeas corpus is, however, 'a writ antecedent to statute . . . throwing its root deep into the genius of our common law.' The writ appeared in English law several centuries ago, became 'an integral part of our common-law heritage' by the time the Colonies achieved independence . . . and received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.'") (internal citations omitted).

54. See *infra* note 57.

55. See Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 456–57 (1996). Maryland delegate Luther Martin voted with the minority on the Suspension Clause motion, saying:

As the State governments have a power of suspending the habeas corpus act [in cases of rebellion or invasion], it was said there could be no good reason for giving such a power to the general government, since whenever the *State* which is invaded or in which an insurrection takes place, finds its safety requires it, *it will make use of that power—And it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an act of rebellion, and suspending the habeas corpus act, may seize upon the persons of those advocates of freedom, who have had virtue and resolution enough to excite the opposition, and may imprison them during its pleasure in the remotest part of the union, so that a citizen of Georgia might be bastiled in the furthest part of New-Hampshire—or a citizen of New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection—These considerations induced me, Sir, to give my negative also to this clause.*

*Id.* (emphasis in original).

56. See Sholar, *supra* note 41, at 672. Sholar notes that:

At the Convention, Charles Pinkney of South Carolina moved that "[t]he privileges and benefit of the Writ of Habeas Corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months."

*Id.*

rebellion or invasion the public safety may require it.”<sup>57</sup> Following ratification, Congress followed suit and enacted section 14 of the Judiciary Act of 1789.<sup>58</sup> The Act provides that “courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>59</sup>

So vital was the writ that following the Constitutional Convention there was fierce debate over the effectiveness of the Suspension Clause.<sup>60</sup> Some questioned whether it would safeguard a robust interpretation of the writ as a prohibition against unjust government detainment, particularly of those expressing minority or unpopular views.<sup>61</sup> Furthermore, with respect to the ratification debate, “four states specifically asked for a clause in the new Constitution guaranteeing the right to file a Writ of Habeas Corpus without any means of suspension.”<sup>62</sup> Subsequent American history, including recent cases discussed *infra*,<sup>63</sup> reveal that the writ was in fact employed successfully in instances where citizens and aliens alleged unlawful government detention.<sup>64</sup> In sum, it is clear that the Founders worked to assure the states that the Constitution provided a way to challenge any unjust executive detention that might impinge on their citizens’ liberty.<sup>65</sup> Having

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57. U.S. CONST. art. 1, § 9, cl. 2.

58. Judiciary Act of 1789, § 14.

59. *Id.*

60. See Freedman, *supra* note 55, at 456. Freedman provides an excerpt of James Madison’s notes that record the debate at the Convention on Charles Pinkney’s habeas motion:

Mr. Pinkney, urging the propriety of securing the benefits of the Habeas corpus in the most ample manner, moved “that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months”

Mr. Rutledge was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary at the same time through all the States—

Mr. Govr. Morris moved that “The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it”.

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The first part of Mr. Govr. Morris’s motion, to the word ‘unless’ was agreed to nem: con:—on the remaining part; N.H. . . .

*Id.*

61. *Id.*

62. Sholar, *supra* note 41, at 673.

63. See *infra* Parts IV.A.1–3 and accompanying text.

64. See *id.*

65. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 121 (2005) (“Another section 9 clause, sounding in both federalism and separation of powers, guaranteed that ‘the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.’ In the absence of any such extreme circumstance, courts

explored its value during the founding period, it is now appropriate to consider how the writ is in fact asserted against unlawful executive detention.

### C. *The Operation of the Writ in Federal Court*

The writ of habeas corpus is:

[T]he 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.<sup>66</sup>

But where the writ runs,<sup>67</sup> the authority on which it runs,<sup>68</sup> the manner in which its availability can be restricted,<sup>69</sup> and its application to aliens are important issues the Supreme Court has dealt with as it has applied the writ in different circumstances.<sup>70</sup> These general issues can be consolidated into three specific issues for purposes of habeas jurisprudence: jurisdiction, merits challenges, and procedural challenges.<sup>71</sup>

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would remain open to hear all challenges to the lawfulness of executive detentions.”).

66. See Fallon & Meltzer, *supra* note 36, at 2032; see also *Rasul v. Bush*, 542 U.S. 466, 474–75 (2004) (“But ‘[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.’” *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). See also *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”). As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U.S. custody: ‘Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.’ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–219 (1953) (dissenting opinion). Consistent with the historic purpose of the writ, this Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan*, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U.S. 1 (1946).”.

67. See Fallon & Meltzer, *supra* note 36, at 2032.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 2037–40.

The initial inquiry is whether the court has proper jurisdiction to hear the matter.<sup>72</sup> As noted above, section 14 of the Judiciary Act of 1789 grants federal courts the statutory jurisdiction to hear habeas appeals to executive detention.<sup>73</sup> Although it seems simple enough, jurisdiction remains a debatable issue. Whether the statute allows federal courts to grant the writ to state prisoners in the absence of a statute granting such authority has been disputed since John Marshall served on the Court.<sup>74</sup> This issue is important because subsequent amendments to the federal habeas statute,<sup>75</sup> now codified as 28 U.S.C. § 2241,<sup>76</sup> have raised new questions about whether the habeas right is a legislative one.<sup>77</sup> Moreover, some also question whether legislative enactments can legally restrict habeas rights without violating the Suspension Clause of the Constitution.<sup>78</sup>

Another key feature of habeas jurisdiction is the fact that “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>79</sup> Indeed, the defining feature of the writ is that, if successful, it grants release from

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72. *Id.* at 2037–38.

73. *See* Judiciary Act of 1789, *supra* note 58.

74. *See* Faridi, *supra* note 38, at 367. Faridi notes that:

Justice Marshall interpreted Section 14 of the Judiciary Act of 1789 to mean that the Act does not grant federal courts the power to issue writs of habeas corpus to state prisoners, and that federal courts lack the power to issue writs of habeas corpus unless affirmatively granted by a statute.

*Id.*

75. *See id.* at 368. The federal habeas statute was subsequently amended in 1833 “to empower federal courts to hear claims where states detained federal officers for acts authorized by federal law, and later in 1867 to enforce newly created federal rights during the Reconstruction era.” *Id.* The 1867 Act was itself amended in 1885. *Id.* The most relevant amendment for this discussion is that which occurred under the auspices of the Detainee Treatment Act of 2005, which added two new subsections, each labeled (e), which preclude federal court jurisdiction to hear detainee habeas appeals. *See* Cornell University Law School Legal Information Institute, *available at* <http://www.law.cornell.edu/uscode/28/2241.html> (last visited Nov. 25, 2008).

76. 28 U.S.C. § 2241 (2005).

77. If claimants must base their habeas petitions solely on the grant of jurisdiction contained in the habeas statute, and not on an inherent right to habeas under the Constitution, this implies that the statute is the principal source of the right, despite the fact that the right to habeas corpus is explicitly mentioned in the Constitution. *See* Faridi, *supra* note 38, at 367. Under this analysis, Congress would determine the extent to which individuals have the right to challenge executive detention. This is doubtless a controversial proposition given the wartime context and the recent history of single party control of the Legislative and Executive branches.

78. *See id.*; *see also* Fallon & Meltzer, *supra* note 36, at 2038. The authors note that “[a]lthough the existence of habeas jurisdiction is initially a statutory question, limits on statutory jurisdiction sometimes present constitutional questions.” *Id.* These constitutional questions, they argue, might lend credence to the argument that “implicit in the Constitution’s structure” is a grant of “substantive rights to judicial relief from executive detention,” a position they attribute to Professor Henry Hart. *Id.* at 2039.

79. *See* Fallon & Meltzer, *supra* note 36, at 2038.

executive detention. Yet, release is predicated upon the detained individual demonstrating why his detention is an unlawful one. To do that, he must marshal evidence to contest the merits of his detention.

Substantive challenges to the merits of executive detention represent the second key issue in federal habeas challenges.<sup>80</sup> Habeas petitioners typically seek to challenge the merits of their detentions in three ways. First, in line with Justice Jackson's concurrence in *Youngstown*,<sup>81</sup> the initial argument rests upon separation of powers and considers whether the Executive branch has legal support, vis-à-vis Congress, in conducting the detainment.<sup>82</sup> Second, the petitioner alleges his constitutional right to be free from unlawful detention.<sup>83</sup> Third, habeas petitioners can point to extra-constitutional rights, such as those enshrined in the Geneva Conventions, which might restrict executive detention in specific instances.<sup>84</sup> Each of

80. See *id.* at 2039.

81. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, Justice Jackson laid out a three-part framework for evaluating the constitutional authority of executive action. He reasoned that:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Id.* at 636–38.

82. See Fallon & Meltzer, *supra* note 36, at 2039.

83. See *id.* A good example is an individual detained for protesting the war in violation of his First Amendment rights. *Id.*

84. *Id.*

these arguments is relevant because detainees at Guantanamo Bay have presented similar arguments in contesting their detentions.<sup>85</sup> Finally, having challenged both the jurisdictional and merits aspects of their detention, habeas petitioners also attempt to show that the detention process itself is violative of their procedural rights.<sup>86</sup>

Judicial review of the Executive's detention procedures or processes represents the third component of federal habeas actions.<sup>87</sup> As it pertains to enemy aliens asserting the writ against government detention, this review analyzes the military detention procedures, the evidence collection procedures, and the appeals process if one is available.<sup>88</sup> Procedural questions are integral as much of the detainee litigation occurring in the D.C. Circuit Court of Appeals and the Supreme Court concerns the sufficiency of the process available to detainees seeking to challenge the merits of their detentions.<sup>89</sup> However, before addressing the recent detainee cases, it is necessary to consider how the Court has dealt with habeas challenges brought by petitioners residing outside the jurisdiction in which the petition is asserted. These decisions highlight the Court's evolving habeas jurisprudence, and it is against the backdrop of these decisions that the Court's war on terror decisions must be understood.<sup>90</sup>

#### *D. Habeas Jurisprudence Prior to the War on Terror*

In many respects, the development of the Court's habeas jurisprudence mirrors its development in other areas of substantive constitutional law. Just as the Court has utilized substantive due process to expand the range of protected liberties under the Fourteenth Amendment in the post-*Lochner* period,<sup>91</sup> the Court has also been willing to apply the writ more expansively

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85. See *infra* Parts IV.A–B.

86. See *id.*

87. See Fallon & Meltzer, *supra* note 36, at 2039.

88. See *infra* Part V.

89. See *id.*

90. See *infra* Part II.D.

91. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) (“One hundred years after the Supreme Court invalidated a law regulating bakers’ working hours as a violation of liberty of contract in *Lochner v. New York*, the case and its legacy are at the forefront of debate over the Constitution. Justice Antonin Scalia, dissenting in *Lawrence v. Texas*, argued that the Fourteenth Amendment no more protects the right to engage in homosexual sodomy than it protects the right to work ‘more than 60 hours per week in a bakery.’ Conservative scholar Robert George, attacking the majority opinion in *Lawrence* and the Massachusetts Supreme Court opinion recognizing a right to same-sex marriage, asserts that ‘it is important to make clear that what is going on in the state and federal courts is *Lochnerizing* on a massive scale.”); see also Erwin Chemerinsky, *Practising Law Institute Section 1983 Civil Rights Litigation Symposium, Substantive Due Process*, 15 TOURO L. REV. 1501, 1502–05 (1999) (“Substantive due process was used, as you know, in the first third of this century to aggressively protect economic liberties from government interference. *Lochner v. New York* is the quintessential case from that era.”).

in the twentieth century than in the previous two centuries.<sup>92</sup> A notable exception to this trend was the Court's general unwillingness to let petitioners located outside the jurisdictional boundaries of federal courts assert the writ in those courts, particularly if those petitioners were enemy aliens detained outside the United States.<sup>93</sup> The Court hewed closely to a strict jurisdictional interpretation of the habeas statute until subsequent decisions overruled that principle as it applied to domestic cases.<sup>94</sup> It was later overruled as it applied to international habeas cases brought during the current war on terror.<sup>95</sup>

The Supreme Court's 1948 decision in *Ahrens v. Clark* illustrated the Court's traditional reluctance to let petitioners in one federal jurisdiction assert habeas claims in another federal jurisdiction.<sup>96</sup> The issue in *Ahrens* was "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*."<sup>97</sup> Even though they were detained at Ellis Island, New York, 120 Germans being held for deportation brought their claims in federal court in Washington, D.C.<sup>98</sup> The Court construed the words "within their respective jurisdictions"<sup>99</sup> of the habeas statute to mean that a federal court could not entertain writs filed by petitioners outside its territorial jurisdiction.<sup>100</sup> This interpretation of the habeas statute was important because it led the District Court in *Johnson v. Eisentrager* to conclude that it lacked jurisdiction over the claims brought by German detainees seeking to utilize the writ.<sup>101</sup> The *Eisentrager* holding appeared to affirm this interpretation and confirm that a strict interpretation of the habeas statute's

92. See *Rasul*, 542 U.S. at 474 ("As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries.' *Swain v. Presley*, 430 U.S. 372, 380 n.13 . . . (1977).").

93. See *infra* notes 103–14.

94. See *infra* notes 117–27.

95. See *Rasul*, 542 U.S. at 479.

96. *Ahrens v. Clark*, 335 U.S. 188 (1948).

97. *Id.* at 189.

98. *Id.*

99. For the literal language of the then-current habeas statute, 28 U.S.C. § 452, see *Rasul*, 542 U.S. at 490 (Scalia, J., dissenting).

100. See *Ahrens*, 335 U.S. at 189. The Court rejected the petitioners' claims and held that "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction." *Id.* at 190 (citations omitted). Furthermore, the Court expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.* at 192 n.4.

101. See *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950).



jurisdictional requirements was appropriate for both domestic and international habeas cases.<sup>102</sup>

In *Eisentrager*, twenty-one German nationals imprisoned at Landsberg Prison in Germany petitioned for writs of habeas corpus in the District Court for the District of Columbia.<sup>103</sup> They were convicted by a United States Military commission for engaging in hostilities against the United States in China.<sup>104</sup> The Court dismissed the petitions, finding that neither the Constitution nor any statute supported holding the writ of habeas corpus to be available to alien enemies captured outside the United States.<sup>105</sup> Furthermore, the Court noted that in those instances where habeas rights were afforded to aliens, it was because those aliens were located within the United States.<sup>106</sup> As petitioners were captured in China and imprisoned in Germany, they had no physical connection to the United States that warranted application of federal law or the constitutional protections of habeas corpus.<sup>107</sup> Thus, the Court found “no basis for invoking federal judicial power in any district . . . .”<sup>108</sup>

This decision was important on several levels. First, it clearly rejected the notion that the German petitioners had a right under the habeas statute to bring a habeas claim in a federal court where the petitioners’ capture and detention occurred beyond the reach of federal court jurisdiction.<sup>109</sup> Second, it rejected the notion that the Constitution itself conferred the habeas right to such aliens located outside the United States.<sup>110</sup> Third, it made explicit that the extension of habeas rights to aliens was premised upon those aliens having a physical presence in the country.<sup>111</sup> Addressing this point, the Court noted that:

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102. See *Rasul*, 542 U.S. at 490 (Scalia, J., dissenting).

103. See *Eisentrager*, 339 U.S. at 765.

104. *Id.*

105. *Id.*

106. *Id.* at 778.

107. *Id.* The Court went to great lengths to reject the petitioners’ contention that aliens outside the United States were entitled to American courts via habeas corpus and noted that:

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. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

*Id.* at 777–78.

108. *Id.* at 790.

109. *Id.* at 768.

110. *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.”).

111. *Id.* at 777–78.

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes. Absence of support from legislative or juridical sources is implicit in the statement of the court below that “The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases.”<sup>112</sup>

Thus, two years after *Ahrens*, the Court affirmed the principle set forth in *Ahrens* by holding that federal habeas statute jurisdiction does not extend to those held outside the jurisdiction of the federal courts.<sup>113</sup> Applying that rule to alien enemies during wartime, the Court closed the courthouse door on enemy aliens detained overseas.<sup>114</sup> This decision stood undisturbed until 2004, when the Supreme Court held that a 1973 decision overruling *Ahrens* also overruled *Eisentrager*.<sup>115</sup> That 1973 decision was *Braden v. 30th Judicial Circuit Court of Kentucky*.<sup>116</sup>

In *Braden*, an Alabama prisoner filed a habeas petition in Kentucky, alleging that a three-year-old Kentucky indictment violated his constitutional right to a speedy trial.<sup>117</sup> The Court considered whether the habeas statute, which provided that “[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions’ . . . precluded the District Court from entertaining petitioner’s application.”<sup>118</sup> It held the district court was not precluded from considering the writ<sup>119</sup> because “developments since *Ahrens* have had a profound impact on the continuing vitality of that decision.”<sup>120</sup> The Court cited several such legislative<sup>121</sup> and

112. *Id.* at 768.

113. *Id.* at 791.

114. *Id.*

115. See *Rasul v. Bush*, 542 U.S. 466 (2004).

116. See *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

117. *Id.* at 485.

118. *Id.* at 485–86 (emphasis in original).

119. *Id.* at 486.

120. *Id.* at 497.

121. Congressional amendments to the habeas statute regarding collateral attack rules, the prisoner’s ability to bring a habeas challenge in multiple venues, and the requirement that the petitioner be present before the court adjudicating his habeas claim demonstrated that “Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy.” *Id.*

judicial<sup>122</sup> developments that indicated a desire on the part of Congress and the Supreme Court to reduce the inconvenience associated with contesting charges in multiple jurisdictions.<sup>123</sup> In light of these considerations, the Court rejected the notion that *Ahrens* mandated an “inflexible jurisdictional rule” requiring appearance in an “inconvenient forum.”<sup>124</sup> The Court ultimately held that “[u]nder these circumstances it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama.”<sup>125</sup>

With respect to the reach of statutory habeas jurisdiction, there was little doubt<sup>126</sup> that *Braden* overruled *Ahrens* to the extent that prisoners subject to court jurisdiction in one state could now bring habeas claims to contest charges in other states.<sup>127</sup> Yet, it did not mention *Eisentrager* or how its ruling might affect the rights of enemy aliens detained abroad.<sup>128</sup>

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122. *Id.* at 498–99 (“A further, critical development since our decision in *Ahrens* is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the “custody” requirement of the habeas statute. See *Peyton v. Rowe*, 391 U.S. 54 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Jones v. Cunningham*, 371 U.S. 236 (1963). The overruling of *McNally v. Hill*, 293 U.S. 131 (1934), made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of prisoner’s attack on the detainer.”).

123. *Id.* at 497–500.

124. *Id.* at 500.

125. *Id.* at 499 (“Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. Under these circumstances it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama. In fact, a slavish application of the rule would jar with the very purpose underlying the addition of the phrase, ‘within their respective jurisdictions.’”).

126. See *Rasul v. Bush*, 542 U.S. 466, 494 (2004) (Scalia, J., dissenting) (“But in fact *Braden* did not overrule *Ahrens*; it distinguished *Ahrens*.”).

127. See *Braden*, 410 U.S. at 502 (Rehnquist, J., dissenting) (“Today the Court overrules *Ahrens v. Clark*, 335 U.S. 188 (1948), which construed the legislative intent of Congress in enacting the lineal predecessor of 28 U.S.C. § 2241. Although considerations of ‘convenience’ may support the result reached in this case, those considerations are, in this context, appropriate for Congress, not this Court, to make. Congress has not legislatively overruled *Ahrens*, and subsequent ‘developments’ are simply irrelevant to the judicial task of ascertaining the legislative intent of Congress in providing, in 1867, that federal district courts may issue writs of habeas corpus ‘within their respective jurisdictions’ for prisoners in the custody of state authorities.”).

128. *Id.* at 484–511. Indeed, the crucial fact in *Braden* was the fact that the petitioner, a United States citizen, was already subject to the jurisdiction of one state before he filed the writ in a second state, and the Court’s rationale is replete with forum convenience analysis as to why a citizen should not be barred from bringing a habeas claim under the circumstances. *Id.* at 493–94 (majority opinion) (“In terms of traditional venue considerations, the District Court for the Western District of Kentucky is almost surely the most desirable forum for the adjudication of the claim. It is in Kentucky, where all of the material events took place, that the records and witnesses pertinent to petitioner’s claim are likely to be found. And that forum is presumably no less convenient for the respondent and the Commonwealth of Kentucky, than for the petitioner. The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing

Additionally, subsequent Supreme Court decisions did not provide occasion for the Court to articulate a clear rationale for distinguishing between the habeas rights of citizens and aliens in the wartime context; nor did they articulate a precise definition of the sovereign territory of the United States to be applied should such a case arise.<sup>129</sup> Such questions were arguably thought to be settled before the Supreme Court took up the issue in *Rasul*.<sup>130</sup> The road from *Ahrens* to *Rasul* was an interesting one, but the journey from the battlefields of Afghanistan to the Supreme Court in Washington, D.C., required an unlikely detour through Guantanamo Bay, Cuba.<sup>131</sup>

### III. EXECUTIVE DETENTION IN THE WAR ON TERROR

Following the September 11th attacks, Congress passed the Authorization for Use of Military Force (AUMF), which granted the President the authority to use “all necessary and appropriate force” to wage war against those responsible for the attacks.<sup>132</sup> Acting under this directive and his Article II commander-in-chief authority,<sup>133</sup> the President commenced

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prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined. Indeed, respondent makes clear that ‘on balance, it would appear simpler and less expensive for the State of Kentucky to litigate such questions [as those involved in this case] in one of its own Federal judicial districts.’”)

129. This definition is integral to applying habeas rights under the federal statute because the statute extends federal court jurisdiction only to those areas within the sovereign territory of the United States. See U.S.C. § 2241 (2005).

130. See *Rasul*, 542 U.S. at 496–98 (Scalia, J., dissenting).

131. See *infra* Part III.

132. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (“This joint resolution may be cited as the ‘Authorization for Use of Military Force’. SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES. (a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (b) War Powers Resolution Requirements—(1) SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. (2) APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this resolution supercedes [sic] any requirement of the War Powers Resolution.”).

133. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

hostilities against the Taliban in Afghanistan in 2001,<sup>134</sup> and the government of Saddam Hussein in 2003.<sup>135</sup> Operations in both theaters of the war resulted in the capture of hundreds of enemy fighters.<sup>136</sup>

In 2002, the United States military designated the United States naval base located at Guantanamo Bay, Cuba, as the principal location for the detainment and prosecution of enemy fighters captured during the war.<sup>137</sup> The Bush Administration determined that the detainees' disregard of traditional laws of warfare did not entitle them to POW (prisoner of war) status under international law.<sup>138</sup> It then declared its intention to detain them indefinitely until they were determined to be enemy combatants and established military commissions to try those prisoners determined to be enemy combatants.<sup>139</sup> The Supreme Court subsequently invalidated these

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134. See Presidential Address to the Nation, Oct. 7, 2001, <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> ("THE PRESIDENT: Good afternoon. On my orders, the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.").

135. See President Bush Addresses the Nation, March 19, 2003, [www.whitehouse.gov/news/releases/2003/03/20030319-17.html](http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html) ("THE PRESIDENT: My fellow citizens, at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people, and to defend the world from grave danger. On my orders, coalition forces have begun striking selected targets of military importance to undermine Saddam Hussein's ability to wage war. These are opening stages of what will be a broad and concerted campaign. More than 35 countries are giving crucial support—from the use of naval and air bases, to help with intelligence and logistics, to the deployment of combat units. Every nation in this coalition has chosen to bear the duty and share the honor of serving in our common defense.").

136. See *Rasul v. Bush*, 542 U.S. 466, 471 (2004) ("Since early 2002, the U.S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay."); see also Joint Task Force Guantanamo, *supra* note 6, "Mission," available at <http://www.jtfgtmo.southcom.mil/mission.html> (last visited Nov. 23, 2008) ("The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. During the course of the Global War on Terror, U.S. and allied forces have captured thousands of individuals fighting as part of the al-Qaida and Taliban effort.").

137. See Joint Task Force Guantanamo, *supra* note 6, "Joint Task Force History," <http://www.jtfgtmo.southcom.mil/about.html#gtmo> (last visited Sept. 16, 2008).

138. See Bialke, *supra* note 17, at 2 ("The U.S. has applied well-established existing international law in holding that the al-Qaeda and Taliban detainees are presumptively unlawful combatants not entitled to POW status. Taliban and al-Qaeda enemy combatants captured without military uniforms in armed conflict are not presumptively entitled to, nor automatically granted, POW status. POW status is a privileged status given by a capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that POW status is merited. In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict, and al-Qaeda's failure to adequately align with a state show POW status is not warranted.").

139. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004). The pertinent sections of the order are quoted below.

Section 1. *Findings*. . . (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary

provisions<sup>140</sup> and new procedures were established in conjunction with Congress to conform to the mandates of the Court's decisions.<sup>141</sup>

Yet even before the Supreme Court weighed in on the due process rights of detainees, the military had established procedures to frequently reassess the evidence supporting detentions.<sup>142</sup> Since 2002, annual review boards have reviewed the classified and non-classified evidence pertaining to each detainee to ensure that continued detention is warranted.<sup>143</sup> The boards' assessment is forwarded to the Deputy Secretary of Defense, who makes the final decision regarding whether the evidence warrants release, transfer or continued detention.<sup>144</sup> As of November 2008, "approximately 255" detainees were being held at Guantanamo, while over five hundred detainees had been transferred.<sup>145</sup>

The detentions at Guantanamo Bay have not been without controversy,<sup>146</sup> and that controversy—in some instances fueled by inaccurate

for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals. . . .

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be—(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; . . .

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.* (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

*Id.* §§ 1(e), 3(a), 4(a) (emphasis in original).

140. See Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005 (2007); see also Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004). These cases are discussed in Part IV, *infra*.

141. See *infra* notes 233–37 and accompanying text.

142. See *infra* notes 143–44 and accompanying text.

143. See Joint Task Force Guantanamo, *JTF Guantanamo Marks 500<sup>th</sup> Detainee Transfer*, available at <http://www.jtfgtmo.southcom.mil/storyarchive/2008/January/010408-1-500transfer.html> (last visited Oct. 21, 2008).

144. *Id.*

145. See U.S. Department of Defense, *Detainee Transfer Announced*, Nov. 4, 2008, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12332> ("Since 2002, approximately 520 detainees have departed Guantanamo for other countries including Albania, Algeria, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Great Britain, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom and Yemen. There are approximately 255 detainees currently at Guantanamo.").

146. See Charles Babington, *Critics of Guantanamo Urge Hill to Intervene*, WASH. POST, June 16, 2005 at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/15/AR2>

media reports<sup>147</sup>—has served to heighten judicial and congressional scrutiny of the facility. Some in Congress have called for the detention center at Guantanamo to be closed, and for its prisoners to be transferred to prison facilities within the United States.<sup>148</sup> There are no indications, however, that this will occur in the near future. Furthermore, while President Bush<sup>149</sup> and Joint Chiefs Chairman Admiral Mike Mullen<sup>150</sup> have expressed their desire to see Guantanamo closed, there are no current indications that the Guantanamo detention facility will be closed any time soon.<sup>151</sup> It is against

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005061500823\_pf.html (“Pressure has mounted on Congress in recent weeks to address allegations of detainee abuse at the prison, opened in January 2002 at a Navy base on a U.S.-leased slice of Cuba. Amnesty International issued a report last month and its secretary general called the camp ‘the gulag of our time,’ a reference to Soviet labor camps. Former president Jimmy Carter is among those who have called for the United States to close the facility.”).

147. Howard Kurtz, *Newsweek Apologizes: Inaccurate Report on Koran Led to Riots*, WASH. POST, May 16, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/15/AR2005051500605.html> (“Newsweek apologized yesterday for an inaccurate report on the treatment of detainees that triggered several days of rioting in Afghanistan and other countries in which at least 15 people died.”).

148. *See Democrats Mull Plan to Close Guantanamo: Key House Democrats Suggest Speedy Trial Or Release Of Most Prisoners*, THE ASSOCIATED PRESS, Feb. 8, 2007, available at <http://www.cbsnews.com/stories/2007/02/08/terror/main2452243.shtml> (“Key House Democrats said Thursday they are considering a plan to close the prison at Guantanamo Bay, Cuba, by the end of 2008, with the exception of several dozen detainees in the war on terror who would be kept at the facility and tried there. Rep. John Murtha, D-Pa., said he hopes to include the provision in legislation this spring that Democrats also intend to use to try to prevent further increases in troop strength in the war in Iraq. Without public notice, Murtha dispatched Rep. Jim Moran, D-Va., to the detention center at the U.S. naval base at Guantanamo Bay on a one-day trip late last month to recommend ways for closing it. Both men said the prison has become counterproductive as the United States tries to win converts overseas in the war on terror.”).

149. *See Babington, supra* note 146 (“President Bush has left open that possibility [closing Guantanamo], but he and Defense Secretary Donald H. Rumsfeld also have defended treatment of Guantanamo Bay captives and said the government must have a facility where it can hold terrorism suspects.”).

150. *See* ABCNEWS.com, *Joint Chiefs Chairman: Close Guantanamo*, <http://abcnews.go.com/Politics/wireStory?id=4131424> (last visited Sept. 16, 2008) (“The chief of the U.S. military said he favors closing the prison here as soon as possible because he believes negative publicity worldwide about treatment of terrorist suspects has been ‘pretty damaging’ to the image of the United States. ‘I’d like to see it shut down,’ Adm. Mike Mullen said Sunday in an interview with three reporters who toured the detention center with him on his first visit since becoming chairman of the Joint Chiefs of Staff last October.”).

151. *See* White House Press Briefing by Dana Perino, June 22, 2007, available at <http://www.whitehouse.gov/news/releases/2007/06/20070622-4.html> (“Q Can we go on to Guantanamo? Was there a meeting scheduled for today to discuss Guantanamo? MS. PERINO: There’s meetings scheduled regularly to talk about Guantanamo, they happen frequently, they happen often, because people are charged with the responsibilities that the President has given them to try to close down that facility. Yes, there was going to be a meeting today, but there was a determination that it wasn’t needed. Q Was it because of the AP story? MS. PERINO: I think that the decision to make—to not have the meeting happened late in the day after that story came out. Q So it was because of that? MS. PERINO: What I can tell you is that meeting was not a decisional meeting, there was nothing imminent coming out of that meeting, and that there are people who are charged with—tasked with working on this issue every day, not only here at the White House, but at the Defense Department, State Department and other agencies, to make sure that we are figuring out a way to repatriate these

the backdrop of the controversy surrounding Guantanamo that we now turn to evaluate the detainee challenges to the Guantanamo detention system and the response those challenges elicited from Congress and President Bush.

#### IV. THE ENEMY COMBATANT CASES AND CONGRESSIONAL RESPONSE

In 2004, the Supreme Court decided three detainee cases,<sup>152</sup> and Congress and the President responded with a statute to overturn the third and most controversial decision.<sup>153</sup> In 2006, the Court decided a fourth detainee case,<sup>154</sup> and Congress and the President again responded in an attempt to correct what they perceived as an errant ruling.<sup>155</sup> Habeas petitions from two more detainees reached the Court during its October 2007 Term, and a decision was reached in the summer of 2008.<sup>156</sup> Additionally, there is recent detainee litigation in the D.C. Circuit Court of Appeals that is likely to reach the Court in the near future.<sup>157</sup>

These developments demonstrate the tension between the Court and the political branches regarding the legality of the detention system established above. A recurring issue is the Court's concern that detainees have the ability to challenge the merits of their detentions through habeas or an acceptable substitute.<sup>158</sup> Whether the legislation enacted in response to the

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individuals, so they can go back to their countries in a way that we can make sure that they're going to be held, and not a threat to anybody else, as well as be treated humanely. Q Are you nearing a decision? Was there anything different about this meeting? Are the meetings and the attendees—and the Secretary of State? Was there something different? Was this going to be a focus? MS. PERINO: Well, the meeting was going to be focusing on doing what the President has asked them to do for the past few years, which is work to get the facility closed. I think that—I think that report was overblown. There was not an imminent decision made. There's no deadline. There was just a regular meeting.”); see also David Stout, *Bush Advisors Weigh Closing Guantanamo Prison Sooner*, N.Y. TIMES, June 22, 2007, available at <http://www.nytimes.com/2007/06/22/washington/22cnd-gitmo.html>.

152. See *infra* Parts IV.A.1–3.

153. See *infra* note 244 and accompanying text.

154. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

155. See *infra* notes 272–75.

156. See *supra* note 21; see also *infra* note 291 and Part IX.

157. See *infra* note 304 and accompanying text.

158. See *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–278, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (KENNEDY, J., concurring, and cases cited therein.”).



Court's decisions enables such challenges is a matter of debate and is discussed *infra*.<sup>159</sup> Those decisions and the resulting legislative responses are discussed in the following section.

A. *Round One: Hamdi, Padilla, Rasul, CSRTs and the Detainee Treatment Act of 2005*

1. *Hamdi v. Rumsfeld*—The Due Process Rights of Citizen Detainees

Yaser Esam Hamdi was born in Louisiana in 1980, moved with his family to Saudi Arabia, and by 2001 was living in Afghanistan.<sup>160</sup> That year, following the initiation of military hostilities against the Taliban, Hamdi was captured by the Northern Alliance—an Afghani militia group allied with the United States.<sup>161</sup> He was then delivered to the United States military.<sup>162</sup> The government alleged that after Hamdi arrived in Afghanistan, he joined the Taliban and participated in weapons training.<sup>163</sup> Therefore, the government determined he was an enemy combatant subject to indefinite detention.<sup>164</sup> In January 2002, Hamdi was transferred to Guantanamo, but after learning that he was an American citizen, military authorities transferred him to a military prison in Virginia and then to South Carolina.<sup>165</sup> Hamdi's father filed a writ of habeas corpus on Hamdi's behalf, claiming that Hamdi went to Afghanistan to do relief work, and that his detention was illegal and in violation of Hamdi's Fifth and Fourteenth Amendment Due Process Rights.<sup>166</sup>

Writing for the plurality, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, articulated two propositions that were central to the holding. First, the Court held that as a valid and necessary means of preventing combatants from returning to the battlefield, "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"<sup>167</sup> Second, the Court held that the Authorization for the Use of Military Force gave the President the authority to conduct such detentions.<sup>168</sup>

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159. See *infra* notes 310–403 and accompanying text.

160. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

161. *Id.*

162. *Id.*

163. *Id.* at 512–13.

164. *Id.* at 513.

165. *Id.* at 510.

166. *Id.* at 511.

167. *Id.* at 518 (citation omitted).

168. *Id.* The Court also held that Hamdi's citizenship did not preclude his detention as an unlawful combatant. *Id.* at 519 ("There is no bar to this Nation's holding one of its own citizens as

Second, the Court applied the *Mathews* due process balancing test<sup>169</sup> to determine what sort of process Hamdi was due.<sup>170</sup> Weighing the interests led the Court to conclude that “[s]triking the proper constitutional balance” required that “a citizen-detainee seeking to challenge his classification as an enemy combatant must 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>171</sup>

Three more features of the plurality opinion warrant mention. First, the Court held that the due process requirements they outlined “could be met by an appropriately authorized and properly constituted military tribunal.”<sup>172</sup> Second, in the absence of such a tribunal, the Court asserted that “a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.”<sup>173</sup> And third, the Court found “Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict,” provided “that the individual is . . . an enemy combatant . . . .”<sup>174</sup>

These three issues are important because they affirm, to a certain extent, the Court’s traditional practice of giving reasonable deference to Executive

an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen . . . . We held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.’ . . . While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.” (internal citations omitted).

169. *Id.* at 528–29 (“The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not ‘deprived of life, liberty, or property, without due process of law,’ is the test that we articulated in *Mathews v. Eldridge*. . . . *Mathews* dictates that the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of ‘the risk of an erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute procedural safeguards.’”) (internal citations omitted).

170. *Id.* at 530. On the one hand, the Court found that Hamdi’s principal interest was “a citizen’s right to be free from involuntary confinement by his own government without due process of law.” *Id.* at 529. On the other hand, the government was interested “in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States” and “unnecessarily and dangerously” distracting its officers “by litigation half a world away.” *Id.* at 531–32.

171. *Id.* at 530–33.

172. *Id.* at 538.

173. *Id.*

174. *Id.* at 521, 523.

wartime decision-making regarding the due process rights of enemy combatants.<sup>175</sup> Furthermore, if the detention and review procedures outlined in the Detainee Treatment Act and the Military Commissions Act<sup>176</sup> are therefore subject to similar deference, a plausible argument can be made that the procedures established therein might fulfill the “minimum requirements of due process” mentioned in Justice O’Connor’s plurality opinion.<sup>177</sup>

The *Hamdi* dissenters, Justices Scalia, Souter (concurring in the judgment, but dissenting in part and concurring in part), Ginsburg, Thomas, and Stevens, rejected the plurality’s opinion for several reasons.<sup>178</sup> First, Justice Souter, joined by Justice Ginsburg, argued that the Non-Detention Act prevented government detainment of Hamdi.<sup>179</sup> Second, Justice Scalia,<sup>180</sup> joined by Justice Stevens, argued that when the government accuses a citizen of being an enemy combatant, the traditional practice is either to charge him with treason or invoke the Suspension Clause if such procedures are not possible during wartime.<sup>181</sup> Finally, Justice Thomas,

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175. See Kmiec, *supra* note 16, at 871–72 (“The commonsense accommodation of interests in Hamdi was a vindication for the President and the Congress, and for war conducted largely by nonjudicial—but still constitutional—means. In an age of concern over the pervasiveness of judicial presence, it is important to reflect even momentarily on how all that is constitutional is not necessarily judicial. Acting constitutionally is not synonymous with acting judicially. The Supreme Court in Hamdi demonstrated considerable, but not total, deference to its coequal branches, and that is much to its credit. The depth of that respect is revealed by the Court’s comment that the due process standards outlined could be met by military tribunal. In this regard, Justice O’Connor makes reference to a tribunal mechanism far less exacting than that envisioned by President Bush’s military order and Pentagon regulation for the trial of al Qaeda or those who harbor or assist them. Specifically, the Justices highlight existing military regulations that tribunals be made available to determine the status of enemy detainees who assert POW status under the Geneva Convention. If the military chooses not to supply the review itself, the Court concedes that habeas is available to a citizen-detainee within the jurisdiction of the United States, but admonishes district courts to proceed with caution and to ‘engag[e] in a factfinding process that is both prudent and incremental.’”).

176. See *infra* notes 241, 273 and accompanying text.

177. See *Hamdi v. Rumsfeld*, 542 U.S. at 538 (2004) (plurality opinion); see also *infra* note 333 and accompanying text.

178. *Id.* at 539–99.

179. Non-Detention Act, 18 U.S.C. § 4001(a) (“No citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress.”). Justice Souter, who was joined by Justice Ginsburg, concurred in part, dissented in part, and concurred in the judgment, asked whether:

[t]he severity of the Act be relieved when the Government’s stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act “pursuant” to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification . . . the answer has to be no. For a number of reasons, the prohibition within § 4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

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

180. See *Hamdi*, 542 U.S. at 554–79 (Scalia, J. dissenting).

181. *Id.* at 554 (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.

raising a separation of powers argument, asserted that the Court's inquiry should begin and end with the question of whether the President has the necessary authority to wage war and hold enemy combatants as an incident of war.<sup>182</sup> The group of dissenting Justices is significant because it demonstrates an unusual coalition of Court members coming together to reject, for various reasons, the military's detention of a United States citizen in alleged violation of his due process rights.<sup>183</sup> Furthermore, is it noteworthy how dissimilarly organized the dissents were in the following two cases concerning, respectively, the rights of a detained United States citizen<sup>184</sup> and the rights of Kuwaiti and Australian citizens.<sup>185</sup>

## 2. *Rumsfeld v. Padilla*—Citizens and the Immediate Custodian Rule

In conjunction with a grand jury investigation into the September 11th attacks, the United States District Court for the Southern District of New York issued a material witness warrant for Jose Padilla.<sup>186</sup> On May 8, 2002, after arriving at Chicago's O'Hare International Airport on a flight from Pakistan, Padilla was arrested by federal agents executing the warrant and subsequently incarcerated in New York.<sup>187</sup> While in prison, Padilla filed a motion to vacate the warrant.<sup>188</sup> While the motion was pending, President Bush designated Padilla an enemy combatant and directed the Secretary of Defense to detain Padilla in a military facility.<sup>189</sup> Padilla was then incarcerated in the Consolidated Naval Brig in Charleston, South

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Where the exigencies of war prevent that, the Constitution's Suspension Clause allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.") (internal citations omitted).

182. *Id.* at 579–99 (Thomas, J., dissenting). Justice Thomas argued that Article II and the AUMF gave the President the legal authority he needed to detain enemy fighters and determine their legal status as combatants, and therefore all other questions—such as whether Hamdi actually was an enemy combatant, and more broadly, whether enemy combatant determinations are a proper incident of executive war making—are properly left to the government branches responsible for prosecuting the war effort. *Id.*

183. For instance, Justice Stevens joined a dissent authored by Justice Scalia, whereas in *Rasul* Justice Stevens wrote the majority opinion while Justice Scalia wrote a lengthy dissent.

184. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

185. See *Rasul v. Bush*, 542 U.S. 466 (2004).

186. See *Padilla*, 542 U.S. at 430–31.

187. *Id.* at 431.

188. *Id.*

189. *Id.*

Carolina.<sup>190</sup> His counsel subsequently filed a habeas petition in the Southern District of New York, and named as respondents President Bush, former Secretary of Defense Donald Rumsfeld, and the Brig Commander Melanie A. Marr.<sup>191</sup>

The Court was faced with two issues. First, whether the Southern District of New York had jurisdiction over Padilla's appeal.<sup>192</sup> Second, whether the President had the authority to detain Padilla as an enemy combatant.<sup>193</sup> A divided Court held 5–4 that under the rule articulated in *Wales v. Whitney*,<sup>194</sup> Padilla should have brought his habeas petition in the District of South Carolina, not in the Southern District of New York.<sup>195</sup> Finding the habeas petition improperly filed,<sup>196</sup> the Court did not reach the

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190. *Id.* at 432.

191. *Id.*

192. *Id.* at 433–34. Padilla was imprisoned in South Carolina, yet was bringing his claim in New York, and he was asserting the writ against three respondents. As the Court noted, “[t]he consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner’s habeas petition. This custodian, moreover, is ‘the person’ with the ability to produce the prisoner’s body before the habeas court.” *Id.* at 434–35.

193. The district court agreed with the Government’s position that the President had the authority to detain citizens as enemy combatants when they are captured on United States soil during wartime. *Id.* at 433. But the Court of Appeals came to a different conclusion. *Id.* (“Reaching the merits, the court of appeals held that the President lacks authority to detain Padilla militarily. The court concluded that neither the President’s Commander in Chief power nor the AUMF authorizes military detentions of American citizens captured on American soil. To the contrary, the Court of Appeals found in both our case law and in the Non-Detention Act, 18 U.S.C. § 4001(a), a strong presumption against domestic military detention of citizens absent explicit congressional authorization. Accordingly, the court granted the writ of habeas corpus and directed the Secretary to release Padilla from military custody within 30 days.”) (internal citations omitted).

194. In *Wales*, the Court held that the habeas statute “provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.” *Wales v. Whitney*, 114 U.S. 564, 574 (1885).

195. *See Padilla*, 542 U.S. at 451.

196. The Court addresses and then rejects the dissent’s misplaced reliance on *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) and *Strait v. Laird*, 406 U.S. 341 (1972) by arguing that precedent does not “support a deviation from the immediate custodian rule here.” *Padilla*, 542 U.S. at 437. (“In *Braden* and *Strait*, the immediate custodian rule did not apply because there was no immediate physical custodian with respect to the ‘custody’ being challenged. That is not the case here: Commander Marr exercises day-to-day control over Padilla’s physical custody. We have never intimated that a habeas petitioner could name someone other than his immediate physical custodian as respondent simply because the challenged physical custody does not arise out of a criminal conviction. Nor can we do so here just because Padilla’s physical confinement stems from a military order by the President. It follows that neither *Braden* nor *Strait* supports the Court of Appeals’ conclusion that Secretary Rumsfeld is the proper respondent because he exercises the ‘legal reality of control’ over Padilla. As we have explained, identification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged ‘custody.’ In challenges to present physical confinement, we reaffirm that the immediate custodian, not a supervisory official who exercises legal control, is the proper respondent. If the ‘legal control’ test applied to physical-custody challenges, a convicted prisoner would be able to name the State or the Attorney General as a respondent to a § 2241 petition. As the statutory language, established practice, and our precedent demonstrate, that is not the case.”).

merits question.<sup>197</sup>

Justice Stevens' dissent<sup>198</sup> questioned whether the immediate custodian rule was really so inflexible a rule as the majority alleged, finding that "we have declined to adopt a strict reading of *Wales v. Whitney* . . . and instead have favored a more functional approach that focuses on the person with the power to produce the body . . ." <sup>199</sup> Justice Stevens argued, "surely we should acknowledge that the writ reaches the Secretary as the relevant custodian in this case."<sup>200</sup> Therefore, finding "the Secretary is a proper custodian, the question whether the petition was appropriately filed in the Southern District is easily answered."<sup>201</sup> Justice Stevens' emphasis on serving the detainees' custodian (the Secretary of Defense) as a central consideration in the jurisdictional analysis of habeas rights<sup>202</sup> is notable because similar concerns underscored his majority opinion in the next case, *Rasul v. Bush*.<sup>203</sup> This decision effectively enabled the Guantanamo habeas litigation, and is therefore discussed in detail below.

### 3. *Rasul v. Bush*—Detainees and Statutory Access to Habeas

Two Australian citizens<sup>204</sup> and twelve Kuwaiti citizens were captured while fighting with the Taliban in Afghanistan and were subsequently detained at Guantanamo Bay.<sup>205</sup> Both groups of detainees petitioned for a writ of habeas corpus, but the district court and the court of appeals in

197. *Id.* at 430.

198. In which Justices Souter, Ginsburg, and Breyer joined. *Id.* at 455 (Stevens, J., dissenting).

199. *Id.* at 461.

200. *Id.* at 462.

201. *Id.* at 462. The dissent also focused on forum considerations as central to the question of federal court jurisdiction, finding that when it comes to determining the proper forum, "the question is one of venue, *i.e.*, in which federal court the habeas inquiry may proceed." *Id.* at 463 ("As a result of the Government's initial forum selection, the District Judge and counsel in the Southern District were familiar with the legal and factual issues surrounding respondent's detention both before and after he was transferred to the Defense Department's custody. Accordingly, fairness and efficiency counsel in favor of preserving venue in the Southern District.").

202. *Id.* at 464 n.6 ("Although the Court makes no reference to venue principles, it is clear that those principles, not rigid jurisdictional rules, govern the forum determination.").

203. *See Rasul v. Bush*, 542 U.S. 466 (2004).

204. The five year detention of one of the Australian citizens, David Hicks, became something of an international incident. *See* Raymond Bonner, *David Hicks, Australian Convicted of Supporting Terrorism, to be Released*, INT'L HERALD TRIB., Dec. 28, 2007, available at <http://www.ihrt.com/articles/2007/12/28/asia/hicks.php>. Following conversations between former Australian Prime Minister John Howard and Vice President Dick Cheney, Hicks was formally sentenced by a United States military commission. *Id.* He subsequently entered a plea deal, and was returned to Australia where he faced further charges. *Id.*

205. *See Rasul*, 542 U.S. at 470–471.

Washington, D.C., rejected the petitions based on the Court's decision in *Johnson v. Eisentrager*.<sup>206</sup> The Supreme Court, in an opinion by Justice Stevens, reversed and held that the federal habeas statute conferred jurisdiction on federal courts to hear habeas claims brought by Guantanamo detainees.<sup>207</sup>

Several aspects of Justice Stevens' opinion are worth noting. First, he sought to distinguish the petitioners in *Rasul* from those in *Eisentrager*.<sup>208</sup> In *Eisentrager*, the Court had rejected the habeas petitions of German citizens captured in China and imprisoned in Germany following World War II, finding it inappropriate to extend habeas to a prisoner who:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.<sup>209</sup>

Justice Stevens found the *Rasul* petitioners to be distinguishable from the *Eisentrager* petitioners because they:

are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>210</sup>

Furthermore, Justice Stevens argued that these factors were "relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus."<sup>211</sup> *Eisentrager*, in Justice Stevens' view, did not rule out the possibility that the federal habeas statute might extend federal court jurisdiction over the detainees' claims.<sup>212</sup> This was possible because the *Eisentrager* majority, in Justice Stevens' opinion, gave little attention to

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206. *Id.* at 472–73.

207. *Id.* at 473.

208. *Id.* at 476.

209. *Id.* at 475–76.

210. *Id.* at 476.

211. *Id.*

212. *Id.*

statutory habeas considerations and instead focused on the court of appeals's constitutional habeas analysis.<sup>213</sup>

Second, Justice Stevens asserted that *Eisentrager* had rejected the petitioners' reliance on statutory habeas relief because of the Court's holding in *Ahrens*.<sup>214</sup> Yet because the Court had subsequently overruled *Ahrens* in the *Braden* case, discussed *supra*,<sup>215</sup> "*Braden* overruled the statutory predicate to *Eisentrager*'s holding," and therefore "*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims."<sup>216</sup>

213. *Id.* at 477–78 ("The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, reasoning that 'if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute.' *Eisentrager v. Forrestal*, 174 F.2d, at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.' 174 F.2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that 'nothing in our statutes' conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to 'fundamentals' on its own terms. 339 U.S., at 768, 70 S. Ct. 936.")

214. *Id.* at 477–78.

215. See *supra* notes 116–27 and accompanying text.

216. See *Rasul*, 542 U.S. at 479. Justice Stevens' reasoning here is important for the way it applies the logic of the *Braden* decision, which focused on the habeas rights of United States citizens, to find that the habeas statute extends federal court jurisdiction to hear habeas claims from aliens detained at Guantanamo. Because the federal statute conferred the habeas right, petitioners need not rely on any constitutional right to habeas. Stevens argues that:

Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495, 93 S. Ct. 1123, 35 L. Ed.2d 443 (1973), this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process." 410 U.S., at 494–495, 93 S. Ct. 1123. *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." 410 U.S., at 497, 93 S. Ct. 1123. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.*, at 498, 93 S. Ct. 1123 (citing *Burns v. Wilson*, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953), rehearing denied, 346 U.S. 844, 851–852, 74 S. Ct. 3, 98 L. Ed. 363 (opinion of Frankfurter, J.); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8 (1955); *Hirota v. MacArthur*, 338 U.S. 197, 199, 69 S. Ct. 197, 93 L. Ed. 1902 (1948) (Douglas, J., concurring (1949))). *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to



Third, the federal habeas statute provides that federal courts may hear habeas petitions brought by those persons located “within their respective jurisdictions” alleging “custody in violation of the Constitution or laws or treaties of the United States.”<sup>217</sup> Justice Stevens determined that *Braden* allowed a physically absent habeas petitioner to assert the writ in distant federal courts if the petitioner’s custodian could be reached by service of process.<sup>218</sup> He then reasoned that the lease agreement between the United States and Cuba rendered Guantanamo Bay United States territory for purposes of federal court jurisdiction under § 2241.<sup>219</sup> This fact, combined with the principal that “the [habeas] statute draws no distinction between Americans and aliens held in federal custody . . . ,” meant that “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”<sup>220</sup>

Justice Scalia’s lengthy dissent is emblematic of the intense reactions provoked by the *Rasul* decision.<sup>221</sup> Finding the majority position to be “an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field,” Justice Scalia noted several concerns with the Court’s holding.<sup>222</sup> First, Justice Scalia asserted that the majority “largely ignores” the plain meaning of the federal habeas statute, which requires the petitioner to be located within the jurisdiction of a federal court

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the question of the appropriate forum, not to whether the claim can be heard at all. 410 U.S., at 499–500, 93 S. Ct. 1123.

*Id.* at 478–79.

217. 28 U.S.C. § 2241(a), (c)(3) (2005).

218. See *Rasul*, 542 U.S. at 479.

219. *Id.* Despite the 1903 Lease Agreement’s stipulation that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” Justice Stevens concluded that the United States exercises “complete jurisdiction and control over and within said areas.” *Id.* at 471.

220. *Id.* at 481 (“Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on § 2241 through application of the ‘longstanding principle of American law’ that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed.2d 274 (1991). Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within ‘the territorial jurisdiction’ of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949). By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.”)

221. *Id.* at 488–506 (Scalia, J., dissenting); see also *infra* note 243 regarding Congress’s effort to overrule *Rasul* when it passed the DTA.

222. *Rasul*, 542 U.S. at 489 (Scalia, J., dissenting).

before he can assert the writ.<sup>223</sup> Second, Justice Scalia rejects the Court's characterization of *Braden* as overruling *Ahrens*,<sup>224</sup> and notes that the question left unanswered in *Ahrens* but partially addressed in *Eisentrager* is again revisited but answered differently in *Rasul*.<sup>225</sup> Therefore, it is *Rasul* that overrules *Eisentrager*, not *Braden*.<sup>226</sup> Third, Justice Scalia disputes the Court's contention that the lease agreement establishes federal court jurisdiction at Guantanamo by noting the absence of any explanation how "'complete jurisdiction and control' without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws."<sup>227</sup> Next, Justice Scalia argues that the majority's approach to habeas jurisdiction is not "consistent with the historical reach of the writ."<sup>228</sup> In conclusion,

223. *Id.* at 490 ("No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here, as the Court allows, . . . the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of these cases.") (internal citations omitted).

224. *Id.* at 494 ("But in fact *Braden* did not overrule *Ahrens*; it distinguished *Ahrens*. *Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that *Braden* was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for *Braden*'s petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens*." (emphasis in original).

225. *Id.* at 490–91 ("*Ahrens* explicitly reserved 'the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights.' *Id.*, at 192, n.4, 68 S. Ct. 1443. That question, the same question presented to this Court today, was shortly thereafter resolved in *Eisentrager* insofar as noncitizens are concerned.").

226. *Id.* at 497–98 ("The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager*; today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, and why *Eisentrager* was wrong. Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees." (emphasis in original).

227. *Id.* at 501 ("Since 'jurisdiction and control' obtained through a lease is no different in effect from 'jurisdiction and control' acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if 'jurisdiction and control' rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.").

228. *Id.* at 502 ("None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic territory. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The

Justice Scalia proclaims that the Court abandons “the venerable statutory line drawn in *Eisentrager*,” “boldly extends the scope of the habeas statute to the four corners of the earth,”<sup>229</sup> and engages in “judicial adventurism of the worst sort.”<sup>230</sup> Justice Scalia’s vigorous dissent demonstrates the extent to which the *Rasul* decision transformed the legal landscape for the detainees. Now that Guantanamo detainees were given the right to assert habeas petitions to contest their detentions, Congress and the President took quick action to forestall the torrent of appeals that would quickly come.<sup>231</sup> The political branches responded with alacrity and unanimity.<sup>232</sup>

#### 4. Combatant Status Review Tribunals—Implementing *Hamdi*

The Bush Administration’s response to these decisions was two-fold and swift. First, on July 7, 2004, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum establishing Combatant Status Review Tribunals (CSRTs)<sup>233</sup> to determine whether, under a preponderance standard,<sup>234</sup> detainees would be classified as enemy combatants.<sup>235</sup> After *Hamdi* held

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remaining cases involve issuance of the writ to ‘exempt jurisdictions’ and ‘other dominions under the sovereign’s control.’ These cases are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.”) (internal citations omitted).

229. *Id.* at 498.

230. *Id.* at 506.

231. See *infra* notes 241–44 and accompanying text.

232. See *infra* notes 241–44 and accompanying text.

233. See Defense Department Background Briefing on the Combatant Status Review Tribunal, July 7, 2004, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751> (“The procedures that are being—that have been adopted today, in an order signed by the deputy secretary, are intended to reflect the guidance that the Supreme Court provide (sic) in its decisions last week. The court held that federal courts have jurisdiction to hear challenges to the legality of the detention of enemy combatants held at GTMO. In a separate decision—that’s the *Rasul* case. In a separate decision involving an American citizen held in the United States, *Hamdi*, the court held that due process would be satisfied by notice and an opportunity to be heard, and indicated that such process could be provided in the context of a hearing before a military tribunal. . . . The Combatant Status Review Tribunals, which are established today, are a variant on that order and are established to review the case—review each detainee at Guantanamo, and to provide an opportunity for the detainee to contest the determination that’s been made that he is an enemy combatant. It’s a streamlined process. The court recognized—the Supreme Court recognized the military’s need for flexibility, and indicated that that streamlined process might provide all the procedures that were sufficient even for a U.S. citizen. The procedures that are being implemented today are only being applied to alien enemy combatants in control of DOD at Guantanamo Bay, Cuba.”).

234. *Id.* (“The tribunal will decide whether there is—will decide whether a preponderance of the evidence supports the detention of the individual as an enemy combatant. And as provided for—as suggested in Justice O’Connor’s opinion in the *Hamdi* case, there will be a rebuttable presumption in favor of the government’s evidence, but the detainee will be able to have an opportunity to rebut that presumption.”).

235. *Id.* (“In response to last week’s decisions by the Supreme Court, the deputy secretary of Defense today issued an order creating procedures establishing a Combatant Status Review Tribunal, which will provide detainees at the Guantanamo Bay Naval Base with notice of the basis for their

that detainees had the right to contest their detentions before a neutral decisionmaker, the United States military implemented the CSRTs to fulfill this requirement.<sup>236</sup>

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detention and an opportunity for them to contest their detention as enemy combatants.”); *see also* Bismullah v. Gates, 501 F.3d 178, 181–82 (2007) (“In a July 2004 Memorandum for the Secretary of the Navy, the Secretary of Defense established skeletal procedures for the conduct of CSRT proceedings with respect to foreign nationals held at Guantánamo to ‘review the detainee’s status as an enemy combatant.’ The Secretary of the Navy, who was ‘appointed to operate and oversee [the CSRT] process,’ promptly issued a memorandum specifying detailed procedures (Navy Memorandum), which are still in effect. Pursuant to those procedures, a CSRT reviews the determination, made after ‘multiple levels of review by military officers and officials of the Department of Defense,’ (E-1 § B) that a detainee is an ‘enemy combatant,’ defined as ‘an individual who was part of or supporting Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.’ (E-1 § B) A Tribunal is composed of ‘three neutral commissioned officers’ who were not involved in the ‘apprehension, detention, interrogation, or previous determination of status of the detainee[.]’ (E-1 § C(1)) The Tribunal is to ‘determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.’ (E-1 § B) There is a rebuttable presumption that the Government Evidence, defined as ‘such evidence in the Government Information as may be sufficient to support the detainee’s classification as an enemy combatant’ (E-1 § H(4)) is ‘genuine and accurate’ (E-1 § G(11)). The Tribunal is authorized to request the production of ‘reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant,’ (E-1 § E(3)) and the Recorder, a military officer, is charged with obtaining from government agencies and reviewing all such Government Information (E-2 § C(1)). The Recorder must present, orally or in documentary form (E-2 § C(6)), both the Government Evidence and, if any there be in the Government Information, all ‘evidence to suggest that the detainee should not be designated as an enemy combatant.’ (E-1 § H(4), E-2 § B(1)) In advance of the Tribunal hearing, the Recorder must prepare an unclassified summary of the relevant Government Information and provide the summary to the detainee’s Personal Representative, also a military officer. (E-2 § C(2), (4)). Each detainee’s Personal Representative reviews the Government Evidence the Recorder plans to present to the Tribunal (E-3 § C(3)), has access to the Government Information (E-3 § C(2)), and meets with the detainee to explain the CSRT process. The Personal Representative may not, however, share classified information with the detainee. (E-3 § C(4)) The Personal Representative ‘shall present information to the Tribunal if the detainee so requests’ and ‘may, outside the presence of the detainee, comment upon classified information submitted by the Recorder.’ (E-3 § C(5)) The detainee may testify or introduce relevant documentary evidence at the hearing, but may not be compelled to answer questions. (E-1 § F(6)-(7)) He also may present the testimony of any witness who is ‘reasonably available and whose testimony is considered by the Tribunal to be relevant.’ (E-1 § F(6)). . . . Each Tribunal has a ‘Legal Advisor’ with whom the members may consult regarding legal, evidentiary, procedural, and like matters. (E-1 § C(4)) The Legal Advisor reviews for legal sufficiency both the CSRT’s rulings on whether witnesses and evidence are reasonably available and its ultimate determination of the detainee’s status. (E-1 § I(7)) The Legal Advisor forwards the Record of Proceedings to the ‘Director, CSRT,’ (E-1 § I(5)) who reviews the decision as well. (E-1 § I(8), E-2 § C(10)) If approved by the Director, CSRT, then the decision becomes final. (E-1 § I(8)).”).

236. *See* Kathleen T. Rhem, *DoD to Review Status of All Guantanamo Detainees*, AM. FORCES PRESS SERVICE, July 8, 2004, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=25741>; *see also* Defense Department Background Briefing, *supra* note 233 (“SR. JUSTICE DEPT. OFFICIAL: Well, I think that covers all of the basics of the process. I think one thing to

As previously noted, the Court's decision in *Eisentrager* was controlling law for more than fifty years prior to *Rasul*.<sup>237</sup> That precedent meant that when the United States military began detaining captured Taliban and Al Qaeda fighters at Guantanamo in 2002, there was no concern that those prisoners would be able to file habeas petitions in federal courts or need to be afforded any procedures resembling due process.<sup>238</sup> Furthermore, because those detainees were deemed unlawful combatants, the notion that they were entitled to anything resembling due process under United States or international law was never contemplated before *Hamdi* and *Rasul*.<sup>239</sup> Those decisions demonstrated the Court's willingness to give detainees the opportunity to vindicate constitutional rights in federal court.<sup>240</sup> To ensure that federal courts would not further expand the scope of the detainees' legal entitlements, the political branches sought to deny federal courts the legal authority to do so.

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emphasize is that the government here is reacting very quickly to the Supreme Court's decisions. The Supreme Court made important decisions affecting the war on terrorism. And over the past week we've tried to put together—the Department of Defense has tried to put together a process that will respond to the court's concerns, take into account the fact that the detainees at Guantanamo are able to file petitions for habeas corpus in U.S. courts, and to establish a process similar to the process Justice O'Connor referred to in the *Hamdi* decision as a military process that likely would satisfy even the due process rights of an American citizen, to take that existing Army regulation for a form of tribunal and provide actually a little additional process in the form of a personal representative, something that is not a traditional part of the Army regulation, to add on something more to put together a process that will provide the detainees at Guantanamo with any form of process that they have a right to so that when and if there are habeas petitions filed challenging their detention, the government will be in a position to say that we fully satisfied our legal obligations.”).

237. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Rasul v. Bush*, 542 U.S. 466 (2004).

238. Yet *Padilla* and *Rasul* instantly changed the dynamic. *Hamdi* laid out the general due process procedures to which citizens detained as enemy combatants were entitled. See *supra* notes 170–73 and accompanying text. *Rasul* then held that under the habeas statute, federal court jurisdiction extended to alien enemies detained at Guantanamo. See *supra* notes 204–07 and accompanying text. Together, these decisions meant that the military was forced to construct procedures in compliance with *Hamdi* and then apply those procedures to the Guantanamo detainees; see also Defense Department Background Briefing, *supra* note 233 (“And I guess it’s important to emphasize, Justice O’Connor was talking about those basics of due process in the context of an American citizen held in the United States and due process rights under the Constitution. Here we’re using that decision as guidance to try to construct this process, but it is admittedly somewhat uncharted territory to figure out what sort of process would be sufficient or is required at all for alien enemy combatant detainees held outside the United States. We’re using the *Hamdi* decision as guidance to try to provide a process that we think is fair and sufficient to provide notice and opportunity to be heard, so that upon any challenge to the detention it will be clear that sufficient process has been provided. But nothing like this has been provided in any previous armed conflict, you know. Even the regulation that we are modeling this on is not a regulation that requires a hearing like this for all persons detained as POWs or enemy combatants in a traditional war. You know, in World War II, subsequent wars, we have hundreds of thousands of enemy prisoners of war. Not every one of them gets any process like this. So this is entirely new to provide a complete process like this to every single detainee.”).

239. *Id.*; see Bialke, *supra* note 17 and accompanying text.

240. See *supra* notes 160–71, 204–20 and accompanying text.

## 5. The Detainee Treatment Act of 2005—Jurisdiction-Stripping After *Rasul*

A little more than a year after the Pentagon established the CSRTs to determine whether detainees were enemy combatants, Congress passed and President Bush signed the Detainee Treatment Act of 2005 (DTA).<sup>241</sup> At the time of its passage, more than 150 habeas petitions had been filed on behalf of over 300 detainees,<sup>242</sup> and the DTA was Congress's effort to legislatively overrule the *Rasul* decision that made such appeals possible.<sup>243</sup> The principal jurisdictional effect of the DTA was to amend the habeas statute and strip federal courts of jurisdiction to hear habeas claims of Guantanamo detainees.<sup>244</sup> In lieu of habeas corpus,<sup>245</sup> the DTA established a review

241. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 1005(e)(1), 119 Stat. 2739, 2742 (to be codified as amended at 28 U.S.C. § 2241(e)(1)). The full text of the revised portion of the statute reads:

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

242. See 151 Cong. Rec. S14256-01, S14264 (statement of Sen. Kyl).

243. See *id.* In the Senate debate prior to the bill's passage, Arizona Republican Senator Jon Kyl, a sponsor of the legislation, argued that:

Cuba is not the United States. *Eisentrager* should be restored to its rightful place as the precedent that governs litigation attempted by enemy combatants outside of our territory—even for the special case of Guantanamo Bay. *Eisentrager* was the law of the land for over 50 years, until *Rasul* carved a hole into it. Through this act, Congress patches that hole and restores *Eisentrager*'s role as the governing standard. We do this not because, or not just because, *Rasul* doesn't make sense and is wrong. We do it because *Eisentrager*'s reasoning is compelling, and the rule that is established wards off much mischief.

*Id.*

244. See *supra* note 241. Section 1005(e)(1) provides:

Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.

*Id.*

245. See 151 CONG. REC. S14, 256-01, S14264 (statement of Sen. Kyl) (“Mr. KYL. Mr. President, I see that we are nearing the end of our allotted time. If I could quickly address a few other minor issues and summarize briefly. It is important to note that the limited judicial review

process that gave detainees the opportunity to challenge their CSRT determination in the D.C. Circuit Court of Appeals, with possible petition to the Supreme Court.<sup>246</sup> With this legislation, Congress and President Bush thought they had put to rest the torrent of habeas litigation flowing from Guantanamo and established procedures consistent with the Court's demands in *Hamdi*.<sup>247</sup> It was not long, however, before those assumptions were defeated in the Supreme Court. Indeed, the Supreme Court had already granted certiorari to another detainee habeas case before the DTA was even passed.<sup>248</sup>

## B. Round 2: *Hamdan and the Military Commissions Act of 2006*

### 1. *Hamdan v. Rumsfeld*—The Legality of Military Commissions

Shortly after the September 11, 2001 terrorist attacks, President Bush issued Military Order No. 1.<sup>249</sup> This order provided for the establishment of military commissions to try those prisoners determined to be enemy combatants.<sup>250</sup> In November 2001, Yemeni national Salim Ahmed Hamdan was captured while aiding the Taliban in Afghanistan and was sent to Guantanamo the following year.<sup>251</sup> On July 3, 2003, President Bush

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authorized by paragraphs 2 and 3 of subsection (e) are not habeas-corpus review. It is a limited judicial review of its own nature. All habeas actions are terminated by this bill. I hope that this change will also put to rest any arguments that extending habeas to prisoners also extends to them some type of substantive rights. I do not believe that supposition is correct because habeas is a vehicle for asserting rights, not a source of rights. The fact that an individual has access to habeas does not mean that he has any of the rights that he asserts. But in any event, because this bill leaves no habeas in place, that debate need not be rejoined.”)

246. *Id.* (“Also, some have suggested that by vesting exclusive jurisdiction in the DC circuit for the paragraph 2 and 3 appeals, this bill bars even Supreme Court appellate review. That was not the drafters’ intention, nor do I believe that it is a correct reading of the legislative language. Supreme Court review is implicit, or rather, authorized elsewhere in statute, for all judicial decisions. It is rarely mentioned expressly. In fact, when it is mentioned, it is sometimes to preempt Supreme Court review. For example, the limit on successive federal habeas petitions for state prisoners in section 2244 bars petitions for certiorari following a three-judge panel’s decision on a successive-petition application. The clear implication of these provisions is that Supreme Court review is implicitly allowed except where expressly barred, and thus since it is not barred here, it is allowed.”); *see also supra* note 241. Section (e)(2)(B) of the DTA provides that

[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who . . . has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

*Id.*

247. *See supra* notes 233–36 and accompanying text.

248. *See Pushaw, supra* note 140, at 1059.

249. *See supra* note 139 and accompanying text.

250. *See supra* note 139 and accompanying text.

251. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006); *see infra* note 449 and accompanying

announced that Hamdan would be tried by the military commissions pursuant to the November 13, 2001 order.<sup>252</sup> On July 13, 2004, Hamdan was formally charged with conspiring with Al Qaeda to commit acts of terrorism.<sup>253</sup> A simultaneous ruling by a CSRT determined “that Hamdan’s continued detention at Guantanamo Bay was warranted because he was an ‘enemy combatant.’”<sup>254</sup> Hamdan filed a petition for writ of habeas corpus, alleging that President Bush did not have the authority to convene the military commissions to which Hamdan was subject, and that such commissions violated military and international law.<sup>255</sup> The Supreme Court, speaking through Justice Stevens,<sup>256</sup> held that “the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions.”<sup>257</sup>

The Court articulated several propositions that are significant for the detainee litigation. First, the Court held that the language of the DTA supported the inference that its provisions barring courts from hearing detainee habeas claims were not meant to apply to appeals pending on the date of the DTA’s enactment.<sup>258</sup> Second, the Court rejected the government’s request to abstain from ruling on the commissions until an outcome could be reached in those commissions.<sup>259</sup> Third, the Court found that neither the AUMF nor DTA authorized the military commissions at issue.<sup>260</sup> Fourth, the Court held that the government failed to carry its

text regarding Hamdan’s August 2008 conviction by a Guantanamo Bay military commission.

252. *Id.* at 569.

253. *Id.* The specific charges against Hamdan included serving as Osama bin Laden’s driver and bodyguard; facilitating transportation of weapons for bin Laden; escorting and accompanying bin Laden to various Al Qaeda activities; and receiving weapons training with Al Qaeda. *Id.* at 570.

254. *Id.* (citation omitted).

255. *Id.* at 567.

256. Justice Stevens wrote the majority opinion in which Justices Souter, Breyer and Ginsburg joined in full and Justice Kennedy joined in part. Justices Scalia, Thomas, and Alito dissented. *See id.* at 557.

257. *Id.*

258. *Id.* at 583–84 (“Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases. It chose not to so provide—after having been presented with the option—for subsection (e)(1). The omission is an integral part of the statutory scheme that muddies whatever ‘plain meaning’ may be discerned from blinkered study of subsection (e)(1) alone.”).

259. *Id.* at 584–90. The Court rejects the government’s reliance on *Counselman* by distinguishing the petitioners in that case and the instant case, and then analogizes to the *Quirin* decision, arguing that it “provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions.” *Id.* at 588–89 (citation omitted). Therefore, the Court’s abstention was not warranted in this case. *Id.* at 589.

260. *Id.* at 593–94 (“The government would have us dispense with the inquiry that the *Quirin*



burden of demonstrating that “the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.”<sup>261</sup> Next, the Court rejected the government’s contention that the military commissions were authorized under the UCMJ.<sup>262</sup> Finally, the Court held that the military commissions violated Common Article 3 of the Geneva Conventions.<sup>263</sup>

Justice Scalia dissented on the basis that the language of the DTA clearly communicated Congress’s intent to preclude all future and pending habeas claims.<sup>264</sup> Justice Thomas’ dissent focused on the separation of powers between the branches and what he perceived as the Court’s failure to show an appropriate level of deference to executive wartime decision-making.<sup>265</sup> Finally, Justice Alito’s dissent argued that the military commission which tried Hamdan was a “regularly constituted court” for purposes of the Geneva Convention.<sup>266</sup>

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Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President’s authority to convene military commissions.”).

261. *Id.* at 603. The Court looks to history, precedent and international sources in arguing that “the crime charged here”—conspiracy to commit terrorist acts—“is not a recognized violation of the law of war.” *Id.* at 610.

262. *Id.* at 613 (“Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the ‘rules and precepts of the law of nations’—including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.”) (internal citations omitted).

263. *Id.* at 625–35. The Court argued that the government failed to demonstrate “some practical need” to explain “deviations from court-martial practice.” *Id.* at 633. Because the government was unable to justify its use of military commissions, as opposed to the traditional courts martial proceedings established by statute, the Court held that “Common Article 3 . . . is applicable here and . . . requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’” *Id.* at 631–32.

264. *Id.* at 655–56 (Scalia, J., dissenting) (“This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30. It is also perfectly clear that the phrase ‘no court, *justice*, or judge’ includes this Court and its Members, and that by exercising our appellate jurisdiction in this case we are ‘hear[ing] or consider[ing] . . . an application for a writ of habeas corpus.’”) (emphasis in original).

265. *Id.* at 684–85 (Thomas, J., dissenting) (“The plurality’s willingness to second-guess the Executive’s judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And even if such second-guessing were appropriate, the plurality’s attempt to do so is unpersuasive.”).

266. *Id.* at 727–28 (Alito, J., dissenting) (“I see no basis for the Court’s holding that a military commission cannot be regarded as ‘a regularly constituted court’ unless it is similar in structure and composition to a regular military court or unless there is an ‘evident practical need’ for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be ‘regularly’ or ‘properly’

The *Hamdan* decision was significant in two respects. First, the Court read into the DTA an interpretive gap that many of its proponents were startled to discover existed.<sup>267</sup> Second, the Court analyzed the military procedures in light of Geneva Convention requirements.<sup>268</sup> The decision expressed the Court's willingness to invalidate a wartime jurisdiction-stripping habeas statute unless that statute communicated, with unmistakable clarity, Congress's intent in such a way as to preclude any alternative interpretation.<sup>269</sup> Also, the insertion of international law as a relevant factor in deciding detainee habeas appeals introduced a new hurdle the government would have to clear in its prosecution of enemy combatants.<sup>270</sup> As discussed below, Congress again responded, and statutory interpretation and international law would again figure prominently in the detainee litigation challenging this new statute.<sup>271</sup>

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constituted. Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the Former Yugoslavia. Although these courts are 'differently constituted' and differ substantially in many other respects, they are all 'regularly constituted.'")

267. See 152 CONG. REC. S10357, S10404 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the provisions of that act.")

268. *Hamdan*, 548 U.S. at 629–35. This was a novel proposition since, as noted above, prisoners captured during the war on terror did not fit into traditional understandings of lawful combatants. Furthermore, the fact that terrorists like Hamdan waged war on civilians while dressing as civilians, and fighting on behalf of a stateless terrorist organization rather than a signatory to an international accord, would normally disqualify such terrorists from the protections of international accords like the Geneva Conventions. See Bialke, *supra* note 17 and accompanying text.

269. See Pushaw, *supra* note 140, at 1059–61 ("The government contended that the DTA made plain that 'no court' (including the Supreme Court) had jurisdiction to consider habeas petitions by Guantanamo Bay detainees, effective December 30, 2005. This argument, accepted by the dissenters, rested on long and unbroken precedent, which established two principles. First, Article III grants Congress plenary power to make 'exceptions' to the Supreme Court's appellate jurisdiction. Second, a federal law ousting jurisdiction applies to pending cases, except when the statute explicitly reserves such jurisdiction. The majority characterized this precedent as setting forth not an ironclad rule, but merely a 'presumption against jurisdiction.' This presumption could be rebutted by ordinary principles of statutory construction—here, that 'a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.' Applying this interpretive canon to the DTA, Justice Stevens observed that section 1105(h)(2) expressly made sections 1005(e)(2) and (e)(3)—which grant the D.C. Circuit 'exclusive jurisdiction' to review the 'final decisions' of Combat Status Review Tribunals and military commissions—applicable to pending cases, whereas section 1005(h)(1) contained no such explicit termination of pending claims as to section 1005(e)(1). Hence, the majority held that Congress had not intended to eliminate the Court's jurisdiction over Hamdan's case.") (internal citations omitted).

270. See *infra* notes 357–64 and accompanying text (discussing the relevancy of the Geneva Conventions, specifically Article 5, to determine the sufficiency of the DTA/MCA review).

271. See *infra* Parts VI.C–D.2.

## 2. Military Commissions Act of 2006—Precluding All Habeas Claims

On October 17, 2006, President Bush signed the Military Commissions Act of 2006.<sup>272</sup> Section 7, entitled Habeas Corpus Matters, amended the DTA with respect to the relevant portion of the habeas statute, § 2241(e)(1).<sup>273</sup> Similar to Congress's efforts to overrule *Rasul* in the DTA, Congress used this legislation to overrule *Hamdan*.<sup>274</sup> The jurisdiction-

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272. Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006); see President Bush Signs Military Commissions Act of 2006, <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> (last visited Oct. 25, 2008) (“The bill I’m about to sign also provides a way to deliver justice to the terrorists we have captured. In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. These commissions were similar to those used for trying enemy combatants in the Revolutionary War and the Civil War and World War II. Yet the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress.”).

273. Section 7(a) of the MCA provides:

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e): “(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. “(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2635-36.

274. The language of subsection (b) communicates this effect when it provides:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

*Id.* at 2636. Furthermore, the legislative history behind the MCA clearly indicates that both proponents and opponents of the bill understood that the MCA was a direct response to the *Hamdan* ruling. See *Boumediene v. Bush*, 476 F.3d 981, 986–87 n.2 (D.C. Cir. 2007) (compiling various congressional statements regarding the MCA); 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) (“The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act . . . This new bill strips habeas jurisdiction retroactively, even for pending cases.”); *id.* at S10367 (statement of Sen. Graham) (“The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.”); *id.* at S10403 (statement of Sen. Cornyn) (“[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit—only review of the [CSRT] hearings.”); *id.* at S10404 (statement of Sen. Sessions) (“It certainly was not my intent, when I voted for the DTA, to exempt all of the pending

stripping provisions of the MCA clearly intended to preclude federal courts from exercising jurisdiction over detainee habeas claims.<sup>275</sup> This is important given that the Court demands a very high level of clarity when precluding federal court jurisdiction over habeas claims.<sup>276</sup> Furthermore, while Congress was very explicit about stripping federal courts of habeas jurisdiction, the MCA retained the DTA's appellate review process for detainees desiring to appeal the commission's judgment.<sup>277</sup> That review is

Guantanamo lawsuits from the provisions of that act. Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future . . . I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"; 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

275. *Boumediene*, 476 F.3d at 986–97 n.2.

276. See *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001) ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. See *Ex parte Yeger*, 75 U.S. 85, 8 Wall. 85, 102, 19 L. Ed. 332 (1869) ('We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law'); *Felker v. Turpin*, 518 U.S. 651, 660–61, 135 L. Ed. 2d 827, 116 S. Ct. 2333, (1996) (noting that '[n]o provision of Title I mentions our authority to entertain original habeas petitions,' and the statute 'makes no mention of our authority to hear habeas petitions filed as original matters in this Court'). Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. *Ex parte Yeger*, 8 Wall. at 105 ('Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act').").

277. Section 950(g) of the MCA describes the procedures for review in the D.C. Circuit Court of Appeal:

Sec. 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

(b) STANDARD FOR REVIEW.—In a case reviewed by it under this section, the Court of

lodged in the D.C. Circuit Court of Appeals, and requires a federal court to consider the legal sufficiency of the commission's determination.<sup>278</sup>

As federal courts have sought to interpret the DTA and MCA, important questions have arisen regarding the constitutionality of the jurisdiction-stripping provisions of the DTA/MCA and the proper scope of the appellate review process. These questions are addressed in the most recent detainee challenges to the DTA/MCA discussed below.<sup>279</sup>

## V. CURRENT AND UNRESOLVED QUESTIONS

The Supreme Court's willingness to open the federal courts to habeas challenges brought by Guantanamo detainees has led to litigation that, in many instances, has forced the Court to resolve questions of first impression.<sup>280</sup> The following two cases highlight the difficulties of reconciling the Court's willingness to afford habeas rights to detainees with Congress's repeated desire to strip federal courts of jurisdiction to hear detainee habeas claims.

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Appeals may act only with respect to matters of law.

(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution and the laws of the United States.

(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

Military Commissions Act of 2006 § 3, 10 U.S.C. § 950 (g) (2006).

278. *Id.*

279. *See infra* Part V.

280. Litigation in the wake of *Rasul* is a good example of this. As noted earlier, prior to *Rasul* it was assumed that aliens detained outside the United States during wartime had no right to bring habeas claims in federal court. *See infra* Part II. Federal court jurisdiction did not reach aliens detained abroad who had no physical connection to the United States. *Id.* This was the holding in *Eisentrager*, which stood undisturbed for over fifty years. Once *Rasul* determined that federal court jurisdiction extended to Guantanamo for purposes of the habeas statute, courts had to decide how habeas rights would be vindicated in federal courts. This was especially difficult in light of Congress's passage of the DTA and MCA, which in effect stripped federal courts of jurisdiction to hear detainee habeas claims. *See generally* Military Commission Act (MCA), Pub. L. No. 109-336, 120 Stat. 2600 (2006). Whether the MCA applies to detainee claims, and whether the MCA is a violation of the Suspension Clause are two issues that came before the Court in *Boumediene*. *Boumediene*, 476 F.3d at 984, 988. But even if the Court decides the MCA did not apply to detainee habeas claims, which is a difficult proposition given the explicit language of the Act, and even if the Court also decides that the MCA is an unconstitutional violation of the Suspension Clause, it still needs to answer the question of what the habeas process for detainees must look like. The DTA and MCA offer an answer to that question in the form of limited review in the D.C. Circuit Court of Appeals, and one of the open questions is whether that process functions as an adequate substitute for the habeas rights of detainees. That question was addressed by the Court in *Boumediene*. *See infra* Part IX.

## A. Boumediene/Al Odah v. Bush

In 2005, federal district judges in Washington, D.C., issued conflicting rulings in two detainee cases.<sup>281</sup> Judge Green held in the “Al Odah” cases that the detainees had a triable due process claim, while Judge Leon granted the government’s motion to dismiss the “Boumediene” detainee cases.<sup>282</sup> Two years later, these combined appeals reached the D.C. Circuit Court of Appeals in *Boumediene v. Bush*.<sup>283</sup> The petitioners in *Boumediene* challenged the MCA on two grounds. First, they argued that the MCA provisions purporting to strip federal courts of jurisdiction to hear all detainee claims did not include habeas appeals.<sup>284</sup> Second, they argued that the jurisdiction-stripping provisions of the MCA were a violation of the Suspension Clause.<sup>285</sup> The D.C. Circuit Court of Appeals found the first argument to be “nonsense.”<sup>286</sup> The second argument, the court said, failed because federal jurisdiction does not extend to Guantanamo,<sup>287</sup> and that as aliens lacking property or presence in the United States, the detainees had no right to invoke the Suspension Clause.<sup>288</sup> The detainees appealed to the

281. See *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), *rev’d* 127 S. Ct. 3078 (2008).

282. *Id.*

283. *Id.* at 986.

284. *Id.*

285. *Id.* at 988; see also U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

286. *Boumediene*, 476 F.3d at 987 (“The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among ‘all cases, without exception, pending on or after’ the MCA became law. Otherwise, the MCA does not represent an ‘unambiguous statutory directive[ ]’ to repeal habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees’ argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). Congress did not have to say that ‘the amendment made by subsection (a)’—which already expressly includes habeas cases—shall take effect on the date of enactment and shall apply to ‘all cases, without exception, including habeas cases.’ The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.”) (emphasis in original).

287. *Id.* at 990–91 (“*Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), ends any doubt about the scope of common law habeas. ‘We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.’ *Id.* at 768, 70 S. Ct. 936; see also Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 368 (1951).”).

288. *Id.* at 991 (“The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on

Supreme Court, and the Court initially rejected their petition for certiorari.<sup>289</sup> Interestingly, though, the Court subsequently granted certiorari,<sup>290</sup> and oral arguments were heard on December 5, 2007.<sup>291</sup>

The questions raised at oral argument in *Boumediene* indicate the Court's concerns that the DTA/MCA review process provides a meaningful opportunity for detainees to contest the merits of their CSRT determinations and the constitutionality of the DTA/MCA definition of enemy combatant.<sup>292</sup>

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aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses,' 339 U.S. at 783, 70 S. Ct. 936. The Court continued: 'If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.' *Id.* at 784, 70 S. Ct. 936. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. See [http://www.archives.gov/iwg/declassified\\_records/oss\\_records\\_263\\_wilhelm\\_hoettl.html](http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html).)").

289. See William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, available at <http://www.nytimes.com/2007/06/30/washington/30scotus.html> ("The United States Supreme Court reversed course yesterday and agreed to hear claims of Guantánamo detainees that they had a right to challenge their detention in American courts. The decision, announced in a brief order released yesterday morning, set the stage for a legal battle that could shape debates in the Bush administration about how to close the detention center, which has become a lightning rod for international criticism. The order, which required votes from five of the nine justices, rescinded an April order in which the justices declined to review a federal appeals court decision that ruled against the detainees. The court offered no explanation. But the order meant that the justices will hear the full appeal in their next term, perhaps by December."). Some have speculated that the decision to hear the case was influenced by an affidavit filed by Stephen Abraham, an Army reservist and attorney assigned to work on the CSRTs. *Id.*

290. *Id.*; see also *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

291. See David Savage, *High Court Hears Gitmo Detainee Rights Case*, L.A. TIMES, Dec. 6, 2007, available at <http://www.latimes.com/news/nationworld/nation/la-na-scotus6dec06,0,3388729.story?coll=la-home-center>; see also *infra* Part IX.

292. See Transcript of Oral Argument at 55-57, *Boumediene*, 127 S. Ct. 3078 (No. 06-1195, 06-1196), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1195.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf). The exchange between Solicitor General Paul Clement and Justices Kennedy and Stevens demonstrates the substance of the Court's concerns:

JUSTICE KENNEDY: Just one more question on that point: Would the Court of Appeals in—under the MCA have the authority to question the constitutionality of the definition of noncombatant—of unlawful combatant?

GENERAL CLEMENT: Absolutely, Justice Kennedy. That would be available to them in the D.C. Circuit. . . .

JUSTICE STEVENS: You have a hypothetical claim that a particular prisoner says: I was kidnapped by people who were not in the United States Army and sold for a bounty. And I am—I just happened to be there when I got kidnapped. And then there is a genuine question of fact as to whether the fact that they may have been sold in that manner

Yet the D.C. Circuit Court of Appeals has not had the opportunity to address such challenges.<sup>293</sup> This prompted some members of the Court to appear inclined to let the review process work its way through the appellate court before ruling on the adequacy of that process.<sup>294</sup> Furthermore, other members of the Court were concerned that the DTA and MCA withdrew jurisdiction from federal courts to hear the kind of challenges they thought necessary in habeas claims.<sup>295</sup> The government responded that jurisdiction

justifies detention, which is a different question entirely from whether they committed a violation under the law of war.

GENERAL CLEMENT: Absolutely, Justice Stevens. But that question, of course, can be considered by the D.C. Circuit on review, because they're specifically entitled to a preponderance review in the D.C. Circuit. So that's a claim that they clearly could bring. They can also bring the statutory and constitutional claims to the standards and procedures, and they can make claims that the procedures that are set forth in the CSRTs are not provided.

*Id.*

293. See *supra* note 292 and accompanying text.

294. Transcript of Oral Arguments, *supra* note 292 at 57–58 (“CHIEF JUSTICE ROBERTS: I suppose any challenges to the adequacy of the standards, or whatever, are the sort of things that would be raised in the D.C. Circuit. And we don't know what that's going to look like yet, because the D.C. Circuit hasn't had an opportunity to rule on those. GENERAL CLEMENT: That's exactly right, Mr. Chief Justice. And that's why, as we say in the brief—I mean there's a sense in which this is really a facial challenge.”).

295. *Id.* at 64–65. The following colloquy illustrates the issue:

CHIEF JUSTICE ROBERTS: Is that because the withdrawal of jurisdiction does not apply to review of the proceedings in the D.C. Circuit that's provided under the statute? In other words, your argument that the habeas jurisdiction doesn't extend[,] doesn't reach the review of the adequacy of the DTA proceedings?

GENERAL CLEMENT: That's exactly right. That's exactly right.

JUSTICE SOUTER: Why would they litigate that adequacy if they have determined in advance that substantively the individuals who are petitioning have absolutely no rights?

GENERAL CLEMENT: They hadn't decided that, Justice Souter. That might have been a problem back in *Rasul*. But now whatever the answer to the question of whether the Constitution provides rights in Guantanamo, they have rights. They have the statutory right to preponderance review. They have a statutory right to have the military follow its own procedures. And they have lots of arguments in the lower courts trying to take advantage of those rights that they have. So there will be a meaningful procedure in the D.C. Circuit.

*Id.* This dialogue is interesting because it seems to indicate that at least four members of the Court—Justices Stevens, Souter, Breyer, and Ginsburg—do not acknowledge the DTA as a direct overruling of *Rasul*. Congress was very clear in its intent to overrule what it perceived as an errant interpretation of the habeas statute with regard to aliens detained abroad. The text of the DTA itself, and its subsequent amendment by the MCA, indicates that *Rasul* was fully rejected and thus has no force with regard to extraterritorial habeas claims. For these members of the Court to act as though *Rasul* was still controlling is puzzling at best and a direct denial of clear congressional will at worst. Justice Ginsburg's questioning during oral argument in *Boumediene* indicates this idea:

JUSTICE GINSBURG: I thought this was decided in *Rasul*. That's why I am so puzzled by the Government's position. I think Justice Kennedy said it most clearly when he said that, well, in every practical respect, Guantanamo Bay is U.S. territory; and whatever



was not withdrawn from the appellate court tasked to hear habeas appeals,<sup>296</sup> and that the legal challenges proceeding in the appellate court were addressing the contours of the DTA/MCA review process.<sup>297</sup> Thus, regardless how the Court rules on the MCA's application to detainee habeas claims and its relation to the Suspension Clause, it is clear that whether the statutory review process affords detainees habeas-like rights depends in large part on the review proceeding in the appellate court. The litigation concerning the scope and nature of that review illustrates how the D.C. Circuit Court of Appeals has interpreted its mandate under the DTA/MCA review process. The *Bismullah* litigation is the first instance where the court has had the opportunity to explain its role in the detainee review process.<sup>298</sup>

### B. *Bismullah v. Gates*

In *Bismullah v. Gates*, eight Guantanamo detainees sought review of their CSRT determinations that they were enemy combatants.<sup>299</sup> They argued that the evidentiary record before the appellate court should include all the information that was used by the CSRT to make the determination that they were enemy combatants.<sup>300</sup> The government argued that “the record before the court is properly limited to the Record of Proceedings, as compiled by the Recorder.”<sup>301</sup> The D.C. Circuit Court of Appeals rejected the government's request for a more limited record.<sup>302</sup> In its rejection, the Court held that “the record on review consists of the Government Information, that is, all ‘reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.’”<sup>303</sup> The court later denied the government's request for rehearing, and also denied the government's petition for rehearing en banc.<sup>304</sup>

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Congress recently passed, they can't, as you pointed out, change the terms of the lease.  
See Transcript of Oral Argument, *supra* note 292, at 31.

296. *Id.* at 64–65.

297. *Id.*

298. As noted above, in *Boumediene* the Court of Appeals was concerned with interpreting the MCA and determining whether its provisions violated the Suspension Clause. See *supra* notes 285–88. The *Bismullah* litigation, by contrast, was the first case where the court gave meaning to the statutory mandates of the review process itself. See *infra* notes 299–303.

299. See *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

300. *Id.* at 180.

301. *Id.* at 185.

302. *Id.* at 192.

303. *Id.*

304. See *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007). This order is important for the way it clarifies the government's obligations under the DTA review process. The court rejected the government's requests in two key areas regarding the type and amount of information it would be required to furnish on review. First, the government alleged that the initial *Bismullah* ruling imposed an onerous discovery burden that would “divert limited resources and sidetrack the

These cases are significant because they go to the heart of the debate regarding the habeas rights of Guantanamo detainees. With respect to the fundamental habeas right to contest the merits of one's detention, the

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intelligence community from performing other critical national security duties during a time of war." *Id.* at 140. The court rejected this assertion and held that:

If the Government cannot, within its resource constraints, produce the Government Information collected by the Recorder with respect to a particular detainee, then this court will be unable to confirm that the CSRTs determination was reached in compliance with the DoD Regulations and applicable law. The Government does have an alternative: It can abandon its present course of trying to reconstruct the Government Information by surveying all relevant information in its possession without regard to whether that information is reasonably available, and instead convene a new CSRT. If the Government elects to convene a new CSRT, it will have to collect only the Government Information specified by DoD regulations—that is, the relevant information in its possession that is then *reasonably available*.

In summary, the record on review must include all the Government Information, as defined by the DoD regulations. If the Government did not preserve that entire body of information with respect to a particular petitioner, then it will have either to reassemble the Government Information it did collect or to convene a new CSRT, taking care this time to retain all the Government Information.

*Id.* at 141–42 (citations and footnotes omitted). Second, the court addressed the government's concern that the production requirement outlined in the first *Bismullah* decision would affect its efforts to filter classified information from that provided to detainees' counsel. The court noted that:

[T]he Government now indicates that a substantial amount of the Government Information comes within one or another of the three exceptions, thereby "exponentially increase[ing] the magnitude of" its review of Government Information to determine what to withhold . . . . In any event, the proportion of the Government Information that may be withheld from the petitioners' counsel should not affect to an appreciable degree the burden upon the Government of producing the Government Information to the petitioners' counsel. Regardless of how much ultimately may be withheld, the Government will have to conduct the same review of the Government Information in order to make that determination; so much was inherent in the Government's proposed standard for withholding information, which we adopted. Thus, the real import of the Government's argument seems to be that having to review the Government Information to determine whether it must be disclosed creates a substantial burden for the Government and therefore, because the Government obviously cannot indiscriminately turn over all the Government Information to the petitioners' counsel, the only solution is to turn over none of it. As we explained in *Bismullah I*, however, entirely *ex parte* review of a CSRT determination is inconsistent with effective judicial review as required by the DTA and should be avoided to the extent consistent with safeguarding classified information.

*Id.* at 143 (citation omitted). The court's Order denying the government's request for rehearing en banc was filed February 1, 2008. See *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (order denying petition for rehearing *en banc*). The government requested an expedited review by the Supreme Court. See U.S. Plans Swift New Appeal on Detainees, <http://www.scotusblog.com/wp/uncategorized/us-plans-swift-new-appeal-on-detainees/#more-6563> (Feb. 5, 2008, 4:03 am EST). On June 23, 2008, the Supreme Court vacated and remanded the D.C. Circuit Court's *Bismullah* ruling and ordered the court to reconsider the case in light of the Supreme Court's *Boumediene* decision. See Order List, Monday, June 23, 2008, Certiorari—Summary Dispositions, case number 07-1054, available at <http://www.supremecourtus.gov/orders/courtorders/062308pzor.pdf>.

*Bismullah* ruling demonstrates how the D.C. Circuit Court of Appeals has interpreted its mandate under the DTA/MCA to conduct an effective judicial review of the military's CSRT determination. Its interpretation—that all of the government information relevant to the enemy combatant determination must be made available on review—makes it more likely that detainees will be able to mount a more vigorous challenge to the merits of their CSRT determinations.<sup>305</sup> *Boumediene* and other recent Supreme Court cases signal that at least four (and possibly five if Justice Kennedy is included) members of the Court strongly feel that detainees should be able to mount factual and constitutional challenges to their detentions.<sup>306</sup> Thus, a robust challenge at the appellate level, especially if that challenge could result in a detainee's release from Guantanamo,<sup>307</sup> would arguably satisfy that requirement.<sup>308</sup> Whether the statutory review process conforms to the habeas requirements expressed in the Court's detainee decisions is a question that will persist beyond the resolution of the above cases.<sup>309</sup> A possible answer to that question is presented in the section that follows.

## VI. THE DTA/MCA AND HABEAS IN THE DETAINEE CONTEXT

As noted above, the Court's recent detainee decisions have discussed whether Guantanamo detainees have habeas rights and have answered that question in the affirmative, at least with regard to habeas under § 2241.<sup>310</sup> Yet the DTA overruled *Rasul*, and therefore it is necessary to consider

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305. See *infra* notes 374–80 and accompanying text.

306. The Court's decisions in *Hamdi*, *Rasul*, and *Hamdan* indicate the Court's desire for detainees to have access to federal courts and exemplify the Court's willingness to reject the Executive's attempt to completely cut off detainees from American courts. The appellate review process provided for by the DTA/MCA gives detainees that have been determined to be enemy combatants, and those awaiting such a determination, access to federal courts for a limited review of that determination. Whether that review is sufficient as a DTA/MCA review was not directly at issue in *Boumediene*, but that question underlies the Court's concerns with prolonged detentions and the detainees' rights to challenge those detentions. See *supra* Part IV.A–B; see also *infra* Part IX.

307. Solicitor General Paul Clement appeared to concede that such a release was possible following review by the D.C. Circuit Court of Appeals, though he did not indicate that to a certainty. See Transcript of Oral Argument, *supra* note 292, at 37–38. This uncertainty is indicative of the effect the appellate litigation is having on the Court's review of the DTA/MCA. See *supra* note 295 and accompanying text.

308. See *infra* Parts VI.D.1–4.

309. None of the detainee cases that came before the Court before *Boumediene* directly asked the Court to consider whether the DTA/MCA review process is a sufficient substitute for habeas. The majority opinion in *Boumediene* addressed that question in the negative, but as Chief Justice Roberts noted in dissent, there are still several unresolved issues that the Court will likely be forced to confront again in the near future. See *infra* Part IX.

310. See *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (“We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of the detention at the Guantanamo Bay Naval Base”); see also *infra* Part IX, regarding the Court's determination that detainees have a constitutional right to habeas.

whether detainees have any basis for claiming habeas rights.<sup>311</sup> The Court has noted that habeas restrictions in the DTA and MCA implicate not only the federal habeas statute but also the Constitution and the Geneva Conventions.<sup>312</sup> Therefore, the DTA/MCA review process must be considered in light of those factors. Also important is how the D.C. Circuit Court of Appeals has construed the language of the DTA/MCA with respect to its judicial review of the CSRT determinations.<sup>313</sup> The discussion below argues that Congress acted within its authority when it subjected detainees to the DTA/MCA process because detainees have neither a constitutional nor statutory right to habeas. Therefore, the remaining consideration is whether the DTA/MCA review process satisfies the Geneva Conventions requirements.<sup>314</sup>

The DTA/MCA process easily satisfies these requirements.<sup>315</sup> If, however, the Court still recognizes the *Rasul* holding that detainees have a statutory right to habeas, then the DTA/MCA review process represents a sufficient substitute for the right of habeas corpus.<sup>316</sup>

#### A. § 2241—Habeas Within the Territory of the United States

##### 1. Differentiation Between Enemy and Non-Enemy Alien Detainees

The prima facie inquiry in detainee habeas cases is whether the detainee is detained pursuant to military-related offenses.<sup>317</sup> Proper differentiation

311. There are only two bases for habeas corpus rights: the federal habeas statute or the Constitution. The DTA says detainees have no statutory access to habeas, and thus detainees must attempt to claim a constitutional right to habeas. *See supra* note 241. This claim is unavailing, for many reasons. *See infra* Parts VI.B.1–2.

312. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that military commissions violate the Geneva Conventions); *see also Rasul*, 542 U.S. at 484 n.15 (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–278, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (KENNEDY, J., concurring), and cases cited therein.”).

313. *See infra* Parts VI.D.1–2.

314. *See infra* notes 357–64 and accompanying text.

315. *See infra* Part VI.C.

316. *Rasul* was clearly overruled so this question should be of no great moment, but even if there is some doubt about the question, the answer is clear. If the Court feels detainees need a habeas substitute, they have it in the DTA/MCA review. *See infra* notes 387–99 and accompanying text; *see also infra* Part IX, discussing the status of the DTA/MCA review process in light of the *Boumediene* decision.

317. *See supra* note 292 and accompanying text.

under the MCA is important for habeas purposes because it ensures that only those detained for war-related offenses are subject to the DTA/MCA review process. In *Rasul*, the Supreme Court held that for purposes of the habeas statute, Guantanamo Bay was a United States territory subject to federal court jurisdiction.<sup>318</sup> Therefore, the MCA provisions dealing with the detention of enemy aliens could theoretically apply to aliens anywhere in the United States, regardless of whether or not they were involved in war-related activities.<sup>319</sup> Indeed, one of the chief concerns expressed by opponents of the legislation was that the MCA did not sufficiently differentiate a wartime detainee from one with no military connection.<sup>320</sup> A hypothetical scenario given to reflect this concern was that of the law-abiding resident alien

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318. See *Rasul v. Bush*, 542 U.S. 466 (2004) (“By the express terms of the agreement with Cuba, the United States exercise ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base . . .”) (quoting *Lease of Lands for Coaling and Naval Stations U.S.-Cuba*, Feb. 23, 1903, T.S. No. 418).

319. See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:s3930enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf) (last visited Oct. 25, 2008). The relevant portion of the MCA is Section 7, entitled Habeas Corpus Matters.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by [sic] section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

*Id.*

320. See 152 CONG. REC. S10356057 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/SCOR-2006-09-28.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/SCOR-2006-09-28.pdf) (“Section 7 of the bill before us represents a choice about how to treat them. This bill could have been restricted to traditional notions of enemy combatants—foreign fighters captured on the battlefield—but the drafters of this bill chose not to do so . . . . This new legislation goes far beyond Guantanamo and strips the right to habeas of any alien living in the United States if the alien has been determined an enemy combatant, or even if he is awaiting a determination—and that wait can take years and years and years. Then, 20 years later, you can say: We made a mistake. Tough. It allows holding an alien, any alien, forever, without the right of habeas corpus, while the Government makes up its mind as to whether he is an enemy combatant.”).

detained for contributing money to an Islamic charity that, unbeknownst to the donor, had ties to a terrorist organization.<sup>321</sup> Opponents of the MCA feared such innocents would be subject to prolonged detention at Guantanamo with no access to habeas to contest their detentions.<sup>322</sup> The language of the statute refers only to an alien “detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”<sup>323</sup> Were the Supreme Court to construe the MCA as applying to both wartime detainees and those with no connection to the war on terror, then it is likely that the apparent lack of differentiation, accompanied by the limited appellate review of CSRT determinations, would run afoul of Court precedent granting fundamental constitutional rights to non-enemy aliens physically present in the United States.<sup>324</sup>

Yet it is clear from the legislative history of the MCA that it is meant to apply only to those aliens detained at Guantanamo for connection to war-related activities.<sup>325</sup> Furthermore, the MCA was a direct response to and

321. *Id.*

322. *Id.*

323. See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006).

324. See *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

325. See 152 CONG. REC. S10361 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn) (“Now, the question may be: Are we going to provide what the law requires? Are we going to provide additional rights and privileges that some would like to confer upon these high-value detainees located at Guantanamo Bay? But the fact is, to do what the proponents of this amendment propose would be to divert our soldiers from the battlefield and to tie their hands in ways with frivolous litigation and appeals. And the last thing that I would think any of us would want to do would be to provide an easy means for terrorists to sue U.S. troops in U.S. courts, particularly when it is not required by the Constitution, laws of the United States, not mandated by the Supreme Court, and we have provided an adequate substitute remedy, which I believe is entirely consistent with the U.S. Supreme Court’s decisions in this area. We have provided an avenue or a process by which these detainees can have their rights protected, such rights as they have being unlawful combatants attacking innocent civilians. America is conferring rights upon them that we do not have to confer, but we are conferring them because we believe there ought to be a fair process and we ought to be consistent with our Constitution and with the decisions of the U.S. Supreme Court.”); *id.* at 10367 (statement of Sen. Graham) (“Why not habeas for noncitizen, enemy combatant terrorists housed at Gitmo? No. 1, the whole Congress has agreed prospectively habeas is not available; the Detainee Treatment Act will be available. The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply to the Detainee Treatment Act retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now. Why do we—I and others—want to take habeas off the table and replace it with something else? I don’t believe judges should be making military decisions in a time of war. There is a reason the Germans and the Japanese and every other prisoner held by America have never gone to Federal court and asked the judge to determine their status. That is not a role the judiciary should be playing. They are not trained to make those decisions. Under the Geneva Conventions article 5, the combatant tribunal requirement is a military decision. So I believe very vehemently that the military of our country is

rejection of the Court's holding in *Hamdan* that struck down the military commissions instituted to try those detainees held at Guantanamo.<sup>326</sup> Therefore, Congress intended only to restrict the habeas rights of those aliens held as detainees in connection with war-related activities. Thus, there is no reason to construe the MCA to apply to those aliens outside the wartime context.

Separate and apart from legislative intent, the DTA/MCA review process allows the military to differentiate between war-related detainees and non-war-related detainees.<sup>327</sup> These procedures subject the military's evidence against a detainee to multiple levels of review, and ensure that detention for war-related crimes is warranted.<sup>328</sup> This differentiation is

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better qualified to determine who an enemy combatant is over a Federal judge. That is the way it has been, that is the way it should be and, with my vote, that is the way it is going to be.”).

326. *See id.* at 10367 (statement of Sen. Graham) (“The only reason we are here is because of the *Hamdan* decision.”).

327. As noted above, the CSRT regulations require all reasonably available exculpatory and inculpatory evidence to be presented to the tribunal members so they can determine whether a detainee should be classified and detained as an enemy combatant. *See supra* notes 233–35 and accompanying text. Furthermore, review in the D.C. Circuit Court of Appeals subjects the CSRT determination to a thorough judicial review. *See infra* Parts VI.D.1–2. As demonstrated in the *Hamdi*, *Padilla*, *Rasul*, *Hamdan*, and *Boumediene* litigation, it is possible for detainees to contest their detentions in the Supreme Court.

328. Some commentators have noted the potential “gap” in the DTA/MCA review process that exists for a detainee that has not been subject to a CSRT determination. *See* Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. C.R. & C.L. 259 (2006). They question whether that process is a sufficient replacement for habeas because before *Rasul* such detainees were held at Guantanamo without any means of contesting their detentions. *See id.* at 288 (“The DTA provides jurisdiction to review appeals only by detainees who have had a CSRT status determination or who have completed a trial before a military commission. However, without habeas, there is no way to enforce the DTA requirement (and that of *Rasul*) that detainees be given CSRT determinations. For almost four years, up until the Supreme Court’s decision in *Rasul*, detainees were held without any opportunity to contest the factual basis for their detention. Even after *Rasul*, the government has not provided hearings to all detainees. In fact, it has turned to a policy of holding ‘high-value’ detainees outside of Guantanamo and keeping their names, where they are being held, what they are alleged to have done, and what is happening to them secret. Some Guantanamo detainees have been rendered to foreign countries where they have no procedural rights and where the federal courts where they had already filed habeas petitions would lose their jurisdiction. Others have obtained orders preventing the government from transporting them without prior notice to the court; if the DTA’s withdrawal of jurisdiction applies to these pending cases, those injunctions would presumably be of no further effect. Even if the provision for review of final decisions by CSRTs and military commissions is an adequate substitute for habeas, there are categories of detainees who may have viable constitutional or statutory claims but who will not be eligible for judicial review under the statute. For them, habeas—or some other form of judicial review, by extraordinary writ or otherwise—may be constitutionally required.”). While this criticism is not fully without merit, several facts counsel patience before rejecting the DTA/MCA process. First, that process has only been law for slightly longer than two years, meaning detainees awaiting their chance to challenge their detentions—a right only granted to them in 2005—have not been subject to the kind of indefinite detention as many of their supporters assert. *See supra* notes 241, 272. Second, as noted above, the military has been actively conducting CSRT determinations, and that system, along with the regular annual review board process, has resulted in hundreds of detainees being released from Guantanamo. *See supra* notes 143–45 and accompanying text. Third, the viability of the MCA is still being debated in federal court litigation, which could result in those

important for habeas purposes not only because it preserves the longstanding distinction between enemy aliens and non-enemy aliens, but also because it triggers the DTA/MCA review—a review process far more robust than any procedural rights traditionally afforded to enemy aliens detained outside the United States.<sup>329</sup> Furthermore, the process is even more substantial in light of the Court's recent decision regarding the due process owed citizens detained as enemy combatants.<sup>330</sup>

## 2. *Padilla v. Rasul*—Due Process Rights of Citizen v. Noncitizen Detainees

The Court's June 28, 2004 decisions in *Padilla* and *Rasul* are seemingly inconsistent.<sup>331</sup> It is difficult to imagine the Court meant to give presumptive noncitizen terrorists detained at Guantanamo greater procedural rights than a United States citizen detained in the United States.<sup>332</sup> Along the same lines, it is equally hard to conclude that the *Hamdi* plurality's directive to provide a detained United States citizen the "minimum requirements of due process" is not fulfilled by the DTA/MCA review with respect to noncitizens alleged to be enemy combatants.<sup>333</sup> Thus, even though the Court has not spoken

petitioners being released from Guantanamo if the Court alters the contours of the present review process. See *supra* Part V. Thus, the DTA/MCA review process is already functioning in many respects as a habeas review even while its implementation and legality are being litigated in federal courts.

329. See *infra* notes 344–47 and accompanying text.

330. See *supra* Part IV.A.

331. Justice Scalia, in his *Rasul* dissent, notes the tension between the Court's simultaneous decisions in *Rasul* and *Padilla*. See *Rasul v. Bush*, 542 U.S. 466, 506 (Scalia, J., dissenting) ("Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their confinement, see *Rumsfeld v. Padilla*, *post*, 542 U.S. 426 (2004), whereas under today's strange holding Guantanamo Bay Detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum-shop.") (internal citation and footnotes omitted). In *Padilla*, the Court held that a United States citizen detained at a military brig in South Carolina could not pursue a habeas petition under the statute in New York because his immediate custodian was not located in New York. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). *Rasul* held that noncitizens detained at Guantanamo were not prevented from filing habeas petitions in Washington, D.C., even though they were held outside the United States and until that date federal courts had never exercised jurisdiction over Guantanamo during the 101 year period of the lease agreement with Cuba. See *Rasul*, 542 U.S. at 501–04.

332. See *supra* note 331 and accompanying text.

333. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion). Due process required that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive



clearly or thoroughly regarding the due process rights of noncitizens detained at Guantanamo,<sup>334</sup> it is likely the DTA/MCA review fulfills what limited due process entitlements they would possess should the Court find they could claim such rights.<sup>335</sup>

## B. Habeas Under the Constitution

### 1. Aliens at Guantanamo v. Aliens in the United States

The statutory scheme upon which the DTA/MCA review is predicated fits well within the historical understanding of the reach of federal court jurisdiction under the habeas statute, at least with respect to aliens outside the United States.<sup>336</sup> How that statutory scheme comports with the

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notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. The DTA/MCA review fulfills this requirement by providing the detainee and his lawyer access to the unclassified evidence used in the CSRT determination, a chance to appeal the CSRT determination before the D.C. Circuit Court of Appeals, and the opportunity to appeal to the Supreme Court. *See supra* notes 241, 246 and accompanying text. In each instance the detainee has the opportunity to present arguments in his defense and contest the CSRT determination before a neutral authority. *Id.*

334. The debate over what rights detainees have in light of the *Rasul* decision has been vibrant in the federal district court in Washington, D.C. *See* Kmiec, *supra* note 16, at 886–88 (“By contrast, how the courts will assess the merits of the cases brought by Guantánamo detainees under their newfound statutory habeas right is wholly open-ended. The Supreme Court in *Rasul*, it will be remembered, left this up to the lower courts to fill out, but with an unexplained footnote-thumb on the scale, noting that the detainees’ ‘allegations . . . unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” The district courts have taken up the grand debate. It is a debate that is largely occurring in Washington, D.C. between Judges Leon and Green over what rights, if any, accompany the extension of a statutory right of habeas corpus to noncitizen detainees outside U.S. sovereign territory. In a nutshell, Judge Leon reasons that the writ means that these alien detainees are empowered to ask: were we properly captured as part of a properly authorized military conflict? Judge Leon finds this question largely answered for him by Congress’s sweeping AUMF and the President’s own inherent Constitutional authority, provided, of course, the detainees were captured within the scope of those parameters. The last proviso is not unimportant as it gives lie to the rhetorical claim that anyone could be snatched up at any time for indefinite detention. To the contrary, it is only upon the proper showing of a wartime capture that Judge Leon finds other causes of action, that are really only multiply-expressed challenges to the authority to detain during war, to be either not judicially enforceable or inapplicable. Judge Green skips over the issue of whether or not someone was properly captured and proceeds directly to the issue of whether or not noncitizens have Fifth Amendment due process rights. Relying upon the *Rasul* footnote, Judge Green concludes that noncitizen detainees may challenge not just the detention itself, but also its nature and manner in terms of the conditions of custody, access to counsel, and perhaps a full panoply of matters arising under the Fifth and Sixth Amendments. Judge Green thereby produces an anomaly: citizens within the United States (pursuant to the Supreme Court’s decision in *Hamdi*) may challenge the lawfulness of the detention, but noncitizens beyond our borders have federal judicial supervision well in excess of that, over a host of subsidiary matters that were previously thought to be the subject of diplomacy or the province of military judgment limited by international accord.”) (footnotes omitted).

335. *See supra* note 333 and accompanying text; *see also infra* note 435 and accompanying text (discussing Justice Kennedy’s needful due process analysis in the *Boumediene* majority).

336. *See* Fallon & Meltzer, *supra* note 36, at 2064 (“The statutory scheme appears to make no provision for habeas corpus jurisdiction, or any substitute therefor, over challenges of any kind to the

traditional understanding of the constitutional rights of aliens detained within the United States is the current question.<sup>337</sup> *Rasul* did not elaborate upon what fundamental constitutional rights, if any, accompanied federal court jurisdiction as it stretched the ninety miles from Florida to Cuba via the federal habeas statute.<sup>338</sup> This raises the question whether rights of Guantanamo aliens are as constitutionally broad as aliens within the United States. Some have argued they are.<sup>339</sup> But two factors counsel the opposite conclusion.

First, Guantanamo detainees have not met—and never will meet, provided they remain at Guantanamo—the crucial requirement of having any physical connection with the United States.<sup>340</sup> The “privilege of litigation,” as noted in *Eisentrager*, was only available to those aliens having a physical presence in the United States.<sup>341</sup> Notwithstanding *Rasul*’s questionable statutory analysis, the fact remains that as habeas petitioners Guantanamo detainees cannot establish the simple predicate for alien access to federal courts.<sup>342</sup>

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 *Eisentrager* (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.”)

337. See *supra* note 295 and accompanying text. As previously mentioned, this question assumes *Rasul* is still valid, even though the DTA clearly overruled it. *Id.*

338. See *Rasul v. Bush*, 544 U.S. 466 (2004); see also *supra* note 245 and accompanying text.

339. See Fallon & Meltzer, *supra* note 36, at 2064 (“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 Guantanamo 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 Guantanamo Bay noted above and in part on the closely related view . . . that aliens detained at Guantanamo Bay possess at least ‘fundamental’ constitutional rights and thus a right to claim judicial redress for violations of those rights.”) (footnote omitted).

340. See *supra* note 107 and accompanying text.

341. See *supra* note 107 and accompanying text.

342. See *supra* note 107 and accompanying text. The fundamental criterion for alien access to federal courts is alien residence within sovereign United States territory. That the United States exercises “complete control” over Guantanamo and federal law governs United States citizens at Guantanamo—facts the *Rasul* court found sufficient to satisfy the sovereignty requirement—clearly does not mean the same thing as sovereignty, and thus casts grave doubt on the *Rasul* analysis. As Justice Scalia and many other commentators have noted, this rationale would mean that federal courts could exercise their jurisdiction under the habeas statute at Bagram Air Force Base in Afghanistan, or any United States military facility in Iraq. The *Boumediene* oral argument featured an exchange discussing the difficulty of using a jurisdictional analysis that relied on a standard less than “sovereignty.” Transcript of Oral Argument at 14–15, 17, *Boumediene*, 127 S. Ct. 3078 (No. 06-1195, 06-1196), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1195.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf).

Second, assuming *Rasul* is correct and Guantanamo detainees are physically present in the United States, their presumptive enemy status affords them limited judicial review of their detentions.<sup>343</sup> *Eisentrager* discussed this issue and held that the judicial inquiry resulting from the habeas petition of a resident enemy alien was a limited one.<sup>344</sup> *Rasul* held that § 2241 did not bar detainees from accessing federal courts, but it did not elaborate on what substantive rights, if any, such access would entail.<sup>345</sup> In light of the historically limited nature of the judicial inquiry noted above, it seems likely that the detainees' newfound habeas rights would entitle them to similarly limited judicial inquiry.<sup>346</sup> The requirement of a limited judicial

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MR. WAXMAN: Mr. Chief Justice, let me answer that question directly and then if I may finish my answer to Justice Scalia. We don't contend that the United States exercises sovereignty over Guantanamo Bay. Our contention is that at common law, sovereignty (a) wasn't the test, as Lord Mansfield explained, and (b) wasn't a clear-cut determine—there weren't clear-cut sovereignty lines in those days. Our case doesn't depend on sovereignty. It depends on the fact that, among other things, the United States exercises—quote—“complete jurisdiction and control over this base.” No other law applies. If our law doesn't apply, it is a law-free zone.

JUSTICE ALITO: So the answer to Justice Ginsburg's question, it wouldn't matter where these detainees were held so long as they are under U.S. control. If they were held on a U.S. military base pursuant to a standard treaty with another country, if they were in Afghanistan or in Iraq, the result would be the same?

MR. WAXMAN: No, I think, Justice Alito, I want to be as clear about this as I can be. This is a particularly easy straightforward case, but in another place, jurisdiction would depend on the facts and circumstances, including the nature of an agreement with the resident sovereign over who exercises control . . . .

CHIEF JUSTICE ROBERTS: So to determine whether there's jurisdiction, in every case we have to go through a multi factor analysis to determine if the United States exercises not sovereignty, which you've rejected as the touchstone, but sufficient control over a particular military base? Over the Philippines during World War II, in Vietnam, and it is going to decide in some cases whether the control is sufficient and others whether it isn't?

MR. WAXMAN: Well, I don't—

CHIEF JUSTICE ROBERTS: And that is a judgment we the Court would make, not the political branches who have to deal with the competing sovereignties in those situations?

*Id.*

343. See *infra* note 344 and accompanying text.

344. See *Johnson v. Eisentrager*, 339 U.S. 763, 775–76 (1950) (“The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment . . . . A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: ‘The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.’”) (citations omitted).

345. See *supra* note 338 and accompanying text.

346. See *supra* notes 343–44 and accompanying text.

inquiry is more than met in the DTA/MCA review, which provides for review in the D.C. Circuit Court of Appeals and the Supreme Court.<sup>347</sup>

## 2. The Constitutional Right to Habeas

*Eisenrager* is important not only for its statutory holding but also for its related holding that the Constitution does not confer upon enemy aliens detained abroad a right to bring habeas actions in federal courts.<sup>348</sup> The Court discussed the panoply of rights to which aliens within the United States are entitled under the Constitution,<sup>349</sup> but noted that, as mentioned earlier, these protections inhere by virtue of the alien's presence within the territorial jurisdiction of the United States.<sup>350</sup> Furthermore, the Court presciently commented on the relationship between aliens and the Executive during wartime, noting that security concerns require the free exercise of Executive authority unfettered by alien-related litigation.<sup>351</sup> Finally, as noted above, the Court declared its unwillingness to conduct a searching judicial inquiry into the detainment of resident enemy aliens.<sup>352</sup> Each of these points is made to communicate the crucial idea that because the constitutional rights of aliens within the United States are necessarily limited, there is no

347. See *supra* notes 241, 246 and accompanying text; see also *infra* Part IX. Chief Justice Roberts rightly notes that the majority's failure to clearly show the inadequacy of the DTA/MCA review process calls into question the majority's view that the process fails to provide sufficient habeas protections. *Id.*

348. See *Eisenrager*, 339 U.S. at 768 ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.")

349. *Id.* at 770–71 ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive Deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment.") (citations omitted).

350. *Id.* at 771.

351. *Id.* at 774–75 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies. This statute was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders.")

352. See *supra* notes 343–44 and accompanying text.

conceivable basis for the claim that the Constitution provides a right for alien enemies detained outside the United States to file a writ of habeas corpus in federal courts.<sup>353</sup>

Notably, the Court in *Rasul* does not directly refute this longstanding constitutional interpretation. Instead, it sidesteps the issue by attempting to distinguish between the *Eisentrager* and *Rasul* petitioners on the basis of six factors laid out in the *Eisentrager* opinion.<sup>354</sup> Yet *Rasul*'s distinguishing the petitioners by no means overrules the firmly rooted doctrine that enemy aliens detained abroad have no constitutional access to habeas, and nothing in the opinion indicates that the constitutional bar is overruled by the Court's new statutory interpretation.<sup>355</sup> Thus, despite the statutory interpretation in *Rasul*, there is no reason to believe aliens detained at Guantanamo have a constitutional right to habeas relief. The Supreme Court's June 12, 2008 decision in *Boumediene v. Bush*, which reached the opposite conclusion, is discussed in the Postscript.

### C. Habeas Under the Geneva Conventions

The incorporation of international law into constitutional jurisprudence has always been a contentious issue, and the *Hamdan* decision was noteworthy for the way it struck down the military commissions as violative of the Geneva Conventions.<sup>356</sup> If this decision is indicative of the emerging importance of international treaties to the Court's jurisprudence, then the Court is likely to subject future detainee decisions to the scrutiny of the Geneva Conventions. Therefore it is necessary to evaluate the DTA/MCA review process in light of the Geneva requirements.

Briefly stated, the applicable Geneva regulation is Article 5, which requires that in cases where questions "arise as to whether persons . . . belong to any of the categories enumerated in Article 4,<sup>357</sup> such persons shall enjoy the protection of the present Convention until . . . their status has been

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353. See *Eisentrager*, 339 U.S. at 778.

354. See *Rasul v. Bush*, 542 U.S. 466, 476 (2004). The *Rasul* Court found those factors "relevant only to the question of the prisoners' constitutional entitlement to habeas corpus." *Id.* at 477. Therefore, because the Court found that the petitioners were easily distinguished on the basis of those factors, the constitutional impediment to habeas jurisdiction was easily disposed of and "persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review." *Id.* at 478.

355. *Id.*

356. See *supra* note 268 and accompanying text.

357. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm#art5> (last visited Sept. 16, 2008). Article 4 lays out the criteria for being categorized as a prisoner of war. See *id.* It is notable that those persons detained at Guantanamo Bay do not fit into any of these categories, which explains the Bush Administration's 2002 policy to classify the detainees as enemy combatants instead of prisoners of war. See Bialke, *supra* note 17, at 1-2, 15.

determined by a competent tribunal.”<sup>358</sup> The obvious question is whether the CSRTs fulfill this “competent tribunal” requirement.<sup>359</sup> Many reasons

358. See *id.*; see also Bialke, *supra* note 17, at 49–51 (“A capturing party convenes a ‘competent tribunal’ under Geneva Convention III art. 5 when it is necessary to resolve a material factual issue of doubt as to the legal status of captured combatants. Geneva Convention III art. 5 does not purport to dictate the nature of a POW status tribunal, deferring to the detaining power as to tribunal procedures and composition. Art. 5 does not specify how tribunals are to be structured or organized. Neither does art. 5 instruct whether the tribunals are executive or judicial in nature. Art. 5 does not instruct that the detaining power establish a separate tribunal for each detainee who has ‘fallen into the hands of the enemy.’ Art. 5 merely directs that doubt as to a captured combatant’s status should be considered and settled by a ‘competent tribunal.’ Such individual art. 5 tribunals were designed to provide *ad hoc* on-the-scene minimal due process to rectify expediently the battleground front-line factual errors of combatant status. For example, individual art. 5 tribunals are meant to ensure that a few displaced civilians or other individual noncombatant captives rounded up by mistake and who are in the proximity of belligerent activity taking place in a combat zone, are then released promptly. Art. 5 tribunals are also meant to provide POW status to a deserter of an opposing armed force who has discarded his or her uniform, to confer timely POW status to a captured lawful combatant who lost an identification card or to a lawful combatant captured off-duty (or otherwise legitimately out-of-uniform). As stated earlier, art. 5 defers to the detaining power and does not indicate how individual competent tribunals should be organized or structured. Generally, however, an individual art. 5 tribunal would be non-adversarial and limited in scope.”) (footnotes omitted).

359. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 550–51 (2004) (plurality opinion) (discussing the “competent tribunal” requirement as enacted in military regulations) (“Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, ch. 1, §§ 1-5, 1-6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual’s status. See, e.g., *id.*, § 1-6 (‘A competent tribunal shall be composed of three commissioned officers’; a ‘written record shall be made of proceedings’; ‘[p]roceedings shall be open’ with certain exceptions; ‘[p]ersons whose status is to be determined shall be advised of their rights at the beginning of their hearings,’ ‘allowed to attend all open sessions,’ ‘allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal,’ and to ‘have a right to testify;’ and a tribunal shall determine status by a ‘[p]reponderance of evidence’). One of the types of doubt these tribunals are meant to settle is whether a given individual may be, as Hamdi says he is, an ‘[i]nnocent civilian who should be immediately returned to his home or released.’ *Id.*, § 1-6e(10)(c). The regulation, jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, provides that ‘[p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.’ *Id.*, § 1-6g. The regulation also incorporates the Geneva Convention’s presumption that in cases of doubt, ‘persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal.’ *Id.*, § 1-6a.”). As noted earlier, it is not a settled proposition that detainees as unlawful combatants are entitled to the protections of international law, and a good case can be made that the manner in which they fight deprives of them of the protections accorded to traditional soldiers. See Bialke, *supra* note 17, at 51 (“In regards to captured al-Qaeda and Taliban irregular combatants captured out-of-uniform in armed conflict, there is no question, doubt, or ambiguity that they failed *en masse* to meet any of the four criteria of lawful belligerency and, subsequently then, equally no doubt as to their status as unlawful combatants. Generally, both the al-Qaeda and Taliban detainees now in Cuba were captured without responsible chains of command, without uniforms, with concealed weapons, and without any commitment to or history of compliance with international humanitarian law and LOAC. As a result of the lack of doubt as to both al-Qaeda and the Taliban’s unlawful combatant status, art. 5 tribunals, in regards to individual

suggest they do. First, the CSRTs are composed of three neutral commissioned officers.<sup>360</sup> Second, “[t]he detainee shall be allowed to attend all proceedings . . . .”<sup>361</sup> Third, the detainee can call and question witnesses.<sup>362</sup> Fourth, the detainee has the right to testify.<sup>363</sup> In short, the CSRTs were modeled after the Geneva requirements as they were incorporated into Army Regulation 190-8.<sup>364</sup> Therefore, there is little question that the CSRTs satisfy the Geneva Convention “competent tribunal” requirement.

#### *D. Statutory Interpretation—The Scope of Appellate Review*

How the D.C. Circuit Court of Appeals has understood its obligation under the DTA/MCA review is crucial to habeas considerations for several reasons. First, a broad evidentiary record on appellate review of a CSRT determination affirms Congress’s intent to enable detainees to challenge the merits of their detentions by contesting the evidence used in their CSRT determinations.<sup>365</sup> Second, forcing the government to either produce all of the information used in the CSRT or convene a new CSRT expands the scope of the government’s documentary obligation, strengthens the factual record on review, and gives teeth to the appellate review process.<sup>366</sup> Third, a broad interpretation of the appellate review that encompasses constitutional challenges to the DTA/MCA review process would ensure that the appellate review is not limited to purely fact-based challenges.<sup>367</sup> Finally, the appellate court’s ability to order release for unwarranted detentions would demonstrate that the DTA/MCA review functions as an effective habeas remedy.<sup>368</sup> The discussion that follows demonstrates how a robust judicial review in the D.C. Circuit Court of Appeals ensures that detainees are

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captured al-Qaeda and Taliban combatants, would not be applicable.”).

360. See *supra* note 235 and accompanying text. Letter (e) of the implementing order provides that “A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, or previous determination of status of the detainee.”

361. See *supra* note 235 and accompanying text; see also Memorandum of Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal, at (g)(4) (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter Wolfowitz Memorandum].

362. See *supra* note 235 and accompanying text; see also Wolfowitz Memorandum, *supra* note 361 at (g)(8).

363. See *supra* note 235 and accompanying text; see also Wolfowitz Memorandum, *supra* note 361 at (g)(10).

364. See *supra* note 359 and accompanying text.

365. See *infra* Part VI.D.1.

366. See *infra* Part VI.D.2.

367. See *infra* Part VI.D.3. An example of such a constitutional claim would be a detainee challenging the government’s definition of “enemy combatant” as an unconstitutionally broad or vague definition. *Id.*

368. See *infra* Part VI.D.4.

afforded the essential habeas protection and properly respects the President's wartime authority.<sup>369</sup>

### 1. The Scope of the Record on Appellate Review

The D.C. Circuit Court of Appeals has issued one decision and two orders denying the rehearing of its July 2007 decision clarifying the scope of the record on review when a detainee challenges his CSRT determination.<sup>370</sup> These rulings are important because they demonstrate how that court has construed the language of the DTA<sup>371</sup> with regard to the breadth of the factual record the government must divulge.<sup>372</sup> Thus far, the Court has rejected the government's request for a more limited evidentiary review, both in terms of the volume of information and the type of information that must be delivered to petitioners' counsel.<sup>373</sup> This is crucial for two reasons.

First, the requirement that the government must divulge all the information collected by the Recorder, and not just that used in the CSRT determination,<sup>374</sup> ensures that the appellate review addresses the facts of the

369. See *infra* Part VI.5; see also *infra* Part IX (discussing the sufficiency and validity of the appellate review process in light of *Boumediene*).

370. See *supra* note 304.

371. It should be noted that the court of appeals has yet to rule on the scope of the record on review of a military commission's final decision, which is governed by the MCA, but there is no reason to believe the court would construe its language in a way inconsistent with its interpretation of the DTA. That is to say, the court construed the DTA's provisions to require the government to make available the fullest amount of information it could with respect to the CSRTs, and it is likely the court would exert a similarly robust legal review under the MCA, as it does not make provision for factual review. See *supra* note 277 and accompanying text.

372. See Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(c)(2) 110 Stat. 2680, 2742-44 (2005), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&> (last visited Oct. 25, 2008). The relevant DTA language governing the review in the appellate court reads:

(C) SCOPE OF REVIEW—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (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

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

*Id.*; see also *supra* note 277 for the relevant MCA language governing appellate review.

373. See *supra* notes 302–04 and accompanying text.

374. See *Bismullah v. Gates*, 514 F.3d 1291, 1295–96 (D.C. Cir. 2008) (order denying petition for rehearing en banc) (“The DoD Regulations, which establish the ‘standards and procedures’ to be



record in terms of the classified and non-classified information against the detainee.<sup>375</sup> It also ensures appellate review of whether the CSRT met its legal burden—whether the evidence is sufficient to affirm the CSRT’s determination by a preponderance of the evidence standard.<sup>376</sup> Second, the Court’s refusal to reduce the government’s burden of culling highly sensitive information from that required to be handed over to petitioners’ counsel suggests the court is dedicated to ensuring petitioners’ counsel are not

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followed by the Recorder, the detainee’s Personal Representative, and the CSRTs themselves, require the Recorder to obtain all the Government Information, E-1 § C(2); E-2 § C(1), to cull from the Government Information and forward to the Tribunal such information ‘as may be sufficient to support the detainee’s classification as an enemy combatant’ together with all exculpatory information, E-1 § H(4); E-2 §§ B(1), C(6), and to share all the Government Information with the detainee’s Personal Representative, E-1 § F(8); E-2 § C(4). In order to review whether the Recorder performed these tasks, the court obviously must see all the Government Information. See *Bismullah I*, 501 F.3d at 185–86; *Bismullah II*, 503 F.3d at 139–40. Further, the court will be able to assess whether any failure by the Recorder to perform these tasks affected the weight of the evidence before the CSRT only if the court can consider that failure in light of all the information the Recorder was supposed to collect and forward. See *Bismullah I*, 501 F.3d at 185–86; *Bismullah II*, 503 F.3d at 139–40. Irrespective, therefore, of what § 2112 might say in general about the scope of a record on review, the DTA requires that the record on review of a CSRT’s status determination include all of the Government Information, regardless of whether it was all put before the Tribunal.”).

375. Both the DTA and MCA provide for deletion of classified material for security purposes, but the court of appeals in its October 3, 2007 order stated that while deletion of sensitive material was allowed, “entirely *ex parte* review of a CSRT determination is inconsistent with effective judicial review as required by the DTA and should be avoided to the extent consistent with safeguarding classified information.” See *Bismullah*, 503 F.3d at 143.

376. *Id.* See *supra* notes 234–35; see also Fallon & Meltzer, *supra* note 36, at 2107 (“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. 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 afforded by the MCA in trials for war crimes.”). A recent independent review of hundreds of CSRT determinations indicates the overwhelming accuracy of the CSRT process. See generally Joseph Felter & Jarrett Brachman, AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNALS (CSRT) UNCLASSIFIED SUMMARIES, Combating Terrorism Center, West Point, July 25, 2007, available at <http://www.ctc.usma.edu/csrt/CTC-CSRT-Report-072407.pdf>. The authors note that only six out of 516 detainees posed no security threat to the United States:

In 2007, the Office of Detainee Affairs in the Office of the Secretary of Defense, asked faculty at the Combating Terrorism Center (CTC) at West Point to review information recorded in the 516 CSRT unclassified summaries (hereinafter referred to as “CSRT records”) and provide an objective assessment of this information.

After querying the 516 CSRT unclassified summaries, the CTC found that 73% of the unclassified summaries meet the CTC’s highest threshold of a ‘demonstrated threat’ as an enemy combatant. The CTC established two other categories with four discrete proxy characteristics in each (‘potential threat’ and ‘associated threat’) in order to help assess whether the information in these records indicated these individuals *posed or potentially posed a threat as an enemy combatant*. The CTC found that six of the publicly available CSRT unclassified summaries contained no evidence that fit any of the CTC’s twelve threat variables.

*Id.* at 4.

denied the information necessary to successfully contest the CSRT determination.<sup>377</sup> The court has made clear it will not be a rubber stamp for the CSRTs, and its rulings demonstrate that it intends to conduct a thorough judicial review of the factual and legal conclusions of CSRT determinations, and the same is likely true for the judgments of military commissions.<sup>378</sup> To the extent that habeas rights traditionally involve the ability to contest the evidence justifying one's executive detention, a review providing noncitizen enemies near total evidentiary disclosure<sup>379</sup> before a federal civil appellate court clearly satisfies the requirements of habeas corpus.<sup>380</sup>

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377. See *supra* notes 302–05 and accompanying text.

378. The MCA provides for only legal review of military commission judgments, and while this restriction on factual review would seem to suggest shortcomings in the habeas analysis, the greater structural protections within the military commission system itself belie that criticism. See Fallon & Meltzer, *supra* note 36, at 2106–07 (“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. In light of that general standard, the MCA’s preclusion of factual review 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 fact-finding 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.”).

379. That disclosure is necessarily limited to accommodate the government’s concerns regarding classified or highly sensitive information. The D.C. Circuit Court of Appeals has sought to balance between accommodating the government’s security concerns and fulfilling its DTA mandate to conduct a thorough judicial review. See *Bismullah v. Gates*, 503 F.3d 137, 143 (D.C. Cir. 2007), (“In *Bismullah I*, we dealt with the Government’s concern about disclosure by providing, just as the Government urged, that it may withhold from the petitioners’ counsel any Government Information that is either ‘highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee.’ The Government’s need to review the Government Information in order to determine whether it fits within any of these three exceptions gives rise to the Government’s present concern about the burden of complying with *Bismullah I*.”) (citation and footnote omitted). The court then rejected the government’s request for a reduced burden regarding its obligations to sift classified information from that being made available to petitioners’ counsel. *Id.*

380. As noted above, the essence of habeas is the ability to come before a civil court to contest the evidence supporting an allegedly unlawful executive detention. See generally *supra* Part II. In a situation where Congress has been very explicit that the Guantanamo detainees have absolutely no right to file habeas appeals in federal courts, a system of review that affords those same detainees access to evidence used to justify their detentions, and the chance to contest that evidence before multiple civil appellate courts undoubtedly qualifies as a substitution for habeas. See *supra* Part IV.

## 2. The Government Obligation to Produce Evidence or Convene a New CSRT

Similarly, the D.C. Circuit has not been reticent about enforcing the government's production requirements such that the government's inability to meet its burden will necessitate convening a new CSRT.<sup>381</sup> This is important because it displays the court's seriousness about its role in providing an independent civil check on the military's CSRT determination.

Habeas came into its own as a means of requiring the Admiralty to justify its detention of British subjects.<sup>382</sup> The Crown's failure to establish cause required it either to assert new charges warranting detention or release the prisoner.<sup>383</sup> Similarly here, the government's failure to retain the necessary evidence with respect to the detainee challenging his CSRT determination requires it to validate that determination again before military authorities and civilian courts.<sup>384</sup> The court's language here is instructive regarding the government's burden to fulfill its evidentiary duty under the DTA/MCA process or face the consequences of having to reconvene a second CSRT. The court states that, "[i]f the Government did not preserve that *entire body of information* with respect to a particular petitioner, then it will have either to reassemble the Government Information it did collect or to convene a new CSRT, *taking care this time to retain all the Government Information.*"<sup>385</sup> The court's willingness to reject the CSRT determination and force the military to reconvene a new tribunal to determine detainee status fits well within the habeas tradition of subjecting executive detention to independent civil court review.<sup>386</sup>

## 3. Constitutional Challenges to the DTA and MCA

Whether detainees can mount constitutional challenges to their confinement strikes at the heart of the habeas debate because such challenges allow the detainee the opportunity to contest not only his individual confinement, but the very constitutional authority underlying his detention.<sup>387</sup> Both the DTA and MCA appear to make provisions for such challenges by allowing the appellate court to consider whether the DTA and

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381. See *supra* note 304 and accompanying text.

382. See *supra* note 44 and accompanying text.

383. See *supra* note 44 and accompanying text.

384. Whether the D.C. Circuit can order a detainee's release if the CSRT evidence is found wanting is discussed in Part VI.D.4, *infra*.

385. See *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (emphasis in original).

386. See *supra* note 44 and accompanying text.

387. Such was the situation in *Hamdan* where the petitioner detainee, bin Laden's former driver, was able to contest his detention up to the Supreme Court, where the Court struck down the military commissions established to try detainees like Hamdan. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

MCA decisions were consistent with “the Constitution and the laws of the United States.”<sup>388</sup>

One of the persistent questions accompanying detainee litigation has been the soundness of the government’s definition of the term “enemy combatant.”<sup>389</sup> Detainees see the perceived lack of a formal definition as a potential avenue of successful litigation, and recent Supreme Court litigation has touched on whether detainees would have the right under the DTA/MCA process to challenge the constitutionality of the government’s definition of “enemy combatant.”<sup>390</sup> The government has indicated that detainees would have that right in the appellate court or the Supreme Court.<sup>391</sup> Like the *Hamdan* decision, this strategy would involve second-guessing an Executive decision made during wartime. Certain members of the Court would likely be reticent to read this right into the review process and be unresponsive to the merits of such challenges.<sup>392</sup>

388. See *supra* notes 277, 372 and accompanying text.

389. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (“The threshold question before us is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’ There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individual who, it alleges, was ‘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. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.”).

390. See *supra* note 292 and accompanying text.

391. See *supra* note 292 and accompanying text.

392. See *supra* note 265. Justice Thomas dissented in *Hamdan* on the grounds that the Court should not be second-guessing decisions properly left to the Executive during a time of war. See *Hamdan*, 548 U.S. at 682–83 (Thomas, J., dissenting); see also Fallon & Meltzer, *supra* note 36, at 2101 (“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.’ 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 decisionmakers under ordinary administrative law doctrines and due to executive officials in the foreign affairs arena should carry over into habeas corpus. 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

Nevertheless, the fact that the DTA/MCA process grants detainees the right to bring this particular constitutional challenge is significant because it arguably means detainees can use the Constitution to challenge other components of their detention. Also, striking down fundamental articles of executive detention like the definition of “enemy combatant” serves the essential purpose of habeas relief—the possibility of release.<sup>393</sup>

#### 4. Merits Relief under the DTA and MCA

The provision for detainee release under the DTA/MCA was discussed at great length in the *Boumediene* oral argument.<sup>394</sup> Justice Souter in particular was concerned that the language and practice of the DTA demonstrated that it was unavailing for detainees to seek their release under that system.<sup>395</sup> The government responded that nothing in the text of the DTA precluded the Court from interpreting it to require the D.C. Circuit Court of Appeals to release detainees if the evidence did not support their CSRT determination.<sup>396</sup> Thus, while the DTA does not expressly provide for

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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.”) (footnotes omitted).

393. There is no guarantee that constitutional challenges to the DTA/MCA review process will result in a detainee’s release or transfer from Guantanamo. Congress’s reaction to *Hamdan* was a good illustration of what happens when the Court rejects executive detentions and Congress responds by specifically authorizing the system of detention struck down. *See supra* Part II. Yet there is good reason to believe similar Court response to future constitutional challenge of the DTA/MCA would not produce the same result. First, Congress is controlled by Democrats, who have been ardent in their criticism of Guantanamo and have made efforts to “restore” habeas rights to Guantanamo detainees. *See* Jonathan Weisman, *GOP Blocks Bid on Rights of Detainees*, WASH. POST, Sept. 20, 2007, at A05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/19/AR2007091900873.html>. Second, the makeup of the Court could likely change. Come January 2009, six of the nine Justices will be seventy or older, and the Obama administration could witness new changes on the Court. *See* Steven G. Calabresi & John O. McGinnis, *McCain and the Supreme Court*, WALL ST. J., Feb. 4, 2008, at A14.

394. Transcript of Oral Argument at 37, *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (No. 06-1195, 06-1196), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1195.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf) (last visited Nov. 25, 2008).

JUSTICE SOUTER: Okay. It was a practical problem. But the fact is that the effectiveness of habeas jurisdiction, for example, in requiring new trials, and so on, depends upon the ultimate sanction, which is the authority of the court to let somebody go if the Government does not comply with a condition. And the—the Government practice so far under the DTA seems quite contrary to that.

GENERAL CLEMENT: Well, again, Justice Souter, what I would say is simply this: that if what the Constitution requires to make the DTA to be an adequate substitute is the power to order release, there is no obstacle in the text of the DTA to that. And the All Writs Act is available to allow them to order release to protect their jurisdiction under the DTA.

*Id.*

395. *See id.* at 36.

396. *See id.* at 37.

a detainee's release in the event he successfully challenges his CSRT determination, it does not specifically foreclose the opportunity.<sup>397</sup> This interpretive gap leaves room for the Court to construe the DTA review process to comply with constitutional requirements, and the same option is available with respect to the MCA as well.<sup>398</sup> Thus, it can be said that the DTA and MCA fully express the essential protections of the Great Writ because they provide no obstacle for the ultimate vindication of the habeas right. Furthermore, the statutes provide these protections while respecting the Executive's authority to "wage war successfully."<sup>399</sup>

##### 5. Robust Appellate Review and Respect for Presidential Wartime Authority

The DTA and MCA were enacted to refute the Court's determination that President Bush had overstepped his wartime authority.<sup>400</sup> The legislative history demonstrates that congressional sponsors sought to restore the status quo ante with respect to President Bush's decisions to detain and prosecute detainees.<sup>401</sup> These sponsors argued that *Eisentrager* correctly rejected the habeas claims of alien enemies detained overseas and deferred to Executive wartime decision-making.<sup>402</sup> The DTA and MCA incorporated this understanding into the appellate review process, ensuring it would not handcuff the President's prosecution of the war.<sup>403</sup> The comity between the statutory review process and the President's wartime authority demonstrates that Congress properly exercised its authority when it enacted the DTA and MCA.

397. *Id.*; see *supra* note 394 and accompanying text.

398. See *supra* note 277 and accompanying text.

399. The Supreme Court has held that the power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238 (1917)).

400. See *supra* notes 243–47, 272–74 and accompanying text.

401. See *supra* notes 272–74 and accompanying text.

402. *Id.*

403. The appellate review is focused in the D.C. Circuit Court of Appeals, and as noted above, requires the government to provide all reasonably available information, not all information that might pertain to a detainee without regard to whether it is reasonably available. See *supra* note 304 and accompanying text. Furthermore, the appellate review encompasses both factual and legal review of CSRT determinations, but with respect to military commission judgments, the MCA mandates only legal review. See *supra* note 378 and accompanying text. These limitations demonstrate Congress' desire to strike an appropriate balance between granting detainees a viable process to challenge their detentions and respecting the President's authority to determine detention and prosecution procedures.

## VII. IMPLICATIONS FOR THE BROADER WAR

The legal debate over detainee rights has profoundly affected the prosecution of the war by forcing the Executive to wage battle against radical Islamic jihadists on multiple fronts. The campaigns in Iraq and Afghanistan have resulted in the killing or capturing of thousands of Al Qaeda and Taliban members<sup>404</sup> committed to the destruction of the government whose legal system has, since 2004, been accommodating their efforts to hamstring the Executive's prosecution of the war.<sup>405</sup> It is too soon to tell whether the military accomplishments realized abroad will withstand the legal assaults waged within the United States, especially if enemies who are vanquished on foreign battlefields are able to assert legal claims against their victors in American courts.<sup>406</sup> Such an absurd scenario was rightly unthinkable before 2004.

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404. See President George W. Bush, State of the Union Address (Jan. 28, 2008), available at [www.whitehouse.gov/news/releases/2008/01/20080128-13.html](http://www.whitehouse.gov/news/releases/2008/01/20080128-13.html) (last visited Sept. 26, 2008) (“When we met last year, al Qaeda had sanctuaries in many areas of Iraq, and their leaders had just offered American forces safe passage out of the country. Today, it is al Qaeda that is searching for safe passage. They have been driven from many of the strongholds they once held, and over the past year, we’ve captured or killed thousands of extremists in Iraq, including hundreds of key al Qaeda leaders and operatives.”).

405. See *supra* notes 207–20 and accompanying text. See also Gitmo and al Qaeda, WALL ST. J., July 26, 2007, at A12, available at <http://www.opinionjournal.com/editorial/feature.html?id=110010383> (“While Guantanamo is clearly disliked around the world, those who want to close it have yet to offer a suitable alternative. Transferring its detainees to some place further offshore would mean spending billions of more dollars on a new facility, while facing the same criticism from antiwar activists. Gitmo is also territory under U.S. control, which means it avoids the complication of embarrassing allies in Afghanistan, Iraq, or somewhere else (as in the ‘secret CIA prisons’ in Europe where KSM and other 9/11 plotters were allegedly kept before their transfer to Gitmo in 2006). The legality of Guantanamo has also been upheld by the Supreme Court, which isn’t true of any other foreign outpost. The High Court has agreed to hear another Gitmo-related case in October, and it’s not a bad idea to remind the Justices that Guantanamo harbors terrorists captured on the current battlefield while trying to kill Americans. That fact might give them pause before they supplant their own war judgment for the Commander in Chief’s and make it easier for these killers to return to the war. The real goal of Guantanamo’s critics is to have these killers treated like common criminals in American courts. That would make it impossible to deny them the full array of U.S. legal protections. In many cases, prosecutors would lack enough evidence to convict them under normal trial rules, especially if much of the evidence were classified. Soldiers don’t build a criminal case like ‘C.S.I.’ sleuths when they’re snagging an enemy on the battlefield while also trying to avoid getting killed. The result of bringing Gitmo detainees into U.S. criminal courts would inevitably be their widespread release—which means leaving them free to kill Americans again. The Combating Terrorism Center at West Point recently examined the non-classified evidence about Gitmo detainees, and in a new report concludes that 73% were a ‘demonstrated threat’ to U.S. forces. No less than 95% were a ‘potential threat.’ According to the Pentagon, at least 30 former Gitmo detainees have returned to fight Americans after deceiving U.S. interrogators and being released. One of those detainees, Abdullah Mahsud, was captured in northern Afghanistan in late 2001, held until March 2004, and upon release immediately became a Taliban leader in southern Waziristan near the Afghan-Pakistan border. In October 2004, he directed the kidnapping of two Chinese engineers, one of whom was killed during a rescue attempt. This week he blew himself up with a grenade rather than surrender to Pakistani troops who had him surrounded.”).

406. This was the practical import of the *Rasul* decision. Emblematic of this problem specifically,

It is beyond dispute that there are important constitutional questions at stake in the detainee litigation, at least if one believes the Constitution invests America's enemies with rights traditionally afforded to citizens,<sup>407</sup> or law abiding resident aliens.<sup>408</sup> Longstanding precedent held, for good reason,<sup>409</sup> that enemy aliens detained abroad had neither constitutional nor

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and more generally the American legal profession's willingness to use captured terrorists as a vehicle for contesting the prosecution of the war and punishing those who assisted in its prosecution was the January 2008 lawsuit brought by convicted terrorist Jose Padilla against John Yoo, a Boalt Hall professor and former Justice Department official for President Bush. See John Yoo, *Terrorist Tort Travesty*, WALL ST. J., Jan. 19, 2008, at A13, available at <http://online.wsj.com/article/SB120070333580301911.html>. The lawsuit was made possible by lawyers and students from Yale Law School, who are attempting to use such suits to protest the war. *Id.* ("Last week, I (a former Bush administration official) was sued by José Padilla—a 37-year-old al Qaeda operative convicted last summer of setting up a terrorist cell in Miami. Padilla wants a declaration that his detention by the U.S. government was unconstitutional, \$1 in damages, and all of the fees charged by his own attorneys. The lawsuit by Padilla and his Yale Law School lawyers is an effort to open another front against U.S. anti-terrorism policies. If he succeeds, it won't be long before opponents of the war on terror use the courtroom to reverse the wartime measures needed to defeat those responsible for killing 3,000 Americans on 9/11. On Thursday, a federal judge moved closer to sentencing Padilla to life in prison. After being recruited by al Qaeda agents in the late 1990s, Padilla left for Egypt in 1998 and reached terrorist training camps in Afghanistan in 2000. American officials stopped him at Chicago O'Hare airport in 2002, based on intelligence gained from captured al Qaeda leaders that he was plotting a dirty bomb attack. President Bush declared Padilla an enemy combatant and ordered him sent to a naval brig in South Carolina. After a federal appeals court rejected Padilla's plea for release, the government transferred him to Miami for trial for al Qaeda conspiracies unrelated to the dirty bomb plot. Federal prosecutors described Padilla as 'a trained al-Qaeda killer,' and a jury convicted him of conspiring to commit murder, kidnapping and maiming, and of providing material support to terrorists. Now Padilla and his lawyers are trying to use our own courts to attack the government officials who stopped him. They claim that the government cannot detain Padilla as an enemy combatant, but instead can only hold and try him as a criminal. Padilla alleges that he was abused in military custody—based primarily on his claim that he was held in isolation and not allowed to meet with lawyers. But enemy prisoners in wartime never before received the right to counsel or a civilian trial because, as the Supreme Court observed in 2004, the purpose of detention is not to punish, but to prevent the enemy from returning to the fight. Under Padilla's theory, the U.S. is not at war, so any citizen killed or captured by the CIA or the military can sue.")

407. See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("Because the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad. When any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful, to use means not amounting to acts of war to effectuate his release. It is neither sentimentality nor chauvinism to repeat that 'Citizenship is a high privilege.' *United States v. Manzi*, 276 U.S. 463, 467.")

408. *Id.* at 778.

409. It is hard to consider the magnitude of the *Rasul* decision and how it will affect further wartime litigation because there is nothing in the text of the opinion to suggest its rationale extends beyond Guantanamo. One hopes that will be the extent of its reach, for there is no principled way to distinguish, for purposes of the habeas statute, between those military areas where the United States military exercises "exclusive control" and those where it does not. See *Rasul v. Bush*, 542 U.S. 466, 498–99 (2004) (Scalia, J., dissenting) ("The consequence of this holding, as applied to aliens outside



statutory access to habeas.<sup>410</sup> The long-term effects of *Rasul*'s quasi-overturning of this pragmatic rule are hard to discern.<sup>411</sup> The even more difficult, and potentially unsettling question is, whether the Court will continue its recent discovery of the apparently long-dormant rights due aliens detained abroad as unlawful enemy belligerents.<sup>412</sup>

Furthermore, the Court's willingness to actively intrude on the Executive's prosecution of the war is also reason for concern.<sup>413</sup> But history

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the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. See, e.g., Department of Army, G. Lewis & J. Mewha, *HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776–1945*, Pamphlet No. 20-213, p. 244 (1955) (noting that, '[b]y the end of hostilities [in World War II], U.S. forces had in custody approximately two million enemy soldiers'). A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the '[p]etitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.") (citations omitted).

410. See Eisentrager, 339 U.S. at 768.

411. See Kmiec, *supra* note 16, at 880 ("Can the damage to the successful conduct of the war be contained? Yes and no. Yes, because just as the Court's statutory construction was more the product of assertion than reasoning, so too, its scope was by like declaration limited to the unique confines of Guantanamo Bay. Justice Stevens and the *Rasul* majority do not explicitly limit the holding to Cuba, but it can be inferred from the Court's casual dismissal of the customary rule against the extraterritorial application of statutes.").

412. See Bialke, *supra* note 17 and accompanying text; see also David B. Rivkin Jr. & Lee A. Casey, *Gitmo Goes to Court: The Judiciary Has No Business Managing How We Fight Wars Abroad*, WALL ST. J., Dec. 6, 2007, available at <http://www.opinionjournal.com/editorial/feature.html?id=110010949> ("Because the Constitution does not apply to foreigners overseas, the procedural rights accorded to the Guantanamo detainees are a matter exclusively for the political branches. Subjecting them to constitutional scrutiny would overstep the judiciary's legitimate power, making it the ultimate arbiter of U.S. foreign policy. Moreover, if the court were to grant constitutionally based habeas rights to aliens overseas, there is no principled means of avoiding extension of the entire Constitution anywhere in the world where U.S. forces (or officials) may go. For the first time in American history, an entire panoply of the federal government's overseas actions directed at foreigners, including surveillance and even use of deadly force, would become subject to constitutional strictures. This would transform the U.S. into a Gulliver, bound by its own judicial strings, on the international stage.").

413. Numerous constitutional authorities, from Alexander Hamilton to Justice Robert Jackson, have held that the Executive reigns supreme in matters of foreign affairs. The energy and dispatch with which the Executive can respond to crises has traditionally warranted it great deference by the Court in its exercise of its Article II authority. See *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) ("Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States. The Founders in their wisdom made him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.").

suggests this fact might have more to do with the perceived political weakness of the Executive rather than any fundamental shift in the separation of powers.<sup>414</sup> This rationale, however, does not alter the reality that the Court has asserted itself into affairs more properly managed by the political branches, and there is no reason to expect the Court's forays into foreign affairs to necessarily have the intended result, either at home or abroad.<sup>415</sup> The wisdom of the *Eisenrager* Court is still prescient today as

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414. See Pushaw, *supra* note 140, at 1077–78 (“As with the 2004 detention decisions, then, *Hamdan* is a setback for the President, but hardly the devastating blow imagined by many commentators. The Court has not plunged into a brave new world of bold judicial review. Rather, four Justices (Roberts, Scalia, Thomas, and Alito) embraced strong executive power; two others (Kennedy and Breyer) concurred to emphasize the limited nature of the Court’s holding; and even Justice Stevens and his allies did not question the President’s authority to detain alien enemy combatants like Hamdan or to try them outside of the ordinary federal court system. Rather, the majority seized an opportunity to check a politically vulnerable President by requiring him to obtain unmistakable authorization from Congress before using military commissions in a nonemergency situation where regular procedures could be followed. The Court conspicuously avoided grand constitutional pronouncements and focused on the particular circumstances. The situation, and hence the Court’s approach, could change in an instant. For example, if the terrorists had succeeded in their July 2006 plot to blow up ten planes bound from England to the United States, Americans would have clamored for much tighter security measures and harsh treatment of the perpetrators. In such a climate, the Justices would become more reluctant to guarantee procedural niceties to accused terrorists. Overall, the four “enemy combatant” decisions follow a historical pattern in which the Court has curbed the President and vindicated individual rights when politically feasible to do so. Such cases represent a statistical minority, however, as the Justices usually defer to the military judgments of the majoritarian branches, often because they have no other realistic choice. If the terrorists escalate their attacks and the President responds aggressively, history suggests that the Court will back down.”) (footnotes omitted).

415. Serious questions have been raised regarding how the granting of constitutional rights to those at Guantanamo will affect future presidents’ decisions of where to detain enemies captured abroad. See Robert Haddick, *Judicial Imperialism: The U.S. Supreme Court May Expand its Power at the Expense of Other Countries’ Sovereignty*, WALL ST. J., Dec. 26, 2007, available at <http://www.opinionjournal.com/federation/feature/?id=110011038> (“If the Supreme Court grants all of these habeas corpus claims, it will do so with the belief that it is extending its supposedly civilizing influence to parts of the globe it feels would benefit from that authority. Yet, its actions would have the opposite effect. In the future, no U.S. president would ever contemplate bringing war prisoners to the United States, to Guantanamo Bay or any other place that the U.S. court system might see fit to get its hands on. In fact, the U.S. military could find it preferable, at least less legally bothersome, to ‘subcontract’ such things as prisoner-holding and interrogations to allied countries, or, where none are available, friendly tribes and militias. And if this doesn’t reduce the legal nightmare caused by capturing detainees, the U.S. and its tribal allies might just be inclined not to take any prisoners. Why use rifles and pistols to raid a suspected terror safe-house when a laser-guided bomb will do? Such a practice would reduce the amount of intelligence U.S. military units might have otherwise received from live detainees. Or maybe not, if some judges feel especially inclined to micromanage the war effort. During the past six years of conflict, nothing has caused more embarrassment and grief to the U.S. military than the detainees it has acquired. Knowing what it knows now, the Bush administration would never have established the detainee camp at Guantanamo Bay. Future presidents will also learn from this experience. They could be forced into a course that will result in much less visibility for future prisoners, and as a consequence, much less humane treatment.”).

the Court considers whether America's most determined and dangerous enemies are proper recipients of America's most treasured rights.<sup>416</sup>

A Supreme Court holding that the DTA/MCA review process is a proper exercise of congressional authority in the detainee context would affirm Congress's ability to determine the habeas rights of those traditionally falling outside of constitutional protections.<sup>417</sup> In the absence of Supreme Court jurisprudence providing for a constitutional right to habeas, a decision

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416. One of the frequent refrains of war critics is that having lost the "moral high ground" because of the alleged scandals at Abu Ghraib and the so-called torture of detainees held at Guantanamo, America needs to "restore" the constitutional rights of the detainees so that America will once again be seen as an honest defender of individual rights. Further, despite the barbaric murders of Nicholas Berg and Daniel Pearl to the contrary, these critics disingenuously assert that if America grants constitutional rights to terrorists, those terrorists will somehow treat captured Americans more humanely. The *Eisenrager* Court wisely noted how granting constitutional rights to America's enemies does little more than frustrate the war effort while affording no reciprocal benefit to those soldiers thus frustrated. See *Johnson v. Eisenrager*, 339 U.S. 763, 778–79 (1950) ("To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States. Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. Except in England, whose law appears to be in harmony with the views we have expressed, and other English-speaking peoples in whose practice nothing has been cited to the contrary, the writ of habeas corpus is generally unknown.")

417. As noted above, *Eisenrager* specifically held that detainees had no constitutional access to habeas, and that still seems to be the prevailing interpretation, even after the *Rasul* holding. See Andrew C. McCarthy, *The New Detainee Law Does Not Deny Habeas Corpus: Fear Not*, New York Times, *Al Qaeda's Lawfare Rights Are Still Intact*, NAT'L REV. ONLINE, Oct. 3, 2006, available at <http://article.nationalreview.com/?q=YWNIMjg3YWRlNmNjMTk0NDc1NzE0ZW12YzBIOGRlNzU=> ("The right against suspension of habeas corpus is found in the Constitution (art. I, 9). Constitutional rights belong only to Americans—that is, according to the Supreme Court, U.S. citizens and those aliens who, by lawfully weaving themselves into the fabric of our society, have become part of our national community (which is to say, lawful permanent resident aliens). To the contrary, aliens with no immigration status who are captured and held outside the territorial jurisdiction of the United States, and whose only connection to our country is to wage a barbaric war against it, do not have *any* rights, much less 'basic rights,' under our Constitution. Indeed, even when the Supreme Court, in its radical 2004 *Rasul* case, opened the courthouse doors to enemy fighters in wartime for the first time in American history, it relied not on the Constitution but on the *federal habeas corpus statute*. So put aside that *Rasul* was an exercise in judicial legerdemain whose holding depended on a distortion of both that statute and the long-established limitations on the Court's own jurisdiction (which does not extend outside sovereign U.S. territory to places like Guantanamo Bay, Cuba). Even in its willful determination to reach a result that rewarded al Qaeda's lawfare, the Court declined to rule that alien combatants have fundamental habeas rights. Instead, they have only what Congress chooses to give them—which Congress can change at any time.")

recognizing that Congress properly resolved the habeas issue in the DTA/MCA would confirm the principal that certain federal rights are conferred and therefore expanded or limited by federal statutes.<sup>418</sup> Thus, a new Congress would be able to amend or repeal the DTA/MCA as it sees fit.<sup>419</sup> Furthermore, recognition that the DTA/MCA establishes the functional equivalent of habeas would support the Bush Administration's claim that the rights afforded detainees in these statutes go far beyond those ever provided to alien enemies.<sup>420</sup> With respect to separation of powers, it would support the related argument that the DTA/MCA represents an appropriate wartime balancing by the political branches between the needs of the Executive and the due process considerations of detainees.<sup>421</sup>

Conversely, a Supreme Court decision finding that the DTA/MCA are not a proper exercise of congressional authority would likely require the Court to delineate, as it did in *Hamdi*, the procedural rights of detainees in light of their habeas rights.<sup>422</sup> Such a decision would represent an unwise judicial intervention in a wartime matter best left to the discretion of the

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418. See Andrew C. McCarthy, *Lawfare Strikes Again: The Fourth Circuit's combatant case heralds the return of September 10<sup>th</sup>*, NAT'L REV. ONLINE, June 12, 2007, available at <http://article.nationalreview.com/?q=YWVIMGZIMzJhN2EwMWU0YjIzZjkwOGRIOTBIY2UxYTQ=> ("Indeed, even in its awful 2004 *Rasul v. Bush* decision, which granted Qaeda detainees statutory habeas rights, the Supreme Court declined to hold that aliens had constitutional rights—notwithstanding that the Court majority had (erroneously) found them to be inside de facto U.S. territory (i.e., Guantanamo Bay). And in its 2001 decision in *Zadvydas v. Davis*, which strained to give excludable aliens constitutional due process rights, the Court was careful to qualify that it was not addressing aliens involved in 'terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.' (Tellingly, Monday's panel majority cites *Zadvydas* but elides mention of this crucial caveat.) Why is this distinction between statutory and constitutional rights so vitally important? For two reasons. First, if rights are conferred only by statute, Congress can eliminate or narrow them. In connection with enemy combatants, it has done the latter—balancing due process and military necessity—by two major pieces of legislation since 2005. These statutes (the Detainee Treatment Act and the Military Commissions Act) permit military tribunals (to determine combatant status and try war crimes) and limit review in the civilian courts to only the D.C. Circuit Court of Appeals, and, ultimately, the Supreme Court. If, however, the combatants' rights were deemed to be inherently constitutional, that would mean unaccountable federal courts, not political officials answerable to Americans, would take charge of determining how military detainees in wartime must be treated. This would be a radical departure. The Supreme Court has acknowledged, repeatedly, that the detention and trial of enemy combatants is a military determination committed to the political branches.").

419. *Id.*

420. See Transcript of Oral Argument at 38, 40, *Boumediene v. Bush*, 127 S. Ct. 3078 (No. 06-1195, 06-1196), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1195.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1195.pdf) (last visited Nov. 25, 2008).

421. *Id.*

422. See *supra* notes 167–73 and accompanying text; see also *infra* Part IX, discussing the habeas rights of detainees in light of *Boumediene*.

political branches, the Executive in particular.<sup>423</sup> More significantly, since the DTA/MCA clearly amended the federal habeas statute in order to restrict the detainees' habeas rights, such a decision would likely require the Court to either invalidate these statutes or attempt to distinguish them under a dubious statutory interpretation like that demonstrated in *Rasul*.<sup>424</sup> Most troubling, this could lead the Court to possibly determine that detainees have a constitutional right to habeas and other constitutional protections.<sup>425</sup> Such an unprecedented and unwarranted judicial extension of fundamental rights would be a dangerous deviation from traditional constitutional practice.<sup>426</sup>

## VIII. CONCLUSION

The Supreme Court will continue to wrestle with detainee cases as long as America is engaged in the war on terror. As it does so, it would do well to remember Justice Robert Jackson's warning that "the result of . . . enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."<sup>427</sup> Future litigation will explore the full contours of detainees' rights, and the Obama Administration, Congress, and the Supreme Court will surely be called upon to further clarify which protections detainees are entitled to under federal law. They must do so with great care. War always raises important and difficult questions, and it will be sufficient if the ideas expressed here help shed light on these historic and complex issues.

## IX. POSTSCRIPT<sup>428</sup>

On June 12, 2008, a bare majority of the Supreme Court decided *Boumediene v. Bush*.<sup>429</sup> The Court, speaking through Justice Kennedy, held that detainees have a constitutional right to habeas corpus to challenge their detentions;<sup>430</sup> that the review procedures in the DTA were not a sufficient

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423. See *supra* notes 265, 418 and accompanying text.

424. See *supra* notes 214–16.

425. See McCarthy, *supra* note 417; see also *infra* Part IX. The Court did find a constitutional right to habeas in *Boumediene*, and it remains to be seen what further substantive rights the Court will now discover alien enemy combatants are entitled to under the Constitution.

426. *Id.*

427. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

428. This article was written prior to the Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

429. See *id.*

430. *Id.* at 2240. Justice Kennedy wrote that "practical concerns" and "objective factors," such as the United States' exercise of de facto sovereignty over Guantanamo Bay under the terms of the lease with Cuba, warranted the extraterritorial extension of the fundamental constitutional habeas right to the detainees held there. *Id.* at 2258. Allowing the political branches to determine what constitutes sovereign United States territory, Justice Kennedy maintained, did not imply a coterminous ability for the political branches to decide when the Constitution would or would not

substitute for habeas corpus,<sup>431</sup> and therefore that the MCA provision that stripped federal courts of jurisdiction to hear detainee habeas claims was an unconstitutional suspension of the writ of habeas corpus.<sup>432</sup> The Court left the district court to determine whether the President has the authority to

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apply in such territories. *Id.* Those questions, Justice Kennedy held, remain the province of the Court. *Id.* at 2259. Allowing the political branches to decide such issues would violate fundamental separation of powers principles, under which the Supreme Court decides “what the law is.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

431. The Court compared the protections that had been afforded to the *Eisentrager* petitioners and found that those provided to the detainees fell short of the habeas standard. *Id.* at 2260. Justice Kennedy wrote that “the procedural protections afforded to the detainees in the CSRT hearings are far more limited . . . and fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.” *Id.* In particular, Justice Kennedy referred to the fact that

[a]lthough the detainee is assigned a “Personal Representative” . . . that person is not the detainee’s lawyer . . . . The Government’s evidence is accorded a presumption of validity . . . . [The detainee’s] ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage.

*Id.* (internal citations omitted). Additionally, Justice Kennedy was concerned that “although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.” *Id.* Concerning the evidentiary provisions of the DTA, Justice Kennedy found the statute lacking because there is “no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.” *Id.* at 2272. Along the same lines, Justice Kennedy expressed the majority’s concern with the appellate review provision under the DTA when he pointed out that

[t]here is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings.

*Id.* at 2273. In essence,

[b]y foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate.

*Id.* Additionally, the Court found it “troubling” that “[t]he DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention.” *Id.* at 2271.

432. *Id.* at 2274. The extension of the writ and rejection of the DTA review process means that detainees are now entitled to forgo that process. Instead, they may seek immediate habeas hearings in federal district court. *Id.* at 2275. The Court held:

To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. . . . While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

*Id.*

detain individual detainees, whether the writ must issue for each individual detainee, and the scope of evidentiary procedures for dealing with classified information.<sup>433</sup>

Chief Justice Roberts dissented and was joined by Justices Scalia, Thomas, and Alito.<sup>434</sup> Chief Justice Roberts rightly critiqued the majority for its failure to address what he considers the “critical threshold question”—whether the DTA review system sufficiently protects the detainees’ rights, whatever they may be.<sup>435</sup> He also questioned the majority’s claim that directing detainees to file habeas claims in federal district courts will resolve their legal uncertainties more expeditiously or consistently than if they had simply proceeded through the two-tiered DTA review system.<sup>436</sup> Additionally, Chief Justice Roberts accused the majority

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433. *Id.* at 2241, 2276.

434. *Id.* at 2279 (Roberts, C.J., dissenting).

435. *Id.* Chief Justice Roberts argued that the most important consideration “in these cases, prior to any inquiry about the writ’s scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called ‘habeas’ or something else.” *Id.* The majority’s error, he noted, is that “its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-case basis.” *Id.* at 2280. “This whole approach,” he argued, “is misguided.” *Id.* Furthermore, the out-of-hand rejection of the DTA process without any critical analysis of what might replace it belies the majority’s true purpose: asserting control over federal detainee policy. *Id.* at 2279. Given the lack of clear habeas standards provided by the majority to replace the allegedly inadequate DTA system, “[a]ll that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.” *Id.* at 2280. At bottom, Chief Justice Roberts was clearly uneasy with the ease with which the majority disregards a painstakingly created two-part legal system fashioned by the political branches to address the complex legal issues surrounding the detainees. As he noted,

this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect petitioners’ rights. Instead, it not only denies the D.C. Circuit the opportunity to assess the statute’s remedies, it refuses to do so itself: the majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process.

*Id.* at 2280. He found it “grossly premature” for the Court “to pronounce on the detainees’ right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim.” *Id.* at 2280–81. He did not foreclose the possibility that at some future date it might be necessary to resort to the writ if the alternative measures Congress provided in the CSRTs and DTA review prove inadequate substitutes; the crucial point is that that day has not yet arrived. *Id.* at 2281. In the meantime, analyzing the potential sufficiency of the CSRTs and DTA is little more than futile speculation that violates the canons of constitutional avoidance and judicial restraint. *Id.* at 2282.

436. *Id.* at 2282. Indeed, under the new system mandated by the Court, detainees will be forced to complete their CSRT hearing, and then file a habeas appeal in a federal district court. *Id.* This in effect adds another step in the review process; where detainees could appeal directly to the D.C. Circuit Court of Appeals from their CSRT determination under the DTA review process, now they must first appeal to a federal district court in Washington. *Id.* And, in light of the fact that the Court’s majority opinion provides no clear guidelines on how the district courts are supposed to implement the Court’s ruling, there is a good chance conflicting rulings will only result in greater litigation. As the Chief Justice wrote,

[t]he effect of the Court’s decision is to add additional layers of quite possibly redundant

of failing to comprehend the DTA itself.<sup>437</sup> He noted that its two-tiered review system, which was created in response to the Court's *Hamdi* decision concerning the due process rights of American citizens detained as combatants, was surely protective enough of the due process rights of non-citizen combatants.<sup>438</sup> Finally, Chief Justice Roberts surveyed the alleged deficiencies of the DTA review process noted by the majority and concluded that "the DTA satisfies the majority's own criteria for assessing adequacy."<sup>439</sup> In conclusion, Chief Justice Roberts asserted again what he noted at the introduction to his dissent—in short, that "[t]his statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history."<sup>440</sup>

Justice Scalia's lengthy dissent was joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.<sup>441</sup> After discussing the atrocities wrought by the radical Islamists the United States is currently fighting, Justice Scalia concentrated his dissent on several key principles. First, the writ has never extended to aliens detained abroad.<sup>442</sup> Second, the Court's decision damages the Executive branch's ability to rely on the Court's precedent and harms the

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review. And because nobody knows how these new layers of "habeas" review will operate, or what new procedures they will require, their contours will undoubtedly be subject to fresh bouts of litigation. If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2 1/2 years, with its Article III review in the D.C. Circuit.

*Id.*

437. *Id.* at 2283–84.

438. *Id.* at 2285. Chief Justice Roberts argued that the DTA needs to be understood in light of the Court's *Hamdi* decision, and that the majority's disregard of *Hamdi* indicated that the Court is not respecting Congress's good faith effort to comply with that ruling.

The use of a military tribunal such as the CSRTs to review the aliens' detention should be familiar to this Court in light of the *Hamdi* plurality, which said that the due process rights enjoyed by *American citizens* detained as enemy combatants could be vindicated "by an appropriately authorized and properly constituted military tribunal." 542 U.S., at 538, 124 S. Ct. 2633. The DTA represents Congress' considered attempt to provide the accused alien combatants detained at Guantanamo a constitutionally adequate opportunity to contest their detentions before just such a tribunal.

*Id.* at 2284. "In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. See 542 U.S., at 538, 124 S. Ct. 2633. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch." *Id.* at 2284–85.

439. *Id.* at 2293.

440. *Id.*

441. *Id.* (Scalia, J., dissenting).

442. *Id.* at 2294 ("My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.").



war effort.<sup>443</sup> Third, the decision represents an unwise judiciary intervention in foreign affairs when it is the least qualified branch to do so.<sup>444</sup> Fourth, there is no possible Suspension Clause violation because “[t]he writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written.”<sup>445</sup> Fifth, the Court’s *Eisentrager* decision decisively forecloses the possibility of the writ extending to aliens detained beyond the territorial sovereignty of the United States.<sup>446</sup> Sixth, *Eisentrager* in no way provides the elements of the “functional” test underlying the majority decision.<sup>447</sup> Finally, Justice Scalia argued that what truly animated the majority’s opinion was an effort to assure judicial branch supremacy in detainee decisionmaking at the expense of the political branches.<sup>448</sup>

Several brief observations are appropriate. First, it is important to reiterate that the only provision struck down by the Supreme Court in

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443. *Id.* at 2294 (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court’s blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), when he established the prison at Guantanamo Bay for enemy aliens.”). Justice Scalia also highlighted recent examples of detainees rejoining the fight after being released from Guantanamo. *Id.* at 2295 (“Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Still another murdered an Afghan judge. It was reported only last month [May 2008] that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq.”) (citations omitted).

444. *Id.* at 2296 (“What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”).

445. *Id.* at 2297.

446. *Id.* at 2298–99 (“*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.”).

447. *Id.* at 2302 (“The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court’s ‘functional’ test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed.”).

448. *Id.* at 2302 (“What drives today’s decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy.”). Putting it another way, Justice Scalia said that

[t]he gap between rationale and rule leads me to conclude that the Court’s ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The ‘functional’ test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

*Id.*

*Boumediene* is the jurisdiction-stripping provision of the MCA.<sup>449</sup> Second, Chief Justice Roberts and Justice Scalia are rightfully concerned about the lack of procedural guidelines and substantive standards provided by the *Boumediene* majority to guide the district court judges tasked to implement the Court's decision.<sup>450</sup> Detainee trials in federal district court in Washington, D.C., began in November 2008 before Judge Richard Leon.<sup>451</sup> There is little reason to be optimistic that the procedures and rulings emerging from those trials will be consistent with similar trials occurring in other federal district courts.<sup>452</sup> The only predictable result is years of more

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449. *Id.* at 2275 (“The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp.2007). Accordingly, both the DTA and the CSRT process remain intact.”). The recent trial and conviction of Salim Hamdan, Osama bin Laden’s driver, by a Guantanamo Bay military commission demonstrates the continuing vitality of that process. See Carol J. Williams, *Bin Laden Driver Convicted at Guantanamo of Aiding Terror*, L.A. TIMES, Aug. 7, 2008, available at <http://articles.latimes.com/2008/aug/07/nation/na-hamdan7>.

450. See Andrew C. McCarthy, *A Quick Way Forward After Boumediene*, NAT’L REV. ONLINE, June 16, 2008, available at <http://article.nationalreview.com/?q=ZGEwMTY5YTU3NGRIOWUyMzkxZTU3MDElZWUwMDYxOTM=&w=MA=> (“The most reprehensible aspect of the *Boumediene* ruling is thus Justice Kennedy’s diktat that all ‘questions regarding the legality of the detention [of combatants] are to be resolved in the first instance by the District Court’—as if Congress, the law writing branch of our government, had nothing to say about them. Congress must ignore that brazen overstatement. *Boumediene* is a terrible decision, but all it means for the moment is that the jihadists held at Guantanamo Bay have been given the opportunity to press their cases—i.e., to seek their release from custody—in the federal district courts. The combatants have not been ordered released, and the narrow majority did not presume to prescribe a procedure for how the district courts should handle those cases.”).

451. See William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantanamo Detainees*, N.Y. TIMES, Nov. 6, 2008, available at [http://www.nytimes.com/2008/11/07/washington/07/washington/07gitmo.html?\\_r=1&scp=12&sq=Guantanamo%20Bay&st=cse&oref=slogin](http://www.nytimes.com/2008/11/07/washington/07/washington/07gitmo.html?_r=1&scp=12&sq=Guantanamo%20Bay&st=cse&oref=slogin) (“After years of legal clashes over whether detainees have the right to contest their detention in court, a federal judge on Thursday opened the first hearing into the government’s justification for holding suspects at the naval base at Guantánamo Bay, Cuba. But after opening statements that did not detail the evidence, the judge, Richard J. Leon of Federal District Court here, closed the courtroom, saying the evidence was classified.”).

452. As Justice Kennedy noted in the majority opinion, the Court’s decision only struck down jurisdiction-stripping provision of section 2241(e). See *supra* note 449 and accompanying text. But the second portion of the statute aimed to preclude federal courts from hearing detainee appeals concerning any other aspect of their confinement. Federal district court Judge Ricardo M. Urbina was recently forced to consider whether the *Boumediene* decision invalidated the second section of section 2241(e). See Posting of Lyle Denniston to SCOTUSblog, *Analysis: What Did Boumediene Strike Down?*, <http://www.scotusblog.com/wp/analysis-what-did-boumediene-strike-down/> (Aug. 7, 2008, 8:11pm EST). Judge Urbina faced an appeal from six detainees seeking a transfer from one Guantanamo camp to another. *Id.* They claimed the desired camp was more human than their current conditions. *Id.* While not fully accepting the Justice Department’s claim that *Boumediene* did not affect the section part section 2241, Judge Urbina found that given the security concerns presented by the military and the uncertainty of *Boumediene* regarding the second part of section 2241, the military did not have to order the transfer of the prisoners. *Id.* (“Judge Urbina is one of 15 District judges in Washington who, sooner rather than later, will be deciding detainee habeas cases, including the kinds of claims that implicate Section 7(e)’s second part. In addition, the D.C. Circuit

litigation, and there is no guarantee that litigation will be any more helpful than the two-tiered DTA review system in articulating the procedural and substantive protections to which the detainees are entitled. What does seem abundantly clear is that the Court's most recent foray into foreign affairs has produced far more chaos when certainty is needed.<sup>453</sup> Chief Justice Roberts was sadly accurate when he called the decision a "constitutional bait and switch."<sup>454</sup> If the political branches cannot rely on a fifty-year precedent like *Eisenrager* when fashioning war policy, there is little reason for them to place any reliance on a deeply flawed, constitutionally suspect decision like *Boumediene*.<sup>455</sup>

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already has before it some of the same issues—particularly issues about conditions of confinement, and about transfers out of Guantanamo. It is by no means clear that this array of judges will reach the same conclusions, thus raising the distinct possibility that the Supreme Court may have to say what it actually meant on June 12.”).

453. See *Boumediene v. Bush*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting) (“So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to ‘determine—through democratic means—how best’ to balance the security of the American people with the detainees’ liberty interests, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 636, 126 S. Ct. 2749, 165 L. Ed.2d 723 (2006) (BREYER, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.”).

454. *Id.* at 2285.

455. See *supra* note 435 and accompanying text. As Chief Justice Roberts pointed out at length, not one detainee has yet to exercise his full rights under the DTA review system. *Id.* Thus, it is impossible for the Court to conclude that the DTA system is not sufficiently protective of the detainees’ constitutional rights. *Id.* Therefore, it is difficult to see how the decision is anything but a politically driven facial challenge to a statutory scheme that has yet to fully run its course. The political angle appears even clearer when one considers the substantial international and domestic pressure to close Guantanamo and the fact that the Court majority was comprised of the same five Justices that have routinely opposed the Administration’s war policies since the detainee decisions began in 2004; see also McCarthy, *supra* note 450 (“If you can follow this, the bloc of liberal justices reasons that the framers designed our fundamental law to empower enemies of the American people to use the American people’s courts as a weapon to compel the American people’s commander-in-chief to justify his actions during a war overwhelmingly authorized by the American people’s elected representatives . . . even as those enemies continue killing Americans.”).

\* J.D. Candidate, Pepperdine University School of Law, May 2009. I wish to thank Professor Douglas Kmiec for his insights; my former White House colleagues for their inspiring and untiring devotion to our nation; and, most importantly, my family for their support and encouragement. This article is dedicated to the men and women of the United States military, whose heroic service safeguards the freedoms we enjoy under the law. Many brave soldiers, sailors, airmen and Marines have given their lives in Operation Enduring Freedom and Operation Iraqi Freedom. Men like Paul Smith, Ross McGinnis, Michael P. Murphy, Matthew Axelson, and Danny Dietz gave what President Lincoln called “the last full measure of devotion.” Our country owes them and their families a debt we can never repay. I would also like to pay special tribute to the Greene family of

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Thousand Oaks, California. All of the Greene children – Byron, Spencer, and Laura – are serving in the United States Army and have completed tours in Iraq and Afghanistan. As America grapples with the legalities of twenty-first century warfare, it must do so in a way that honors the "cherished memory of the loved and lost," of those who daily offer "so costly a sacrifice upon the altar of freedom." Truly, "greater love hath no man than this, that a man lay down his life for his friends."

