2007

Habeas Without Rights

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ARTICLES

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I. INTRODUCTION

The writ of habeas corpus has long been understood to provide an "effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."[1] Yet in February 2008, six years will have passed since the first petition for habeas corpus was filed on behalf of accused enemy combatants held at Guantanamo Bay, Cuba.[2] In that time, no hearings have been held on the merits of any of the petitions filed by the detainees challenging the legality of their detentions. No discovery has proceeded. No depositions have been taken. And no court has examined the evidence offered to support the detentions or ruled on whether any of the detainees are legally held.[3] With the enactment of the Military Commissions Act of 2006 (MCA), which purports to withdraw federal jurisdiction over the Guantanamo detainees' habeas petitions, the prospect that any of the detainees will get their day in court seems more remote than ever.[4]

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1. Carafas v. LaVallee, 391 U.S. 234, 238 (1968). Habeas has provided a quick remedy for unlawful detention at least since the Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (1679) (Eng.), which Parliament enacted to provide "more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" and which required that a jailer provide a return on the writ within three days.

2. *See* Docket, Rasul v. Bush, Civil Action No. 1:02cv00299 (D.D.C.) (opened Feb. 19, 2002).

3. In January 2005, Judge Leon ruled that the Guantanamo detainees lack cognizable rights and therefore the detainees' habeas petitions should be dismissed for failure to state a claim. Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), *aff'd sub nom.*, Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007). Although Leon effectively upheld the legality of the detentions, neither he nor any court has reviewed the particular evidence or allegations put forward to justify the detention of any individual detainees.

4. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950j, 120 Stat. 2600, 2623-24 (2006).

Rather than reviewing the sufficiency of any allegations or evidence that the government might offer to justify the indefinite detentions, the courts have spent six years trying to answer a single question: whether the detainees possess any legally cognizable rights.[5] Even that issue remains unresolved. Although a person might have expected that the detainees would be the parties drawing attention to their rights, it has been the government, at every turn, that has made the detainees' rights the central issue in the Guantanamo cases. From the beginning, the government has argued that the detainees have no legally enforceable rights because they are foreigners held outside U.S. territory, and the government has repeated this argument in various forms throughout the litigation. Initially, the government framed the no-rights argument in terms of jurisdiction: the courts lack jurisdiction because the detainees have no right to go to court.[6] After the Supreme Court rejected that argument, the government argued that the detainees have no right to counsel because they are foreigners held outside U.S. territory.[7] After the district court rejected that argument, the government moved to dismiss the habeas petitions on the merits because, as foreigners held outside U.S. territory, the detainees have no rights.[8] In the latest phase of the litigation, the government bas again invoked its argument that the detainees have no rights, asserting that the withdrawal of federal jurisdiction under the MCA does not violate the Suspension Clause of the U.S. Constitution because the detainees are aliens held outside U.S. territory and therefore have no rights under the Suspension Clause or any other source of U.S. law.[9] In June 2007, the

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5. *See* Rasul v. Bush, 215 F. Supp. 2d 55, 57 (D.D.C. 2002) (holding that the federal courts have no jurisdiction to review the petitioners' habeas claims because the petitioners have no cognizable rights), *aff'd*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, Rasul v. Bush, 542 U.S. 466, 468 (2004) (holding that the detainees have the statutory right to pursue habeas), *upon remand*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) (denying motion to dismiss on the ground that the detainees have enforceable rights under the Fifth Amendment), *rev'd*, *Boumediene*, 476 F.3d at 991 (holding that the petitioners lack constitutional rights, including rights under the Suspension Clause), *cert. granted*, *Boumediene*, 127 S. Ct. at 3078. This litigation history, and the central role played by the question of the existence of the detainees' rights, is discussed in Part I.A.

6. *See Al Odah*, 321 F.3d at 1139–40, *rev'd*, *Rasul*, 542 U.S. at 467–68.

7. *See* Al Odah v. United States, 346 F. Supp. 2d 1, 5 (D.D.C. 2004).

8. As discussed below, two district courts reached contrary positions on whether the detainees possess enforceable rights. *Compare In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 445 (holding that the detainees possess rights to due process under the Fifth Amendment), *with Khalid*, 355 F. Supp. 2d at 314 (holding that the detainees have no rights under U.S. law). *See also infra* notes 41–60 and accompanying text.

9. Brief for the Respondents in Opposition at 19–25, Boumediene v. Bush, Nos. 06-1195 and 06-1196 (U.S. filed Mar. 21, 2007).

Supreme Court granted certiorari to review the application of the Suspension Clause to the MCA, and the Court now appears poised, at long last, to determine whether the detainees possess enforceable rights.[10]

With so much judicial attention devoted to the question of whether the detainees have any legal rights, a great deal of scholarship has addressed which categories of accused enemy combatants, if any, possess rights enforceable through habeas.[11] Scholars have come to differing conclusions about whether aliens held outside U.S. territory possess cognizable rights.[12] Professors Richard H. Fallon, Jr., and Daniel J. Meltzer recently summarized the state of the law by describing an ascending scale of rights accused enemy combatants possess, determined by the detainees' citizenship, place of seizure, and site of detention.[13] Corresponding to the varying strengths of the detainees' rights are varying degrees of judicial review available in habeas actions: the stronger the detainees' rights, the more stringent the judicial review.[14] Notwithstanding this profusion of scholarship on the scope of detainees' rights, no one appears to have challenged the

10. *Boumediene*, 127 S. Ct. 3078, 3078 (2007) (granting writ of certiorari).

11. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2031 (2007); Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565, 568–69 (2003); David A. Martin, *Offshore Detainees and the Role of Courts After* Rasul v. Bush*: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125 (2005); Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 76 (2005) ("A writ of habeas corpus may only be issued to terminate custody in violation of the Constitution or federal laws."); Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 354 (2006); Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 B.Y.U. L. REV. 1255, 1260; Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1084 (2005) (declaring that for the Guantanamo detainees' habeas claims to proceed they "must allege custody in violation of federal law, the Constitution, or a treaty").

12. *Compare* Randolph N. Jonakait, Rasul v. Bush*: Unanswered Questions*, 13 WM. & MARY BILL RTS. J. 1129, 1141 (2005) (arguing that aliens held outside the United States have no enforceable rights), *with* Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 410–11 (2005) (arguing that aliens detained abroad are entitled to constitutional rights).

13. *See* Fallon & Meltzer, *supra* note 11, at 2056–65; Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (describing an "ascending scale of rights" afforded to individuals by U.S. laws depends on citizenship and connections with the United States).

14. Fallon & Meltzer, *supra* note 11, at 2065–70.

premise that the detainees' habeas claims rise or fall based on the strength of their rights.[15]

This Article argues that habeas relief does not require the possession of rights. As Part II explains, the courts have uniformly and mistakenly concluded that the Guantanamo detainees' habeas claims, as well as the habeas claims brought by other accused enemy combatants, require a showing that the detainees possess cognizable rights violated by the detentions, most especially rights protected by the Constitution. Part III argues that, for most of the long history of habeas corpus, courts resolved habeas claims without undertaking any inquiry into the petitioner's rights by determining instead whether the jailer had authority to impose the challenged detention. Habeas did not address "rights" in the modern sense of a discrete group of personal trumps against governmental action, such as those protected by the Bill of Rights. Habeas did not protect rights in this sense for a simple reason: habeas predates rights.[16] Traditionally, habeas cases were not framed in terms of rights but in terms of power. As Chief Justice John Marshall framed the habeas inquiry: "The question is, what authority has the jailor to detain him?"[17] Part IV argues that the traditional habeas inquiry into the jailer's power, not modern individual-rights analysis, provides the best framework for resolving the Guantanamo detainee cases because it squarely addresses the detainees' central claim that they are not enemy combatants. As that Part shows, under traditional habeas principles the government bears the burden of establishing, as a matter of fact and law, that the detainees are enemy combatants and therefore fall within the scope of the government's detention power.

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15. In *Enemy Combatants and the Jurisdictional Fact Doctrine*, forthcoming in the *Cardozo Law Review*, Professor Franklin presents an argument that is fully in accord with the views of the author. Franklin argues that a structural approach to the enemy combatants cases rather than an individual-rights approach provides for greater clarity and would in practice be more protective of individual rights than the individual-rights approach. Franklin bases his approach on the jurisdictional-fact doctrine. Franklin does not, however, address the issue this Article addresses: whether the possession of individual rights is necessary to bring a habeas claim.

16. To the extent that habeas was understood to protect an individual right, it protected a general "right of liberty," which was violated whenever imprisonment was imposed without a lawful basis. *See, e.g.*, ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 143 (1858); *infra* Part III.A.

17. *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 452 (1806).

II. THE GUANTANAMO CASES HAVE BEEN MISTAKENLY ANALYZED AS INDIVIDUAL-RIGHTS CLAIMS

This Part explores how the unresolved question of whether the Guantanamo detainees possess cognizable rights has dominated the Guantanamo-detainee habeas litigation. Although the detainees assert both that the detentions violate their rights and that the government lacks authority to impose the detentions, the courts have analyzed the cases solely in terms of individual rights. The monomaniacal focus on whether the detainees possess enforceable rights, to the near exclusion of all other issues raised by the detainees, has been the primary reason that the cases have been stalled for almost six years. Because the cases have been analyzed only in terms of the detainees' rights, the courts have failed to address the detainees' basic challenge to executive power.

A. The Detainees' Central Claim Is that They Are Not Enemy Combatants

In January 2002, the United States began bringing men held by U.S. forces in Afghanistan to the U.S. Naval Base in Guantanamo Bay, Cuba. At its peak, the Guantanamo detention center held over seven hundred detainees, who were citizens of forty-four different countries.[18] Most of the detainees were seized in Pakistan, some were seized in Afghanistan, and others were seized in places as far afield as Gambia, Zambia, Bosnia, and Thailand.[19] As of June 2007, after more than four hundred detainees had been returned to their home countries, Guantanamo held approximately 375 detainees.[20]

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18. *See* Transcript of Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba, James McGarrah, Dir., Dep't of Def. Office for the Admin. (July 8, 2005), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171. In May 2006, the Department of Defense released a list of the names and nationalities of the Guantanamo detainees in response to an order under the Freedom of Information Act. The list is available at http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf.

19. *See, e.g.*, First Amended Petition for Writ of Habeas Corpus, El-Banna v. Bush, No. 1:04-CV-01144 (D.D.C. filed July 8, 2004) (involving British petitioners arrested in Gambia and Zambia); Petition for a Writ of Habeas Corpus, Boumediene v. Bush, No. 1:04-CV-01166 (D.D.C. filed July 8, 2004) (involving six Algerian permanent residents of Bosnia arrested in Sarajevo); Petition for Habeas Corpus, Paracha v. Bush, No. 1:04-CV-02022 (D.D.C. filed Nov. 17, 2004) (involving Pakistani citizen arrested in Thailand).

20. *See* News Release, U.S. Department of Defense, Detainee Transfer Announced (June 29, 2007), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11030.

The government has declared the Guantanamo prisoners to be "enemy combatants"—a novel legal category not mentioned in the Geneva Conventions or previously established under federal law[21]—who are subject to indefinite detention under the powers given to the President by the Authorization to Use Military Force (AUMF)[22] and under the President's constitutional powers as Commander-in-Chief.[23] The government has concluded that the detainees are not entitled to the protections for prisoners of war under the Geneva Conventions.[24] Initially, the military employed an informal and apparently unwritten process for determining whether a detainee is an enemy combatant.[25] In July 2004, in response to the Supreme Court's decisions in *Rasul v. Bush*[26] and *Hamdi v. Rumsfeld*,[27] the Department of Defense announced that the designation of enemy combatants would be reviewed through Combatant Status Review Tribunals (CSRTs), a new Department of Defense administrative process.[28]

Since February 2002, around two hundred habeas petitions have been filed on behalf of the Guantanamo detainees.[29] The heart of the

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21. *See* David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1144 (2007) (describing the category of "enemy combatants" as "a category . . . without precedent in modern military operations or international law"); Jeffrey H. Smith, *Keynote Address, Symposium: State Intelligence Gathering and International Law*, 28 MICH. J. INT'L L. 543, 548 (2007) ("In creating a new and previously unknown category of 'unlawful enemy combatants,' the President acted outside the scope of international law, and caused enormous harm to the United States."); Joanna Woolman, *The Legal Origins of the Term "Enemy Combatant" Do Not Support Its Present Day Use*, 7 J. L. & SOC. CHALLENGES 145, 145 (2005).

22. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF gives the President the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by sueh nations, organizations or persons." *Id.*

23. *See* Brief for the Respondents at 41–42, Rasul v. Bush, Nos. 03-334, 03-343 (U.S. filed March 3, 2004).

24. *See* Guantanamo Detainees, http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf (last visited Nov. 21, 2007); Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo, www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Nov. 21, 2007).

25. *See* Guantanamo Detainees, *supra* note 24 (describing a "multi-step process" to determine if detention is necessary).

26. 542 U.S. 466 (2004).

27. 542 U.S. 507 (2004).

28. Memorandum from Paul Wolfowitz to the Secretary of the Navy on an Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

29. *See* Docket, Rasul v. Bush, No. 1:02-cv-00299 (D.D.C. opened Feb. 19, 2002); 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham)

detainees' claims is that they are not enemy combatants but rather innocent civilians seized by mistake:

> Petitioners do not challenge the government's authority to capture and detain members of enemy armed forces who engage in combat against the United States and its allies. Nor do petitioners challenge the government's authority to arrest and incarcerate people who engage in acts of international terrorism. But petitioners contend that they have not engaged in combat against the United States or its allies and have not participated in acts of terrorism. All they seek—and have ever sought for the almost six years that they have been detained—is a fair and impartial hearing at which they have the opportunity to confront and rebut whatever accusations there are against them and to present evidence of their own to establish their innocence.[30]

(asserting that 160 cases had been filed on behalf of the Guantanamo detainees); Prepared Remarks of Attorney General Alberto R. Gonzales at the JAG Corps Leadership Summit (October 23, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_061023.html ("Our civil litigators are defending more than 200 cases pending in federal courts related to detainees, including habeas petitions, FOIA lawsuits, and tort claims."); Posting of hilzoy to Obsidian Wings, *Why Are They Doing This? (Special Habeas-Stripping Edition)*, http://obsidianwings.blogs.com/obsidian_wings/2006/09/why_are_they_do.html (Sept. 23, 2006, 12:06 EST) ("[W]hile no one seems to know the exact number of habeas cases filed by the Guantanamo detainees, estimates range from 160 to 200."); *cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2748, 2817 (2006) (Scalia, J., dissenting) ("The Solicitor General represents that [h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees.") (internal quotations omitted).

30. Brief for Petitioners El-Banna et al. at 9, Al Odah v. United States, No. 06-1196 (U.S. filed Aug. 24, 2007); *see also* Petition for Writ of Certiorari at 2, Al Odah v. United States, No. 06-1196 (U.S. filed Mar. 5, 2007) ("All [of the petitioners] maintain that they have never engaged in combat against the United States and are wholly innocent of wrongdoing."); Petition for Writ of Habeas Corpus ¶ 22, Rasul v. Bush, Nos. Civ. A. 02-299 (CKK) and Civ. A. 02-828 (CKK) (D.D.C. 2002) ("The detained petitioners are not enemy aliens. On information and belief, [petitioner Hicks] had no involvement, direct or indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group."); First Amended Petition for a Writ of Habeas Corpus ¶¶ 21-22, Boumediene v. Bush, No. 1:04-cv-01166 (D.D.C. Aug. 20, 2004) ("The Detained Petitioners are not, nor have they ever been, enemy aliens, lawful or unlawful belligerents, or combatants in any context involving hostilities against the citizens, government or armed forces of the United States. . . . The Detained Petitioners are not, nor have they ever been, 'enemy combatants' . . . ."); *Rasul*, 542 U.S. at 486 (stating that the detainees "claim to be wholly innocent of wrongdoing").

The detainees' habeas claims thus focus narrowly on the validity of their designation as enemy combatants.

The detainees rely alternatively on arguments that the detentions exceed the President's power and that the detentions violate their individual rights.[31] In their challenge to executive authority, the detainees argue that the President has never been granted authority by the Constitution or by statute to impose indefinite detention on enemy combatants under the government's broad definition of that term. The CSRTs declared detainees to be enemy combatants if they supported al Qaeda or the Taliban in any way—including support that was coerced, unintentional, or unknowing—without any requirement that the detainees participated in combat or even supported combat operations.[32] The detainees further argue that, even if the government has authority to hold enemy combatants under an appropriate definition, the government lacks power to hold them because there is no factual basis for their designations as enemy combatants.[33]

While the detainees' challenge to the government's detention power focuses on the *substance* of their designation as enemy combatants, the detainees' individual-rights claims focus on the *process* by which the government made the designations. The detainees argue that the CSRT process did not provide due process under the Fifth Amendment.[34] In the CSRTs, the detainees were not represented by counsel but instead received advice from "personal representatives" appointed by the military.[35] The detainees were not allowed to see any evidence the government deemed classified, which comprised most of the evidence offered to support the detentions.[36] The detainees had no opportunity to confront their accusers because the government called no

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31. *See, e.g.*, Petition for Writ of Habeas Corpus, Rasul v. Bush, *supra* note 30, at ¶¶ 44–53.

32. *Id.* at ¶ 28; *see also infra* notes 221–24 and accompanying text.

33. As the petitions explain, the United States dropped leaflets in Afghanistan and Pakistan offering thousands of dollars in bounties to anyone turning in supporters of al Qaeda or the Taliban, and, in response, local villagers turned over hundreds of foreigners. *See* MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA App. 23–25, *available at* http:// law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (reproducing and translating leaflets). In addition, the detainees assert that the detentions violate their rights under the Geneva Conventions, the International Covenant on Civil and Political Rights, and other international law. *See, e.g.*, Petition for Writ of Habeas Corpus, Rasul v. Bush, *supra* note 30, ¶¶ 40–49 (reciting claims).

34. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that the CSRTs failed to provide due process).

35. *See* Memorandum from Paul Wolfowitz, *supra* note 28, at ¶ c.

36. *Id.* ¶ g(4); MARK DENBEAUX ET AL., NO-HEARING HEARINGS 2, 5, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

witnesses and instead relied on summaries of interrogation and intelligence reports.[37] The detainees had no ability to argue that the evidence against them was obtained through coercion or torture.[38] The detainees could not present any evidence unless the CSRT panels found it was "reasonably available," which the panels rarely did.[39] The CSRT procedures established a presumption in favor of the government's evidence, including the evidence kept secret from the detainees.[40] Thus, under the CSRTs, the detainees bore the burden of proving themselves innocent of allegations that were supported by evidence they had not seen, made by anonymous sources they could not confront, and were required to do so without counsel.

B. The Courts Have Analyzed the Guantanamo Detainees' Claims Exclusively in Terms of Individual Rights

While the detainees have framed their habeas claims in terms of both rights and power, the government has sought to keep the cases framed solely within the paradigm of individual rights, and it has succeeded in doing so. The government has continually argued that the cases must be dismissed because the detainees have no rights. In doing so, the government seeks vindication of its position that its treatment of the detainees is unconstrained by law, at least any law that can be judicially enforced.[41] The government appears to rely on an intuition that judges will lack sympathy with any assertions of the rights of terrorists bent on national destruction, who the government has continually portrayed as the worst of the worst.[42] The government has

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37. *See* DENBEAUX, *supra* note 36, at 2, 5.

38. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 472.

39. Memorandum from Paul Wolfowitz, *supra* note 28, ¶ g(8); DENBEAUX, *supra* note 36, at 25, 31.

40. Memorandum from Paul Wolfowitz, *supra* note 28, ¶ g(12).

41. William H. Taft IV, the Legal Adviser to the Department of State under Colin Powell, described how ideologically driven Bush-administration lawyers had "proposed to create a regime in which detainees were deprived of all legal rights and the conditions of their treatment were a matter of unreviewable executive discretion. Why lawyers, of all people, should want to establish the point that such a lawless regime could legally exist, even as a theoretical matter, much less recommend that one actually be created, is, I confess, beyond me . . . ." William H. Taft, IV, *Address: A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT'L L. 503, 509 (2006).

42. *See, e.g.*, Transcript of Secretary Rumsfeld Roundtable with Radio Media, Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. (Jan. 15, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2132 ("hardest of the hard core" and "very hardest core terrorists"); WHITE HOUSE REPORT: ARGENTINA, PHILIPPINES, GUANTANAMO, SOUTH ASIA (2002), *available at* http://usinfo.state.gov/regional/nea/sasia/afghan/text/0116wthsrpt.htm; Transcript of

repeatedly ridiculed the notion that the Constitution could be read to provide enforceable rights to our enemies.[43]

The government first employed the argument that the detainees have no rights in service of a motion to dismiss for lack of jurisdiction. The government argued, and the Court of Appeals for the District of Columbia Circuit agreed, that the detainees have no rights because they are aliens held outside the United States.[44] Because they have no rights, the court concluded, the detainees could not pursue relief through habeas: "[T]he right to a writ of habeas corpus [is] a subsidiary procedural right that follows from the possession of substantive constitutional rights."[45] And because the detainees lack substantive rights, the courts lack jurisdiction to hear their claims: "if the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."[46] In *Rasul v. Bush*, the Supreme Court reversed, ruling that the federal habeas statute provides jurisdiction, without definitively ruling that the detainees possess cognizable rights.[47]

Department of Defense News Briefing, Donald Rumsfeld, Sec'y of Def., and Richard B. Meyers, Chairman, Joint Chiefs of Staff (Jan. 11, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031 ("These are people that would gnaw hydraulic lines in the back of a C-17 to bring it down. . . . [T]hese are very, very dangerous people, and that's how they're being treated."); Transcript of Department of Defense News Briefing, Victoria Clarke, ASD PA, and John Stufflebeem, Rear Admiral (Jan. 28, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2355. Rear Admiral Stufflebeem stated: "These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established." *Id.*

43. *See, e.g.*, Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, Hicks v. Bush, No. 02-CV-0299 (D.D.C. filed Oct. 4, 2004) ("Petitioners demand an unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the U.S. Constitution.").

44. *See* Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003).

45. *Id.* at 1140 (internal quotations omitted).

46. *Id.* at 1141.

47. Rasul v. Bush, 542 U.S. 466, 484–85 (2004). In a footnote, the Court strongly suggested that the detainees adequately alleged a habeas claim based on a violation of their rights:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably

Upon remand from *Rasul*, the government again invoked its argument that the detainees possess no rights, this time arguing that the detainees have no legal right to the advice of counsel.[48] As the government once again argued, the detainees have no protections under the Constitution or any other sources of U.S. law because they are foreigners held outside U.S. territory. Because the detainees had no right to counsel, the government argued, it could monitor any communications between the detainees and their lawyers or impose any other reasonable restrictions on the detainees' access to counsel.[49] The district court rejected the argument, holding that the detainees were entitled to confidential communications with counsel in order to proceed with their habeas claims.[50]

The government next yoked its no-rights argument to a motion to dismiss on the merits.[51] The habeas petitions are meritless, the government argued, because the detainees are foreigners held outside of U.S. territory and therefore could not allege any violations of U.S. law. The government's argument that the detainees possess no cognizable rights was addressed by two different district-court judges, who reached opposing conclusions. In *Khalid v. Bush*, Judge Richard Leon agreed with the government that aliens held outside U.S. territory have no cognizable rights and that the detainees' habeas petitions therefore had to be dismissed.[52] Twelve days later, Judge Joyce Hens Green ruled that all of the detainees are entitled to fundamental due process under the Fifth Amendment and the detainees accused of supporting the Taliban are also entitled to the protections of the Geneva Conventions.[53]

Although Leon and Green disagreed about whether the detainees possess any legal rights, they agreed on the underlying premise that the detainees' ability to pursue habeas relief depends on whether they can claim that they are held in custody in violation of rights protected by

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describe "custody in violation of the Constitution or laws or treaties of the United States."

Id. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)).

48. *See* Al Odah v. United States, 346 F. Supp. 2d 1, 3 (D.D.C. 2004).

49. It now appears that the government's adamant assertions that national security required monitoring the detainees' communications with counsel were concocted by the Department of Justice, over the objections of Department of Defense intelligence officers and legal counsel. *See* Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAG., Oct. 21, 2007, at 78, 81.

50. *Id.*

51. *See* Individual Respondents' Motion to Dismiss and Supporting Memorandum at 2, Hicks v. Bush, No. 02-CV-0299 (D.D.C. filed Oct. 4, 2004).

52. Khalid v. Bush, 355 F. Supp. 2d 311, 311 (D.D.C. 2005).

53. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 443 (D.D.C. 2005).

the Constitution or federal law. Leon expressly rejected the argument that the detainees' habeas claims could proceed without any alleged violation of rights. In a brief footnote, Leon held that the detainees' lack of cognizable rights mandated the dismissal of their claims challenging the President's detention authority.[54] Green, in contrast, did not even mention the detainees' challenge to presidential power. To both judges, the central and dispositive question in assessing the habeas claims was whether the detainees possess enforceable rights.

With the enactment of the MCA, the question whether the detainees possess rights has arisen in yet another way. Enacted while the decisions of Green and Leon were pending on appeal, the MCA purports to overrule *Rasul* and withdraw the federal courts' jurisdiction to hear the detainees' habeas claims.[55] The detainees argue that the MCA is invalid under the Suspension Clause.[56] The government defends the constitutionality of the MCA by once again trotting out its familiar no-rights argument: the Suspension Clause does not protect the detainees for the same reason that the detainees are entitled to no constitutional protections—because they are aliens held outside the United States. In *Boumediene v. Bush*, the D.C. Circuit once again agreed with the government that "the Constitution does not confer rights on aliens without property or presence within the United States."[57] The D.C. Circuit thus concluded that the detainees' supposed lack of rights means that the Suspension Clause does not apply to the MCA.

Dissenting, Judge Judith Rogers construed the Suspension Clause to impose a limitation on congressional power rather than establish an individual right. Rogers characterized the Suspension Clause as a "structural" limitation on Congress, not an individual right, and concluded that application of the Suspension Clause does not depend on whether the detainees possess constitutional rights: "It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement."[58] According to Rogers, if Congress exceeded the Constitution's structural limitations when it withdrew

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54. *Khalid*, 355 F. Supp. 2d at 324 n.17. Without any citation or support, Judge Leon concluded that the habeas statute could not give the detainees "more rights than they would otherwise possess under the Constitution." *Id.*

55. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006).

56. The Suspension Clause provides: "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." U.S. CONST. art. I, § 9, cl. 2.

57. Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007).

58. *Id.* at 995, 997 n.3 (Rogers, J., dissenting).

federal habeas authority, the withdrawal was void even if the detainees possess no individual rights.[59]

The *Boumediene* majority, however, found that the distinction between claims based on rights and claims based on power was incomprehensible: "[T]he dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all."[60] Under this view, Congress could be said to have exceeded its authority under the Suspension Clause only if the detainees could establish a right against it. In other words, to the *Boumediene* majority, power claims and rights claims are simply two sides of the same coin.

C. The Other Enemy-Combatant Cases Have Also Been Dominated by Individual-Rights Analysis

The dominant role that the question of the existence of individual rights has played in the Guantanamo-detainee litigation has been repeated in the other enemy-combatant cases. As with the habeas cases brought by Guantanamo detainees, the habeas cases brought by Yasser Hamdi, Jose Padilla, Salim Hamdan, Ali Al-Marri, among others, have also focused largely, if not exclusively, on the existence and strength of the detainees' rights.[61] The courts allowed the habeas petitions of Hamdi and Padilla to proceed only after determining that, as American citizens, they possess constitutional rights.[62] Likewise the court allowed Al-Marri's habeas claim to proceed only after it concluded that he is entitled to constitutional rights because he is detained in the United States.[63] The D.C. Circuit rejected Hamdan's habeas petition challenging the legality of military commissions on the ground that Hamdan lacked any enforceable rights under the Geneva Conventions or any other source.[64] In perhaps the only exception to the courts' reliance on individual-rights analysis, the Supreme Court reversed the *Hamdan* decision on the merits, ruling that the military commissions

59. *Id.* at 997 (Rogers, J., dissenting).

60. *Id.* at 993.

61. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2753 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007); Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

62. Hamdi v. Rumsfeld, 316 F.3d 450, 464–65 (4th Cir. 2003); Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).

63. *Al-Marri*, 487 F.3d at 174–75.

64. Hamdan v. Rumsfeld, 415 F.3d 33, 38–40 (D.C. Cir. 2005).

were not authorized by federal law, without determining whether the military commissions violated Hamdan's rights.[65]

As Fallon and Meltzer have recently summarized, the enemy-combatant cases, taken together, have created a sliding scale of constitutional rights based on the detainees' citizenship, where they were seized, and where they are detained.[66] At one end of the spectrum are American citizens seized in the United States and detained on U.S. soil, who have the full protection of the Constitution and federal laws.[67] On the other end are foreign citizens detained outside the United States, who have few or no rights.[68] In between lie detainees who have rights of varying strengths—for instance, Americans detained abroad and foreigners detained in the United States.[69]

Under the courts' decisions in the enemy-combatant cases, the strength of the detainees' rights determines the scope of executive power to detain them as well as the scope of judicial power to review the detentions. As a result, the first and likely dispositive question to be resolved in any habeas case challenging executive detention is a determination of the existence and strength of the detainees' rights. Under this scheme, detainees possessing strong rights are entitled to searching judicial review, detainees possessing weak rights are entitled only to cursory review, and detainees possessing no rights are entitled to no review. Corresponding to the spectrum of individual rights are spectra of executive power and judicial review. The executive branch has the least amount of power in its treatment of Americans seized and detained in the United States: they can only be imprisoned based on a criminal trial.[70] The executive branch has the most power in its treatment of foreigners held outside the United States: they can be imprisoned forever without judicial review, can be transferred to countries that engage in torture, and presumably can be tortured without judicial interference. In between lie cases in which the

65. *Hamdan*, 126 S. Ct. at 2774–75; *see also* Fallon & Meltzer, *supra* note 11, at 2088 ("In *Hamdan*, the Supreme Court conducted a classic habeas corpus inquiry into wbether executive detention was authorized by law.").

66. Fallon & Meltzer, *supra* note 11, at 2065–89.

67. *Id.* at 2066–82.

68. *Id.* at 2087–88.

69. *See, e.g.*, Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007). Professors Fallon and Meltzer consider Guantanamo an intermcdiate case because it is neither wbolly foreign nor wholly sovereign territory. *See* Fallon & Meltzer, *supra* note 11, at 2058–60, 2088–89.

70. *See* Al-Marri v. Wright, 487 F.3d 160, 193 (4th Cir. 2007).

government can impose detention on the basis of something less than criminal standards and can engage in perhaps just a little torture.[71]

III. TRADITIONAL HABEAS ACTIONS ADDRESS QUESTIONS OF POWER RATHER THAN RIGHTS

Claims that imprisonment violates the petitioners' rights have become so prevalent in contemporary habeas practice that it is easy to miss a fundamental fact about habeas history—habeas predates rights. This Part explores that history and shows that, until the modern era, habeas cases were not framed in terms of the prisoners' rights. Instead, courts in habeas cases determined whether detention was lawful by demanding that jailers establish that they had acted within the scope of their lawful authority. This history is especially relevant in analyzing the habeas claims brought by the Guantanamo detainees and other accused enemy combatants because the Suspension Clause and the original grant of federal habeas authority, section 14 of the Judiciary Act of 1789, embody traditional habeas standards. These standards remain vital parts of federal habeas law.[72] While federal habeas power has expanded considerably since 1789, the writ is constitutionally protected today at least to the extent it was available in 1789.[73] Because habeas cases proceeded in 1789 without any requirement that the petitioner establish or even allege a violation of rights, no such requirement can be imposed today.[74]

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71. Professor Lederman and others sometimes use the term "torture light" to describe various harsh interrogation techniques such as waterboarding, stress positions, hypothermia, and threatening the death of loved ones. *See, e.g.*, Posting of Marty Lederman to Balkinization, http://balkin.blogspot.com/2005/05/has-congress-prohibited-torture-light.html (May 11, 2005, 6:03 EST); Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y, 187 (2005).

72. Section 14 is now codified at 28 U.S.C. § 2241(c)(1) (2000). *See* INS v. St. Cyr, 533 U.S. 289, 305 n.25 (2001).

73. *St. Cyr*, 533 U.S. at 301 ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" (quoting Felker v. Turpin, 518 U.S. 651, 663-64 (1996)).

74. To be clear, this Article does not suggest that the standards and practices employed in habeas cases in 1789 are the best or most correct habeas standards or that contemporary habeas law has mistakenly diverged from the writ's fundamental purposes. That is, this Article is not guided by what one commentator has characterized as "the vision of a single true *writ of habeas corpus.*" Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1244 (2006). Instead, this Article proceeds from the premise, accepted by the Supreme Court, that the extent of habeas protections guaranteed in 1789 represent the minimum constitutional protection against unlawful detention, and no one should be imprisoned today who would have been freed in 1789.

Section A shows that, by the late seventeenth century, habeas actions were governed by well-established procedures, standards, and burdens of proof, which focused the courts' inquiries on the jailers' power and did not require a determination of whether the petitioners possessed any legal rights. Section B discusses the application of those standards in the United States and explains that federal habeas protection was understood from the outset to embody traditional habeas standards. A comprehensive review of the 124 reported federal habeas cases decided between the establishment of federal habeas authority in 1789 and its expansion in 1867 demonstrates that federal courts uniformly engaged in the traditional habeas inquiry into the custodian's authority and did not depend on claims that detention violated petitioners' rights. Section C discusses the modern trend of framing habeas claims in terms of individual rights, which began roughly with the adoption of the Habeas Corpus Act of 1867 and accelerated during the twentieth century. As that Section argues, federal habeas claims can now be based on almost any asserted violation of individual rights.

Although habeas relief can be based on individual-rights claims, it does not follow that establishing a violation of rights is required to make out a habeas claim. Habeas provides a remedy for "unlawful imprisonment,"[75] and, broadly speaking, imprisonment can be "unlawful" in two ways—when it violates specific rights protected by law or when the jailer lacks power to impose it.[76] Traditional habeas claims challenging unauthorized executive detention, the historical core of habeas law, remain available under federal law without regard to rights.

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75. Chin Yow v. United States, 208 U.S. 8, 13 (1908); *see also* Holmes v. Jennison, 39 U.S. (14 Pet.) 649, 653 (1840) ("If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy.").

76. *See, e.g.*, IX THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 184–85 (John Houston Merrill ed., 1889) (declaring that habeas relief must be granted if the petition establishes that "the imprisonment is illegal, or that there is no reasonable ground for detention"). Professors Fallon and Meltzer declare that habeas petitioners challenging the lawfulness of detention can raise three types of claims:

> The first kind focuses on separation-of-powers matters: does the Executive possess authority—either with or without congressional authorization, or in the teeth of a congressional prohibition—to detain? The second involves claims of protected constitutional rights: for example, even with congressional authorization, the Executive could not detain a citizen merely for voicing opposition to a war. The third involves claims of subconstitutional rights—in statutes or treaties—to be free from detention in specified circumstances.

Fallon & Meltzer, *supra* note 11, at 2039. This Article refers to the first type of habeas claim as a claim of unauthorized detention and the second two types as individual-rights claims.

A. Habeas Developed as a Check on Imprisonment Power, Not as a Protection of Individual Rights

When the writ of habeas corpus was developing under English law, the concept of legal rights was in its infancy.[77] The modern conception of rights involves what rights theorists characterize as "subjective rights"—personal privileges or powers inherent in individuals that the government cannot take away except in extraordinary circumstances or with strong justifications—that is, the conception of rights as "trumps."[78] Rather than protecting discrete individual rights, such as the right to a jury trial, the right to counsel, or the right to confrontation, the writ of habeas corpus developed as a means of ensuring that detention could only be imposed based on lawful authority. Habeas cases focused on the jailer's power.[79] To the extent that habeas was characterized as protecting prisoners' rights, it was not understood to protect discrete individual rights but rather to protect a general "right to liberty," which was violated whenever imprisonment was imposed without a lawful basis.[80] Habeas thus was established as a

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77. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625 (1997); Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After*, 3 AVE MARIA L. REV. 23 (2005); Charles J. Reid, Jr., *The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney*, 83 CORNELL L. REV. 437 (1998); Kenneth Pennington, *The History of Rights in Western Thought*, 47 EMORY L.J. 237 (1998); James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 AM. J. JURIS. 185 (1994).

78. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (1977) ("A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."); JOHN HART ELY, DEMOCRACY AND DISTRUST 36 (1980) (asserting that "rights and powers are not simply the absence of one another but that rights can cut across or trump powers"). *But see* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727 (1998).

79. As Justice Cooley explained in 1867:

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. . . . The whole force of the writ is spent upon the respondent.

In re Jackson, 15 Mich. 416, 439–40 (1867); *see also Ex parte* Endo, 323 U.S. 283, 306 (1944) (quoting *Jackson*).

80. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129–37 (1788) (characterizing the "personal liberty of the subject" as a "natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, nor ought to be abridged in any case without the special permission of law"); HURD, *supra* note 16, at 143.

mechanism to protect the rule of law, a broader concept than individual rights.

From its earliest uses, the central purpose of habeas has been to require that jailers justify the legal cause of detentions.[81] The earliest known uses of the English-common-law writs of habeas corpus were in the thirteenth century, when several related writs were employed to compel the appearance of a person in court.[82] These writs had in common the Latin phrase "habeas corpus," a command to "have the body" brought to court.[83] One of the early habeas writs, the writ of habeas corpus cum causa, was so named because it required courts to make an inquiry into the cause of detention.[84] Beginning in the sixteenth century, the crown courts expanded the use of these writs to resolve conflicts with rival courts and other quasi-judicial bodies.[85] As part of this expansion, the crown courts required the courts to clearly declare a sufficient legal cause to justify the imprisonments and detentions that they ordered.[86] In this way, the writ was used to test the legality of the "cause" of imprisonment.

By the sixteenth century, the writ began to be employed to challenge the legality not only of detention by inferior courts but by executive officials as well.[87] The English courts used writs of habeas corpus to demand that the crown's officers provide justifications for holding political prisoners.[88] For instance, in 1587, the Court of Common Pleas issued a writ of habeas corpus to produce the body of a

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81. *See, e.g.*, HURD, *supra* note 16, at 255 ("[T]he aim and effect of the writ is to require the defendant to show the cause of the imprisonment."); JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1339 (Melville M. Bigelow ed., 1891) (describing habeas corpus as "the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge").

82. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-23 (1980).

83. *Id.* at 17.

84. *See* DUKER, *supra* note 82, at 24-25; Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172, 197 (1940).

85. *See* DUKER, *supra* note 82, at 62; Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2521-22 (1998).

86. *See* DUKER, *supra* note 82, at 41-43; R.J. SHARPE, THE LAW OF HABEAS CORPUS 5 (1976).

87. Rollin Hurd traced the earliest uses of the writ against the crown to the reign of Henry VII, who ruled England from 1485 to 1509. HURD, *supra* note 16, at 145; *see also* SHARPE, *supra* note 86, at 7 (declaring that by the late 1500s, habeas corpus had been "shown to be a remedy fit to challenge the authority of the crown").

88. *See* DUKER, *supra* note 82, at 41-43.

man named Hellyard, who was beld by royal command at Fleet Prison.[89] In response, the warden of the prison submitted a return simply explaining that Hellyard was being held by the command of Sir Francis Walsingham, the Secretary of State.[90] The court ruled that the return was inadequate because "the warden did not shew in his retorn for what cause the said Hellyard was committed."[91] Likewise, in *Addis' Case* of 1615, the jailer's return to the writ merely declared that the prisoner was held for matters concerning the king, but the court held the return insufficient "for it shews not for what causes he was committed."[92]

Although these cases required that even the crown had a duty to explain the legal basis for holding prisoners, the principle was not firmly established until 1679. Controversy erupted in 1627 in the seminal *Five Knights Case*, also known as *Darnel's Case*, over whether the king's word alone was sufficient to establish sufficient legal cause.[93] The *Five Knights Case* arose when the king ordered suspected state enemies detained based solely upon his special command and sought to block any judicial inquiry into the basis for their confinement.[94] The prisoners argued that, unless criminal charges were brought, "imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually," in violation of the Magna Carta.[95] The court, however, sided with the king.[96]

Parliament strongly objected to the suggestion that the king and his officers enjoyed unchecked detention authority and responded by enacting a series of statutes to prohibit detention without a legal cause. In 1628, Parliament enacted the Petition of Right, which prohibited

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89. Hellyard's Case, (1587) 74 Eng. Rep. 455 (K.B.).

90. *Id.*

91. *Id.* Five years after *Hellyard's Case*, the court declared that "her Majesties Writs have sundry times been directed to divers persons having the custody of such persons unlawfully imprisoned, upon which Writs no good or lawful cause of imprisonment hath been returned or certified: whereupon according to the Laws they have been discharged from their imprisonment." (1592) 123 Eng. Rep. 482 (C.P.D.).

92. Addis' Case, (1615) 79 Eng. Rep. 190–91 (K.B.); *see also* Searches Case, (1587) 74 Eng. Rep. 65–66 (K.B.) (discharging prisoner for insufficient cause stated in return); Peter's Case, (1586) 74 Eng. Rep. 628 (K.B.) (same).

93. Darnel's Case, (1627) 3 Cobbett St. Tr. 1, 4 (K.B.); *see also* DUKER, *supra* note 82, at 43–44; 3 BLACKSTONE, *supra* note 80, at 133–34.

94. Darnel's Case, (1627) 3 Cobbett St. Tr. 1, 37 (K.B.).

95. *Id.* at 8; *see also* MAGNA CARTA art. 39 (1215) ("No free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land.").

96. Darnel's Case, (1627) 3 Cobbett St. Tr. 1, 59 (K.B.).

imprisonment upon royal command and without formal charges.[97] When the king nonetheless continued to impose imprisonment without charges, Parliament enacted the Habeas Corpus Act of 1641, which commanded the king's custodians to provide a legal basis for a prisoner's detention and instructed judges to act "without delay" in response to a petition for habeas corpus.[98] Under the 1641 Act, whenever the legal authority of any person holding another was challenged through a petition for habeas corpus, the custodian was required to "certify the true cause of such his detainer or imprisonment," and the court was required to "proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not."[99] When even the 1641 Act proved ineffective, Parliament adopted the Habeas Corpus Act of 1679, which remedied various procedural flaws that had prevented prompt judicial inquiry into the legality of confinement.[100]

With the adoption of the 1679 Act, habeas became, in William Blackstone's words, an effective remedy for "all manner of illegal confinement."[101] The writ was available to challenge unlawful restraints by private actors as well as imprisonment ordered by the King, Parliament, or the courts.[102] Blackstone declared that the 1679 Act represented a "second magna carta and stable bulwark of our liberties" because it effectively prohibited imprisonment without lawful authority.[103] The writ served its function by requiring anyone restraining another's liberty to provide legal justification for the restraint and requiring the courts to determine if the justification was valid.[104] Under the 1641 and 1679 Habeas Corpus Acts, the ultimate issue in all habeas cases was whether the jailer could establish a legal "cause" to justify the detention. In 1758, the Chief Justice of the Court of Common Pleas described the writ as a judicial command to the

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97. 3 Car. 1, c. 1, §§ 5, 10 (1628) (Eng.).

98. The Habeas Corpus Act of 1641, 16 Car. 1, c. 10 (1641) (Eng.); DUKER, *supra* note 82, at 47; 3 BLACKSTONE, *supra* note 80, at 129–35. The 1641 Act applied only to government-imposed detention, but the common-law writ remained available to challenge private detention. *See* Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 43 (K.B.).

99. An Act for the Regulation of the Privy Council and for Taking Away the Court Commonly called the Star-Chamber, 1641, 16 Car. 1, c. 10, § 8; *see* DUKER, *supra* note 82, at 47.

100. The Habeas Corpus Act of 1679, 31 Car. 2, c. 2; *see* DUKER, *supra* note 82, at 48–58.

101. *See* 3 BLACKSTONE, *supra* note 80, at 131.

102. HURD, *supra* note 16, at 147.

103. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (1766).

104. *See* HURD, *supra* note 16, at 144.

custodian to "[t]ell the reason why you confine him. The Court will determine whether it is a good or bad reason."[105] A group of legal historians recently described the writ in similar terms: its "very essence . . . its substance—was a searching inquiry by neutral judges into the factual and legal validity of the [executive's] proffered justification for the detention."[106]

Judicial inquiry into the legal cause of detention required the jailer to establish with strict precision the legal authority for holding the petitioner. As Blackstone explained:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an [sic] *habeas corpus* may examine into it's [sic] validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.[107]

As Blackstone thus made clear, sufficient justification for detention can only be based upon positive law, whether under the common law or statute, which clearly defines and limits the circumstances in which detention can be authorized and by whom.[108]

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105. Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 43 (K.B.) (internal quotations omitted).

106. Supplemental Brief Amici Curiae of British and American Habeas Scholars Listed Herein in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005 at 12, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (No. 05-5064).

107. 3 BLACKSTONE, *supra* note 80, at 133.

108. 1 BLACKSTONE, *supra* note 103, at 132–33 ("To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*."); *see also* HURD, *supra* note 16, at 256 ("To justify the detention, the return must show it to be founded on sufficient authority, either public or private."); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 987 (1998) ("Executive detention always requires affirmative authorization in positive law."). Legal authority for imposing detention could be established by statute or by common law. For instance, English common law authorized husbands, fathers, guardians, and masters to impose restraints "in order to enforce a performance of those natural, moral, and civil duties, which wives, children, wards, and apprentices, owe to their superiors." Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 36 (K.B.). Thus, in habeas actions challenging private detentions, courts looked to whether the common law granted the custodian authority to impose the detention and whether he had acted in accordance with that authority.

The 1641 and 1679 Habeas Corpus Acts codified not only the common-law standard for issuing habeas relief, the lack of a valid cause of detention, but also codified the procedures for determining whether detention was based on lawful authority. Under these Acts, the petitioner began a habeas action by submitting a request for the writ. When the petition on its face demonstrated the validity of the detention, the court would dismiss the petition.[109] If, on the other hand, the petition established probable cause for concluding that the petitioner was being held without a lawful basis, courts had no discretion but were required to issue the writ.[110] Upon receiving the writ, the custodian was required to submit a "return," which certified the "cause" of detention, and bring the petitioner to court.[111] The court then was required to examine that cause and determine whether it was sufficient to establish a lawful detention.[112] If the court ruled the cause insufficient, it would order the custodian to discharge the petitioner.[113]

As the traditional habeas standards and procedures make clear, habeas corpus historically served as a mechanism for ensuring that detention was imposed only on the basis of lawful authority. To determine whether detention was authorized—that is, whether a sufficient legal "cause" supported the detention—courts asked whether the jailer could show that, by statute or otherwise, he had been granted power to impose imprisonment and that, in imprisoning the petitioner, he had acted within the scope of that power. Habeas courts thus had no occasion to ask whether the petitioner's "rights" had been violated because the only right at issue was the right not to be imprisoned

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109. *See* HURD, *supra* note 16, at 255.

110. Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 36 (K.B.) (stating that courts would not issue writs of habeas corpus "upon a mere suggestion; but upon some proof of a wrong and injury done to a subject"); 3 BLACKSTONE, *supra* note 80, at 132–33 ("[I]f a probable ground be shewn, that the party is imprisoned without just cause, . . . the writ of *habeas corpus* is then a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."); *see also* DUKER, *supra* note 82, at 5 ("Once probable ground was shown that the party was committed for no crime, or that he was imprisoned for a crime by a person or an organ lacking jurisdiction, habeas corpus became a matter of right. If doubt existed whether a crime was committed or not, or whether the party was committed by a competent jurisdiction, or there appeared to be a bailable crime, habeas corpus again would be granted as a matter of right.").

111. *See* HURD, *supra* note 16, at 239, 243.

112. The 1679 Act maintained the common law's focus on whetber the jailer could establish his lawful authority for imposing detention. Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § II (1679) (Eng.) (requiring the jailer to "certify the true causes of his detainer or imprisonment").

113. *See* 3 BLACKSTONE, *supra* note 80, at 133.

without legal cause, an inquiry resolved by determining the scope of the jailer's authority.

B. Until the Modern Era, Federal Habeas Actions Followed Traditional Habeas Standards by Focusing on the Custodian's Authority, Not the Petitioner's Rights

Federal habeas authority was established in 1789 with the ratification of the Constitution, which expressly limits Congress's power to suspend the writ, and with the enactment of section 14 of the Judiciary Act, which authorizes federal courts to issue the writ for federal prisoners.[114] As this Section shows, the writ of habeas corpus protected by federal law in 1789 was the familiar writ described by Blackstone, and the standards and procedures for issuing habeas relief were well established: the jailer was required to establish his lawful authority for imposing detention; authority was only lawful if established by positive law; and, in cases of executive detention, courts would scrutinize the proffered basis with exacting scrutiny. Federal habeas actions thus did not require the petitioner to make any showing of a violation of rights, except to the extent that unauthorized detention itself was understood to violate the petitioner's "right of liberty."

Although the traditional habeas action has become neglected, it remains a part of federal law. The habeas standards established in 1789 have never been altered by Congress or the Supreme Court, and section 14 is now codified at 28 U.S.C. § 2241(c)(1).[115]

1. THE SUSPENSION CLAUSE AND THE JUDICIARY ACT OF 1789 EMBODY THE TRADITIONAL HABEAS PROTECTION AGAINST UNAUTHORIZED DETENTION

The foundational grants of federal habeas authority—the Suspension Clause and section 14 of the Judiciary Act—incorporate what by 1789 were well-established habeas standards, which focus on the jailer's authority, not the prisoner's rights. The Suspension Clause in Article I, Section 9 of the Constitution, provides: "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."[116] Section 14 of the Judiciary Act, adopted six months after the Constitution went into effect, provides that "the justices of the supreme

114. U.S. CONST. art. I, § 9; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

115. *See* INS v. St. Cyr, 533 U.S. 289, 305 n.25 (2001); Carbo v. United States, 364 U.S. 611, 615-16 (1961) (both reviewing statutory history of section 14).

116. U.S. CONST. art. I, § 9.

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."[117] The texts of the Suspension Clause and Judiciary Act are quite sparse, and, as Marshall observed, neither expressly defines habeas corpus or provides any guidance upon what grounds the writ should issue.[118] From the outset, however, these provisions have been understood to incorporate the habeas standards that had developed under English law. As Marshall declared, the term "habeas corpus" was "well understood" in 1789, and the content of habeas corpus could be gleaned from a historical understanding of the traditional writ.[119] As Marshall declared, "[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law."[120]

By authorizing federal courts to employ the writ of habeas corpus "for the purpose of an inquiry into the cause of commitment," section 14 of the Judiciary Act makes clear that federal habeas law embodies traditional habeas standards.[121] Judicial review of the legality of the "cause" of imprisonment had long been the traditional function of habeas, as codified in the Habeas Corpus Acts of 1641 and 1679, which

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117. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789). The term "commitment" was never given a technical meaning by federal courts and instead was understood simply to refer to any restraint on liberty. After thoroughly reviewing cases construing the term, one district court concluded that "[i]n no case known and accessible to this court, has it ever been held that United States courts of original jurisdiction cannot issue the writ where a person is held in illegal restraint under or by color of the authority of the United States, whether there has been a technical commitment or not." *In re* McDonald, 16 F. Cas. 17, 27 (E.D. Mo. 1861) (No. 8,751).

118. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830) ("No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it.").

119. *Id.*

120. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807). As Dallin Oaks remarked, ever since *Bollman* "the history of this venerable remedy has played an important role in the Supreme Court." Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 451 (1966); *see also* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999 (1992) ("[A] proper determination of the Great Writ's future requires an accurate understanding of its past.").

121. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789). The 1875 revision to the federal laws codified section 14 at Revised Statutes § 752 and made slight changes to the statutory language, authorizing federal courts "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." Habeas Corpus, ch. 13, § 752, Rev. Stat. (1873–74); *see* Carbo v. United States, 364 U.S. 611, 616 (1961) (reviewing statutory history of section 14). In 1948, that section was codified at 28 U.S.C. § 2241, and the quoted words were omitted, as the statutory revisor explained, because they were understood to be "merely descriptive of the writ." *See Carbo*, 364 U.S. at 619 (quoting H.R. Rep. No. 2646, at A169 (1945); H.R. Rep. No. 308, at A177–A178 (1946)).

required English courts to "examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not."[122] The conclusion that the original grants of federal habeas authority incorporated traditional habeas standards is bolstered by Federalist No. 84, in which Alexander Hamilton stated:

> The observations of the judicious Blackstone in reference to [habeas corpus], are well worthy of recital. "To bereave a man of life (says he) or by violence to confiscate his estate, 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 nation; but confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil, he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British Constitution."[123]

Federalist No. 84 thus makes clear that the "habeas corpus" protected by the Suspension Clause is the familiar writ praised by Blackstone and codified in "the habeas corpus act," that is, the famous Habeas Corpus Act of 1679.[124] As Hamilton explained, the writ protected against "arbitrary imprisonments," that is, imprisonments without legal cause, which was precisely the standard codified under English habeas traditions.[125] Because traditional habeas standards did

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122. Act for the Abolition of the Court of Star Chamber, Statutes of the Realm, July 5, 1641, 16 Car. 1, c. 10, § 8 (1641) (Eng.). The recognition that section 14 was intended to serve the traditional habeas function should also carry over to the Suspension Clause because the Judiciary Act was enacted by many of the constitutional framers, and it has long been characterized as "a contemporaneous exposition of the Constitution," Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821), in which Congress gave "this great constitutional privilege . . . life and activity," *Ex parte* Bollman, 8 U.S. at 95.

123. THE FEDERALIST No. 84, at 557 (Alexander Hamilton) (Edward Mead Earle ed., 1937) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1788)).

124. *Id.*; *see also* 3 BLACKSTONE, *supra* note 80, at 135; Habeas Corpus Act of 1679, see *infra* notes 89–93 and accompanying text.

125. The ratification debates also suggest that the writ protected by the Suspension Clause referred to the traditional writ. Several state legislatures that ratified the Constitution sought to clarify that the habeas corpus enshrined in Article I was the traditional writ. Thus, Virginia endorsed an amendment that provided "that every freeman restrained of his liberty is entitled to a remedy, to enquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be

not require any showing that the petitioner's rights had been violated, federal habeas relief likewise does not require the possession of rights.

To construe the federal habeas authority established in 1789 to require the assertion of individual rights would strongly conflict with Federalist conceptions prevalent in 1789 of the relationship between governmental powers and individual rights.[126] In 1789, the Bill of Rights had not been ratified. Plainly, federal habeas corpus could not have been understood to require the assertion of rights not yet in existence. In Federalist No. 84, Hamilton argued that a bill of rights was unnecessary because, among other things, the Constitution includes the Suspension Clause, which protects against "arbitrary imprisonments, [which] have been in all ages the favourite and most formidable instruments of tyranny."[127] Because the Constitution guaranteed that the writ of habeas corpus was available as a remedy against imprisonment without cause, Hamilton argued, no additional constitutional protection of individual rights was necessary.

The Suspension Clause and section 14 of the Judiciary Act promote the Federalist project of protecting individual liberty by limiting the government's powers, not by enumerating discrete individual rights.[128] Enumerated individual rights were unnecessary, the Federalists argued, because the Constitution establishes sufficient structural mechanisms to ensure that the government operates within its limited powers. As Justice Joseph Story later explained, habeas served as the "great bulwark of liberty" not by protecting a discrete set of individual rights but by requiring that the government act within the bounds of its authority, that is, by imposing imprisonment only for a lawful cause. [129] Habeas thus served to protect individual freedom

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denied or delayed," and similar recommendations were endorsed by the conventions of Rhode Island and North Carolina. DUKER, *supra* note 82, at 134.

126. *See, e.g.*, Letter from James Madison to George Washington (Dec. 5, 1789), *reprinted in*, 5 DOCUMENTARY HISTORY OF THE CONSTITUTION: 1786–1870, at 221–22 (U.S. Dep't of State ed., 1905) ("If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter to be secured . . . by declaring that they shall not be abridged, or that the former shall not be extended.").

127. THE FEDERALIST No. 84, at 557 (Alexander Hamilton) (Edward Mead Earle ed., 1937).

128. *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1225 (1990) ("[T]he founding generation was very comfortable with the idea that structural provisions, including provisions that define governmental powers and clarify that powers not granted are reserved, constitute individual rights provisions of the first order.").

129. 2 STORY, *supra* note 81, at § 1339 ("It is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his

against tyranny, but it did so by focusing on whether detention exceeded the government's powers.

2. FEDERAL HABEAS CLAIMS UNDER SECTION 14 OF THE JUDICIARY ACT FOCUSED ON POWER, NOT RIGHTS

Federal habeas actions brought under section 14 of the Judiciary Act followed traditional habeas procedures and standards and offered relief when imprisonment was imposed without legal authority.[130] As a result, the vast majority of federal habeas actions under section 14 were framed as challenges to the government's detention powers, not as claims that discrete individual rights were violated. Indeed, in the 124 reported federal habeas decisions between 1789 and 1867, only five involve allegations that the petitioners rights were violated.[131] All of the other reported federal habeas cases involve allegations that detention was unauthorized by law.

Ex parte Burford, one of the first cases decided under section 14, is particularly instructive on judicial inquiry in federal habeas cases.[132] The habeas petition in that case was filed by John Atkins Burford, who had been imprisoned based on a warrant alleging that he had a notorious reputation and was likely to incite criminal activities. Specifically, the warrant stated that Burford was a man:

> not of good name and fame, nor of honest conversation, but an evil-doer and disturber of the peace of the United States, so that murder, homicide, strifes, discords, and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby.[133]

The petition alleged that detention was unauthorized because the "warrant states no offence."[134] In evaluating the petition and awarding

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immediate discharge."); *see also* Thomas B. McAffee, *The Federal System As Bill Of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 17-18 (1998) ("[O]ur familiarity with the modern judiciary's reliance upon specific textual rights provisions as trumps against otherwise valid claims of legislative authority has blinded us to the fact that [to the Constitution's Framers] claims based on a lack of governmental authority are also individual rights claims.").

130. As Rollin Hurd explained in 1858, under American habeas law "the general principles of practice are substantially the same as those prevailing at common law and under [the Habeas Corpus Act of 1679]." HURD, *supra* note 16, at 209.

131. *See infra* note 155.

132. 7 U.S. (3 Cranch) 448 (1806).

133. *Id.* at 450-51.

134. *Id.* at 452.

habeas relief, Marshall framed the Court's inquiry solely in terms of the government's power: "The question is, what authority has the jailor to detain him?"[135] The Court found that the custodian lacked power to hold Burford because he failed to "express the cause [of commitment] with convenient certainty" and because he failed to demonstrate "that such cause be a good one."[136] The Court thus granted habeas relief, not because Burford had identified a right violated by the imprisonment, but because "the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath."[137]

Before 1867, when Congress expanded federal habeas authority, federal courts issued 124 reported decisions in habeas cases, and all of these cases were understood to pose the same question raised by *Burford*—"what authority has the jailor to detain him?" These decisions include a wide range of claims challenging the scope of federal detention and imprisonment powers: in nine cases, petitioners challenged federal authority to hold them pending extradition;[138] in twelve cases, petitioners challenged the scope of the detention powers of a military commission;[139] in twenty-three cases, petitioners challenged military custody on the ground that they were exempt from service;[140] in six cases, petitioners alleged that the arrest warrant or

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135. *Id.*

136. *Id.* at 453.

137. *Id.*

138. *Ex parte* Van Aernam, 28 F. Cas. 931 (C.C.D.N.Y. 1854) (No. 16,824); *In re* Heilbronn, 11 F. Cas. 1025 (S.D.N.Y. 1854) (No. 6,323); *In re* Kaine, 14 F. Cas. 84 (C.C.S.D.N.Y. 1852) (No. 7,598); *In Re* Kaine, 55 U.S. (14 How.) 103 (1852); *In re* Pederson, 19 F. Cas. 91 (S.D.N.Y. 1851) (No. 10,899a); *In re* Veremaitre, 28 F. Cas. 1147 (S.D.N.Y. 1850) (No. 16,915); *In re* Metzger, 46 U.S. (5 How.) 176 (1846); *In re* Sheazle, 21 F. Cas. 1214 (C.C.D. Mass. 1845) (No. 12,734); *Ex parte* Anthony, 1 F. Cas. 1045 (1806) (No. 485).

139. *Ex parte* Milligan, 71 U.S. 2 (1866); *In re* Egan, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4,303); *In re* Bickley, 3 F. Cas. 332 (S.D.N.Y. 1865) (No. 1,387); *In re* Dugan, 6 D.C. 131 (1865); *In re* Blum, 3 F. Cas. 752 (D. Mass. 1863) (No. 1,572); *Ex parte* Vallandigham, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816); *Ex parte* Field, 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4,761); *In re* Winder, 30 F. Cas. 288 (C.C.D. Mass. 1862) (No. 17,867); *Ex parte* Benedict, 3 F. Cas. 159 (N.D.N.Y. 1862) (No. 1,292); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487); *In re* McDonald, 16 F. Cas. 17, 18 (E.D. Mo. 1861) (No. 8,751); *In re* Biddle, 30 F. Cas. 965 (C.C.D.C. 1855) (No. 18,236).

140. *In re* Conley, 6 F. Cas. 281 (S.D.N.Y. 1866) (No. 3,102); *In re* McDonald, 16 F. Cas. 33 (D. Mass. 1866) (No. 8,752); Antrim's Case, 1 F. Cas. 1062 (E.D. Pa. 1863) (No. 495); Stingle's Case, 23 F. Cas. 107 (E.D. Pa. 1863) (No. 13,458); *In re* Fagan, 8 F. Cas. 947 (D. Mass. 1863) (No. 4,604); *In re* Irons, 13 F. Cas. 98 (C.C.N.D.N.Y. 1863) (No. 7,066); *Ex parte* Burke, 4 F. Cas. 731 (E.D. Pa. 1863) (No. 2,156a); McCall's Case, 15 F. Cas. 1225 (E.D. Pa. 1863) (No. 8,669); *In re* Dunn, 8 F. Cas. 93 (S.D.N.Y. 1863) (No. 4,171); United States v. Taylor, 28 F. Cas. 22 (D.N.J. 1863) (No. 16,439); United States *ex rel.* Henderson v. Wright, 28 F.

indictment stated no offense punishable by the court;[141] in ten cases, petitioners alleged that they were detained by officials who had not been granted relevant detention powers;[142] in five cases, petitioners alleged that the law they were charged with violating was not in force in the place of their actions;[143] and in thirteen cases, petitioners alleged that federal law did not authorize imprisonment for debt.[144]

In addition to these challenges to federal detention powers, eleven of the federal habeas cases decided before 1867 challenged detention by private persons,[145] and ten cases challenged detention imposed by the

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Cas. 796 (C.C.W.D. Pa. 1863) (No. 16,777); United States *ex rel.* Turner v. Wright, 28 F. Cas. 798 (C.C.W.D. Pa. 1862) (No. 16,778); United States *ex rel.* Murphy v. Porter, 27 F. Cas. 599 (C.C.D.C. 1861) (No. 16,074a); United States *ex rel.* Rush v. Watson, 28 F. Cas. 499 (C.C.D.C. 1856) (No. 16,650a); Bamfield v. Abbot, 2 F. Cas. 577 (D. Mass. 1847) (No. 832); *In re* Keeler, 14 F. Cas. 173 (D. Ark. 1843) (No. 7,637); United States v. Stewart, 27 F. Cas. 1336 (E.D. Pa. 1839) (No. 16,400); *Ex parte* Brown, 4 F. Cas. 325 (C.C.D.C. 1839) (No. 1,972); *Ex parte* Smith, 22 F. Cas. 371 (C.C.D.C. 1826) (No. 12,967); United States v. Bainbridge, 24 F. Cas. 946 (C.C.D. Mass. 1816) (No. 14,497); Wilson v. Izard, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No. 17,810); United States v. Anderson, 24 F. Cas. 813 (C.C.D. Tenn. 1812) (No. 14,449); Shorner's Case, 22 F. Cas. 8 (D. Pa. 1812) (No. 12,808).

141. *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1844); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Bennett, 3 F. Cas. 204 (C.C.D.C. 1825); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Johns, 26 F. Cas. 616 (C.C.D. Pa. 1806) (No. 15,481).

142. *In re* Hotchkiss, 6 D.C. 168 (1866); *In re* Bryant, 4 F. Cas. 514 (D. Or. 1865) (No. 2,067); Richardson's Case, 20 F. Cas. 703 (C.C.D.C. 1837) (No. 11,778); *Ex parte* Reed, 20 F. Cas. 404 (C.C.D.C. 1835) (No. 11,634); *Ex parte* Williams, 29 F. Cas. 1316 (C.C.D.C. 1833) (No. 17,699); *Ex parte* Smith, 22 F. Cas. 372 (Ark. Terr. Super. 1832) (12,967a); *Ex parte* Minor, 17 F. Cas. 457 (C.C.D.C. 1823) (No. 9,643); Hernandez v. Aury, 12 F. Cas. 33 (D.S.C. 1818) (No. 6,413); *Ex parte* D'Olivera, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967); *Ex parte* Anthony, 1 F. Cas. 1045 (C.C.D.C. 1806) (No. 485).

143. *In re* Hall, 6 D.C. 10 (1863); United States v. Copeland, 25 F. Cas. 646 (C.C.D.C. 1862) (No. 14,865a); United States v. Dawson, 25 F. Cas. 788 (C.C.D. Ark. 1853) (No. 14,933); United States v. Ivy, 26 F. Cas. 554 (C.C.D. Ark. 1847) (No. 15,451); United States v. Starr, 27 F. Cas. 1296 (C.C.D. Ark. 1846) (16,379).

144. Pratt v. Fitzhugh, 66 U.S. (1 Black) 271 (1861); *Ex parte* Wilson, 10 U.S. (6 Cranch) 52 (1810); *In re* Snow, 22 F. Cas. 722 (C.C.D. Mass. 1847) (No. 13,143); *Ex parte* Dexter, 7 F. Cas. 579 (C.C.D.C. 1844) (No. 3,854); Nelson v. Cutter, 17 F. Cas. 1316 (C.C.D. Ohio 1844) (No. 10,104); *In re* Cheney, 5 F. Cas. 539 (C.C.D. Mass. 1842) (No. 2,636); United States v. Dobbins, 25 F. Cas. 876 (W.D. Pa. 1842) (No. 14,971); *Ex parte* Kennedy, 14 F. Cas. 308 (C.C.D.C. 1834) (No. 7,698); *Ex parte* Bill, 3 F. Cas. 375 (C.C.D.C. 1827) (No. 1,405); *Ex parte* Reardon, 20 F. Cas. 369 (C.C.D.C. 1826) (No. 11,615); Frere v. Mudd, 9 F. Cas. 805 (C.C.D.C. 1823) (No. 5,107); Gill v. Jacobs, 10 F. Cas. 373 (C.C.D.S.C. 1816) (No. 5,426); Wilson v. Marshal of the Dist. of Columbia, 30 F. Cas. 146 (C.C.D.C. 1809) (No. 17,822).

145. Barry v. Mercein, 46 U.S. (5 How.) 103 (1846); *Ex parte* Barry, 43 U.S. (2 How.) 65 (1844); *Ex parte* Everts, 8 F. Cas. 909 (C.C.S.D. Ohio 1858) (No. 4,581); United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 686 (E.D. Pa. 1855)

states.[146] All of these claims were framed as challenges to the custodian's detention authority, not as violations of individual rights.

To determine whether the custodian had authority to detain the petitioner, courts examined the power that had been given to the custodian under the Constitution, federal statutes, and the common law. For instance, *In re Hotchkiss* arose when the District of Columbia chief of police imprisoned George Hotchkiss, a private detective, for disobeying the chief's order to return stolen money that the detective had recovered.[147] Hotchkiss argued that the police chief lacked authority to imprison a civilian for contempt.[148] The court resolved the claim by determining that neither federal statute nor the common law gave the police chief power to imprison private citizens.[149] The scope of the chief's legal powers did not involve any question of the petitioner's rights. Instead, the central question in *Hotchkiss*, like other section 14 claims, was whether the custodian had authority to impose detention.

In addition to challenging the custodian's legal authority to impose detention, some of the section I4 cases involved fact-based challenges to the custodian's authority to hold the petitioners. For instance, in the landmark case of *Ex parte Bollman*, the Supreme Court examined habeas petitions submitted by two prisoners charged with treason for participating in Aaron Burr's conspiracy.[150] The petitioners did not challenge the federal government's authority to impose imprisonment for treason but instead alleged that the government had relied upon an

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(No. 16,726); United States v. Davis, 25 F. Cas. 775 (C.C.D.C. 1839) (No. 14,926); Bell v. English, 3 F. Cas. 102 (C.C.D.C. 1834) (No. 1,250); United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256); Gusty v. Diggs, 11 F. Cas. 128 (C.C.D.C. 1820) (No. 5,878); Handy v. Brown, 11 F. Cas. 422 (C.C.D.C. 1810) (No. 6,019); *Ex parte* Sprout, 22 F. Cas. 1010 (C.C.D.C. 1807) (No. 13,267); McCutchin v. Jamieson, 16 F. Cas. 13 (C.C.D.C. 1806) (No. 8,743).

146. This last category includes cases brought under an act that authorized federal courts to issue writs of habeas corpus for petitioners detained by state officials for acts done in pursuance of federal law. *See* Ch. 57, § 7, 4 Stat. 634, (1833) (codified at 28 U.S.C. § 2241(c)(2) (2000)); *Ex parte* Sifford, 22 F. Cas. 105 (S.D. Ohio 1857) (No. 12,848); *Ex parte* Robinson, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934); *Ex parte* Robinson, 20 F. Cas. 969 (C.C.S.D. Ohio 1855) (No. 11,935); United States *ex rel.* Garland v. Morris, 26 F. Cas. 1318 (D. Wis. 1854) (No. 15,811); *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259). The remaining cases challenging state detention prior to 1867 are *Ex parte* McCann, 15 F. Cas. 1251 (E.D. Tenn. 1865) (No. 8,679); *Ex parte* Des Rochers, 7 F. Cas. 537 (C.C. Cal. 1856) (No. 3,824); United States v. Rector, 27 F. Cas. 726 (C.C.D. Obio 1850) (No. 16,132); *Ex parte* Smith, 22 F. Cas. 373 (C.C.D. Ill. 1843) (No. 12,968); United States v. French, 25 F. Cas. 1217 (C.C.D.N.H. 1812) (No. 15,165).

147. *In re* Hotchkiss, 6 D.C. 168, 168 (1866).

148. *Id.*

149. *Id.*

150. 8 U.S. (4 Cranch) 75 (1807).

overly broad definition of "treason" and that the allegations did not support charging them with treason under an appropriate definition.[151] The Court heard arguments from both sides on the meaning of "treason" and held hearings and examined in detail the affidavits and other evidence presented to justify the petitioners' arrests.[152] Declaring that it had "fully examined and attentively considered" the government's evidence, the Court ruled that "there is not sufficient evidence" to uphold them.[153] Under section 14, habeas was thus available not only to challenge the custodian's general authority to impose detention but to challenge whether, under the specific facts of the petitioner's case, the custodian had acted within the scope of that power.

As the Supreme Court has recognized, these early federal cases contain "no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error."[154] In fact, claims that detention violated the petitioner's rights were exceedingly rare. Only five of the 124 reported section 14 cases involve assertions of individual rights, and in all but one of those cases the court refused to reach the individual-rights claim.[155] In *Ex parte Watkins*, for instance,

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151. *Id.* at 125–27.

152. *Id.*

153. *Id.* at 125, 135. Numerous other cases confirm that, in common-law habeas cases, courts routinely examined the factual underpinnings of executive detentions. *See, e.g.*, R v. Dawes, (1758) Eng. Rep. 486, 486 (K.B.) (declaring that the Court "went minutely through the affidavits on both sides" in order to determine whether a soldier had been lawfully impressed); R v. Kessel, (1758) 97 Eng. Rep. 486, 486 (K.B.) (ordering the petitioner released from military service after taking "time . . . to look into the affidavits" and independently assessing the facts underlying the detention); *In re* Sommersett, (1772) 20 Howell St. Tr. 1, 81 (K.B.) (holding a factual hearing on the return); R v. Turlington, (1761) 97 Eng. Rep. 741, 741 (K.B.); King v. Lee, (1676) 83 Eng. Rep. 482, 482 (K.B.) (considering "divers affidavits" from both sides in deciding habeas petition); Oaks, *supra* note 120, at 454 n.20 (listing instances too numerous to specify in which individuals could contradict facts in return); Hafetz, *supra* note 85, at 2535.

154. INS v. St. Cyr, 533 U.S. 289, 302–03 (2001).

155. *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 573–74 (1833); *Ex parte* Vallandigham, 28 F. Cas. 874, 875 (C.C.S.D. Ohio 1863) (No. 16,816); *Ex parte* Field, 9 F. Cas. 1, 1 (C.C.D. Vt. 1862) (No. 4,761); *In re* Bates, 2 F. Cas. 1015, 1018 (D.S.C. 1858) (No. 1,099a); *Ex parte* Randolpb, 20 F. Cas. 242, 242 (C.C.D. Va. 1833) (No. 11,558). Some other cases arguably involve claims that detention violated individual rights, even though they do not use the language of rights. For instance, in *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822), the petitioner alleged that the circuit court exceeded its authority by imprisoning him for contempt of court for refusing to answer incriminating questions, but the basis of the claim is unclear from the decision, and the court did not reach it. *See also Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (rejecting claim that arrest on a bench warrant following release through habeas corpus was barred by the rule against being twice arrested for same offense, without invoking the language of individual rights).

the petitioner alleged that federal marshals lacked authority to imprison him for failing to pay a fine that was excessive in violation of the Eighth Amendment.[156] The Supreme Court ruled, however, that it could not review the validity of the fine because it had been imposed by a court of competent jurisdiction.[157] In *Ex parte Vallandigham*, the petitioner alleged that his arrest and trial by a military commission for expressing sympathy with the Confederacy violated his constitutional rights to free speech and jury trial, but the trial court held that it could not rule on the validity of the military's actions, and the Supreme Court agreed that it could not address the merits.[158] The only federal habeas case before 1867 that reached the merits of an individual-rights claim is *In re Bates*, in which a pretrial detainee argued he was guaranteed a right to confront witnesses prior to commitment, but the court rejected the argument.[159]

These cases make clear that it was not a wholly foreign idea that habeas relief could be granted if detention violated individual rights, but framing habeas claims in terms of individual rights was far from the norm. Instead, the long tradition of habeas applied by federal courts under section 14 of the Judiciary Act focused judicial attention on the jailer's power, not the petitioner's rights.

C. Modern Habeas Actions Focus on Individual Rights

The judicial inquiry in federal habeas actions has undergone a significant change since 1789. Little more than a hundred years after Marshall declared that in a federal habeas case "the question is, what authority has the [jailor] to detain him?" Justice Oliver Wendell Holmes posed the habeas inquiry in a very different way: "[W]hat we have to deal with [is] solely the question whether [the petitioner's] constitutional rights have been preserved."[160] In the years between these two decisions, federal courts shifted from conceiving of the writ solely as a mechanism for ensuring that detention was imposed based on law

156. 32 U.S. (7 Pet.) at 573.

157. *Id.* at 574.

158. *Ex parte* Vallandigham, 28 F. Cas. at 922–24; *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 243 (1863). Although the district court did not reach the merits of Vallandigham's constitutional claims, it nonetheless commented extensively on them, declaring that constitutional protections are necessarily diminished during wartime. *See* 28 F. Cas. at 923 ("I may be indulged in the remark that there is too much of the pestilential leaven of disloyalty in the community."); *see also* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 105 (1998).

159. *In re* Bates, 2 F. Cas. 1015, 1018 (D.S.C. 1858) (No. 1,099a).

160. *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 450 (1806); Moore v. Dempsey, 261 U.S. 86, 87–88 (1923).

and had begun to see it as a means of protecting the expanding body of individual rights. This shift only accelerated in the decades after Holmes's description of the habeas inquiry. The shift had a number of causes—the expansion of federal habeas authority under the Habeas Corpus Act of 1867, the increased willingness of federal judges to employ habeas corpus for collateral review of state criminal convictions, and, more generally, the ever-expanding canon of individual rights available to criminal defendants.[161]

The primary change to the text of the federal habeas statute was made by the Habeas Corpus Act of 1867, which authorizes federal courts to issue habeas relief for any person in custody "in violation of the Constitution, or of any treaty or law of the United States."[162] The terms of the 1867 Act effected a significant expansion of federal habeas authority by providing federal habeas review for state prisoners, thus expanding exponentially the pool of potential federal habeas petitioners.[163] The language of the 1867 Act also significantly shifted the judicial inquiry in federal habeas actions toward individual rights. Whereas section 14 authorizes the traditional habeas inquiry into the "cause of commitment," the 1867 Act authorizes relief for custody imposed in "violation" of federal law. The 1867 Act thus shifts the judicial inquiry from whether detention is *authorized* to whether it is *prohibited*.

The legal questions posed by the federal habeas statutes of 1789 and 1867, whether detention is authorized or prohibited, may appear to be merely two ways of asking the same question, but the two questions actually require distinct inquiries into different sources of law. To determine whether authorization for detention exists, a court must determine whether the jailer has been given imprisonment power by the Constitution, by statute, or by some other source, and the court must also determine whether the jailer has acted within the scope of that power. In contrast, the most prominent prohibitions on the

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161. *See, e.g.*, DUKER, *supra* note 82, at 248-49; DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 55 (1966); Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1277 (2006).

162. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867); *see* DUKER, *supra* note 82, at 189.

163. As explained by Senator Trumbull, then-Chairman of the Judiciary Committee, the Judiciary Act of 1789 "confines the jurisdiction of the United States courts in using writs of habeas corpus to persons who are held under United States laws," while the 1867 Act authorized the writ to any person "held under a State law in violation of the Constitution and laws of the United States." DUKER, *supra* note 82, at 192. *But see* Eric M. Freedman, *Milestones in Habeas Corpus*, 51 ALA. L. REV. 531, 541 (2000) (arguing that the Supreme Court erred in holding that federal habeas authority under the Judiciary Act of 1789 was limited to federal prisoners).

government's imprisonment powers are found in the Bill of Rights, such as the rights to due process, counsel, and trial by jury. The 1867 Act signaled a shift in the judicial focus in habeas cases away from the sources of a jailer's power toward an inquiry into the specific rights the Constitution provides the petitioner. This shift gained in significance as constitutional protections for criminal defendants began to be applied to the states via the Fourteenth Amendment. As state prisoners increasingly could claim that their detention violated federal rights, federal habeas claims increasingly began to be framed in terms of the prisoner's rights, rather than the jailer's power.[164]

The 1867 Act ultimately led to perhaps the most dramatic change in federal habeas litigation—collateral review of state criminal judgments. The traditional habeas inquiry into the jailer's authority ordinarily meant that habeas courts engaged in minimal review of detention imposed through judicial proceedings, and habeas courts ordinarily reviewed only whether the sentencing court had competent jurisdiction.[165] During the twentieth century, however, the Supreme Court authorized increasingly rigorous federal habeas review of state criminal judgments, under the guise that state courts acting contrary to federal rights exceeded their jurisdiction.[166] Eventually, the Court, by its own admission, "discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review" and expressly acknowledged that habeas review would be available "for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'"[167]

With few exceptions, federal habeas review is now available to consider alleged violations of federal rights occurring in state courts.[168]

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164. The sponsors of the 1867 Act appear to have intended this change. Senator Trumbull thus declared that "[i]t is a bill in aid of the rights of the people." CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866).

165. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) ("This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction . . . is not that judgment in itself sufficient cause?"); Johnson v. United States, 13 F. Cas. 867, 868 (C.C.D. Mich. 1842) (No. 7,418) ("[I]t is clear that on the habeas corpus, the court cannot look behind the sentence of the court, where the jurisdiction is undoubted."); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463–74 (1963).

166. *See* Bator, *supra* note 165, at 486–87; Oaks, *supra* note 120, at 451. *But see* Liebman, *supra* note 120, at 1998.

167. Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (quoting Waley v. Johnston, 316 U.S. 101, 105 (1942)).

168. *See* McCleskey v. Zant, 499 U.S. 467, 479 (1991) ("With the exception of Fourth Amendment violations that a petitioner has been given a full and fair

At the same time, the Court greatly expanded the variety of constitutional rights available in criminal proceedings.[169] Habeas corpus became available as a mechanism to obtain federal judicial review of a vast array of individual-rights claims that previously were not cognizable through habeas, either because they had not yet been recognized or because they only arose in criminal cases where habeas review was rarely available.[170]

As a result of the dual expansion of both federal habeas authority and the scope of individual rights cognizable in habeas, federal habeas cases became dominated by claims that judicial processes violated the petitioner's individual rights.[171] The shift from the traditional inquiry into the jailer's authority to the modern inquiry into individual rights is not merely a new way of phrasing the old test. Under the individual-rights inquiry, petitioners bear the burden of identifying rights violated

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opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner.") (internal citation omitted).

169. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (creating the exclusionary rule); Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing the right to assistance of counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (providing procedural safeguards for the privilege against self-incrimination); *see generally* DUKER, *supra* note 82, at 269 ("Because of the dramatic expansion of rights, the scope of the habeas inquiry ballooned."); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210–15 (2002); Michael Edmund O'Neill, *Criminal Law and Procedure*, 34 U. RICH. L. REV. 749, 750 (2000) (discussing "the dramatic expansion of criminal defendants' rights" by the Warren Court).

170. *See, e.g.*, Withrow v. Williams, 507 U.S. 680 (1993) (discussing *Miranda* rights); Burns v. Wilson, 346 U.S. 137, 142 (1953) (holding federal courts have habeas corpus jurisdiction to review all constitutional issues not "fully and fairly" considered by military tribunals); Wade v. Mayo, 334 U.S. 672 (1948) (discussing right to counsel); White v. Ragen, 324 U.S. 760, 764–65 (1945) (holding perjured testimony violates due process); Arndstein v. McCarthy, 254 U.S. 71 (1920) (discussing Self-Incrimination Clause of Fifth Amendment); Morgan v. Devine, 237 U.S. 632 (1915) (discussing double jeopardy); Rogers v. Peck, 199 U.S. 425 (1905); Andersen v. Treat, 172 U.S. 24 (1898) (discussing the Sixth Amendment right to counsel); *In re* Converse, 137 U.S. 624 (1891) (discussing the Due Process Clause of Fourteenth Amendment); Callan v. Wilson, 127 U.S. 540, 557 (1888) (discussing the constitutional right to jury trial in federal criminal cases); *Ex parte* Wilson, 114 U.S. 417 (1885) (discussing the Fifth Amendment grand-jury right); Liebman, *supra* note 120, at 2082 ("[By 1948, o]n the state-prisoner side, the range of available constitutional rights grew as slowly as incorporationism, but all rights that did exist were enforced on habeas corpus, as on appeal, with *de novo* legal review.").

171. *See* Louis H. Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 52 (1956) ("Typically, the applicant will urge that the state trial was fatally tainted by lack of counsel, by a coerced confession, by officially suborned perjury, by discriminatory jury selection, or by other deprivations of Fourteenth Amendment rights.") (internal citations omitted).

by imprisonment, while under traditional habeas standards the jailer bears the burden of establishing the lawfulness of detention. The judicial task in analyzing individual-rights claims requires the application of a large variety of tests, principally balancing tests weighing the relevant individual and governmental interests, while the inquiry in traditional habeas claims involves a relatively straightforward resolution of whether the government has acted within the scope of its imprisonment powers.

With the dominance of individual-rights claims in federal habeas actions, the traditional inquiry into the jailer's authority to impose detention has become a largely forgotten relic of history. Courts and commentators began to talk about habeas as if it had always been focused on individual rights.[172] By the time of the Guantanamo-detainee cases, it had become conceivable that judges who might otherwise disagree on fundamental questions could nonetheless agree that habeas claims could proceed only if they were based on allegations that imprisonment violates the petitioner's individual rights.[173] Traditional habeas claims, while long neglected, nonetheless remain available under section 14 of the Judiciary Act of 1789, codified at 28 U.S.C. §

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172. *See, e.g.*, Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights."); Herrera v. Collins, 506 U.S. 390, 402 (1993) ("[F]ederal habeas courts act in their historic capacity—to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights."); Sawyer v. Whitley, 505 U.S. 333, 352 (1992) (Blackmun, J., concurring) ("By the traditional understanding of habeas corpus, a fundamental miscarriage of justice occurs whenever a conviction or sentence is secured in violation of a federal constitutional right.") (internal quotations omitted); Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 524 (1982) (Blackmun, J., dissenting) ("Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights."); Bounds v. Smith, 430 U.S. 817, 827 (1977) ("As this Court has 'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)); Francis v. Henderson, 425 U.S. 536, 543 (1976) (Brennan, J., dissenting) ("[T]his Court's solemn constitutional duty [is] to preserve intact the sanctity of the Great Writ of habeas corpus and to ensure that 'federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.'" (quoting Fay v. Noia, 372 U.S. 391, 424 (1963)); Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) ("Traditionally, habeas corpus review has existed to correct violations of constitutional rights."); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 563 (1994) (stating that the Suspension Clause "mirrors the commitment of the Framers to individual rights"); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 631 (2006) ("Habeas claims traditionally focus on violation of a prisoner's constitutional rights.").

173. *See supra* Part I.

2241(c)(1), and the Suspension Clause continues to protect them from judicial or congressional interference.

IV. THE TRADITIONAL HABEAS INQUIRY INTO UNAUTHORIZED DETENTION PROVIDES THE BEST ANALYTICAL FRAMEWORK FOR RESOLVING THE GUANTANAMO CASES

This Part seeks to illustrate how the traditional habeas inquiry into the jailer's authority would apply in the Guantanamo detainees' cases. As Part II showed, traditional habeas standards and proeedures did not require petitioners to establish violations of individual rights, or even to establish that they possessed rights, but instead required the jailer to demonstrate that the detention was authorized by law. As this Part argues, the traditional inquiry into the government's detention powers provides the best framework for resolving the Guantanamo detainees' habeas claims.

As Section A explains, individual-rights analysis does not squarely address the detainees' central claim that they are not enemy combatants but instead focuses judicial attention on the process by which the detainees were designated enemy combatants. Although the procedures the government employed in designating the detainees to be enemy combatants lacked most of the rudiments of due process, the due-process balancing test the Supreme Court adopted in *Mathews v. Eldridge* and endorsed in *Hamdi* is unlikely to result in searching judicial review of the detainees' claims of innocence. By contrast, as Section B argues, the traditional habeas inquiry into the jailer's authority would require the courts to determine in each case whether a sufficient basis exists in law and fact for holding the detainees as enemy combatants.

A. Individual-Rights Analysis Is Unresponsive to the Guantanamo Detainees' Central Claim that They Are Not Enemy Combatants

Given the dominance of individual-rights analysis in contemporary habeas practice, it is hardly surprising that the Guantanamo detainees' cases have been analyzed in terms of individual rights. Individual-rights analysis focuses judicial as well as public attention on the eoncrete harms to the detainees. These detainees have been held indefinitely, without charges, on the basis of secret evidence; deprived of contact with the outside world; and subjected to coercive interrogation techniques, such as stress positions, extreme temperatures, sexual

humiliation, and the use of dogs for intimidation. These techniques have frequently been characterized as tantamount to torture.[174] To describe the treatment of the detainees as violating the detainees' individual rights invokes the inviolability of all individuals, who are understood to have fundamental rights to liberty that can only be taken away if the government adheres to the requirements of due process.[175]

Notwithstanding the appeal of individual rights as a framework for analyzing the Guantanamo detainees' claims, it is far from clear that it provides a mechanism for courts to resolve the detainees' claims that they are not enemy combatants. A preliminary question for applying individual-rights analysis, of course, is the determination of what legal rights the petitioners possess and that question has tied up the Guantanamo-detainee litigation for almost six years. Even if the detainees are found to have cognizable rights, individual-rights analysis focuses on the *process* by which the detainees were designated enemy combatants, not the *substance* of that designation. To be sure, the detainees have strong claims that the process they received was grossly inadequate. Yet even if the detainees are constitutionally entitled to due process, the Due Process Clause, as conventionally understood, may not guarantee the detainees a stringent process for determining their status.

The procedural-due-process balancing test is not directed to resolving claims of innocence. Instead, under *Mathews v. Eldridge*, courts attempt to determine the validity of procedures for depriving an individual of protected liberties by weighing the individual's interests, the government's interests, and the risks of erroneous deprivations.[176] Applying the *Mathews* test, the *Hamdi* plurality described the task of courts in a due-process challenge to the detention of an enemy

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174. The International Committee of the Red Cross, among others, has characterized the treatment of Guantanamo detainees as "tantamount to torture." *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1. The Parliamentary Assembly of the Council of Europe likewise has concluded that many Guantanamo detainees have been subjected to treatment amounting to torture, which "occurred systematically and with the knowledge and complicity of the United States Government." Parl. Ass. Of the Council of Eur., 2005 Sess., Res. No. 1433, ¶ 7(ii). *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, at xiii (Karen J. Greenberg & Joshua L. Dratel eds., 2005); STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006); PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES (2005), *available at* http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

175. *See, e.g.*, 3 BLACKSTONE, *supra* note 80, at 129–37.

176. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

combatant as balancing the petitioner's interest in liberty and the government's interests in national security:

> It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's private interest . . . affected by the official action is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. . . . On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.[177]

In *Hamdi*, the Court found that the appropriate balance between these competing interests means that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[178] Although the plurality found that Hamdi was entitled to the rudiments of due process, the plurality nonetheless concluded that national-security interests dictate considerable departures from ordinary due-process requirements.[179] The plurality thus agreed that fact-finding proceedings could be "tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," and

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177. Hamdi v. Rumsfeld, 542 U.S. 507, 529, 531 (2004) (internal quotations omitted). *Hamdi* exemplifies the tendency since September 11 to debate all government policies—not only detention policies but issues as far afield as immigration and the availability of driver licenses—as conflicts between national security and civil rights. *See* Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness within the Borders*, 38 U.C. DAVIS. L. REV. 1683, 1718 (2005) ("Whatever national security gains the government claims to gain from the driver's license reforms, these must be balanced against the civil rights of citizens and noncitizens, including privacy."); David D. Cole, *Citizenship in a Post-9/11 World: An Exchange Between Peter H. Schuck and David D. Cole: Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2531, 2541, 2547 (2007) ("Due process analysis in this setting essentially consists of weighing the government's interests in national security against the individual's interest in a deprivation of liberty."); Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT'L & COMP. L.J. 363, 363 (2006) ("Finding a balance between national security and the rights of individuals is the most significant issue liberal democratic nations face in developing their counter-terrorism strategies."); Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2151 (2006) ("Most debates about terrorism proceed on the assumption that there is a trade-off between security and rights. The question is often defined in terms of the proper balance between these two important values.").

178. *Hamdi*, 542 U.S. at 533.

179. *Id.* at 531.

hearsay "may need to be accepted as the most reliable available evidence from the Government in such a proceeding."[180] Moreover, the plurality concluded that the "Constitution would not be offended by a presumption in favor of the government's evidence."[181] The Court further suggested "the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal" rather than an Article III court.[182]

While *Hamdi* condones substantial limitations on the ordinary procedural protections offered in judicial processes, it may nonetheless represent the strongest procedural protections that enemy combatants could hope to obtain. Judicial balancing under *Mathews v. Eldridge* creates a sliding scale of procedural protections under which detainees get rigorous review if federal law strongly protects their liberty interests and little or no review if they have weaker liberties. This determination depends on the detainee's citizenship, place of seizure, and place of detention.[183] Hamdi was a U.S. citizen detained on U.S. soil. Greater procedural rights would be accorded only to U.S. citizens seized and detained on U.S. soil, such as Jose Padilla, who was given a full criminal trial.[184] The Guantanamo detainees, in contrast, are foreigners detained outside the technical sovereignty of the United States.[185] As such, they may be entitled to fewer procedural protections than were given to Hamdi or Padilla, or even none.[186]

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180. *Id.* at 533–34.

181. *Id.* at 534.

182. *Id.* at 538.

183. *See* Fallon & Meltzer, *supra* note 11, at 2090. Fallon and Meltzer declare that there is a "large range of potentially pertinent variables" for determining the scope of detainees' rights to procedural protections, which include:

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

Id.

184. *See* Hanft v. Padilla, 546 U.S. 1084, 1084–85 (2006) (granting government's motion "to transfer Padilla from military custody to the custody of the warden of a federal detention center in Florida, to face criminal charges").

185. *See* John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1160 (2006) ("aliens outside the territorial United States" should receive fewer procedural protections than citizens because their "individual liberty interest[s] might be reduced").

186. This is precisely what Professors Fallon and Meltzer appear to suggest *should* happen. They argue that the Guantanamo detainees are entitled only to

The *Mathews-Hamdi* balancing may also provide little relief for the Guantanamo detainees because of the absence of a reliable scale upon which to measure and balance the detainees' liberty interests against the government's national-security interests.[187] The ease with which the *Mathews* test could be manipulated to deny the detainees judicial review can be seen in the application of its third factor, the likelihood of erroneous decisions under existing and more rigorous procedures. A court may conclude that strong procedural protections could result in erroneous decisions to release terrorists bent on our national destruction, as the government suggests has already occurred.[188] Indeed, the Fourth Circuit concluded that criminal prosecution of accused enemy combatants posed too grave a risk that terrorists could return to battle.[189] While criminal law establishes rigorous procedural safeguards out of concern for the consequences of a

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fundamental procedural protections because they are foreigners held outside the United States at a location under exclusive U.S control. Under this scheme, detainees held by the United States in more remote locations would be entitled to no procedural protections. *See* Fallon & Meltger, *supra* note 11, at 2073. It bears noting that Guantanamo was selected to house accused enemy combatants precisely because it was believed that foreigners detained abroad would be entitled to few or no individual rights. *See* Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., and John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice to William J. Haynes II, Gen. Counsel, Dep't of Defense on Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142–43 (2006) (explaining that while "[n]o location was perfect," Guantanamo seemed "to fit the bill" because it would allow military interrogations without judicial review); Scott Higham et al., *Guantanamo: A Holding Cell in War on Terror*, WASH. POST, May 2, 2004, at A1.

187. On this issue, the author is in agreement with John Yoo, who argued that "*Eldridge* seems particularly inappropriate because of its lack of coherence or predictability. How are courts to measure values such as 'the private interest' or 'the government interest' in any systematic manner?" Yoo, *supra* note 186, at 1159; *see also* Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10, 14 (2007) ("[I]t is possible that the Court would uphold procedures for classifying aliens as unlawful enemy combatants even though those procedures would be impermissible under *Hamdi* for citizens.").

188. *See* Press Release, Ex-Guantanamo Detainees who have Returned to the Fight, *available at* http://www.defenselink.mil/news/d20070712formergtmo.pdf (last visited Nov. 18, 2007) ("[A]t least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention"). *But see* H. Candace Gorman, *Return to the Battlefield: The Number One Guantanamo Myth*, HUFFINGTON POST, Mar. 13, 2007, *available at* http://www.huffingtonpost.com/h-candace-gorman-/return-to-the-battlefield_b_43344.html (arguing that the government's claims are false).

189. *See* Padilla v. Hanft, 423 F.3d 386, 394–95 (4th Cir. 2005) ("[T]he availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place—the prevention of return to the field of battle.").

false positive, an innocent individual sent to jail, the government defends terrorist-detention policies based on the consequences of a false negative—terrorist plotters who were not caught in time. In this context, Vice President Dick Cheney has declared that the government should respond to a one percent chance of a major terrorist attack as if it were a certainty.[190] Given the scale of the terrorist events of September 11, the potential costs of mistakenly ordering a detainee's release might be catastrophic. Indeed, the government has presented the risks to national security that would result from judicial involvement in detention decisions in truly apocalyptic terms.[191] Out of fear of releasing potential terrorists, courts applying *Mathews* might approve diminished procedural protections for accused enemy combatants.[192]

Once the Guantanamo-detainee cases are analyzed as individual-rights claims, where modern habeas jurisprudence channels them, the cases call on courts to balance the detainees' rights, which may be seen as carrying little or no weight, against the necessity of military detentions, a test courts seem ill-equipped to undertake.[193] As

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190. *See* RON SUSKIND, THE ONE PERCENT DOCTRINE 61–62 (2006) ("We have to deal with this new type of threat in a way we haven't yet defined . . . . With a low-probability, high-impact event like this . . . I'm frankly not sure how we engage. . . . If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." (quoting Vice President Richard Cheney)); *cf.* Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503 (2007).

191. For instance, the government argued in its motion to dismiss the Guantanamo cases that "[i]nvolvement of the judiciary in second-guessing the determinations of the Military regarding combatant status would . . . strike at the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries." Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 45, Hicks v. Bush, No. 02-CV-0299 (D.D.C. filed Oct. 4, 2004).

192. That concern played a role in persuading Congress to remove the courts' habeas jurisdiction over claims brought by Guantanamo detainees. *See* 151 CONG. REC. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (asserting that at least a dozen released detainees "have gone back to fighting").

193. Many judges have expressed great skepticism of the courts' ability to balance the competing factors, as have many commentators. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2822 (2006) (Scalia, J., dissenting) (arguing that judicial review of Hamdan's habeas claim "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent"); Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) ("First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld."); Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring) (concluding that the judgments required to address the detainees' habeas

individual-rights claims, the cases pose considerable difficulties for the courts, and it is perhaps not surprising that the cases have long been stalled. As discussed below, the cases present more straightforward judicial questions if they are understood as challenges to the President's detention authority rather than as allegations of individual-rights violations.

B. The Guantanamo Detainees' Claims Are Best Analyzed as Claims of Unauthorized Detention

While individual-rights analysis may provide an appropriate vehicle for challenging the process by which the detainees were designated enemy combatants, the traditional habeas inquiry into the jailer's authority presents the proper framework for analyzing the detainees' challenge to the substance of their designations as enemy combatants. The detainees' central claim that they are not enemy combatants has two components: arguments challenging the breadth of the government's authority to hold enemy combatants and arguments challenging the factual basis for designating the detainees to be enemy combatants. Together, these arguments amount to a claim of unauthorized detention—that the government lacks authority to hold the detainees because, as a matter of fact and law, they are not enemy combatants.

As this Section argues, traditional habeas principles establish that the courts should independently review the scope of the government's legal authority to hold enemy combatants and should determine whether the government has a sufficient factual basis to justify each detention. Because the government has asserted broad authority to hold detainees designated enemy combatants who are not alleged to have participated in combat, the government is unlikely to prevail in traditional habeas actions.

1. UNDER TRADITIONAL HABEAS PRINCIPLES, THE GUANTANAMO DETAINEES ARE ENTITLED TO INDEPENDENT JUDICIAL REVIEW OF THE LEGAL SCOPE OF THE PRESIDENT'S DETENTION AUTHORITY

The Supreme Court has resolved the basic question of whether the President has legal authority to hold enemy combatants seized in the

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claims "have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain."); *see also* John Yoo, *Courts At War*, 91 CORNELL L. REV. 573, 574–75 (2006). A lack of judicial competence was also cited in the Senate as a reason for removing habeas jurisdiction over the Guantanamo detainees' claims. *See* 151 CONG. REC. S12,756 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) ("My belief is the military is the best group to run the war, not Federal judges.").

war in Afghanistan. In *Hamdi v. Rumsfeld*, a plurality of the Court held that Congress gave the President power to detain enemy combatants when it adopted the Authorization to Use Military Force (AUMF).[194] The plurality concluded that, although the AUMF does not mention detention, it is best read to authorize the President to employ the accepted "incident[s] of war," and detention of enemy combatants is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[195]

Although *Hamdi* effectively answers the question whether the President has authority to detain enemy combatants, it does not resolve several important legal questions about the scope of that power, including the meaning of the key term "enemy combatant."[196] The *Hamdi* plurality held that the AUMF authorizes the President to detain "enemy combatants," a term it understood to mean individuals who were "part of or supporting forces hostile to the United States or coalition partners . . . and who engaged in an armed conflict against the United States there."[197] *Hamdi* thus upheld the President's authority under the AUMF to detain persons who both "support[ed]" hostile forces and "engaged" in armed combat against the United States.[198] In designating the Guantanamo detainees to be enemy combatants, however, the government applied a much broader definition of enemy combatants than the Supreme Court approved in *Hamdi*. The CSRTs employed a definition of enemy combatants that encompassed:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.

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194. Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224, 224-25 (2001). That resolution gives the President power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* The President has also asserted that he has authority to hold enemy combatants under his constitutional authority as Commander-in-Chief, but the Court in *Hamdi* did not address that argument. *Hamdi*, 542 U.S at 517 ("We do not reach the question whether Article II provides such authority.")

195. 542 U.S. at 518.

196. *Id.* at 516. In addition, *Hamdi* did not resolve whether the power to detain enemy combatants extends to terrorist operatives seized anywhere in the world and whether the power authorizes indefinite detention. *Id.* at 516, 519-20.

197. *Id.* at 516 (internal quotations omitted).

198. *See id.* at 526 (emphasizing the two elements to the meaning of enemy combatant).

> This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[199]

The touchstone for enemy-combatant designation in the CSRTs is "support" for al Qaeda or the Taliban alone, and the CSRTs declared detainees to be enemy combatants if they could be said to have "supported" al Qaeda or the Taliban, without any allegation that the detainees participated in combat.[200]

Pursuant to the broad definition of enemy combatant, the CSRTs designated as enemy combatants individuals whose "support" for al Qaeda or the Taliban was, by the government's own allegations, minor, inadvertent, or unwilling. In response to questioning by the district court, the government agreed that the CSRT definition of enemy combatant would encompass "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."[201] The possibility that the government would hold detainees based on very loose connections to terrorism is far from hypothetical.[202] A comprehensive study of the CSRT records reveals that sixty percent of the detainees were designated as enemy combatants based on the allegation that they were "affiliated with" al Qaeda, the Taliban, or another related group, without any allegation that they engaged in acts

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199. Wolfowitz, *supra* note 28, at 1.

200. *See* United States v. Khadr, No. CMCR 07-001, slip op. at 16 (Ct. Mil. Comm. Rev. Sept. 24, 2007) ("A detainee could be classified as an enemy combatant under the C.S.R.T. definition simply by being a part of the Taliban or al Qaeda, without ever having engaged in or supported hostilities against the United States or its coalition partners.") (internal quotations omitted).

201. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (internal quotations omitted).

202. For instance, the CSRT for Omar Amin did not identify any evidence that he undertook any actions to support terrorism. Instead, the CSRT relied upon evidence that during an interrogation Amin once referred to the Northern Alliance as "the opposition," a usage that the CSRT panel stated was "persuasive to the Tribunal that the Detainee was supportive of the Taliban." *See* Al Odah v. United States, No. 05-5064, App. at 1379 (D.C. Cir. filed May 25, 2005). In another case, the Legal Advisor to the CSRTs concluded that a detainee forced against his will to work for al Qaeda or the Taliban could properly be designated as an enemy combatant because "a detainee's motive for joining or supporting al Qaida is irrelevant to a determination of their status as an enemy combatant . . . . In other words, if the detainee had claimed that he was forced to join al Qaida, then his motive would be irrelevant to the Tribunal's purpose." *See* Memorandum from Legal Advisor to Director, Combatant Status Review Tribunal, on the Legal Sufficiency Review of Combatant Status Review Tribunal for Detainee, at 5 (Oct. 5, 2004), *available at* http://www.cageprisoners.com/downloads/martinmubanga.pdf.

hostile to the United States, let alone that they engaged in combat operations against the United States.[203]

The lawful scope of the government's authority to hold detainees under the AUMF is a pure question of law typical of many traditional challenges to executive detention authority. For instance, in *Ex parte Smith*, the petitioner was charged with assault under a city ordinance adopted in the federal territory of Arkansas and argued that Congress had not authorized the city to adopt the ordinance.[204] The habeas petition turned solely on the scope of the city's authority provided by federal statute.[205] The Guantanamo detainees' cases present a similarly straightforward question of the scope of the power to detain enemy combatants provided by Congress in the AUMF. *Hamdi* suggests that the question should be resolved by considering "longstanding law-of-war principles."[206] The question, thus, is whether it is an accepted incident of war that the military can detain persons who "supported" the enemy in their hearts but did not engage in combat. Leading scholars on the laws of war agree that the accepted incidents of war do not include authority to detain everyone who could be said to "support" al Qaeda or associated groups. Professors Jack Goldsmith and Curtis Bradley, for instance, argue that the laws of war allow the military to detain members of armed forces and other "persons who take a 'direct' part in hostilities."[207] Professors Ryan Goodman and Derek Jinks argue that the President's power under the AUMF is more limited.[208] Under

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203. DENBEAUX, *supra* note 33, at 8, 11.

204. *Ex parte* Smith, 22 F. Cas. 372, 372-73 (Ark. Terr. Super. 1832) (No. 12,967a).

205. *Id.* at 373.

206. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2094 (2005) ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.").

207. Bradley & Goldsmith, *supra* note 207, at 2115. Professors Bradley and Goldsmith argue that the direct-participation standard:

> includes more people than those who participate in combat, and fewer people than every civilian who supports the war effort, which in some modern wars would include everyone. Although there is uncertainty about where the line should be drawn between these two extremes, the key point is that, under the laws of war, enemy organizations will include some individuals who assist the organization in carrying out attacks, even if they are not formal members of the organization.

Id. at 2115-16.

208. Ryan Goodman & Derek Jinks, *Replies to* Congressional Authorization*: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2657-58 (2005).

either view, the definition of enemy combatant employed in the CSRTs far exceeds traditional law-of-war principles.

The government has repeatedly argued, however, that it is due the "utmost deference" for its judgments regarding the scope of its power to hold enemy combatants.[209] Under contemporary administrative-law principles, the government surely is right that courts owe deference to an administrative agency's reasonable statutory construction when a statute it administers is ambiguous or silent.[210] The AUMF is entirely silent on the subject of detentions of enemy combatants, and thus a court would ordinarily defer to the military's reasonable attempts to fill gaps in its authority.[211] In addition, the government has asserted that the "customary deference that courts afford the Executive in matters of military affairs is especially warranted" in reviewing enemy-combatant designations.[212]

While deference to administrative constructions of ambiguous statutes certainly is the rule today, as is deference to the President in the area of foreign policy, such deference, in Fallon and Meltzer's view, is "in considerable tension with the historic office of the Great Writ."[213] Deference to a jailer's judgments about the scope of his

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209. *See* Brief for the Respondents at 25, Hamdi v. Rumsfeld, 542 U.S. 507, (2004) (No.03-6696) ("The Executive's Determination That An Individual Is An Enemy Combatant Is Entitled To The Utmost Deference By A Court.").

210. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

211. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2345-46 (2007) ("[T]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . When an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding.") (internal citations and quotations omitted).

212. Brief for the Respondents at 25, Hamdi v. Rumsfeld, 542 U.S. 507, (2004) (No. 03-6696). In *Hamdan v. Rumsfeld*, Justices Thomas and Scalia agreed that federal courts owe considerable deference to executive constructions of law. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2824 (2006) (Thomas, J., dissenting). As Thomas's dissenting opinion concluded, "When the President acts pursuant to an express or implied authorization from Congress, his actions are supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." *Id.* (internal quotations omitted). Several prominent academic commentators, including Professors Posner and Sunstein, have agreed that the government is entitled to considerable deference for its legal judgments underlying the detention of enemy combatants, including the meaning of the term "enemy combatant." *See* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007); *but see* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007).

213. *See* Fallon & Meltzer, *supra* note 11, at 2069.

detention powers was entirely unknown in traditional habeas cases.[214] As one nineteenth-century habeas case declared, "to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department at Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity."[215]

Not one of the 124 federal habeas cases decided between 1789 and 1867 suggests that any judicial deference is due to jailers' views on the scope of their powers. In over twenty of those cases, federal courts examined whether the military had lawful custody of draftees and enlistees who claimed statutory exemptions from military service, and no example can be found in which a court deferred to the military's construction of its powers.[216] Each of these cases presented a straightforward legal question of government power to hold the petitioners, and courts uniformly undertook de novo determinations of the government's detention power.

It would dramatically undercut the core function of habeas—protecting against unlawful detention—if jailers were entitled to deference in determining the scope of their authority. Under traditional habeas principles, the Guantanamo detainees are entitled to an independent judicial determination of the scope of the government's authority to hold them. To the extent that traditional habeas claims remain available under federal law, federal courts cannot defer to the Executive's views on its power to hold enemy combatants but must independently review the scope of executive power to detain them.[217]

2. UNDER TRADITIONAL HABEAS PRINCIPLES, THE GUANTANAMO DETAINEES ARE ENTITLED TO INDEPENDENT JUDICIAL REVIEW OF THE FACTUAL SUPPORT FOR DETAINING THEM

In challenging the factual validity of their designations as enemy combatants, the Guantanamo detainees assert that the government simply has rounded up the wrong individuals. As one of the detainees'

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214. *See* Neuman, *supra* note 108, at 980 ("Moreover, reviving eighteenth-century practice could require courts . . . to refuse deference to executive interpretations of statutes."); *cf.* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983) (arguing that nineteenth-century courts exercised independent judicial interpretation of statutes in cases involving coercive government).

215. *In re* Jung Ah Lung, 25 F. 141, 143 (D. Cal. 1885).

216. *See supra* Part III.B.2.

217. Even if principles of deference applied in this context, courts could nonetheless find that the government's expansive views are unreasonable and therefore not entitled to deference.

lawyers argued before the D.C. Circuit, habeas would have been available during the internment of Japanese Americans during World War II for a detainee who sought to challenge not only the underlying legality of the internment policy but whether that policy applied to him: "[Suppose] a person came in and he said, 'I'm not of Japanese descent. My name isn't Hara, it's O'Hara and I'm Irish and you've just made a mistake here.' He would have a right to go in and challenge that."[218]

The detainees' factual claims that they are not enemy combatants challenge the application of the government's detention authority, not the violation of their rights. There is substantial reason to believe that, if they received independent judicial review, many of the detainees' factual challenges would succeed. If the President's power to detain enemy combatants is limited, as Goldsmith and Bradley argue, to persons who "direct[ly] participat[ed]" in combat operations,[219] the government cannot establish a factual basis for holding most of the Guantanamo detainees. One study of the evidence offered by the government to support the detentions concluded:

> A high percentage [of the detainees] . . . were not captured on any battlefield . . . . Fewer than 20 percent . . . have ever been Qaeda members. Many scores, and perhaps hundreds, of the detainees were not even Taliban foot soldiers, let alone Qaeda terrorists. They were innocent, wrongly seized noncombatants with no intention of joining the Qaeda campaign to murder Americans.[220]

Military officials have repeatedly acknowledged that many of the detainees are being held by mistake. The former Guantanamo commander stated: "Sometimes, we just didn't get the right folks, [yet n]obody wants to be the one who signs the release papers."[221] It appears that five years ago, the CIA sent a confidential memorandum to the White House that concluded that most of the Guantanamo detainees "didn't belong there."[222]

The government has argued, however, that the courts either are barred entirely from reviewing the factual basis for designating the detainees to be enemy combatants or the courts must review the

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218. Boumediene v. Bush, Oral Argument Tr. at 17 (D.C. Cir. Sept. 8, 2005).

219. Bradley & Goldsmith, *supra* note 207, at 2115.

220. Corine Hegland, *Who Is at Guantanamo Bay*, NAT'L J., Feb. 4, 2006; Stuart Taylor, Jr., *Falsehoods About Guantanamo*, NAT'L J., Feb. 4, 2006.

221. Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1.

222. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, at 44.

allegations and evidence under an "extraordinarily deferential" standard.[223] The government argues that judicial examination of the factual basis for designating detainees as enemy combatants would be inconsistent with traditional habeas standards, which the government asserts barred petitioners from challenging the custodian's assertions of facts.[224] The government further argues that judicial review of the facts purported to support the designation of enemy combatants would violate separation of powers:

> The Executive's determinations with respect to who should be and who are enemy combatants is a quintessentially military judgment, representing a core exercise of the Commander in Chief authority. . . . By contrast, the judiciary lacks institutional competence, experience, and accountability to make such military judgments at the core of the war-making powers.[225]

Several commentators have agreed that courts have a very limited role and owe substantial deference to the military's designations of enemy combatants. Fallon and Meltzer, for instance, have concluded that courts should uphold enemy-combatant designations as long as "a rational trier of fact could have found by a preponderance of the evidence that a petitioner was an enemy combatant."[226]

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223. *See* Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 43–51, Hicks v. Bush, No. 02-CV-0299 (D.D.C., filed Oct. 4, 2004) ("Any Judicial Review of the Results of the Combatant Status Review Tribunals Must Be Extraordinarily Deferential."); Brief for Respondents at 27, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696) (arguing that courts may "not inquire whether the military authorities have made a wrong decision on disputed facts") (internal quotations omitted).

224. Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 at 51, Boumediene v. Bush, No. 05-5062 (D.C. Cir. 2006) (arguing that courts cannot examine the facts purported to justify detention of enemy combatants because habeas courts at common law "engage[d] in highly deferential sufficiency review" that precluded prisoners from contesting the facts alleged in the custodian's return).

225. Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 43–44, Hicks v. Bush, No. 02-CV-0299 (D.D.C. filed Oct. 4, 2004). The government thus argues that, due to the combined weight of habeas traditions and separation-of-powers principles, the courts' role in reviewing enemy-combatant designations would be "at most, merely to confirm that a factual basis exists supporting the Military's determination." *Id.* at 46.

226. Fallon & Meltzer, *supra* note 11, at 2108; ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 258 (2007) (arguing in favor of complete judicial deference to executive designation of enemy combatants). *But see* Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85

Just as there is no basis in habeas traditions to defer to the government's conclusions about the legal scope of its power to hold enemy combatants, there is no basis to defer to the government's assertions of the facts supporting detention.[227] Habeas courts traditionally have undertaken independent investigation of the facts offered to support detention imposed without trial. For instance, in 1670, in *Bushell's Case*, the Court of Common Pleas held that it was required to review the factual and evidentiary support for imprisoning petitioners for contempt of court.[228] The court held that the jailer was required to provide sufficient factual support so that the court could assess for itself whether the detention was lawful: "[T]he cause of the imprisonment ought, by the retorn, to appear as specifically and certainly to the Judges of the retorn, as it did appear to the court or person authorized to commit."[229] Similarly, in *Bollman*, the Supreme Court did not defer to the magistrate's view that there was a sufficient factual basis for holding the petitioners on charges of treason but instead held hearings and examined in detail the affidavits and other evidence presented to justify detentions.[230] The Court ruled that "there is not sufficient evidence" to hold the petitioners only after it "fully examined and attentively considered" the testimony and affidavits the government offered to justify the detentions.[231] Numerous other cases confirm that in traditional habeas cases courts routinely examined the factual underpinnings of executive detentions.[232] This is the modern view as well.[233]

N.C. L. REV. 1687, 1735 (2007) ("The factfinder must impose on the Government the burden to show—preferably by clear and convincing evidence, arguably beyond a reasonable doubt, or at least by a preponderance of the evidence—that it has met the criteria for designating a citizen an enemy combatant.").

227. *See* HURD, *supra* note 16, at 293 ("The following rule, it is believed, correctly describes the nature of the facts which may be controverted. Where the commitment is under express legal process, those facts may be put in issue which, on a question arising only collaterally, are necessary to warrant the imprisonment.").

228. (1670) 124 Eng. Rep. 1006, 1010 (C.P.).

229. *Id.* at 1007.

230. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 125, 135 (1807).

231. *Id.* at 125.

232. For example, in *In re* Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558), Chief Justice Marshall, riding circuit, reviewed the commitment of a civil debtor by a municipal authority, took new evidence, and reached his own conclusions, notwithstanding the municipal authority's previous factfinding on the same subject. *See also* R v. Dawes, (1758) 97 Eng. Rep. 486 (K.B.) (declaring that the Court "went minutely through the affidavits on both sides" in order to determine whether a soldier had been lawfully impressed); *Id.* (ordering the petitioner released from military service after taking "time . . . to look into the affidavits" and independently assessing the facts underlying the detention); *In re* Sommersett, (1772) 20 Howell's St. Tr. 1 (K.B.) (holding a factual hearing on the return); R v. Turlington, (1761) 97 Eng. Rep. 741

It has often mistakenly been stated that, at common law, habeas petitioners could not challenge the factual assertions made by the custodian in the return on the writ.[234] While challenges to the factual basis for detention werc largely, if not entirely, barred in habeas challenges to criminal convictions, the limitation did not apply to executive detentions and other detentions imposed without trial. As Professor Dallin Oaks declared: "[W]ith respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were 'governed by a principle sufficiently comprehensive to include most . . . cases' so that it was 'impossible to specify those [noncriminal cases] in which it could not [be controverted].'"[235] Habeas proceedings challenging criminal convictions were limited for a simple reason: the prisoner already had received an opportunity to confront and cross-examine witnesses and to respond to the evidence against him, and a jury had found that the government proved its allegations beyond a reasonable doubt. Practically by definition, detention imposed through a criminal conviction was understood to be lawful because it was imposed after trial by a court of competent jurisdiction.[236] Thus, the first question, and usually the last question, that courts asked in resolving habeas petitions challenging criminal convictions was whether the sentencing court had acted within its jurisdiction.[237]

(K.B.); King v. Lee, (1676) 83 Eng. Rep. 482 (K.B.) (considering "divers affidavits" from both sides in deciding habeas petition)); Oaks, *supra* note 120, at 454 n.20 (listing instances in which individuals could contradict facts in return); Hafetz, *supra* note 85, at 2535.

233. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 298 (1969) ("Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts.").

234. *See, e.g.*, Neuman, *supra* note 108, at 986 ("One of the maxims of eighteenth-century habeas corpus practice had been that the petitioner could not controvert the facts stated in the return. . . . Like other maxims, this general statement papered over exceptions, not all of which were remembered by those who repeated the maxim.").

235. Oaks, *supra* note 120, at 454 n.20 (quoting HURD, *supra* note 16, at 270–71); *see generally* Hafetz, *supra* note 85, at 2515–16.

236. *See* INS v. St. Cyr, 533 U.S. 289, 301 n.14 (2001) ("At common law, while habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.") (internal quotations omitted). The conclusion that habeas courts traditionally undertook little review of criminal convictions is challenged in ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 5 (2001) and Liebman, *supra* note 120, at 2055.

237. HURD, *supra* note 16, at 153–54, 331–51; Bator, *supra* note 165, at 471. To be sure, even in habeas actions challenging criminal judgments, which were limited to a review of the criminal court's "jurisdiction," flexible notions of jurisdictional

In contrast to imprisonment imposed after a criminal conviction, executive detentions like those in Guantanamo carry no such presumption of legality:

> Detention by executive authority, after all, poses the oldest and perhaps the greatest threat to liberty under law. For, by hypothesis, there is incarceration with no judicial determination of anything. Since the deprivation of liberty has not been subjected to the scrutiny of a court, it lacks that assurance of legality which has come to be thought of as integral to government under law.[238]

The Supreme Court has declared that the protections offered by habeas are at their "strongest" in challenges to executive detentions precisely because executive detention does not involve the assurance of legality associated with judicial processes.[239]

Since 1789, federal courts have undertaken independent fact-finding in reviewing executive detentions.[240] This has been especially

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review often allowed broad factual and legal inquiries. *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 70 (2d ed. 1989) ("The courts have really never been prevented by [this] common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention").

238. *See* MEADOR, *supra* note 161, at 38.

239. *See St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); Lonchar v. Thomas, 517 U.S. 314, 322 (1996) (stating that the common law writ's "most basic purpose [was] avoiding serious abuses of power by a government, say a king's imprisonment of an individual, without referring the matter to a court"); Swain v. Pressley, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (noting that traditionally the writ was used "to inquire into the cause of commitment not pursuant to judicial process"); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Hafetz, *supra note* 85, at 2525 ("Executive detention implicated the core function of the writ of habeas corpus . . . .").

240. *See* SHARPE, *supra* note 237, at 70 ("[C]ourts have never really been prevented by the common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention."); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention."). Moreover, even if deference were appropriate in enemy-combatant cases, deference to the military's judgment that the Guantanamo detainees are enemy combatants would be inappropriate. Deference to administrative factfinding is limited to determinations made "in a judicial capacity," resolving "disputed issues of fact properly before it which the parties . . . had an adequate opportunity to litigate." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). The designation of the Guantanamo detainees as enemy combatants does not fall within

true in challenges to military detention. For instance, before 1867, more than twenty habeas petitions were brought on behalf of military personnel, including deserters and others seeking to resist military discipline, claiming that they were not properly subject to military service.[241] Although federal courts would not review whether the military was correct to impose punishment on military personnel, federal courts did not shy away from reviewing whether the military had lawful custody over the petitioners in the first place.[242] The federal courts uniformly rejected the argument that they lacked authority to interfere with military custody over its personnel. As one case concluded: "Whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under a habeas corpus."[243] In habeas challenges to the validity of military enlistments, federal courts reviewed evidence offered to establish the petitioners' eligibility to enlist, notwithstanding the military's prior determinations that the petitioners were eligible.[244] Federal courts thus concluded that habeas required independent judicial determination of the facts necessary to establish whether the military had lawful custody over habeas petitioners.[245]

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those limits, considering the absence of any traditional procedural protections in the CSRTs. *See supra* Part II.A.

241. *See supra* note 140.

242. *See, e.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 243 (1960) ("[M]ilitary jurisdiction has always been based on the status of the accused, rather than on the nature of the offense."); *In re* Grimley, 137 U.S. 147, 150 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence.").

243. McCall's Case, 15 F. Cas. 1225, 1231 (E.D. Pa. 1863) (No. 8,699).

244. *See* United States *ex rel.* Henderson v. Wright, 28 F. Cas. 796, 797 (C.C.W.D. Pa. 1863) (No. 16,777) ("The proofs show that John M. Henderson was enlisted in the month of August, 1861."); United States *ex rel.* Turner v. Wright, 28 F. Cas. 798, 798 (C.C.W.D. Pa. 1862) (No. 16,778) ("[T]he proof before the court is clear that he was but nineteen years of age on the 2d day of October last."); *In re* Keeler, 14 F. Cas. 173, 175 (D. Ark. 1843) (No. 7,637) ("The proof of the facts alleged in this application, before a court or judge of the United States, would certainly entitle George B. Keeler to be discharged."); United States v. Stewart, 27 F. Cas. 1336, 1336 (E.D. Pa. 1839) (No. 16,400) ("The proof of minority wholly failed."); *Ex parte* Brown, 4 F. Cas. 325, 326 (C.C.D.C. 1839) (No. 1,972) (reviewing "evidence" of whether petitioner's father consented to enlistment); *cf.* United States v. Bainbridge, 24 F. Cas. 946, 951-52 (C.C.D. Mass. 1816) (No. 14,497) (Story, J., on circuit) (deciding that Congress authorized minorities to enlist in the Navy, but could require enlistment of minors without parental consent, and declaring that "[i]f it had been necessary in this case to ascertain, whether there had been any consent of the father, I should have thought it necessary to have required more explicit affidavits than have been made.").

245. *See, e.g.*, *In re* McDonald, 16 F. Cas. 33, 35-36 (D. Mass. 1866) (No. 8,752) (rejecting the argument that the "secretary of war . . . must be presumed to have

The belief that habeas guaranteed independent judicial examination of the facts and law offered to support military custody was so strong that the courts held that the only valid way to diminish their role was through a valid suspension of the writ. In *United States v. Anderson*, a case decided during the War of 1812, the circuit court held that Congress could not validly give the military final authority to determine the legality of its custody over military personnel because "Congress could not pass a law vesting the war department with a power which would in effect suspend the writ of habeas corpus."[246] During the Civil War, Congress enacted a law declaring that the oath given by enlistees at the time of enlistment "shall be conclusive" that the enlistee was of lawful age,[247] but courts nonetheless held that the factual question of the enlistee's age could still be examined independently in habeas proceedings.[248] Similarly, when a federal statute declared that the military's rejection of claimed exemptions from service "shall be final,"[249] federal courts held that habeas continued to guarantee independent judicial review.[250] As the courts concluded, Congress could not preclude judicial review of the facts and law offered to support military custody unless it suspended the writ. As Judge John Cadwalader declared: "[A]n act of congress making such a decision as to the status of a citizen final, in such a sense as to preclude judicial cognizance elsewhere of the question, would not be constitutional."[251]

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exclusive authority" to determine the legality of an enlistment, and that "the courts have no jurisdiction" to hear a habeas petition). It continues to be the rule that federal courts can review the factual basis asserted to support the military's custody of military personnel. *See* Parisi v. Davidson, 405 U.S. 34, 35 (1972) ("When a member of the armed forces has applied for a discharge as a conscientious objector and has exhausted all avenues of administrative relief, it is now settled that he may seek habcas corpus relief in a federal district court on the ground that the denial of his application had no basis in fact.").

246. 24 F. Cas. 813, 814 (C.C.D. Tenn. 1812) (No. 14,449).

247. *See* Act of Feb. 13, 1862, ch. 15, § 2, 12 Stat. 339, 339 (1862).

248. *See* Seavey v. Seymour, 21 F. Cas. 947, 950 (C.C.D. Me. 1871) (No. 12,596); *Wright*, 28 F. Cas. at 798-99 ("Congress never intended that the oath, however false, should be binding on the courts . . . ."). *But see In re* Cline, 5 F. Cas. 1054 (S.D.N.Y. 1867) (No. 2,896) (holding that an enlistee's age given by oath at time of enlistment could not be reviewed in a habeas proceeding).

249. See Act of March 13, 1863, ch. 75, § 14, 12 Stat. 731, 733-34 (1863).

250. *See* Antrim's Case, 1 F. Cas. 1062, 1067 (E.D. Pa. 1863) (No. 495).

251. *Id.* at 1067; *see also Seavey*, 21 F. Cas. at 953 ("Very strong doubts are entertained whether congress could constitutionally pass a law giving the exclusive power to the secretary of war to hear and determine such cases as those mentioned in the petitions before the court."); *In re* McDonald, 16 F. Cas. 33, 35-36 (D. Mass. 1866) (No. 8,752) (holding that a military proceeding did not preclude judicial review); *In re* Keeler, 14 F. Cas. 173, 174 (D. Ark. 1843) (No. 7,637) ("The military is subordinate to the civil authority, and the privilege of the writ of habeas corpus cannot be suspended unless when, in cases of rebellion or invasion, the public safety may

The principle that Congress cannot preclude habeas review of military custody absent a valid suspension of the writ apparently continues to hold, as the Court ruled in 1960 that a statute declaring military review of court-martial convictions "final and conclusive," and "binding upon all . . . courts . . . of the United States" could not be construed to preclude judicial review through habeas.[252]

These cases provide a clear answer to the government's repeated demands for deference to military judgments about the facts offered to support the Guantanamo detentions and invocations of separation of powers concerns. Under section 14 of the Judiciary Act of 1789, the predecessor to 28 U.S.C. § 2241(c)(1), federal courts independently examined the facts and law offered to support military authority over soldiers, sailors, and marines, and the courts discharged petitioners who were determined not to fall within military custody. The military's authority over its own personnel is a central aspect of military power, no less than authority over enemy combatants, yet federal courts traditionally did not defer to military judgments. Moreover, if Congress and the President object to independent judicial review of the facts and law supporting military custody of the Guantanamo detainees, the Constitution provides a ready solution through the power to suspend the writ. In the absence of a valid suspension, however, the courts cannot voluntarily relinquish their duty in habeas cases of providing independent review of military detention.[253]

While the government might argue that the enlistment and draft cases show only that federal courts undertook independent investigation of the facts offered to support military custody of *citizens*, the courts have long recognized an obligation in habeas proceedings to examine the factual basis for holding aliens as well.[254] The courts held that the

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require it. It is only in that event the writ cannot be issued. There is no other restriction.") (internal citations omitted).

252. United States v. Augenblick, 393 U.S. 348, 349-50 (1969).

253. The *Hamdi* plurality likewise agreed that habeas requires independent judicial review not only of the legal authority for imposing detention but of the facts as well. *See* 542 U.S. 507, 535-36 (2004) ("Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.").

254. It might also be argued that federal courts in modern habeas cases routinely defer to military findings of fact made in court martial and other court-like military proceedings. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."). These cases do not conflict with the argument presented here because the Supreme Court has consistently held that federal

Alien Enemies Act of 1798 gives the President unreviewable discretion to decide whether to detain or deport enemy aliens, but judicial review has remained available to determine whether a petitioner is in fact an enemy alien.[255] More broadly, the courts have never deferred to executive determinations that petitioners are subject to deportation or exclusion because they are aliens and not citizens but instead have always provided independent examination of the factual question of a detainee's citizenship status through habeas proceedings.[256]

The Guantanamo detainees do not challenge the President's power to hold enemy combatants; they simply challenge the President's assertion that, as a matter of fact and law, they are enemy combatants. Habeas has always provided a judicial forum to review such claims. As shown in the enlistment, court-martial, alien-enemy, and deportation cases, the usual principles of deference to the military in military matters does not preclude federal courts in habeas proceedings from independently reviewing whether petitioners properly are within a

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habeas review is available to determine whether a military tribunal had proper jurisdiction over the petitioner, a question that depends on the petitioner's status, not guilt or innocence. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 243 (1960); *In re* Grimley, 137 U.S. 147, 150 (1890). In the Guantanamo cases, the question whether the detainees are properly under the jurisdiction of the military depends on whether they have the status of enemy combatants. *See* Franklin, *supra* note 15, at 5 ("A detainee's status as a combatant on the one hand or a civilian on the other is therefore a jurisdictional fact which must be subjected to searching inquiry by an Article III court.").

255. Ludecke v. Watkins, 335 U.S. 160, 171 n.17 (1948) ("[W]hether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts."); *see also* United States *ex rel.* Hack v. Clark, 159 F.2d 552, 554 (7th Cir. 1947) ("In a proceeding of this kind but one question is open to the relator, and that is whether he is an enemy alien."); Citizen's Protective League v. Clark, 155 F.2d 290, 294 (D.C. Cir. 1946) ("Unreviewable power in the President to restrain, and to provide for the removal of, alien enemies in time of war is the essence of the [Enemy Alien] Act, . . . [yet t]he one question, whether the individual involved is or is not an alien enemy, is admitted by the Attorney General to be open to judicial determination."); *Ex parte* Fronklin, 253 F. 984, 984 (N.D. Miss. 1918) ("[T]he only question for determination on this hearing is whether he is a citizen of the United States or is a German alien enemy."); Minotto v. Bradley, 252 F. 600, 602 (N.D. Ill. 1918) ("The sole question, as I see it, is: Is the petitioner an alien enemy, as defined by Congress? If the petitioner is not an alien enemy, the writ in this case must issue.").

256. *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 279, 285 (1922) (holding that, notwithstanding an executive determination to the contrary, habeas petitioners "are entitled to a judicial determination of their claims that they are citizens of the United States"); Chin Yow v. United States, 208 U.S. 8, 13 (1908) (same); *see also* Holiday v. Johnston, 313 U.S. 342, 351–52 (1941) (rejecting deference to factfinding by a prison commissioner and declaring that in habeas cases "Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself."); *see generally* Neuman, supra 108, at 961–63.

category of persons whom the government has the authority to detain.[257] Under traditional habeas principles, the Guantanamo detainees are entitled to searching judicial review of the factual basis for the government's claim that they are enemy combatants. From the course of the litigation, it appears that such evidentiary hearings are exactly what the government fears most.[258] And apparently for good reason: the evidence against most of the detainees appears to be weak or nonexistent.[259] Yet evidentiary hearings are precisely what is required once the claims brought by the Guantanamo detainees are recognized for what they are—traditional habeas challenges to the government's detention powers.

V. CONCLUSION

The Guantanamo detainees' habeas cases have been stalled for almost six years because the courts have been asking the wrong question: whether the detainees possess any rights. Courts in habeas actions traditionally have asked a different question: whether the jailer has power to hold the prisoner. In the Guantanamo cases, the traditional habeas inquiry would mean that the government must show that the detentions fall within the scope of executive authority to hold enemy combatants. The required judicial inquiry involves both a legal question, the scope of the category "enemy combatant," and a factual question, whether the detainees fall within that category. There is substantial reason to doubt that in most of the Guantanamo cases the government could prevail on either question. The government has employed a definition of enemy combatant that far exceeds the military's detention powers under law-of-war principles, and most of the detainees are not alleged to have participated in combat and therefore could not validly be designated enemy combatants. If the government cannot establish its lawful authority to hold the Guantanamo detainees, habeas relief must be granted even if the detainees otherwise have no cognizable rights.

257. *See supra* notes 138–49 and accompanying text.

258. *See supra* note 158.

259. *See supra* notes 175–77 and accompanying text.

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