WILL JUSTICE DELAYED BE JUSTICE DENIED? CRISIS JURISPRUDENCE, THE GUANTÁNAMO DETAINEES, AND THE IMPERILED ROLE OF HABEAS CORPUS IN CURBING ABUSIVE GOVERNMENT DETENTION

by
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In June of 2007, the Supreme Court abruptly reversed its earlier decision and granted certiorari in the Guantánamo Bay detainee case, Boumediene v. Bush*. Legal scholars anticipate the Court will now address the issue that has been lurking in the background of the detainee litigation since the Court's decision in* Rasul v. Bush*: does the Constitution mandate that the writ of habeas corpus is available to aliens held in military detention facilities outside the territorial boundaries of the United States, but nevertheless within its sovereign jurisdiction and control?*

In this Article, the authors contend that the Constitution requires that federal court jurisdiction exist with respect to habeas claims of unlawful detention raised by the Guantánamo Bay detainees, notwithstanding their classification by the Executive Branch as unlawful enemy alien combatants. The authors support their contention with a number of propositions drawn from the text and history of the Constitution. First, the power to grant a writ of habeas corpus is an essential and inherent incident of the judicial power of the United States that cannot be impaired, except in times of rebellion or invasion, without violating the Suspension Clause contained in Article I, Section 9, clause 2 of the Constitution. Second, because sovereignty is manifested by the exercise of power within a legal and political space, and not simply by the boundaries of a physical or territorial place, the Guantánamo Bay Navel Station is subject to the limitations imposed by Due Process on Executive Branch detentions. Third, the Constitution and binding jus cogens principles of international law protect the legal identity of all individuals by, in part, prohibiting indefinite detention without an independent judicial determination of cause. Fourth, insofar as the tripartite structure of government established by the Constitution contemplates habeas corpus as a critical judicial check on unitary Executive Branch detention activity, impairment of that function violates the separation of powers doctrine.

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Invoking these propositions, the authors argue that the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 are unconstitutional to the extent they abrogate the jurisdiction of the federal courts to entertain the habeas petitions of the Guantánamo Bay detainees. These Acts permit indefinite detention—an action unparalleled in American history, and contrary to the rule of law and values of this Nation. Because indefinite detention destroys the legal identity of human beings, the authors urge the Supreme Court to restore the writ of habeas corpus to its intended function in the Constitutional scheme established by the Founders.

I. INTRODUCTION

The Constitution of the United States contemplates that, in a time of crisis, the Executive Branch will respond quickly, efficiently, and authoritatively to the challenge presented in order to secure the survival of the Nation and the safety and security of its people. Such a time of crisis was precipitated by the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. However, the Constitution does not confer absolute power on the Executive Branch even when the country is at war. Under the framework of governance established by the Constitution, sovereignty is not ultimately reposed in a person or entity that "decides on the exception" by suspending the rule of law in order to address the unique circumstances of a crisis.[1] Rather, regardless of any present peril, the power of sovereignty remains with "We the people of the United States," and its exercise as legislative, executive, and judicial power is at all times governed by the Constitution.[2]

[1] CARL SCHMITT, POLITICAL THEOLOGY 5 (George Schwab trans., Univ. of Chicago Press 1985) (1922). Schmitt, a legal and political theorist and professor of law in Germany at the time of the Weimar Republic and during the Nazi period, argued that no system of law can anticipate all of the crisis events a state may face. A viable government structure must, therefore, contain a mechanism that will allow for its laws to be suspended (*i.e.*, the declaration of a state of exception) so that actions can be taken to preserve the state. For Schmitt, the person or entity having the power of decision with respect to declaring a state of exception is the true sovereign—"Because the authority to suspend valid law—be it in general or in a specific case—is so much the actual mark of sovereignty." *Id.* at 9.

[2] As Chief Justice Hughes observed in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934): "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." These words have not been heeded by the Bush administration. In addition to power to indefinitely detain the Guatánamo Bay detainees, the Bush administration contends the President "has inherent authority to subject persons legally residing in this country . . . to military arrest and detention," if the President believes they have "engaged in conduct in preparation for acts of international terrorism." Al-Marri v. Wright, 487 F.3d 160, 190 (4th Cir. 2007) (quotation marks and citation omitted). Similarly, the President contends that the surveillance procedures established by the Foreign Intelligence Surveillance Act do not apply to the warrantless eavesdropping on international telephone calls conducted by the National Security Agency because, under the current conditions of the war on terrorism, the President has inherent authority to use all necessary force to pursue terrorists. R. Andrew

In a famous study of the employment of dictatorship as a mechanism of governance in a time of crisis, Clinton Rossiter wrote: "No form of government can survive that excludes dictatorship when the life of the nation is at stake."[3] However, in the face of crisis, the Constitution does not summon a dictator to take charge of the nation; rather, it calls on each of the respective departments of government—the legislative, executive, and judicial branches—to meet adversity by fulfilling their ordained functions and by remaining faithful to the delicate balance between the needs of the social order and the exercise of personal liberties that the Constitution has protected for over two hundred and eighteen years.

Beginning in 2002, as a result of military and intelligence activities conducted in Afghanistan and elsewhere against the perpetrators of the September 11 attack and their supporters, American military personnel began to take custody of individuals, both on and off the battlefield, who were subsequently classified as enemy combatants. Many of these detainees were soon transported out of the military's theater of operation to a hastily constructed detention facility located at the Guantánamo Bay Naval Base in Cuba.[4] Jettisoning *jus in bello* principles of international humanitarian law governing the treatment of people captured during an armed conflict, the Bush Administration declared that the war on terror required a "new paradigm," and that individuals detained at Guantánamo Bay and other so called "black sites" were "unlawful combatants" who would not be treated as prisoners of war under the Third Geneva Convention.[5] Nor, in the Bush Administration's view, did the detainees qualify for the minimum humanitarian requirements established by Common Article Three of the Geneva Conventions.[6] Furthermore, in addition to concocting legal rationalizations for legitimating torture on a scale and to a degree never before countenanced by United States

Smith, *Breaking the Stalemate: The Judiciary's Constitutional Role in Disputes Over the War Powers*, 41 VAL. U. L. REV. 1517, 1531–32 (2007).

[3] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP xix (Transaction Publishers, 2006).

[4] Since 2002, more than 700 detainees have been transported to the detention facility at the Guantánamo Bay Naval Base. Initially, the facility consisted of a number of separate camps where the prisoners were housed in temporary chain-link pens or cage-like structures. The construction of a permanent prison-like building to house detainees was completed at Camp Delta in 2006. As of March 23, 2007, the government reported that, since the opening of the camp, approximately 390 detainees have been released. At the present time, the detention facility holds approximately 385 detainees. *See* Human Rights Watch, *United States: Guantanamo Two Years On*, (Jan. 9, 2004), *available at* http://hrw.org/english/docs/2004/01/09/usdom6917.htm; Human Rights *First*, In the Courts: Detentions at Guantánamo Bay, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_gitmo1.htm

[5] JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 84 (2006). Prior to being invoked by the Bush Administration, the term "enemy combatant" had not been used in the Geneva Conventions or in U.S. military regulations. *Id.*

[6] *Id.*

government policy,[7] Justice Department lawyers also theorized that habeas corpus would not be available to the Guantánamo Bay detainees because they are aliens held outside of the sovereign territory of the United States.[8]

As Commander in Chief, the Bush Administration continues to assert that the President has a constitutionally based entitlement to wield total power over the Guantánamo Bay detainees—a use of sovereign power for which the President is not accountable to any other governing body or agency, domestic or international. If the Bush Administration's position prevails, the detainees will be barred from claiming a right to relief under any body of law. In effect, the detainees will be reduced to an ontological state of human being that has not been present in the West since the Nazi extermination camps of the holocaust—they will have been rendered completely devoid of legal identity. Like the occupants of the Nazi concentration camps, although biologically alive, the Guantánamo Bay detainees will be legally dead.[9]

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[7] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). United States law proscribes the infliction of torture "outside the United States." 18 U.S.C. § 2340A(a) (2000). In 18 U.S.C. § 2340 torture is defined as an act "specifically intended to inflict severe physical or mental pain or suffering." According to Bybee's memorandum:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.

Memorandum from Jay S. Bybee, *supra*. Bybee was nominated to the United States Court of Appeals for the Ninth Circuit by President Bush in May of 2002, and confirmed by the Senate in March of 2003. The Bybee "Torture Memorandum" was purportedly written in large part by Deputy Assistant Attorney General John C. Yoo. Yoo is now a professor of law at Boalt Hall School of Law, University of California, Berkley.

[8] Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L., POL'Y & ETHICS J. 127, 130–31 (2006).

[9] Concerning the normalization of the state of exception that the Nazi concentration camps represented, Giorgio Agamben writes:

> Whoever entered the camp moved in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer made any sense. What is more, if the person entering the camp was a Jew, he had already been deprived of his rights as a citizen by the Nuremberg laws and was subsequently completely denationalized at the time of the Final Solution. Insofar as its inhabitants were stripped of every political status and wholly reduced to bare life, the camp was also the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation.

GIORGIO AGAMBEN, HOMO SACER 170–71 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998). The space of the concentration camp is one in which the juridico-political identity of a certain group of people is reduced solely to that of being "the Other." The Guantánamo Bay facility where the detainees are held cannot be characterized as either a penal or a detention facility, because in those custodial environments the inmates retain some

Fortunately, after the detainees began arriving at Guantánamo Bay, family members filed next-of-friend habeas petitions on behalf of some of the detainees challenging their confinement.[10] Habeas litigation was also commenced by other individuals taken into custody in connection with allegedly terrorist activities.[11] This litigation resulted in public disclosure of the plight of the detainees and the conditions of their confinement. The litigation also produced three significant Supreme Court decisions: *Rasul v. Bush*,[12] *Hamdi v. Rumsfeld*,[13] and *Hamdan v. Rumsfeld*.[14] Although these cases presented different fact patterns and distinct issues, the Supreme Court concluded that the petitioners had lawfully pursued habeas review and rejected the Executive Branch's arguments challenging the Court's jurisdiction.[15]

modicum of rights. The only nomination for that facility which accurately describes the political-legal status of the Guantánamo Bay detainees is that of "concentration camp."

[10] The current statutory grant of authority to the federal courts to entertain habeas petitions is found in 28 U.S.C. § 2241 (2000). Section 2241(a) provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Section 2241(c) provides that, in order for a petition to be considered, the petitioner must be in custody under one of the forms of custody therein described, including "custody in violation of the Constitution or laws or treaties of the United States."

[11] *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[12] 542 U.S. 466 (2004).

[13] 542 U.S. 507 (2004).

[14] 126 S. Ct. 2749 (2006).

[15] A brief synopsis of the facts and issues presented by these cases is as follows:

Rasul: The Supreme Court entertained a Petition for a Writ of Habeas Corpus on behalf of two British citizens, Shafiq Rasul and Asif Iqbal, and an Australian, David Hicks, all detained at Guantánamo Bay. The three men had not been charged with an offense, notified of the charges against them, appeared before any type of military or civilian tribunal, informed of their rights, or been able to contact counsel. The Supreme Court ruled 6-3 that the Guantánamo detainees were statutorily entitled to invoke the habeas jurisdiction of the federal courts to challenge their detention.

Hamdi: Yaser Esam Hamdi, an American citizen, was held for nearly three years—one at Guantánamo Bay and two at a naval base in Virginia—for reasons never disclosed. A plurality of the Court held that while the United States could detain citizens as enemy combatants, due process demanded that a citizen-detainee receive notice of the factual basis for his classification as an enemy combatant, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker. 542 U.S. at 533. The Court also held that Hamdi "unquestionably has the right to access to counsel." *Id.* at 539. Released in 2004, Hamdi was never tried. Phil Hirschkorn, *Saudi Once Held by U.S. Returns Home*, CNN.COM, Oct. 11, 2004, http://www.cnn.com/2004/WORLD/meast/10/11/hamdi/.

Hamdan: Salim Ahmed Hamdan, a Yemeni detainee, was captured by bounty hunters in Afghanistan and designated for trial before a military commission in Guantánamo Bay, Cuba. The Court held that the Detainee Treatment Act of 2005 applied only prospectively and that Hamdan retained the right, recognized in *Rasul*, to challenge his detention under the federal habeas corpus statute, 28 U.S.C. §2241. The Court also held that Common Article 3 of the Geneva Conventions applied and that the military commission set up by the Bush

The Bush Administration countered the detainees' litigation efforts by securing passage of two legislative enactments: the Detainee Treatment Act of 2005 (DTA),[16] and the Military Commissions Act of 2006 (MCA).[17] By means of these enactments, the Executive Branch sought to block judicial review of the Guantánamo Bay detainees' constitutional claims by excluding them from access to the petition for writ of habeas corpus. On February 20, 2007, the District of Columbia Circuit Court of Appeals upheld the Military Commissions Act in *Boumediene v. Bush*.[18] On March 5, 2007, a petition for certiorari was filed with the Supreme Court seeking an expedited hearing.[19]

On April 2, 2007, the Supreme Court denied certiorari.[20] Predictably, Justices Scalia, Alito, Thomas, and Chief Justice Roberts, voted to deny certiorari.[21] Justice Breyer, joined by Justices Souter and Ginsberg, filed a dissenting opinion urging that certiorari be granted because the petitioners had raised "important question[s]" as to the whether the MCA "deprives courts of jurisdiction to consider their habeas claims, and, if so, whether that deprivation is constitutional."[22] Justices Stevens and Kennedy issued a joint statement explaining that, given the DTA, the traditional procedural requirement of exhaustion of available remedies made "it appropriate to deny these petitions at this time."[23] However, the Justices also stated that if the "petitioners later seek

administration to try Hamdan "violate[d] both the [Uniform Code of Military Justice] and the four Geneva Conventions."

[16] Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd).

[17] Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948–50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)–(e)). Although the DTA purported to strip habeas jurisdiction from the federal district courts to entertain petitions filed by the Guantánamo detainees, the Supreme Court held that the language of the DTA was insufficiently clear, and that therefore, the DTA would be accorded only prospective effect. *Hamdan*, 126 S. Ct. at 2764–69. The Executive Branch responded by obtaining passage of the MCA, which provides, with respect to a new amendment of 28 U.S.C. § 2241(e), that the amendment "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." MCA § 7(b), 120 Stat. 2636 (2006) (to be codified at 28 U.S.C. 2441 note).

[18] 476 F.3d 981 (D.C. Cir. 2007). The case of *Al Odah v. United States*, No. 05-5095, was consolidated for hearing with the *Boumediene* case, No. 05-5062.

[19] Petition for cert. filed, 75 U.S.L.W. 3483 (March 5, 2007) (No. 06-1196).

[20] Boumediene v. Bush, 127 S. Ct. 1478 (April 2, 2007).

[21] Two of the four justices voting to deny certiorari are recent appointees. Chief Justice John G. Roberts, Jr. and Justice Alito were nominated for their positions on the Court by President Bush. Chief Justice Roberts took his seat on September 29, 2005, and Justice Alito took his seat on January 31, 2006.

[22] *Boumediene*, 127 S. Ct. at 1479 (Breyer, Souter & Ginsburg, JJ., dissenting from denial of certiorari).

[23] *Id.* at 1478 (Stevens & Kennedy, JJ., statement respecting denial of certiorari). Justice Kennedy took a similar cautious wait-and-see approach with respect to whether the procedures ultimately to be employed by the military commission charged with trying Salim Ahmed Hamdan would satisfy constitutional and statutory requirements. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2809 (2006) (Kennedy, J., concurring) ("The evidentiary

to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act . . . , or some other and ongoing injury, alternative means exist for us to consider our jurisdiction over the allegations made by petitioners before the Court of Appeals. See 28 U.S.C. §§ 1651(a), 2241."[24]

On June 29, 2007, the Supreme Court suddenly reversed course, vacating the April 2 order denying certiorari, and setting the *Boumediene* and *Al Odah* cases for oral argument at the beginning of the October term.[25] Notwithstanding this somewhat Delphian occurrence, recent disclosures concerning the failure of the Combatant Status Review Tribunal (CSRT) process to conform to the procedures established by the Department of Defense to guide review of enemy combatant designations appear to have precipitated this change of heart. As recently as April 26, 2007, the Court denied applications submitted by *Boumediene* and *Al Odah* seeking an extension of time to file petitions for rehearing of their certiorari petitions.[26] The Court explained this denial by noting that "[t]his most extraordinary relief will not be granted unless there is a 'reasonable likelihood of this Court's reversing its previous position and granting certiorari.'"[27] However, during May and early June, in the course of litigation proceedings in *Bismullah v. Gates*, an action initiated in the District of Columbia Circuit Court of Appeals pursuant to the DTA seeking review of the petitioner's CRST proceeding, a number of deficiencies in the CSRT process came to light.[28]

In a declaration submitted by the government, Rear Admiral (Retired) James M. McGarrah, Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), averred that after September 1, 2004, "[T]he task of gathering and analyzing the Government Information was performed by a specifically-formed research, collection and coordination team."[29] However, McGarrah also acknowledged that the actual assembling and analyzing of the Government Information and Government Evidence had been performed by "Case Writers" who received approximately two weeks' training.[30] Furthermore, in addition to identifying a number of ways the CSRT

proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.").

[24] *Boumediene*, 127 S. Ct. at 1478.

[25] Boumediene v. Bush, 127 S. Ct. 3078 (2007); Al Odah v. United States, 127 S. Ct. 3067 (2007).

[26] 127 S. Ct. 1725 (2007).

[27] *Id.* at 1727.

[28] Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

[29] *See* Declaration of Rear Admiral (Retired) James M. McGarrah ¶¶ 1, 4, Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007) [hereinafter McGarrah Declaration]. McGarrah served as the Director of OARDEC from July 2004 until March 2006. He is currently Special Assistant to the Deputy Assistant Secretary of Defense for Detainee Affairs.

[30] McGarrah Declaration ¶ 5. The "Government Information" consists 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." *Bismullah*,

proceedings were conducted that varied from the procedures for those proceedings established by the Department of Defense, McGarrah also revealed that some of the electronic files containing Government Information and possibly exculpatory information had been "corrupted," making "it difficult to fully recreate the electronic files of Government Information compiled for each tribunal."[31]

In response to the McGarrah declaration, the Petitioner submitted the declaration of Stephen Abraham, a lieutenant colonel in the United States Army Reserve, who had served at OARDEC from September 11, 2004, through March 9, 2005.[32] According to Abraham, the information comprising the Government Information and the Government Evidence had not been compiled in accordance with the procedures established by the Department of Defense, and the individuals entrusted with this task had "little training or experience in matters relating to the collection, processing, analyzing, and/or dissemination of intelligence material."[33] In addition to reciting numerous problems with the methods used to gather and process the information submitted by the government in the CRST hearings, Abraham also described activity on the part of Rear Admiral McGarrah suggesting that any finding that a detainee was not an enemy combatant was viewed with suspicion, and that in such cases the CSRT review process would be reopened so that further evidence could be submitted against the detainee.[34]

Based on his evaluation of the procedures established by the Department of Defense for conducting the CSRT proceedings, Circuit Judge Rogers concluded that, at best, the CSRT record for review was only "a partial record."[35] Furthermore, contrary to the Executive Branch's representation "that the CSRT process in the DTA was designed as an adequate replacement for the writ of habeas corpus," the revelations contained in the McGarrah and Abraham Declarations have reinforced "concerns about the adequacy of actions under the DTA as a substitute for the writ of habeas corpus."[36] Thus, according to Circuit Judge Rodgers: "The gap between Congress's aspirations for the DTA and the Executive's implementation of the CSRT procedures for

2007 WL 2067938, at *14 (Rogers, J., concurring) (quoting Memorandum from Gordon England, Secretary of the Navy, Regarding Implementation of CSRT Procedures for Enemy Combatants at Guantanamo Bay Naval Base, Cuba, encl. 1, § E(3)). The "Government Evidence" consists of "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant." *Bismullah*, 2007 WL 2067938 at *2. In effect, the Government Evidence is simply the evidence submitted to the CSRT by the government for the purpose of supporting the enemy combatant designation previously imposed on the detainee by the Department of Defense. *Id.* at *6–7.

[31] McGarrah Declaration ¶¶ 4, 10, 16.

[32] *See* Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve ¶¶ 1–4, Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007) [hereinafter Abraham Declaration].

[33] Abraham Declaration ¶ 6.

[34] Abraham Declaration ¶¶ 21–24.

[35] *Bismullah*, 2007 WL 2067938 at *14 (Rogers, J., concurring).

[36] *Id.* at *15.

compiling the record, which has come to light during briefing in this case, presents new questions that also cannot be resolved today."[37]

Given the harsh conditions of confinement at the Guantánamo Bay detention facility, every day that passes without resolution of the issues raised in *Boumediene* represents not only justice delayed, but justice denied. According to Amnesty International, the conditions at the detention facility have actually worsened since the completion of construction of the new, permanent Camp 6 facility.[38]

When *Boumediene* and *Al Odah* come again before the Supreme Court in October, the Court will have to confront three decisive issues presented by the MCA and the Guantánamo Bay detainees' habeas litigation. First, given the Suspension Clause's[39] specific reference to the writ of habeas corpus, what is the constitutional status and role of the writ? Second, does the United States' treaty entitlement to complete jurisdiction and control over the Guantánamo Bay Naval Base, in conjunction with actions by the United States at Guantánamo that exceed the authority extended to it by the treaty, manifest an exercise of sovereign power over the territory occupied by the base? Third, are aliens held in U.S. military custody in territory subject to the sovereign power of the United States entitled to claim, in federal court, the protections afforded by the Constitution against arbitrary detention? In addition, assuming the Court answers these issues favorably to the detainees, the Court will also have to decide whether the DTA's procedures and scope of review represent an adequate and effective substitute for habeas corpus.

The history of the various legislative enactments and Supreme Court rulings concerning the entitlement of the Guantánamo Bay detainees to invoke the privilege of the writ of habeas corpus discloses the existence of an ongoing power struggle with respect to the meaning and scope of the writ of habeas corpus. On one side stand the partisans of the current Executive Branch, aided

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[37] *Id.* at *14.

[38] In its April, 2007 report entitled *Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay*, Amnesty International describes the conditions currently encountered by detainees at Camp 6:

> Detainees are confined for a minimum of 22 hours a day in individual steel cells with no windows to the outside. The only view from each cell is through strips of glass only a few inches wide in and adjacent to the cell door which looks onto an interior corridor patrolled by military police. There are no opening windows and detainees are completely cut off from human contact while inside their cells.
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> . . . .
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> Contrary to international standards, the cells have no access to natural light or air, and are lit by fluorescent lighting, which is on 24 hours a day, and controlled by guards.

AMNESTY INT'L, UNITED STATES OF AMERICA—CRUEL AND INHUMAN: CONDITIONS OF ISOLATION FOR DETAINEES AT GUANTÁNAMO BAY (2007), *available at* http://web.amnesty.org/library/Index/ENGAMR510512007. The report also observes that there is no "social interaction or activities which are a basic part of human life." According to Amnesty International, the conditions at Camp 6 "contravene international standards for humane treatment." *Id.*

[39] U.S. CONST. art. I, § 9, cl. 2.

by members of the Legislative Branch and the Judicial Branch, who believe that in a time of crisis the power of the Presidency must be undisturbed, unrestrained, and unlimited. On the other side stand members of the Judicial and Legislative Branches who hold the rule of law, and the values associated with due process as a check on unilateral Executive Branch action, to be of paramount importance to the survival of American society. Among the issues at play in this highly ideological contest is whether the text of the Constitution, and the dynamic structure of governance it has instituted, require Congress to vest habeas corpus jurisdiction in the federal courts as an essential component of the judicial power of the United States in accordance with Article III, Section 1. The final outcome of this struggle will determine not only which government branch has the power to define how, and by whom, the writ of habeas corpus may be invoked, but the prominence accorded the rule of law and the nature of this Nation's character.

In our society, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception."[40] A primary purpose of government is to protect the subjects thereof from arbitrary infliction of injury by others. Thus, when a United States citizen is involuntarily detained, depending on whether such detention is criminal or civil in nature, either the Fourth Amendment or the Due Process Clause may be invoked to challenge the government's use of force. But what of the non-citizen, the alien? According to Thomas Hobbes, the English political philosopher who wrote *Leviathan* in 1651, a sovereign government can treat aliens in any manner conducive to its interests because the duties and rights generated by the social compact in forming a commonwealth extend only to the members thereof.[41] The

[40] United States v. Salerno, 481 U.S. 739, 755 (1987); *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

[41] According to Hobbes:

> [T]he Infliction of what evil soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Commonwealth, and without violation of any former Covenant, is no breach of the Law of Nature. For all men that are not Subjects, are either Enemies, or else they have ceased from being so, by some precedent covenants.

THOMAS HOBBES, LEVIATHAN 160 (Norton 1997). Hobbes' social contractarian philosophy does not address the change in the source of legitimacy of governmental power occasioned by the enactment of a written constitution. Although a government may trace its existence to a founding covenant, once established, it is the constitution, not the initial compact between the founders, that serves as the source and measure of its legitimacy. Thus, any person subject to the powers of government may claim the protections afforded by the constitution against their abuse, without having to demonstrate participation in the originating covenant or some other racial or social pedigree. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 275–76 (1990) (Kennedy, J., concurring) ("The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms."). The Hobbesian world view has also been surpassed by the four Geneva Conventions of 1949, which serve to ensure that no person is bereft of a legal identity by protecting certain basic human rights regardless of a person's status as being a combatant, a non-combatant, a civilian, or a stateless person. Thus, according to the International Committee of the Red Cross, "What is important to know is that no person captured in the

Constitution is not so myopic in its vision concerning the need for protection of liberty against encroachment by government. As the Supreme Court declared in *Zadvydas v. Davis*, even with respect to aliens found illegally inside the nation's borders, due process requires that detention be accompanied by "adequate procedural protections," and a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[42]

Like Hobbes, the current Executive Branch would bar the captive alien enemy combatant from claiming constitutional protections afforded individual liberty against abuse by government actors, even when held under United States law in territory over which the United States exercises complete control. The premise of this Article is that such exclusion cannot be squared with the Constitution's text, nor with the history of the American experience with republican governance, nor with the protection accorded the legal identity of human beings by due process of law.

II. THE ENEMY COMBATANT DESIGNATION AND THE ROAD TO GUANTÁNAMO

In response to the September 11 terrorist attacks, on September 18, 2001, Congress issued a Joint Resolution pertaining to the Authorization for Use of Military Force (hereinafter "AUMF").[43] The AUMF authorized the President 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."[44] Pursuant to the AUMF, on November 13, 2001, the President issued a military order to govern the "Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism."[45] In *Hamdan*, the Supreme Court read this order as authorizing the detention as an enemy combatant of "any noncitizen for whom the President determines 'there is reason to believe' that he or she (1) 'is or was' a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States."[46] The November 13 order also authorized the

fight against terrorism can be considered outside the law. There is no such thing as a 'black hole' in terms of legal protection." International Humanitarian Law and Terrorism: Questions and Answers, International Committee of the Red Cross, http://www.icrc.org/web/eng/siteeng0.nsf/html/5YNLEV.

[42] 533 U.S. 678, 690 (2001).

[43] *See* Pub. L. No. 107-40, 115 Stat. 224 (2001).

[44] *Id.* (emphasis added).

[45] 66 Fed. Reg. 57833.

[46] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2760 (2006). In *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004), the Supreme Court noted that the "[g]overnment has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]." In the instance of a "declared war between the United States and any foreign nation or

establishment of military commissions to try detainees for "any and all offenses triable by military commission that such individual is alleged to have committed."[47]

On June 28, 2004, the Supreme Court decided *Rasul v. Bush*, holding that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[48] Following the *Rasul* decision, a significant number of

government," Congress has authorized the President to apprehend, restrain, secure, and remove, as "alien enemies" all "natives, citizens, denizens, or subjects of the hostile nation or government." 50 U.S.C. § 21 (2000). However, only the Congress can declare war, and no such declaration has been issued with respect to the Executive Branch's military activities in Afghanistan and the "war on terror." The term "enemy combatant" was first used by the Supreme Court in *Ex Parte Quirin*, 317 U.S. 1 (1942), to explain the difference in treatment accorded lawful as opposed to unlawful combatants:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 30–31 (emphasis added). With respect to the trial of "enemy combatants," the prosecution activities of military commissions were described by the Court as conducted in connection with a Congressionally authorized war and not simply according to Executive Branch fiat. Even in the role of Commander in Chief the President "has no power to initiate or declare a war either against a foreign nation or a domestic State." The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862). Thus, the Executive Branch's current claim of authority to detain and prosecute individuals for crimes outside of the established criminal law process relies on the President's constitutional obligation to protect the national security. To what lengths the Executive Branch will press this claim remains uncertain. In *In re Guantánamo Detainee Cases*, the district court noted:

> It is the government's position that once someone has been properly designated as [an enemy combatant], that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies.

355 F. Supp. 2d 443, 447 (D.D.C. 2005).

[47] Prosecution under the November 13 Order is not limited to offenses defined by the currently recognized international laws of war, but extends to crimes defined by any "applicable laws." 66 Fed. Reg. 57833, § 1(e). Moreover, the "Order appears designed to permit the President to bypass the ordinary criminal processes with respect to a wide range of persons suspected of terrorist acts or plots unrelated to the events of September 11 and the ensuing U.S. military action in Afghanistan." Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 323 (2002).

[48] Rasul v. Bush, 542 U.S. 466, 485 (2004). In reaching this decision, the Court relied on the statutory text of 28 U.S.C. § 2241. *Id.* at 484. The Court did not address the issue presented by the passage of the MCA—whether the Constitution mandates that federal court jurisdiction include habeas review of the legality of an individual's detention by the Executive Branch.

detainees commenced habeas actions in the District Court for the District of Columbia.[49] On June 28, the Supreme Court also announced its decision in *Hamdi v. Rumsfeld*. In *Hamdi*, the Court held 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." [50]

On July 7, 2004, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum establishing Combatant Status Review Tribunals (CSRTs) and outlining the procedures, purportedly conforming to *Hamdi*, to be used in reviewing the enemy combatant designations previously made by Department of Defense personnel with respect to the Guantánamo Bay detainees and others. Wolfowitz also extended the reach of the term "enemy combatant":

> For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.[51]

A little less than a year later, on March 23, 2005, the Joint Chiefs of Staff issued a slightly different definition of "enemy combatant" in its Joint Publication 3-63, entitled *The Joint Doctrine For Detainee Operations*. This document again enlarged the scope of the term "enemy combatant," by specifying that, for "purposes of the war on terror, an enemy combatant includes, but is not necessarily limited to, a member *or agent* of al Qaeda, Taliban, *or another international terrorist organization* against which the United States is engaged in an armed conflict."[52]

On December 30, 2005, President Bush signed the DTA into law. The DTA amended 28 U.S.C. § 2241 by adding a new subsection (e) that specifically provided that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba."[53] The DTA's use of the term "alien" is consistent with the Executive Branch's contention that aliens outside the territorial boundaries of the United States do not receive any constitutional protection. However, the DTA did not broaden

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[49] One hundred and ninety-six habeas corpus petitions were filed, some covering groups of detainees. Karen DeYong, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18.

[50] *Hamdi*, 542 U.S. at 533.

[51] Memorandum from the Assistant Sec'y of Defense to the Sec'y of The Navy on the Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter Order Establishing Combatant Status Review Tribunals]; *see also Hamdan*, 126 S. Ct. at 2761 n.1.

[52] Order Establishing Combatant Status Review Tribunals, *supra* note 51, at 1–12 (emphasis added).

[53] 28 U.S.C. § 2241(e)(1).

the definition of "enemy combatant," and the effect of the habeas preclusion language was at least limited to aliens detained at Guantánamo Bay.

In June of 2006, in *Hamdan*, the Supreme Court declared the DTA's jurisdiction-stripping provision to have only prospective effect.[54] Bush Administration personnel and their legislative supporters returned to the drafting board, and on September 29, 2006, Congress passed the MCA.[55] In addition to clarifying Congressional intent with respect to the MCA's/DTA's retroactive divestment of habeas petition rights from the Guantánamo Bay detainees and other alien enemy combatants, and providing for the creation of military commissions to try enemy combatants for war crimes, the MCA advances yet another and broader definition of the term "enemy combatant" by distinguishing between lawful and unlawful enemy combatants. In section 948a, the term "unlawful enemy combatant" is defined as follows:

> "(1) UNLAWFUL ENEMY COMBATANT.— (A) The term 'unlawful enemy combatant' means –
>
> "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> "(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[56]

To be designated an "enemy combatant" and subject to indefinite detention, it is no longer necessary to show that an individual "directly supported hostilities" or is a "member or agent of . . . [an] international terrorist organization against which the United States is engaged in an armed conflict," but only that he "has purposefully and materially supported hostilities against the United States." The causal relationships connoted by the terms "directly supported" and "member or agent of" are considerably stronger than the descriptor "purposefully and materially supported." Consequently, there is an appreciable risk that application of the MCA's unlawful enemy combatant classification will be heavily influenced by subjective assessment of an individual's intentions and motives, rather than a strictly objective determination of culpability or threat based on harmful actions.

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[54] 126 S.Ct. at 2764–69.

[55] The MCA was signed into law by President Bush on October 17, 2006. In *Boumediene*, 476 F.3d at 986, the Court observed that "[e]veryone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*."

[56] The term "lawful enemy combatant" is defined in MCA §3 (codified at 10 U.S.C. § 948a(2)(A)) as being a person who is "a member of the regular forces of a State party" and/or who meets criteria similar to that employed by the Third Geneva Convention to identify prisoners of war.

From the issuance of the AUMF to the enactment of the MCA, the connection has gradually weakened between the events giving rise to the President's authority to take military action against the perpetrators of the September 11 attacks, and the basis for the use of force by the Executive Branch to detain individuals seized in Afghanistan and elsewhere. The Executive Branch has ignored this circumstance, and continues to assert that detention of "enemy combatants" pursuant to the President's power as Commander in Chief is constitutional. Moreover, the Executive Branch contends that whatever process is due the detainees as a matter of U.S. or international law is fully satisfied by the Combatant Status Review Tribunal process.[57]

Under the MCA, alien enemy combatants, whether lawful or unlawful, are excluded from access to habeas review. Thus, it is not a detainee's status as an "unlawful enemy combatant" that renders habeas review unavailable, but simply his status of being both an "alien" and an "enemy combatant." Analysis of the Executive Branch's expansion of the enemy combatant classification discloses that alienage is the decisive factor in determining whether a detainee will be granted an opportunity to challenge the constitutional legitimacy of his confinement.

A. The AUMF Does Not Authorize Ongoing or Indefinite Detention Absent Demonstration of a Constitutionally Adequate Factual Basis for such Detention

Specific congressional authorization to detain individuals falling within the scope of the AUMF is unnecessary "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and, thus, permitted by Congress under the clause of the AUMF authorizing the President to use "necessary and appropriate force."[58] However, in *Hamdi* the Supreme Court stated that the constitutionality of any such detention is

[57] According to the government, the CSRT process involves an administrative proceeding that is "non-adversarial" and which is intended to serve as a mechanism for affirming the enemy combatant determinations previously made in the course of "multiple levels of review" by "officers of the Department of Defense." *See* Order Establishing Combatant Status Review Tribunals, *supra* note 51, at 1. The purpose of the CSRT process was never to afford detainees a meaningful opportunity to rebut the administrative determinations that resulted in their being labeled and indefinitely detained as enemy combatants. Given the limited allowance for participation by the detainee in the CSRT process, the detainee's lack of a real capacity to present witnesses, the absence of counsel of choice, and the lack of full disclosure with respect to the evidence relied on by the tribunal in finding that a detainee qualifies for enemy combatant status, the CSRT process simply serves as an Executive Branch "rubber-stamp" for decisions classifying detainees as enemy combatants previously made by personnel in the Department of Defense. *Cf.* Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 WL 2067938, at *14–15 (D.C. Cir. July 20, 2007).

[58] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

premised on an accurate determination, by a neutral decision maker, that the individual detained is an enemy combatant.[59]

Although *Hamdi* only addressed the due process protection afforded a citizen, the same protections must be extended to an alien indefinitely detained by order of the Executive Branch. According to the Supreme Court, the Due Process Clause applies to all "persons" within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[60]

The "touchstone of due process is protection of the individual against arbitrary action of government."[61] Due process protects against arbitrary and capricious governmental action by interposing a neutral decision maker between the government and the individual.[62] Prolonged and arbitrary detention also offends due process principles of customary international humanitarian law. In *Martinez v. City of Los Angeles*,[63] the Ninth Circuit Court of Appeals held that "there is a clear international prohibition against arbitrary arrest and detention." The Ninth Circuit held that detention is arbitrary if "it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time."[64]

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[59] *Id.* at 533. In *Hamdi*, the Court commented on the importance of judicial involvement in the determination of the constitutional legitimacy of an individual's detention:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Id. at 535.

[60] Zadvydas v. Davis, 533 U.S. 678, 693 (2001). The "indefiniteness" of an individual's detention is a constitutionally significant factor, drawing into play due process considerations, as well as the cardinal principle of statutory interpretation known as the Canon of Constitutional Avoidance. *Id.* at 689–90. In accordance with this principle, when an act of Congress raises "a serious doubt" as to its constitutionality, a court must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994). In *Zadvydas*, the Court used the Canon of Constitutional Avoidance to interpret statutory provisions governing removal of aliens so as to provide that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." 533 U.S. at 699.

[61] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[62] *Cf.* UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trustees, 56 F.3d 1469, 1473 (D.C. Cir. 1995) ("the basic element of due process [is] the opportunity to be heard by a neutral decision-maker").

[63] 141 F.3d 1373, 1384 (9th Cir. 1998).

[64] *Martinez*, 141 F.3d at 1384 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. h (1987)).

B. The World War II-Vintage Decision in Johnson v. Eisentrager *Does Not Bar Captive Aliens from Claiming Fifth Amendment Due Process Clause Protection*

Following remand in *Hamdan v. Rumsfeld*, on December 13, 2006, District Judge Robertson issued a memorandum opinion dismissing Hamdan's long-pending habeas petition for want of subject-matter jurisdiction.[65] Judge Robertson based his decision on the ground that, given the Supreme Court's 1950 decision in *Johnson v. Eisentrager*,[66] "Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus."[67]

Jurisdiction "is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[68] When "jurisdiction is conferred by an Act of Congress and that Act is repealed, 'the power to exercise such jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the Act of Congress.'"[69] Thus, if the MCA's jurisdiction-stripping provisions are ultimately upheld by the Supreme Court, the detention of the Guantánamo Bay detainees will continue indefinitely subject only to the discretion of the Executive Branch and the limited review of CSRT procedures provided by the DTA.

A jurisdiction-stripping statute does not ordinarily affect a litigant's substantive rights but only reduces "the number of tribunals authorized to hear and determine such rights."[70] So long as a newly enacted jurisdiction-stripping statute does not impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, the statute does not present a retroactivity problem.[71] However, if a statute does have retroactive effect, the traditional presumption "teaches that it does not govern absent clear congressional intent favoring such a result."[72]

In Judge Robertson's memorandum opinion, he noted that neither rebellion nor invasion was occurring at the time of the passage of the MCA and found that the MCA did not suspend the privilege of the writ of habeas corpus.

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[65] 464 F. Supp. 2d 9 (D.D.C. 2006).

[66] 339 U.S. 763 (1950).

[67] 464 F. Supp. 2d at 19.

[68] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

[69] Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (quoting Assessors v. Osbornes, 76 U.S. (9. Wall.) 567, 575 (1869); *see also* Bruner v. United States, 343 U.S. 112, 116–17 (1952) (When "a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law.").

[70] *Id.* at 117; Hallowell v. Commons, 239 U.S. 506, 508 (1916) (a jurisdiction-stripping statute "takes away no substantive right but simply changes the tribunal that is to hear the case").

[71] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2765 (2006); Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

[72] *Landgraf*, 511 U.S. at 280.

Therefore, according to Judge Robertson, the MCA's curtailment of habeas jurisdiction is unconstitutional only if it "operates to make the writ unavailable to a person who is constitutionally entitled to it."[73]

In *Rasul*, the Supreme Court held that the federal courts could exercise jurisdiction over the Guantánamo detainees' habeas petitions on the basis of the then existent text of 28 U.S.C. § 2241 and the fact that the United States exercised "complete jurisdiction and control" over the Guantánamo Bay Naval Base.[74] The MCA's amendments to section 2241 overturn *Rasul* and withdraw federal court jurisdiction with respect to any "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."[75] Relying on the Supreme Court's decision in *Johnson v. Eisentrager*,[76] Judge Robertson concluded that because Hamdan is neither a citizen nor a person voluntarily and lawfully admitted to the territory of the United States, "his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."[77]

In reaching this conclusion, Judge Robertson erred by confusing constitutional theory pertaining to claims seeking extra-territorial application of the Constitution with claims based on the application of the Constitution to government activity that occurs within territory subject to the plenary control of the government. "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."[78] However, as noted in *Reid v. Covert*, the government can "only act in accordance with all the limitations imposed by the Constitution."[79] Thus, once an individual is brought within the compass of the government's power, and is held in a location completely dominated by that power, the constitutional protection afforded by due process of law applies notwithstanding the individual's alienage.[80]

Misreading *Eisentrager* has led to a focus on lawful presence in the territory defined by national boundaries as being the *sine qua non* of a non-citizen's entitlement to the protections afforded by the Constitution. In *United States v. Verdugo-Urquidez*, former Chief Justice Rehnquist cited *Eisentrager* in support of his Hobbesian proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of

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[73] Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 16 (D.D.C. 2006).

[74] Rasul v. Bush, 542 U.S. 466, 480 (2004).

[75] MCA § 7(a), 120 Stat. 2636 (2006) (to be codified at 28 U.S.C. 2241(e)(1)).

[76] 339 U.S. 763 (1950).

[77] *Hamdan*, 464 F. Supp. 2d at 18.

[78] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

[79] Reid v. Covert, 354 U.S. 1, 6 (1957).

[80] United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."); *see also* Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004).

the United States."[81] However, in concluding that the German nationals in *Eisentrager* were not entitled to bring a habeas action, the Supreme Court referred to *Ex parte Quirin*,[82] and *In re Yamashita*,[83] and differentiated between a location (such as China) over which the United States had no sovereign or territorial control whatsoever, and a territory (such as the Philippines) where the United States was in a position to exercise sovereign power: "By reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts."[84] Similarly, given the extent to which the political and legal status of the Guantánamo Bay Navel Base is solely a function of U.S. sovereign power, the situation of the detainees with respect to access to habeas review must be seen as far more analogous to that of Yamashita and Quirin, than that of Eisentrager.

C. Insofar as Sovereignty is Constituted by Political and Legal Space, Not Simply Territorial Place, the Guantánamo Bay Naval Station is Subject to the Sovereign Dominion of the United States

Judge Robertson's decision upholding the MCA is premised on his contention that the Guantánamo Bay detention facility "lies outside the sovereign realm."[85] On the basis of this determination, Judge Robertson concluded that Hamdan did not have a constitutional entitlement to habeas review. In Judge Robertson's view, the "sovereign realm" is simply the physical place adumbrated by the boundaries of a state; but the term

[81] 494 U.S. at 269

[82] 317 U.S. 1 (1942).

[83] 327 U.S. 1 (1946).

[84] Johnson v. Eisentrager, 339 U.S. 763, 780 (1950). In *Quirin*, seven German saboteurs, including one naturalized American citizen, sought relief in the Supreme Court by way of both applications for leave to file original petitions for habeas corpus, and by petitions for certiorari to review orders of the District Court for the District of Columbia denying their petitions for habeas relief from death sentences imposed by a military commission. The petitioners contended that their trial by military commission for offenses against the law of war violated the Constitution because they were entitled to be tried in civil courts with all the constitutional protections afforded criminal defendants. Noting that the country was in a time of war, that Congress had authorized trial of offenses against the law of war by military commission, that such offenses were not required to be tried by jury at common law, and that the Constitution did not bar trial of offenses against the law of war by military commission, the Court rejected the petitioners' arguments, denied their applications for habeas relief, and affirmed the orders of the district court. *Ex parte* Quirin, 317 U.S. at 20–24. In *Yamashita*, the former Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands sought habeas and certiorari review in the Supreme Court from the judgment of a military commission sentencing him to death by hanging for war crimes. 327 U.S. at 5–6. Although the Supreme Court upheld the power of the military commission to try and sentence Yamashita, it also observed that, in accordance with then governing law, neither the legislative nor the executive branch could, "unless there was a suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9.

[85] Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 18 (D.D.C. 2006).

"sovereignty" describes a space that is defined, not simply by geography, but by the exercise of a unitary power vested in a structure of law that possesses both being and personality.

The "very meaning of sovereignty is that the decree of the sovereign makes law."[86] In *Rasul*, Justice Kennedy remarked on the extent of the control wielded by the United States over the Guantánamo Bay facility:

> Guantánamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . What matters is the unchallenged and indefinite control that the United States has long exercised over Guantánamo Bay. From a practical perspective, the indefinite lease of Guantánamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.[87]

The United States government exercises complete control over the Guantánamo Naval Base—it makes the law that governs the conduct of all persons within the environs of the base.[88] Moreover, although the Guantánamo Bay land area is occupied by the United States pursuant to a lease agreement with Cuba, for many years the Cuban government has wanted the United States to terminate its leasehold and leave.

The Guantánamo Bay lease agreement between the United States and Cuba provides that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the" lands and waters subject to the lease.[89] However, the lease agreement also provides that the United

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[86] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909). The internal connection between sovereignty and law has long been recognized. In 1576, the French political theorist Jean Bodin wrote that a sovereign:

> must not be subject in any way to the commands of someone else and must be able to give the law to subjects, and to suppress or repeal disadvantageous laws and replace them with others—which cannot be done by someone who is subject to the laws or to persons having power of command over him.

JEAN BODIN, ON SOVEREIGNTY 11 (Julian H. Franklin ed. & trans., Cambridge Univ. Press 1992) (1576). In a similar vein, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court declared:

> *Sovereignty* itself is, of course, not subject to law, for it *is the author and source of law*; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. *And the law is the definition and limitation of power*.

Id. at 370 (emphasis added).

[87] Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *see also In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantánamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.")

[88] Persons who commit crimes at Guantánamo Bay are often brought back to the United States to stand trial. *See* Gherebi v. Bush, 352 F.3d 1278, 1289 n.13 (9th Cir. 2003), *judgment vacated on other grounds*, 542 U.S. 952 (2004).

[89] *See* Agreement Between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba,

States "shall exercise complete jurisdiction and control over and within" the leased areas."[90] Furthermore, by means of a subsequent agreement, the lease continues in perpetuity "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations."[91] Given these inroads on Cuba's dominion over its own territory, is it nonetheless reasonable to contend that Cuba retains sovereignty over the Guatánamo Bay territory currently occupied by the U.S. military?

The origin of state sovereignty as a concept of political organization stems from the Peace of Augsburg signed in 1555, between the Holy Roman Emperor Charles V and the Schmalkaldic League, an alliance of Lutheran princes, and the Peace of Westphalia, signed in 1648 by the Holy Roman Emperor Ferdinand III and various European monarchies, which ended the Thirty Years' and Eighty Years' religious wars. The Peace of Augsburg endorsed the principle that, although one unified religion was necessary for the well-being of the state, it did not have to be the same religion for every state. Thus, each monarch possessed the right to determine the religion of his own state in accordance with the principle *cuius regio, euis religio* ("whose rule, his religion") without outside interference. The Peace of Westphalia endorsed the Peace of Augsburg, but certain of its provisions actually contravened the principle that a ruler could dictate the religion to be practiced within the state in that the "[t]erritories were to retain the religious affiliation that they had on January 1, 1624, regardless of the desires of their ruler."[92] In a further limitation on sovereign prerogative, the Peace of Westphalia also provided that Lutherans who lived in Catholic territories, and Catholics who lived in Lutheran territories, were to be allowed to continue to practice their respective religions in the privacy of their own homes.[93]

The Peace of Westphalia is most commonly cited for its role in solidifying two distinct principles that define the modern notion of sovereignty: first, that the government of a nation-state is unequivocally sovereign within its own territory (the autonomy principle); and second, that no nation-state may interfere in the domestic affairs of another nation state (the non-interference principle).[94] The Peace of Westphalia's provisions for religious tolerance also gave early support to the concept that state autonomy need not be absolute in order to preserve state sovereignty and to the concept that the power of a state

art. III, Feb. 16–23, 1903, T.S. No. 418 (6 Bevans 1113), *available at* http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm.

[90] *Id.*

[91] *See* Treaty between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682.

[92] *See* STEPHEN D. KRASNER, SOVEREIGNTY ORGANIZED HYPOCRISY 79–80 (1999).

[93] *Id.* at 80.

[94] *Id.* at 20 ("The fundamental norm of Westphalian sovereignty is that states exist in specific territories within which domestic political authorities are the sole arbiters of legitimate behavior.").

could be limited by the actions of other states in order to protect important human rights.[95]

Territoriality is a "crucial" component of sovereignty,[96] but it is not the sole or even the most important attribute of sovereignty. As is the case with the concept of "property,"[97] sovereignty may be understood as consisting of a bundle or basket of attributes that includes, in addition to dominion over a bounded geographical place, the recognition of a state's existence by other equal sovereign states, a state's exercise of self-determination and autonomy, and the power to promulgate laws that govern its internal affairs as well as its external relations.[98] But, as with property,[99] one key criterion binds the bundle of attributes essential to recognition of the sovereignty of a state—this criterion is the power of law-making:

> Sovereignty is the supreme legal authority of the nation to give and enforce the law within a certain territory and, in consequence, independence from the authority of any other nation and equality with it under international law. Hence, the nation loses its sovereignty when it is placed under the authority of another nation, so that it is the latter that exercises supreme authority to give and enforce the laws within the former's territory.[100]

The Guantánamo Bay lease agreement contravenes Westphalian sovereignty in that, although Cuba nominally retains "ultimate sovereignty," it is the United States that exercises "complete jurisdiction and control" over the territory occupied by the base. Moreover, Cuba's autonomy is impaired insofar as it is precluded from voiding the lease absent the concurrence of the United States. It is also significant that, by its terms, the lease agreement cedes control over Cuban land to the United States for use as a "coaling or Naval station

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[95] *Id.* at 81.

[96] *See* DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY 17 (Princeton University Press 2001).

[97] Property is commonly described in the law as "'a bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." United States v. Craft, 535 U.S. 274, 278 (2002). Thus, the claim that something is one's property may refer to a right to use the thing, to receive or control income produced by the thing, to exclude others from it, to a share in its division in the event of divorce, to encumber it to secure a debt, to sell it or to block another from selling it, and/or to bequeath it upon one's death. *Id.*

[98] *Id.* KRASNER, *supra* note 92, at 220; *see also* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE 63–82 (1995) (distinguishing between the "chunk" approach to sovereignty, which requires that to be sovereign a state must possess a specific list of attributes, and the "basket" approach, which views sovereignty as a bundle of rights or competences that may take more than one form).

[99] *See* Dickman v. Comm'r, 465 U.S. 330, 336 (1932) ("Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial.").

[100] HANS J. MORGENTHAU, POLITICS AMONG NATIONS, THE STRUGGLE FOR POWER AND PEACE 323 (7th ed. McGraw-Hill 2006).

only, and for no other purpose."[101] Using the base as a prison site is not a permitted use under the treaty, and thus this use constitutes a further encroachment on Cuban sovereignty by the sovereign power of the United States.

Since Fidel Castro came to power in 1959, the Cuban government has refused to receive the U.S. lease checks and it has repeatedly demanded that the U.S. vacate the base.[102] The fact that the U.S. has ignored the Cuban government's demands and retained control of Guantánamo Bay further substantiates its exercise of sovereign power over that territory.[103] In accordance with the principles of autonomy and non-interference, from the Peace of Westphalia onwards, sovereignty has been understood as connoting the absolute right of a sovereign to dominion over its own territory. This right of dominion includes the right of a nation to expropriate private property and to exercise eminent domain within its territory, even if to do so affects international interests.[104] By rejecting the Cuban government's demand that it withdraw from Guantánamo Bay, the United States has not just stood on its contractual rights but has wielded its superior military power to infringe on and restrict Cuba's sovereign control over its own territory.[105] The political

[101] According to Morgenthau, the provisions of the 1901 Treaty of Havana "restricted to an unusual degree the discretion of the Cuban government in foreign and domestic affairs *and even obligated it to surrender its sovereignty over parts of Cuban territory*." *Id.* at 325 (emphasis added).

[102] Insofar as a treaty is nothing more than a contractual agreement between nations, it may be breached at the will of a sovereign. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian Tribe, is essentially a contract between two sovereign nations."); *cf.* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796) ("It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void.").

[103] *Cf.* New Jersey v. New York, 523 U.S. 767, 786 (1998) ("As between two sovereigns, jurisdiction may be obtained by one through prescriptive action at the other's expense, over the course of a substantial period, during which the latter has acquiesced in the impositions upon it.").

[104] It is "generally accepted today in international law that states have the right to expropriate property and rights of foreigners." Kaj Hober, *Investment Arbitration in Eastern Europe*, 14 AM. REV. INT'L ARB. 377, 380 (2003). The right of eminent domain is "an incident of sovereignty" that does nor require explicit "constitutional recognition." United States v. Jones, 109 U.S. 513, 518 (1883).

[105] FOWLER & BUNCK, *supra* note 98, at 93 ("By refusing to allow Cuba to exercise eminent domain, the American government has underscored the idea that Cuba's basket of sovereign rights differs from those of other sovereign states. Thus, although the island's sovereign status is indisputable, Cuba's communist government has long lacked exclusive control over its national territory."); *see also* Kara Simard, *Innocent at Guantánamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 SUFFOLK TRANSNAT'L L. REV. 365, 372 (2007) ("The United States exercises sovereign power over Guantánamo Bay by maintaining exclusive physical control and legal jurisdiction, like the mandatory application of U.S. criminal laws, jurisdiction in the U.S. courts over each detainee, regardless of nationality, and an ability to freely exercise eminent domain."); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise*

significance of this incursion, as a matter of international law and the relations of nation states, may be drawn from the words of Chief Justice Marshall:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[106]

Thus, it cannot be reasonably disputed that the power exercised by the United States over the Guantánamo Bay territory is that of a sovereign—it is equivalent to the power the United States wielded over the Philippines in *Yamashita*—and where the United States is sovereign, the limitations on governmental power established by the Constitution must be obeyed, and the rights of individuals recognized by the Constitution must be respected.[107]

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of Presidential Power, 4 U. PA. J. CONST. L. 648, 705–06 (2002) ("Because of the nature of the Lease and, thus, the undoubted property interest that the United States has in the Base, it would appear, at least while the United States occupies that enclave and exercises all the powers normally associated with sovereignty to the exclusion of the Republic of Cuba, that the Constitution would apply in Guantánamo, by virtue of its territorial clause.").

[106] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812). In *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819), the Court was confronted with the question whether goods delivered into the harbor of Castine, within the district of Maine, while the same was occupied by Great Britain, were subject to duty owed to the United States upon withdrawal of the British forces. Justice Story held that no duty was owed to the United States because at the time the goods were imported the harbor was subject to the sovereign power of Great Britain:

> By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recogni[z]e and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience.

[107] It is the legal fact of U.S. sovereignty over the Guantánamo Naval Base that constitutes the condition precedent to application of constitutional restrictions on the Executive Branch's exercise of its powers in that locale. Congress's attempt in the DTA to limit habeas jurisdiction by declaring that Guantánamo Bay is not within the geographical boundary of the United States is simply a *non sequitur*. *See* DTA § 1005(g), Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005) (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd) ("United States Defined—For purposes of this section, the term 'United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantánamo Bay, Cuba.").

D. Eisentrager's *Wartime Holding Limiting Habeas Review of Military Commissions' Determinations Does Not Apply to the Guantánamo Detainees*

Proponents of Executive Branch authority to detain individuals at the Guantánamo Bay facility without federal judicial oversight by means of habeas review continue to rely heavily on the *Eisentrager* decision. In *Boumediene*,[108] the Court of Appeals for the District of Columbia held that the MCA terminated any statutory entitlement on the part of the Guantánamo detainees to pursue habeas relief, and cited *Eisentrager* as conclusively establishing that "aliens without presence or property within the United States" are not constitutionally entitled to invoke the habeas jurisdiction of the federal courts:[109]

> Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, the controlling case is *Johnson v. Eisentrager*.[110]

In *Eisentrager*, the Supreme Court considered a habeas petition brought by a German national who, along with twenty-one other German nationals, had petitioned the District Court for the District of Columbia for relief from confinement on the ground that their trials before a Military Commission in China violated the United States Constitution and the 1929 Geneva Convention governing treatment of prisoners of war. In their petitions, the German nationals contended that, prior to May 8, 1945, the date on which Germany surrendered to the Allied forces, they were employees of civilian agencies in China. Taken into custody by the United States Army after the Japanese surrender, the German nationals were subsequently convicted by a United States Military Commission for war crimes. The Military Commission was constituted by the American Commanding General at Nanking, and it sat in China "with the express consent of the Chinese Government." The proceedings of the Commission were conducted in accordance with procedures established by the United States military and did not involve international participation.[111] Following their convictions, the German nationals were transported to the Landsberg prison in Germany to serve their sentences.[112]

The district court dismissed the petitions for failure to name a custodian located within the physical territory of the court in accordance with the holding in *Ahrens v. Clark*.[113] The Court of Appeals for the District of Columbia Circuit

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[108] 476 F.3d 981 (D.C. Cir. 2007).

[109] *Id.* at 990.

[110] *Id.* (citation omitted).

[111] Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

[112] *Id.*

[113] 335 U.S. 188 (1948). In *Ahrens*, the Court held, in a majority opinion written by Justice Douglas, that the statutorily conferred jurisdiction of federal district courts to entertain habeas petitions was limited to petitions presented by or on behalf of prisoners detained or confined within the court's territorial jurisdiction. *Id.* at 192. In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973), the Court implicitly overruled

reversed the district court, and ordered the petitions reinstated. Based on its reading of the Constitution's text, and its understanding of the judiciary's power and prerogative to set aside void Executive and Legislative Branch actions, the court of appeals concluded that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ."[114] Consequently:

> [W]hen a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.[115]

The Supreme Court, in a majority opinion written by Justice Jackson, reversed the court of appeals and reinstated the decision of the district court. Justice Jackson noted that, not only were there "inherent distinctions" in the rights afforded "citizens and aliens," and between "aliens of friendly and of enemy allegiance," but that "the alien who becomes also an enemy" suffers additional disabilities "imposed temporarily as an incident of war and not as an incident of alienage."[116] Hence, because in a time of war the security of the Nation requires that the power of the Executive Branch over aliens be at its zenith, courts will entertain the plea of a resident alien to be free "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."[117] Beyond the

its holding in *Ahrens*, noting that Congress had acted to expand the habeas jurisdiction of the federal courts, and finding that the language of then current 28 U.S.C. § 2241 required only that the court issuing the writ have jurisdiction over the custodian. *See* Wang v. Reno, 862 F. Supp. 801, 812 (E.D.N.Y. 1994).

[114] Eisentrager v. Forrestal, 174 F.2d 961, 963 (D.C. Cir. 1949).

[115] *Id.* at 967.

[116] Johnson v. Eisentrager, 339 U.S. 763, 768–69, 771–72 (1950). Contrary to Justice Jackson's view of the relative importance of an individual's status as an enemy, as compared to alienage, in the evolution of the enemy combatant concept, alienage as the determinative justification for denial of rights has moved to the fore. Boumediene v. Bush, 476 F.3d 981, 991–92 (D.C. Cir. 2007).

[117] *Eisentrager*, 339 U.S. at 775. In the course of discussing the powers of the Executive Branch and the military in times of war, Justice Jackson observed: "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." *Id.* at 788 (emphasis added). No citation to authority for this proposition (this "of course") appears in the text of Justice Jackson's opinion. Nor is any clause contained in Article II of the Constitution that is in any way similar to the "necessary and proper" clause contained in Article I, § 8, cl. 18. Concerning a forerunner of the latter clause, James Madison remarked in Federalist No. 44: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., Mentor 1961). However, given the Founders' antipathy to the centralization and aggrandizement of magisterial power, it is

determination of such "jurisdictional elements," the Supreme Court held that the federal courts were not empowered to inquire into any other issue of a resident alien's confinement. Concerning the nonresident enemy alien, the Court held that "one who has remained in the service of the enemy, does not even have this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[118]

For Justice Jackson, the factor distinguishing the resident from the non-resident alien, in terms of access to the courts, was the existence of a basis to raise a claim "upon our institutions." Such a claim was held to arise as a result of an alien's presence within the sovereign territory of the United States:

> 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.[119]

Given the exclusive authority of the military in a time of war to punish those guilty of offenses against the laws of war, and the lack of any entitlement on the part of the German nationals to raise a claim "upon our institutions," the Court held that there was no basis for exercise of habeas jurisdiction by the federal courts, and it therefore affirmed the decision of the district court dismissing Eisentrager's petition.

Unquestionably, "inherent distinctions" exist between the rights enjoyed by citizens, resident aliens, aliens present within the sovereign territory of a nation, and aliens "of enemy allegiance."[120] An alien lawfully present in the United States is commonly assured of "safe conduct" and of "certain rights," which become more extensive and secure "when he makes preliminary declaration of intention to become a citizen."[121] The Guantánamo Bay

questionable whether they intended the President alone to be entrusted with the final decision as to what is "necessary and proper" for carrying out his duties as Commander in Chief.

[118] *Eisentrager*, 339 U.S. at 776.

[119] *Id.* at 777–78.

[120] *Id.* at 769–71. In Justice Jackson's view, the rights to be accorded an alien are dependent on how far along the continuum from outsider to insider, stranger to neighbor, non-citizen to citizen, the alien has progressed:

> 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.

Id. at 770.

[121] *Id.* at 770–71. From time immemorial, the lawfully resident alien has been accorded significant rights. *See Leviticus*, 19:33–34: "When a stranger sojourns with you in your land,

detainees are aliens, and they have been labeled as enemies, but their presence within territory subject to the plenary control of the United States is, albeit involuntary, nevertheless lawful. If a "resident enemy alien" is entitled to a minimal judicial determination as to "the existence of a state of war" and as to whether he has been properly classified as an "alien enemy," shouldn't a similar determination be afforded the Guantánamo Bay detainees?

The protection afforded the resident alien under current law is broader than that considered by Justice Jackson in *Eisentrager*. In *Al-Marri v. Wright*, the Fourth Circuit held the MCA inapplicable to a resident alien whom President Bush had determined was an enemy combatant with close ties to Al Qaeda:

> Congress sought to eliminate the statutory grant of habeas jurisdiction for those aliens captured and held outside the United States who could not lay claim to constitutional protections, but to preserve the rights of aliens like al-Marri, lawfully residing within the country with substantial, voluntary connections to the United States, for whom Congress recognized that the Constitution protected the writ of habeas corpus.[122]

Finding that al-Marri's residence in Illinois "for several months, with his family, and attending university" established "substantial connections" sufficient to give rise to Due Process Clause protections, the Fourth Circuit found that the AUMF, the Patriot Act, and the President's inherent powers did not support the government's contention that "individuals with constitutional rights, unaffiliated with the military arm of any enemy government, can be subjected to military jurisdiction and deprived of those rights solely on the basis of their conduct on behalf of an enemy organization."[123] Some four years after al-Marri was taken into military custody as an enemy combatant, the Fourth Circuit instructed the district court to issue a writ of habeas corpus "directing the Secretary of Defense to release al-Marri from military custody."[124]

E. The Supremacy Clause Gives Certain Customary International Humanitarian Laws the Status of United States Law

As noted above, in *Boumediene*, the District of Columbia Circuit Court of Appeals focused on *Eisentrager* in propounding a negative answer to the question, "Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantánamo Bay Naval Base in Cuba?"[125] However, by focusing on physical place, rather than the space of legal entitlement created by the dynamic interplay of the Constitution's text with other rights-conferring enactments

you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself . . . ."

[122] Al-Marri v. Wright, 487 F.3d 160, 171 (4th Cir. 2007).

[123] 487 F.3d at 175, 186–87, 188–89, 190–91.

[124] *Id.* at 195. Notwithstanding the inapplicability of the MCA, al-Marri remains subject to prosecution in federal district court for any criminal acts he may have committed. *Id.*

[125] Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007).

recognized as domestic law, the court of appeals replicated District Court Judge Robertson's misreading of *Eisentrager*. For, although an alien's presence within the territorial jurisdiction of the United States is one way that a constitutionally protected right of access to the courts may arise, it is not the only way. In accordance with *Eisentrager*, a right of access should also be recognized where the alien has a valid basis on which to claim the protection of "our institutions."

Eisentrager addressed whether nonresident enemy aliens prosecuted before military commissions in a time of war had any claim on "our institutions," and answered that question in the negative. In *Boumediene* the court of appeals applied *Eisentrager* to support its conclusion that the MCA's jurisdiction-stripping provisions are constitutional notwithstanding critical differences between the state of affairs in *Eisentrager* and that of the Guantánamo detainees. Unlike the circumstances in *Eisentrager*, the "war on terror" is not supported by a formal declaration of war, and consequently the Executive Branch's military detention authority with respect to individuals detained by U.S. military personnel in foreign lands is restricted to the authority granted by the AUMF. Furthermore, unlike the *Eisentrager* petitioners, the great majority of the Guantánamo detainees have not been accorded anything close to a military commission hearing with its attendant procedural requirements—such as the pleading of formal charges, provision of certain entitlements to the defendant with respect to gaining access to the government's evidence, and the obtaining of contrary evidence by means of witnesses and investigation activity.

The most critical factor distinguishing the German nationals before the Court in *Eisentrager* and the Guantánamo detainees is that, notwithstanding their status as aliens, the detainees do have a basis for claiming the protection of "our institutions." Not only are the Guantánamo detainees subject to the sovereign authority of the United States, in a place where no other sovereign's power is in play, they are also the beneficiaries of evolving standards of international and municipal law that protect the legal identities of individuals against arbitrary and aggressive government attack.

The courts of the United States are "bound by the law of nations which is a part of the law of the land."[126] In *The Paquete Habana*,[127] the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[128] The Supremacy Clause of the United States Constitution

[126] The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) ("It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained, . . . like any other, in the appropriate case." (citation omitted)).

[127] 175 U.S. 677 (1900).

[128] *Id.* at 700.

(Article VI, Section 2) "gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations."[129]

The Restatement (Third) of Foreign Relations Law, § 702, provides that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."[130] The Human Rights Committee established by the International Covenant on Civil and Political Rights (ICCPR) "has recognized that freedom from arbitrary detention or arrest is a peremptory norm *jus cogens* (and is, thus, a right of fundamental and preemptive importance)" and has expressly declared that a state "may not depart from the requirement of effective judicial review of detention," affirming that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party's decision to derogate from the Convention."[131]

In *Sosa v. Alvarez-Machain*,[132] the Supreme Court declared that federal courts, when exercising the jurisdiction conferred by the Alien Tort Statute (ATS),[133] could recognize private claims based on international law norms as

[129] Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1986).

[130] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). Under 28 U.S.C. § 2241(c)(3), the status of being held in custody in violation of "laws or treaties of the United States" is one of the legislatively recognized bases for issuance of a writ of habeas corpus. The Supreme Court has recognized that the writ of habeas corpus provides a mechanism for review and relief in the instance of an individual unlawfully detained in violation of a treaty. *See* Mali v. Keeper of the Common Jail, 120 U.S. 1, 17 (1887).

[131] Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 509 (2003) (citations omitted). A *jus cogens* norm is a norm that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331.

[132] 542 U.S. 692, 732 (2004). In 1990 a federal grand jury indicted Humberto Alvarez-Machain (Alvarez) for the torture and murder of a DEA Agent that allegedly occurred in Guadalajara, Mexico, in 1985. In order to get Alvarez into court, the DEA hired a group of Mexican nationals, including José Francisco Sosa, who forcibly seized Alvarez and turned him over to U.S. authorities. Alvarez moved to dismiss the indictment for, among other things, "outrageous governmental conduct." The indictment was ultimately upheld in *United States v. Alvarez-Machain*, 504 U.S. 655, 658 (1992), on the ground that Alvarez's forcible seizure in Mexico did not affect the jurisdiction of the federal court to try him. Alvarez proceeded to trial but, at the close of the government's case, the district court granted his motion for a judgment of acquittal. In 1993, Alvarez filed a civil action in federal district court against Sosa, and various Mexican nationals and DEA agents, seeking damages under the Federal Tort Claims Act (FTCA) and the Alien Tort Statute (ATS). Lower courts rejected Alvarez's FTCA claim, but rewarded him $25,000 in damages on his ATS claim. When the case reached the Supreme Court, the Court rejected both claims.

[133] As passed by the First Congress as part of the Judiciary Act of 1789, the ATS provided that the new federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. As currently codified at 28 U.S.C. § 1350, the ATS

federal common law.[134] However, given the restraints imposed on the development of federal common law, the Court also held that any claim based on the present-day law of nations must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."[135] In light of this determination, the Court opined that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[136] But the Court also suggested that a federal "common law" claim could be based on facts falling within the scope of a norm of customary international humanitarian law, such as that recognized by section 702 of the Restatement (Third) of Foreign Relations Law, if the substance of that norm could be ascertained with the requisite specificity.[137]

In 1949, in order to prevent torture, inhumane treatment of soldiers captured in the course of war, and mistreatment of civilians caught up in an armed conflict, the nations of the world ratified the four Geneva Conventions. The third of these conventions, the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), confers upon captured soldiers substantive and procedural protections designed to curb abuse by a detaining power.[138] Central to these protections is a detainee's right to be treated as a prisoner of war unless and until his status has been determined by a "competent tribunal."[139] There is thus a presumption that an individual detained by an occupying military force in connection with the occurrence of belligerent activities or other resistance is to be treated as a prisoner of war.[140]

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reads: "[T]he district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[134] Notwithstanding the limitation on development of federal common law established by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in *Sosa* the Court recognized that rights established by international norms represent an enclave in which federal judicial development of common law should continue—"the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." 542 U.S. at 729.

[135] *Sosa*, 542 U.S. at 725. The paradigms identified by the Court consist of three specific offenses against the law of nations described by Blackstone: "violation of safe conducts, infringements of the rights of ambassadors, and piracy. 4 Commentaries 68." *Id.* at 715.

[136] *Sosa*, 542 U.S. at 738.

[137] With respect to facts that could sustain such a claim, the Supreme Court observed: "Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." *Id.* at 737; *see also In re* Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

[138] 6 U.S.T. 3316, 75 U.N.T.S. 135.

[139] Third Geneva Convention, Article 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42.

[140] *See* Yasmin-Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 574–75 (2002) (stating that Article 5 creates a presumption of POW status). Individuals

Under customary international humanitarian law, a competent tribunal must resolve any doubt about the status of a captured combatant.[141] This same principle is incorporated into the binding military regulations of the United States. In this regard, Army Regulation 190-8 provides: "All persons taken into custody by U.S. Forces will be provided with the protections of the GPW until some other legal status is determined by competent authority."[142]

Persons detained during an armed conflict, who are not subject to classification as prisoners of war under the Third Geneva Convention or as protected persons under the Fourth Geneva Convention,[143] are nonetheless protected by Common Article 3 of the Geneva Conventions, which applies to all armed conflicts and incorporates customary due process protections into the conventions.[144] According to Justice Kennedy, this article is "part of a treaty the United States has ratified and thus accepted as binding law."[145] Thus, insofar as Article 3 has been subsumed within the law of the United States,

who are not classifiable as prisoners of war, but who are taken into custody by an occupying power of which they are not nationals, may be found deserving of classification as "protected persons" under the Fourth (Civilians) Convention. *See* Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1, 20–21 (2005). Protected persons "may be detained for only two reasons: (1) punishment of criminal offenses under domestic legislation and (2) urgent security reasons." *Id.* at 21.

[141] *See* Martin D. Dupuis, John Q. Heyward & Michele Y.F. Sarko, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT'L L. REV. 415, 425 (1987) (recognizing the "principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal").

[142] Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, § 1-5(a)(2) (Oct. 1, 1997). The composition of, and the procedures to be followed by, a "competent tribunal" are defined by Army Regulation 190-8, § 1-6.

[143] The Fourth Geneva Convention provides protection for civilians in time of war. MALCOLM N. SHAW, INTERNATIONAL LAW 1061 (5th ed. 2003). A civilian is defined as "any person not a combatant," and in cases of doubt a person is to be considered a civilian. In addition to provisions requiring respect for human rights (such as freedom of religious practice) and prohibitions against maltreatment, the Convention also sets forth "various judicial guarantees as to due process." *Id.*

[144] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–96 (2006); *see also* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 817–18 (2005) ("Common Article 3 assures that any person detained has certain rights 'in all circumstances' and 'at any time and in any place whatsoever,' whether the detainee is a prisoner of war, unprivileged belligerent, terrorist, or noncombatant.").

[145] *Hamdan*, 126 S.Ct. at 2802 (Kennedy, J., concurring). According to the International Committee of the Red Cross, "persons detained in relation to a non-international armed conflict, such as the war against terrorism that has been waged in Afghanistan since June of 2002, are protected by Common Article 3 and relevant rules of international humanitarian law." *See* International Humanitarian Law and Terrorism: Questions and Answers, http://www.cicr.org/Web/Eng/siteeng0.nsf/html/5YNLEV

"[W]hether non-POW detainees are to be prosecuted or merely detained as security threats, each such detainee has the right under customary and treaty-based human rights law to obtain judicial review of the propriety of his detention."[146]

F. The MCA's Limitation on the Geneva Conventions as a Source of Rights Must Be Interpreted so as to Avoid Conflict with International Humanitarian Law and the International Obligations of the United States

Not only does the MCA strip the federal courts of jurisdiction to entertain a section 2241(c)(3) claim brought by an alien who has been classified as an enemy combatant,[147] it also imposes that bar retroactively to any "alien detained by the United States since September 11, 2001".[148] As such, the provisions of the MCA violate the requirement for an independent determination of the legitimacy of detention established by customary international humanitarian law and Common Article 3.[149] However, the MCA also attempts to block reliance on the Geneva Conventions. Section 5(a) of the MCA states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States or its States or territories."[150] Not only does this provision attempt to insulate Executive Branch decision-makers from actionable claims for human rights violations, it also derogates from obligations the United States has assumed as a signatory of the Conventions.[151]

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[146] Paust, *supra* note 131, at 514.

[147] MCA § 7(a), 120 Stat 2636 (2006) (to be codified at 28 U.S.C. § 2241(e)(1)) amends 28 U.S.C. § 2241 by inserting new text that reads as follows: "(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."

[148] MCA § 7(b), 120 Stat 2636 (2006) (to be codified at 28 U.S.C. § 2241 note):

> 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.

[149] In addition, MCA § 7(b), 120 Stat 2636 (2006) (to be codified at 28 U.S.C. § 2241 note) presents issues that call for examination in accordance with the prohibition on ex post facto laws set forth in Article I, Section 9, Clause 3, of the Constitution, and the presumption against the retroactive application of legislation. *Cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) ("Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust . . . .").

[150] MCA § 5(a), 120 Stat 2631 (codified at 28 U.S.C. § 2241 note); *see also* 10 U.S.C. § 9486b(g) ("No alien unlawful enemy combatant subject to trial by military commission . . . may invoke the Geneva Conventions as a source of rights.").

[151] The MCA's exclusion of the Guantánamo detainees from access to habeas review may also constitute a form of punishment prohibited by the Bill of Attainder Clause. Article

In *Murray v. Charming Betsy*,[152] Chief Justice Marshall declared that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." In this regard, section 114 of the Restatement (Third) of the Foreign Relations Law of the United States (1987), provides, in relevant part: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Thus, where "rights" are at stake, the "law of nations" trumps domestic law, and federal statutes are to be construed so as to avoid impinging on such rights in a manner inconsistent with international law.[153]

I, Section 9, Clause 3, of the Constitution provides that "[n]o Bill of Attainder . . . shall be passed." Common Article 3 provides, in relevant part, that "[p]ersons taking no active part in the hostilities, including those placed hors de combat by . . . detention . . . shall in all circumstances be treated humanely . . . ." Although the scope of what constitutes humane treatment is subject to debate, there are certain core matters that have achieved the status of peremptory norms or *jus cogens* prohibitions under customary international humanitarian law. For example, the transfer from occupied territory of a person protected under Common Article 3 "is a war crime in violation of Article 49 of the Geneva Civilian Convention." Paust, *supra* note 144, at 851. Moreover, in 2006, the U.N. Committee Against Torture, established under the auspices of the U.N. Convention Against Torture, noted that "detaining persons indefinitely without charge constitutes per se a violation of the Convention." U.N. COMM. AGAINST TORTURE, REPORT OF THE COMMITTEE AGAINST TORTURE ¶ 22, at 6 (July 25, 2006). The plans made and executed by Executive Branch personnel "to deny protections that are owed to other human beings under the Geneva Conventions were necessarily plans to violate the Conventions, and violations of the Conventions are war crimes." Paust, *supra* note 144, at 861–62. In closing the doors of the federal district courts to the Guantánamo detainees by passage of the MCA, the Legislative and Executive Branches seek to prevent the disreputable record of Executive Branch misconduct in the treatment of the detainees from being fully exposed. Legislation that is targeted against a specific group for the purpose of denying the members of that group access to the courts qualifies for characterization as a bill of attainder. Since 1866, the constitutional proscription against punishment by bill of attainder has encompassed the deprivation or suspension of "any rights, civil or political," by legislative fiat. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."). Not only does the MCA deny the Guantánamo detainees access to the writ of habeas corpus, it also prevents the detainees from claiming the protections afforded by Common Article 3. Insofar as the detainees constitute a discrete and insular minority (*cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)), the MCA's abrogation of their few remaining rights is attainting and punitive.

[152] 6 U.S. (2 Cranch) 64, 118 (1804).

[153] *See* Jordan J. Paust, *Customary International Law And Human Rights Treaties Are Law Of The United States*, 20 MICH. J. INT'L L. 301, 331–32 (1999). The domestic law of the United States, by way of the Canon of Constitutional Avoidance, also requires "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" that the courts must "construe the statute to avoid such problems." INS v. St. Cyr, 533 U.S. 289, 299–300 (2001). Application of the Canon of Constitutional Avoidance does not turn on the ambiguity of the

Section 5(a) of the MCA threatens to undermine the international credibility of the United States to the extent it contravenes commitments made by the United States to uphold the provisions of the Geneva Conventions.[154] In order to avoid direct conflict with the provisions of the Conventions, MCA section 5(a) should be construed as precluding recognition of the Conventions as a source of rights only to the extent such rights are inconsistent with domestic law. Under this construction, the Guantánamo detainees may claim protections afforded by "our institutions," and thus escape the prohibition established by *Eisentrager* with respect to access to habeas review by aliens located outside the immediate territorial confines of the United States.

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language contained in a statute, but rather on its equivocalness. As the Court noted in *Clark v. Martinez*:

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.

543 U.S. 371, 380–81 (2005). On the strength of this canon of statutory construction, the Supreme Court has read limiting language into statutes and has modified statutory text based on what it understood Congress would have intended had it been aware of the constitutional problem at the time of a statute's enactment. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."); *see also United States v. Booker*, 543 U.S. 220, 246 (2005) (Breyer, J.) ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding.").

[154] By derogating from the Geneva Conventions as statements of humanitarian law, deserving of universal respect and implementation, this provision violates the obligation imposed on the United States not to take actions that undermine the Conventions. *See* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 352 (1987) (discussing the obligation on a signator to "ensure respect" for the Conventions). Moreover, MCA § 5(a) conflicts with Common Article 3's provision of "some minimal protection" to individuals who are involved in a conflict in the territory of a signatory, and as a consequence of that circumstance are taken into custody and detained by the United States. *Cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2006). As a general rule, when a statute "which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." Reid v. Covert, 354 U.S. 1, 18 (1957). However, "The doctrine making all international law rules, irrespective of their content or importance, inferior to later-in-time statutes no longer accords with contemporary international theory or practice." Jules Lobel, *The Limits Of Constitutional Power: Conflicts Between Foreign Policy And International Law*, 71 VA. L. REV. 1071, 1152 (1985); *see also* Jennifer R. White, Note, *IEEPA's Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organizations*, 104 MICH. L. REV. 2019, 2040 (2006) ("The later-in-time doctrine is the customary method of analyzing conflicting laws, but it is not clearly applicable to conflicts involving humanitarian law."). Chief Justice Marshall's opinion in *Charming Betsy* "demonstrates that rights under customary international law are to prevail over unavoidably inconsistent federal statutes." Paust, *supra* note 153, at 331–32. Thus, courts may "use international law to override domestic law when rights are at stake." *Id.* at 332. Insofar as Common Article 3 recognizes and incorporates a right on the part of individuals seized during the course of a conflict not to be subjected to prolonged, arbitrary detention, section 5(a) cannot constitutionally be employed to bar a litigant from seeking habeas relief on the basis of that right.

G. Alienage Alone Does Not Defeat the Detainees' Due Process Entitlement to Habeas Review

The power to expel or exclude aliens has long been recognized as "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[155] Congress is entrusted by the Constitution with authority "to establish an uniform Rule of Naturalization."[156] But the power to govern the admission and exclusion of aliens from the territory of the United States "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[157]

In the routine case of excluding an alien who has not previously been lawfully admitted to the United States, "Whatever the procedure authorized by Congress is, it is due process as far as an alien entry is concerned."[158] But procedural due process is inherently variable according to the circumstances presented, the government function or purpose involved, and the individual interests affected by government action.[159] Hence, while it may well lie within the framework of due process, in wartime, to summarily exclude an alien from the territory of the United States without provision for a judicial hearing, when such an exclusion results in indefinite custodial confinement by U.S. military personnel, the change in circumstances is a change due process will not ignore.[160] When detention is no longer temporary, but indefinite, and when the deprivation of an individual's liberty is not merely ancillary to the accomplishment of some further government purpose, but is near to becoming an end in itself, due process requires that the government demonstrate a legitimate basis for such detention before a neutral and independent decision-maker.[161]

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[155] Shaughnessy v. United States, 345 U.S. 206, 210 (1953).

[156] U.S. CONST. art. I, § 8, cl. 4.

[157] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 557, 542 (1950).

[158] *Id.* at 544.

[159] As the Court observed in *Cafeteria & Restaurant Workers Union , Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961): "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

[160] *Cf. Shaughnessy*, 345 U.S. at 227 (Jackson, J., dissenting): "[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them."

[161] In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1982), the Supreme Court upheld legislation whereby aliens, whether lawfully or unlawfully present in the United States, could be removed according to the decision of executive officers. In a subsequent case, the Court held that "detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid." Wong Wing v. United States, 163 U.S. 228, 235 (1896). However, the Court also held that Congress was barred by the Fifth Amendment's Due Process and Equal Protection Clauses from promoting its policy of excluding aliens by "adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of

In examining to what extent the Guantánamo detainees may claim due process protections, it is important to remember that they were brought to their present location by the U.S. military at the direction of the Executive Branch.[162] For Justice Stevens, the fact that an individual has been taken into custody by U.S. authorities and brought to the United States against his will is a sufficient basis to find him entitled to the protections of the Bill of Rights.[163] For Justice Kennedy, although the "Constitution does not create, nor do general principles of law create, any juridical relation between our country and some limitless class of noncitizens who are beyond our territory," that circumstance is "quite irrelevant to any construction of the powers conferred or the limitations imposed" by the Constitution.[164] Rather, in determining the reach of the Constitution, what must be done is to "interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[165] Thus, while it would be "altogether impracticable and anomalous" to apply the Fourth Amendment's warrant requirement to the activities of foreign law enforcement officers, it cannot seriously be argued that the dictates of the Fifth Amendment do not protect an alien forcibly removed from his homeland and brought to the United States for criminal prosecution and trial.[166]

The democratic ideal of the United States rests on the proposition that there is an irreducible core of entitlement that is not only shared by all human beings, but constitutive of human being. The Declaration of Independence proclaims: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."[167] No warrant is provided by the Declaration for these "inalienable rights" because they are

any justice, judge or commissioner of the United States, without a trial by jury." *Id.* at 235, 237–38; *see also* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

[162] It is also important to remember that the Guantánamo detainees are not a homogenous group, but individuals from a number of different countries, some friendly to the U.S., who were seized under a variety of circumstances, some on the battlefield and some outside any theater of hostility, and who each have an individual story to tell. *See Boumediene*, 127 S.Ct. at 1480 (Breyer, J., dissenting).

[163] United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1990) (Stevens, J., concurring). In *Verdugo-Urquidez*, the Court addressed the question whether the defendant, a Mexican citizen who had been seized in Mexico and transported to the United States for prosecution in connection with narcotics trafficking, could claim the protections afforded by the Fourth Amendment. In his majority opinion for the Court, Chief Justice Rehnquist rejected Verdugo-Urquidez's argument that prior cases had conferred certain constitutional rights on aliens: "These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id*. at 271 (Rehnquist, C.J., dissenting).

[164] *Id.* at 275–76 (Kennedy, J., concurring).

[165] *Id.* at 277.

[166] *Id.* at 277–78.

[167] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

"self-evident." As "rights" existing prior to any enactment of positive law, they describe not rules but attributes of identity which the signatories of the Declaration believed to be essential to human being. Irrespective of the status of alien, as opposed to citizen, human beings have by operation of the rule of law a legal identity—an identity that confers on them what the philosopher Hannah Arendt described as "a right to have rights."[168]

The powers exercised by the Legislative and Executive Branches, whether conferred by the text of the Constitution, or springing from the nature of the function each branch performs in its service to the nation, are subject to the limitations imposed by the Constitution.[169] Due process restrains the extent to which government power may be employed to deprive a person of liberty. By imposing limits on the exercise of government power, the Due Process Clause protects the legal identity of human beings. When government power imposes indefinite detention on a human being, a condition that threatens to wipe away the very last residuum of legal identity encompassed by the right to have rights, due process intercedes to require that review of the legitimacy of the government's actions by way of habeas corpus be made available.[170] This requirement can neither be excused or avoided by the claim that the human being so confined is an alien.[171]

III. THE SEPARATION OF POWERS DOCTRINE, HABEAS REVIEW, AND THE MILITARY COMMISSIONS ACT OF 2006

The "Constitution created a Federal Government of limited powers."[172] In 1787, the league of states that would in time become the United States of America faced threats of attack and conflict from without and within the nation's still forming borders. The Founders determined it was necessary to

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[168] Concerning the "right to have rights," Arendt wrote:

> We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.

HANNA ARENDT, THE ORIGINS OF TOTALITARIANISM 296–97 (Meridian Books 1961).

[169] *See e.g.* Kennedy v. Mendoza-Martinez, 372 U.S. 144. 164–65 (1963) ("It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process.").

[170] *Cf.* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."); *see also In re* Chin Ah Sooey, 21 F. 393, 393 (D. Cal. 1884) ("That any human being claiming to be unlawfully restrained has a right to demand a judicial investigation into the lawfulness of his imprisonment, is not questioned by any one who knows by what constitutional and legal methods the right of liberty is secured and enforced by at least all English-speaking peoples.").

[171] *Cf.* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

[172] Gregory v. Ashcroft, 501 U.S. 451, 457 (1991).

abandon the weak confederacy and in its place substitute a nation ruled by executive and legislative organs with far-reaching powers.[173] Fresh memories of the despotism that occasioned the Revolutionary War led them to formulate a mechanism of governance incorporating strong protections against the tyrannical exercise of power. These protections appear explicitly in the Constitution's text and implicitly in the governmental structure that text creates.

A. Sovereignty and the Doctrine of Separation of Powers

In accordance with the doctrine of separation of powers, the various powers of sovereign governance (the making of law, the implementation of law, and the resolution of conflicts in and under the law) are apportioned amongst different governmental departments or branches. Each of these branches (the Legislative, the Executive, and the Judicial) acts and interacts according to rules, set forth in a constitution, that describe and limit the powers available to the branches, whether acting jointly or severally.[174]

The Constitution is the original and dynamic expression by "We the People of the United States" whereby the powers of sovereignty are identified and assigned to the three branches of government. The legislative power—the power to make the laws—is vested in Congress.[175] The executive power—the power to implement and execute the laws made by the legislature—is vested in the President.[176] The judicial power—the power to declare what the law is and to enforce the law by deciding cases and controversies involving those subject to the laws of the nation—is vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[177]

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[173] *See* Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1482 (2005) ("On May 14, 1787, when the Federal Constitutional Convention assembled, the United States faced substantial threats to its security on all sides.").

[174] In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), the Supreme Court noted that the Separation of Powers Doctrine was one of the governmental principles "on which the whole American fabric has been erected." The provisions of the Constitution establish three coequal but separate branches of government, each with the ability to exercise checks on, and by such means balance, the powers exercised by the others. To preserve this dynamic, the Constitution mandates that each of the general departments of government must remain "'entirely free from the control or coercive influence, direct or indirect, of either of the others.'" Mistretta v. United States, 488 U.S. 361, 380 (1989) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

[175] U.S. CONST. art. I, § 1.

[176] U.S. CONST. art. II, § 1.

[177] U.S. CONST. art. III, § 1. In *Marbury*, Chief Justice Marshall described the constitutional function of the judiciary as both interpretive and decisional with respect to the laws of the nation: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Marbury*, 5 U.S. at 177; *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) ("judicial Power is one to render dispositive judgments" (citation and

In addition to allocating the sovereign powers of governance to three separate branches, the separation of powers doctrine mandates the coordinated implementation of two principles. First, the specific power (legislative, executive, judicial) vested in each separate branch must not be invaded or usurped by the other branches. Second, all limitations on the scope and exercise of the powers established by the founding rules of governance must be respected. The direct link between these two principles informs Madison's discussion of the separation of powers doctrine in Federalist No. 48:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.[178]

The Founders devoted considerable attention to seeking practical security against forcible detention by executive or legislative ukase, without trial. Their efforts found expression in several provisions of the Constitution. These provisions are the prohibition against suspension of the "privilege of the writ of habeas corpus" except "when in cases of rebellion or invasion the public safety may require it,"[179] and the prohibition against passage of bills of attainder and ex post facto laws.[180] In 1791, the Founders added a third bulwark against abuse of government power in the form of the Fifth Amendment's requirement that no person be deprived of life, liberty, or property without due process of law.

The Preamble to the Constitution states: "We the people of the United States," establish this Constitution, "in order to form a more perfect union," a union that will "provide for the common defense," and that will also "establish

quotation marks omitted)). In *Marbury*, Chief Justice Marshall also declared that by extending to the Supreme Court, in the thirteenth section of the Judiciary Act of 1789, the power to issue an original writ of mandamus, Congress had erred insofar as the Constitution did not confer on Congress any power to enlarge the Court's original jurisdiction as defined by Article III, Section 2. *Marbury*, 5 U.S. at 175–80. This important corollary to the principle of judicial review established the written text of the Constitution as supreme with respect to its delineation of the functions and powers of the three departments of government: "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument." *Id.* at 180 (emphasis in original).

[178] THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

[179] U.S. CONST. art. I, § 9, cl. 2.

[180] U.S. CONST. art. I, § 9, cl. 3.

justice." The Founders employed a written constitution to establish a system of governance according to law, not a régime of power relationships ruled by the will of one person, or any group of people, even a majority. The principle *necessitas non habet legem* (necessity has no law), which underlies Executive Branch claims to unbridled decision-making power with respect to those characterized as enemy aliens, has no place in the constitutional framework. In *Reid v. Covert*,[181] four Justices of the Supreme Court rejected the notion that necessity justifies broad disregard for the Bill of Rights:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.[182]

B. Article III and the Judicial Power

The Constitution provides that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[183] In defining the reach of the federal judicial power, Article III, Section 2, Clause 1, provides that "judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority" and to certain other enumerated cases and controversies.[184]

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[181] 354 U.S. 1 (1957).

[182] *Id.* at 14 (Black, Douglas & Brennan, JJ., & Warren, C.J.); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) (noting that the Founders omitted unreviewable presidential "powers *ex necessitate* to meet an emergency" from the Constitution because they knew such powers would "afford a ready pretext for usurpation"); Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy, J., concurring) ("From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.").

[183] U.S. CONST. art. III, § 1. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), Justice Story took note of the mandatory use of "shall" in Article III, Section 1, and declared: "If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*." *Id.* at 330 (emphasis in original). Whether it is Congress that must "vest" the judicial power in one Supreme Court and such inferior courts as may be created, or the Constitution itself that accomplishes such vesting, it is clear that the "Constitution *requires* that there be a federal judiciary vested with the judicial power." Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U.L. REV. 671, 700 (1997).

[184] The terms "cases" and "controversies" mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998). The term "all cases" refers to litigation seeking vindication for the alleged violation of a legal right recognized in or arising under the Constitution, the laws of the United States, or treaties. In addressing such "cases," a

In the course of describing the structure and functions of the federal courts, Article III uses the terms "judicial power" and "jurisdiction." The "judicial power," is not power in the abstract, but the "judicial power of the United States"—a power that along with the other incidents of sovereignty pre-existed the Constitution, and which "shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[185]

In Article III, the term "jurisdiction" is used to distinguish between "original" and "appellate" jurisdiction,[186] and to refer to a particular form of subject-matter jurisdiction, that of "admiralty and maritime jurisdiction."[187] In *Rhode Island v. Massachusetts*,[188] the Court noted that "[j]urisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them." In other words, jurisdiction denotes authority to exercise the judicial power with respect to a particular case.[189] The provisions of Article III suggest that the federal courts "are courts of limited jurisdiction"; consequently, they may only exercise the jurisdiction allowed under the Constitution when authorized by statute.[190] However, it was "the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others."[191] Hence, when establishing inferior courts and regulating the appellate

court's function is to declare the law as well as to decide the case. The term "controversy," on the other hand, refers to the litigation of disputes between parties where the court's principal function is that of impartial arbitrator. *See* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense Of The Neo-Federalist Interpretation Of Article III*, 1997 BYU L. REV. 847, 870 (1997) ("Considerable evidence from this era [the early Republic] reflects a general understanding of the discrete judicial functions of exposition in Article III 'Cases' and dispute resolution in 'Controversies.')."

[185] U.S. Const. art. III, § 1.

[186] U.S. Const. art. III, § 2, cl. 2.

[187] U.S. Const. art. III § 2, cl. 1. Article III, Section 2, Clause 2, provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[188] 37 U.S. (12 Pet.) 657, 718 (1838).

[189] United States v. Arredondo, 31 U.S. (6 Pet.) 691, 709 (1832) ("The power to hear and determine a cause is jurisdiction . . . .").

[190] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

[191] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871). In *Klein*, the Supreme Court rejected congressional legislation that sought to strip the Supreme Court of jurisdiction based on its making of a factual finding. The Court rejected this approach as constituting nothing less than the legislative imposition of a "rule of decision" whereby the jurisdiction of the Court was terminated. *Id.* at 147. A legislative directive that attempts to dictate how a federal court shall exercise its judicial functions, otherwise known as a "rule of decision," invades the province of the judiciary and violates the separation of powers principle. Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1274 (11th Cir. 2005).

jurisdiction of the Supreme Court, Congress must not act in a manner that impairs the judicial power of the United States.

C. Congress Cannot Interfere with the Constitutionally Ordained Functions of the Judicial Branch

The Constitution vests the Supreme Court with authority to wield the judicial power of the United States, and one of the essential attributes of that power is habeas corpus review of claims of unlawful detention. Although the Constitution delegates to Congress the power to establish inferior courts, whether inferior courts are established is not a matter of discretion. Article III, Section 1, dictates that the judicial power "shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[192] Given the duty imposed on Congress by Article III to vest the "judicial power of the United States," and the limited scope of original jurisdiction reposed in the Supreme Court by Article III, Section 2, Clause 2, Congress must establish inferior federal courts if the judicial power of the United States as to all other subjects canvassed by Article III, Section 2, is to be rendered effective.[193]

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[192] In Article III the term "shall" is used in both a mandatory sense (§ 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury . . . .")) and a permissive sense (§2, cl. 2 (" . . . with such exceptions, and under such regulations as the Congress shall make.")). Which sense of the term "shall" controls interpretation of the text of Section 1 must therefore be determined, not only by reference to semantic and linguistic rules of construction, but by examination of the function that the judicial power is intended to serve in the Constitution's framework of government. Insofar as "judicial power" flows from the Constitution itself, and not from the legislature, and insofar as the Constitution contemplates three fully implemented and coequal branches of government, the only viable construction of "shall" as used in Section 1 that ensures that the judicial power will be vested as intended by the Constitution is that which takes the term "shall" as mandatory. *See* Velasco, *supra* note 183, at 699 ("The appropriate interpretation is not that Congress must vest the judicial power in the federal judiciary, but that the Constitution itself does the vesting.").

[193] *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, § 355, at 260 (Regnery Gateway, Inc., 1986) ("But it is clear from the language of the Constitution, that, in one form or the other, it is absolutely obligatory upon Congress, to vest all the jurisdiction in the National courts, in that class of cases, at least, where it has declared, that it shall extend to 'all cases.'"). The federal government was intended by the Founders to be a government of limited powers. Reid v. Covert, 354 U.S. 1, 5–6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." (footnotes omitted)). The importance of a court system to the maintenance of a government of limited powers was understood by the Founders. *See, e.g*, THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."). The federal court system also ensures that the federal government's position of supremacy in the republic created by the Constitution will not be undermined by conflicts between the states. In *Ableman v. Booth*, the Supreme Court observed that the supremacy conferred by the Constitution and the laws of the United States by Article VI, Section 2:

As regards cases and controversies outside the Supreme Court's original jurisdiction, Article III, Section 2, Clause 2, provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." As Justice Marshall observed in *Durousseau v. United States*:[194] "The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act and by such other acts as have been passed on the subject." The power to regulate is not, however, "a power to destroy."[195] Thus, given its duty to establish inferior federal courts, Congress must abide by the Constitution's mandate and not undermine the essential functions of the Supreme Court and the federal judiciary.[196]

D. Habeas Review is an Essential Function of the Judicial Branch

Concerning the nature of the writ of habeas corpus, and the scope of its application, in *Ex parte Watkins*[197] Chief Justice Marshall wrote:

> No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution, as one which was well understood; and the judicial act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ 'for the purpose of inquiring into the cause of commitment.' This general reference to a power which we are required to exercise, without any precise definition of that power, *imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own*. The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It

> could not peaceably be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken.

62 U.S. (21 How.) 506, 517–18 (1858). Consequently, it was "essential . . . to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws." *Id.* at 518.

[194] 10 U.S. (6 Cranch) 307, 314 (1810).

[195] *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968) (citation omitted).

[196] *See* Henry M. Hart., Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) ("The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); *see also* Loving v. United States, 517 U.S. 748, 757 (1996) ("the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties").

[197] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

> is in the nature of a writ of error, to examine the legality of the commitment.[198]

In *Ex parte Watkins*, the Supreme Court received a petition that averred Watkins was "detained in prison by virtue of a judgment of the circuit court of the United States . . . rendered in a criminal prosecution . . . ."[199] The Supreme Court had previously issued writs of habeas corpus in *United States v. Hamilton*,[200] *Ex parte Burford*,[201] and *Ex parte Bollman and Swartwout*,[202] releasing the petitioners from confinement. However, in none of those cases "was the prisoner confined under the judgment of a court" as was Watkins.[203] Watkins' confinement, according to the judgment of a court, was critical because the writ of habeas corpus had not traditionally been used to occasion one court's review of another court's lawful order of commitment, and Congress had not granted the Supreme Court jurisdiction to review the criminal judgment of a circuit court.[204] In light of this circumstance, the Supreme Court determined that it did not have jurisdiction to issue a writ of habeas corpus to review a judgment that had been validly entered in the circuit court. Notwithstanding this outcome, *Watkins* underscores the importance of a judicial determination of the lawfulness of the individual's detention.

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[198] *Id.* at 201–202 (emphasis added). It is important to be mindful of the distinction between an original proceeding, and the original and appellate jurisdiction of a court. As noted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803), "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create the cause." The original jurisdiction of the Supreme Court is thus limited to those cases which fall within the circumference of Article III, Section 2. However, it is also the case that a proceeding may originate in the Supreme Court that does not fall within Section 2, so long as its function is to review the decision of an inferior court. *See* Felker v. Turpin, 518 U.S. 651, 661–62 (1996) (approving the filing of a habeas petition as an original proceeding to review a decision of the Circuit Court of Appeals denying Felker's second habeas petition, notwithstanding the AEDPA's preclusion of Supreme Court review by appeal or certiorari review).

[199] *Watkins*, 28 U.S. at 201.

[200] 3 U.S. (3 Dall.) 17 (1795).

[201] 7 U.S. (3 Cranch) 448 (1806).

[202] 8 U.S. (4 Cranch) 75 (1807).

[203] *Ex parte* Watkins, 28 U.S. at 208.

[204] As noted by Chief Justice Marshall: "We have no power to examine the proceedings on a writ of error, and it would be strange, if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond its control." *Ex parte* Watkins, 28 U.S. at 203. In his analysis of the question presented, the Chief Justice distinguished between the function served by the writ of habeas corpus—"the liberation of those who may be imprisoned without sufficient cause," and that served by the writ of error—"to examine the legality of the commitment." *Id.* at 202. Observing that an individual who is imprisoned by a valid judgment is lawfully imprisoned, the Chief Justice concluded that a writ of habeas corpus did not lie to review such confinement even if there was some error in the issuance of the judgment because the judgment constitutes sufficient cause for the confinement. *Id.* at 206 ("If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded.").

From the Judiciary Act of 1789 until the passage of the DTA in 2005, Congress's only explicit attempt to restrict the habeas jurisdiction of the federal courts, without suspending the writ of habeas corpus, occurred in 1868, when Congress passed an enactment purportedly stripping the Supreme Court of jurisdiction to review the habeas decisions of the circuit courts.[205] However, when the Supreme Court reviewed this legislation in *Ex parte Yerger*,[206] the Court found that Congress's 1868 enactment, eliminating an 1867 statute conferring jurisdiction to review habeas decisions, did not void the habeas jurisdiction that had previously been extended to the Supreme Court by the fourteenth section of the Judiciary Act of 1789.

Observing that the "great writ of habeas corpus has been for centuries esteemed the best and only sufficient defen[s]e of personal freedom," the Court recalled that the writ had been "brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors."[207] Turning to the source of its own jurisdiction, the Supreme Court commented:

> But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this court is conferred by the Constitution, and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law, and is original.[208]

Nevertheless, the Court held that it possessed jurisdiction to issue a habeas writ because Congress had not excepted writs of habeas corpus from its appellate jurisdiction as conferred by the Judiciary Act of 1789.[209]

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[205] Actual suspension of the writ has "been an exceedingly rare event in the history of the United States." *Boumediene v. Bush*, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Roders, J., dissenting). On only four occasions has Congress authorized a suspension of the writ; two of which occurred in times of actual war. *Id.*

[206] 75 U.S. (8 Wall.) 85 (1868).

[207] *Id.* at 95. The Court also spoke of the "constitutional guaranty of the writ of *habeas corpus*," and noted that the intent of the Constitution with respect to the function performed by the writ was manifest: "It is that every citizen may be protected by judicial action from unlawful imprisonment." *Id.* at 97, 101.

[208] *Id.* at 96–97.

[209] As distinguished from earlier cases where habeas petitioners had been confined under a warrant or order of a federal court, in *Yerger* the Court entertained the petition of a civilian held without judicial warrant for trial by a military commission. In opposition to the Attorney General's contention that issuance of the writ would be an exercise of original jurisdiction, the Supreme Court ruled:

> [I]n all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorar*i, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

Ex parte Yerger, 75 U.S. at 103. Thus, *Yerger* conclusively established that the Court's appellate jurisdiction to entertain habeas review was not limited by the nature or source of

Ex parte Watkins and *Ex parte Yerger* tell us that the MCA's denial of the privilege of habeas corpus to those whom the Executive Branch deems alien enemy combatants is unconstitutional. In both cases, the Court considered the purposes served by the writ under the common and statutory law of England, and in the history of the United States, particularly noting its application to persons detained without a judicial determination of sufficient cause.[210] The Court also carefully analyzed the nature of the relief sought in light of its then legislatively conferred jurisdiction.[211] Similar considerations render the MCA's jurisdiction-stripping provisions unconstitutional because the Constitution requires that Congress must, in vesting the judicial power, provide for habeas review of Executive detention, without distinction as to race, gender, or alienage, as a component of the original jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court.

E. Except in Times of Rebellion or Invasion, Habeas Review Must Be Available to Test the Constitutionality of the Government's Detention of an Individual, Whether a Citizen or an Alien

Confronted by the failure of the Articles of Confederation to establish a working government, in May of 1787, the Founders called a Constitutional Convention to order in the Pennsylvania State House in Philadelphia. While recognizing the need for a stronger form of centralized government if the United States was to function as a nation, the Founders also sought to limit as far as possible the arbitrary exercise of executive and legislative powers. Some of the Founders believed that the tripartite structure of government contemplated by the Constitution, along with various provisions such as the Bill of Attainder, Ex Post Facto Law, and Suspension Clauses, was sufficient to guard against the risk of despotism.[212] A proponent of this view, Alexander

the authority under which a detention was initially effectuated. *See* Dallin H. Oaks, *The "Original" Writ Of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 165 (1962).

[210] *Ex parte* Yerger, 75 U.S. at 95; *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830). *See* Felker v. Turpin, 518 U.S. 651, 663 (1996) (commenting on the Court's review in *Ex parte Watkins* of "the English common law which informed American court's understanding of the scope of the writ.").

[211] *Ex parte* Yerger, 75 U.S. at 98; *Ex parte* Watkins, 28 U.S. at 201. Commenting on the importance of the writ, in *Ex Parte Yerger*, the Court refused to entertain a legislative construction that would divest it of jurisdiction to conduct habeas review in the absence of a clear statutory directive to that effect: "These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are." 75 U.S. at 103.

[212] From antiquity, political theorists and philosophers have categorized the forms of government most suitable to the ordering and governance of civil society as consisting of three ideal types: monarchy, aristocracy, and democracy. Each of these forms of government displays a certain quality or character of excellence: for monarchy, it is order or energy; for aristocracy, it is wisdom; for democracy, it is honesty or goodness. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 198 (1998). However, each of these ideal

Hamilton, wrote that the "Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights."[213] On the other hand, the Anti-Federalists insisted that additional limitations on the powers of the federal government, in the form of specifically recognized rights, should be added to the Constitution's text.

When the Constitution was signed by its drafters on September 17, 1787, it did not contain a bill of rights.[214] Anti-Federalists and others who feared the Constitution would prove ineffective against the dangers posed by a strong, centralized federal government, continued to agitate for a bill of rights. In doing so, Anti-Federalist writers noted the importance of the writ of habeas corpus and other rights for which recognition had been won by the English people in their long struggle against the Crown. In his sixteenth letter, dated January 20, 1788, the Federal Farmer wrote:

> The jury trial in criminal causes, and the benefit of the writ of habeas corpus, are already as effectively established as any of the fundamental or essential rights of the people of the United States. This being the case, why in adopting a federal constitution do we now establish these, and omit all others, or all others, at least with a few exceptions, such as again agreeing there shall be no ex post facto laws, no titles of nobility, &c . . . . *Security against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law* . . . . These rights are not necessarily reserved, they are established, or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws. In the execution of those laws, individuals, by long custom, by magna charta, bills of rights &c. have become entitled to them. A man, at first, by act of parliament, became entitled to the benefits of the writ of habeas corpus—men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will

types of government also poses a particular threat to civil society: monarchy—despotism; aristocracy—faction and usurpation; democracy—anarchy. Thus, the Founders determined that the preservation of liberty and the conditions requisite to its exercise required a mixed form of government that would combine and balance the characteristics of all three ideal types. *Id.*

[213] THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In arguing against the need for a bill of rights, Hamilton observed that the proposed Constitution contained specific rights, including "establishment of the writ of habeas corpus," that provided security to "liberty and republicanism" equal to if not greater than the rights and privileges contained in the Constitution of the State of New York, the home state of some of the "most intemperate partisans of a bill of rights." *Id.* at 510–11. Thus, for Hamilton, the Suspension Clause does not simply stand as a limit on Congressional action with respect to the availability of habeas corpus; rather, the Suspension Clause confirms the existence of a right to habeas corpus conferred by the Constitution as a component of the judicial power.

[214] The Constitution did not take formal effect until March 4, 1789, after having been ratified by eleven of the thirteen state legislatures.

> be entitled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws.[215]

On March 4, 1789, the First Congress passed the Judiciary Act of 1789, establishing the federal court system. In section 14 of the Act, Congress vested the courts of the United States with the "power to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[216]

On September 25, 1789, by way of a Joint Resolution, the First Congress of the United States proposed to the state legislatures twelve amendments to the Constitution to rectify deficiencies that the Anti-Federalists claimed to have found in the Constitution's text. Two of the proposed amendments were rejected. The remaining amendments were ratified by three-fourths of the state legislatures, and in 1791 they became the first ten amendments of the Constitution, known as the Bill of Rights.[217]

The Bill of Rights was intended to further secure the rights of citizens and others in the face of aggressive governmental action. These amendments must therefore be taken into consideration when interpreting the Constitution's text and attempting to understand how the various branches should function if they are to operate in conformity with the Constitution's plan. When the requirements of due process are considered in conjunction with the prohibition against suspension of the privilege of the writ of habeas corpus, the importance of habeas corpus in the constitutional plan of governance is clear.[218]

The Fifth Amendment provides, in relevant part, that "nor shall any person . . . be deprived of life, liberty, or property without due process of law." The process that is "due" in any system of law is a function of the workings of that system in terms of its principles of origination and their development through application to real-world problems over time. With respect to the system of law established under the Constitution, the Supreme Court has recognized that adequate notice of a claim or charge,[219] an opportunity to be heard at a

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[215] THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 82–84 (Herbert J. Storing ed., Univ. Chicago Press 1985) (emphasis added).

[216] In *Trial of Burr*, 25 F.Cas. 187, 188 (C.C. Va. 1807) (No. 14, 694), Chief Justice Marshall wrote, concerning "the principles and usages of law," that he understood them to be "those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognized and long established law, which forms the substratum of the laws of every state."

[217] *See* AKHIL REED AMAR, THE BILL OF RIGHTS 8–13 (1998).

[218] As noted by Justice Stone in *McNally v. Hill*, 293 U.S. 131, 135 (1934): "The use of the writ of habeas corpus as an *incident of the federal judicial power* is implicitly recognized by Article 1, § 9, Clause 2, of the Constitution . . . ." (emphasis added).

[219] Memphis Light, Gas and Water Division v. Kraft, 436 U.S. 1, 19–20 (1978). The Supreme Court has emphasized that a biased decision maker is "constitutionally unacceptable." Withrow v. Larkin, 421 U.S. 35, 47 (1975). Proceedings held in secrecy have also been held to contravene the dictates of due process. *See In re* Oliver, 333 U.S. 257, 270 (1948) ("Whatever other benefits the guarantee to an accused that his trial be conducted in

meaningful time,[220] and an unbiased decision maker,[221] are "basic" or "fundamental requirements" of due process.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*,[222] the Court considered whether a warrant of distress, issued by the treasury department in accordance with an act of Congress subjecting the property of a public officer to levy and sale, was lawful. The Court focused its attention on determining whether the warrant complied with the requirements of due process:

> That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law?" The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will. *To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country*.[223]

Because the common and statutory law of England and the laws of the states in place at the time of the enactment of the Fifth Amendment allowed for the recovery of debts owed to the government by public officers by way of the seizure and sale of their property, the Court found that the procedure authorized by Congress did not offend due process.[224]

An alien "seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."[225] However, once

public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." (footnote omitted)).

[220] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[221] *Larkin*, 421 U.S. at 47.

[222] 59 U.S. (18 How.) 272 (1855).

[223] *Hoboken Land & Improvement Co.*, 59 U.S. at 276–77 (emphasis added); *see also Ex parte* Grossman, 267 U.S. 87, 108–09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to the British institutions as they were when the instrument was framed and adopted."), and *Ex Parte* Randolph, 20 F. Cas. 242, 253 (C.C.D. Va. 1833) (No. 11,558) (examining common law authorities in construing the scope of the writ).

[224] *Hoboken Land & Improvement Co.*, 59 U.S. at 280.

[225] Landon v. Plasencia, 459 U.S. 21, 32 (1982).

an alien is in the United States he or she is entitled to be recognized as a "person" who may claim the protection of the Due Process Clause.[226] Arguably, the Guantánamo Bay detainees are lawfully in the United States. They were transferred to Guantánamo by, and remain subject to, the United States government.[227] The DTA attempts to undercut recognition of the detainees' entitlement to claim the rights and protections afforded "persons" by the Constitution by redefining the meaning of the term "United States" so as not to include, when used in a *geographic sense*, the United States Naval Station, Guantánamo Bay, Cuba.[228] But, as previously noted,[229] this subterfuge fails insofar as territory, for purposes of the rights and protections afforded by the Constitution, is not simply a geographical place, but the space occupied by sovereign power.

Employing the Court's analytic method in *Murray's Lessee* to address the constitutionality of the MCA's preclusion of habeas relief for the Guantánamo Bay detainees raises two questions. First, as a matter of due process, is barring the Guantánamo Bay detainees from pursuing habeas relief compatible with the writ of habeas corpus as it existed under the laws of England and the United States at the time of the ratification of the Constitution and the adoption of the Bill of Rights? Second, does the MCA's abrogation of habeas jurisdiction clash with any other provision(s) of the Constitution?

The answer to the first question is "no." The MCA intrudes upon the scope of habeas corpus jurisdiction that has existed as a necessary and essential component of the judicial power of the United States since the formative days

[226] As declared by Justice Kennedy: "As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause. Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention." Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting). For Justice Kennedy, whether an alien may claim a right or a protection afforded by the Constitution is not determined by the place where the alien is located at the time of the claim—as being inside or outside (whether physically or legally) the territory of the United States. For Justice Kennedy, with respect to aliens inside U.S. territory, "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 721. As regards the application of the Constitution's provisions to aliens outside United States territory but still within the sphere of the government's foreign operations, Justice Kennedy appears to have adopted Justice Harlan's approach in *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring), such that whether a constitutional right or protection is available is dependent on whether application of the relevant constitutional provision would be "impracticable and anomalous." United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

[227] In *Verdugo-Urquidez*, Justice Stevens had no difficulty in recognizing that the provisions of the Bill of Rights applied to an alien forcibly transported to the U.S. for trial: "In my opinion aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment. Respondent is surely such a person even though he was brought and held here against his will." *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring).

[228] DTA § 1005(e)(1), Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd).

[229] *See supra*, note 107 and accompanying text.

of the Nation. To abrogate that jurisdiction by denying a discrete group of stigmatized individuals access to independent judicial review of the circumstances of their confinement is unconstitutional. The answer to the second question is "yes." The MCA's abrogation of habeas jurisdiction with respect to individuals classified as alien enemy combatants by the Executive Branch violates, not only the Due Process Clause of the Fifth Amendment, but the Suspension Clause contained in Article I, Section 9, Clause 2, of the Constitution.[230]

F. Because Habeas Review is a Fundamental Incident of the Judicial Power of the United States, Congress Must Establish a Federal Court System with Authority to Entertain Habeas Claims

By means of the Judiciary Act of 1789, Congress exercised its power under Article 1, Section 9, Clause 8, and Article III, Section 1, and established the federal court system, designating the number of judges who would sit on the Supreme Court, and further specifying the jurisdictional authority of the federal district and circuit courts.[231] As previously noted, in section 14 of the Act, Congress declared that "all the before-mentioned courts of the United States, shall have power to issue writs of . . . habeas corpus . . . ."

Concerning the relationship between the Suspension Clause contained in Article I, Section 9, Clause 2, of the Constitution, and the Judiciary Act's recognition of judicial power in all of the federal courts to issue "writs of habeas corpus, for the purpose of an inquiry into the cause of commitment," Chief Justice Marshall declared:

> It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

[230] There is both a functional and a dynamic hermeneutic relationship between the Due Process and Suspension Clauses. In terms of their functional relationship, both clauses serve to limit the power of the Executive and Legislative Branches to arbitrarily detain individuals. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2494–95 (1998) ("[W]henever the government detains an individual and bars all judicial review of the legality of her detention, it gives rise to a constitutional violation of both the Due Process Clause and the Suspension Clause."). The hermeneutic relationship arises out of the historical connection between the enactment of the Constitution in 1787 and the ratification of the Bill of Rights in 1791. Given the ongoing political discussion concerning the nature and form of the federal government that took place between 1787 and 1791, from an interpretive standpoint there is no reason to view the Constitution's text as primary, and the Bill of Rights as being, in some sense, secondary. Rather, the Constitution and of the Bill of Rights should be read together as informing the meaning of their respective provisions.

[231] *See* 1 Stat. 73 (1789).

> Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. *Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.*[232]

Chief Justice Marshall's comments underscore the obligation imposed on Congress by the Constitution to enact implementing legislation to ensure that the habeas corpus component of the judicial power may be exercised by the federal courts. Given the relegation of habeas corpus to the often mundane role of reviewing the constitutional infirmities of state criminal convictions, it is easy to lose sight of the function performed by this component of the judicial power of the United States in preserving liberty from encroachment by the Executive Branch.[233] The great object of the writ of habeas corpus has always been the "liberation of those who may be imprisoned without sufficient cause."[234] Review of the legality of an individual's detention by government, whether in the form of the English monarchy or the American presidency, has been a fundamental purpose of the writ of habeas corpus for over 800 years.[235] At its historical core, "[T]he 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."[236]

Irrespective of the arrangement Congress might employ in establishing "inferior courts" in accordance with Article III, Section 1, if the protections established by the Constitution against arbitrary detention of individuals by the Executive Branch are to be available to the individuals so affected, Congress

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[232] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (emphasis added). In *INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001), Justice Stevens read Chief Justice Marshall's comments as expressing the "sensible view that the [Suspension] Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress."

[233] One of the most important functions served by the federal courts is to protect those who cannot rely on the political process for protection from majoritarian abuses. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Utilization of the writ of habeas corpus is essential to the performance of this function. A suspension of the privilege of the writ of habeas corpus does not confer any legitimate power or authority on the other branches of government: "The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 115 (1866). However, in the power vacuum created by a suspension of the writ, and the resulting disequilibrium in the relationship of the three branches of government, there is little to restrain the Executive Branch from implementing aggressively punitive policies against those discrete and insular minorities it targets as enemies—whether domestic or foreign.

[234] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

[235] Rasul v. Bush, 542 U.S. 466, 473 (2004).

[236] INS v. St. Cyr, 533 U.S. 289, 301 (2001). As noted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004), habeas corpus provides "a critical check on the executive, ensuring that it does not detain individuals except in accordance with law."

must vest at least one inferior court with jurisdiction to exercise the full judicial power of the United States to conduct habeas review.[237] Habeas corpus review, as it existed in 1789, is a constitutionally established attribute of the judicial power of the United States that is immune from legislative tampering. Congress can designate which federal courts may entertain habeas petitions, but Congress cannot limit habeas review in a manner that contravenes its constitutional function. Insofar as the MCA limits the jurisdiction of the federal courts to conduct habeas review, it clashes with the scope of the judicial power of the United States as recognized by Article III and the Fifth Amendment's Due Process Clause.

G. The Due Process Clause and the Suspension Clause Prevent Congress from Abrogating the Writ of Habeas Corpus as it Existed in 1789

In *Rasul*,[238] the Supreme Court held that individuals detained at the direction of the executive could contest the legitimacy of their detention by means of the writ of habeas corpus. The MCA overrides *Rasul* by terminating the jurisdiction of the federal courts to entertain habeas petitions filed by alien enemy combatants. However, the Supreme Court has also recognized that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[239] Thus, Congress' power to regulate the jurisdiction of the federal courts does not allow it to restrict access to the writ in a manner that would not have been lawful at the time the Constitution was enacted. Consequently, the MCA's attempt to block the federal courts from exercising habeas review jurisdiction with respect to the Guantánamo detainees is unconstitutional.

The Suspension Clause, as found in Article I, Section 9, Clause 2, states: "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." Insofar as the Suspension Clause is found in Section 9, its provenance is to limit Congressional power. Some commentators have suggested that this clause was simply intended to limit the power of Congress to interfere with the then-existing habeas jurisdiction of the state courts.[240] However, the Supreme Court

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[237] *Cf. Ex parte* Bollman, 8 U.S. at 96 ("Whatever motives might induce the legislature to withhold from the *supreme* court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from *every* court in the United States . . . .") (emphasis in original); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816) ("But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under [Congress's] authority.").

[238] 542 U.S. at 479–82.

[239] *St. Cyr*, 533 U.S. at 301.

[240] *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 568–69 (2002). Had the thrust of the Suspension Clause been simply to limit the power of Congress to suspend state-law-based habeas, it would have been consistent for the Founders to place a similar prohibition against suspension of the writ in Article I, Section 10, Clause 1, so as to preserve the writ against state legislative action. Moreover, an interpretation of the Clause as directed only against federal legislative

has consistently read the clause as preserving the writ of habeas corpus as a remedy for unlawful federal detention.[241]

Although the jurisdictional power to award a writ of habeas corpus must "be given by written law," in order to ascertain the "meaning of the term *habeas corpus*, resort may unquestionably be had to the common law."[242] Thus, as Chief Justice Burger observed, concurring in *Swain v. Pressley*,[243] the "sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted."

The historic purpose of the writ "has been to relieve detention by executive authorities without judicial trial."[244] Since the founding of the Nation, even aliens have been able to challenge their confinement through habeas.[245]

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encroachment on state habeas corpus powers conflicts with Supreme Court decisions finding state courts barred by the Constitution from exercising habeas jurisdiction with respect to detentions effectuated by the federal government. There are a number of early decisions which report the issuance of habeas writs by state courts to federal authorities. *See, e.g.*, Commonwealth *ex rel.* Bressler v. Gane, 3 Grant 447, 1863 WL 4691, at *11 (Pa. 1863) ("It may be considered settled, that State courts may grant the writ in all cases of illegal confinement under the authority of the United States."). However, in *Ableman v. Booth*, 62 U.S. (21 How.) 506, 525–26 (1858), and *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407–09 (1871), the Supreme Court held that, in light of the Supremacy Clause, once it is determined that a person is detained under the authority of the United States, state courts are barred from taking action to grant relief.

[241] *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 386 (1977) (Burger, C. J., concurring) ("the traditional Great Writ was largely a remedy against executive detention").

[242] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807); *see also* McNally v. Hill, 293 U.S. 131, 136 (1934) ("To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.").

[243] 430 U.S. at 384.

[244] Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result); *see also St. Cyr*, 533 U.S. at 301 ("At 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."). Concerning the function of the writ under English law, in *Ex parte Merryman*, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (No. 9,487), the court observed:

> From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail.

Id.

[245] *See, e.g.*, United States v. Villato, 2 U.S. (2 Dall.) 370 (1797) (granting a habeas petition and ordering the release of a Spanish citizen accused of high treason); *Ex parte* Quirin, 317 U.S. 1 (1942) (habeas proceeding initiated by "enemy belligerents"); Mohammed v. Harvey, 456 F. Supp. 2d 115, 126 (D.D.C. 2006) ("[T]he remedy provided by the writ of habeas corpus is expansive and not confined solely to U.S. citizens."); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 989–90 (1998) (commenting on *Somerset's Case*, which involved a slave, originally from Africa, who was brought into England by way of Virginia, and

The "common-law writ of habeas corpus was recognized throughout the thirteen American colonies at the time they broke free from British rule."[246] Under the common law, habeas review addressed questions of both law and fact raised by the detention of an individual.[247] Factual review has also been a historically recognized component of habeas litigation in the federal system.[248]

The Supreme Court has recognized that the writ must be administered with "initiative and flexibility" if it is to satisfy its constitutionally ordained role as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[249] Moreover, the scope of the writ's application has always been broad. At common law, the writ was invoked to challenge "Executive and private detention in civil cases as well as criminal," and it "encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes."[250] This function continues in the present day: "[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."[251]

Even if confined solely to review of the legality of a detention as a matter of law, the writ of habeas corpus is the appropriate vehicle whereby detainees may challenge their detention in federal court. As the Supreme Court observed in *St. Cyr*:

> [E]ven assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law . . . could have been answered in 1789 by a

thereafter freed by Lord Mansfield in 1772, who granted habeas relief because slavery was contrary to the law of England).

[246] Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1502 (1996).

[247] *See* Jonathan L. Hafetz, *The Untold Story Of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L. J. 2509, 2535 (1998).

[248] *See, e.g.*, Moore v. Dempsey, 261 U.S. 86, 92 (1923) (noting that a judge of the United States has a "duty of examining the facts for himself" in addressing a petition for habeas relief); Commonwealth *ex rel.* Bressler v. Gane, 3 Grant 447, 1863 WL 4691, at *14 (Pa. 1863) ("The plain principle of the common law is that cause must be shown for the detention by the return, and the body of the prisoner must be brought into court as commanded by the writ, 'so he may make answer' to such return, or, in other words, he may traverse the return."). From the federal judiciary's earliest days, habeas review of the reasons advanced for detaining an individual has contemplated consideration of evidence extrinsic to the return made by the responding party:

> Lewis examined the affidavits produced against the prisoner, to show, that although he attended at several meetings of the insurgents, his deportment, upon those occasions, was calculated to restore order and submission to the laws; *and he added the affidavits of several of the most respectable inhabitants of the western counties, in testimony of the propriety of the prisoner's conduct throughout the insurrection.*

United States v. Hamilton, 3 U.S. (3 Dall.) 17, 17–18 (1795) (emphasis added).

[249] Harris v. Nelson, 394 U.S. 286, 290–91 (1969).

[250] INS v. St. Cyr, 533 U.S. 289, 302 (2001).

[251] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

> common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes [AEDPA and IIRIRA] have withdrawn that power from federal judges and provided no adequate substitute for its exercise.[252]

The privilege of the writ of habeas corpus can only be suspended by an act of Congress when the conditions requisite to such suspension ("in cases of rebellion or invasion") exist.[253] If suspended, the suspension of the writ can last only so long as the reasons requiring Congressional action persist.[254] Whether the conditions requisite to suspension of the writ exist is a political question that is addressed to the Legislative Branch.[255] However, the federal courts retain power to assess the constitutional legitimacy of a Congressional enactment, such as the MCA, that excludes a specific group of individuals from access to the writ. Such an enactment is not a suspension, but an abrogation of the writ that offends both the Due Process and the Suspension Clauses. Consequently, the Supreme Court retains jurisdiction to determine whether the MCA's jurisdiction-stripping provisions are constitutional.[256]

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[252] 533 U.S. at 304–05. As noted, *supra* note 239 and accompanying text, in *St. Cyr* the Court suggested that "at the absolute minimum" the Suspension Clause protects the writ as it existed in 1789. Determination of the scope of this "absolute minimum" involves examination of historical documents and case decisions that reflect how the writ of habeas corpus was employed prior to 1789. While it is important that our understanding of the writ be informed by history, it is also important that we not be misled by some idealized originary construction of the text of the Suspension Clause. As the constellation of the semantic components of a particular field of discourse change, the meanings of the terms constitutive of that discourse also change. Insofar as it is impossible to step outside of the existential "now" that marks the flow of time, we are all historical readers of the texts we encounter. Whatever meaning (in the broadest and most impactive sense of meaning) the Suspension Clause had for human beings in 1789, that meaning can only be grasped today by human beings of the twenty-first century. Change in the semantic content and effect of terms is inevitable: "In the process of repeating a term or a concept, we never simply produce a replica of the first original usage and its intended meaning: rather every repetition is a form of variation." SEYLA BENHABIB, THE RIGHTS OF OTHERS, ALIENS, RESIDENTS AND CITIZENS 179 (2004). We can pretend to read the text of the Clause as if we were human beings of the eighteenth century, but while conducting this pretense we remain denizens of the twenty-first century. What is most important in understanding the Constitution's text is not what we can discern could have been its meaning in 1789, but how our relationship to that idealized meaning is reflected in the goals and practices of current governance. Thus, rather than confining the Suspension Clause to the writ as it existed in 1789, the Court has read the Suspension Clause to apply "to the writ as it exists today." Felker v. Turpin, 518 U.S. 651, 663–64 (1996).

[253] Smith v. Bennett, 365 U.S. 708, 712–13 (1961).

[254] *Ex parte* Spurlock, 66 F. Supp. 997, 1004 (D. Haw. 1944).

[255] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide.").

[256] Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2155 (2006) (a federal court's adjudicatory authority includes "its authority to determine it own jurisdiction"); *see also Ex*

The Fifth Amendment "contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government."[257] Chief among these restrictions is the Due Process Clause, which serves the same function in the constitutional

Parte Milligan, 71 U.S. at 130–31. The dynamic tension between the prerogative of Congress to suspend the privilege of the writ of habeas corpus and the judicial power of the United States came to the fore in 1865, after Congress enacted legislation authorizing "the suspension, during the Rebellion, of the writ of habeas corpus throughout the United States by the President." *Id.* at 133. President Lincoln had previously suspended the writ by proclamation in 1862 on his own authority. In 1863, Lincoln issued a second proclamation suspending the writ according to the authority granted to him that same year by the Habeas Corpus Act of 1863. Lambdin P. Milligan was thereafter arrested on October 5, 1864, and subsequently charged and convicted before a military commission for disloyal activities. Sentenced to be hanged, Milligan commenced a habeas proceeding, that ultimately reached the Supreme Court. In his petition, Milligan argued that the President had no power under the Constitution to try a civilian before a military commission at a time when the regular courts were open for business. *See* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 26–39 (1976). The Court sided with Milligan, holding that constitutional guarantees with respect to the criminal prosecution could not be avoided in the absence of a true and present military necessity. *Milligan*, 71 U.S. at 123–27. In addition, notwithstanding the suspension of the writ, the Court held that Milligan's habeas petition was properly before it because the "suspension of the privilege of the writ of habeas corpus does not suspend the writ itself." *Id.* at 130–31. Rather, the "writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." *Id.* at 131. From this pronouncement, two important propositions may be drawn. First, if the writ of habeas corpus remains effective despite suspension of the privilege of the writ, then the writ must represent an incident of the judicial power that is beyond the authority of Congress to curtail. It is the privilege of the writ that is suspended—the remedial aspect of judicial power; but the power to issue the writ, the power which must exist if the writ itself is to exist, cannot be abrogated. Second, even when the privilege of the writ is suspended, the Judicial Branch retains authority to determine whether the circumstances of any particular case are such as to render a petitioner without any present opportunity for obtaining relief. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1398 (1953) ("[W]here statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention.").

[257] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833); *see also* Kring v. Missouri, 107 U.S. 221, 226 (1883) (noting that the first ten amendments were "all designed to operate as restraints on the general government."). In *Monongahela Navigation Co. v. United States*, the Supreme Court observed that the first ten amendments had been adopted to address what some contended, notwithstanding Hamilton's argument to the contrary in Federalist No. 84, were deficiencies in the Constitution's protection of individual rights:

> The first 10 amendments to the constitution, adopted as they were soon after the adoption of the constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

148 U.S. 312, 324 (1893).

text as the words "by the law of the land" served in the Magna Carta with respect to protecting the individual against arbitrary action on the part of government.[258]

The "Great Writ" of habeas corpus was in use before the Magna Carta.[259] As recognized in *United States ex rel. Hendricks v. Harris*,[260] the protections afforded liberty by the Due Process Clause, the Magna Carta, and the writ of habeas corpus are interrelated:

> One of the rights secured to the citizen by the fifth amendment of the constitution is that which declares that no person shall 'be deprived of life, liberty, or property without due process of law.' This essential safeguard of the people is deduced from its grand original, the twenty-ninth chapter of Magna Charta, which asserts and preserves, among other blessings, the personal liberty of individuals; and this guaranty contains the very essence of the writ of habeas corpus. Speaking of this writ, the supreme court of the nation, in *Ex parte Watkins*, 3 Pet. [28 U. S.] 193, said: 'It is in the nature of a writ of error to examine the legality of the commitment. It brings the body of the prisoner up together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause.'

In *Ingraham v. Wright*,[261] the Supreme Court described the scope of the protection afforded personal liberty by the Due Process Clause of the Fifth Amendment:

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the crown . . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

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[258] *In re* McDonald, 16 F. Cas. 17, 21 (E.D. Mo. 1861) (No. 8751); *cf.* County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). Early in its history, the Supreme Court observed that the words "due process of law" were "undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta." *Hoboken Land & Improvement Co.*, 59 U.S. at 276. Article 39 of the Magna Carta states: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." The Magna Carta was originally issued in 1215 and by its terms King John acknowledged that the power of the king was not above the law.

[259] Doss v. Lindsley, 53 F. Supp. 427, 429 (E.D. Ill. 1944).

[260] 26 F. Cas. 177, 180 (C.C.S.C. 1872) (No. 15,313); Blackstone referred to the writ of habeas corpus *ad subjiciendum* as "the great and efficacious writ, in all manner of illegal confinement." WILLIAM BLACKSTONE, 3 COMMENTARIES *131.

[261] Ingraham v. Wright, 430 U.S. 651, 672–74 (1977) (footnotes and citation omitted).

There is no federal common law writ of habeas corpus separate and apart from its existence as a component of the judicial power of the United States.[262] The federal courts which are "created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[263] However, Congress cannot abrogate federal court habeas jurisdiction in a manner that prevents the federal courts from fulfilling their constitutionally mandated function—to review Executive Branch acts that result in the detention of individuals in the absence of a properly made charge, trial, and conviction—without contravening the judicial power of the United States and violating the doctrine of separation of powers.[264] The Suspension Clause and the Due Process Clause provide more than adequate textual warrant for preservation of the common law writ of habeas corpus as a component of the judicial power of the United States vested by the Constitution in the federal courts. Hence, any individual burdened by arbitrary government detention may seek original habeas review of the constitutional legitimacy of such detention as a matter of due process in an inferior federal court having jurisdiction over the custodian of

[262] As a matter of general principle there is no "federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). However, the Supreme Court has recognized that, in enacting legislation, Congress has on occasion intended that extant common law propositions inform the substantive construction of statutory text. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (holding that, with respect to the Alien Tort Statute, the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time"). Similarly, with respect to the privilege of the writ of habeas corpus preserved in Article I, Section 9, Clause 2, the history of the Constitution's initial formation and establishment (over the time period from 1787 through 1791) indicates that the Founders intended that the extant common law practices and procedures associated with the writ would be incorporated into the judicial power of the United States. *Cf. Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (noting that determination of the scope of habeas review requires reference to the common law "which is in a considerable degree incorporated into our own"). The confirmation of that intent, if not its final implementation, occurred with the ratification of the Fifth Amendment and its textual incorporation through the Due Process Clause of the "law of the land" into the judicial power of the United States.

[263] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807). As the Supreme Court observed in *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796): "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."

[264] With respect to the dynamic tension between congressional power to define the jurisdiction of the inferior federal courts and the Due Process Clause, in *Battaglia v. Gen. Motors Corp*., 169 F.2d 254, 257 (2d Cir. 1948) (footnote omitted), the Second Circuit Court of Appeals commented as follows:

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.

the claimant,[265] or in the Supreme Court if no such federal district court exists.[266]

IV. THE MCA VIOLATES THE SEPARATION OF POWERS DOCTRINE

The MCA bars access to the writ of habeas corpus for any "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."[267] Consequently, the only vehicle for review of the circumstances of a Guantánamo Bay detainee's confinement is that provided by DTA § 1005(e)(2) with respect to Combatant Status Review Tribunal (CSRT) proceedings.[268]

In *Hamdan*, Justice Stevens characterized the review provided by the DTA with respect to military commission defendants as "limited,"[269] as did Justice Kennedy in his concurring opinion.[270] This characterization applies with equal if not greater force to the review process contemplated by the DTA with respect to detainees. Section 1005(e)(2)(A) places exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that "an alien is properly detained as an enemy combatant" in the Court of Appeals for the District of Columbia. However, the scope of the appellate court's review is limited to (1) whether the status determination made by the CSRT "was consistent" with the standards and procedures established by the Secretary of Defense, and (2) "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States."[271]

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[265] Rejecting the view that the place of confinement must be within the territorial jurisdiction of the district court in order for it to entertain a habeas petition, in *Ex parte Endo*, 323 U.S. 283, 306 (1944), a majority of the Supreme Court declared that "we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner." Similarly, in *Strait v. Laird*, 406 U.S. 341, 345 (1972), the Supreme Court found that habeas jurisdiction is proper even though the custodian is not physically present in the relevant district, as long as the custodian is within reach of the district court's process.

[266] In the absence of an inferior federal court system, a Justice of the Supreme Court, exercising the judicial power of the United States, could entertain a habeas petition without offending the Constitution. Article III, Section 2, Clause 2, addresses the original and appellate jurisdiction of the Supreme Court; however, since the first Judiciary Act, jurisdiction to entertain and grant writs of habeas corpus has been conferred on the Justices as individuals and separate and apart from the Court as a judicial body. If that conferral of jurisdiction is viewed as original, "then there would seem to be no reason why a denial of habeas corpus by a single Justice could not be just as effective a basis for the Court's appellate jurisdiction as a similar denial by a district judge." Oaks, *supra*, note 209, at 165.

[267] MCA § 7(a), 120 Stat 2636 (2006) (to be codified at 28 U.S.C. § 2241(e)(1)).

[268] *See* DTA § 1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (codified at 10 U.S.C. § 801).

[269] 126 S. Ct. at 2771 n.19.

[270] *Id.* at 2807.

[271] DTA § 1005(e)(2)(C).

In contrast to a habeas proceeding, the DTA's limitations on the scope of appellate review are constitutionally deficient. The DTA directs the court of appeals to focus its review solely on the CSRT enemy combatant determination; it does not authorize or contemplate review of the constitutional legitimacy of the Executive's action in taking a detainee into custody in the first place. Furthermore, notwithstanding the lack of any real opportunity for a detainee to develop favorable facts during the CSRT process, and contrary to traditional habeas practice, the DTA does not authorize or contemplate any additional factual development by the detainee with respect to the record subject to review.[272] Lastly, while the province of habeas corpus "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person,"[273] the DTA does not provide any remedy other than remand for a new CSRT proceeding.

In dissent from the denial of certiorari in *Boumediene*, Justice Breyer noted the procedural infirmities, including the lack of any mechanism to augment the record, that render the DTA review process inadequate as a mechanism for reviewing the claims raised by the Guantánamo Bay detainees.[274] Furthermore, Justice Breyer observed that the second prong of circuit court review contemplated by the DTA had been rendered a "nullity" by the *Boumediene* decision: "The lower court expressly indicated that no constitutional rights (not merely the right to habeas) extend to the Guantánamo detainees."[275]

In *Swain v. Pressley*, the Supreme Court held legislation substituting a collateral remedy for habeas corpus review "which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."[276] However, in announcing this holding, the Court did not indicate that something less than the review provided by a habeas proceeding would suffice to avoid the proscription contained in Article I, Section 9, Clause 2.

Swain involved legislation passed by Congress and applicable to the District of Columbia that substituted a new postconviction remedy for claims of sentencing error while restricting use of the petition for writ of habeas corpus for such purposes. In its analysis of this legislation, the Court found the procedure for collateral review of convictions set forth in the statute (amending section 23-110 of the District of Columbia Code) "comparable to that

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[272] In a habeas proceeding, as distinct from the DTA, the federal courts retain inherent equitable power to supplement the record "where the interests of justice require." *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004). The prejudicial impact on a detainee of the lack of any mechanism that could be used to develop facts favorable to his position is exacerbated by the DTA's allowance of a "rebuttable presumption in favor of the Government's evidence" that is to be employed by the court of appeals in the course of its review. *See* DTA, § 1005(e)(2)(C)(i).

[273] *Carafas v. LaValle*, 391 U.S. 234, 238 (1968).

[274] Boumediene v. Bush, 127 S. Ct. 1478, 1481 (April 2, 2007).

[275] *Id.* at 1480 (emphasis omitted).

[276] Swain v. Pressley, 430 U.S. 372, 381 (1977).

authorized by 28 U.S.C. § 2255 for the United States district courts."[277] Upholding the legislation as an adequate and effective substitute remedy, the Court stated as follows:[278]

> We are persuaded that the final clause in § 23-110(g) avoids any serious question about the constitutionality of the statute. That clause allows the District Court to entertain a habeas corpus application if it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant's] detention."

The review process instituted by the DTA does not mirror the procedure followed by the federal courts in conducting habeas review under 28 U.S.C. § 2241 and its predecessor statutes going back to section 14 of the Judiciary Act of 1789. Unlike the review process examined in *Swain*, the DTA fails to provide any avenue for fact development by the detainee and limits the exercise of judicial power by barring review of issues pertaining to the constitutional legitimacy of a detainee's initial capture and incarceration.[279] The DTA review process is neither an adequate nor effective substitute for habeas review; to compel its use in place of the writ is therefore a violation of the Suspension Clause.[280]

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[277] *Id.* at 375.

[278] *Id.* at 381. The only distinction noted by the Court, as between the post-conviction remedy provided by District of Columbia Code § 23-110 and that available through traditional habeas corpus review, was that the judges who administer the § 23-110 procedure "do not have the tenure and salary protection afforded by Article III of the Constitution." *Id.* at 382. The Court found this distinction immaterial insofar as it did not presage any deficiency on the part of the District of Columbia judges to decide constitutional questions. *Id.* at 382–83.

[279] In the first substantive decision to emerge from the DTA circuit court review process, the court held that the record to be submitted for its consideration, and (excepting certain highly sensitive information) for review by petitioner's counsel, consisted of the "Government Information," and not just the "Government Evidence." Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 W.L. 2067938, at *1 (D.C. Cir. July 20, 2007). The "Government Information" includes "all the information a [CSRT] Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense . . . ." *Id.* However, the recent disclosures concerning the Executive's failure to implement and conduct the CSRT proceedings in accordance with the procedures established by the Department of Defense, and the corruption of electronic files containing Government Information, undermines confidence in the capacity of the DTA to operate as a substitute for habeas review. *Id.* at 14–15 (Rogers, J., concurring).

[280] *See* Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings, CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* (2006), Seton Hall Public Law Research Paper No. 951245, *available at* http://ssrn.com/abstract=951245 ("The Government is attempting to replace habeas corpus with this no hearing process."); *see also* Boumediene v. Bush, 476 F.3d 981, 1004–07 (D.C. Cir. 2007) (Rogers, J., dissenting) (cataloging deficiencies in CSRT process and concluding that Congress "has revoked the privilege of the writ of habeas corpus . . . without providing an adequate alternative").

V. CONCLUSION

In passing the Military Commissions Act, Congress removed the jurisdiction of the federal courts to address issues pertaining to the constitutional legitimacy of the detention of alien enemy combatants. To accomplish this objective, Congress invoked its authority to define the original jurisdiction of the inferior courts and to regulate and except from the appellate jurisdiction of the Supreme Court. The MCA renders resolution of the question of the legitimacy of an alien's initial detention solely an Executive Branch function, while leaving only a limited and vestigial review function to the District of Columbia Court of Appeals. By taking these actions, Congress overstepped the limits of its constitutionally circumscribed authority and intruded upon the prerogative of the Judicial Branch to entertain and decide questions concerning the constitutionality of Executive Branch detentions as an aspect of the judicial power of the United States.[281] The function served by the Great Writ in the intricate balance of structural and dynamic relationships created by the Constitution amongst the departments of government cannot be impaired without threatening the stability of the entire edifice. As Justice Brennan observed, writing for the Court in *Fay v. Noia*:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.[282]

The Due Process and Suspension Clauses protect the Great Writ, as a necessary incident of the judicial power of the United States, against encroachment by the Executive and Legislative Branches. Although wounded by the September 11 terrorist attack, and bellicose in its communications with the nations of the world it perceives as its enemies, the United States is still a civilized society governed by the rule of law. The sovereign people of the United States are not a people given to abandoning their political responsibilities and hard won liberties in the face of fear, and the character of

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[281] *Cf.* Crowell v. Benson, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

[282] 372 U.S. 391, 401–02 (1963), overruled on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977).

this nation is not one that needs to find a Hobbesian identity by excluding those it deems to be aliens from the protection of its laws.[283]

In enacting the MCA, and attempting to bar the Guantánamo detainees from habeas review, Congress undermined one of the foundational supports of the rule of law and of the liberty enjoyed by all who find themselves subject to the laws of the United States. Fortunately, the separation of powers doctrine and the status of the Great Writ as an incident of the judicial power of the United States render the MCA and the DTA unconstitutional.

In October the Guantánamo Bay detainees will return to the Supreme Court to once again seek justice before an independent and unbiased tribunal.[284] When they do, the irony of the fact that it is the Guantánamo Bay detainees who are fighting to preserve habeas corpus as an essential component of the judicial power of the United States should encourage the Court to recognize their legal identity and to resolve their claims in accordance with the rule of law.[285]

[283] In his *Thoughts On Government*, John Adams observed: "Fear is the foundation of most governments; but it is so sordid and brutal a passion, and renders men in whose breasts it predominates so stupid and miserable, that Americans will not be likely to approve of any political institution which is founded on it." John Adams, "*Thoughts On Government*," *in* THE PORTABLE JOHN ADAMS 234 (Penguin 2004).

[284] Justice "only has meaning if it retains the spirit of dis-interestedness [sic] which animates the idea of responsibility for the other man." EMMANUEL LEVINAS, ETHICS AND INFINITY 99 (Richard A. Cohen trans., Duquesne 1985).

[285] We dedicate this Article to our client, Chaman Gul, No. 1021, who has been detained at the Guantánamo Bay detention facility since April of 2003, without trial, without access to counsel of his choice, without a full and complete disclosure of the evidence the government contends supports his classification as an enemy combatant, and without a fair opportunity to gather evidence to rebut that charge.