

Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts

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Many have long debated whether Congress may strip the federal courts completely of jurisdiction over certain classes of cases. Leading scholars of federal courts and constitutional law have made significant contributions to our understanding of the various issues involved with jurisdiction stripping, as it is known in the literature. Recent discussion has focused on whether Article III's grant of the judicial power over "all cases arising under the Constitution, laws of the United States, and treaties" is a mandatory constitutional command that Congress must implement. Some, for example, argue that Congress must vest the federal courts with jurisdiction, either appellate or original, over all federal question cases;¹ others believe that the national judiciary must receive the power to hear all of Article III's party-based categories of federal jurisdiction. Related questions involve whether Congress can narrow the appellate jurisdiction of the Supreme Court, manipulate the province of the inferior courts, or whether the Bill of Rights requires that some federal tribunal hear

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1. See generally RICHARD FALLON, JR., DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM [hereinafter HART & WECHSLER] 331-34 (5th ed. 2003). See e.g., Robert Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Robert Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986).

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individual rights claims.² Scholars have reached no consensus.

Until the last few years, these debates met the very definition of academic. Congress had considered proposals to strip the courts of jurisdiction as early as the 1820s, when Congress debated Section 25 of the Judiciary Act of 1789's grant of appellate authority to the Supreme Court over the decisions of the state courts in matters involving federal law.³ In the last half-century, proposals for jurisdiction stripping turned from concerns about the centralization of power in the Supreme Court generally to efforts seeking to block certain judicial decisions by preventing the federal courts from hearing cases on specific subjects, such as reapportionment, school prayer, school busing, and abortion.⁴ Nonetheless, aside from two statutes, one from the Reconstruction period, examined in *Ex Parte McCordle*,⁵ the other from the New Deal, reviewed in *Lauf v. E.G. Shinner*,⁶ Congress had never engaged in clear removal of cases from the Supreme Court or the lower federal courts.

That changed with the Court's decision in *Rasul v. Bush*, which extended the federal writ of habeas corpus to alien enemy combatants detained at the Guantanamo Bay, Cuba Naval Station.⁷ In response to *Rasul*, Congress enacted the Detainee Treatment Act of 2005 (DTA), which forbade any federal court to entertain a petition for a writ of habeas corpus from an enemy combatant held at Guantanamo Bay.⁸ In the place of habeas review, the statute declared that the "United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."⁹ The Defense Department established the Combatant Status Review Tribunals (CSRTs) to review the grounds for detention of alien enemy combatants held at Guantanamo Bay. Congress limited the D.C. Circuit's review, however, only to those detainees who had received a "final decision" from a CSRT, and only as to (1) "whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)," and (2) "whether the use of such standards and procedures to make

2. See generally HART & WECHSLER, *supra* note 1, at 330-45.

3. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896-97 (1984).

4. See HART & WECHSLER *supra* note 1, at 321-22.

5. 74 U.S. (7 Wall.) 506 (1869).

6. 303 U.S. 323 (1938).

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

8. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd).

9. Pub. L. No. 109-163, Div. A, Title XIV, § 1405(e)(2)(A), Jan. 6, 2006, 119 Stat. 3476, 3479 (codified at 10 U.S.C. § 801).

the determination is consistent with the Constitution and laws of the United States.”¹⁰

In the DTA, Congress made clear that the federal writ of habeas corpus did not extend to the detention of alien enemy combatants held at Guantanamo Bay, and that federal judicial review would be limited to whether the Defense Department’s CSRT’s had followed their own administrative procedures. At best, the courts can examine whether the Defense Department’s procedures for evaluating the detention of enemy combatants comply with the Constitution or some other federal statute. But Congress did not permit the courts to decide for themselves whether any individual is improperly detained; under the DTA, a federal court apparently cannot order the release of an enemy combatant because it believes that insufficient evidence exists to justify the detention. The Pentagon, however, might choose to discharge a detainee rather than suffer repeated reversals and remands from the D.C. Circuit.

Soon thereafter, the Court in *Hamdan v. Rumsfeld* interpreted the DTA not to apply to cases pending at the time of enactment.¹¹ Congress and the President responded in the Military Commissions Act of 2006 (MCA) by overturning the Court’s ruling in *Hamdan* that Congress did not want its repeal of habeas jurisdiction to apply to already existing cases.¹² Section 7 of the MCA provides that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”¹³ In addition, the MCA re-codified Congress’s definition of the role of the courts in direct review of the decisions of the CSRTs and the military commissions. It reaffirmed that an individual held at Guantanamo Bay could appeal a CSRT’s determination of his combatant status to the D.C. Circuit. It also reaffirmed a DTA provision that allowed those convicted by a military commission, for sentences of ten years or longer, to appeal to the D.C. Circuit. This is the first time since the isolated examples from Reconstruction and the New Deal that Congress has so completely withdrawn the jurisdiction of the federal courts over a discrete category of cases. Congress’s action, taken in evident disagreement with the Court’s decisions in the war on terrorism, implicates several of the important constitutional issues identified in the academic literature concerning both the scope of the judicial power under Article III and the due process rights of individuals.

To honor Paul Mishkin’s many years of work on central federal courts

10. *Id.* at § 1405(e)(2)(C)(i)-(ii).

11. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-69 (2006).

12. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

13. This language in Section 7 of the MCA amends 28 U.S.C. § 2241 and will be codified at 28 U.S.C. § 2241(e)(1). *See* Pub. L. No. 109-366, Oct. 17, 2006, 120 Stat 2600.

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questions, we will discuss our differing views regarding the constitutional issues raised by the DTA and MCA. We believe this is in keeping with Professor Mishkin's attitude toward these problems – he always sought to bring abstract theories down to the earth demanded by real cases and real facts. We also resurrect the Socratic dialogue as a tool to probe these matters. Again, this is out of homage to Professor Mishkin; one of us as a student and colleague, and one of us as a co-teacher of classes, have been the recipient or witness to his masterful use of the Socratic method of instruction. Also, the most well-known published example of the Socratic method in legal scholarship, Henry Hart's dialogue, addressed this very question of congressional regulation of jurisdiction, and is considered one of the most memorable features of the landmark casebook on federal courts by Hart and Herbert Wechsler,¹⁴ on which Mishkin once served as co-author.

INTRODUCTION

Yoo: Congress's effort to divest the courts of jurisdiction over habeas corpus claims arising out of Guantanamo Bay rests on several firm bases. First, it represents a congressional correction of an erroneous judicial interpretation of a federal statute, thus falling within traditional understandings of the authority of Congress over the jurisdiction of the federal courts. The Constitution vests the political branches, primarily the President, with the authority to set wartime policy concerning the detention and trial by military courts of enemy combatants. Congress has the constitutional authority to determine the jurisdiction of the federal courts, and it may use this power to limit the courts' ability to review wartime decisions just as it can refuse to grant jurisdiction over any other category of federal cases. Second, Congress's limitation of the scope of habeas corpus does not constitute a suspension of the writ, as prohibited by the Constitution. Congress has no constitutional obligation to create the writ of habeas corpus, and even if it did, it has never been understood to extend to enemy combatants in wartime. Theories about the Due Process Clause or special roles for the federal courts in the political system have never guided the decisions of the courts in wartime, nor do they provide a neutral approach, based in the text or structure of the Constitution, to justify judicial review over the detention of enemy combatants in wartime.

Choper: I begin from the proposition that the paramount justification for vesting the federal courts with the awesome power of judicial review is to guard against governmental infringements of individual liberties secured by the Constitution.¹⁵ Consequently, I believe that congressional attempts to restrict the right of persons held at Guantanamo Bay to challenge the constitutionality

14. HART & WECHSLER, *supra* note 1.

15. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* ch. 2 (1980).

of their detention or trial by military commission in the courts may conflict with three provisions of the Constitution: (1) it has been forcefully contended that Article III assigns a core role to the national judiciary in respect to this matter; (2) the Suspension Clause may fairly be read to generate the existence of the writ of habeas corpus which may only be withdrawn under designated conditions; and (3) independently of Article III and the Suspension Clause, but buttressed by their purposes and policies, the Due Process Clause guarantees that persons who suffer harm allegedly in violation of their individual constitutional liberties have a right to be heard by Article III judges.

I

ERROR CORRECTION OR JURISDICTION STRIPPING?

Yoo: Until 2004, the federal courts had never allowed alien enemy combatants to seek writs of habeas corpus to challenge the legality of their wartime detention, so long as the enemy combatants were held outside the sovereign territory of the United States. In *Johnson v. Eisentrager*, for example, the Court rejected the habeas petition of German prisoners held in occupied Germany after World War II who were convicted of war crimes by an American military commission.¹⁶ The Court never reached the merits of their claims because it held that there is nothing in the Constitution or any federal statute that extends the right of habeas corpus to aliens held outside the territorial jurisdiction of the United States. The Court identified a number of harms that would result if it were to read the habeas statute so broadly:

The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.¹⁷

Despite *Eisentrager*, the Court in *Rasul* mistakenly read the habeas corpus statute as extending to the benefit of al Qaeda and Taliban detainees held in wartime outside the United States. For the *Rasul* majority, Justice Stevens read the habeas statute as allowing anyone held by the United States government

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

17. *Id.* at 779.

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anywhere in the world to challenge their detention in federal court.¹⁸ In one fell swoop, the Court erased the careful distinctions between aliens and citizens, lawful and unlawful enemy combatants, and detention inside and outside the United States.

Congress merely corrected *Rasul*'s mistake in the DTA, which restored federal habeas law to the *status quo ante*. In *Hamdan*, the Court persisted in its efforts to expand its jurisdiction by misreading the DTA and finding, for the first time in Anglo-American history, that a termination of jurisdiction did not immediately apply to pending cases. *Hamdan* read a separate section in the Act, which specifically mentioned both pending and future detainee cases, *in pari materia* to imply that the Act's ouster of jurisdiction did not apply to both categories of cases.¹⁹ But Congress obviously believed that the Court had misread the statute, and made its intentions clear in the MCA.

If Congress lacks the authority to reverse what it considers mistaken readings of the federal habeas corpus statute, the result is a one-way ratchet which supports ever-expanding jurisdiction for the federal courts. Every time the courts enlarge their jurisdiction through interpretation, your view would effectively prohibit Congress from reversing the decision, even though the Constitution gives Congress control over the jurisdiction of the federal courts.²⁰

Choper: My difficulty is with your analysis of *Rasul v. Bush*. As *Eisentrager* makes clear, the federal habeas corpus statute runs throughout the sovereign territory of the United States, regardless of where it is located, or whether the petitioner is a citizen or alien, or a lawful or unlawful enemy combatant.²¹ At the end of World War II, for example, the Court allowed Japanese General Yamashita to bring a habeas action challenging his conviction by military commission because the trial took place in the Philippines, then a territory of the United States.²² In *Rasul*, the Court did not allow "anyone held by the United States government anywhere in the world" to seek federal habeas. That indeed would be contrary to *Eisentrager*. All that *Rasul* did was to find that Guantanamo Bay was the equivalent of the Philippines at the end of World War II, because of the lease agreement with Cuba which gave the United States "complete jurisdiction and control," if not technical "sovereignty," over the base, with the authority "to exercise such

18. *Rasul*, 542 U.S. at 480-84.

19. *Hamdan*, 126 S. Ct. at 2769.

20. See U.S. CONST. art. III, §§ 1-2.

21. *Eisentrager*, 339 U.S. at 777-78.

22. In re Yamashita, 327 U.S. 1 (1946) (When "Congress sanction[s] ... trials of enemy aliens by military commission for offenses against the law of war ... the Executive branch of the government could not, unless there was suspension of the writ [of habeas corpus], withdraw from the courts the duty and power to [inquire into whether] the Constitution or laws of the United States withhold authority to proceed with the trial").

control permanently if it so chooses.”²³ The Court was not expanding its understanding of the reach of habeas corpus. It was only making a determination that Guantanamo Bay constituted “American territory.”²⁴ To enact a law that says that habeas jurisdiction does not apply to alien enemy combatants held in Guantanamo Bay eliminates judicial authority over a category of cases that the *Rasul* Court persuasively found had long been within the province of the federal courts.

Yoo: You are proposing an alternate justification for the result in *Rasul*, but one which the Court did not, in the end, adopt. It is true that the Court’s opinion contains an extensive discussion of the status of Guantanamo Bay as territory of the United States. But the critical part of the Court’s opinion allowing the petitioners to seek a writ of habeas corpus was not based on Guantanamo Bay’s status as territory of the United States. Rather, the Court indicated that the writ of habeas corpus could be brought by any individual in the custody of the United States.²⁵ The Court did not limit its reading of the statute only to the territory of the United States. In any event, it is not crucial whether the Court relied upon either a theory that finds Guantanamo Bay to be territory of the United States or a conclusion that the writ runs to anyone held by a custodian who is a member of the United States government. Congress clearly disagreed with the Court’s outcome on either theory and overruled it with the MCA.

Choper: The language you rely on from *Rasul* appears in the Court’s concluding paragraph to its discussion of the issue and ignores its repeated references throughout the opinion—indeed, in a footnote to the very sentence you reference—that the detainees in the case allege “that 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.”²⁶ As a realistic matter, the holding in *Rasul* goes not one step beyond an area of that kind which has been traditionally subject to federal habeas corpus review.

Yoo: If the Court should take account of the present “status” of Guantanamo Bay, it should also take account of the current policy preferences of the President and Congress. One way to understand the MCA is as a struggle between the President, Congress, and the courts over setting wartime policy.

23. *Rasul*, 542 U.S. at 480.

24. As Justice Kennedy, “follow[ing] the framework of *Eisentrager*,” noted in his concurring opinion, “Guantanamo Bay is in every practical respect a United States territory.” *Id.* at 487 (Kennedy, J., concurring).

25. According to the Court, “[p]etitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court’s jurisdiction over petitioners’ custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.” *Id.* at 483 (footnotes and citations omitted).

26. *Id.* at 484 n.15.

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Before the September 11, 2001 attacks, American policy toward terrorism for many years had considered the war on terrorism as a criminal justice problem.²⁷ Suspects in al Qaeda terrorism attacks, as with their earlier effort to destroy the World Trade Center in 1993, would be subject to arrest and a criminal trial before a jury, and entitled to direct and habeas review of their convictions. After the airplane attacks in New York and Washington, President Bush preferred a policy that gave no role to the federal courts in reviewing the detention of alien enemy combatants. This is part of his administration's broader approach of addressing terrorism as war, rather than crime, which justifies the use of military force, detention without charges, and trial of enemy combatants by military commission.²⁸ Policy after 9/11 shifted to the other end of the policy spectrum from where it had rested before.

The MCA represents the latest round of moves between the President, Congress, and the courts. Moving first, President Bush issued unilateral executive orders establishing the military commissions, which were thought to be excluded from habeas corpus review for prisoners held at Guantanamo Bay because of *Eisentrager*. A group of Senators appeared to have at least enough votes to filibuster any congressional effort to shift terrorism policy from Bush's preferred point back toward the criminal justice model's provision of de novo review of detentions. Moving second, the *Rasul* Court sought to direct policy in the criminal justice direction by extending habeas corpus review to enemy aliens held outside the United States. The Court's majority may have believed that its decision rested somewhere closer to the preference of the median member in Congress, but at the very least it must have thought that its views represented those of at least 41 Senators, enough to filibuster any congressional proposal to overrule *Rasul*.²⁹

Acting third, Congress in the DTA voted to overrule *Rasul*. Clearly, the Court erred in its political calculation that at least 41 Senators agreed with its extension of habeas corpus to enemy alien combatants. At the same time, however, Congress did not return policy to the President's preference to eliminate the role of the federal courts in reviewing enemy combatant detentions. It gave the D.C. Circuit the authority to review the decisions of CSRTs. After passage of the DTA, two new Justices joined the Court, Chief Justice John Roberts and Justice Samuel Alito, both of whom might reasonably be expected to join the Justices in the dissent in *Rasul*. The five Justices remaining from the *Rasul* majority, however, believed that they could shift policy yet again toward their preferred outcome. In *Hamdan*, they read an

27. See John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1166 (2006).

28. These policies are discussed in JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERRORISM* (2006).

29. See Yoo, *supra* note 27, at 1167.

ambiguity into the legislation overturning *Rasul*, which they claimed applied only prospectively but not to the hundreds of habeas claims already filed in the federal courts.³⁰ The *Hamdan* majority was still intent on exercising judicial review over the legality of the detention of every enemy combatant held at Guantanamo Bay, and, if it were acting rationally, assumed that at least 41 Senators could filibuster any proposals to overturn it. It was wrong again.

Choper: I have no disagreement with most of your description of the evolution of the Bush administration's detention policy. However, I seriously question your assertion that the *Rasul* majority "must have thought . . . that at least 41 Senators agreed with its extension of habeas corpus to enemy alien combatants." That is pure speculation, with no basis in fact as far as I know. Perhaps I am politically naïve, but I do not think that considerations of that kind play a part in Supreme Court decision making. And I strongly believe that the Court's doing so would be grossly inconsistent with its proper role in our system of government. Finally, rather than characterize the *Hamdan* majority's interpretation of the DTA as its effort to "shift policy yet again toward their preferred outcome," I would prefer to describe it as adherence to the long established principle of construing ambiguous legislation as to avoid a serious constitutional issue.³¹ That is quite different from "creating a one-way ratchet" that never allows Congress to change judicial interpretations of the habeas statute as it has done many times.

In any event, the Military Commission Act plainly goes beyond simple "error correction" or "restoring the status quo" with respect to the habeas corpus statute. Before *Hamdan*, the Court had permitted the writ to be brought by anyone detained within the sovereign territory of the United States (or property over which we had "complete jurisdiction and control" such as Guantanamo), but not by aliens who were held outside those areas.³² The MCA not only divests the federal courts of jurisdiction over cases brought by aliens in Guantanamo, but it also removes their authority over alien enemy combatants who are held within the United States. This is a clear removal of jurisdiction that existed before. It directly overrules *Yamashita*.

Yoo: I agree this aspect of the Act directly raises the question whether Congress may strip the federal courts of jurisdiction in a way that does not involve error correction. This provision respecting aliens held inside the country illustrates the *Hamdan* Court's mistake in refusing to obey the DTA's limitation of habeas for enemy aliens held outside the United States. Because *Hamdan* so deliberately misread the DTA, Congress went even further this time to make sure that the courts understood its intentions. If the Court had not decided *Hamdan*, Congress would never have removed habeas jurisdiction over

30. *Hamdan*, 126 S. Ct. at 2769.

31. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

32. *See Rasul*, 542 U.S. at 480-81.

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enemy aliens held within the United States as well as outside of it.

We can initially address this issue as a matter of congressional control over the appellate jurisdiction of the Supreme Court. Among other removals of authority, the MCA bars Supreme Court Justices from issuing any writ or exercising any jurisdiction over alien enemy combatants.³³ Congress clearly enjoys the power to restrict the appellate jurisdiction of the Court under Article III and, as discussed below, the Supreme Court's ability to issue writs of habeas corpus has been found to be an aspect of its appellate jurisdiction. Article III provides that the Court's appellate jurisdiction shall be subject to "such Exceptions, and under such Regulations as the Congress shall make."³⁴ This provision seems to undermine directly the idea that the Constitution requires the creation of a federal judicial system that can ensure uniformity in the interpretation of federal law. If the Exceptions Clause means anything, it means that Congress can remove certain issues from the appellate jurisdiction of the Supreme Court. Almost by definition, there will be no uniformity of interpretation over those issues because the Supreme Court will be unable to resolve conflicts.

Choper: Articles I and III of the Constitution may be read to authorize a range of significant variations in the design of the federal judicial system. To sketch just a few possibilities, we could have the present system, in which the lower federal courts and the state courts can exercise original jurisdiction over virtually all federal question cases, and the Supreme Court enjoys appellate review over the decisions on federal law from those courts. Second, Congress might refuse to create any lower federal courts. All cases raising federal questions would then be heard as an original matter in the state courts. But an Article III court would still have a final say by exercising appellate review over the decisions of the state courts on all issues of federal law—most importantly for me, those allegedly infringing individual constitutional rights. Third, Congress might even attempt to eliminate the appellate jurisdiction of the Supreme Court over federal questions, but it would fully vest federal question jurisdiction in some lower federal court.³⁵

I am inclined to accept that Congress can restrict Supreme Court appellate review over certain discrete subjects and consequently impose some limits on uniform interpretation. But even if I were willing to assume that Congress may provide that the Supreme Court cannot exercise review over military commission or detention decisions, then at least the lower federal courts must be available to address questions of individual constitutional rights. I believe

33. See MCA Section 7 (Pub. L. No. 109-366, Oct. 17, 2006, 120 Stat 2600) (to be codified at 28 U.S.C. § 2241(e)(1)).

34. U.S. CONST. art. III, § 2 ("Exceptions Clause").

35. See HART & WECHSLER, *supra* note 1, at 337-42 (discussing congressional power over the Supreme Court's appellate jurisdiction).

that various provisions of the Constitution require that any citizen (and many aliens) who claim a violation of a constitutionally designated personal liberty must at a minimum have meaningful recourse to some Article III court.

Yoo: Whether Congress has the authority to remove federal jurisdiction over a class of federal question cases is a difficult issue, but it seems to me that the balance of authorities is in favor of the power. Congress has traditionally been understood by most,³⁶ but not all,³⁷ commentators to hold the power to decide whether to implement Article III's jurisdictional grants to the federal courts. This power comes from several sources. First, Article III, Section 2's enumeration of the cases and controversies to which the federal judicial power extends has not generally been thought to be self-executing.³⁸ Second, Congress has the power to decide whether to create the inferior courts at all, and this power has been thought to imply the authority to define what cases will be heard by those courts.³⁹ These powers allow Congress to remove whole categories of cases from the jurisdiction of both the lower federal courts and the Supreme Court.

Neither Article I nor Article III appears to place any substantive limitation on how Congress chooses to use these powers. In the past, the Court has accepted the removal of jurisdiction when Congress obviously sought to stop the Court from reaching substantive outcomes with which Congress disagreed. The clearest example of this is *Ex Parte McCardle*, in which the Court upheld Congress's elimination of an 1867 Act's grant of appellate jurisdiction to the Supreme Court in federal habeas claims.⁴⁰ Reacting to *Ex Parte Milligan*,⁴¹ decided the year before *McCardle*, Congress stripped the Court of jurisdiction because it feared that the Court would use the case to pass on the constitutionality of military occupation of the Southern States during Reconstruction. Congress even went so far as to act after the Court had heard

36. See, e.g., Paul Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030-31 (1982) (arguing that it would "make nonsense of" the Madisonian Compromise to hold that "the only power to be exercised is the all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court").

37. See, e.g., JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* 246-47 (1971) (arguing that Congress must create lower federal courts and vest them with the full possible jurisdiction).

38. See HART & WECHSLER, *supra* note 1, at 319 ("It has traditionally been understood that certain claims under federal law...permit but do not require judicial determination. Pursuant to its Article I powers, Congress may provide or withhold original federal jurisdiction to decide such claims").

39. See Bator, *supra* note 36, at 1030.

40. *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1868).

41. 71 U.S. (4 Wall.) 2 (1866) (habeas corpus action holding that a military tribunal in Indiana, where civil courts were available, lacked jurisdiction to try a citizen for conspiring to aid the Confederacy).

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oral argument but before it had issued a judgment.⁴² Nonetheless, in *McCardle* the Court upheld the law and dismissed the case, saying that it lost jurisdiction the moment Congress passed the stripping law and had no authority to declare the law invalid. In *Lauf v. E.G. Shinner*, the Norris-La Guardia Act removed jurisdiction from the federal courts to issue injunctions in labor dispute cases, again because Congress disagreed with the course of previous judicial decisions.⁴³

Another point against the argument that the Constitution requires a specific manner for constitutional liberties to be raised before a federal court is the history of the military justice system. Until enactment of the Uniform Code of Military Justice (UCMJ), individuals convicted of violations of the Articles of War (the precursor to the UCMJ) by courts-martial had no right of direct appeal to a civilian court, and it was not until 1983 that such verdicts were reviewable not just by a civilian Article I court, but by the Supreme Court. Until 1950, individuals could challenge the constitutionality of courts-martial verdicts only through a writ of habeas corpus under Section 14 of the Judiciary Act of 1789. Even this avenue was rarely used and may not have been even fully understood at the time of its passage. The Supreme Court, for example, did not entertain its first habeas case seeking review of a courts-martial verdict until 1879.⁴⁴ Review after this time remained limited primarily to a determination whether the courts-martial had properly exercised jurisdiction, and habeas did not become a vehicle that allowed a verdict to be challenged because of constitutional problems with trial proceedings. The federal courts would not fully use habeas review to review the constitutionality of courts-martial procedures until *Burns v. Wilson*, decided in 1953.⁴⁵ This seems to demonstrate that no one initially believed that the Constitution required federal judicial review of cases on the military and the conduct of war, even those involving our own soldiers. Congress granted the armed forces fairly broad discretion in operating the military justice system. This, no doubt, occurred because considerations of military discipline and the uniquely different demands of wartime seem to call for greater deference from the courts.

Choper: *McCardle* and *Lauf* are different from the MCA. In *McCardle*, the Court was willing to allow the removal of part of its appellate jurisdiction because there were other avenues available for federal judicial review of conduct that may have violated federal law.⁴⁶ The lower federal courts, for

42. See HART & WECHSLER, *supra* note 1, at 328.

43. *Lauf v. E.G. Shinner*, 303 U.S. 323.

44. *Ex Parte Reed*, 100 U.S. 13 (1879). See Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 19 (1985).

45. 346 U.S. 137 (1953).

46. 74 U.S. at 515 (holding that “The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”).

example, still could exercise habeas jurisdiction in such cases; appeals of those decisions just could not be brought to the Supreme Court. Moreover, in *Ex Parte Yerger*, decided the same year as *McCardle*, the Court upheld its own jurisdiction to hear a habeas petition brought under a pre-1867 statute which permitted Supreme Court review by certiorari.⁴⁷ As others have observed, the result in *McCardle* did not prevent the petitioner from seeking an original writ of habeas corpus from the Supreme Court under Section 14 of the Judiciary Act of 1789.⁴⁸ As recently as 1996 in *Felker v. Turpin*, the Court relied upon *Yerger* to find that a contemporary federal law's withdrawal of the Court's jurisdiction to review certain habeas decisions by the lower courts did not raise a constitutional problem under Article III, since Congress had left untouched the Court's jurisdiction to entertain habeas petitions under Section 14.⁴⁹

Neither does *Lauf* provide support for an unfettered congressional power to strip the federal courts of jurisdiction. First, *Lauf* did not involve constitutional liberties, but only statutory rights under the Norris-LaGuardia Act. For me, the crucial constitutional concerns with jurisdiction stripping are not implicated when Congress is only defining the manner in which it wishes non-constitutional matters to be enforced. *Lauf* simply accepts Congress's choice of executive branch or state court enforcement of federal statutory provisions rather than a federal court.⁵⁰ But Congress does not have a similar freedom over constitutional rights, which it has not created but in fact is itself charged with enforcing in many respects. Second, *Lauf* is not really a jurisdiction restricting case as much as it is about remedies. True, the Court observed that "there can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."⁵¹ But the Norris-LaGuardia Act simply prohibited the remedy of obtaining injunctions in labor disputes, primarily because Congress opposed federal judicial decisions blocking employee strikes. Neither of these cases contradicts the point I just made that, at minimum, the Constitution requires Article III court dominion over claims of denial of constitutionally-created individual rights.

Yoo: Individual liberties do not seem to me to be the dispositive factor in whether jurisdiction stripping is constitutional, at least under the Court's existing precedents. Your theory that the Constitution requires a federal court on all claims of constitutional rights is rooted in your preferred normative goal that claims of constitutional rights must be protected at all costs by the courts. You provide no means to choose between your normative vision and any

47. *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

48. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 180 (1960).

49. *Felker v. Turpin*, 518 U.S. 651, 659-61 (1996).

50. *Cf.* Martin Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. REV. 143 (1982).

51. *Lauf*, 303 U.S. at 330.

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others. The one adopted by the Supreme Court at the end of World War II, which seems to me to express historical practice, is that a more important goal is allowing the political branches the freedom to pursue successfully those policies necessary, in their judgment, to win a war. One could argue, as some political philosophers have, that protection of the nation from foreign attack is the primary purpose of society, and that this outweighs concerns about any claims of constitutional rights by enemy prisoners. You do not explain why your preference for protection of individual rights should trump the security of the nation in war.

Choper: You overstate my position. I argue neither that individual rights “must be protected at all costs,” nor that they “trump the security of the nation in war.” Virtually no constitutional liberties are absolute. Rather, they all carry qualifications, as illustrated by the rational basis and strict scrutiny approaches for reviewing substantive provisions and by the weighing method articulated in *Mathews v. Eldridge*⁵² for determining the details of procedural due process. Nor do I doubt that “protection of the nation from foreign attack” may reasonably be found to be “the primary purpose of society.” But none of this leads to the conclusion that the role of the federal judiciary in enforcing the Constitution ends when war begins. It may well be that the degree of the Court’s deference to “Congress’ authority over national defense and military affairs” is greater than on any other subject,⁵³ but “in that area, as any other, Congress remains subject to the limitations of the Due Process Clause.”⁵⁴

Let me distinguish among three types of detainees. The first consists of conventional Prisoners of War (POWs), who I do not believe should have a right of access to an Article III court, regardless of their citizenship and regardless of where in the world they are being held. These are persons captured on the battlefield and held in POW camps. They are accorded a set of rights under the Geneva Conventions and various federal treaties and are regulated by the laws of war. Those preclude their interrogation and, through “combat immunity,” their trial by military courts for acts of war. They also provide methods traditionally used to monitor the conditions of their detention. Historically, the laws of war have been universally relied upon to secure their civilized treatment, and I know of no serious modern effort to alter that basic system. My concern is with enemy combatants in the other two categories—those who claim that they have been mistakenly classed as enemy combatants (like Hamdi), or who are being tried for war crimes before a military commission (like Hamdan).

I believe that persons who are tried by military tribunals for violating the laws of war—whatever their citizenship and wherever they are being held—and

52. 424 U.S. 319 (1976).

53. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

54. *Id.* at 67.

are thus being treated differently than POWs in respect to the length or conditions of their incarceration, should have a right of some judicial review by an Article III court of the facts or the law, i.e. some right of due process. Some have found this right to be indirectly grounded in the Suspension Clause, whose “very purpose,” they reason, “was to protect the remedy of *state* habeas from being abrogated by the federal government.”⁵⁵ This being true, “resolution of the merits by a state court would present a federal question that would trigger Supreme Court appellate review under the relevant jurisdictional statutes,”⁵⁶ thus affording detainees access to the federal courts. I understand that my view conflicts with the decision in *Eisentrager* and the language of Chief Justice Stone in *Yamashita*, although *Yamashita* (and *Quirin*) specifically ruled that Congress had authorized judicial review by writs of habeas corpus, albeit a quite limited one.⁵⁷

Finally, there is the closer (and more difficult) issue of someone who is being held as a conventional POW and subject only to laws of war for those captured on the battlefield or otherwise working for the enemy who is not being interrogated, prosecuted for war crimes, or held beyond the cessation of hostilities, but who claims that he has been mistakenly detained as an enemy combatant. As to such persons, who I think would be a negligible percentage of all those captured, I might distinguish between citizens (no matter where held) and aliens (who are held outside the territory of the United States). As to the latter, it may well be that review by some type of military commission, authorized by Congress and/or the President or mandated by the laws of war, would suffice. This would not be for any lack of the reach of judicial power because the Court has ruled that habeas only requires “jurisdiction over the custodian,” and this is met because all prisoners are regarded as “held” by Defense Department officials within this country regardless of where the captives are physically located.⁵⁸ Rather it would rest on a principle, strongly suggested but never unqualifiedly established, that the Due Process Clause does not extend to aliens in foreign nations.⁵⁹

Yoo: Whether a detainee has POW status under the Geneva Convention should make no difference in whether judicial review should apply. You argue that if the government were to accord the detainees at Guantanamo Bay POW

55. WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-80 (1980).

56. Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987).

57. See *In re Yamashita*, 327 U.S. 1 (1946).

58. *Braden v. 30th Judicial District*, 410 U.S. 484 (1973) (overruling decision on which *Eisentrager* had relied).

59. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“our rejection of extraterritorial application of the Fifth Amendment [in *Eisentrager*] was emphatic”). Compare HART & WECHSLER, *supra* note 1, at 37 (2006 Supp.) (*Eisentrager* “did not make wholly clear whether it meant to hold that the petitioner had no right to habeas corpus review at all or that he had no substantively valid claim to relief.”).

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status under the Conventions, judicial review would be unnecessary. I do not see why this comports with your notions of procedural due process, and why the system established by the executive branch and the MCA does not. Even if the Geneva Conventions were to apply, a POW might still claim that he or she was mistakenly identified as an enemy combatant. Or a POW could claim that the military was violating the Geneva Conventions in terms of his treatment. It seems to me that your argument requires a detainee who believes he is held by mistake or is being mistreated to have the right to access the civilian courts for relief, regardless of his status under the Geneva Conventions.

Nor should judicial review depend on detention of a lawful enemy combatant, which you appear to concede would not trigger review, versus trial by military commission. This misunderstands the difference between war and crime. If the United States were addressing terrorism solely as a crime, then I would agree that an enemy alien should have, and would have, a right to a jury trial in a federal court. But in wartime, military detention is not meant as a punishment. As the Court explained in *Hamdi*,⁶⁰ its purpose seeks only to prevent a member of the enemy from returning to the war and rejoining the fight against the detaining power. It is not a question of guilt or innocence. Detainees are released when the conflict ends, because at that point they should no longer pose a threat. Because of this different purpose to military detention, the United States historically never opened its civilian courts to review, through a writ of habeas corpus, the detention decisions made during war, except in the case of an American citizen who joins the enemy or an enemy alien who is brought to U.S. territory. This principle applies even if an enemy prisoner were to claim that he was identified by mistake.

Both detention and war crimes trials are functions of the war power. Historically, both have usually been seen as a product of the President's Commander-in-Chief authority to wage war. The power to use force in wartime includes the power to detain captured members of the enemy. Waging war is not limited only to ordering which enemy formations to strike or what targets to bomb. It also involves forming policy on how to fight, which includes how to sanction the enemy if it violates the rules of civilized warfare. As the Supreme Court recognized in *Yamashita*, "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war."⁶¹ Military commissions help commanders properly restore order in the aftermath of a conflict, and this can be an important way of making sure fighting does not flare up again. If you accept that judicial review

60. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-35 (2004).

61. *Yamashita*, 327 U.S. at 11 (citing *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).

should not extend to detention, because the courts must respect the discretion of the government to wage war, then courts should provide similar discretion to decisions to try enemy combatants for war crimes.

Choper: Even though simple detention of POWs and war crimes trials may both be “functions of the war powers,” I believe that there are significant distinctions between them. In addition to longstanding traditions, these include such matters as the cause of imprisonment, the severity of consequences, and the protections accorded in the absence of judicial review. As I have already indicated,⁶² these factors and others call for different degrees of constitutional protection.

Before that discussion, it should be noted that a number of scholars have argued that Congress’s power not to create lower courts may be limited by the structure of Article III itself. In various ways, they reason that Congress must vest some or all of Article III’s enumeration of cases and controversies in the hands of some federal court. For example, Lawrence Sager believes that the structural independence of the federal courts requires that they exercise review over state court denials of federal rights.⁶³ Going beyond that, Robert Clinton contends that some federal court must exercise jurisdiction over every case or controversy listed in Article III.⁶⁴ Akhil Amar has developed a “two-tiered” thesis.⁶⁵ He submits that Article III extends mandatory federal court jurisdiction to “all” cases involving federal questions, maritime matters, and ambassadors. In contrast to these three designations, federal jurisdiction is not obligatory over the “controversies” listed in Article III, which do not have the modifier “all” before them: primarily diversity cases and other suits defined by the identity of the parties rather than their subject matter. Amar’s view builds on Justice Story’s argument in *Martin v. Hunter’s Lessee* that suggested that federal courts must exercise jurisdiction over these three heads of jurisdiction in order to maintain the uniformity of federal law.⁶⁶ Taking even the narrowest view, the availability of an Article III court to challenge executive detention of enemy combatants convicted by a military tribunal would fall directly within federal question jurisdiction.

62. See TAN 54-59 *supra*.

63. See Lawrence Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

64. See Clinton, *supra* note 1, at 749-50 (concluding that “Congress [must] allocate to the federal judiciary as a whole each and every type of case or controversy” within the scope of Article III, “excluding, possibly, only those cases that Congress deemed to be so trivial that they would pose an unnecessary burden.”).

65. See Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Akhil Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

66. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 333-34 (1816).

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Yoo: Critics have raised a number of problems with the different theories of mandatory jurisdiction. The comprehensive thesis places far too much importance on diversity jurisdiction, which protects no serious federal legal or constitutional issues aside from making a more neutral forum available for out-of-state parties. Moreover, the all-inclusive theory seems to have no textual support in the Constitution – or at least the Founding generation didn’t seem to think so. There does not appear to have been any discussion in the Philadelphia Convention or the state ratifying conventions asserting that the federal courts would exercise mandatory jurisdiction over any class of cases. The First Congress, which contained many members of those state conventions, did not fully vest diversity or federal question jurisdiction in the federal courts. Diversity was subject to a minimum amount in controversy, and Congress did not vest general federal question jurisdiction in the courts at all – that would not come until 1875.⁶⁷ Since the Judiciary Act of 1789 only granted the Supreme Court the power to issue a writ of error in civil cases, the Court initially could not exercise appellate review in federal criminal cases.⁶⁸ The Supreme Court could only exercise appellate review over cases coming out of the state courts involving federal law when the courts denied a federal right.⁶⁹ If the First Congress did not see fit to vest general federal question jurisdiction in the lower courts or on appeal from the state courts, it must have been because it did not understand Article III to require mandatory jurisdiction over federal question cases such as habeas.

Choper: Even assuming that original understanding resolves all matters of contemporary constitutional interpretation, a matter that I shall address soon, your description of the evolution of federal jurisdiction from 1789 to 1867 goes a long way to show that, from the beginning, some Article III court had authority to pass judgment on the denial of almost every individual constitutional right. Once that is bolstered by the heavy negative pregnant of the Suspension Clause, that I shall discuss later, I would find the existence of the general right to Article III review for most detentions to follow quite naturally.

In addition, Congress’s elimination of suitable participation by federal judges undermines the “essential function” of the national judiciary. Henry Hart famously argued in his dialogue that Congress could not enact exceptions to the Supreme Court’s appellate jurisdiction that would “destroy the essential role of the Supreme Court in the constitutional plan.”⁷⁰ While Hart was surely

67. Act of March 3, 1875, § 1, 18 Stat. 470, discussed in HART & WECHSLER, *supra* note 1, at 320.

68. See *United States v. More*, 8 U.S. (3 Cranch) 159 (1805); see also HART & WECHSLER, *supra* note 1, at 321.

69. Section 25 of the Judiciary Act of 1789 (1 Stat. 73, 85), discussed in HART & WECHSLER, *supra* note 1, at 320, 466.

70. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An*

vague about what this “essential function” is, others have argued that it is the duty to maintain the supremacy and uniform interpretation of federal law.⁷¹ I do not reach that broadly. Rather, I believe that the essential function of the Court is to enforce the individual rights guaranteed by the Constitution and to protect those liberties against encroachment by the elected branches. It is hard to imagine a stronger case in this regard, where both the President and Congress may be seen as joining together to violate the right of an individual to be free of mistaken government detention or trial by a tribunal in a way that does not comport with due process. When the majority wishes to take an individual’s liberty, the counter-majoritarian role of the federal courts is at its zenith.⁷² To allow the political branches not only to violate the rights of individuals but also to prevent some Article III court from exercising jurisdiction over cases brought by them would allow the majority to seriously impair what I believe to be the primary contemporary value of our Constitution.

Yoo: The problem with the essential functions thesis is that it has no authoritative support in the traditional sources of constitutional interpretation. There is no mention of the role in the Constitution, and most writers have never even identified a textual location for it. If it rests anywhere, it must be rooted in Article III’s vesting clause of the judicial power in the Supreme Court and the lower federal courts.⁷³ But there was no sign of such an understanding of the federal judicial power at the time of the ratification of the Constitution. It emerges in Justice Story’s opinion in *Hunter’s Lessee*. In explaining the constitutionality of Supreme Court appellate review over state court decisions, for example, Story observed that “Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself.”⁷⁴ Federal courts were necessary, he concluded, because “if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states.” To Story, “the public mischiefs that would attend such a state of things would be truly deplorable.”⁷⁵ But Story himself was not a framer and *Hunter’s Lessee* came many years after the

Exercise in Dialectic, 66 HARV. L. REV. 1362, 1364-65 (1953).

71. See, e.g., Ratner, *supra* note 48, at 201-02 (arguing that to be constitutionally valid, “exceptions” to the Court’s appellate jurisdiction must not “negate” the Court’s “essential constitutional functions of maintaining the uniformity and supremacy of federal law”).

72. See JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS ch. 2 (1980).

73. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”).

74. *Hunter’s Lessee*, 14 U.S. at 348.

75. *Id.*

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ratification of the Constitution.

The “essential role” of the Court is in the eye of the beholder. You may believe that it is to enforce individual liberties because of your concerns about majoritarian oppression. But there is nothing in the Constitution that identifies that role; your support for it comes from your concerns about the way modern politics work and your view that individual rights will be under-protected. The Court’s power of judicial review does not come from any special function it plays in the constitutional system, but rather from its equal obligation to obey the Constitution above any conflicting act of another branch. Judicial review is more of a choice-of-law rule, as it is described in *Marbury v. Madison*, than a special power that is given to the judges because of their unique role in protecting individual rights.⁷⁶ Enforcing the Constitution, including its individual liberties protections, is the obligation of each of the branches, not just the Supreme Court.

If your essential functions thesis were correct, it would force a revolution in the operation of the federal courts. Your position would require Congress to enact full federal jurisdiction over the classes of cases, and perhaps even the controversies, in Article III, Section 2, if plaintiffs characterized their claims as ones involving individual rights. Since one of your individual rights is the right to due process, it seems to me that any claim by any alien enemy combatant that he is not actually fighting for al Qaeda or the Taliban would have to be heard in a federal court. But the federal judiciary under-enforces constitutional norms because of a number of justiciability doctrines, such as standing, the political question doctrine, and mootness and ripeness, that derive from the Constitution itself, in addition to a number of other prudential measures that courts themselves have developed.⁷⁷ These doctrines also stand in the way of your claim that anyone who claims a violation of constitutional liberties, no matter how frivolous, should have access to a federal court.

Choper: Your argument is not convincing for at least two reasons. First, while it may be the case that the Constitution imposes on each branch an obligation to enforce individual liberties, it is wholly unrealistic to believe that enforcement will be carried out nearly as assuredly or as effectively without the Court’s superintendence. Judicial review is necessary precisely because there will be occasions, notably in war, where the majority will violate the rights of the minority. We cannot confidently expect the President and Congress to adequately protect the individual liberties of the minority when the majority is under the pressure of armed conflict.

Second, your position that Congress has no obligation to vest adjudicative power in the lower federal courts depends on state courts to play a role similar

76. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178-80 (1803).

77. See generally HART & WECHSLER, *supra* note 1, at 114-267.

to the one envisioned by supporters of the “traditional” view concerning extensive power of Congress over federal court jurisdiction. As Bator and Redish, among others, have argued, the Constitution’s vesting of power in Congress over federal court jurisdiction is not a sign of hostility toward the enforcement of federal rights.⁷⁸ Rather, the Madisonian compromise merely posited that federal and state courts are equally capable of enforcing federal rights, and gave Congress the power to choose between them to perform that function. Therefore, state courts would have exercised original jurisdiction over federal cases, but only on the assumption that the Supreme Court would still have appellate jurisdiction over the decisions, thus preserving a significant role for Article III judges. Your reading of Congress’s unbounded power would only make sense if Congress had the discretion to create both the inferior federal courts and the Supreme Court itself.

Congress’s power to limit the jurisdiction of the federal courts, therefore, was not a power to eliminate all judicial consideration of federal issues, but rather was only a transfer of some decision-making responsibility from the federal courts to the state courts. As Bator observed about previous stripping statutes, “Such jurisdictional statutes rest on a rational and legitimate notion: that our federalism may benefit if the further elaboration of certain types of constitutional issues are subjected to the insights of the state, rather than the lower federal courts before they reach the United States Supreme Court.”⁷⁹ Even Bator, who strongly favored congressional control over federal jurisdiction, believed that when lower federal courts were not permitted to exercise jurisdiction over a specific subject, the Supreme Court still must possess appellate review over the decisions of state courts on that subject.⁸⁰ A law that withdrew both Supreme Court appellate jurisdiction and lower federal court original jurisdiction over an issue, indeed over *all* issues (including abridgment of constitutional liberties)—which you would apparently permit—would “violate the spirit of the Constitution, if not the letter.”⁸¹

Under Bator’s approach, state courts would still have to play the initial role of enforcing federal rights. In the context of military commissions and detainees, however, this option appears to be foreclosed by *Tarble’s Case*.⁸² A father who believed that federal military authorities had illegally recruited his son to join the United States armed forces brought *Tarble’s Case*. The father sought a petition for a writ of habeas corpus from a state court. The Supreme Court ultimately held that state courts could not issue writs of habeas corpus under state law against federal officials who detained individuals according to

78. See Bator, *supra* note 36, at 1037; Redish, *supra* note 50, at 155-56.

79. Bator, *supra* note 36, at 1037.

80. *Id.* at 1039.

81. *Id.*

82. 80 U.S. (13 Wall.) 397 (1872).

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federal law. I do not believe that the Court would have reached the outcome in *Tarble's Case* if Section 14 of the Judiciary Act had not been available for federal habeas.

Yoo: You are right in your description of how the debate over Congress's powers has evolved. Most of the argument centered on whether the federal courts or the state courts should be the primary enforcers of federal law. Earlier scholars did not focus on the possibility that Congress might preclude review by both federal and state courts. On the other hand, the issues that are dear to supporters of the essential functions thesis are not present here. Taking their cue from Justice Story, these scholars argue that the Supreme Court must exercise appellate review over all federal question cases in order to ensure the uniformity and supremacy of federal law.⁸³ Those concerns are not present with the MCA because of the role it provides for the D.C. Circuit, whose decisions seemingly may be reviewed by the Supreme Court.

You appeal to a different type of essential function, the idea that the federal courts exist to check and balance the other branches of government. But it is simply not the case that the political branches must allow for judicial oversight of every regulatory regime that they establish or every right that they create. Congress has chosen to rely on non-judicial means of enforcement for certain policies, especially those that involve high amounts of government discretion or rights that did not exist at common law.⁸⁴ The political branches have even greater authority over whether to choose judicial enforcement of federal rights in the realm of foreign affairs. The doctrine of non-self-executing treaties, for example, allows the President and the Senate to decide that a treaty will not be enforced domestically via judicial means.⁸⁵ If the President and Senate choose to make a treaty non-self-executing, they have decided to rely upon political and diplomatic means to enforce the agreement's terms. Judicial review could interfere with the successful negotiation with another country over treaty issues, or the achievement of treaty-related foreign policy goals. Automatic judicial enforcement could undermine United States threats to refuse to observe an international agreement unless another state agrees to abide by the treaty. Judicial review could interfere in the attempts of the political branches to calibrate a combination of sanctions and rewards toward another nation in the midst of a dispute.⁸⁶ These doctrines go back to the Marshall

83. See e.g., Ratner, *supra* note 48, at 201-02.

84. See *Crowell v. Benson*, 285 U.S. 22 (1932); Administrative Procedure Act, 5 U.S.C. §§ 701-706.

85. See, e.g., John Yoo, *Globalism and the Constitution, Treaties, Legislative Power, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

86. For a more complete discussion of these functional problems with judicial participation in foreign affairs cases, see Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 169-70.

Court,⁸⁷ and directly contradict your argument that the Court's essential role, even in foreign affairs, is to check and counter the other branches by protecting individual rights.

The MCA illustrates congressional discretion over the institutional enforcement and interpretation of federal rights related to foreign affairs. In *Hamdan*, the Supreme Court concluded that the Geneva Conventions applied to the operation of military commissions, despite the fact that al Qaeda is not a nation-state, has not signed the Conventions, and violates the basic rules of civilized warfare.⁸⁸ *Hamdan* implied that certain provisions of the Conventions, particularly what is known as common article three, would apply more generally to the war on terrorism, in direct contradiction to the position taken by the Bush administration a few months after the 9/11 attacks.⁸⁹ In response to *Hamdan*, Congress not only removed federal habeas jurisdiction over alien enemy combatants (the procedural vehicle by which *Hamdan* reached the issue), but it also declared that "no person may invoke the Geneva Conventions or any protocols thereto in any habeas proceeding or other civil action or proceeding" involving the United States or its officers as a source of rights.⁹⁰ Our courts have long recognized that the political branches have the discretion to decide whether and how to enforce rights involving foreign affairs, and Congress and the President made a decision in the MCA that the federal courts are not the best means to enforce them.

Choper: I need not address most of what you have just said because it does not deal with individual constitutional rights. That fact is what I believe largely undermines your difficulty with my view. I may be wrong, but I do not know of any case denying review of enemy combatant status to any American citizen or an alien on American controlled territory. That (as will be more fully developed below), I believe, due process requires, just as *Hamdi* held, at least in respect to citizens. Moreover, now that the MCA has removed the federal jurisdictional preface for the *Hamdan* ruling, I believe that at least four or perhaps all five members of the *Hamdan* majority, which survives the recent changes in the Court's composition, would agree with me that either the Suspension Clause or the Due Process Clause stands in the way of insulating convictions by military tribunals from Article III review in the way that you think Congress has deemed.

But even though we may disagree about the essential functions thesis, we may not need to reach it if we can agree that Congress cannot use its powers in

87. See, e.g., *Foster v. Neilson*, 27 U.S. 253 (1829) (recognizing doctrine of non-self-executing treaties).

88. *Hamdan*, 126 S. Ct. at 2793-98.

89. See JOHN YOO, *WAR BY OTHER MEANS* (2006).

90. MCA Section 5(a) (to be codified at 28 U.S.C. § 2241 note). See Pub. L. No. 109-366, Oct. 17, 2006, 120 Stat 2600.

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a way that violates other constitutional provisions. Here, the Military Commission Act may create just such a problem because of its treatment of aliens. Enemy combatants who are citizens appear to continue to enjoy the privilege of the Great Writ. Aliens do not. In my view, this violates the Due Process Clause. While the equal protection component of the Due Process Clause awards Congress very broad authority to draw substantive classifications between citizens and aliens,⁹¹ aliens still have procedural due process rights.⁹² Surely, for example, under present doctrine, Congress could not pass a law allowing aliens to be convicted of and then imprisoned for ordinary federal crimes under procedures that violate due process if applied to citizens. Yet the Military Commission Act appears to do this very thing.

Yoo: War by its nature requires the government to make distinctions between citizens and aliens. War calls on the government to use force to prevent the enemy, either a foreign state or now terrorist organization, from harming its citizens. That will mean that the government must make distinctions between citizens and enemies in using force as well as detentions. At times, however, American citizens will join the enemy forces, and in those cases citizens will be subject to the same rules that apply to enemy aliens, as the Court recognized in *Ex Parte Quirin* and again in *Hamdi*. But other than under these circumstances, war, by definition, has a foreign source, and the government will engage in distinctions between aliens and citizens by the very act of defending the country from the enemy. If the enemy were not primarily foreign in nature, a threat to public safety would be either a criminal problem or an insurrection. Distinctions between aliens and citizens are just as inevitable in war as they are in immigration law.

Choper: I would rely on the Due Process Clause for a fairly narrow proposition: to afford at least *some* adequate review by an Article III court, to claimed violations of constitutionally-guaranteed personal liberties, for persons tried for war crimes by American authorities and to citizens (and aliens in American territory) who claim they are being erroneously detained as POWs. This goes beyond saying that the courts should simply be available, as they were in only the most limited way in *Yamashita* and *Quirin*.⁹³ On the other hand, a due process approach may be more limited than habeas corpus whose scope often includes the right to challenge detention for any legal reason, not just constitutional issues.⁹⁴ I limit my proposed Article III review to constitutional violations only.⁹⁵

91. *Mathews v. Diaz*, 426 U.S. 67 (1976) (rational basis test for denying aliens welfare benefits).

92. *Kwong Hai Chew*, 344 U.S. 590, 596 (1953).

93. *See In re Yamashita*, 327 U.S. 1 (1946).

94. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

95. For "judicial suggestions that Congress cannot preclude judicial review of constitutional issues," *see* Richard Fallon, *Applying the Suspension Clause to Immigration Cases*,

The Due Process Clause acts as an important “external limit”⁹⁶ on attempts by Congress to use its power under Article III to restrict the authority of the federal courts. Just as it may be contended that a First Amendment abridgement occurs when an act of Congress that withholds judicial review is applied to an alleged violation of free speech, so, too, may the statute be challenged under the Due Process Clause when applied to an alleged denial of the procedural protections of the Bill of Rights by a person detained by government. Indeed, this argument may well be strengthened when the law singles out such persons, as do the DTA and MCA, for insufficient access to an Article III judge.

Due process—especially *procedural* due process—is not a static concept, and it never has been. Its recognized basic definition is “fundamental fairness,” affording the federal judiciary with a discretion in constitutional adjudication that I generally disfavor.⁹⁷ Nonetheless, I have no preferred alternative in regard to procedural due process which is generally based on the notion that liberty is endangered unless there is a trustworthy institutional check on arbitrary government action even in an “area of legitimate governmental concern.”⁹⁸ There is no denying the substantial subjectivity in defining this concept, and the precise scope of the due process right in respect to trial procedures. The level of deference that the judiciary should give to determinations of the political branches when measured against “military necessity”⁹⁹ is beyond our immediate subject.

Still, I would urge adherence to Henry Hart’s belief that while “the requirements of due process must vary with the circumstances, and allowing

98 COLUM. L. REV. 1068, 1088 (1998) and *id.* n.108: *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (construing a statute not to foreclose judicial review ‘in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim’ (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *see also* RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 5.2 118 (2d ed. 1992) (concluding that “[d]espite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency action.”); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 8.6, at 482-83 (3d ed. 1991) (terming it the “clear implication” of Supreme Court authority that “there is a constitutional right of review of constitutional issues and characterizing the opposing view as ‘constitutional heresy’”).

96. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 272 (3d ed. 2000).

97. In my view, one of the Court’s major goals in generating intellectually coherent legal principles should be to produce rules that, in application, will work as forcefully as attainable to constrain judges from inserting their own ideological beliefs into constitutional decision making in ad hoc, unreasoned ways.

98. Sanford Kadish, *Methodology and Criteria in Due Process Adjudication - A Survey and Criticism*, 66 *YALE L.J.* 319, 340 (1957).

99. *See Middendorf v. Henry*, 425 U.S. 25, 42-48 (1976) (refusing to apply the right to counsel rule of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to summary court-martial proceedings).

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them all the flexibility that can conceivably be claimed, it still remains true that the Court is obliged, by the presuppositions of its whole jurisprudence in this area, to decide whether what has been done is consistent with due process—and not simply pass back the buck to an assertedly all-powerful and unimpeachable Congress.”¹⁰⁰ Consequently, I would suggest that the *Teague* criterion for making new rules retroactive on habeas corpus—“procedures without which the likelihood of an accurate conviction is seriously diminished”¹⁰¹—would also be appropriate here because the “detention” we are discussing is official imprisonment of individuals for substantial periods of time. That calls for the unique independence and impartiality of Article III judges because, as Hamilton recognized in Federalist No. 78, “inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.” Although I do not go so far as to impose “a requirement of appellate review by an article III court in *all* cases decided by non-article III federal tribunals,”¹⁰² nor do I contend that the “one supreme Court” created by Article III “must have ultimate power to decide the issues arising in *all* Article III matters,”¹⁰³ I do find these positions strong candidates in respect to constitutionally guaranteed individual rights.

Yoo: Opportunity for judicial review exists within the framework of the DTA and MCA. Under executive branch regulations, the Department of Defense provides all of its detainees with a hearing before a Combatant Status Review Tribunal, which hears evidence in a non-adversarial legal proceeding on whether a detainee is an enemy combatant. Under the Detainee Treatment Act, a detainee can appeal the determination of a CSRT to the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰⁴

Review, however, would not sweep as broadly as habeas jurisdiction or normal appellate review. Instead, the D.C. Circuit may pass judgment on whether the CSRT’s determination “was consistent with the standards and procedures specified” by the Secretary of Defense for their operation, including the requirement that an enemy combatant’s status be supported by a preponderance of the evidence and allowing the defendant to rebut a finding of his status, but without benefit of a lawyer.¹⁰⁵ In other words, the D.C. Circuit’s role does not permit de novo review of the legality of an enemy combatant’s

100. Hart, *supra* note 70, at 1394.

101. *Teague v. Lane*, 489 U.S. 288, 313 (1989).

102. Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 974 (1988).

103. Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, San Diego Legal Studies Paper No. 07-71 (October 6, 2006).

104. Detainee Treatment Act of 2005, Pub L. No. 109-148 §§ 1005(e)(2), 119 Stat. 2739, 2742 (2005).

105. Detainee Treatment Act, § 1005(e)(2)(C)(i).

detention, or even review under a deferential standard. Rather, the D.C. Circuit is to ensure that the CSRT's are faithfully applying their own procedural charter.¹⁰⁶ The D.C. Circuit may also decide whether those procedures are consistent with the Constitution or federal laws.¹⁰⁷ It does not appear, however, that a finding that the CSRT procedures are unconstitutional would require the release of an enemy combatant. Instead, such a finding would send the procedures back to the Defense Department for revision.

Choper: The Guantanamo Bay jurisdiction-stripping statutes present a series of such issues that will soon be before the courts. For example, is due process violated by the exclusion of any judicial review prior to a "final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," which means that all such persons who are not brought before the military panel have no recourse without any specified time limit? Even as to a "final decision," does the restriction of judicial authority to "whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense" comport with "fundamental fairness"? What of the provision that "the conclusion of the Tribunal be supported only by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence"? Or the admissibility of (a) coerced testimony even if obtained by "cruel, inhuman or degrading treatment" as long as it is "reliable, probative and in the interests of justice," or (b) hearsay unless the detainee can "demonstrate that the evidence is unreliable or lacking in probative value"? What of the DTA's denial of all judicial review for a Guantanamo prisoner who is convicted by a military commission but sentenced to less than ten years? Or the Department of Defense procedures that do not guarantee detainees' representation by lawyers? Does the DTA's important acceptance of the role of Article III courts in specifically authorizing the D.C. Circuit to subject the "standards and procedures" to constitutional review satisfy due process, at least in respect to those matters, or is further review needed? I understand you to believe that, under the Constitution, none of these questions is relevant.

It is exactly at moments such as these, when the majority takes away the liberty of a minority, that the courts must perform its most difficult counter-majoritarian role to protect civil liberties. Allowing Congress and the President to act together to preclude judicial review over such questions would eliminate any check at all on the power of the majority. Even if we are at war, due process requires that the courts have a role to ensure that the government is exercising its war powers without improperly denying individual constitutional rights.¹⁰⁸

106. *Id.*

107. Detainee Treatment Act, § 1005 (e)(2)(C)(ii).

108. I do not think that federal courts should intervene in separation of power disputes or

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The need for some form of due process is manifestly present where there is the possibility of a basic factual error that could lead to a civilian being incorrectly classified as an enemy combatant. The Court in *Hamdi* recognized this when it applied the basic procedural due process standards of *Mathews v. Eldridge* to require that the military provide a hearing to determine whether an American citizen had been properly found to be an enemy combatant.¹⁰⁹ Detention of non-POW enemy combatants for the period of an entire war, especially the wholly indeterminate war on terror, without a criminal trial is a deprivation of a liberty interest that requires some due process. Although I am sympathetic to the suggestion that the Due Process Clause should mandate de novo consideration by an Article III court of the adjudicative facts critical to the constitutional issue presented, it may be, as the plurality opinion in *Hamdi* described as a “possibility,” that the hearing before “a neutral decisionmaker” could be provided “by an appropriately authorized and properly constituted military tribunal.”¹¹⁰ But to preclude all vehicles for Article III judicial review of that determination violates due process.

Yoo: You are importing norms of due process from the peacetime civilian context into the wartime context without taking into account the different demands of each.¹¹¹ The demands of wartime action, in particular the need to take preventive action to stop threats of attack from materializing, do not allow for the generous procedures in peacetime. Take the use of force, for example. In peacetime, police officers cannot use force unless their lives or the lives of a third party are under imminent threat of attack. In wartime, however, the military uses force to prevent future harms by targeting any member of the enemy’s forces, regardless of whether that individual is about to engage in an imminent attack. Detention of the enemy serves a similar purpose. It does not exist to punish for the violation of the criminal laws, but only to prevent members of the enemy from returning to the battlefield to come back again. Due process has never been understood in any previous war to require judicial review over status in wartime detention of alien enemies, because it would be impractical, the costs would outweigh any benefits, and the stakes in wartime outweigh to a great degree the liberty interests of the alien enemy combatant.

Another problem with your argument is that you interpret the Due Process Clause to provide a hearing for an enemy combatant on the questionable assumption that enemy combatants have any substantive constitutional rights during wartime. In fact, the conduct of military hostilities against the enemy

federalism disputes, mainly because these constitutional issues may be trustworthily resolved within the political process, but also in order to husband their institutional capital to protect personal liberties. CHOPER, *supra* note 15, chs. 4-5.

109. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-35 (2004).

110. *Id.* at 538.

111. See Yoo, *supra* note 27, at 1159 (criticizing the *Hamdi* Court’s application of the *Mathews* balancing test to the wartime context).

involves deprivations of life, liberty, and property by the government without any notions of Due Process. Take again the use of force. If the United States uses military force against enemy personnel, it is depriving them of their lives. There is no Due Process provided ex ante, nor ex post – the survivors of a slain enemy soldier do not have a constitutional right to seek a wrongful death action against the United States or military personnel. Civilians might be killed in such an attack because they are working in military, government, or industrial facilities, or because they are nearby a military target, or even because the military makes an error in its targeting. In none of these situations, as far as I am aware, have the federal courts concluded that a constitutional right has been violated.

One can infer this principle not just from the absence of any precedent to the contrary, but from the rules of war and from related Supreme Court decisions. Under the laws of war, for example, “combatant immunity” protects legal combatants and their use of force from peacetime criminal or civil sanctions. A nation at war possesses the power to detain enemy combatants without criminal charge. Nowhere do the customary laws of war, or the Geneva Conventions, call for domestic judicial enforcement or appeal to any domestic constitutional legal norms. Nowhere do the laws of war, either customary or treaty based, require that domestic courts provide some form of due process review, or, indeed, any review at all for claims arising out of detention.

If there are no substantive constitutional rights that alien enemies might hold in wartime, then it is difficult to understand why the Due Process Clause requires that aliens have the right to file claims in federal court when our nation is at war with them. You have simply decided that due process means that alien enemy combatants have a right to file for a writ to challenge their detention, but at the same time, you would not claim that aliens have a similar due process right to seek a remedy for harm in military action, compensation for property destroyed, or an injunction against an illegal war in which they may be harmed. That is not based on any consistent view of what due process requires in wartime, but rather what some would consider the best policy outcome. Some form of judicial review may make for good policy, but that is not for the courts to decide, but rather for the political branches, to whom the Constitution gives the authority to make war.

Choper: Let me close this part by underlining that my position in the present discussion is concerned only with detention of enemy combatants who, like Hamdi, allege that they have been improperly placed in that category. That claim is different, I think, than persons “seeking compensation for harm in military action, or stopping an illegal war in which they may be harmed.” *Hamdi* did recognize that the military “possesses the power to detain enemy combatants without criminal charge.” But the Court ruled that due process requires that a citizen held in the territory of the United States as an enemy combatant have a meaningful opportunity to contest the factual basis for his

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detention before a neutral decision maker. I would extend that ruling to aliens as well.

Indeed, as you have pointed out, both the MCA and DTA explicitly recognize a continued role for Article III courts. Indeed, Congress said nothing that would foreclose normal review of the D.C. Circuit's decision in the Supreme Court by writ of certiorari. Moreover, the somewhat opaque clause in the statutes that preserves the D.C. Circuit's authority to resolve "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States," may plausibly be interpreted to grant Article III judgments on most of the questions—if not all of them, or more—that I have urged must be retained by the federal judiciary.

II

HABEAS CORPUS

Yoo: The Constitution's provision that "[t]he 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"¹¹² provides a second ground upon which to question the MCA. I do not believe that such a claim ultimately succeeds, though there are certainly strong arguments to the contrary. First, it seems clear that Congress has never been obligated to fully extend the writ of habeas corpus as far as it has, or at least as the courts have today. But Article I fails to impose any standards on the scope of the writ that will be provided or even to require that Congress create the writ in the first place. It only makes clear that if Congress creates the writ, then it cannot be suspended other than during wartime and rebellion.

Choper: A statute that eliminates jurisdiction over habeas corpus claims of a certain group of people from all federal courts other than under the circumstances designated in Article I, Section 9 threatens the constitutional liberties of individual detainees. It seems to me that when the Constitution says that a right cannot be taken away, the natural inference is that the right already existed. For example, while the Seventh Amendment states that the "right of trial by jury shall be preserved," that does not mean that its being depends on Congress. The Suspension Clause assumes that a right of habeas corpus must already be in existence; there would simply be no reason to limit the suspension of something that does not already exist.

So, the Suspension Clause implies that Congress has a constitutional obligation to make the writ of habeas corpus available. Consequently, in the absence of special countervailing factors, the MCA and DTA cannot withdraw the writ of habeas corpus without providing "other mechanisms of sufficiently

112. U.S. CONST. art. I, § 9, cl. 2.

searching judicial oversight”¹¹³ to prevent an individual from challenging his or her detention by the government (except under the Article I, Section 9 conditions) because this is at the core of the privilege. Indeed, the English common law courts first used the writ of habeas corpus precisely to prevent the Crown from simply detaining whomever it chose without criminal charge and conviction.¹¹⁴

The Court itself long ago recognized the “privilege of the writ of habeas corpus” as being one of “the privileges and immunities of citizens of the United States.”¹¹⁵ This not only secures it against state interference and enables Congress to enforce it by appropriate legislation, but, more importantly for our discussion, it provides the Court with an alternative constitutional provision to the Suspension Clause to reject efforts by Congress that unduly limit the writ. More recently, the Court has periodically declared that the Suspension Clause prevents Congress from reducing the scope of habeas corpus beyond certain minima. Within the present decade,¹¹⁶ in *INS v. St. Cyr*, the Court addressed provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which appeared to remove judicial review over decisions by the Attorney General on whether or not to waive the deportation of a resident alien who has pleaded guilty to a felony.¹¹⁷ Justice Stevens for a 5-4 majority declined to read these statutes as preventing an illegal immigrant from challenging his deportation under the federal habeas statute, without a clear statement otherwise, because that would present a substantial constitutional problem: whether “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”¹¹⁸ The Court observed that historically “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 are strongest.”¹¹⁹ Even though *St. Cyr* involved judicial review of an act of executive *discretion*, the Court found “substantial evidence to support the proposition that pure questions of law” such as the claim of improper use of discretion “could have been answered in 1789 by a common law judge with power to issue the writ of habeas corpus.”¹²⁰

A unanimous Court made a similar comment in its ruling five years earlier

113. Fallon, *supra* note 95, at 1083.

114. See HART & WECHSLER, *supra* note 1, at 1284-85.

115. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

116. For a somewhat earlier statement, see *Sanders v. United States*, 373 U.S. 1, 11-12 (1963) (commenting that construing a statutory change “to derogate from the traditional liberality of the writ ... might raise serious constitutional questions.”).

117. *St. Cyr*, 533 U.S. at 289.

118. *Id.* at 301.

119. *Id.*

120. *Id.* at 304-05.

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in *Felker v. Turpin*.¹²¹ *Felker* upheld Congress's decision in AEDPA that a second, or successive petition for a writ of habeas corpus cannot go forward without the approval of the court of appeals, and that this judgment could not be reviewed through a writ of certiorari. Chief Justice Rehnquist made clear that whether Congress could strip the federal courts completely of jurisdiction over a certain class of cases presented a difficult constitutional issue sufficient to trigger the canon of avoiding constitutional questions. Consequently, the Court held that AEDPA should not be read to repeal other forms of review, namely the Supreme Court's original habeas corpus jurisdiction. This weakened any challenge to AEDPA as an unconstitutional suspension of the writ or invalid removal of federal jurisdiction.¹²² In reviewing the Suspension Clause challenge, the *Felker* Court assumed that the Clause protected the writ in its modern scope, but gave as the other alternative that the Clause protected the writ "as it existed in 1789."¹²³

It would not have been necessary to read AEDPA and IIRIRA as allowing some avenue for habeas corpus if, as you argue, the Constitution had given Congress full control over the scope of the writ. The historical origins of the writ under the British common law, at the time of the ratification, were primarily to protect against illegal executive detention, exactly the concern at issue here. Surely you would agree this helps define the minimum scope of the writ today.

Yoo: I agree that *St. Cyr* and *Felker* invoke the possibility that the Suspension Clause requires Congress to create a certain minimum form of habeas corpus, although the opinions avoided the question. But the cases they draw upon, such as *Swain v. Pressley*,¹²⁴ do not actually invoke the Suspension Clause as protecting the writ as it existed in 1789. Rather, those prior decisions took note of the scope of the writ in 1789 to argue that subsequent developments, primarily the use of the federal writ to review the constitutionality of state criminal procedures, went far beyond the original purpose of the writ.

If the Framers intended to create a constitutionally-required writ of habeas corpus, they did so with the strangest circumlocution. Why did the Framers not simply come right out and say that a federal right to habeas corpus was required? At the Philadelphia Convention, the original proposal for what became Article I, Section 9 had stated that the "privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner."¹²⁵ That looks like your affirmative

121. 518 U.S. 651 (1996).

122. *Id.* at 658-63.

123. *Id.* at 664.

124. 430 U.S. 372 (1977).

125. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341 (Max Farrand ed., 1911).

requirement of habeas corpus. The proposal, made by Charles Pinkney, also stated that the writ “shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding ___ months.”¹²⁶ The latter clearly became today’s Suspension Clause. When the Convention considered the judicial article of the draft Constitution, Pinkney proposed his language as an amendment, but dropped the first clause, leaving only the suspension language.¹²⁷ Other delegates voted with Gouvenour Morris’ proposal to replace “urgent and pressing occasions” with the present-day cases of “Rebellion or invasion.”¹²⁸

One could read this slender amount of evidence to support the idea that the Convention delegates assumed that habeas corpus would exist, and hence no specific mandate for it in the Constitution was necessary. On the other hand, one could just as easily read the approval of the Clause, dropping the affirmative language in favor of a common law writ, as doing the exact opposite. If the Clause is read in harmony with nearby provisions limiting state power, it suggests that the Framers did not understand the Constitution to create a self-executing writ of habeas corpus. The Framers certainly had no trouble elsewhere in Article I, Section 9, declaring that ex post facto laws and bills of attainder were illegal.

The history of the Constitution’s adoption does not appear to support your argument in favor of a mandatory writ of habeas corpus. During the ratification, four state conventions complained that the Constitution did not affirmatively establish the writ of habeas corpus.¹²⁹ If the understanding of the Constitution at the time of the ratification was that the Constitution created a self-executing writ of habeas corpus, these state conventions were mistaken. We should also have expected Federalists in these conventions, and in the press, to have responded by claiming that the Constitution established a certain minimum right of habeas corpus. There does not appear to be any record of that. If the Framers had understood the Constitution as you understand it, there should have been a very different debate in the ratifying conventions. Anti-Federalists, who were concerned that the Constitution created a dictatorial president, would have pointed out the lack of a writ of habeas corpus. Federalists, who sought to downplay the powers of the Presidency, would have emphasized that the Constitution created a check on executive authority through a writ of habeas corpus. It would have been to their political advantage to emphasize that the Constitution created a permanent, minimum form of habeas corpus for the purpose of reviewing executive detention, if such a right had existed.

126. *Id.*

127. *Id.* at 438-39.

128. The brief record of the Philadelphia proceedings is discussed in Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 608-16.

129. Rex Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 340-41 (1952).

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Choper: All of these Talmudic conjectures about who should have said what if something happened is just too speculative and uncertain for me. You make a series of “what if” arguments that depend a great deal on negative inferences – on the fact that something did not happen. Justice Scalia makes a good case about the dangers of using legislative history, because it is too easily manipulated and is not a reliable sign of congressional intent.¹³⁰ I feel his argument has additional force in the context of constitutional interpretation because of the substantially larger difficulty in correcting an erroneous judicial reading of the original understanding.

Our grasp of history is imperfect; we usually do not have nearly enough information to reach reliable judgments about what the real intentions of the Framers were. We may have some fragmentary, if exceptionally well-reasoned, explanations from Founders such as Alexander Hamilton, James Madison, and James Wilson, but we have no comprehensive poll of the views of the delegates to the Philadelphia Convention, not to mention the hundreds of state representatives who approved the Constitution in the ratification process. How the evidence that does exist should be interpreted is also an open question. One influential recounting concludes that “the record discloses no concern that the federal constitution made no express grant of the habeas corpus privilege whose suspension it forbade. It seems to have been assumed either that the right to the writ was conferred by implication in the anti-suspension provision or that it existed under the common law in force in the several states.”¹³¹

Let me illustrate with an issue related to one that we considered earlier. Daniel Meltzer finds as “perhaps the most fundamental example of confusion . . . about the significance of history” in connection with whether “Congress has plenary authority over federal court jurisdiction” to be whether Article III “obliges Congress to create lower federal courts or give them jurisdiction over any particular matters. The history of the Convention clearly shows that the answer is no; this is one that would command agreement from [theorists on all sides.] . . . Yet in the first Congress (and, incidentally, in the ratification debates), it was not uncommon to hear just the opposite asserted.”¹³²

As a result, I often see history being logically, even persuasively, cited to support both sides of a debate. Indeed, you did that very thing earlier in your discussion concerning the evolution of the language of the Suspension Clause.

130. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

131. Dallin H. Oaks, *Habeas Corpus in the United States -- 1776-1865*, 32 U. CHI. L. REV. 243, 248-49 (1965). See also David L. Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 62 (2006) (“[T]he contemporary history, both during the Convention and after, turns out to be more ambiguous, and to leave the present-day observer -- perhaps even a dyed-in-the-wool originalist -- uncertain.”).

132. Daniel Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1610-11 (1990).

Then, in connection with the ratification process, you infer from the silence on the question of whether the Constitution requires the writ as a lack of any consensus that it did. But I could just as easily conclude that the understanding that the Constitution recognized a pre-existing common law writ inherent in the courts was so widely held that no discussion was necessary.¹³³ Having said all this, one can point to Hamilton's statements in Federalist Nos. 83 and 84 as trustworthy evidence of a constitutionally-secured right of habeas corpus.¹³⁴

Furthermore, constitutional interpretation by the Supreme Court is replete with examples of amplifications of the original understanding. Two obvious illustrations concern the meaning of "Commerce . . . among the several states" as it applies to activities "completely within a particular state,"¹³⁵ and of "equal protection of the laws" as it relates to racial segregation.¹³⁶ Similarly, the original understanding, I would submit, is simply not clear on the question of whether Congress and the President can eliminate the writ of habeas corpus over certain classes of cases, without suspending the writ itself, perhaps because the Founders had not thought of, or at least carefully considered, it. It is the Court's responsibility today to give meaning to the principles that underlay the Constitution, as best it can identify and explicate them, in the context of current circumstances. This will, at times, depend on actions and decisions that come after the Constitution's ratification, not before. For example, the Fifth Amendment's Due Process Clause, which I believe is the core of the right to a writ of habeas corpus, was enacted after the historical events upon which you rely.

In sum, I believe that seeking to identify the elusive intentions of all those persons who were framers or ratifiers of the Constitution—either their attitudes about specific issues or, more generally, their broader design for how the document should be interpreted over time in light of changed conditions and evolving values—is usually overwhelmingly difficult. It is preferable to strive to fulfill the broad ambitions and essential ideas underlying the relevant constitutional clauses in order to fashion reasoned constitutional precepts that will address the evils the framers feared, account for the language set down in the document, and reflect cherished contemporary values by a "continuity of identification with those who had proposed and ratified"¹³⁷ the provisions of

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

134. THE FEDERALIST NO. 83 (Habeas was "provided for, in the most ample manner, in the plan of the convention."); FEDERALIST NO. 84 (discussing the Constitution's "establishment of the writ of *habeas corpus*").

135. *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824).

136. *Brown v. Board of Education*, 347 U.S. 483, 489 (1954).

137. Robert C. Post, *Theories of Constitutional Interpretation*, in LAW AND THE ORDER OF CULTURE 19, 13, 29 (Robert Post ed. 1991).

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our nation's charter.

Yoo: Even if you think the original understanding is either impossible to discover or irrelevant, your broad claim does not comport with the early history of the writ either. Although Congress established the Great Writ as early as the Judiciary Act of 1789, it was nowhere near as broad as it is today. Section 14 of the Judiciary Act¹³⁸ stated that the courts of the United States “shall have power to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions.” Section 14 limited the writ, however, only to cases where the prisoners are in the custody of the federal government.¹³⁹

Section 14 complicates your argument in two ways. First, if the Constitution was generally understood to create a self-executing writ of habeas corpus, Congress need not even have enacted Section 14. It would have been redundant, as if Congress passed a law forbidding ex post facto laws or bills of attainder.¹⁴⁰ Second, Section 14 does not come close to your broad reading of the scope of habeas corpus. It only applies to prisoners in federal custody, and provides no avenue of relief for prisoners held by state governments in violation of the Constitution. Again, if you were correct in reading the Constitution to create a mandatory writ of habeas corpus to provide a remedy for constitutional violations, then why did the First Federal Congress enact a writ that neglected state prisoners?

You place greater importance on Supreme Court opinions than on historical material. But the foundational Supreme Court opinion to address this question clearly rejects your thesis. In *Ex Parte Bollman*, decided in 1807,¹⁴¹ the Court faced the question whether it could issue a writ of habeas corpus in its original jurisdiction, even though it had recently held in *Marbury v. Madison*¹⁴² that Congress could not constitutionally expand the Court's original jurisdiction. Chief Justice Marshall wrote for the Court that Section 14 allowed the Supreme Court to grant the writ of habeas corpus in its appellate jurisdiction.¹⁴³ Marshall denied that the federal courts possessed any inherent common law powers to issue writs of habeas corpus; “Courts which originate in the common law possess a jurisdiction which must be regulated by the common law,” he wrote, “but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”¹⁴⁴ Marshall addressed the claim that Congress had a mandatory duty to implement

138. Judiciary Act of 1789, ch. 20, Sect. 14, 1 Stat. 81.

139. *Id.*

140. U.S. CONST. art I, § 9, cl. 3 states that “No Bill of Attainder or ex post fact Law shall be passed.”

141. 8 U.S. (4 Cranch) 75 (1807).

142. 5 U.S. (1 Cranch) 137 (1803).

143. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

144. *Id.* at 93.

habeas corpus, and in rejecting it, he seemed to acknowledge that no congressional action at all would mean that the writ would not be available; “Acting under the immediate influence of this injunction” of the Suspension Clause, Congress “must have felt, with particular force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity.” However, Marshall saw no constitutional requirement for Congress’s action; “for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.”¹⁴⁵

Bollman has stood for two propositions: that the Court can only exercise the writ of habeas corpus so far as authorized by Congress;¹⁴⁶ and that Congress is under no constitutional obligation to vest a certain minimum power of habeas corpus in the courts.¹⁴⁷ Congress did not extend the privilege to prisoners held by state governments until 1833, and only in the narrower case where the prisoner had acted pursuant to federal law.¹⁴⁸ In 1842, Congress extended the writ of habeas corpus to the case of foreigners detained by a state in violation of a treaty.¹⁴⁹ Congress did not expand habeas to include cases where prisoners claimed they were held in violation of federal rights until 1867.¹⁵⁰ If the argument that some form of habeas corpus jurisdiction is mandatory to challenge violations of federal constitutional law were right, then it should have been unnecessary for Congress to pass the 1833, 1842, or 1867 Acts, not to mention Section 14 of the Judiciary Act of 1789.

Clearly, Congress had and did exercise discretion to create different categories of habeas jurisdiction, rather than simply implementing some form of mandatory habeas jurisdiction. Federal review of state court convictions did not expand into the full-fledged review of all aspects of trial procedures for consistency with the Constitution until the twentieth century. Unless Congress was in violation of the Constitution for not fully vesting habeas jurisdiction in the federal courts before 1867, this practice would seem to bear out Congress’s discretion over the breadth of habeas jurisdiction. Second, Congress has narrowed habeas jurisdiction before in response to perceived misinterpretations of federal law. In the 1996 Anti-Terrorism and Effective Death Penalty Act, Congress adopted new habeas rules that restricted the right of prisoners to bring multiple or successive habeas petitions. AEDPA effectively narrowed the right of habeas by limiting the types of claims that prisoners could bring.

Choper: I do not view AEDPA as an example of Congress using its power

145. *Id.* at 95.

146. *See id.* at 93-94 (stating that “...for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law”).

147. *See id.* at 95.

148. Act of Mar. 2, 1833, ch. 57, Sect. 7, 4 Stat. 634.

149. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

150. Act of Feb. 5, 1867, ch. 28, Sect. 1, 14 Stat. 385.

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over the federal courts to impermissibly deny the writ. As indicated in *Felker* and *St. Cyr*, AEDPA sought only to modify or clarify, though not without significant consequences, several procedural matters, such as filing successive petitions and the standard of review by federal courts of legal and factual conclusions reached by state courts in the cases under consideration. AEDPA did not, as I read it, enact any exclusionary restrictions or withdrawals of federal habeas similar to the DTA and MCA.

Next, let me take up your historical arguments. First, it has been urged—at least as credibly, in my opinion—that *Bollman* did exactly the opposite of what you describe.¹⁵¹ You contend that Chief Justice Marshall “reject[ed] . . . the claim that Congress had a mandatory duty to implement habeas corpus” in *Bollman*.¹⁵² But, although Marshall did not explain “what happens if the constitutional command is disobeyed,”¹⁵³ it was unnecessary for him to do so since Congress had already satisfied its obligation. It follows, under Article I, Section 9, that Congress, having promulgated Section 14 of the First Judiciary Act, may only suspend it in the circumstances designated. Indeed, this view received the endorsement of a majority of the Supreme Court in *St. Cyr*. Responding to the *St. Cyr* dissent’s reading of *Bollman*, which is essentially that which you have advanced, Justice Stevens described this as:

[A] proposition that the Chief Justice did not endorse, either explicitly or implicitly. . . . He did note that ‘the first congress of the United States’ acted under ‘the immediate influence’ of the injunction provided by the Suspension Clause when it gave ‘life and activity to ‘this great constitutional privilege’ in the Judiciary Act of 1789, and that the writ could not be suspended until after the statute was enacted. . . . That statement, however, surely does not imply that Marshall believed the Framers had drafted a Clause that would proscribe a temporary abrogation of the writ, while permitting its permanent suspension. Indeed, Marshall’s comment expresses the far more sensible view that the Clause was intended to preclude any possibility that ‘the privilege itself would be lost’ by either the inaction or the action of Congress.¹⁵⁴

Further, the language of Section 14 of the Judiciary Act may be read

151. Shapiro, *supra* note 131, at 63 (“that the writ is in fact guaranteed by implication . . . is . . . for me the most plausible reading of Chief Justice Marshall’s somewhat cryptic discussion in *Ex Parte Bollman*”); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 581 (2002) (“*Bollman* does not suggest that Congress could abrogate the privilege of the writ without violating the Constitution”); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 877 (1994) (Marshall’s position was “that the Suspension Clause obligated Congress to make the writ available”).

152. See *supra* Part III.

153. Hart, *supra* note 70, at 1397.

154. *St. Cyr*, 533 U.S. at 304, n.24.

differently than Chief Justice Marshall concluded in *Bollman*. The first sentence of Section 14 grants the power of the writ to the courts, and the second sentence grants the power of the writ to individual Justices and judges. The third and last sentence then contains the proviso that the writ extends only to prisoners held by the federal government. Several students of the history of the writ have argued that the limitations of the third sentence of Section 14 only apply to the second sentence and not the first sentence. In other words, Section 14 limits the power of individual judges and Justices – and not of the courts in general – to federal prisoners: “Because much judicial work was then done by individual judges rather than courts as such, reading the proviso to apply to the former rather than the latter [means] . . . that the federal courts have had statutory authorization since 1789 to grant the writ of habeas corpus to state prisoners.”¹⁵⁵

A final point concerning *Bollman* arises from its peculiar facts which were connected with the activities of Aaron Burr. A federal court had issued an arrest warrant for treason and then denied the prisoners’ petition for habeas corpus. Rather than taking an appeal from the district court, they sought habeas directly from the Supreme Court. The Chief Justice held that issuance of the writ was within the Court’s appellate jurisdiction, in order to avoid the decision in *Marbury v. Madison* limiting the Court’s original jurisdiction, because the petition reviewed the detention of a federal prisoner by the court below. In approving Marshall’s somewhat strained reasoning, James Pfander effectively argues that “the constitutional requirement of a supreme-inferior relationship between the Supreme Court and inferior federal courts” confers “an important textual and structural” inherent supervisory power on the Supreme Court that cannot be removed by the political branches.¹⁵⁶

I acknowledge that you accurately describe the *Bollman* and post-*Bollman* understanding of the scope of the writ as being limited to prisoners held under federal law. But it seems to me that Congress did not implement any habeas jurisdiction over state prisoners because none was truly necessary. There were very few opportunities for state violations of individual rights under the original Constitution – I know of none beyond the ex post facto, bill of attainder, and contract impairment prohibitions, and only the first of these would likely result in detention. There are no Supreme Court rulings during this period that deny federal relief for alleged violations of these clauses. I believe that if any of these federal constitutional rights had been violated in state trials, the Supreme Court could issue writs of error on direct appeal of the state judgments. This allowed the Supreme Court to effectively review the same claims that would be raised on any federal habeas, wholly apart from the

155. Freedman, *supra* note 133, at 541; *see also* Paschal, *supra* note 128, at 641-49.

156. James Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1436 (2000).

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possibility that the Supreme Court itself may have issued a writ of habeas corpus. When federal law granted significant individual rights against the states in the 1866 Civil Rights Act, Congress then enacted a federal judicial avenue for relief in the form of the 1867 extension of habeas corpus to those held by state governments in violation of federal law. Consequently, this structure was already in place when the most fruitful source of rights, the Fourteenth Amendment, was ratified a year later – it had been proposed in 1866 and was contemplated for Article III protection when the habeas coverage was extended to state prisoners in 1867. Thus, even if history were dispositive, there is, at minimum, a plausible historical argument supporting my position.¹⁵⁷

Yoo: You argue that since the writ in 1789 allowed petitioners to challenge executive detention, enemy combatants today should have the same right. But this evades the issue simply by setting the question at too abstract a level of generality. The question is not whether executive detention in general could be challenged by the writ in 1789, but whether it would have been understood to allow a challenge to military detention of an enemy alien in wartime.

It does not appear that the federal courts had recognized the writ of habeas corpus as going so far. There does not appear to be any examples of enemy aliens successfully bringing habeas petitions, aside from those who were detained on U.S. territory as in *Ex Parte Quirin* and *In re Yamashita*. Indeed, the United States held hundreds of thousands of enemy prisoners of war in World War II, and it seemed to have been generally understood that they could not seek the writ of habeas corpus to challenge their wartime detention. If the Framers had understood the writ of habeas corpus to extend even to enemy aliens, we should see some practice to this effect.

Instead, Courts in earlier wars doubted whether military commissions are even “courts” over which the Justices can exercise their appellate jurisdiction. As I have argued elsewhere,¹⁵⁸ military commissions have historically been understood as an exercise of the President’s power, as Commander-in-Chief and Chief Executive, to conduct war. They are less a species of court than part of the President’s authority, in setting war policy, to sanction enemy violations of the laws of war. In *Ex Parte Vallandigham*,¹⁵⁹ the Court held during the Civil War that its power to issue writs of certiorari in its appellate jurisdiction did not give it the power to review the proceedings of a military commission: “Nor can it be said that the authority to be exercised by military commission is

157. In further support, see the carefully qualified conclusion (especially, but not only, the phrase in parentheses) that “the original understanding of the writ’s function would argue (albeit *not conclusively*) against reading the Suspension Clause as conferring a *constitutional* right to postconviction review,” in HART & WECHSLER, *supra* note 1, at 1291.

158. Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENTARY 179 (2006).

159. *Ex Parte Vallandigham*, 68 U.S. 243 (1863).

judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings.”¹⁶⁰ In *Yamashita*, Chief Justice Stone made a similar observation: “In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court.”¹⁶¹

Even if you were right that the MCA amounts to a suspension of the writ, why is that unconstitutional? Congress has the power to suspend the writ in cases of rebellion or invasion. It seems to me that the MCA could at a minimum find constitutional support as a suspension of the writ because the United States suffered the equivalent of an invasion on September 11, 2001, when we were attacked on our home soil against our nation’s government, military, and financial centers. We need not restrict an “invasion” to an attack by a nation-state in which a significant enemy armed force has a sustained presence on American territory. Suppose an enemy has attacked the United States, which is successfully beaten back, but that other attacks are known to be coming. It seems unreasonable to think that Congress could not suspend the writ in this period between attacks precisely because our armed forces succeeded in defeating the first attack, and hence preventing the enemy from establishing any foothold on U.S. territory. Article I, Section 9’s use of the term “invasion” also must include the threat of an invasion or attack, just as self-defense today does not require the United States to suffer an attack before using force in response.

In any event, it seems to me that whether the United States is currently being invaded or under threat of invasion is a political question for which the judiciary is ill-equipped to make a determination. In the course of litigation, a federal court cannot gather sufficient evidence, nor will it have access to the necessary classified information, to make a reasoned, fully-informed decision whether the nation has been invaded. Recognizing this, the Court in the past has refused to exercise review over whether the United States has entered or left a state of war, but instead has deferred to the political branches. In *The Prize Cases*, for example, the Court explained that, whether the President “in fulfilling his duties as Commander in Chief” was justified in treating the southern States as belligerents and instituting a blockade, was a question “to be decided by him.”¹⁶² The Court could not question the merits of his decision, but must leave evaluation to “the political department of the Government to which this power was entrusted.”¹⁶³ In a case that reached the courts three years after

160. *Id.* at 253.

161. *Yamashita*, 327 U.S. at 8.

162. *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

163. *Id.*

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the end of hostilities in World War II, the Court refused to examine whether a state of war had ended between the United States and Germany.¹⁶⁴

If it is unquestioned that Congress has the power to suspend the writ during time of invasion, why cannot Congress decide that the 9/11 attacks were an invasion? If Congress has done so, and arguably it did when it authorized the President to use force against anyone connected to the attacks,¹⁶⁵ then it seems to me the MCA is a legitimate exercise of the suspension power. Certainly critics of the bill argued in Congress that the narrowing of habeas constituted a suspension of the writ. I do not see why Congress has to specify in the statute that it is in fact using its power to suspend the writ. The constitutionality of economic regulation, for example, does not turn on whether Congress declared in the statute that it is proceeding under the Commerce Clause. Instead, a court must uphold the regulation if any available power supports it.¹⁶⁶ Requiring Congress to declare it is exercising the Suspension Clause power would constitute a clear statement rule that would force Congress to deliberate before it takes the serious step of suspending habeas. Here, however, Congress has thought about this issue sufficiently to pass a statute making clear habeas does not extend to enemy aliens held outside the United States *twice*. Suppose the MCA had included a finding that Congress believed it was only restoring the status quo, but that if the courts disagreed, then it is suspending the writ in the case of enemy aliens. I doubt that this would have caused enough members of Congress to switch their votes so as to defeat the MCA.

Choper: I agree that “we need not restrict an invasion to an attack by a nation-state” with a continuing “presence on American territory,” and, thus, that the September 11 attacks constituted an “invasion” under the Suspension Clause. It may even be true that the invasion does not end even if more attacks are not imminent, but may be coming very soon. But it has been almost six years since the 9/11 attacks, and it seems to me that we have long exceeded the time that the Court would hold to be reasonable for Congress to legitimately suspend the writ because of a threat of continuing attacks that might be part of the same “invasion” as 9/11.

I also disagree with you that the issue of whether the Suspension Clause (or the Due Process Clause) has been properly invoked during warfare should be a political question. The cases you rely on concern constitutional issues much different than suspension of the writ of habeas corpus. The question in *The Prize Cases*, whether President Lincoln had constitutional authority without the approval of Congress to “institute a blockade of ports in possession of persons in armed rebellion against the government,” involves the separation

164. *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948).

165. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

166. *Woods v. Cloyd W. Miller Co.* 333 U.S. 138, 144 (1948).

of powers between the two national political branches, a subject that I agree should be nonjusticiable.¹⁶⁷

Unlike Civil War blockades (or the extent of Congress's power to regulate¹⁶⁸), habeas corpus involves individual rights where the federal courts owe the political branches the least amount of deference.¹⁶⁹ Moreover, it is one thing to give significant judicial respect to the political branches on the question of what comprises an "invasion" under the Suspension Clause and quite another to permit people to be imprisoned indefinitely with no judicial role whatever because Congress or the President has decreed that a further attack might be made. And even if other issues, such as whether a state of "rebellion" currently exists or whether the "public safety" requires the suspension, may be strong candidates for special comity by the Court, that does not foreclose judicial consideration of the detention under the less textually confined and traditionally evolving right of due process. Similarly, although I would generally agree that "determination of sovereignty over an area is for the legislative and executive departments,"¹⁷⁰ this should be qualified when individual rights are at stake. Thus, the Court's ruling in *Rasul* that "Guantanamo Bay is in every practical respect a United States territory"¹⁷¹ should dictate whether the constitutional protection of habeas corpus extends there.¹⁷²

Yoo: Whether individual rights are at stake cannot be the determinative factor in triggering judicial review. Every constitutional provision could conceivably be challenged by some claim of an individual right. Take the *Prize Cases* themselves. There, the case was brought by plaintiffs who claimed the federal government had illegally seized their shipping.¹⁷³ The right not to have property taken without any legal authorization is an individual right. Or take *Ludecke v. Watkins*. Ludecke was a German national living in the United States at the time that the United States declared war on Germany. Under the Alien Enemy Act, the government interned Ludecke on December 8, 1941, and decided to remove him from the country on July 14, 1945. Ludecke brought a writ of habeas corpus claiming that he could no longer be removed because active hostilities had ended with Germany. In rejecting the claim, even though the shooting war in Germany had ended three years earlier, Justice Frankfurter

167. JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* ch. 5 (1980).

168. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (Congress's war power may continue after cessation of hostilities to remedy problems created by the war).

169. Jesse Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1497-99 (2005).

170. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948).

171. See text accompanying *supra* note 24.

172. *Contra*, *Al Odah v. United States*, ___ F.3d ___ (D.C. Cir 2007).

173. *The Prize Cases*, 67 U.S. at 636-37.

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wrote:

The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that “a state of war still exists.” The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.¹⁷⁴

Again, an individual right was involved, the right against arbitrary detention, and it was brought through your preferred route of habeas corpus. Yet the Supreme Court refused to examine whether the United States was still sufficiently at “war” to justify the detention of enemy aliens without criminal charges. The *Ludecke* Court clearly recognized that the judiciary does not have the competence to properly determine whether hostilities are ongoing, and it suggested that the responsibility for such decisions rests with the political branches.

Choper: Constitutional questions about the war power arise most prominently when the president takes military action without congressional approval. This implicates the division of authority between the political branches and, in the absence of additional circumstances, raises no individual rights claim. But the equation changes when personal liberties are at stake. Neither the text of the Constitution nor the Court’s precedents call for judicial abdication in those circumstances. Although seized property may have been involved in *The Prize Cases*, no individual rights claim of a taking without just compensation was either put forward or resolved. The ruling in *Ludecke* did involve an individual’s resistance to deportation, but removal of legally admitted aliens has long been considered to be wholly outside the purview of any substantive constitutional protection.¹⁷⁵ Even so, four dissenters in *Ludecke* found that due process had been denied. Indeed, the case I find closest to addressing this matter, *Ex parte Milligan*,¹⁷⁶ employs vigorous judicial review.¹⁷⁷

174. *Ludecke*, 335 U.S. at 170 (citations and footnote omitted).

175. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

176. *Milligan*, 71 U.S. at 2.

177. *Accord*, Hart, *supra* note 70, at 1398.

CONCLUSION

Congress's enactment of the Military Commission Act of 2006 raises several complicated constitutional issues. Our dialogue in honor of Paul Mishkin seeks to clarify the issues at stake and to present the competing arguments. Limiting the habeas corpus jurisdiction of the federal courts for aliens held at Guantanamo Bay may represent error correction, but it also exposes the MCA to attack as unconstitutional jurisdiction stripping or an illegal suspension of the writ of habeas corpus. Our dialogue identifies and articulates the conflict between two long-standing constitutional principles. On one side lies congressional control over the jurisdiction of the federal courts, and a complementary reliance on the political branches to manage wartime strategy and tactics. On the other rests the Due Process Clause's requirement that all persons receive a fair opportunity to challenge the constitutionality of their detention by the government. In the Military Commission Act, the President and Congress chose to support the first set of principles, but the courts are certain to have their say on whether the political branches have adopted the right balance, or whether they must grant the detention and trial of suspected terrorists greater procedural protections.