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# ON PROPER ROLE OF FEDERAL HABEAS CORPUS IN THE WAR ON TERRORISM: AN ARGUMENT FROM HISTORY

*Colin William Masters*\*

To bereave a man of life, . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

– William Blackstone<sup>1</sup>

## I. INTRODUCTION

With the terrorist attacks of September 11, 2001, have come familiar questions of the seemingly irreconcilable tension between civil liberties and national security in times of war or crisis.<sup>2</sup> Like all wars or crises, however, the effect that this tension has had on our system of government has been unique and unpredictable. The statute that allows federal courts to issue writs of habeas corpus, 28 U.S.C. § 2241, has changed drastically in the last fifteen years to respond to a growing threat to national security: terrorism. In the wake of the terrorist attacks of September 11, Congress passed two statutes: the Detainee Treatment Act of 2005 (“DTA”)<sup>3</sup> and the Military Commissions Act of 2006 (“MCA”).<sup>4</sup>

The DTA and the MCA significantly restrict the availability of the writ of habeas corpus to non-citizens subject to extrajudicial executive detention. The DTA removed the jurisdiction of any court to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.<sup>5</sup> The MCA amends the DTA, removing habeas corpus jurisdiction for any alien, wherever seized or held, who has “been determined by the United States to have been properly detained as an enemy combatant or is awaiting such

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\* Colin Masters; J.D. Candidate 2009, University of Notre Dame; B.A., Ohio University; I would like to thank my family, and in particular my parents and brother, for their support, the staff of the *Journal of Legislation* for their hard work making this article fit to print, and Professor Bellia, whose Federal Courts class first got me thinking about these issues. This article is dedicated to my grandmother Gloria.

1. 1 WILLIAM BLACKSTONE, COMMENTARIES \*136.

2. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1, 1–6 (2004); WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (2000).

3. Pub. L. No. 109-148, 119 Stat. 2680 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

4. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 28 U.S.C.).

5. DTA § 1005(e), 119 Stat. at 2742–44.

determination.”<sup>6</sup> Notably, neither statute limits its operation to persons detained pursuant to the war on terrorism. The determination of “enemy combatant” status is to be made by a Combatant Status Review Tribunal (CSRT), created and operated by the Department of Defense.<sup>7</sup> The practical implication of these statutes is to strip the federal courts of jurisdiction to hear applications for writs of habeas corpus by aliens detained anywhere, including within their territorial jurisdiction.<sup>8</sup>

These laws have brought to the forefront of the war on terrorism the writ of habeas corpus. Perhaps more importantly, the laws implicate the writ of habeas corpus in its historic office: a writ to challenge the lawfulness of extrajudicial executive detention. An outpouring of scholarly work has followed, exploring many aspects of the implications of the DTA and the MCA. This Note attempts to explore the question of whether, in light of the jurisdiction-stripping nature of the DTA and MCA, federal courts need statutory authorization to issue writs of habeas corpus to inquire into the detention of suspected terrorists within their territorial jurisdictions.

Jurisdiction-stripping has been a topic of academic debate for some time, producing copious scholarly articles and texts.<sup>9</sup> Several times jurisdiction-stripping statutes have come to the Court, often resulting in the Court bowing to congressional intent.<sup>10</sup> As one scholar has pointed out, however, constitutional problems have always been avoided, either because Congress backs off eventually, or because alternative avenues of review (such as through the state courts) provide for resolution of constitutional questions in forums other than the lower federal courts.<sup>11</sup> Now, the newly-declared “war on terrorism,” and the DTA and MCA enacted to further its goals, threaten to upset this delicate balance by effectively writing all courts out of the equation.

This Note argues that, despite the DTA, MCA, and Chief Justice Marshall’s opinion in *Ex parte Bollman*,<sup>12</sup> in the context of extrajudicial executive detention, federal courts do not need statutory authorization to issue writs of habeas corpus. Further, the availability of the writ of habeas corpus in federal court is an essential component of an indeterminate war on terrorism because it preserves the Court’s traditional role in safeguarding the effectiveness of separation of powers in an ongoing conflict that blurs the line between battleground and playground. Part I of this Note shows the historical role of habeas corpus in reviewing executive detention, arguing that, since *Bollman*, the Court has mistakenly held that it needs statutory authorization to issue the writ of habeas corpus. Part II of this Note critiques the applicability of Supreme Court precedent regarding the availability of habeas corpus in wartime to the current war on terrorism. Specifically, this Part begins by questioning whether we are

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6. MCA § 7(a), 28 U.S.C. § 2241(e).

7. *Id.*

8. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that the Naval base at Guantanamo Bay, Cuba, was within the territorial jurisdiction of United States federal courts under the habeas statute because the United States exercised “plenary and exclusive control, but not ultimate sovereignty” over Guantanamo Bay. *Id.* at 475 (quotations omitted).

9. Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 143 & n.1 (1982).

10. For an example of judicial acquiescence in the habeas context, see *Ex parte McCordle*, 74 U.S. 506 (1869).

11. Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. CIV. R. & CIV. L. 259, 260 (2006).

12. 8 U.S. 75 (1807).

at “war” (as the term is commonly understood), then shows that each war or crisis will require a reformulation of the role of habeas corpus by considering the exigencies facing the Nation. Part III of this Note argues that the DTA and MCA are not only dangerous and poorly thought-out statutes, but threaten the proper role the courts should play in preserving the separation of powers during the war on terrorism. This Note will conclude that, considering the historical development of habeas corpus and the effect that understanding had on the framers, in the context of extrajudicial executive detention, federal courts do not need statutory authorization to issue the writ. Courts should be attuned to the exigencies presented by the war on terrorism, but these exigencies cannot serve to justify writing the courts out of what will likely prove to be a long, drawn-out struggle to keep our country safe from terrorist attacks.

## II. “NECESSARY FOR THE EXERCISE OF THEIR RESPECTIVE JURISDICTIONS”<sup>13</sup>

The writ of habeas corpus has not always served as a means of ensuring the individual liberty of the people in Anglo-Saxon law. The so-called great writ of liberty was born out of political struggle.<sup>14</sup> The writ’s use—and usefulness—as a tool to challenge the authority of the Crown to arbitrarily imprison the people was largely a reflection of a growing societal consensus of the importance of individual autonomy in proper government.<sup>15</sup> Although much of the rhetoric extolling the virtues of habeas corpus concerns its ability to protect individual liberty, habeas corpus’s ability to protect federal court jurisdiction, and therefore preserving the courts’ ability to preserve the separation of powers, is equally important.

For better or for worse, history has played an important role in the Supreme Court’s analysis when faced with a question about the proper role of habeas corpus in American law.<sup>16</sup> In order to properly understand the function of the writ of habeas corpus in American government, it is important to first understand the writ’s development through history and what the founders would have thought about the writ.

### A. *The Founders’ Habeas Corpus*

It is perhaps axiomatic at this point in our history to note that the framing generation drew heavily on the precepts of the English common law in forming our system of government. At the time of the Founding, English habeas corpus was just completing a transformation from a procedural writ ensuring a party’s presence in court to a check against unfettered governmental power and personal autonomy.<sup>17</sup> The colonists considered themselves the “proud heirs” of English liberty, and the writ of

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13. First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 82 (1789).

14. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 62 (1980) (“From the fourteenth to the seventeenth century, habeas corpus was a convenient weapon wielded by the courts of England in their maneuvers to increase and to safeguard their jurisdictions.”).

15. *Id.*

16. See, e.g., *Fay v. Noia*, 372 U.S. 391, 402–03 (1963) (discussing *Bushell’s Case*, 84 Eng. Rep. 1123 (C.P. 1670), an English common law decision concerning the scope of habeas corpus).

17. DUKER, *supra* note 14, at 62–63.

habeas corpus as a bulwark of that liberty.<sup>18</sup>

## 1. English Origins

A brief overview of the development of habeas corpus in English law is helpful in understanding the form and importance of habeas corpus to the framers.<sup>19</sup> The writ of habeas corpus *ad subjiciendum* holds an exalted place in our Anglo-Saxon legal heritage,<sup>20</sup> in large part because it has come to reflect our deep-seated conviction that individual autonomy and liberty are fundamental values inherent in our system of government.<sup>21</sup> But it was not always this way.

Habeas corpus first appeared in the thirteenth century as the writ of habeas corpus *ad respondendum*, issued by the Crown's judicial officers and requiring the sheriff to produce "the defendant's body before the court. . . ."<sup>22</sup> At this time, only the king could petition for the issuance of the writ.<sup>23</sup> However, by the middle of the fourteenth century, habeas corpus had evolved to allow a prisoner to petition the Crown to come before the court and have the court inquire into the reasons for his imprisonment.<sup>24</sup> This enabled the centralized courts of the Crown to release certain prisoners from imprisonment by inferior local courts, thereby protecting the central courts' jurisdiction while releasing the prisoners.<sup>25</sup>

Beginning in the late fifteenth century and continuing throughout the sixteenth century, the common law courts of England used writs of habeas corpus to guard and expand their jurisdictions against incursions by partly judicial, partly executive bodies such as the Court of Chancery, the Ecclesiastical Courts, and the Courts of Admiralty and Requests.<sup>26</sup> The Court of Chancery was essentially a court of equity, established to alleviate the rigidity of the common law.<sup>27</sup> In *Glanville v. Courtney*<sup>28</sup> and *King v. Dr. Gouge*,<sup>29</sup> Lord Coke ruled that if a case was decided first in the common law courts, it

18. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 9 (2001) ("As proud heirs to the traditions of English liberty, the framers of the Constitution felt very deeply the importance of habeas corpus as a weapon against tyranny.").

19. To call this account of hundreds of years of English legal history cursory is an understatement. It is necessary to give a very general account of the origins of the writ to explain its role in our contemporary separation of powers analysis. For a much more thorough examination of this history, see DUKER, *supra* note 14, at 12–63 (1980); see generally J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (4th ed. 2005).

20. 1 BLACKSTONE, *supra* note 1, at \*137 (referring to the Habeas Corpus Act of 1679 as a second Magna Carta). At common law, there were several different kinds of writs of habeas corpus. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1284 n.1 (5th ed. 2003) (citing 3 COMMENTARIES 129–32). Habeas corpus *ad subjiciendum* was the writ that required a custodian who was holding a prisoner, alleged to be held without having received due judicial process, to "present the body" of the prisoner and provide an adequate reason for his or her detention.

21. DUKER, *supra* note 14, at 62. See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

22. DUKER, *supra* note 14, at 17.

23. *Id.* at 23.

24. *Id.* at 24–25; Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 378 (1998).

25. Clarke, *supra* note 24, at 378.

26. DUKER, *supra* note 14, at 33–40.

27. *Id.* at 33–34.

28. 80 Eng. Rep. 1139 (K.B. 1615).

29. 81 Eng. Rep. 98 (K.B. 1615).

could not subsequently be reversed in equity, and released both parties on writs of habeas corpus.<sup>30</sup> Thus, the common law courts used habeas corpus as a tool “to defeat . . . the King’s own authority. . . .”<sup>31</sup> At the same time, the common law courts waged a similar war with the Ecclesiastical Courts.<sup>32</sup> The Ecclesiastical Courts were relatively new creations and particularly prone to engage in “‘usurpations’ of the affairs of the common-law courts.”<sup>33</sup> The common law courts used the writ of habeas corpus to free prisoners who had been imprisoned by the Ecclesiastical Courts.<sup>34</sup> In *Thomlinson’s Case*,<sup>35</sup> the Common Pleas court issued a writ of habeas corpus and freed a prisoner held in contempt of the Court of Admiralty.<sup>36</sup> Similarly, in *Hawkeridge’s Case*,<sup>37</sup> the Common Pleas court released a prisoner held by the marshal of the Admiralty Court because of an insufficient show of cause.<sup>38</sup> And in *Humfrey v. Humfrey*,<sup>39</sup> the Common Pleas court released a prisoner held at the behest of the Court of Requests because he tried to execute a judgment from the Common Pleas court.<sup>40</sup>

The development of the writ of habeas corpus as a means of the common law courts to protect their jurisdiction from usurpations by these quasi-executive courts moved the writ closer to being a safeguard against the arbitrary use of executive power.<sup>41</sup> The writ’s development from procedural writ to writ of liberty moved further along when common law court began to resist the Privy Council.<sup>42</sup> The Privy Council was the “organ through which the King carried on the work of government” and “a predecessor of the modern-day administrative agency.”<sup>43</sup> In 1641, Parliament gave the common law courts “clear power to inquire into the causes of imprisonment and order release... even where the... Privy Council ordered the detention.”<sup>44</sup> Thus, at this time common law courts could invoke the writ of habeas corpus to release prisoners from executive detention.

Starting in the late 1620s, the English parliament began pushing the Crown to ensure the availability of the writ of habeas corpus in order to prevent detention by the Crown without cause.<sup>45</sup> Finally, in 1679, Parliament passed the Habeas Corpus Act.<sup>46</sup> While the Act did not from that point on establish habeas corpus as the bulwark of liberty it was considered to be in 1787,<sup>47</sup> it was an important symbolic step. And while

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30. *Glanville*, 80 Eng. Rep. at 1139–40; *Dr. Gouge*, 81 Eng. Rep. at 98–99.

31. DUKER, *supra* note 14, at 35.

32. *Id.*

33. *Id.* at 36 (citation omitted).

34. *Id.*

35. 77 Eng. Rep. 1379 (C.P. 1605).

36. *Id.* at 1379.

37. 77 Eng. Rep. 1404 (C.P. 1617).

38. *Id.* at 1404.

39. 135 Eng. Rep. 291 (C.P. 1572).

40. *Id.* at 291.

41. DUKER, *supra* note 14, at 40.

42. *Id.*

43. *Id.*

44. Clarke, *supra* note 24, at 383 (citing 16 Car. 1, ch. 10, § 8 and DUKER, *supra* note 14, at 47).

45. DUKER, *supra* note 14, at 44–45.

46. *Id.* at 52.

47. *Id.* at 52–62.

the writ of habeas corpus was never officially extended to the American colonies, at the time of the Rebellion in 1776, habeas corpus was available in various forms in all thirteen original colonies.<sup>48</sup>

Since its very origins, the ability of courts to issue writs of habeas corpus has been tied to the balance of governmental power. The writ of habeas corpus protects individual liberty, not only by setting prisoners free, but also by continually checking executive authority to imprison without process. It is *this* writ that the founders inherited from the English common law.

## 2. Habeas Corpus and the Constitution

While much of the work the framers did in Philadelphia was a result of intense discussion and debate on the floor of the Convention, the sources are sparse and inconclusive on the availability of habeas corpus.<sup>49</sup> The Constitution specifically protects the availability of the writ of habeas corpus from suspension.<sup>50</sup> However, the Suspension Clause, while “simple in appearance, is fraught with confusion.”<sup>51</sup> Whatever the confusion or scarcity of sources, the framers certainly believed that the writ of habeas corpus was an important aspect of government and wanted to safeguard its availability.

Perhaps the most vexing question surrounding the Suspension Clause, and the one with which this Note deals most closely, is: from where do courts derive the power to issue writs of habeas corpus? The Constitution simply states that the availability of habeas corpus cannot be suspended unless certain conditions exist. However, while presupposing its existence, the Constitution is unclear as to whether federal courts should have the power to issue writs of habeas corpus, and whether that power is inherent or available only with statutory authorization.

Charles Pickney first mentioned habeas corpus at the Convention, providing that the privilege of the writ of habeas corpus should not be suspended except during rebellion or invasion.<sup>52</sup> Pickney later proposed that:

The privileges and benefit of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months.<sup>53</sup>

Pickney’s motion to have a suspension provision included in the Constitution used the phrase “in *this* government,” emphasizing in his view the importance of habeas corpus as an essential aspect of the federal government, and indicating that habeas corpus

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48. *Id.* at 115.

49. FREEDMAN, *supra* note 18, at 12 (noting that “the history of the [Suspension] Clause is sparse but clear”).

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

51. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1263 (1970) [hereinafter *Developments*].

52. 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 604, 609 (rev. ed. 1966).

53. 2 *id.* at 340.

would be an intrinsic part of the new government. John Rutledge went so far as to propose immediately after Pickney's motion that habeas corpus be declared inviolable.<sup>54</sup> And several members of the Convention were doubtful that the requisite exigency would ever exist to suspend the writ.<sup>55</sup> After some discussion about what level of government, state or federal, should have the suspension power,<sup>56</sup> the text we have today was adopted.<sup>57</sup>

In the ratification debates, the habeas clause generated more controversy. Unfortunately, much of the debate concerns the suspension power and not the nature of habeas corpus.<sup>58</sup> In FEDERALIST 84, Alexander Hamilton defends the Constitution's lack of a bill of rights by pointing to "[t]he establishment of the writ of *habeas corpus*. . . ."<sup>59</sup> This would suggest that Hamilton, at least, viewed the Suspension Clause as creating a federal writ of habeas corpus. But further support is scarce at best.

What *is* clear from this history is that the framers assumed that habeas review would be available in some form. From this starting point, commentators have drawn various conclusions. One conclusion is that the habeas clause was intended to require all superior courts, state and federal, to make the writ of habeas corpus routinely available.<sup>60</sup> Still another conclusion is that the Suspension Clause was intended to prevent Congress from interfering with the ability of state courts to issue writs of habeas corpus to free federal prisoners.<sup>61</sup> Perhaps what the Suspension Clause requires is that some court, whether it be the state courts or lower federal courts (should Congress choose to create them) be available to issue habeas corpus to federal prisoners.<sup>62</sup> The Court in *Bollman* adopted a different view: the federal courts do not have the power to issue writs of habeas corpus, unless Congress grants them that power in a statute.<sup>63</sup> The text of the Judiciary Act of 1789 does not support any of these conclusions.

54. *Id.* at 438.

55. *Id.* at 340–42.

56. FREEDMAN, *supra* note 18, at 13 (citing Luther Martin, *Genuine Information VIII* (Jan. 22, 1788), reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 434 (John P. Kaminski & Gaspare J. Saldino eds., 1984)).

57. 2 FARRAND, *supra* note 52, at 596.

58. FREEDMAN, *supra* note 18, at 14.

59. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

60. Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 (1970) ("[T]he Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.").

61. DUKER, *supra* note 14, at 126–56.

62. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2499 (1998) ("The Framers' decision to forbid 'suspension' of the writ rather than to require affirmative of the writ could be read to mean that the power to grant habeas corpus for persons held under authority of federal law must lie in *some court*—in the state courts if there were no federal courts, and in the federal courts once they were created.") (emphasis in original).

63. *Bollman*, 8 U.S. at 95 ("Acting under the immediate influence of this injunction, [the First Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.").



### 3. The Judiciary Act of 1789

A fair reading of the Judiciary Act of 1789 reveals that federal courts have inherent power, by virtue of their jurisdiction, to issue the writ. Section fourteen of the Judiciary Act of 1789 reads:

That all before-mentioned courts of the United States, shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either the justices of the supreme court, as well as judges of the district courts, shall have power to issue 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.<sup>64</sup>

Section fourteen acknowledges that some writs, like habeas corpus, that are “not specifically provided for by statute” are still “necessary for the exercise of [the federal courts’] respective jurisdictions.”<sup>65</sup> As Professor Paschal points out, if section fourteen was meant to affirmatively grant federal courts the power to grant habeas writs, it would seem more logical to include its provisions in section thirteen.<sup>66</sup> Section thirteen reads:

. . . The Supreme Court . . . shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.<sup>67</sup>

The grant of power in section thirteen is direct and unqualified; the acknowledgment of power in section fourteen contains the qualitative phrases “and all other writs not specifically provided for by statute,” and “necessary to the exercise of their respective jurisdictions.” Read together, it becomes clear that section thirteen provides affirmative power to issue writs that the first Congress believed federal courts would not inherently possess, and section fourteen acknowledges that the affirmative grant of section thirteen does not preclude federal courts from issuing necessary writs that they would inherently possess the power to issue.

An additional benefit of reading section fourteen as acknowledging the inherent power of federal courts to issue writs of habeas corpus is that it explains the Constitution’s silence on the source of the writ of habeas corpus: the framers obviously did not believe they needed to specifically provide for the power to issue writs of

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64. First Judiciary Act, § 14, 1 Stat. at 81–82 (1789).

65. *Id.*

66. Paschal, *supra* note 60, at 620 (noting that section thirteen affirmatively grants federal courts the power to issue writs of prohibition and mandamus).

67. First Judiciary Act, ch. 20, § 13, 1 Stat. at 81 (1789).

habeas corpus because they believed that power to be inherent in the concept of judicial power. Further, in a system predicated on the separation of governmental power between coequal branches of government, it would seem counterintuitive that the framers would have allowed habeas corpus's existence to be contingent on the whim of the legislative branch, especially considering habeas corpus's role as a check on executive power. When the framers created the federal judiciary, it was assumed that the courts would have the power to issue writs of habeas corpus, not because they had admonished Congress to provide a statutory basis for habeas, but because the structure of American government clearly implies habeas power for the courts.

### B. *The Bollman Misstep*

As Professor Freedman observed in the title of a recent article, the fact that it was Chief Justice John Marshall who said that the power of federal courts to issue writs of habeas corpus requires statutory authorization does not make it true.<sup>68</sup> However, that is exactly what Chief Justice John Marshall opined in *Bollman*.<sup>69</sup> *Bollman* was wrong when it was decided, at least inasmuch as it claims that federal courts have no inherent power to issue writs of habeas corpus, and it continues to be wrong today. And yet, this position still retains its supporters.<sup>70</sup>

#### 1. The Decision

In *Bollman*, the petitioners Samuel Swartwout and Erick Bollman were committed to stand trial for treason.<sup>71</sup> The two subsequently petitioned the Supreme Court for writs of habeas corpus.<sup>72</sup> While the Attorney General declined to argue on behalf of the United States,<sup>73</sup> counsel for the petitioners framed the issue this way: “[t]here are two general considerations: 1. Whether this court has the power generally of issuing the writ of *habeas corpus ad subjiciendum*? 2. If it has that power generally, whether it extends to commitments by the circuit court?”<sup>74</sup> Petitioner’s counsel went on to argue of habeas corpus:

The general power of issuing this great remedial writ, is incident to this court as a supreme court of record. It is a power given to such a court by the common law. *Every court possesses necessarily certain incidental powers as a court. . . .* If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could

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68. Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 531 (2000).

69. 8 U.S. at 95.

70. *Developments, supra* note 51, at 1045.

71. *Bollman*, 8 U.S. at 75–76.

72. *Id.*

73. *Id.* at 79. In fact, the Attorney General apparently did not doubt that the Court could issue the writ, saying that if the Court chose to issue the writ, he “‘should cheerfully submit to it.’” FREEDMAN, *supra* note 18, at 21 (quoting N.Y. EVE. POST, Feb. 14, 1807, at 1).

74. *Bollman*, 8 U.S. at 79 (emphasis in original).

not imprison for contempts in its presence. It could not compel the attendance of a witness, nor oblige him to testify. It could not compel the attendance of jurors, . . . nor punish them for improper conduct. These powers are not given by the constitution, nor by statute, but flow from the common law. . . . [T]he power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.<sup>75</sup>

Petitioners argued alternatively that section fourteen of the Judiciary Act of 1789 gave the Court the power to issue writs of habeas corpus.<sup>76</sup>

The Chief Justice rejected the petitioners' assertion that the Supreme Court had inherent power to issue writs of habeas corpus, "disclaim[ing] all jurisdiction not given by the constitution, or by the laws of the United States."<sup>77</sup> As opposed to courts of common law jurisdiction, the Chief Justice stated that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."<sup>78</sup> Finally, the Chief Justice pointed out that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law."<sup>79</sup> The inquiry in cases like this was simply "whether by any statute, compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, . . . has been given to this court."<sup>80</sup>

The evidence that the Chief Justice points to in support of this conclusion is flimsy at best. In his opinion, Chief Justice Marshall says that "[i]t is unnecessary to state the reasoning on which this opinion is founded, because it has been *repeatedly given* by this court. . . ."<sup>81</sup> As many scholars have noted, however, the assertion that the Court had ever explained why the outcome in *Bollman* was necessary is simply false.<sup>82</sup> Indeed, one scholar points out that Chief Justice Marshall was not able to give the evidence, "not because he had no time to collect the citations, but because there were none to collect."<sup>83</sup>

Instead, Chief Justice Marshall looked to context and, in particular, the Suspension Clause. The Chief Justice explained:

Acting under the immediate influence of this injunction, [the First Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension

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75. *Id.* at 79–80 (emphasis added).

76. *Id.* at 83–86.

77. *Id.* at 93.

78. *Id.*

79. *Bollman*, 8 U.S. at 93–94.

80. *Id.* at 94.

81. *Id.* at 93 (emphasis added).

82. FREEDMAN, *supra* note 18, at 25 and n.40 (noting that John Marshall was known for cavalier treatment of precedent).

83. Paschal, *supra* note 60, at 628.

should be enacted.<sup>84</sup>

He further construed the portion of section fourteen that reads “which may be necessary for the exercise of their respective jurisdictions” to be a limiting principle on all of section fourteen. This reading allowed the Chief Justice to come to the conclusion that the Supreme Court could hear a petition for a writ of habeas corpus even when the Court could not exercise jurisdiction over the underlying controversy.<sup>85</sup> Finally, he tersely agreed with the petitioners’ assertion that entertaining a habeas corpus petition would be an exercise of appellate, rather than original, jurisdiction without much discussion.<sup>86</sup>

## 2. The Political Context

The underlying context surrounding the way in which the *Bollman* case came to the Court paints the decision in a dubious light. The *Bollman* case arose out of the “Aaron Burr conspiracy,” and came to the Court at a time when “Republican hostility towards the Court and towards Marshall personally was brought to a climax. . . .”<sup>87</sup> The two petitioners in *Bollman* were accused of aiding Aaron Burr.<sup>88</sup> President Jefferson took drastic measures, bringing Bollman and Swartwout to Washington, D.C., in spite of the fact that the two had petitioned for and received writs of habeas corpus from the Louisiana courts and a federal court in South Carolina.<sup>89</sup>

While the two were in custody in Washington, President Jefferson asked the Congress to suspend the writ of habeas corpus, in order to prevent the federal judicial power from releasing the *Bollman* petitioners from custody.<sup>90</sup> A bill to that effect passed the Senate with only one vote against, but the House of Representatives subsequently rejected the bill on a vote of 113 to nineteen.<sup>91</sup> The petitioners were then charged in the Circuit Court with treason, and the Supreme Court heard petitioners’ request for a writ of habeas corpus.<sup>92</sup>

Almost all of the Congress attended the oral argument, as interest in the case was at a “fever pitch.”<sup>93</sup> Counsel for the petitioners engaged in “a very unnecessary display of energy and pathos” intended to “enlist the passions or prejudices” of the audience.<sup>94</sup> The counsel urged the Court to eschew their own “passions and prejudices” and other

84. *Bollman*, 8 U.S. at 95.

85. FREEDMAN, *supra* note 18, at 24–25. This language created a problem for the Chief Justice because the Supreme Court’s “respective jurisdiction,” as delineated in the statutory grant of jurisdiction, did not include the case with which it was presented.

86. *Bollman*, 8 U.S. at 101.

87. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 301 (photo. reprint 1987) (rev. ed. 1926).

88. *Id.* at 302. It was unclear, however, whether Aaron Burr actually intended to commit treason or simply to violate the United States’s neutrality laws. *Id.*

89. *Id.*

90. DUKER, *supra* note 14, at 135.

91. FREEDMAN, *supra* note 18, at 37.

92. *Id.*

93. Paschal, *supra* note 60, at 625.

94. *Bollman*, 8 U.S. at 103, 107 (Johnson, J., dissenting).

“external influences,”<sup>95</sup> an obvious reference to the risk that the Court might bow to political pressure in coming to its decision. Further, Chief Justice Marshall handed down his decision in the case two days after oral argument, causing one scholar to observe that “[e]vidence of the haste with which the opinion was prepared is everywhere.”<sup>96</sup>

In this political context, it is not surprising that the Chief Justice would be hesitant to carve out for the Court substantial inherent power beyond that which was granted by statute. The Chief Justice’s cursory dismissal of petitioners’ argument that the federal courts possessed no inherent power to issue writs of habeas corpus was “simply an *ipse dixit* conveniently brought forth for the occasion.”<sup>97</sup> Showing his political prowess, the Chief Justice’s opinion first disclaimed the position advocated by the petitioners that would have appeared to his Republican audience as staking out an overly-broad power for federal courts, while ultimately holding that the federal courts have the power to issue habeas corpus by virtue of the statutory jurisdictional grant.<sup>98</sup> Typical of the Chief Justice’s jurisprudence throughout his years on the Court, he was simply “doing what was politically smart and institutionally essential.”<sup>99</sup>

### 3. What Did *Bollman* Hold?

In terms of its essential holding, *Ex parte Bollman* is a case of statutory construction—nothing more and nothing less.<sup>100</sup> However, like many of the decisions of the Marshall Court, *Bollman* has cast a long shadow. Since *Bollman*, conventional wisdom has become that federal courts cannot exercise habeas corpus jurisdiction without statutory authorization from Congress.<sup>101</sup> The conclusion that *Bollman* settled the issue of federal courts’ inherent power to issue writs of habeas corpus is, however, unsupported.<sup>102</sup>

The Chief Justice held that section fourteen of the Judiciary Act of 1789 provided a statutory basis for issuing the writs of habeas corpus to *Bollman* and *Swartwout*. Therefore, any statement about the ability of federal courts to issue writs of habeas corpus in the *absence* of a statutory grant is pure dictum. The doctrine of constitutional avoidance should have counseled the Chief Justice from passing on the constitutional

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95. *Id.* at 87.

96. Paschal, *supra* note 60, at 628.

97. FREEDMAN, *supra* note 18, at 36.

98. *Id.* at 27.

99. R. Kent Newmyer, *Chief Justice John Marshall in the Context of His Times*, 56 WASH. & LEE L. REV. 841, 844–45 (1999) (describing the political prowess of Chief Justice Marshall in the context of *Marbury v. Madison* and the establishment of judicial review).

100. FREEDMAN, *supra* note 18, at 26 (describing the actual holding of *Bollman* as being “the perfectly reasonable conclusion that the Judiciary Act gave the Court jurisdiction over the proceedings before it”).

101. Alexander, *supra* note 11, at 276.

102. In fact, the Court has indicated in a subsequent case that it might have inherent power to issue the writ of habeas corpus. See *Ex parte Yerger*, 75 U.S. 85, 95–96 (1868) (“The terms of [the Suspension Clause] necessarily imply 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.”) Notwithstanding this suggestive language, the Court went on the ground its ruling in the language of the First Judiciary Act, and not an inherent power to issue the writ. *Id.* at 96.

question<sup>103</sup> regardless of whether he deemed it necessary to soften the political blow of the actual holding. *Bollman*, properly understood, should be limited to its statutory holding.

The history of habeas corpus and the creation of the American constitution suggest that the ability of the federal courts to issue writs of habeas corpus in the context of extrajudicial executive detention is an inherent power, intimately intertwined with the concepts of liberty and the separation of powers. The question of whether federal courts have inherent power to issue writs of habeas corpus is a grave constitutional question, and one that will likely be brought to the Court in a situation like that presented by the Guantanamo Bay cases in the current war on terrorism.<sup>104</sup>

### III. "INTER ARMA SILENT LEGES"<sup>105</sup>

Before engaging in an examination of how the Court should approach the habeas-stripping provisions of the DTA and MCA in light of history and the development of habeas corpus in American law, another issue must be addressed. President Bush has asserted repeatedly as a justification for his post-September 11 actions the Commander in Chief powers given to the President in the Constitution.<sup>106</sup> The underlying assumption, which President Bush has stated explicitly,<sup>107</sup> is that the United States has been at war since September 11, 2001. The existence of a state of war, and the exigencies that it creates, change the way in which courts and government view habeas corpus.<sup>108</sup> As the late Chief Justice Rehnquist put it, "[t]he laws will thus not be silent in time of war, but they will speak with a somewhat different voice."<sup>109</sup>

The availability of habeas corpus in times of war has always been subject to the practical necessities of an ongoing conflict.<sup>110</sup> And the Court has consistently been attuned to the idea that military emergencies necessitate increased governmental emphasis on the strengths of the politically accountable branches of government, especially the executive.<sup>111</sup> However, this judicial deference has always been

103. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandies, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")

104. See *infra* Part III.

105. Cicero's maxim: "in times of war law is silent."

106. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . .").

107. Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 96 (Jan. 20, 2004) [hereinafter "State of the Union 2004"].

108. The debates on the existence of the Suspension Clause, and in particular the question that some of the framers raised as to whether a suspension of habeas corpus would ever be necessary, supports this view. See *infra* Part I.A.2. If the framers believed that habeas corpus should operate the same in peacetime as in times of rebellion or insurrection, the Suspension Clause would be unnecessary.

109. REHNQUIST, *supra* note 2, at 225.

110. See, e.g., *Ex parte Milligan*, 71 U.S. 2, 109 (1866). See also *infra* Part II.B.

111. *Id.*; see also Issacharoff & Pildes, *supra* note 2, at 4 (discussing other countries that have changed their stance on civil liberties to address the problems of terrorism and noting that "[i]t is now true for the United States as well, as the government (national and state) modifies the legal framework designated for

predicated on the practical considerations of war. Thus, the role that habeas corpus will play in each new conflict will be largely dependent on the exigencies of the particular emergency in which the country finds itself.

### A. *Are We At War?*

Before engaging the inadequacy and inapplicability of the Court's past precedents on the intersection of habeas corpus and war, it is worth engaging in a brief analysis of whether we are even at "war" at all. To be sure, the action that the government has taken subsequent to the September 11 terrorist attacks has come to be known as the "war on terror."<sup>112</sup> Yet, it is beyond question that the war on terrorism does not at all resemble the wars we have waged in the past. As such, Congress and the Court should not mechanically invoke and apply past precedent to present problems in the war on terrorism.

In his January 20, 2004 State of the Union address, President Bush publicly addressed concerns with the term "war" being used for the governmental response to terrorism:

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. . . . After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.<sup>113</sup>

Rhetoric aside, President Bush's point is certainly well taken: in the wake of September 11, the normal functions of the criminal justice system are not likely to be able to deal with the exigencies of the threat of domestic terrorism. As Professor Ackerman notes, however, presenting the problem of terrorism as an all-or-nothing proposition—either we deal with terrorism with all the incidents of war or we use the criminal sanctions already in place—creates a "false dichotomy."<sup>114</sup> Certainly any rational person would support waging a *war* on terrorism if the alternative is criminal law sanctions that were inadequate to prevent the attacks in the first instance. Further, as a result of invoking the talismanic concept "war," the President can invoke the formidable Commander-in-Chief powers, and call the country (including the Congress) to rally behind the cause.<sup>115</sup>

In international law, "[a] war or armed conflict... has two important components: It consists of two or more organized armed groups engaged in protracted and intense

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normal times to adjust to the radical new security threat posed by militant Islamic fundamentalism reflected in the events of September 11, 2001").

112. 147 CONG. REC. 17,321 (2001) (President Bush referred to it as a "war on terror" with al-Qaeda); *see also* 151 CONG. R. S12631, 12655 (daily ed. Nov. 10, 2005) (statement of Sen. Graham) ("One thing we need to understand as a nation and we need to understand in the Senate, in my opinion, is that the attack of 9/11 was an act of war. It was not a criminal enterprise.").

113. State of the Union 2004, *supra* note 107, at 96.

114. Bruce Ackerman, *This Is Not A War*, 113 YALE L. J. 1871, 1873 (2004) [hereinafter *Not A War*]. Professor Ackerman proposes a third framework—a compromise, of sorts—that would describe the threat of terrorism, not as a state of war but as a state of emergency. *Id.*

115. *Id.* at 1872 ("Even at its most metaphorical, martial rhetoric allows the President to invoke his special mystique as Commander in Chief, calling the public to suffer greatly for the good of the nation.").

armed hostilities.”<sup>116</sup> On its face, the war on terrorism does not seem to fit this definition. However, Presidents in recent years have been more prone to announce “wars” on perceived evils, rather than armed forces.<sup>117</sup> Several factors suggest that the war on terrorism is not a war at all—at least not in the conventional sense.

The first is the indeterminacy of the threat of terrorism. While Professor Ackerman’s distrust of the courts in dealing with terrorist threats may be misplaced, he is certainly on firm ground when he observes that the threat of terrorism will likely never cease.<sup>118</sup> Indeed, “[w]ar between sovereign states . . . comes to an end; some decisive act of capitulation, armistice, or treaty takes place for all the world to see.”<sup>119</sup> In the war on terrorism, this is not likely to happen.<sup>120</sup> In a similar vein, Justice Jackson, in his dissenting opinion in *Korematsu v. United States*,<sup>121</sup> noted that “[a] military order, however unconstitutional, is not apt to last longer than the military emergency.”<sup>122</sup> By virtue of the determinate nature of military necessity, Justice Jackson advocated avoiding “a judicial construction of the due process clause that would sustain” the military order authorizing the internment of Japanese during World War II because approving it would be “a far more subtle blow to liberty than the promulgation of the order itself.”<sup>123</sup> Implicit in Justice Jackson’s remarks is the idea that in times of military necessity, the courts should not interfere with executive action, however likely it may be that it is unconstitutional, because the military necessity that justifies it is temporary. This temporary aspect of wartime that Justice Jackson emphasizes is simply not part of the war on terrorism. Thus, questionable actions such as the jurisdiction-stripping aspects of the DTA and MCA should be subject to greater judicial scrutiny.

The second is the lack of a defined enemy. This aspect is particularly important considering the Court’s emphasis since *Quirin* on the concept of an “enemy combatant.”<sup>124</sup> The Court in *Quirin* was clear that all enemy combatants, whether lawful or unlawful, are subject to capture and detention until the cessation of hostilities.<sup>125</sup> Designating all persons suspected of terrorism enemy combatants is dangerous because “anybody can be suspected of complicity with al Qaeda.”<sup>126</sup> So, if this is a war, “we not only subject *everybody* to the risk of detention by the Commander in Chief, but we subject everybody to the risk of *endless* detention.”<sup>127</sup>

This is not to say that terrorism is best understood as a crime. It is somewhere in

116. Mary Ellen O’Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 2 ILSA J. INT’L & COMP. L. 535, 537 (2006).

117. *Not a War*, *supra* note 114, at 1872 n.2.

118. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1070 (2004) [hereinafter *Emergency Constitution*].

119. *Id.* at 1033.

120. *Id.*

121. 323 U.S. 214 (1944).

122. *Id.* at 246 (Jackson, J., dissenting).

123. *Id.* at 245–46.

124. *Quirin*, 317 U.S. at 30–31.

125. *Id.*

126. *Emergency Constitution*, *supra* note 118, at 1033.

127. *Id.*



between. Whether one calls the state of our nation an “emergency,”<sup>128</sup> a crisis, or some other appropriate appellation, it is crucial that we understand that our traditional analysis of wartime jurisprudence, especially in the context of civil liberties and habeas corpus, needs to be rethought. And when courts go about rethinking this analysis, they should keep in mind the unique qualities of the war on terrorism.

### B. *The Great Writ at War*

Since September 11, 2001, the Court has decided four cases arising from petitions for writs of habeas corpus by parties claiming to be the victim of extrajudicial executive detention at Guantanamo Bay, Cuba,<sup>129</sup> and more are on the way.<sup>130</sup> In these decisions, the Court has looked to cases dealing with the availability of habeas review in wartime, arising from the events of Civil War and World War II, in an attempt to sort out the complicated issues presented by the “legal black hole” of Guantanamo Bay.<sup>131</sup> These cases, although arguably correct, given the exigencies apparent to the Court at the time of the decisions, are by and large inapposite to the exigencies of the war on terrorism.

#### 1. *Ex Parte Milligan*

*Milligan* was a case that arose in 1864 during the Civil War. Milligan was a citizen of Indiana who was arrested by the military and tried before a military commission for violations of the laws of war and aiding and abetting the rebellion.<sup>132</sup> The military commission tried Milligan and sentenced him to be hanged.<sup>133</sup> Milligan petitioned the federal court in Indiana for a writ of habeas corpus on the grounds that, as a citizen of Indiana who was not part of the armed conflict of the Civil War, the military commission did not have jurisdiction to hear his case.<sup>134</sup> The federal circuit court split on the issue, and the case was certified to the Supreme Court.<sup>135</sup>

The Supreme Court heard expedited arguments on behalf of the petitioners and the government over the course of six consecutive days.<sup>136</sup> On April 3, 1866, the last day

128. *Id.* at 1037.

129. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul*, 542 U.S. at 475; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

130. Just this last Term, the Court issued decisions in *Boumediene v. Bush*, No. 06-1195, 553 U.S. \_\_\_\_ (2008), and *Munaf v. Geren*, No. 06-1666, 553 U.S. \_\_\_\_ (2008), two cases involving habeas rights in the war of terrorism. The impact of *Boumediene* on the topic of this Note is discussed *infra*, Part V. Not only will the lower federal court have to sort out the issues in these cases, possibly resulting in the need for further intervention by the Supreme Court, but the Court has granted certiorari in *Al-Marri v. Spagone*, 77 U.S.L.W. 3340 (U.S. Dec. 5, 2008) (No. 08-368). This habeas petition will test the government’s power to indefinitely detain a person lawfully within the United States by designating him or her an “enemy combatant.”

131. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004) (“The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals.”).

132. *Milligan*, 71 U.S. at 6.

133. *Id.* at 107.

134. *Id.* at 107–108.

135. *Id.* at 108.

136. REHNQUIST, *supra* note 2, at 118.

of the term, the Court entered an order that the writ of habeas corpus should issue, and that the military commission had no jurisdiction to try Milligan.<sup>137</sup> The opinions in the case were not read, however, until the next term, and on December 17, 1866, Justice Davis delivered his opinion for the Court.<sup>138</sup>

The central holding of *Milligan* is that a citizen who is “no wise connected with the military service” may not be tried before a military commission when the civil courts are “open” and the civilian authority “unopposed.”<sup>139</sup> However, the decision is not very useful for courts today that are trying to deal with the Guantanamo Bay cases. The order freeing Milligan was issued on April 3, 1866, almost a year after General Lee and the Confederacy had surrendered. The opinion setting forth the reasons for the Court’s order was not issued for another eight months. Further, Milligan was a citizen, and he was captured and held within the United States.<sup>140</sup> Much of the difficulty with the Guantanamo Bay cases surrounds the territorial status of the military base in Cuba and the availability of habeas corpus to non-citizens.

*Milligan* is important for present purposes because it highlights the fact that the Court has been willing in the past to hear habeas corpus petitions arising from alleged prisoners of war. However, much of the reasoning in *Milligan* is *post hoc*, in that the Court did not need to engage in a wholesale balancing of the competing governmental interests in times of war because the war had long been over. Therefore, *Milligan* does little to instruct us as to the proper role of habeas corpus in the war on terrorism.

## 2. *Ex Parte Quirin*

Fast-forward eighty years to World War II. The Supreme Court’s decision in *Quirin*<sup>141</sup> involved eight German soldiers (one of whom, Haupt, may have been an American citizen) captured on American soil engaging in efforts to sabotage the United States’s war effort.<sup>142</sup> The eight men split up into two groups, the first of which landed near Long Island, New York, on June 12, 1942.<sup>143</sup> The second submarine landed near Jacksonville, Florida, on June 16, 1942.<sup>144</sup> Almost immediately, one of the saboteurs, George John Dasch, notified the FBI of the plot and all eight were arrested soon thereafter.<sup>145</sup> The executive branch chose to try the saboteurs before a military tribunal, rather than a civilian court.<sup>146</sup> On July 2, 1942, President Roosevelt authorized the use of the tribunal, and the saboteurs sought writs of habeas corpus in the federal courts to challenge their detention and trial before military courts.<sup>147</sup> In the meantime, the

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137. *Id.* at 128.

138. *Id.*

139. *Milligan*, 71 U.S. at 121–22.

140. *Id.* at 107.

141. 317 U.S. at 1.

142. *Id.* at 20–21.

143. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 25 (2003).

144. *Id.* at 35.

145. *Id.* at 34, 38.

146. *Id.* at 46.

147. *Quirin*, 317 U.S. at 18–19.

military trial continued.<sup>148</sup> In a brief per curiam decision, the Court denied the saboteurs' petitions for habeas corpus and held that the military trials could proceed.<sup>149</sup> All eight were tried and convicted before the military tribunal.

The first time the phrase "enemy combatant" appears in a Supreme Court opinion is in *Quirin*.<sup>150</sup> The government asserted that the soldiers were unlawful enemy combatants, and were therefore subject to trial by military commission for crimes under the laws of war.<sup>151</sup> Further, the government argued that because the German soldiers were alien enemy combatants, the Court could not issue a writ of habeas corpus to review the constitutionality of their detention.<sup>152</sup> The Court ended up denying the soldiers' applications for writs of habeas corpus, but the Court was unclear as to whether it was denying the applications for the writs based on the merits of the soldiers' constitutional claim or on a belief that it was without power to grant the writs.<sup>153</sup>

As Justice Scalia put it in his dissent in *Hamdi v. Rumsfeld*, *Quirin* "was not th[e] Court's finest hour."<sup>154</sup> The Court's lack of clarity in its reasoning might be attributed to the fact that, like *Milligan*, its reasoning was *post hoc*. After oral argument, the Court issued its brief per curiam decision denying the applications for writs of habeas corpus, and the soldiers were executed a week later.<sup>155</sup> Chief Justice Stone's opinion for the Court was in all likelihood prepared after the saboteurs were executed and their legal rights, for better or worse, decided with finality.

The most vexing aspect of *Quirin* is its ambiguity as to whether the Court decided that, because of the existence of a state of war, it could not (or even should not) consider the petitioners' habeas application, or if the Court decided as a matter of constitutional law that the trial by military tribunal was permissible. The per curiam decision listed three holdings:

- (1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege and offense or offenses which the President is authorized to order tried before a military commission.
- (2) That the military commission was lawfully constituted.
- (3) That petitioners are held in lawful custody for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.<sup>156</sup>

This language would tend to suggest that the Court decided the petitioners underlying constitutional claims, rather than denying the petition for habeas corpus as beyond the Court's power to entertain. But the Court goes on: "[t]he motions for leave to file

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148. *Id.* at 23.

149. *Id.* at 18–19.

150. *Id.* at 30–31.

151. *Id.* at 24.

152. *Quirin*, 317 U.S. at 24–25.

153. *Id.* at 24.

154. *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting).

155. *Id.*

156. *Quirin*, 317 U.S. at 18–19.

petitions for writs of habeas corpus are denied.”<sup>157</sup> This language would suggest that the Court did not reach the substantive claims of the petitioners, but simply denied passing on the issues at all.

This apparent ambiguity was taken up by Chief Justice Stone’s opinion. The Court noted that the normal procedure would be to determine whether the saboteurs’ habeas petition could proceed; if it could, the Court would then inquire into the reasons for their detention.<sup>158</sup> In this case, however, the Court skipped the initial step, asking only “whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner.”<sup>159</sup> Thus, the confusion in the holding appears to be the result of a procedural expedient: the Court, seeking to dispose of the case quickly, decided the underlying constitutional claims before they granted the habeas petitions. The fact that they reached the constitutional claims suggests, however, that if the case was less urgent, the Court believed that it had could and should issue the writ.

### 3. *Johnson v. Eisentrager*

In *Eisentrager*,<sup>160</sup> twenty-one German nationals petitioned the District Court for the District of Columbia for writs of habeas corpus.<sup>161</sup> In their original petition, they alleged that they were in the German armed forces in China, but they amended the petition to say that they were working for civilian agencies.<sup>162</sup> When hostilities with Germany ceased, the petitioners allegedly continued hostile military activities, helping the Japanese forces in the Pacific by collecting intelligence on American forces.<sup>163</sup> The petitioners were convicted by a military commission and repatriated to Germany to serve their sentence.<sup>164</sup>

The petitioners applied for writs of habeas corpus, and the Court held that aliens detained abroad may not avail themselves of the writ of habeas corpus in federal court.<sup>165</sup> In *Eisentrager*, the Court relied on *Ahrens v. Clark*,<sup>166</sup> which held that a petition for habeas corpus could not stand if the petitioner could not be brought before the court.<sup>167</sup> Because the petitioners in *Eisentrager* were held overseas, and bringing the petitioners before the court would be impractical, if not impossible, the Court dismissed their petition.<sup>168</sup>

The Court in *Rasul* noted that “[b]ecause *Braden* [v. 30th Judicial Court of Ky.]<sup>169</sup> overruled the statutory predicate to *Eisentrager*’s holding, *Eisentrager* plainly does not

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157. *Id.* at 19.

158. *Id.* at 24.

159. *Id.*

160. 339 U.S. 763 (1950).

161. *Id.* at 765.

162. *Id.*

163. *Id.* at 766.

164. *Id.*

165. *Eisentrager*, 399 U.S. at 781.

166. 335 U.S. 188 (1948).

167. *Id.* at 192.

168. *Eisentrager*, 399 U.S. at 790–91.

169. 410 U.S. 484 (1973).

preclude the exercise of [statutory habeas] jurisdiction over petitioners' claims."<sup>170</sup> The "statutory predicate" that *Braden* overruled was the interpretation that *Ahrens* gave the habeas statute requiring that the petitioner be able to be brought before the Court. The Court in *Rasul* clearly stated that the petitioner does not need to be able to be brought before the habeas court. Further, *Eisentrager* is inapplicable to the Guantanamo Bay cases because the Court determined that Guantanamo Bay, unlike Germany, is within the territorial jurisdiction of the federal courts.

If there is anything that is clear from *Milligan*, *Quirin*, and *Eisentrager*, it is that the practical exigencies of war affect the availability of habeas relief. But what is equally clear is that because every war is unique, the courts' responses to the practical necessities must also be tailored to the war's unique characteristics. While the holdings in these three cases are all distinguishable on the facts, the methodology—the Court tailoring its response to the situation at hand when weighing whether to issue writs of habeas corpus—is sound.

The Court is not the only branch of the federal government, however, that must react to the war on terrorism. Congress has enacted two pieces of legislation concerning the availability of habeas that threaten to prevent the Court from playing a role in prosecuting the war on terrorism. These two statutes may prove to deal subtle but substantial blows to Americans' civil liberties.

#### IV. "A MORE DANGEROUS ENGINE OF ARBITRARY GOVERNMENT"<sup>171</sup>

It is no great stretch to suggest that September 11, 2001, and the events thereafter, have produced the constitutional crises of our day. Lawmakers are faced with the day-to-day task of protecting the American people from the threat of terrorism while "preserving our commitment at home to the principles for which we fight abroad."<sup>172</sup> These efforts have produced several statutes aimed at providing the executive branch with the tools to fight terrorism at home and abroad. The two that this Note will now take up directly are the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006.

##### A. Background

In order to properly engage the DTA and MCA in light of the history of habeas corpus discussed above, some background on the events that transpired after the terrorist attacks of September 11 is necessary. On September 18, 2001, in the wake of the September 11 terrorist attacks, Congress passed the Authorization for Use of Military Force (AUMF).<sup>173</sup> This joint resolution empowered the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . . ."<sup>174</sup> In short order President Bush, relying on the

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170. *Rasul*, 542 U.S. at 479.

171. 1 BLACKSTONE, *supra* note 1, at \*136.

172. *Hamdi*, 542 U.S. at 532.

173. Pub. L. No. 107-40, 115 Stat. 224 (2001).

174. *Id.*

Commander in Chief power, the AUMF, and 10 U.S.C. §§ 821 and 836,<sup>175</sup> issued an executive order authorizing the executive detention of non-citizens in the war on terror.<sup>176</sup> The order, by its terms, applies to non-citizens who the President determines:

- (i) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described in subparagraphs (i) and (ii) of [this] subsection of this order . . .<sup>177</sup>

The order further provided that individuals detained by the President pursuant to the order will be under the authority of the Secretary of Defense.<sup>178</sup> The Secretary of Defense held these detainees at the Naval Base at Guantanamo Bay, Cuba.

In its October Term, 2003, the Supreme Court decided three cases concerning the ability of prisoners detained pursuant to the war on terrorism to avail themselves of federal courts and the writ of habeas corpus.<sup>179</sup> One of these cases, *Rasul*, directly resulted in Congress passing the DTA. In *Rasul*, the Court determined that Guantanamo Bay is within the territorial jurisdiction of the federal courts.<sup>180</sup> The petitioners in *Rasul* were two Australian citizens and twelve Kuwaiti citizens captured in Afghanistan during hostilities between the United States and the Taliban regime and held by the United States government at Guantanamo Bay.<sup>181</sup> The government argued that Guantanamo Bay was outside the territorial boundaries of the United States and that congressional action is presumed not to have extraterritorial effect.<sup>182</sup> Petitioners argued that Guantanamo Bay is within the jurisdiction of the United States because the government exercises plenary and exclusive jurisdiction, but not ultimate sovereignty.<sup>183</sup> The Court sided with the petitioners, determining that the federal courts' habeas corpus jurisdiction is broad enough to hear the claims of the petitioners in *Rasul*.<sup>184</sup>

In the wake of the Court's decision in *Rasul*, Congress acted to ensure that non-citizens held at Guantanamo Bay could not avail themselves of the writ of habeas

175. These two statutes empower the president to establish military commissions and prescribe in general terms the rules by which they will operate.

176. Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

177. *Id.*

178. *Id.*

179. *Padilla*, 542 U.S. at 426; *Rasul*, 542 U.S. at 466; *Hamdi*, 542 U.S. at 507.

180. *Rasul*, 542 U.S. at 484.

181. *Id.* at 470–71.

182. *Id.* at 480 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). Obviously, this argument presupposes that the power to issue habeas corpus is contingent upon 28 U.S.C. § 2441, the statutory grant of power. If, as this Note argues, the federal courts have inherent power, this argument is irrelevant.

183. *Id.* at 475 (citing *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418*).

184. *Id.* at 484.

corpus. To do this, they passed the DTA.

### B. The Detainee Treatment Act

In passing the DTA, Congress removed the jurisdiction of any court to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba. In lieu of habeas review, the DTA established Combatant Status Review Tribunals (CSRTs) to determine whether an alien detainee was an enemy combatant.<sup>185</sup> If the alien detainee was determined to be an enemy combatant, the military could detain them at Guantanamo Bay indefinitely. The underlying rationale was that, under the laws of war, enemy combatants who are captured by the military can be detained until the end of hostilities. The D.C. Circuit Court of Appeals has exclusive jurisdiction to hear appeals of a CSRT determination; the court's inquiry, however, is limited to a determination of whether a CSRT followed procedures promulgated by the Department of Defense, and whether the CSRT determination "is consistent with" the Constitution, where it applies.<sup>186</sup>

The jurisdiction-stripping portions of the DTA were added as an amendment to be included in the Senate's defense appropriations bill. Senator Graham presented the amendment as a compromise between those who wanted to see congressional oversight of the CSRTs and prevent the use of coerced testimony in the CSRT proceedings,<sup>187</sup> and those who wanted to legislatively overrule *Rasul*.<sup>188</sup> The sponsors of the DTA argued that allowing detainees at Guantanamo Bay to petition for writs of habeas corpus in federal court would undermine national security by preventing the authorities from interrogating terrorist suspects.<sup>189</sup> Senator Graham urged that civilian judges should not interfere with military matters.<sup>190</sup> What appears to be an overriding concern, however, is the fear that the detainees at Guantanamo Bay, who Senator Specter called "the worst of the worst,"<sup>191</sup> would bring frivolous claims about the conditions of their confinement.<sup>192</sup> Senator Graham summed up his statements in support of his amendments by stating that "[o]f all the people in the world who should enjoy the rights of an American citizen in Federal court, the people at Guantanamo Bay are the last we should confer that status on."<sup>193</sup>

The opponents of the bill, Senators Specter, Leahy, Levin, and Bingaman, all urged against passing the DTA. Senator Bingaman stressed the nature of habeas corpus as a core civil right,<sup>194</sup> and stressed the fact that the Senate Judiciary Committee should have reviewed Senator Graham's amendment before the Senate took such a dramatic

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185. DTA § 1005(e)(2)(A).

186. DTA § 1005(e)(2)(C).

187. Alexander, *supra* note 11, at 261.

188. 151 CONG. REC. S14256-01, 14260 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl). Senator Kyl was a co-sponsor of the DTA.

189. *Id.* at S12657 (statement of Sen. Graham).

190. *Id.* at S12656 (statement of Sen. Graham).

191. *Id.* at S12658 (statement of Sen. Specter).

192. *Id.* at S12656-57 (statement of Sen. Graham).

193. 151 CONG. REC. at S12657 (statement of Sen. Graham).

194. *Id.* at S12657 (statement of Sen. Bingaman).

step as stripping habeas jurisdiction.<sup>195</sup> Despite these Senators' opposition, the Graham amendment passed by a vote of forty-nine to forty-two.<sup>196</sup>

### C. *The Military Commissions Act*

In the wake of the Court's 2006 decision in *Hamdan v. Rumsfeld*, the Senate passed the Military Commissions Act, which responded to portions of the Court's decision that invalidated the military commissions the executive had convened to try detainees held at Guantanamo Bay.<sup>197</sup> Along with amending the procedures of the military commissions used to try terrorist suspects, the MCA further limits the availability of habeas corpus by stating that no court has jurisdiction to hear an application for a writ of habeas corpus made by an alien, wherever he or she is held, who has been found to be an enemy combatant or is awaiting such determination.<sup>198</sup> This jurisdiction-stripping provision applies retroactively to all aliens detained after September 11, 2001.<sup>199</sup>

Senator Specter again opposed this jurisdiction-stripping provision and proposed an amendment to remove the jurisdiction-stripping provision from the final version of the law. His amendment was voted down by a narrow fifty-one to forty-eight, and the President signed the bill into law on October 17, 2006.

The sum total of the DTA and MCA in terms of the availability of the writ of habeas corpus will be codified at 28 U.S.C. § 2241(e):

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

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>200</sup>

Paragraphs (2) and (3) of section 1005(e) of the DTA provided for the limited review by CSRTs, discussed above. The terms of the statute are very clear: non-citizens who are detained by the United States and held anywhere are not entitled to the writ of habeas

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195. *Id.*

196. Alexander, *supra* note 11, at 264.

197. *Hamdan*, slip op. at 2 (majority opinion).

198. MCA § 7(a), to be codified at 28 U.S.C. § 2241(e)(1).

199. MCA § 7(b).

200. MCA § 7.



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#### D. Habeas Review After the DTA and MCA

The intentions of the Congress are similarly clear: the federal court have no statutory authorization to issue writs of habeas corpus to inquire into the detention of non-citizens who have been determined to be enemy combatants. They do not even have authority to review the executive branch's determination that a detainee is in fact an enemy combatant. They arguably also do not have the authority to determine if the definition of enemy combatant used by the executive to justify detention is a constitutionally adequate predicate for indefinite, extrajudicial detention. In effect, Congress has attempted to make the executive branch judge and jury of the rights of aliens who are "determined" to be enemy combatants.

These statutes are clearly aimed at removing the courts from playing a role in the war on terrorism due to a disapproving view of the legal process; indeed, the legislative history makes that clear. The legislative history also shows that both the sponsors and opponents of the bills had already determined that the detainees held at Guantanamo Bay were guilty of terrorism before they ever received a hearing.<sup>201</sup> This creates a paradox, as the petitioners from Guantanamo Bay are attempting to challenge their terrorist status. True, there are problems inherent in the courts. They are slow and hard for the public to understand. However, the Senate would do well to keep in mind the words of Senator Bingaman:

The writ of habeas corpus, . . . which is in essence a right to petition the court to review the legality of one's detention by the Government, is at the core of civil rights in this country. . . . Our Founding Fathers wrote this into our own Constitution. . . . Our Founding Fathers wanted to ensure that the Government could not simply imprison people at will and that there was judicial review that would be available as a check on that executive power. . . . This right is enshrined in our own Constitution. It would be a terrible mistake for us to suspend that right. . . .<sup>202</sup>

#### V. "A VITAL INSTRUMENT"<sup>203</sup>: *BOUMEDIENE* AND HOPE FOR THE FUTURE

Last term, the Supreme Court issued its decision in *Boumediene v. Bush*, holding that the MCA unconstitutionally suspended the writ of habeas corpus.<sup>204</sup> In so holding, the Court determined that the procedures made available to Guantanamo detainees in the MCA were not an "adequate and effective substitute for habeas corpus."<sup>205</sup> The

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201. See 151 CONG. REC. at S12657 (statement of Sen. Graham) ("Of all the people in the world who should enjoy the rights of an American citizen in Federal court, the people at Guantanamo Bay are the last we should confer that status on."); see also *id.* at S12658 (statement of Sen. Specter) (calling the detainees "the worst of the worst"); *id.* at S12659 (statement of Sen. Kyl) ("[L]et's be plain, that the Great Writ does not apply to terrorists.").

202. *Id.* at S12657 (statement of Sen. Bingaman).

203. *Boumediene*, 128 S.Ct. at 2244.

204. *Id.* at 2240.

205. *Id.*

Court's holding was narrow, expressly disavowing any view on whether "the president has authority to detain these petitioners" or "the writ must issue."<sup>206</sup> In arriving at this limited conclusion, however, the Court embraced a broad vision of the role of habeas corpus.

Justice Kennedy's opinion for the majority reviewed much of the history of the development of the writ of habeas corpus discussed above. Justice Kennedy began his analysis of the habeas issue by noting the development of the writ from "a mechanism for securing compliance with the King's laws"<sup>207</sup> to "a restraint upon" the crown's power.<sup>208</sup> Justice Kennedy then tied the Framers' view of habeas corpus as a vital instrument in protecting individual liberty to the importance of effective diffusion of governmental power embodied in our doctrine of separation of powers.<sup>209</sup> Finally, Justice Kennedy concludes that these broad conceptions of habeas corpus were embodied in the Suspension Clause.<sup>210</sup>

Thus while the Court's decision in *Boumediene* turns on an issue that is tangential but related to the subject of this Note—the geographical reach of the constitutional privilege to the writ of habeas corpus—the Court's historical analysis of the origins of the writ indicate that the Court is not willing to allow the executive and legislative branches to exclude the Court from passing on the constitutionality of extra-judicial executive detention through jurisdiction-stripping legislation. This should be a welcome development for scholars, bureaucrats, and lawyers who take seriously the writ of habeas corpus as the great bulwark of liberty and the vital role that the writ plays in our system of separated powers.

## VI. CONCLUSION

If statutory habeas is not available, the question becomes: do federal courts have inherent, constitutional power to issue habeas corpus? The question was touched on in *Bollman*, where Chief Justice Marshall brusquely dismissed the idea.<sup>211</sup> But the history of the development of habeas corpus through the English common law and the Constitutional Convention counsels otherwise. Further, the Judiciary Act of 1789 suggests that the framers believed that some writs did not need to be authorized by statute because they were necessary for the exercise of the courts' jurisdiction. The Court suggested that the power to issue habeas corpus might transcend statute and be implicit in the Constitution in *Yerger*. And its analysis in *Boumediene* further support this conclusion.

It is a fundamental tenet of our system of government not to allow power to be

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206. *Id.*

207. *Id.* at 2244–45 (citing Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts and American Implications*, 94 VA. L. REV. 575 (2008)).

208. *Id.* at 2245 (citing Rex. A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 336 (1952)).

209. *Boumediene*, 128 S.Ct. at 2246.

210. *Id.* at 2246–47 ("That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension . . .").

211. *Bollman*, 8 U.S. at 93–94.

concentrated in any one branch.<sup>212</sup> Our founding fathers, having recently escaped the oppressive rule of a despot, had a healthy fear of unbridled executive power.<sup>213</sup> Keeping these two fundamental observations in mind, the framers provided that the judicial department should have a check on the unbridled exercise of executive power, one that was familiar to them: the writ of habeas corpus. They enshrined that writ in the Constitution to ensure that it would be available as a judicial check on executive authority. Federal courts should, and do, have the authority to issue that writ to prisoners held without judicial process within the territorial jurisdiction of the United States.

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212. THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

213. THE FEDERALIST NO. 69 (Alexander Hamilton).