Jurisdiction-Stripping in a Time of Terror

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INTRODUCTION

Although the question of congressional power to limit the jurisdiction of the federal courts is a centerpiece of the federal courts canon, there are few decided cases that grapple squarely with the constitutional issues involved in jurisdiction-stripping.[1] For the past fifty years or so, jurisdiction-stripping bills have been introduced on a host of politically controversial issues[2] including racial discrimination, free speech and association, the rights of criminal defendants, state legislative apportionment, abortion, school prayer, gay marriage,[3] and environmental preservation.[4] In the end, however, Congress usually backs off; very few such bills have been enacted.[5] And while the Supreme Court has repeatedly

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1. As David Cole memorably quipped, "No issue has been more studiously avoided by the courts, and more assiduously studied by law professors, than congressional control over jurisdiction of the federal courts." David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998).

2. *See* proposals collected in RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321-22 nn.14-20 (5th ed. 2003).

3. *See* Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (withdrawing federal court jurisdiction to "hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of" the Defense of Marriage Act of 2005).

4. *See* proposed amendment to S. 2709, 108th Cong., 150 CONG. REC. S9142 (Sept. 13, 2004) (no judicial review of environmental impact statement pertaining to logging proposal) (withdrawn before vote on final bill).

5. *See, e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); 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) [hereinafter Hart, *An Exercise in Dialectic*]. Recent jurisdiction-limiting statutes include, in addition to the statutes discussed in this article, the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915 (1998); the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) (barring judicial review of discretionary relief other than asylum in immigration cases); the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (limiting jurisdiction over habeas petitions by state

said that "substantial constitutional questions" would be raised if judicial review of constitutional claims were unavailable,[6] the Court has almost always managed to resolve challenges to jurisdiction-stripping statutes on non-constitutional grounds-most recently in June 2006.[7] Both Congress and the Court have avoided confrontation.[8]

But now the Executive Branch seems determined to force the constitutional issue. After the Supreme Court rendered decisions requiring procedural safeguards for detainees in the war on terrorism,[9] and with more cases pending that raised additional claims,[10] the Administration elected to press its vision of exclusive and unfettered presidential power and its effort to make Guantanamo Bay a law-free zone where the Constitution does not operate. When the Supreme Court held in *Rasul v. Bush* that the Guantanamo detainees had a right to file habeas petitions challenging their detention and stated in a footnote that their petitions "unquestionably" described violations of the Constitution,[11] Congress passed the Detainee Treatment Act of 2005 (DTA)[12] withdrawing federal jurisdiction over habeas petitions by Guantanamo detainees.[13] Senators who opposed

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prisoners); and the Real ID Act of 2005, Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231 (2005), codified at 8 U.S.C. § 1252 (limiting jurisdiction over challenges to deportation orders based on terrorist activity).

6. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 300 (2001) ("[A] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."); *id.* at 305 ("serious" constitutional issue); Webster v. Doe, 486 U.S. 592, 603 (1988) ("serious constitutional question[s] would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); *see also* Gunther, *supra* note 5, at 921 n.113 ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights.").

7. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764-69 (2006) (jurisdiction-stripping provisions of the Detainee Treatment Act of 2005 did not apply to cases pending when statute was enacted).

8. In *Ex parte McCardle*, the Court upheld the repeal of appellate jurisdiction over habeas cases, but pointedly observed that an alternative avenue to Supreme Court review remained. 74 U.S. 506 (1869). Meanwhile, McCardle was out on bail, see 1868 U.S. LEXIS 1028 at 3, continuing to write editorials excoriating Reconstruction. Only six months after *McCardle*, the Court confirmed in *Ex parte Yerger* that the original writ of habeas was still available to obtain judicial review in the Supreme Court. 75 U.S. 85 (1869). In 1996 the Supreme Court reaffirmed the continued viability of the original writ of habeas corpus. Felker v Turpin, 518 U.S. 651 (1996). Congress did not respond to either case by attempting to foreclose the Court's jurisdiction to entertain original writs of habeas.

9. *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

10. Certiorari was granted in *Hamdan* on November 7, 2005, 546 U.S. 1002, and habeas petitions on other detainees were pending in the D. C. Cireuit. *See* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (deciding appeals of *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) and Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005)).

11. *Rasul*, 542 U.S. at 484 n.15.

12. Pub. L. No. 109-148, 119 Stat. 2739 (2005), codified at 10 U.S.C. § 801 note.

13. DTA § 1005(e), codified as 28 U.S.C. § 2241(e). The final version of the bill provided a limited alternative avenue of review of final decisions of Combatant Status Review Tribunals (CSRTs) in the District of Columbia Circuit. Even this broad withdrawal of habeas jurisdiction did not satisfy the President, who issued a signing statement defending the unitary executive power. President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to

eliminating habeas jurisdiction noted that *Hamdan v. Rumsfeld,* a habeas petition challenging the constitutionality of military commission trials of detainees, was then pending before the Supreme Court,[14] and explicitly likened the situation to that of *Ex parte McCardle.*[15]

The Administration's handling of the detainees received another blow when the Court held in *Hamdan* that the DTA's jurisdiction-stripping provisions were inapplicable to pending cases and invalidated the military commissions because they violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[16] Rather than complying with the decision, or seeking Congressional authorization of appropriate procedures as the Court strongly hinted, however, the Administration secured the passage of the Military Commissions Act of 2006 (MCA).[17] Although the MCA was presented as a compromise bill it in fact was a virtually complete victory for the President, a congressional endorsement (albeit over strong opposition in the Senate) of his broad claims of presidential power in the war on terrorism.

The statute expands the definition of enemy combatant far beyond the Supreme Court's narrow definition in *Hamdi.* Whereas *Hamdi* defined "enemy combatant" as one who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in

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Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 31, 2005), *available at* http://www.whitehouse.gov/news/releases /2005/12/20051230-8.html (last visited May 1, 2007).

14. *See, e.g.,* remarks by Senator Levin on November 10, 2005:

> In the Rasul case, which has been already decided by the Supreme Court, the Supreme Court concluded that 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. This decision of the Supreme Court would be reversed if we adopted this language. . . . [T]here is pending a decision at the Supreme Court which would be retroactively prohibited. . . . In the Hamdan case, the Supreme Court, a few days ago, agreed to determine the legality of the military commissions established by the President to try enemy combatants and about whether detainees at Guantanamo are entitled to protections under the Geneva Conventions. That case would be wiped out . . . The Supreme Court . . . would be stymied in hearing a case they have agreed to hear.

151 CONG. REC. S12663 (daily ed. Nov. 10, 2005) (statement of Sen. Levin). *See id.* at S14274 (daily ed. Dec. 21, 2005) (statement of Sen. Durbin) ("A law purporting to require a Federal court to give up its jurisdiction over a case that is submitted and awaiting decision would raise grave constitutional questions").

15. *See* 151 CONG. REC. S12664 (daily ed. Nov. 10, 2005) (statement of Sen. Levin); *id.* at S12802 (statement of Sen. Levin) (Congress "avoid[ed] repeating the unfortunate precedent in Ex parte McCardle"); *id.* at S12799 (Nov. 15, 2005) (statement of Sen. Durbin); *id.* at S12802 (Nov. 14, 2005) (statement of Sen. Levin); *id.* at S12803 (Nov. 14, 2005) (statement of Sen. Reid). For a discussion of the Senate debates on the DTA, see Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism,* 2 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 259, 261-65, 268-271 (2006). In *McCardle,* the Supreme Court upheld a statute withdrawing its jurisdiction to hear appeals in habeas cases even though the statute had been passed while *McCardle* itself, an appeal of a denial of habeas, was pending before the Court and for the purpose of preventing the Court from deciding the case.

16. *Hamdan,* 126 S.Ct. at 2759.

17. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.) [hereinafter MCA].

an armed conflict against the United States there,"[18] the MCA expands the definition to include those who have "purposefully and materially supported hostilities" against the United States or its allies.[19]

Hamdi did not authorize detention of anyone who did not actually engage in armed conflict against U.S. or allied troops in Afghanistan. The MCA, however, permits the President to treat persons captured far from any battlefield, who have not participated in any violent activity, as enemy combatants. Indeed, the Government's lawyers have taken the position in court that a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but . . . really is a front to finance al-Qaeda activities" can be classified as an enemy combatant.[20]

The MCA also makes all noncitizens who are declared to be enemy combatants subject to trial by military commission rather than the courts,[21] including even lawful permanent residents located within the United States. The provisions denying habeas review apply to all proceedings "relating to" such military commission prosecutions.[22] Additionally, the MCA authorizes the use of military commission procedures that fall short of the requirements of the Geneva Conventions, contrary to the holding of *Hamdan*; purports to give the President the power to interpret the meaning and application of the Conventions;[23] attempts to legislatively define the commissions and the MCA's amendments to the War Crimes Act into compliance with the Conventions;[24] declares that the Conventions may not

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18. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (internal quotation marks omitted).

19. Title 10, chapter 47A, subchapter 948a(1) defines "unlawful enemy combatant" as:

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

(ii) a person who on, before, or after the date 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.

20. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (quoting transcript of oral argument). Other examples included "a person who teaches English to the son of an al Qaeda member" and "a journalist who knows the location of Osama Bin [sic] Laden but refuses to disclose it to protect her source." *Id.*

21. Uniform Code of Military Justice as codified at 10 U.S.C. § 948(c) (2004)

22. *Id.* at § 950(b).

23. MCA § 6(a)(3) ("[T]he President has the authority of the United States to interpret the meaning and application of the Geneva Conventions."). The President also has the power to prescribe the punishments for offenses. 10 U.S.C. § 949(t). (Section 3 of the Military Commissions Act consists of a new chapter 47A to be added to title 10, the Uniform Code of Military Justice. For convenience I refer to these provisions of the MCA as they will be codified in Title 10.)

24. 10 U.S.C. § 948b(f) provides: "Status of Commissions Under Common Article C.—A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of Common Article 3 of the Geneva Conventions." MCA § 6(a)(2) provides, in part: "The provisions of [the War Crimes Act], as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 . . ."

be judicially enforced by any individual, including citizens,[25] despite *Hamdan*'s holding to the contrary; and prohibits the courts from using foreign sources of law in cases interpreting the War Crimes Act.[26] In addition to its express provisions, the MCA strengthens the President's assertion of legal authority in his actions toward the detainees by placing them into the highest category of deference under *Youngstown*,[27] when the President exercises his Article II powers with the express authorization of Congress exercising its Article I powers.

The MCA attempts to insulate all of these innovations from constitutional scrutiny by eliminating the possibility of judicial review. While the DTA denied habeas only for noncitizens detained at Guantanamo by the Department of Defense, the MCA purports to deny habeas (and "any other action" seeking judicial review) for any alien, regardless of geographical location, who has been "determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[28] The MCA thus strips habeas protection from lawful resident aliens detained within the United States as well as detainees at Guantanamo and other locations outside the United States.

The further effect of the jurisdiction-stripping provisions of the DTA and the MCA is to eliminate any means of enforcing *Rasul* and *Hamdan*—which is to say, to render those decisions nullities if the government does not wish to comply with them. Nothing in the DTA or MCA requires a speedy determination of enemy combatant status, or any determination at all, and no review is possible within the military or court systems until a

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25. MCA § 5(a) ("Treaty Obligations Not Establishing Grounds for Certain Claims. (a) In general.—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, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."); 10 U.S.C. § 948b(g) ("Geneva Conventions Not Establishing Source of Rights. No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.").

26. MCA § 6(a)(2) ("no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [18 U.S.C. §2441(d), the War Crimes Act]"). This provision itself is likely an unconstitutional attempt to tell the courts "how to decide a case." *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 (Jackson, J., concurring).

28. MCA § 7(a)(1), codified as 28 U.S.C. § 2241(e)(1). Section 7(a) amends the habeas statute, §2241, by striking the DTA jurisdiction-stripping provision and inserting the following:

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

final decision is made by a Combatant Status Review Tribunal (CSRT) or a military commission. It would now be possible for the administration simply not to conduct status determinations, and the affected detainees would have no way to obtain any relief. In fact, the statutes attempt to make the provisions of the Geneva Conventions, the War Crimes Act, and the substantive restrictions of the Detainee Treatment Act unenforceable as well by expressly climinating jurisdiction for any judicial review of the conditions of confinement, including interrogation through torture or cruel, inhumane and degrading treatment[29] and forced transfer of detainees to other countries for interrogation and imprisonment.[30] Unlike the DTA, which explicitly applied only to noncitizens in the custody of the Defense Department at Guantanamo Bay, the MCA's jurisdiction-stripping provisions apply to all noncitizcns who are determined to be enemy combatants.[31] The provision barring claims based on the Geneva Conventions applies to all persons, including citizens and persons who are not in custody.[32]

As one supportcr of the legislation put it:

> Congress and the president ... told the courts, in effect, to get out of the war on terror . . . It is the first time since the New Deal that Congress had so completely divested the courts of power over a category of cases. It is also the first time since the Civil War that Congress saw fit to narrow the court's habeas powers in wartime because it disagreed with its decisions. The law ... directly reverses *Hamdan* ... [33]

The DTA and the MCA not only strip jurisdiction over constitutional questions concerning the treatment of noncitizen detainees in the war on terror, but do so by purporting to eliminate jurisdiction to hear petitions for writs of habeas corpus. In the conventional account of broad congressional power to limit federal jurisdiction, habeas is the reassuring backstop that assures that even if Congress goes to the nuclear option and strips the courts of jurisdiction to hear a particular category of cases, there will, in the end, be judicial review through habeas if the constitutional question

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29. Such claims would apparently be reviewable only in the context of challenges to evidence admitted in military commission or CSRT proceedings.

30. The MCA appears to prohibit any judicial review of such transfers, *see id.*; the government has taken the position in a brief filed with the Supreme Court that sucb transfers are within the President's exclusive constitutional authority and may not bc reviewed by courts at all. *See* Zalita v. Bush, No. 06A1005 Opposition to Emergency Application for Original Writ of Injunction (U.S. Supreme Court, April 2007) at 7-8, *available at* http://www.scotusblog.com/movabletype/archives/US%20Zalita%20response%204-30-07.pdf.

31. MCA § 7(a)(1).

32. MCA § 5(a). The prohibition on the use of foreign sources of law in interpreting the War Crimes Act applies to all cases. MCA § 6(a)(2).

33. John Yoo, *Congress to Courts: "Get Out of the War on Terror,"* WALL ST. J., Oct. 19, 2006, at A18. This statement echoes Senator Graham's description of the Detainee Treatment Act as legislatively overruling *Rasul*.

involves deprivation of life or liberty.[34] Thus the question of the constitutionality of the DTA and MCA seems, to a federal courts teacher, to be a very existential question indeed.

The constitutionality of the jurisdiction-stripping provisions of the MCA will eventually come before the Supreme Court. The D. C. Circuit in February 2007 held that the MCA did withdraw jurisdiction over the Guantanamo detainees' habeas petitions, but that the withdrawal does not violate the Suspension Clause because its protection does not extend to noncitizens held outside the sovereign territory of the United States—and that, indeed, such persons have no rights under the United States Constitution.[35] The Supreme Court declined to review the decision, at least until the detainees have exhausted their opportunity for statutory review of military tribunal decisions by the D.C. Circuit.[36]

It is possible, of course, that the excursion into jurisdiction-stripping and habeas suspension could be cut short by the passage of any of several bills introduced following the return of Congress to Democratic control designed to undo various provisions of the MCA and DTA, including their jurisdiction-stripping provisions.[37] A veto of such legislation would be likely, however, and there would probably not be enough votes to override a veto.

This Article considers the validity of the jurisdiction-stripping provisions of the MCA and DTA. To begin with, neither the Suspension Clause nor conventional understandings of the limits of the Exceptions and

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34. *See* Hart, *An Exercise in Dialectic*, *supra* note 5, at 1386-1401.

35. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied,* 127 S.Ct. 1478, *reh. granted, cert. granted,* 127 S.Ct. 3078 (2007).

36. Boumediene v. Bush, 127 S.Ct. 1478 (2007). Three justices would have granted cert., *id.* at 1479 (Breyer, J., dissenting, joined by Souter, J., and [in part] Ginsburg, J.), and Justice Stevens, who clearly would have voted to reverse, joined Justice Kennedy in a statement that denial of cert. was appropriate because petitioners should be required to exhaust their remedies by appealing their CSRT determinations to the D.C. Circuit. *Id.* Since this very case makes it the law of the D.C. Circuit that Guantanamo detainees have no constitutional rights to assert, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), such "remedies" will obviously be futile (it is inconceivable that the D.C. Circuit, whose jurisdiction under the MCA is limited to matters of law, would find statutory grounds to reverse all of the petitioners' status determinations), and the only plausible explanation for Justice Stevens' vote is that he is not sure how Justice Kennedy would vote on the merits. Only two months after denying cert in *Boumediene*, the Supreme Court took the highly unusual action of reconsidering its denial of certiorari and granting review. Boumediene v. Bush, 127 S.Ct. 3078 (June 29, 2007). This action was probably precipitated by decisions dismissing two military commission proceedings for lack of jurisdiction—essentially because of sloppy statutory drafting. The MCA grants jurisdiction to hear charges against persons determined to be "unlawful enemy combatants," but, following procedures set out in the DTA, the CSRTs had only determined the defendants to be "enemy combatants," not *unlawful* enemy combatants. *See* William Glaberson, *Military Judges Dismiss Charges for Two Detainees*, N.Y. TIMES, June 5, 2007 at A1. The Supreme Court granted review in *Boumediene* after this Article was completed; accordingly, the text has not been revised to reflect this development.

37. *See, e.g.*, Restoring the Constitution Act of 2007, S. 576, 110th Cong. (introduced by Senator Dodd), http://thomas.loc.gov/cgi-bin/query/z?c110:S.576: (last visited Apr. 3, 2007). The bill also provides for expedited review of the validity of the MCA. *Id.* at § 15.

Regulations Clause would be violated by withdrawal of habeas jurisdiction so long as Congress provided an adequate statutory alternative for judicial review of detentions and convictions. Part I considers whether the statutory review in the D.C. Circuit provided by the MCA and DTA is a constitutionally adequate substitute, and concludes that, at least for the great majority of claims, it is not. *McCardle*,[38] *Yerger*[39] and *Felker*[40] suggest that if a jurisdiction-stripping statute leaves standing pre-existing alternative routes to judicial review of the legality of custody, the statute may be constitutional. Part II discusses possible alternative avenues to judicial review.

Part III considers whether, to the extent that the statutory review provided by the MCA and DTA themselves or existing alternative routes to judicial review do not provide an adequate substitute for habeas, the MCA's repeal of jurisdiction over detainees' claims of unconstitutional custody and treatment violates the Suspension Clause or the Exceptions and Regulations Clause. I conclude that the statutory review in the D.C. Circuit is constitutionally inadequate even where it applies because the procedures of the military tribunals making the initial determinations are so procedurally defective that they do not meet even the most minimal standards of due process or treaty obligations, and that the statutory alternative is not available for a large category of serious constitutional claims, including claims of mistreatment, torture, involuntary transfer to foreign countries, and failure to comply with previous Supreme Court decisions. Because the constitutional prerequisites to a valid suspension of habeas (invasion or rebellion) do not presently exist, the MCA's jurisdiction-stripping provisions violate the Suspension Clause. The MCA is also beyond Congress's power under the Exceptions Clause because it bars all judicial review of this category of constitutional claims.

Finally, I discuss the contention, which is now the law of the D.C. Circuit,[41] that neither the Suspension Clause nor any other rights under the Constitution protect noncitizens held outside the United States, and that Congress is therefore free to eliminate the habeas jurisdiction that the Supreme Court had upheld in *Rasul v. Bush*.[42] I argue that it is fundamentally unsound to frame the question as one concerning whether the Constitution "applies extraterritorially." The legality of the detainees' custody should be conceptualized not as a matter of what rights the Constitution confers on the detainees, but what constraints the Constitution imposes on the government, wherever it operates. It is a logical fallacy to

38. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

39. *Ex parte* Yerger, 75 U.S. 85, 95 (1868).

40. Felker v. Turpin, 518 U.S. 651 (1996).

41. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S.Ct. 1478, *reh. granted, cert. granted*, 127 S.Ct. 3078 (2007).

42. 542 U.S. 466 (2004).

think that the government can hold noncitizen detainees in a geographical place that is beyond the reach of the Constitution, because wherever the government operates, there the Constitution that creates the government and defines its powers and limits goes also.

I
STATUTORY REVIEW IN THE D. C. CIRCUIT

The DTA and the MCA provide a statutory avenue for limited judicial review of final decisions of military commissions and status determinations by Combatant Status Review Tribunals (CSRT). A statutory substitute for judicial review may insulate a withdrawal of habeas jurisdiction from Suspension Clause challenge. *INS v. St. Cyr* interpreted a statute-titled "Elimination of Custody Review by Habeas Corpus"—as *not* eliminating habeas jurisdiction because "a serious Suspension Clause issue would be presented" if the statute "had withdrawn that power [to issue writs of habeas corpus] from federal judges *and provided no adequate substitute* for its exercise."[43] If the potential for judicial review still exists, the withdrawal of habeas may be considered to be just part of the "evolutionary process" of the writ, the "complex and evolving body of equitable principles" that define its scope,[44] and not a suspension of the writ. This Part considers first whether the statutory avenue of review provided by the MCA and the DTA is adequate where it is available, and then describes the broad range of substantial constitutional claims by detainees where the MCA and DTA do not permit any judicial review at all. For these claims, the statutes clearly do not provide an adequate alternative to habeas review.

A. Review of Final Decisions of CSRTs and Military Commissions

The DTA, which applies to "alien[s] detained by the United States," permits a detainee to obtain judicial review of a final status determination by a CSRT in the D.C. Circuit.[45] Review is possible only after a final

43. 533 U.S. 289, 305 (2001) (emphasis supplied).

44. *Felker*, 518 U.S. at 664.

45. Section 1005(e)(2) of the DTA originally provided:

Review of decisions of Combatant Status Review Tribunals of propriety of detention—

In general—Subject to subparagraphs (B), (C), and (C), the United States Court of Appeals for the District of Columbia Circuit shall have 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 eombatant.

Limitation on claims—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

decision of a CSRT.[46] The scope of review is limited to two questions: whether the decision was consistent with the standards and procedures adopted by the Department of Defense for CSRTs, and whether the use of such standards and procedures is consistent with the Constitution and laws of the United States, to the extent that they apply.[47]

The MCA provides for review of the findings and sentence of military commissions first by the convening authority,[48] and then by a newly established Court of Military Commission Review (CMCR).[49] The scope

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> *Scope of review*—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims . . . under this paragraph shall be limited to the consideration of—
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> (i) whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal bc supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
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> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.
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> *Termination on release from custody*—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

Section 10 of the MCA amended § 1005(e)(2)(B)(i) of the DTA to replace "the Department of Defense at Guantanamo Bay, Cuba" with "the United States." MCA §10.

46. Section 1005(e)(2)(A) (D.C. Circuit shall have exclusive jurisdiction "to determine the validity of a final decision" of a CSRT); *id.* at 1005(e)(2)(B)(ii) (review limited to claims by or on behalf of an alien "for whom a [CSRT] has been conducted").

47. Section 1005(e)(2)(1)(C) provides:

> Scope of review—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims . . . under this paragraph shall be limited to the consideration of—
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> (i) whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

As originally proposed (and passed by the Senate on November 10, 2005), the statute would have limited the seope of review in the D.C. Circuit to whether the CSRT had complied with its own standards and procedures as promulgated by the Defense Department. No provision was made for review in the civilian courts of decisions of military commissions. After negotiations with senators who objected to the withdrawal of judicial review, the Graham-Levin-Kyl Amendment substituted a broader scope of review in the D.C. Circuit and added review of convictions before military commissions. The statute as enacted permits the D.C. Circuit to consider at least some claims that the proceedings violate federal law. *See id.* at §§ 1405(e)(2)(C), (e)(3)(D). After the final language was reported out of conference, Senators Graham and Kyl inserted remarks into the Congressional Record to the effect that this provision permitted only a general ehallenge to the statute as a whole whose resolution would then be stare decisis as to all other proceedings; in other words, as-applied challenges would not be permitted. Senator Levin took the opposite view of the statutory language.

The DTA's provision for review by the D.C. Circuit of convietions by military commissions has been superseded by the MCA. MCA § 9.

48. 10 U.S.C. § 950b (2006).

49. *Id.* at § 950c. The Court of Military Commission Review is to consist of one or more panels of not fewer than three appellate military judges. *Id* at § 950f(a).

of review by the CMCR is limited to questions of law.[50] After exhausting these levels of review,[51] the detainee may obtain review of a final judgment of a military commission in the D. C. Circuit.[52] The D. C. Circuit's jurisdiction is exclusive.[53] Review in the D. C. Circuit is limited to questions of law,[54] and is confined to two questions:

> (1) whether the final decision was consistent with the standards and procedures specified in this chapter; and
>
> (2) to the extent applicable, the Constitution and the laws of the United States.[55]

The federal courts may not consider any other issues relating to detention, prosecution, or commission proceedings.[56] Claims of violations of the Geneva Conventions[57] and any claims relating to conditions of confinement and treatment[58] are specifically made not subject to judicial review.

Whether this system of judicial review is adequate to avoid problems under either the Suspension Clause or the Exceptions and Regulations Clause is not clear and will depend in part on how the Court interprets the statutory terms. With respect to the DTA, the scope of review may be ambiguous. After the act was passed, Senator Kyl inserted remarks into the Congressional Record to the effect that this provision permitted only one general, facial challenge to the statute as a whole, whose resolution would

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50. *Id.* at § 950f(d).

51. *Id.* at § 950g(a)(1)(B) ("The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted").

52. *Id.* at § 950g(a)(1)(A) ([T]he United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission . . . under this chapter").

53. 10 U.S.C. § 950g(a)(1)(A).

54. *Id.* at § 950g(b).

55. *Id.* at § 950g(c). The Supreme Court may review the D. C. Circuit's decisions by writ of certiorari. *Id.* at § 950g(d).

56. MCA § 7(a) (amending § 2241(e)), *supra* note [25], prohibits all habeas review by aliens detained as enemy combatants, as well as "any other action . . . relating to any aspect of the detention, transfer, treatment, *trial*, or conditions of confinement." (emphasis supplied). In addition, 10 U.S.C. § 950j(b) specifically limits judicial review of claims relating to military commission proceedings to the review provided under the MCA by the Court of Military Commission Review and the D.C. Circuit. That section provides:

> Provisions of Chapter Sole Basis for Review of Military Commission Procedures and Actions.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

57. 10 U.S.C. § 948b(g); MCA § 5(a), *supra* note [23].

58. MCA § 7 (codified at 28 U.S.C. § 2241(e)), *supra* note [25].

then be stare decisis as to all of the proceedings. In other words, as-applied challenges would not be permitted:

> Nor does it invite an as-applied challenge. All that this language asks is whether using these systems is good enough for the ends that they serve—to justify continued detention or to try an enemy combatant for war crimes. The only thing that this provision authorizes is, in effect, a facial challenge. In fact, we anticipate that once the District of Columbia Circuit decides these questions in one case, at least so long as military orders do not substantially change, that decision will operate as circuit precedent in all future cases, with no need to relitigate this second inquiry in the future. In effect, the second inquiry—into the constitutionality and lawfulness of the use of CRSTs and commissions—need only be decided once by the court.[59]

If Senator Kyl was correct in his interpretation, then for most detainees and most claims, the review provided by the statute will be essentially ineffective. The statute already prevents review of the correctness of the decision, as well as any matters that cannot be tied to the operation of the standards and procedures governing the tribunal. If only facial challenges can be raised, and if every litigant after the first one will be bound by stare decisis, the process will not be even a minimally effective substitute for habeas.

However, the statutory language does not appear consistent with Senator Kyl's interpretation. The court is permitted to review "whether the *use*" of the standards and procedures "to make *the* determination"—presumably, the determination with respect to the particular detainee—is consistent with the Constitution and laws.[60] These words suggest an individualized determination that can accommodate an as-applied challenge.

Even if the statutory language is interpreted to permit as-applied challenges, the restriction of the scope of review to the "use" of the administrative standards and procedures and the prohibition of any review of CSRT fact-finding, even under a deferential standard, raise serious questions whether the statutory review of CSRT determinations is a constitutionally adequate substitute for habeas. For example, what if a CSRT determination was based on a factual finding that was not supported by any evidence in the record? Or what if a detainee complained of a constitutional error in the proceedings that did not stem from the use of the Department of Defense (DoD) standards or procedures, or of being subjected to torture or cruel, inhuman or degrading treatment?

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59. 151 CONG. REC. S14256, 14267 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).
60. H.R. 1815, 109th Cong. § 1405 (2006) (enacted).

In contrast to the DTA, the MCA appears to provide for a broader, or at least less ambiguous, scope of review of questions of law. The grammatical structure of the statutory text suggests that consideration of the Constitution and laws is not limited to the use of the standards and procedures specified in the MCA, but includes all questions arising under the Constitution and laws. The D.C. Circuit's jurisdiction extends only to review of the "validity of the conviction," however, and not to any other matters such as conditions of confinement, transfer, or continued detention as an enemy combatant.

The CSRT proeedures deviate substantially from what would normally be considered necessary process to justify prolonged detention, for example in the presumption in favor of the government's evidence, the authority to base the decision on evidence not disclosed to the detainee, limitations on the detainee's ability to obtain evidence and witnesses on his behalf, lack of provision for representation by a lawyer, and relaxed rules of evidence. It would be possible under the statute for a person to be determined to be an enemy combatant on the basis of coerced testimony he was not allowed to see and that was presumed by the tribunal to be correct. It is unlikely that the limited scope of review permitted by the DTA could be considered an adequate substitute for habeas or any traditional form of judieial review of the legality of custody. The commission procedures specified in the MCA are better than the CSRT procedures, though they fall far short of what we normally think of as minimum requirements of due process. For example, convictions can be based on evidence which defendants are not permitted to sce,[61] coerced testimony can be used,[62] the right against compulsory self-incrimination does not apply,[63] summaries can be substituted for evidence,[64] and defendants can be convicted and even sentenced to death by vote of fewer than all of the commission members.[65]

In both cases, the Court could construe the statutes to permit due process challenges to these procedures. The Court's willingness to approve substantially relaxed due process standards for status determinations in *Hamdi* because of the perceived exigencies of national security, together with its willingness in *Felker* to approve administrative procedures that are substantially less favorable to individuals than the judicial procedures they replace and its traditional unwillingness to create obstacles for the

61. 10 U.S.C. §§ 949d(f)(2), 949j(c).

62. *Id.* §§ 948r(d), 949a(b)(2)(C).

63. *Id.* § 948b(d)(1)(B).

64. *Id.* § 948d(f)(2)(A).

65. *Id.* § 949m(a) (conviction by 2/3 vote of members present when vote is taken); *id.* § 949m(b)(1)(C) (sentence of death requires concurrence of all members present when vote is taken); *id.* § 949m(b)(2) (3/4 vote of those present required for sentence of more than 10 years or life); *id.* § 949m(b)(3) (all other sentences require concurrence of 2/3 of those present).

executive branch in military and national security matters, suggest that at least for cases in which t which review in the D.C. Circuit is available, they might be upheld. Statutory construction will probably broaden the type of constitutional questions, at least, that can be presented.

Judicial review of such questions can be only as good as the record created by the military tribunals, however, and the MCA limits review to questions of law. Both the MCA and the DTA prevent detainees from having access to witnesses and primary evidence on grounds of national security and permit the commission to admit evidence obtained by coercion. These relaxed evidentiary rules, to be administered by military personnel rather than the judicial branch, would ordinarily be considered the kinds of circumstances where fact-finding should not be completely insulated from judicial review. Whether the D.C. Circuit or the Supreme Court would consider the ability to overturn clearly erroneous, unsupported, or constitutionally suspect fact finding to be within the scope of review of "matters of law" has yet to be determined.

Judicial review of factual findings is especially important in the detainee cases, where it has been widely acknowledged that many of the detainees had no connection to terrorism when they were taken into custody. An extreme example is the case of Abdul Rahim Al Ginco, a twenty-two year old former college student who contests his detention on grounds that he could not possibly have fought against the United States in Afghanistan because he was in a Taliban prison, being tortured by al Qaeda operatives for being an American spy.[66] It is difficult to predict whether the Court will uphold the prohibition on reviewing findings of fact, but it has allowed review of factual findings to be severely constricted in cases decided under the Antiterrorism and Effective Death Penalty Act (AEDPA). Recent CSRT proceedings have aired allegations of coerced

66. Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006. A videotape he made under torture was found in an al Qaeda house, and after Attorney General Ashcroft publicized his picture as evidence of al Qaeda "suicide terrorists" Ginco was transferred to Guantanamo, where he has remained since 2002. In the videotape, Ginco said he was corrupted by an "evil acquaintance" in college who introduced him to "a computer game called PlayStation" and introduced him to an American embassy official named "Shamoyel Anty," an agent of "the Israeli intelligence agency." *Id. See* al-Ginco v. Bush, No. 06-5191, 2007 U.S. App. LEXIS 5689 (D.C. Cir. Mar. 6, 2007) (directing that motions, including dispositive motions, be filed in light of Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), which held that Guantanamo detainees have no right to habeas or other constitutional rights).

confessions,[67] and such considerations could make the Court feel less comfortable about allowing the government a free hand.[68]

B. *Cases For Which No Statutory Alternative Is Provided*

Even if the statutory provision for review by the D.C. Circuit is an adequate substitute for habeas in cases where it applies, there are many gaps in which the DTA and MCA provide no possibility of judicial review whatsoever.

1. *Conditions of Confinement*

Both the DTA and the MCA expressly forbid habeas petitions concerning conditions of confinement. This would include allegations of torture or cruel, inhuman or degrading treatment (prohibited by statute and by the Geneva Conventions), involuntary transfer to other countries (extraordinary rendition, or "rendition to torture"), denial of medical care, and similar claims. Even petitioners who had received final determinations by CSRTs or who had been convicted by military commissions would have no way to raise these claims, because they would not relate to the validity of their convictions or status determinations, and because they are expressly excluded by the statutes. The MCA also abolishes jurisdiction over "any other action" against the government or its agents brought by detainees who have been found to be enemy combatants, which is apparently intended to prevent detainees from claims concerning their conditions of confinement through *Bivens* actions or other damages actions.

The United Nations has issued a report concluding that Guantanamo detainees were being subjected to degrading treatment in violation of the International Covenant on Civil and Political Rights (ICCPR),[69] and torture

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67. *See* Adam Liptak, *Suspected Leader of Attacks on 9/11 Is Said to Confess*, N.Y. TIMES, Apr. 15, 2007, *available at* http://select.nytimes.com/search/restricted/article?res=F40D14FA35550C768DDDAA0894DF404482; Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024 (Mar. 10, 2007), http://www.defenselink.mil/news/transcript_ISN10024.pdf. In the transcript, Khalid Sheikh Mohammed appears to claim that he falsely implicated other detainees as a result of coercion. *Id.* at 15.

68. Public awareness of allegations of torture and cruel, inhuman and degrading treatment of detainees at Abu Ghraib, Guantanamo and CIA "black sites" likely contributed to the Court's willingness to find a role for the civilian courts in *Rasul*, *Hamdi* and *Hamdan*.

69. The Administration contends that the ICCPR does not apply outside the borders of the United States, and therefore it is not required to comply with the treaty at Guantanamo. *See* Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR) (July 17, 2006) (statement to U.N. Human Rights Committee by the deputy director of policy planning for the Department of State), *available at* http://www.state.gov/g/drl/rls/70392.htm ("U.S. obligations under the Covenant do not apply outside of U.S. territory").

as defined in the Convention Against Torture.[70] Such treatment violates the Torture Act, the UCMJ, and, after the date of enactment, the MCA in addition to the international agreements themselves. The report also found several other violations of the Convention Against Torture, including force-feeding of detainees, excessive violence during transportation, and rendition to countries where there is a substantial risk of torture, as well as other violations of international law. The report recommended that the Guantanamo Bay detention facility be closed "without further delay,"[71] and that the government "should either expeditiously bring all Guantanamo Bay detainees to trial . . . or release them without further delay."[72] Civil liberties organizations as well as mainstream journalists have also documented widespread occurrences of atrocious treatment.

The statutory prohibition of judicial review of claims about conditions of confinement, particularly in light of the well-documented, independent evidence of mistreatment of detainees, raises a substantial constitutional question. Habeas would traditionally have been available for such serious claims of deprivation of an important liberty interest, and the denial of all judicial review seems to be a clear violation of even the most lenient standard of due process. In addition, the complete denial of judicial review of constitutional claims is beyond Congress's power under the Exceptions and Regulations Clause.[73]

2. *No Provision for Interlocutory Review*

Statutory review in the D.C. Circuit is only available of final decisions of CSRTs and military commissions. Detainees whose CSRT determinations have not become final, or who have never had a CSRT proceeding or a military commission hearing, are covered by the elimination of habeas jurisdiction but they have no alternative means of judicial review. The MCA explicitly makes the speedy trial provisions of the UCMJ inapplicable to detainees.[74] There is no requirement in the DTA for a speedy determination of combatant status, or indeed, any determination at all. Before *Rasul,* the government held many detainees for

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70. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶¶ 87, 88, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (*prepared* by Leila Zerrougui, et. al.).

71. *Id.* at ¶ 96.

72. *Id.* at ¶ 95.

73. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) ("serious constitutional question[s] would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); Bowen v. Mich. Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986) ("[All] agree that Congress cannot bar all remedies for enforcing federal constitutional rights" (quoting *Gunther, supra* note 5, at 921 n.113)). *See supra* notes 211-20.

74. 10 U.S.C. § 948b(d)(1)(A).

as long as three years without a hearing.[75] After the MCA and the DTA, detainees would have no statutory remedy were the government again to deny hearings. Although *Rasul* requires that detainees receive a neutral determination of their combatant status, after the MCA there is no means for them to obtain judicial enforcement of that requirement.

3. *Detainees Who are not Enemy Combatants*

The DTA does not provide an avenue of review for detainees who have been determined not to be enemy combatants, but who have not been released. There is a significant number of such detainees,[76] whom the government says it is continuing to detain because it cannot find a country to accept them.[77] In the immigration context, it has been held that an illegal immigrant who cannot be deported to any country cannot be imprisoned indefinitely, but must be released.

4. *Extraordinary Rendition*

The government's practice of "extraordinary rendition," sometimes called "rendition to torture," whereby it transports detainees to other countries such as Egypt, Syria, or Yemen for interrogation, has been well documented, and convincing evidence has been produced that many of these detainees were tortured by the foreign transferee governments (some of whom are on the U.S. government's terrorist list).[78] Nearly sixty detainees have sought to block their transfer to other countries without their consent.[79] Some judges entered orders requiring prior notice of

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75. A vivid example is that of Abdul Rahim Al Ginco, *supra* text accompanying note 66, a twenty-two year old former college student who contests his detention on grounds that he could not possibly have fought against the United States in Afghanistan because he was in a Taliban prison, being tortured by al Qaeda operatives for being an American spy. Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006. *See also* Rasul v. Bush, 542 U.S. 466, 470-71 (2004) (14 petitioners in that case held, "along with approximately 640 other non-Americans," since 2002); Golden, *supra* note 66.

76. *See, e.g.*, Craig Whitlock, *82 Inmates Cleared But Still Held at Guantanamo*, WASH. POST, Apr. 29, 2007, at A1.

77. *See id.;* 151 CONG. REC. S14256, 14271 (daily ed. Dec. 21, 2005) (statement of Sen. Durbin).

78. *See, e.g.*, Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, *available at* http://www.newyorker.com/fact/content/?050214fa_fact6; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in "Rendition"*, WASH. POST, Dec. 4, 2005, at A1.

79. *See* Habib v. Bush, No. 02-CV-1130 (CKK) (D.D.C. filed Nov. 24, 2004); Al-Masri v. Tenet, No. 05-1417 (E.D. Va. filed Dec. 6, 2005); Abdah v. Bush, No. 04-CV-1254 (HHK), 2005 U.S. Dist. LEXIS 4942 (D.D.C. Mar. 29, 2005) (preliminary injunction granted); Abdah v. Bush, No. 04-CV-1254 (HHK), 2005 U.S. Dist. LEXIS 4144 (D.D.C. Mar. 12, 2005) (TRO granted); *cf.* Sliti v. Bush, 407 F. Supp. 2d 116 (D.D.C. 2005) (request of detainees, including Sami Al Laithi, for preliminary injunction denied). For reports on the efforts by detainees to avoid rendition by resort to the federal courts, *see, e.g.*, Carol D. Leonnig, *Guantanamo Detainee Says Beating Injured Spine; Now in Wheelchair, Egyptian-Born Teacher Objects to Plan to Send Him to Native Land*, WASH. POST, Aug. 13, 2005 at A18 (detainee Sami al-Laithi, who had been exonerated in May 2005 by a CSRT); Neil A. Lewis, *Detainee Seeking to Bar His Transfer Back to Egypt*, N.Y. TIMES, Jan. 6, 2005 at A24

transfer (to permit court challenges); others have denied such orders, and in some cases the detainees have then been sent to other countries, including Egypt. The government has filed motions to dissolve these orders, citing the jurisdiction-stripping provisions of the MCA, which specifically eliminate jurisdiction over both habeas petitions and "any other action . . . relating to any aspect of the . . . transfer" of an alien detained by the United States as an enemy combatant.[80] In *Zalita v. Bush*, a case in which the government acknowledges that it intends to transfer the petitioner to Libya against his will, the petitioner was twice able to obtain a court order forestalling rendition.[81] The government has now moved to dismiss under the MCA, and argues in its brief to the Supreme Court that transfers *out of* United States custody are not proper subjects for habeas relief because the transfer would end the detention by the United States (though not, of course, the deprivation of liberty of which the United States is the but-for cause).[82] More fundamentally, the government argues that transfers to other countries involve a "quintessential foreign affairs function within the sole province of the Executive" and thus are not subject to judicial review.[83] The government also relies on the MCA to argue that claims of violations of the Geneva Conventions are no longer judicially enforceable.[84] Claims that involuntary transfers to countries that practice torture violate substantive and procedural due process, as well as the Geneva Conventions, the Convention Against Torture, and the Refugee Convention, are also being litigated in actions for injunctive and

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(Mamdouh Habib); Carol Rosenberg, *U.S. Returns Guantanamo Detainee to Egypt*, THE MIAMI HERALD, Oct. 4, 2005 (after denial of injunction, al-Laithi rendered to Egypt).

80. MCA § 7(a). The cases were held in abeyance pending decision of *Al-Odah* (*Rasul* on remand) and *Boumediene*. Following its decision in *Boumediene* that Guantanamo detainees lacked constitutional rights, the D.C. Circuit invited the submission of dispositive motions. Al-Ginco v. Bush, No. 06-5191, 2007 U.S. App. LEXIS 5689 (D.C. Cir. Mar. 6, 2007).

Another pending habeas case seeking to block transfer abroad is that of Ali Salah Kahlah al-Marri, a U.S. college student and legal resident being held in the United States. The denial of his habeas petition, *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006), is on appeal to the 4th Circuit. Al-Marri also filed a *Bivens* action seeking declaratory and injunctive relief from his conditions of confinement. *See* Al-Marri v. Rumsfeld, No. 2:05-2259-HFF-RSC, 2006 U.S. Dist. LEXIS 39838 (D.S.C. June 14, 2006). Both actions may be subject to dismissal pursuant to the MCA.

81. Zalita v. Bush, No. 06A1005, U.S. Supreme Court (emergency application for original writ of injunction). The petition involves classified information and is not publicly available; the government's Opposition to Emergency Application for Original Writ of Injunction, filed in April 2007, is available at http://www.scotusblog.com/movabletype/archives/US%20Zalita%20response%204-30-07.pdf. A description of the case is available, Posting of Lyle Denniston, *Court Allows Detainee Transfer to Libya, available at http://www.scotusblog.com/movabletype/archives/2007/05/government_defe.html.*

82. Zalita v. Bush, No. 06A1005, Opposition to Emergency Application for Original Writ of Injunction (U.S. April 30, 2007) at 7-8, *available at* http://www.scotusblog.com/movabletype/archives/US%20Zalita%20response%204-30-07.pdf.

83. *Id.* at 12.

84. The government also argues that the Convention Against Torture and the Refugee Convention are not individually enforceable. *Id.* at 9-10.

declaratory relief brought under § 1331, the general federal question statute.

5. Claims of Violations of the Geneva Conventions.

In *Hamdan,* the Supreme Court found that the Geneva Conventions had been incorporated into the UCMJ through its reference to the "laws of war," and invalidated the military commission procedures under which Hamdan was to be tried as violations of Common Article 3. Many of the hundreds of pending habeas claims, including challenges to CSRT determinations and to trial by military commissions, raise claims under the Geneva Conventions. The MCA, however, prohibits the invocation of the Geneva Conventions "in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States . . ."[85] The Act withdraws jurisdiction over this entire category of claims, a class of claims that have previously been upheld by the Supreme Court in a habeas case. Additionally, because Congress did not in any way repudiate the United States's obligations under the Geneva Conventions (and in fact declared military commissions to be "regularly constituted courts" under Common Article 3[86]), this provision is unconstitutional under *Marbury*[87] and *Klein.*[88]

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Taken together, there are a vast number of claims of violations of constitutional, statutory, and international law for which the statutory avenue of review is not available. Even if the procedures for judicial review in the D.C. Circuit are an adequate substitute for habeas in the cases where they are available, hundreds of detainees have already asserted claims previously cognizable in habeas that would be wiped out by the MCA.

II
ALTERNATIVE AVENUES OF REVIEW OUTSIDE THE ACTS

McCardle, *Yerger*, and *Felker* teach that it may be permissible to eliminate statutory forms of habeas so long as another route to habeas remains. This doctrine is a double-edged sword for habeas petitioners. If the alternative avenue of review is narrow or impractical, the actual effect may be to uphold a drastic contraction of habeas on what amounts to an

85. MCA § 5(a).

86. 10 U.S.C. § 948b(f) provides:

"Status of Commissions Under Common Article 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."

87. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

88. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

illusory promise. This was the case in *Felker*,[89] where the Court upheld a withdrawal of habeas jurisdiction because of the nominal availability of review by an original writ of habeas in the Supreme Court, a device that had not been used in decades and would certainly never provide a means of reviewing any significant number of cases. On the other hand, if the MCA and the DTA left standing mechanisms for judicial review with the capability to accommodate substantial constitutional claims, civil libertarians might be satisfied.

A. Applicability to Pending Cases

Before considering whether alternative avenues of review exist, a threshold issue is whether the MCA's jurisdiction-stripping provisions apply to pending cases. In *Hamdan,* the Supreme Court held that the jurisdiction-stripping provision of the DTA did not apply to cases pending when the statute was enacted, on the basis of language inserted by the Graham-Levin-Kyl Amendment.[90] The MCA attempted to plug this loophole by substituting the following language:

> The [jurisdiction-stripping provision] 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, trial, treatment or conditions of detention of an alien detained by the United States since September 11, 2001.[91]

Although lawyers for the detainees argue that this provision also does not apply to pending cases, the D.C. Circuit has held that it meets the clear statement rule for withdrawing habeas jurisdiction[92] and the Supreme Court is likely to agree.

B. Alternative Avenues of Judicial Review

Habeas is a bit like an onion. It begins with the common law writ of habeas corpus that was available in 1789. Statutory additions and changes were made from time to time, beginning with § 14 of the Judiciary Act of 1789, and including, among others, the statutes of 1867 and 1868 involved in *McCardle* and *Yerger*, and AEDPA, at issue in *Felker.* The central premise of *McCardle* is that unless there is an exceptionally clear statement otherwise, statutory changes do not revoke what existed before. The Court has continued to maintain that principle. *St. Cyr* invoked the "long-standing rule requiring a clear statement of congressional intent to repeal

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89. Felker v. Turpin, 518 U.S. 651 (1996).

90. *See* Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. CR-CL (forthcoming 2007).

91. MCA § 7(b).

92. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

habeas jurisdiction."[93] The new procedures may be so superior that the old ways fall into disuse, but if the new procedures are repealed or otherwise are no longer available, the old ones remain available, like the inner layers of the onion.

The DTA was framed quite simply as an amendment to the federal habeas statute, 28 U.S.C. § 2241, eliminating habeas for Guantanamo detainees. It was possible to argue that the DTA left untouched several avenues of review, including a constitutionally-protected common law right of habeas, an original writ of habeas in the Supreme Court, authorization for a writ of habeas under the All Writs Act, 28 U.S.C. §1651 (with subject matter jurisdiction provided by the general federal question statute, § 1331), mandamus under § 1351, or potential appellate jurisdiction.[94]

The MCA's habeas-stripping provision is framed in the same way, as an amendment to § 2241 eliminating the right to habeas for all noncitizens labeled as enemy combatants.[95] However, the MCA also amends § 2241 to eliminate jurisdiction over "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such persons.[96] Any suggested alternative avenue of review will have to avoid the "any other action" provision as well.

1. Common Law (or Constitutional) Habeas

The Court has long recognized habeas as an "immemorial right[]."[97] Indeed, the Court has stated, "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."[98] In *Rasul,* the Court recognized that habeas is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law."[99] As such, it is "an integral part of our common-law heritage."[100] The Court has made it equally clear that the "historical core" of habeas is as "a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[101]

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93. INS v. St. Cyr, 533 U.S. 289, 299 (2001) ("Congress must articulate specific and unambiguous statutory directives to effect a repeal.").

94. *See generally* Alexander, *supra* note 91.

95. MCA § 7, §2241(e)(1).

96. MCA § 7, §2241(e)(2).

97. *Ex parte* Yerger, 75 U.S. 85, 95 (1868).

98. *Id.*

99. Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945)).

100. *Id.* (quoting Preiser v. Rodriguez, 411 U.S. 475, 485 (1973)).

101. *Id.* at 474 (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

The Constitution clearly presupposes the existence of habeas, in much the way that the Court has held it presupposes state sovereignty,[102] and provides specific protection for it in the Suspension Clause. The scope of habeas that is mandated by the Suspension Clause is often referred to as "constitutional habeas" or the "constitutional writ." It is probably better to think of the "constitutional habeas" that is protected by the Suspension Clause as a certain scope of access to the writ rather than a particular type or category of habeas. Because the Suspension Clause presumes a then-contemporary understanding of the habeas that it protects, it may also be descriptive to refer to "common-law" or "pre-constitutional" habeas. Adding to the lack of precision in this area, the Supreme Court has never squarely decided whether the Suspension Clause protects only the scope of the writ as it existed in 1789, or a conception that has evolved and expanded as our notions of both habeas and constitutional rights have changed.[103]

The extent to which this foundational right to habeas depends on action by Congress is somewhat unclear. *Ex parte Bollman* held that the power to issue the writ was not inherent but required statutory authorization[104]—though the opinion suggests that Congress may have been constitutionally obligated to pass such a statute.[105] Some scholars have argued that in the founding period the federal courts did have common law and state law powers to issue writs of habeas corpus even without statutory authority.[106] And *Yerger* intimated that the Supreme

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102. "[Habeas] was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors." *Ex parte Yerger*, 75 U.S. at 95. *Cf., e.g.*, Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).

103. *Compare* Felker v Turpin, 518 U.S. 651, 663-64 (1996) ("[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."), *with* INS v. St. Cyr, 533 U.S. 289, 300-01 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"); *see also* Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977) (reserving the question, while suggesting that Congress may not "*totally* repeal" all post-18th century developments in the law) (emphasis in original).

104. "The power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

105. "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 shall 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." *Id.* at 95 (emphasis supplied). *See also* Eisentrager v. Forrestal, 174 F.2d 961, 965 (D.C. Cir. 1949), *rev'd sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950) ("if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute" (quoted in Rasul v. Bush, 542 U.S. 466, 477-78 (2004))).

106. Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So*, 51 ALA. L. REV. 531 (2000); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006) [hereinafter Pfander, *The Limits of Habeas Jurisdiction*]; James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*].

Court would have habeas power even if Congress had not enacted a jurisdictional statute.

> The terms of [the Suspension Clause] necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.[107]

Yerger also asserted that the scope of the habeas power in the United States, where it is guaranteed by the written Constitution, could not be less than that guaranteed in the Habeas Corpus Act of 1679 in England.

> It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts in England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.[108]

The Court has continued to hold that the Suspension Clause protects the scope of habeas *at least* as it existed in 1789,[109] and it may protect the broader scope of habeas as we know it today.[110]

Whether or not courts of the United States could exercise common law habeas powers without statutory authorization, the Court held in *Bollman*[111] that § 14 of the First Judiciary Act created an independent writ of habeas corpus that could stand alone and did not need a separate jurisdictional grant. Thus, at the center of the habeas onion lie the pre-constitutional, common law writ of habeas (given constitutional stature by the Suspension Clause) and the §14 statutory writ.

It is at least debatable whether the MCA's revision of § 2241(e)(1) meets the "exceedingly clear statement" standard necessary to roll back not only the previously existing statutory right to habeas under § 2241 (the basis of the Supreme Court's decisions in *Rasul* and *Hamdan*) but also the

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107. *Ex parte* Yerger, 75 U.S. 85, 95-96 (1868).

108. *Id.*

109. INS v. St. Cyr, 533 U.S. 289, 300-01 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'") (citation and footnote omitted).

110. Felker v Turpin, 518 U.S. 651, 663-664 (1996) ("[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."); *see also* Swain v. Pressley, 430 U.S. 372, 380 n.13 (reserving the question, while suggesting that Congress may not "*totally* repeal" all post-18th century developments in the law) (emphasis in original); *id.* at 384-85 (Burger, C.J., concurring in part and concurring in the judgment) (Suspension Clause protects only the writ as it existed when the Constitution was drafted).

111. 8 U.S. (4 Cranch) 75 (1807).

pre-constitutional common law right to habeas.[112] On its face, the language appears to refer merely to the statutory writ granted by § 2241.

The difficulty lies with § 2241(e)(2), the "any other action" provision. That language is sweeping. By separating the jurisdictional prohibitions into two separate statutory subsections, however, the MCA is at least ambiguous (and therefore not "exceedingly clear") on this point. Section 2241(e)(1) deals with habeas, and it does not seem to go beyond eliminating the review previously available under §2241. Section 2241(e)(2) applies to "any *other* action"—that is, not a habeas action. Thus, § 2241(e)(2) might bar an action for damages (although the statute might thereby violate the due process clause), but that subsection would not be read to apply to theories of habeas jurisdiction. To be sure, this argument requires some sleight of hand, in that "habeas" in § (e)(1) is interpreted to mean "habeas under § 2241" and then § (e)(2) is read to mean "any action other than any kind of habeas action." This is, however, the kind of strict reading that is often given statutes under the clear statement standard. However persuasive this argument may be on its own merits, it is likely to get short shrift from the courts for a pragmatic reason. The petitioners in *Hamdan* and *Boumediene* used a similar argument from statutory structure in support of their contention that the MCA does not apply to pending cases. The retroactivity argument is not very convincing, and the courts that have considered it, including the judges who dissented on other points, have rejected it out of hand. Because of the apparent structural similarity of the two arguments, judges who have already considered and rejected the retroactivity argument will, in my opinion, be disposed to reject the common law habeas-stripping argument without looking at it closely.

Arguments about whether particular statutes grant *jurisdictional* power in habeas cases may go further than is necessary today. *Bollman* and *Yerger* were decided before 1875, when general federal question jurisdiction was unavailable and specific jurisdictional grants were necessary, and when the common law writ system was still in place. Today we would normally use three separate concepts to analyze whether a case can be brought: the existence of a substantive right (for example, the right to due process, the right against compelled self-incrimination, or rights guaranteed by the Geneva Conventions); the existence of a cause of action (such as an action for wrongful death, a *Bivens*-type action, or an action under 42 U.S.C. § 1983); and subject matter jurisdiction, the power of the court to hear that type of case.

The existence of the substantive right (e.g., whether the Geneva Conventions confer individually enforceable rights, whether the Bill of Rights protects noncitizens imprisoned outside the United States, and if so,

112. The possible survival of habeas jurisdiction under §14 outside of §2241 is discussed *infra*.

the content of that protection) goes to the merits. So long as the substantive claim arises under federal law (including treaties), the general federal question statute, § 1331, provides subject matter jurisdiction whether or not a specialized habeas statute was available. The only remaining element is the "cause of action."

Just as § 1983 provides a cause of action for plaintiffs who are deprived of federal rights by persons acting under color of state law, habeas provides an analog to a cause of action for petitioners who are in custody in violation of the Constitution or laws. In both cases the substantive law defines the scope of the right, and § 1983 or habeas provides the vehicle for getting into court.[113]

If the common law writ of habeas corpus has not been abolished, therefore, it could provide the third ingredient without having to also constitute a grant of jurisdiction. *Yerger*, *Felker*, and *St. Cyr* tell us that when new statutory rights were enacted, the old forms of habeas corpus were not abolished but remained available for use if needed. The writ of habeas corpus has been in use continuously since before the founding, even if the scope of the writ has gone through an "evolutionary process."[114] Like other common law writs, such as mandamus and prohibition, it has survived to our time. Indeed, the respondent and amici on the government's side in *Felker* argued that it is precisely the common law writ against executive detention that the Suspension Clause protects.[115] If additional authorization for the issuance of the writ were needed, it could be found in the All Writs Act, as discussed below.[116]

If the writ of habeas corpus indeed has the ancient, pre-constitutional antecedents that the Court has repeatedly affirmed, and if, as the Court has also repeatedly held, amendments to later enactments such as § 2241 do not disturb the pre-existing routes to habeas, then the argument that when the MCA eliminated the statutory right to habeas in § 2241, the historical, nonstatutory entitlement to habeas remained in force is at least entitled to very serious consideration.[117]

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113. For example, Hamdan's habeas petition alleged violations of his right to a speedy trial (UCMJ, Art. 10; Geneva Convention, Art. 3; and federal regulations); pre-sentencing judicial process (Geneva Conventions, Common Article 3); constitutional right not to be tried by a military commission that had not been authorized by Congress; equal protection; 42 U.S.C. § 1981; constitutional and statutory right not to be tried by a military commission whose subject matter jurisdiction contravenes the recognized laws of war; and right to be subject to prosecution only for the offenses authorized in the presidential order creating the military tribunals. Petition for an Extraordinary Writ, or, in the Alternative, for an Original Writ of Habeas Corpus at 4, *In re* Hamdan, No. 05-790 (U.S. June 29, 2006).

114. *See* Felker v. Turpin, 518 U.S. 651, 664 (1996).

115. *See* Brief for Respondent, *Turpin*, 518 U.S. (1996) (No. 95-8836); Brief for the United States as Amicus Curiae, *Turpin*, 518 U.S. (1996) (No. 95-8836).

116. 28 U.S.C. §1651; *see infra* notes 136-139.

117. In their statement on the denial of cert. in *Boumediene*, Justices Stevens and Kennedy went out of their way to hint that habeas may be available under § 2241 even after passage of the MCA.

2. *Original Writ of Habeas in the Supreme Court*

The statute at issue in *Felker* amended § 2244(b) to limit second or successive habeas petitions. The Supreme Court held that this limitation did not affect the Court's authority to hear an original writ filed in the Supreme Court, because Congress had not clearly stated its intention to abolish that jurisdiction.

> No provision of [the statute] mentions our authority to entertain original habeas petitions . . . Although [the statute] precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.[118]

As in *Yerger*, the Court said, it would not find repeal by implication. Similarly, in *INS v. St. Cyr*, the Court held that Congress can take away jurisdiction only by so stating with unmistakable clarity.[119]

There is no specific mention in the text of either statute or in the floor debate of the original writ of habeas in the Supreme Court. To the contrary, in the floor debate on the DTA Senator Graham confirmed that the statute did not reach anything but statutory habeas under § 2241 because, he explained, no habeas petitions had been filed asserting any other grounds for judicial review.[120] Thus, even though § 2241 also authorizes the original writ in the Supreme Court, the Court could find that Congress did not clearly state an intention to abolish that form of habeas, but only the ordinary writ, filed in the lower federal courts. This approach would allow the Court to avoid the conclusion that Congress intended, without any specific discussion, to eliminate what has been considered a fundamental backstop to judicial review and due process ever since *McCardle* and *Yerger*. The approach also has the advantage of opening only a small hole in the Act. The original writ only pertains to review by the Supreme Court

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Boumediene v. Bush, 2007 U.S. LEXIS 3783 ("If petitioners later seek to establish that the Government has unreasonably delayed proceedings under the [DTA], or some other and ongoing injury, alternative means exist for us to consider our jurisdiction . . ."); *see* 28 U.S.C. §§ 1651(a), 2241. "Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, 'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.'" (citation omitted).

118. *Id.* at 660.

119. INS v. St. Cyr, 533 U.S. 289, 298-99 (2001).

120. *See* 151 CONG. REC. S12652, 12663 (Nov. 10, 2005) (statement of Sen. Graham) ("The habeas corpus writ that is being exercised does not come from the Constitution. . . . This is an interpretation of a statute we passed, 2241."); *id.* at S12731 (statement of Sen. Graham) ("Habeas petitions are not coming from the Constitution. They are coming from an interpretation of section 2241."); *see also id.* at S12659 (statement of Sen. Kyl) ("No one argued in the Rasul case that the Constitution required habeas corpus petitions. It was, rather, a matter of statutory construction. . . . We have the statutory jurisdiction to write whatever kind of laws we want. We clearly have the statutory jurisdiction to say it does not apply to foreign terrorists.").

in cases that have already been properly before an inferior federal court.[121] As a matter of statutory interpretation, this argument is less persuasive as to the MCA because its language is broader and more emphatic than that of the DTA. Nevertheless, in *INS v. St. Cyr* the Court failed to find a clear statement that Congress intended to abolish habeas in a statute whose title was, "Elimination of Custody Review by Habeas Corpus";[122] manifestly, either the clear statement rule is very strict in the habeas context or the Court's commitment to the avoidance principle is very strong.

Cases such as *Yerger* and *Felker* assume that the Supreme Court has the power to issue original writs of habeas corpus. There is a serious question whether this is correct in cases involving executive detention. Such petitions would not be within the Court's original jurisdiction because neither a State nor an ambassador is a party. But apparently, neither would they be within the Court's appellate jurisdiction, because appellate jurisdiction lies only to review the action of a lower court, not an executive officer.[123] Thus a petition for habeas filed in the Supreme Court as the court of first resort appears to be excluded from both the Court's original and its appellate jurisdiction (though it is, of course, within the federal judicial power). This jurisdictional puzzle is not just a problem for those seeking an alternative to §2241 after the MCA; it is a fault line under cases going back as far as *Ex parte Bollman*, where Justice Johnson dissented on this very ground, citing *Marbury*.[124] Under the Madisonian compromise Congress could have chosen not to create any inferior federal courts. The implication of *Marbury* thus is that habeas petitions challenging executive detention would have to be filed initially in state court. But *Tarble's Case*[125] held that state courts lack the power to grant habeas to persons in federal custody, and the Suspension Clause presupposes that habeas will be available even if no inferior federal courts are created—in fact, the Court has stressed that such cases are at the "core" of habeas. It might be possible to resolve the dilemma by overruling *Tarble's Case*; most commentators agree that the rule of *Tarble's Case* is not constitutionally required. However, a "solution" that would locate the right to habeas review of wartime executive branch detention of noncitizens outside the United States in the state courts seems perverse. It

121. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). On the facts of *Hamdan*, the "original writ" would be an exercise of the Court's appellate jurisdiction, as required by *Marbury*, because the Court would be reviewing the decision of the D.C. Circuit. Because the detainees are subject to executive detention and have not been tried, the "original writ" would only be available if the petitioner had been able to get into some other court whose decision the Supreme Court could then review. It is possible, however, that the doctrine of potential appellate jurisdiction could be invoked to sustain an original writ in the Supreme Court as well as direct review in the D. C. Circuit.

122. *St. Cyr*, 533 U.S. at 308-09, n.31.

123. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

124. 8 U.S. 75, 101, 103-106 (Johnson, J., dissenting).

125. 80 U.S. (13 Wall.) 397 (1872).

seems equally unlikely that the Court would solve the dilemma by overruling *Marbury*.

Professor Edward Hartnett has proposed that the solution to the dilemma lies in the historical power of individual justices to issue writs of habeas corpus. Thus, while the Court as a whole lacks jurisdiction to issue the writ, an individual justice could do so, and the full Court could then review that action in the exercise of its appellate jurisdiction. This ingenious solution has the advantage of tracking historical practice.[126] In fact, Justice Johnson's dissent in *Bollman* alludes to the practice, and suggests that individual justices may be able to issue writs that are not within the jurisdiction of the Court.[127] The crux of the problem is whether habeas issued by individual justices is consistent with *Marbury*. Professor Hartnett's argument stands on three legs: first, the historical scope of the writ, which could be issued by individual judges even when court was not in session;[128] second, practice in the early period of the Republic;[129] and third, an 1852 case, *In re Kaine*,[130] in which following denial of habcas by a district judge, a petition for an original writ was presented to Justice Samuel Nelson in chambers. Justice Nelson granted the writ but referred the case to the full Court for final disposition. The Court concluded that because Justice Nelson had exercised original jurisdiction, the case could not be transferred to the full court (but Justice Nelson's order stood).[131] In a later case in which the petitioner had been convicted in federal court, referral to the full Court was permitted because the individual Justice had been exercising appellate jurisdiction.[132] Thus, individual justices can issue "original writs of habeas" (in the sense that the habeas petition is filed in the first instance in the Supreme Court) and in doing so they exercise either original or appellate jurisdiction, depending on the facts of the cases before them. One extremely important implication of this theory is that in issuing original writs of habeas in executive detention cases the Justices would be exercising original jurisdiction *and therefore the Exceptions and Regulations Clause would not apply*.

Professor Hartnett's explication of the historical practice and the reasoning of *Kaine* is persuasive; but it does not explain how under Article III an individual Justice can exercise jurisdiction beyond the scope of that permitted to the Supreme Court itself. The answer would probably have to

126. *See, e.g.*, *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (opinion of Taney, C.J., as circuit justice).

127. *Ex Parte Bollman*, 8 U.S. at 107 (Johnson, J., dissenting).

128. Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 278 (2005) (discussing the Habeas Corpus Act of 1679).

129. *Id.* at 278-80.

130. 55 U.S. (14 How.) 103 (1852).

131. *See* Hartnett, *supra* note 128, at 284-85.

132. *Ex parte* Clarke, 100 U.S. 399, 400-02 (1879), discussed at Hartnett, *supra* note 128, at 285-86.

be found in the combination of the Suspension Clause, which presumes the availability of habeas; an understanding of the scope of the writ as it existed in 1789, including the power and duty of individual judges to issue the writ when court was not in session; and Article III, whose definition of the federal judicial power is certainly broad enough to include writs of habeas corpus in cases of unlawful executive detention. On this understanding, while Article III's division of Supreme Court jurisdiction into original and appellate marks out the scope of the jurisdiction of the justices sitting as a Court, individual judges sitting in habeas could exercise the full extent powers historically available, so long as the case is within the federal judicial power. The Constitution expresses, in other words, a historically-based understanding of the nature of habeas as protected by the Suspension Clause, a foundational principle in the same way as the principle of state sovereign immunity which the Court now finds implicit in the structure of the Constitution. It is not clear to me, however, that a Court that was prepared to find a fundamental constitutional principle that individual Justices could exercise both original and appellate jurisdiction without regard to the limitations of the Allocation Clause would not be just as prepared to find a fundamental principle that the Suspension Clause authorized the Court sitting as a whole to issue original writs of habeas. The former position may have more support in the old cases, but the latter seems more comfortable to present-day notions of the appropriate exercise of judicial power.[133]

The practical objection to sustaining the MCA on the ground that the original writ of habeas in the Supreme Court is still available is that the Court lacks both the time and the institutional capability to provide effective habeas review of detainees' claims. While the Court can decide occasional cases setting the broad outlines of detainees' rights or the legality of statutory procedures, it cannot take enough cases to resolve all of the issues raised by the indefinite detention of hundreds of individuals by military authorities. Moreover, many detainee claims require factual determinations that the Court is simply not set up to make. It is hard to avoid the conclusion that in *Felker* the alleged availability of the original writ was simply a ploy that allowed the Court to uphold the statute without really confronting the Suspension Clause issues; the Court never seriously contemplated hearing successive habeas petitions.[134] In the detainee cases, however, a majority of justices appears to be concerned that there are substantial claims that should receive some form of meaningful judicial

133. The inability, under *Tarble's Case*, and inappropriateness of state courts granting habeas for federal terrorism detainees would also support this reading.

134. The same is probably not true of *Yerger*, because the original writ of habeas was the normal mechanism for obtaining review of lower court habeas decisions before the 1867 Aet authorized direct appeal.

review. Thus it is unlikely that the original writ theory would be invoked as a serious alternative to habeas in the district courts, and if a majority were to decide that meaningful judicial review was unnecessary it would be more likely to hold that noncitizens held outside the United States simply lack constitutional rights to protect, as discussed below.

3. *Habeas Under the All Writs Act*

It is often said that "[s]ection 14 [of the First Judiciary Act] is the direct ancestor of 28 U.S.C. § 2241, subsection (a)."[135] But § 14 is also the direct ancestor of 28 U.S.C. § 1651, the All Writs Act, which provides in its current version: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." By its terms, § 1651 appears to authorize writs of habeas corpus. The fact that a different statutory provision, § 2241, also authorizes writs of habeas corpus does not mean that § 1651 does not do so as well. Section 1651 no longer contains the phrase "not specifically provided for by statute" that was part of § 14 of the First Judiciary Act. Indeed, as Congress dispensed with the various arcane common law extraordinary writs, this phrase was dropped from the All Writs Act, and § 1651 consolidates writs formerly available under several separate statutory provisions (each of which also derives from § 14).[136] As *Yerger* and *Felker* noted, when the broad habeas provided by § 2241 is in place, there is no reason for petitioners to proceed under the earlier authorities—but that does not mean that they have been extinguished. They are still available to be used if the broader, more recent procedure is repealed.

I am not aware of a case where § 1651 was found to be a basis for habeas. However, it derives from § 14 and there does not appear to be anything in the statutory text that would prevent it. The All Writs Act is not itself a jurisdictional grant, but as discussed above, with § 1331 on the books it is no longer necessary to find a specialized jurisdictional grant for

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135. Felker v. Turpin, 518 U.S. 651, 660 n.1 (1996). Section 14 of the First Judiciary Act provided:

> *And be it further enacted,* That all the before-mentioned courts of the United States, shall have 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. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

136. 28 U.S.C. § 1651. Section 1651 consolidates § 342 (writs of prohibition and mandamus), § 376 (writs of *ne exeat*) and § 377 (writs of *scire facias* and all writs not specifically provided for by statute) of the 1940 Act. The 1911 Act, 36 Stat. 1156, 1162, contained § 234 (writs of prohibition and mandamus), § 261 (*ne exeat*) and § 262 (*scire facias*).

habeas. It is only necessary to find authorization to issue the writ. Indeed, in the habeas repealer contained in the Real ID Act, Congress repeatedly specified the All Writs Act and § 1361 (mandamus) in addition to § 2241.[137] This suggests that the drafters of that statute believed that a plausible case might be made for issuing habeas under the All Writs Act.

The possibility of using the All Writs Act to obtain judieial review of detainee claims received a boost when Justices Stevens and Kennedy, in their statement concerning the denial of certiorari in *Boumediene*, pointedly referred to §1651 as an "alternative means . . . for us to consider our jurisdiction over the allegations made by petitioners."[138]

The weakest point in the argument for § 1651 is that it authorizes the court to issue writs "in aid of its jurisdiction." If the habeas jurisdiction of § 2241 has been withdrawn, however, there may be no jurisdiction to aid. On the other hand, courts have issued writs under the All Writs Act in aid of their own potential appellate jurisdiction and the Supreme Court has appellate jurisdiction over the D.C. Circuit review provided in the DTA and MCA. It may be more likely that the Court would find "in aid of jurisdiction" applicable in a mandamus case, which I discuss below. If § 1651 authorizes habeas writs, however, the reasoning should also apply to such writs.

4. *Mandamus Under § 1361 or § 1651*

Mandamus or other extraordinary relief may also be available under § 1651, the All Writs Act. In *Felker v. Turpin*, two concurring opinions noted that although AEDPA precluded review by "certiorari" or "appeal," it did not foreclose appellate review by way of writs in aid of jurisdiction under § 1651.[139] Through a writ of mandamus, authorized by §1361, the Supreme Court can review the actions of inferior federal courts. Lower federal courts may use mandamus to order government officials, such as the custodians of detainees, to act in accordance with the Constitution and laws.[140] The Supreme Court, of course, can only issue mandamus to a court,[141] and this requires that a court have jurisdiction of a case. Thus such actions would have to originate in the lower federal courts.

Professor Pfander suggests a more powerful version of this analysis, arguing that the First Judiciary Act and Article III conferred a general

137. 8 U.S.C. § 1252 (a)(2).

138. 2007 U.S. LEXIS 3783 (statement of Justice Stevens and Justice Kennedy).

139. 518 U.S. 651, 665-66 (1996) (Stevens, J., concurring) (no limitation on appellate jurisdiction under § 1254(2) or § 1651); *id.* at 666-67 (Souter, J., concurring) (same rationale as Justice Stevens, and also relying on Supreme Court Rule 20.3 and original writs of habeas corpus).

140. Insofar as Hamdan seeks mandamus directly from the Supreme Court to executive officials, the petition appears to be outside the Court's appellate jurisdiction. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). But because the case has already been in the D.C. Circuit, the Supreme Court could issue the writ to that court instead.

141. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

power on the Supreme Court to supervise the decisions of the lower federal courts through writs of habeas corpus and mandamus, even decisions that the Court lacks statutory jurisdiction to review.[142] In a later article, he suggests simply seeking declaratory or injunctive relief, perhaps supplemented by relief under the All Writs Act, invoking jurisdiction under the general federal question statute.[143]

Of course, a different analysis is also possible. Even if the Court of Appeals decision was wrong, if Congress has validly withdrawn jurisdiction for pending cases, then the *case* should be dismissed and the previous opinions withdrawn. If this were done, there would be nothing for the Supreme Court to correct. This course would also avoid the problem of whether the Supreme Court can issue a mandamus order, or the Court of Appeals can obey it, without "consider[ing] . . . an application for a writ of habeas corpus," which would be prohibited by the MCA.

The MCA's "any other action" bar[144] stands as a rather substantial obstacle to proceeding on a mandamus theory (or seeking declaratory or injunctive relief." A mandamus action is clearly "other" than a habeas action; thus congressional intent to deny jurisdiction on these alternative theories seems clear.

5. Bivens *Actions*

A number of detainees have sought to avoid prohibitions on habeas actions in the DTA or MCA by filing *Bivens* actions seeking injunctive and declaratory relief for unconstitutional conditions of confinement.[145] *Bivens* actions are normally utilized to seek damages, but there seems to be no reason why injunctive relief would not be appropriate if the conditions necessary for such relief were met.[146] This strategy had some chance of success under the DTA as originally enacted, whose ban on "any other action" applied only if the alien was currently in military custody or had been determined *by the D.C. Circuit* to have been properly detained as an enemy combatant.[147] This provision has been superseded by the MCA, which eliminated the qualifications that appeared to provide breathing room for *Bivens* actions. However, Congress may not be able to forbid

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142. *See* Pfander, *Jurisdiction-Stripping*, *supra* note 106.

143. *See* Pfander, *The Limits of Habeas Jurisdiction*, *supra* note 106.

144. 28 U.S.C. § 2241(e)(2).

145. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing damages action directly under the Constitution for invasion of constitutional rights by federal agents). *Carlson v. Green*, 446 U.S. 14 (1980), held that a *Bivens* action is available for claims by state prisoners of 8th Amendment violations.

146. *See* General Oil Co. v. Crain, 209 U.S. 211 (1908) (state courts had jurisdiction to enjoin state official from enforcing unconstitutional tax); *see also Ex parte* Young, 209 U.S. 123 (1908) (authorizing suit against state official for injunctive relief against enforcement of unconstitutional statute).

147. *See* DTA § 1005(e)(1)(e)(2).

Bivens actions without at least providing "another remedy, equally effective in the view of Congress."[148] The essence of the Court's holding in *Bivens* is that the right to a remedy arises directly from the violation of constitutional rights, and requires no action whatever by Congress. While Congress may be able to replace a *Bivens* action with a statutory alternative,[149] much as it can provide an adequate statutory alternative to habeas, nothing in any of the Court's cases suggests that where a *Bivens* action is appropriate Congress can simply legislate all right to a remedy away without providing a substitute. This reasoning is consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, in which the Court held that the Due Process Clause "obligates [a] state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation" from an unconstitutionally discriminatory state tax.[150]

The *Bivens-McKesson* rationale is another, doctrinally more satisfying, way of reaching the same result as the essential functions theory[151] when Congress attempts to eliminate jurisdiction to hear constitutional claims. Neither *Bivens* nor *McKesson* had been decided when Professor Hart came up with the essential functions theory as a way of finding some limit to Congress's Exceptions Clause power. Because Hart was thinking about the Exceptions Clause, he conceptualized the problem as one of separation of powers. Therefore the theory looks for the answer in something about the nature of the federal courts-their "essential function." This approach runs into problems right away. Because Congress could have declined to create lower federal courts, the theory really only protects the jurisdiction of the Supreme Court. Moreover, it has been difficult to identify the "functions" that everyone can agree are "essential." "Maintaining the uniformity and supremacy of federal law" are the most non-controversial candidates,[152] but starting with the First Judiciary Act the Supreme Court has never had all the jurisdiction that would be necessary to maintain uniformity and supremacy.[153] Furthermore, Congress never tries

148. *Bivens*, 403 U.S. at 397.

149. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988); Bush v. Lucas, 462 U.S. 367 (1983) (statutory remedy was "constitutionally adequate" even though not an "equally effective substitute" for the remedy sought).

150. 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (denial of right to recover unconstitutional taxes is itself a Due Process violation); First English Evangelical Lutheran Church v. County of L.A., 472 U.S. 304, 316 n.9 (1987) (Just Compensation Clause of 5th Amendment "dictates the remedy" for unconstitutional taking of property); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920) (county was obligated to refund unconstitutional tax even though there was no statute authorizing such refunds).

151. *See* Hart, *An Exercise in Dialectic*, *supra* note 5, at 1365.

152. *See* Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982).

153. For example, significant gaps in federal jurisdiction—such as minimum amounts in controversy in federal question cases, the lack of a general federal question jurisdictional statute until 1875, and the limitation of appeals in federal question cases, until 1914, to cases where the decision

to eliminate all of the Court's jurisdiction, and Hart's formulation—Congress cannot restrict jurisdiction so as to "destroy" the Court's essential functions—is so modest that it is not very powerful; it is difficult to argue that withdrawing jurisdiction over a single topic (abortion, school prayer, claims by enemy combatants) would "destroy the essential role of the Supreme Court in the constitutional plan."[154] An even greater difficulty for the essential functions theory is that the Exceptions Clause is itself part of Article III-part of the text that defines what the federal courts are.[155] How can one of the checks and balances that are permitted by the text of Article III be contrary to the "essential role" of the federal courts? So the essential functions theory is, at its heart, question-begging. In order to apply the test to find that Congress has gone too far, one must already believe that Congress's power to make "such Exceptions and Regulations" is limited.

The *Bivens* approach provides a more direct and robust limit on Congress's power to withdraw jurisdiction. Instead of looking to some way in which the withdrawal of jurisdiction hurts the courts, it looks to whether withdrawal of jurisdiction impairs rights guaranteed by the Constitution. *Bivens* harks back to the "where there is a right, there must be a remedy" approach of *Marbury*[156] and holds that the government cannot violate the Constitution with impunity. As Justice Brandeis wrote, "[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process."[157] Thus the Court in *Bivens* found a right directly under the Constitution to a judicial remedy for constitutional violations. Just as no action by Congress is required to provide a judicial remedy for constitutional violations—the Constitution itself opens the courts to such claims—so Congress cannot close the courts to claims of constitutional violations without providing a constitutionally adequate alternative.

Locating the requirement of federal jurisdiction in the substantive provisions of the Constitution, rather than in the nebulous, implicit "essential functions" of the federal courts, is a superior approach to the question of jurisdiction-stripping. It does not have the circular or question-begging character of the essential functions theory, and it does not require difficult, complex theorizing or line-drawing. Rather than asking what the essential functions of the federal courts are and whether they can be

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went against the federal claimant—went essentially unquestioned. *See generally* Gunther, *supra* note 5, at 906-07.

154. Hart, *An Exercise in Dialectic*, *supra* note 5, at 1365.

155. *See* Gunther, *supra* note 5, at 906 ("After all, the same Convention did insert the exceptions clause, the textual nub of the controversy").

156. The Court explicitly quoted *Marbury* on this point. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).).

157. Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

destroyed by removing jurisdiction over a single category of cases, one asks whether the plaintiff has been harmed by the government's violation of the Constitution, and whether there is any remedy for that harm. Thus framing the action as a *Bivens* action invokes a different, and stronger, argument for finding a constitutional bound on Congress's power to limit the jurisdiction. That limit comes not from the Exceptions Clause itself or from the inherent nature of Article III courts, but from the Due Process Clause and the various substantive provisions of the Constitution.

This argument against jurisdiction-stripping is somewhat weaker today than *Bivens* itself suggests. *Bivens* appeared to contemplate that damages actions could be implied directly under the Constitution for violation of any constitutional right,[158] and at first the Court recognized *Bivens* actions under other constitutional provisions.[159] Since then, the Court has declined to recognize *Bivens* actions where Congress has provided some remedy, even if not as good as a damages remedy,[160] and even without finding that Congress had provided an adequate remedy.[161] Nevertheless, even though the Court has become extremely reluctant to imply remedies generally,[162] its refusal to recognize *Bivens* actions has always been in the context of some other remedial scheme.[163] And the Court has continued to state that withdrawing all judicial remedies for claims of constitutional violations would raise "grave" or "substantial"

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158. "'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Bivens*, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

159. *See* Davis v. Passman, 442 U.S. 228 (1979) (implying damages remedy directly under the Due Process Clause of the Fifth Amendment); Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment).

160. *See* Bush v. Lucas, 462 U.S. 367 (1983) (*Bivens* action under First Amendment denied because of Congressionally-provided remedy under Civil Service Commission); Schweiker v. Chilicky, 487 U.S. 412 (1988) (Fifth Amendment Due Process; Social Security Act provided administrative remedy with judicial review).

161. *See* Chappell v. Wallace, 462 U.S. 295 (1983) (no *Bivens* action for racial discrimination under the Fifth Amendment; "the unique disciplinary structure of the Military Establishment" was a "special factor[] counseling hesitation"); United States v. Stanley, 483 U.S. 669 (1987) (no *Bivens* action for substantive due process violation in administering LSD to service member without his consent because military service constituted a special factor); FDIC v. Meyer, 510 U.S. 471 (1994) (Fifth Amendment Due Process; *Bivens* action available only against federal government officers, not government agencies); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (no *Bivens* action under Eighth Amendment against private contractor). *See also* Henry Paul Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (*Bivens* is an example of "constitutional common law"—federal common law implementing constitutional guarantees, but which can be legislatively modified or repealed because it is not constitutionally required).

162. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001).

163. *See Malesko*, 534 U.S. at 523 ("In sum, respondent is not a plaintiff in search of a remedy as in *Bivens* and *Davis*. Nor does he seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*."). *Cf. id.* at 523-24 (Scalia, J., dissenting) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . [W]e have abandoned that power to invent 'implications' in the statutory field. There is even greater reason to abandon it in the constitutional field.") (citations omitted).

constitutional questions.[164] It would be a major step for the Court to uphold congressional action withdrawing all access to courts for constitutional claims.

Now that the Supreme Court has denied certiorari in *Boumediene* and *Hamdan*, it is possible that the next case to come before it will be *Al-Marri v. Wright*, a habeas case filed on behalf of a resident alien who was arrested at his home in Peoria, Illinois and is in custody in a naval brig in South Carolina.[165] Al-Marri has appealed the dismissal of his habeas petition,[166] and the government has moved to dismiss the appeal for lack of subject matter jurisdiction on the basis of the MCA.[167] Because he is being held in the United States rather than at Guantanamo Bay, Al-Marri has not had a CSRT determination. The government contends that he was "determined by the United States to have been properly detained as an enemy combatant," the predicate for application of the MCA's jurisdiction-stripping provisions, by the President's order designating him an enemy combatant and by the district court's order denying his habeas petition.[168] Significantly, neither the DTA nor the MCA provides for judicial review of such determinations of enemy combatant status.[169] Thus Al-Marri apparently falls into a category of persons who, the government contends, have been determined to be enemy combatants and thus can be detained indefinitely, but who do not have any right of judicial review of their designation as enemy combatants or the legality of their detention. Al-Marri has also filed a *Bivens* action raising claims of unlawful interrogation and denial of his right to counsel,[170] so the *Bivens* question may come before the Court as well.

It is unlikely that given the choice between habeas and a *Bivens* action as a mechanism for challenging executive detention the Court would prefer the *Bivens* action. Habeas is the traditional, historical method for challenging custody. Its procedures are well established and well known, unlike *Bivens* actions, which are seldom successfully used. Habeas is a

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164. *See supra* note 6.

165. Al-Marri v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006).

166. *See* Brief of Appellants, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2006) (No. 06-7427), *available at* http://www.humanrightsfirst.info/pdf/061120-usls-1-am-appeal-open-brief.pdf (last visited May 5, 2007).

167. Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2006) (No. 06-7427), *available at* http://www.humanrightsfirst.info/pdf/061120-usls-2-govt-mot-dismiss.pdf (last visited May 5, 2007).

168. *Id.* The district court adopted the recommendation of the magistrate judge, who relied on a hearsay affidavit, some of which was not disclosed to Al-Marri, from the Director of the Joint Intelligence Task Force for Combating Terrorism summarizing intelligence on Al-Marri's activities in the United States. *Al-Marri*, 443 F. Supp. 2d at 782-83.

169. *See* DTA § 1005(e)(2)(1) (D.C. Circuit "shall have 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").

170. *See* Al-Marri v. Rumsfeld, 2006 U.S. Dist. LEXIS 39838 (D. S.C. 2006).

pure challenge to the legality of custody, whereas *Bivens* actions originated as damages actions; to use them to obtain injunctive relief in the form of release would require an extension of the doctrine and would also raise the possibility that detainees might seek monetary compensation in the same action. Finally, in habeas proceedings it is normal for even successful petitioners to be retried or otherwise continued in custody pursuant to established procedures. These procedures do not exist in *Bivens* actions; a court asked to grant injunctive relief against executive detention would have to fashion some response to the government's request for continued detention while it fixed the constitutional problem. The principal function of the *Bivens* argument is likely to be to demonstrate the necessity to find a way to permit judicial review through habeas in order to foreclose the need for a clumsy *Bivens* action.

III
THE CONSTITUTIONALITY OF THE MCA

The MCA attempts to close the loopholes in the DTA and, under the most straightforward reading of the text, purports to eliminate all forms of habeas review of detainees' claims, including claims already pending before federal courts,[171] except for limited statutory review of final determinations of CSRTs and military commissions for consistency of the determinations with the Constitution and laws. The Acts also deny to all judges and courts jurisdiction to consider "any other action" relating to the detention, treatment, transfer, or trial of alleged enemy combatants. These provisions undeniably repeal jurisdiction that previously existed. The Court explicitly held in *Rasul* that the habeas statute then in force "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Air Base,"[172] and that their petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[173] This Part considers the constitutionality of the jurisdiction-stripping provisions under the Suspension Clause and the Exceptions and Regulations Clause.

A. Constitutionality of the MCA Under the Suspension Clause

1. Repeal of Pre-Existing Habeas Right With No Alternative Avenue of Review

As discussed in Part I, the Court will not find a Suspension Clause violation if Congress repeals habeas jurisdiction but provides a

171. *See* Boumediene v. Bush, 476 F.3d 981, 987 n.2 (D.C. Cir. 2007) (statements by members of Congress demonstrating an intent to target pending petitions in general and the *Hamdan* case in particular).

172. Rasul v. Bush, 542 U.S. 466, 484 (2004).

173. *Id.* at 484 n.15.

constitutionally adequate statutory alternative.[174] The DTA does provide for review by the D.C. Circuit of final decisions of CSRTs, and the MCA provides for D.C. Circuit review of convictions by military commissions. The first question, then, is whether the statutory alternative is an adequate substitute for a habeas action.[175] The answer should be no, even where it is available. The scope of review, particularly of CSRT determinations, is limited and may not include all claims of constitutional, statutory, or treaty violations.[176] Even if the Court construes the statutory text governing the scope of review broadly, so as to permit detainees to raise all legal issues (except, of course, rights under the Geneva Conventions[177]), the special procedural rules for CSRT and military commission proceedings fall far short of the most minimal requirements of due process necessary to ensure that detainees are actually able to present evidence in their behalf, to challenge (or even to see) the evidence against them, or to raise legal challenges to the proceedings. Most troubling is the explicit authorization for the admission of evidence obtained under coercion.[178] Such evidence is inherently unreliable, and in the criminal courts admission of coerced testimony is considered to be antithetical to fundamental constitutional values.

The Court might, however, find that statutory review in the D.C. Circuit is an adequate substitute for habeas where it is available. In *Felker* the Court approved a substantial reduction in the availability of habeas as merely an "evolution" in the scope of the writ. And in *Hamdi* the Court seemed not only willing but eager to water down traditional habeas procedures and notions of due process in habeas actions involving alleged enemy combatants, going out of its way to render an advisory opinion blessing in advance habeas innovations such as a presumption in favor of the government's evidence and basing the determination on hearsay

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174. *See* INS v. St. Cyr, 533 U.S. 289 (2001); Felker v. Turpin, 518 U.S. 651 (1996).

175. *See St. Cyr*, 533 U.S. at 305 ("[A] serious Suspension Clause question would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power [to issue the writ] from federal judges and provided no adequate substitute for its exercise.").

176. *See* discussion *supra* Part I-A.

177. *See* MCA § 5 ("no person may invoke the Geneva Conventions . . . in any habeas corpus or other civil action to which the United States . . . is a party as a source of rights in any court"). By defining the scope of review to include whether the decision was consistent with "the Constitution and the laws of the United States," pointedly excluding reference to "treaties," the drafters may have intended to prevent the D.C. Circuit from hearing any claim based on treaty violations or treaty rights. The statute should not be interpreted in so limited a way, because treaties are "laws" of the United States and are thus included in the scope of review. *See, e.g.*, U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . .").

178. MCA § 948r (criteria for admitting coerced statements; only statements obtained on or after Dec. 30, 2005 must be excluded if obtained through cruel, inhuman, or degrading treatment prohibited by the DTA); § 949a(b)(2)(C) (statements that comply with §948r may not be excluded on grounds of coercion).

evidence.[179] The statutory appeal of military tribunal decisions is to an Article III court, and the Court is likely to interpret the scope of review to include all questions of law, including constitutional claims. Unless the procedural defects of the CSRT or commission proceedings strike the Court as fundamentally unfair and likely to lead to miscarriages of justice, the Court may well defer to the congressional scheme. This would be consistent with the deference shown in the *Bivens* context.[180]

Other routes to judicial review, such as the original writ of habeas in the Supreme Court, the nonstatutory "constitutional writ," and the All Writs Act, have been asserted by detainees. As discussed in Part II, however, the MCA's jurisdiction-stripping provision is fairly comprehensive and likely will be held to foreclose such alternatives.

Even if the statutory appeal to the D.C. Circuit is an adequate alternative to habeas in cases where it is available, however, the MCA completely abolishes previously-existing habeas jurisdiction[181] over certain claims for all persons (e.g., claims of violations of the Geneva Conventions), and over certain categories of claims for noncitizens held outside the United States (e.g., claims relating to conditions of confinement, including interrogation under torture or cruel, inhuman or degrading treatment, and extraordinary rendition). It also abolishes previously available access to habeas for noncitizens who have not been given a status hearing, or who have been acquitted by military commissions or determined not to be enemy combatants but who have not been released. Detainees with such claims, which could raise significant constitutional questions, cannot bring habeas petitions or "any other action" in any court, and they cannot obtain judicial review in the D.C. Circuit. There is not even any provision for administrative review of such claims within the military system, and the government has announced that it plans to place severe limits on lawyers' access to their clients at Guantanamo.[182] These claimants clearly have no access to judicial review whatever under the Act and at least as to them, no statutory alternative is available. Does the MCA therefore violate the Suspension Clause?

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179. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004). The District Court in *Al-Marri* interpreted *Hamdi* to permit an enemy combatant determination to be based solely on a hearsay declaration by a government officer with no personal knowledge of the case, to place the entire burden of producing evidence other than a hearsay summary of intelligence on the detainee, and to extend the definition of "enemy combatants" who can be held indefinitely on the basis of such evidence to civilians arrested at home in the United States who are not alleged to have engaged in any hostilities. Al-Marri v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006).

180. *See* discussion *supra* notes 159-165.

181. *Rasul* held that Guantanamo detainees were entitled to file habeas petitions under §2241.

182. *See* William Glaberson, *U.S. Asks Court to Limit Lawyers at Guantanamo*, N.Y. TIMES, Apr. 26, 2007, at A1.

2. *The Constitutional Text*

The Constitution permits suspension of the privilege of the writ only "when in Cases of Rebellion or Invasion the public Safety may require it."[183] Whatever might have been the case on, say, September 15, 2001, it would require an extraordinary flight of the imagination to argue that this condition is met today. Moreover, Congress made no findings, in either the DTA or the MCA, that there was an invasion or a rebellion. There is not even a statutory recitation that habeas is being suspended or that the public safety so requires. If the MCA is a suspension of the writ, it is unconstitutional.[184]

3. *Applicability of the Suspension Clause*

The only remaining rationale for the legality of the MCA under the Suspension Clause is that the Suspension Clause does not apply. The D.C. Circuit has held that neither the habeas right protected by the Suspension Clause nor other constitutional rights extend to noncitizens held at all times outside the borders of the United States.[185] Justice Scalia also believes that the Constitution does not operate extraterritorially to protect noncitizen detainees outside the United States.[186] I will not rehearse the historical arguments about the reach of the writ here, but I believe the evidence amply supports its availability for noncitizens in custody in areas outside

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183. U.S. CONST. art. I, § 9, cl. 2.

184. Some have argued, based in part on the authority of *Ex parte Bollman*, that the existence of an invasion or rebellion and the requirement of public safety are political questions and the courts are not permitted to second guess Congress on these points. It seems to me that this view is incorrect. The Court has long called habeas an "immemorial right[]," *Ex parte Yerger*, 75 U.S. 85, 95 (1869), "the best and only defence of personal freedom," *id.*, and an "integral part of our common-law heritage," Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting Williams v. Kaiser, 323 U.S. 471, 484, n.2 (1945)). It is a quintessentially *judicial* function. If challenges to executive detention are at the "core" of the federal habeas power, then determining whether the conditions for withholding the jurisdiction are present, when liberty is at stake, must be open for decision by courts. The degree of deference to be afforded a decision by the political branches on such questions is a different question. In the case of the MCA and the DTA, Congress did not appear to give any consideration at all to whether the constitutional conditions were met, so no deference is owed. Moreover, even if the existence of the constitutional prerequisites is a political question that the courts are not permitted to decide, it is still a constitutional question that has a correct answer, and scholars and citizens are duty-bound to consider it (and, if the courts cannot speak on the issue, to insist that the political branches abide by the Constitution).

185. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007)

186. Only the argument that the Suspension Clause does not apply is germane to the jurisdiction-stripping question. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-101 (1998), the Court rejected the concept of hypothetical jurisdiction and the possibility that the court could go directly to the merits and hold that petitioners must lose because they have no substantive rights to assert. Rather, the Court must first squarely face the question whether the withdrawal of jurisdiction is constitutional.

the borders of the United States but within United States jurisdiction and control.[187]

Of course, the Supreme Court had already held in *Rasul* that the Guantanamo detainees had a right to habeas. But the Court based its decision on statutory interpretation of § 2241, the habeas statute. The sponsors of the jurisdiction-stripping provision argued that the decision in *Rasul* had nothing to do with the Suspension Clause.[188] The text of §2241 was ambiguous and could be interpreted to cover the detainees, so the Court "had no choice" but to interpret the reach of the statute broadly. But, they argued, the protections of the Constitution, including the Suspension Clause, do not extend to noncitizens held outside the United States,[189] so Congress could repeal that part of the statute (or, to put it differently, could correct the Supreme Court's interpretation of the statutory language[190]) without in any way implicating the Suspension Clause. The D.C. Circuit adopted similar reasoning to find that *Eisentrager*, which had denied habeas to Germans imprisoned in the American sector of occupied Germany serving sentences imposed by a United States military commission in China after World War II, rather than *Rasul*, governed the *Rasul* and *Hamdan* cases on remand. *Rasul* was based on statutory interpretation of a habeas statute that had been amended; *Eisentrager* was the most recent case to interpret the constitutional right to habeas of noncitizens held outside the United States; under *Eisentrager* the detainees have no constitutional right to habeas; and therefore Congress could repeal the statutory entitlement that governed the *Rasul* and *Al-Odah* cases on remand.[191]

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187. For a fuller discussion of this issue, see, e.g., Brief of Bruce A. Ackerman, Janet C. Alexander, David Cole, Ronald Dworkin, Frank Michelman, Martha Minow, Judith Resnik, William S. Sessions, and Geoffrey R. Stone as *Amici Curiae* in Support of Petitioners, Hamdan v. Gates, No. 06-1169 (U. S. Mar. 29, 2007) at 3-13; Brief for the Human Rights Committee of the Bar of England and Wales and the Commonwealth Lawyers Association as *Amici Curiae* in Support of Petitioner, Hamdan v. Rumsfeld, 2006 U.S. S. Ct. Briefs LEXIS 54 (Jan. 6, 2006); Brief *Amici Curiae* of Former Government Officials in Support of Petitioners, Rasul v. Bush, 2004 U.S. S. Ct. Briefs 28 (Jan. 14, 2004).

188. "The habeas corpus writ that is being exercised does not come from the Constitution. This is not a constitutional right that an enemy combatant has under out law. This is an interpretation of a statute we passed, 2241." 151 CONG. REC. S12652, 12663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

189. "The Great Writ does not apply to terrorists." 151 CONG. REC. S12659 (statement of Sen. Kyl).

190. "Eisentrager was the law of the land for over 45 years, until Rasul carved a hole into it. Through this act, Congress patches that hole and restores Eisentrager's role as the governing standard." 151 CONG. REC. S14264 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

191. *See* Boumediene v Bush, 476 F.3d. 981 (D.C. Cir. 2007). The district court adopted similar reasoning in *Hamdan* on remand. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006); the D.C. Circuit has deferred consideration of the appeal pending the Supreme Court's decision in *Boumediene*. *See* Hamdan v. Gates, 2007 U. S. App. LEXIS 17857 (D.C. Cir. July 24, 2007).

Detainees have argued that whatever the scope of habeas might once have been, the Supreme Court authoritatively determined in *Rasul* that the Guantanamo detainees do have a right to habeas and Congress cannot take that entitlement away without literally suspending the privilege of the writ and thereby violating the Suspension Clause. That is, once a particular person or group has a right to habeas, Congress cannot constitutionally take it away unless the Suspension Clause conditions are met.

The meager store of precedent points in different directions on this issue. On one hand, the Court "assume[d]" in *Felker* that the Suspension Clause protected the writ "as it exists today" rather than in 1789. This suggests that once granted, Congress cannot take away the privilege of the writ. The Court endorsed this expanding conception of "constitutional habeas" in *Fay v. Noia*:

> It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely . . . 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 . . . 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.[192]

On the other hand, in *St. Cyr* the Court rejected the idea that habeas is a one-way ratchet. On the other hand, *Felker* also made it clear that expansion of habeas rights is not a one-way ratchet. The Court distinguished between the "authority to entertain . . . habeas petitions,"[193] and the "standards governing our consideration" of such petitions.[194] The Court held that the "requirements for the granting of relief"[195] were part of a "complex and evolving"[196] body of law and that within this "evolutionary process"[197] Congress could restrict the "conditions under which such relief may be granted."[198] fairly substantially. *St. Cyr* also declined to assume that the Suspension Clause protected the modern scope of the writ,

192. Fay v. Noia, 372 U.S. 391, 401-02 (1963).
193. Felker v. Turpin, 518 U.S. 651, 660-61 (1996).
194. *Id.* at 662.
195. *Id.*
196. *Id.* at 664.
197. *Id.*
198. *Id.* at 662.

expressly reserving that question. In *McCardle* the Court upheld the repeal of an expansion of the scope of the writ.

It is hard to argue that Congress cannot take away by statute what it has given when *McCardle* sustained that very action. However, in *McCardle* there was an alternative avenue to Supreme Court review of the petitioner's habeas claim. The same was true in *Felker*, and in *St. Cyr* as well, where the statute only limited successive petitions. Unlike those cases, the MCA eliminates *all* judicial review of claims by persons who had previously enjoyed a right to federal habeas.[199] The Supreme Court has never sustained a statute eliminating *all* judicial review of the constitutionality of detention when the requirements of the Suspension Clause were not met. To the contrary, the Court has repeatedly indicated that prohibiting all judicial review of constitutional questions would be unconstitutional.[200] As Justice Brandeis observed in *Crowell v. Benson*, "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process."[201] This consideration should carry even more weight when the fundamental interest in liberty is at stake. In fact, as David Cole has observed, deprivation of liberty without access to a court to determine the legality of the deprivation is itself a violation of due process as well as the Suspension Clause.[202]

4. *Extraterritorial Application of the Suspension Clause*

The most serious challenge to the detainees' Suspension Clause claim is that the writ does not run outside the United States's sovereign territory. If this is true, then the statutory extension of habeas to Guantanamo detainees through § 2241, as determined by the Court in *Rasul,* was an exercise of legislative grace. On this reading, the Suspension Clause is simply inapplicable and Congress is entirely free to withdraw the statutory grant of habeas to noncitizens outside the United States. This view was held by some of the sponsors of the jurisdiction-stripping provisions of the DTA.[203]

Habeas was not historically limited to persons in custody within England's sovereign territory.[204] Moreover, the opinion of the Court in

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199. Similarly, in Johnson v. Eisentrager, 339 U.S. 763 (1950), and *In re* Quirin, 317 U.S. 1 (1942), the Court did consider the merits of the petitioners' claims.

200. *See supra* note 6.

201. Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

202. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2495 (1998).

203. *See, e.g.*, 151 CONG. REC. S12659 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl).

204. The history of habeas jurisdiction has been the subject of several helpful briefs. *See, e.g.*, Brief of Bruce A. Ackerman, et. al. as Amici Curiae in Support of Petitioners, Hamdan v. Gates, 127 S. Ct 2133 (2007) (No. 06-1169) (understanding of extraterritoriality at the founding); Brief for the Commonwealth Lawyers Association as Amicus Curiae in Support of the Petitioners, Boumediene v.

Rasul stands rather strongly against the extraterritoriality argument. The Court flatly stated, "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States."[205] Noting that the United States exercises "complete jurisdiction and control" over Guantanamo by the terms of treaties between the United States and Cuba, the Court held that the habeas statute would apply to both United States citizens and noncitizens in Guantanamo.[206] Unlike other United States bases abroad, Cuba does not exercise concurrent jurisdiction over the base. Base personnel visitors do not go through Cuban customs or immigration, and nationals of other foreign countries do not have to receive permission from Cuba to visit the base.[207] But the United States's authority in Guantanamo is not simply analogous to sovereignty, or "de facto sovereignty." It is real sovereignty.

The 1903 treaty between the United States and Cuba grants the United States "complete and exclusive jurisdiction and control" over Guantanamo during its occupation of the base.[208] The lease is perpetual; it has no time limits and remains in force "so long as the United States of America shall not abandon the said naval station of Guantanamo" or the two nations agree to modify the treaty.[209] Though the treaty recognizes "the continuance of the ultimate sovereignty of Cuba" over Guantanamo, it is clear that "ultimate" here means "last in time" and refers to Cuba's reversionary interest should the lease ever be terminated (an act that is within the sole discretion of the United States).[210] An authoritative history of Guantanamo, written by the commander of the base at the time, states:

> "Ultimate," meaning final or eventual, is a key word here. It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy since we exercise complete jurisdiction and control, but in case occupation were ever terminated, the area

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Bush, No. 06-1195 (U.S. Aug. 24, 2007) (availability of British writ of habeas outside borders of United Kingdom).

205. Rasul v. Bush, 542 U.S. 466, 480 (2004).

206. *Id.*; *accord id.* at 485, 487 (Kennedy, J., concurring in the judgment) ("Guantanamo Bay is in every practical respect a United States territory.").

207. I am indebted to David Glazier for this information.

208. The treaty provides, in relevant part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* . . .

T.S. No. 418, Art. III, 6 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 at 1113, 1114 (States Dep't 1971) (emphasis supplied).

209. *Id.* at 1161, 1162 (1934 treaty).

210. I am indebted to David Glazier for pointing out this meaning.

> would revert to the ultimate sovereignty of Cuba. . . [I]t is clear that at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing agreements, the United States has for fifty years exercised the essential elements of sovereignty over this territory, without actually owning it.[211]

Another Navy analysis of the Guantanamo lease stated,

> It may be said that the words used regarding sovereignty in the [Guantanamo] treat[y] grant to the United States the complete right . . . to act as the sovereign, with titular or residual sovereignty in the grantor nation. . . . If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the Untied States.[212]

The military thus has for many years understood that the United States holds "actual sovereignty" over Guantanamo, and the government's civilian lawyers have also maintained that United States law applies.[213] Indeed, press reports indicate that in anticipation of a "mass exodus" of Cuban immigration upon Fidel Castro's death, the government plans to build a facility at Guantanamo to hold such persons while their status is determined.[214] If Cuba, and not the United States, had "present or actual sovereignty" over Guantanamo, holding its nationals there against their will and without the consent of the government of Cuba would not be possible.

At the very least, while the United States occupies Guantanamo it exercises "complete" territorial jurisdiction, and "territorial jurisdiction" authorizes habeas relief under *Eisentrager*.[215] To hold that United States law does not apply at Guantanamo would be to say that there is no law at all there, for Cuba exercises no legal authority whatever over the base, under the express terms of the treaty.

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211. REAR ADMIRAL MARION E. MURPHY, THE HISTORY OF GUANTANAMO BAY 6, 7 (1953) *available at* www.nsgtmo.navy.mil/history.html. The treaty ceding "complete jurisdiction and control" over Guantanamo to the United States is analyzed, and these and other United States and Cuban legal sources quoted and discussed in the excellent and comprehensive Brief Amicus Curiae of Retired Military Offieers in Support of Petitioners, Nos. 03-334, 03-343, Rasul v. Bush and Al-Odah v. United States, 2003 U.S. Briefs 334 (Jan. 14, 2004).

212. Rear Admiral Robert D. Powers, Jr., *Caribbean Leased Powers Jurisdiction*, 15 JAG J. 161, 163 (Oct.-Nov. 1961), quoted and discussed in Brief of Retired Military Officers, *supra* note 211.

213. The government took the position that Guantanamo was within "exclusive" United States jurisdiction for purposes of a federal law concerning slot machines. *See* Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 517-521 (1993).

214. *See, e.g.*, Pablo Bachelet, *Plan Prepared for Cuban Exodus*, THE MIAMI HERALD, Feb. 16, 2007. Holding migrants at Guantanamo would allow the government to consider what to do with them without making them automatically eligible to stay in the United States under the long-standing "wet foot/dry foot" policy. *Id.*

215. Johnson v. Eisentrager, 339 U.S. 763, 768, 778, 781 (1950).

It seems probable that there will be five votes for the proposition that at least at Guantanamo, where the unique provisions of the treaty between Cuba and the United States give the United States exclusive legal jurisdiction and control for as long as the United States wishes to remain there, the United States exercises a form of de facto sovereignty in which the right of habeas applies and fundamental constitutional provisions, including at least the Suspension Clause and the Due Process Clause, apply.

The argument that the Constitution does not apply outside United States borders is incorrect for an additional reason, with respect both to the Suspension Clause and to fundamental constitutional guarantees. The Constitution creates and defines the government, setting its powers and the constraints on those powers as well. The issue in the executive detention cases is not whether the Constitution has conferred rights on the detainees that the government has violated, so that we must ask whether the Constitution's goody bag is deep enough to provide for the entire population of the world. The real issue is whether the government is behaving lawfully, within the constraints the Constitution imposes on it. The Constitution extends wherever the government acts because the government has no existence independent of the Constitution. The Constitution goes with the military in the form of the war powers of the President and Congress, and the statutory and treaty obligations assumed pursuant to the Constitution. It goes with the diplomatic corps as it conducts foreign affairs. It is simply not possible for the executive branch to go far enough away to operate in a law-free zone where it is not subject to the Constitution, because it is the Constitution that constitutes, empowers, and constrains the executive. The real claim in the detainee cases from the point of view of constitutional law is not whether these individuals have rights granted by the Constitution, but whether the U.S. government is permitted, by its constitutive documents and applicable laws, to behave toward them in this way. Habeas is the traditional means for challenging deprivations of liberty by the executive branch in violation of its constitutional power, and it is antithetical to fundamental constitutional principles to leave individuals completely without remedy against government action.

B. Constitutionality of the MCA Under the Exceptions Clause

The constitutionality of the jurisdiction-stripping provisions of the MCA will probably be resolved under the Suspension Clause, but the statute also fails under the Exceptions Clause. Congress's Exceptions Clause power is broad, but it does have limits. The use of the word

"exceptions" implies that the exception may not swallow the whole.[216] Nor may Congress use its power under the Exceptions Clause to violate another constitutional provision.[217] Thus, because the MCA violates the Suspension Clause, it also violates the Exceptions Clause. Additionally, deprivation of liberty without any opportunity to challenge the legality of the deprivation in court would violate the Due Process Clause.[218]

The MCA also fails the "essential functions" test,[219] the most widely held view of the Exceptions Clause power,[220] because it completely withdraws from judicial review both categories of claims and claims by categories of litigants.[221] The essential functions test is itself extremely deferential to Congress's power, as it would invalidate only withdrawals of jurisdiction that "would destroy the essential role of the Court in the constitutional plan."[222] Nevertheless, a statute that would eliminate all judicial review of claims that the executive branch had deprived individuals of their liberty for an indefinite period in violation of the constitution would surely meet the criteria. To be sure, many scholars contend that Congress's power over jurisdiction is plenary.[223] But the Court has stated repeatedly (and recently) that prohibiting all judicial review of a constitutional claim would, at the least, raise serious constitutional questions.[224] Finally, in forbidding courts to consider claims under the Geneva Conventions while not repudiating or modifying the

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216. *See* Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) ("An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite."); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981).

217. *See* Tribe, *supra* note 216.

218. *See supra* note 202 and accompanying text.

219. *See* Hart, *An Exercise in Dialectic*, *supra* note 5, at 1365.

220. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN L. REV. 817, 835 (1994); Sager, *supra* note 216; Tribe, *supra* note 216; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 190 U. PA. L. REV. 157, 160-167 (1960). "[L]egislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment." *Id.* at 201.

221. *See* discussion *supra* accompanying notes 152-156.. The Court has often indicated that such broad withdrawals of jurisdiction would violate the Constitution. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764 (2006) (applying the DTA retroactively could "raise[] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases"); Felker v Turpin, 518 U.S. 651 (1996) (because AEDPA did not "repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2"); *id.* at 667 (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."); INS v. St. Cyr, 533 U.S. 289, 300-301 (2001) ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to serious constitutional questions.").

222. Hart, *An Exercise in Dialectic*, *supra* note 5, at 1365.

223. *See, e.g.*, Gunther, *supra* note 5.

224. *See supra* note 6.

government's obligations under those treaties, the MCA appears to violate the principles of *United States v. Klein*,[225] by telling the courts how to decide the case, and of *Marbury*, by giving the courts jurisdiction to hear the case but forbidding them to look at the applicable law.

CONCLUSION

Although the Court has worked hard since *McCardle* to avoid squarely facing the question whether statutes that apparently eliminate jurisdiction over categories of claims violate the Constitution, Congress has actively sought the confrontation in enacting the MCA. The outcomes in *Hamdi*, *Rasul*, and especially *Hamdan* suggest that when the case is finally heard on the merits a majority of the Court is likely either to find a way to hold that the DTA and MCA do not bar judicial review of the particular claims at issue, or to hold that the statute cannot constitutionally bar all judicial review of cases raising constitutional claims. Although the appointment of Chief Justice Roberts and Justice Alito have produced a Court that is more sympathetic to executive power than previously, they would not by themselves be able to change the result in the previous cases. On the other hand, the Court's failure to grant certiorari in *Boumediene* suggests that Justice Kennedy, who would provide the fifth vote, is still on the fence on either the jurisdiction-stripping issue or the extraterritorial applicability of the Constitution. However, Justice Kennedy also took the unusual step of warning the government against "tak[ing] additional steps to prejudice the position of petitioners."[226] This may indicate that he is waiting to see whether the judicial review provided by the DTA and MCA can effectively consider the detainees' claims.[227]

The Court has carefully rested its holdings in the detainee cases on statutory construction of §2241, declining to adjudicate the constitutional issues. In *Hamdan,* all but one of the justices in the majority pointedly signed a concurrence inviting Congress to legislate with respect to military commissions. Congress accepted that invitation and military commission prosecutions have begun. The denial of certiorari pending exhaustion of the remedy provided by D.C. Circuit review of military commission convictions suggests that the outcome may also depend on the record of what the commission proceedings actually look like, what precise claims are raised, the factual support for the constitutional claims, and how strong the Government's case appears to be on the charges.

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225. 80 U.S. (13 Wall.) 128 (1871). "[O]f obvious importance to the Klein holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor." United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980).

226. Boumediene v. Bush, 127 S.Ct. 1478, 2007 U.S. LEXIS 3783 (Apr. 2, 2007) (statement of Stevens and Kennedy, JJ.).

227. Two months later, the Court vacated its earlier order and granted certiorari. Boumediene v. Bush, 127 S.Ct. 3078 (June 29, 2007).

In accepting the invitation to legislate on the issue of military commissions, however, Congress also enacted a radical jurisdiction-stripping provision that attempts to read the courts out of the constitutional conversation. The Administration and members of Congress, as well as their defenders, have gone out of their way to say that the MCA's purpose was to "reverse" *Hamdan*. In holding that the detainees have no rights the government is bound to respect, the D.C. Circuit made a point of relying, again, on *Johnson v. Eisentrager*, even though the Supreme Court distinguished the detainees' case from *Eisentrager* in a detailed analysis in *Hamdan*. In recent years the Court has not been tolerant of overt challenges to its authority.[228]

Thus the clues point in different directions as to how the Court will eventually decide when a detainee case comes before it again. Current events may have an effect on the result. I do not mean only the difference between the Zeitgeist of 2002, when most people, including the Court, would have given the benefit of the doubt to a strong President acting to protect the country in time of war, and today, when a majority of the population believes many of those actions may have been wrong, incompetently carried out, and ultimately counterproductive. Journalists have reported numerous instances of mistreatment of detainees who are probably innocent of any hostile acts. Government investigations have been undertaken in Canada, Germany, and Italy of instances in which the United States seized persons in or citizens of those countries and subjected them to extraordinary rendition. The Abu Ghraib photos have been seen around the world, the U.N. has issued a report finding that torture has occurred at Guantanamo, and it has been widely reported that the government wants to proceed before military commissions rather than courts because its evidence against "high-value terrorists" was mostly obtained through torture or "torture lite."[229] There is even a Hollywood movie titled, "Rendition." In these circumstances the Court may be less likely to give the executive branch a completely free hand. On the other hand, several prisoners held at the Baghram Air Base in Afghanistan by the Multi-National Force-Iraq have filed habeas petitions. These petitions could raise the specter of enemy soldiers insisting on habeas proceedings on the battlefield, a particularly powerful image that inspires caution among the Justices.

Finally, the denial of cert. in *Boumediene* makes it possible that the next case to come before the Supreme Court might present stronger facts supporting judicial review. For example, it might involve a challenge to

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228. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down Congress's attempt to reinstate the "compelling state interest" test of *Sherbert v. Verner*).

229. Most examples of "torture lite," such as "long time standing" and long-term sleep deprivation, actually constitute torture under well-established international standards.

impending rendition[230] or to harsh treatment, or the petitioner might be a noncitizen, even a lawful permanent resident, arrested or detained within the United States as an "enemy combatant,"[231] or an individual who could make a compelling case of innocence.[232]

In whatever context the issues arise, the MCA's jurisdiction-stripping provisions represent the most serious challenge to the Court's jurisdiction, to judicial independence, and to the judicial role in restraining government violations of individual liberty since the Civil War and Reconstruction, if not in our entire history. At the same time, the claim that the executive branch can act without any constitutional or legal limits whenever it operates outside the borders of the fifty states strikes at principles that were established in the Declaration of Independence and reaffirmed in the Nuremberg prosecutions.

230. *See supra* note 70.
231. *See supra* note 71.
232. *See supra* note 67.