To: Con Law I §2

From: Prof. Steven D. Jamar

Date: February 22, 2007

Re: Supplemental materials: Executive power to torture or abuse prisoners

Notes

The following materials relate to the executive power to use torture or to excuse torture or to abuse prisoners or to excuse abuse of prisoners when done by United States agents such as the military, the CIA, Department of Defense intelligence officers, the Department of Homeland Security, and ordinary police under the direct authority of the President. These materials include parts of memoranda of the Department of Defense, the Justice Department, the Office of the White House Counsel, and relevant treaties. In addition, portions of several Supreme Court cases have been included in order to give some of the standards set by the Supreme Court of some relevance to these matters. These materials are not comprehensive insofar as they do not include all of the relevant items, have been edited to make the quantity of material more manageable, and do not include some items like United States standards for police conduct.

The United States is a party to a number of international treaties banning torture and abuse of prisoners including among others, the Geneva Conventions; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (opened for signature Dec. 16, 1966; entered into force March 23, 1976; ratified by the United States June 8, 1992); and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 24 I.L.M. 535 (opened for signature Dec. 10, 1984; entered into force June 26, 1987; ratified by the United States Oct. 21, 1994). The United States also enacted a law entitled the "Torture Victim Protection Act of 1991," 106 Stat. 73 (1991), 28 U.S.C.A. § 1350 (2004).

Until President George W. Bush, the United States had consistently officially maintained the position that torture was never acceptable under any circumstances and that the treatment of prisoners had to be humane. President Bush, Secretary of Defense Donald Rumsfeld, former Attorney General John Ashcroft, and former White House Counsel and current Attorney General Alberto Gonzales changed that for five years (2002-2007). On December 30, 2004 the Bush administration nominally disavowed the use of torture. However, it has not disavowed the right to abuse prisoners and use inhumane, aggressive interrogation techniques which under international standards would constitute torture. Both United States law and international law prohibit abuse of prisoners and inhumane treatment of any kind regardless of the status of the prisoners as prisoners of war or civilian criminals.

Among the questions pertinent to Constitutional Law I are the following:

1. Does the President have the power to change United States policy as evidenced in treaties and a duly enacted statute?

2. Does the President have the power to authorize abuse or inhumane treatment or torture before the actions are undertaken by agents of the government? Can the President excuse violations of domestic and international law other than through the pardon power?

3. What, if any, are the checks and balances in the United States government for this sort of issue?

4. What, if any, is the role of the Article III courts in such issues?

Selected Treaty Provisions

Geneva Conventions

The Geneva Conventions are a set of four international treaties and two subsequent protocols (treaties that extend the original four to other circumstances) that govern the treatment of prisoners of war, civilians, and people engaged in armed conflict that are not international wars such as civil wars and various forms of armed insurgencies. In general, people are either members of the armed services or civilians and under the Geneva Conventions, both are protected. If a person is not a member of the military, then that person is a civilian. If the person is a civilian, then the person is to be treated as common criminal if the person engages in violent acts. If a person is to be treated as

common criminal, then certain rights relating to due process and certain standards apply regarding the treatment of prisoners generally. If the person is member of the armed services, then the Geneva Convention provisions regarding treatment of prisoners of war apply.

There are a number of questions relating to power of the President arising under the Geneva Conventions including (1) the claim that the President can suspend their operation unilaterally; (2) the claim that the Geneva Conventions do not apply to Al Qaeda or to the Taliban; and (3) the claim that the Geneva Conventions regarding treatment of prisoners does not bar abuse or even torture. I have limited the excerpts from the treaties dramatically. You may wish to read the treaties themselves especially with regard to the more complete language regarding what they apply to.

Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

Part II. General Protection of Prisoners of War

Art. 13. Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

Art. 14. Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Part III. Captivity

Section VI. Relations Between Prisoners of War and the Authorities

Chapter III. Penal and Disciplinary Sanctions

Section I. General Provisions

Art. 87. Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

Section II. Disciplinary Sanctions

Art. 89. The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days. (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention. (3) Fatigue duties not exceeding two hours daily. (4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

Section III. Juridicial Proceedings

Art. 99. No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

Part IV. Termination of Captivity

Section II. Release and Repatriation of Prisoners of War at the Close of Hostilities

Art. 118. Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War , 12 August 1949.

Part III. Status and Treatment of Protected Persons

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Art. 31. No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Art. 32. The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Section III. Occupied territories

Art. 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Art. 48. Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

Art. 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Section II. Combatants and Prisoners of War

Art. 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. . . .

Art. 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

Part II. Humane Treatment

Art. 4. Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any or the foregoing acts.

International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 24 I.L.M. 535 (opened for signature Dec. 10, 1984; entered into force June 26, 1987; ratified by the United States Oct. 21, 1994)

Article I

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Torture Victim Protection Act of 1991, 28 U.S.C.A. §1350 (Pub. L. 102-256 , Mar. 12, 1992, 106 Stat. 73)

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991."

Sec. 2. Establishment of civil action.

(a) Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial killing.–For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.–For the purposes of this Act–

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally

inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Bush Administration Memoranda

From: Jay S. Bybee, Assistant Attorney General, Office of the Legal Counsel of the Department of Justice
To: Memorandum for Alberto R Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense
Date: January 22, 2002
Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees

pp. 1-2 (citations are omitted throughout)

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of a1 Qaeda and the Taliban militia. We conclude that these Treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that [sic] President has sufficient grounds to find that these treaties do not protect members of the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part 1 of this memorandum describes the WCA and the most relevant treaty that it incorporates: the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").

Parts II and III of this memorandum discuss why other deviations front the text of Geneva III would not present either a violation of the treaty or of the WCA. Part II explains that a1 Qaeda detainees cannot claim the protections of Geneva III because the treaty does not apply to them. Al Qaeda is merely a violent political movement or organization and not a nation-state. As a result, it cannot be a state party to any treaty. Because of the novel nature of this conflict, moreover, a conflict with al Qaeda is not properly included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

Part III discusses why the President may decide that Geneva III, as a whole, does not protect members of the Taliban militia in the current situation. The President has the constitutional authority to temporarily suspend our treaty obligations to Afghanistan under the Geneva Conventions. Although he may exercise this aspect of the treaty power at his discretion, we outline several grounds upon which he could justify that action here. In particular, he

may determine that Afghanistan was not a functioning State, and therefore that the Taliban militia was not a government, during the period in which the Taliban was engaged in hostilities against the United States and its allies. Afghanistan's status as a failed State is sufficient ground alone for the President to suspend Geneva III, and thus to deprive members of the Taliban militia of POW status. The President's constitutional power to suspend performance of our treaty obligations with respect to Afghanistan is not restricted by international law. It encompasses the power to suspend some treaties but not others, or some but not all obligations under a particular treaty. Should the President make such a determination, then Geneva III would not apply to Taliban and any failure to meet that treaty's requirements would not violate either our treaty obligations or the WCA.

Part IV examines justifications for any departures from Geneva III requirements should the President decline to suspend our treaty obligations toward Afghanistan. It explains that certain deviations from the text of Geneva III may be permissible, as a matter of domestic law, if they fall within certain justification or legal exceptions, such as those for self-defense or infeasibility. Further, Part IV discusses the President's authority lo find, even if Geneva III were to apply, that Taliban members do not qualify as POWs as defined by the treaty.

In Part V, we address the question whether, in the absence of any Geneva III obligations, customary international law requires, as a matter of federal law, that the President provide certain standards of treatment for a1 Qaeda or Taliban prisoners. We conclude that customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the United States military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause.

pp. 11-15

A. Constitutional Authority

Article II of the Constitution makes clear that the President is vested with all of the federal executive power, that he "shall be Commander in Chief," that he shall appoint, with the advice and consent of the Senate, and receive, ambassadors, and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2, cl. 2. Congress possesses its own specific foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce. While Article II, section I of the Constitution grants the President an undefined executive power, Article I, section 1 limits Congress to "[a]ll legislative Powers herein granted" in the rest of Article 1.

From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington administration: "The constitution has divided the powers of government into three branches [and] . . . has declared that 'the executive powers shall be vested in the President,' submitting only special articles of it to a negative by the Senate.'" Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly." In defending President Washington's authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President's foreign affairs powers. According to Hamilton, Article I "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power, leaving the rest to flow from the general grant of that power." As future Chief Justice John Marshall famously declared a few years later, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation.. . ."

On the few occasions where it has addressed the question, the Supreme Court has lent its approval to the executive branch's broad powers in the field of foreign affairs. Responsibility for the conduct of foreign affairs and for protection the national security are, as the Supreme Court has observed, "central Presidential domains." The President's constitutional primacy flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II making the President the Chief Executive of the Nation and the Commander in Chief. Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive. This foreign affairs power is independent of Congress: it is "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."

In light of these principles, any enumerated executive power, especially one relating to foreign affairs, must be construed as within the control of the President. Although the Constitution does not specifically mention the power to suspend or terminate treaties, these authorities have been understood by the courts and long executive branch practice as belonging solely to the President. The treaty power is fundamentally an executive power established in article II of the Constitution, and power over treaty matters post-ratification are within the President's plenary authority. As Alexander Hamilton declared during the controversy over the Neutrality Proclamation, "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone." Commentators also have supported this view. According to the drafters of the *Restatement (Third) of the Foreign Relations Law of the United States,* the President has the power either "to suspend or terminate an [international] agreement in accordance with its terns," or "to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States." Indeed, the President's power to terminate treaties, which has been accepted by practice and considered opinion of the three branches, must include the lesser power of temporarily suspending them. We have discussed these questions in detail in recent opinions, and we follow their analysis here."

The courts have often acknowledged the President's constitutional powers with respect to treaties. Thus, it has long been accepted that the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or because it has undergone other changes in sovereignty. Nonperformance of a particular treaty obligation may, in the President's judgment, justify a decision to suspend or terminate the treaty. While Presidents have unrestricted discretion, as a matter of domestic law, in suspending treaties, they can base the exercise of this discretion on several grounds. For example, the President may determine that "the conditions essential to the [treaty's] continued effectiveness no longer pertain." He can decide to suspend treaty obligations because of a fundamental change in circumstances, as the United States did in 1941 in response to hostilities in Europe. The President may also determine that a material breach of a treaty by a foreign government has rendered a treaty not in effect as to that govenunent.

Exercising this constitutional authority, the President can decide to suspend temporarily our obligations under Geneva 111 toward Afghanistan. Other Presidents have partially suspended treaties, and have suspended the obligations of multilatera1 agreements with regard to one of the state parties. The President could also determine that relations under the Geneva Conventions with Afghanistan should be restored once an Afghan government that is willing and able to execute the country's treaty obligations is securely established. A decision to regard the Geneva Conventions as suspended would not constitute a "denunciation" of the Conventions, for which procedures are prescribed in the Conventions. The President need not regard the Conventions as suspended in their entirely, but only in part.

Among the grounds upon which a President may justify his power to suspend treaties is the collapse of a treaty partner, in other words the development of a failed state that could not fulfill its international obligations and was not under the control of any government. This has been implicitly recognized by the Supreme Court. In *Clark v. Allen,* 331 U.S. 503 (1947). the Supreme Court considered whether a 1923 treaty with Germany continued to exist after the defeat, occupation and partition of Germany by the victorious World War II Allies. The Court rejected the argument that the treaty "must be held to have failed to survive the [Second World War], since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. Instead, the Court held hat "the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden v. Ames,* 184 U.S. 270, 288 (1902). We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligations of either party in respect to them." In *Clark*, the Court also made clear that the President could consider whether Germany was able to perform its international obligations in deciding whether to suspend out treaty relationship with her.

Clark demonstrates the Supreme Court's sanction for the President's constitutional authority to decide the "political question" whether our treaty with Germany was suspended because Germany was not in a position to perform its international obligations. Equally here, the executive branch could conclude hat Afghanistan was not "in a position to perform its treaty obligations" because it lacked, at least throughout the Taliban's ascendancy, a functioning central government and other essential attributes of statehood. Based on such facts, the President would have the ground to decide that the Nation's Geneva III obligations were suspended as to Afghanistan. The President could further decide that these obligations are suspended until Afghanistan became a functioning state that is in a

position to perform its Convention duties. The federal courts would not review such political questions, but instead would defer to the decision of the President.

pp. 22-23

C. Suspension under International Law

Although the President may determine that Afghanistan was a failed State as a matter of domestic law, there remains the distinct question whether suspension would be valid as a matter of international law. We emphasize that the resolution of that question, however, has no bearing on domestic constitutional issues, or on the application of the WCA. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.

International law has long recognized that the material breach of a treaty can be grounds for the party injured by the breach to terminate or withdraw from the treaty. Under customary international law, the general rule is that breach of a multilateral treaty by a State party justifies the suspension of that treaty with regard to that State. "A material breach of a multilateral treaty by one of the parties entitles , . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state." If Afghanistan could be found in material breach for violating "a provision essential to the accomplishment of the object or purpose of .the [Geneva Conventions]," suspension of the Conventions would have been justified.

We note, however, that these general rules authorizing suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." Although the United States is not a party to the Vienna Convention, some lower courts have said that the Convention embodies the customary international law of treaties, and the State Department has at various times taken the same view. The Geneva Conventions must be regarded as "treaties of a humanitarian character," many of whose provisions "relat[e] to the protection of the human person." Arguably, therefore, a decision by the United States to suspend Geneva III with regard to Afghanistan might put the United States in breach of customary international law.

p. 25

D. Application of the Geneva Conventions As a Matter of Policy

We conclude this Part by addressing a matter of considerable significance for policy makers. To say that the President may suspend specific provisions of the Geneva Conventions *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied as a matter of U.S. Government policy. There are two aspects to such policy decisions, one involving the protections of the laws of armed conflict and the other involving liabilities under those laws.

First, the President may determine that for reasons of diplomacy or in order to encourage other States to comply with the principles of the Geneva Conventions or other Jaws of armed conflict, it serves the interests of the United States to treat al Qaeda or Taliban detainees (or some class of them) as if they were prisoners of war, even though they do not have any legal entitlement to that status. We express no opinion on the merits of such a policy decision.

Second, the President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgressions against those standards. Thus, for example, even though Geneva Convention III does not apply as a matter of law, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners whom they may happen to seize. The US. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.

A decision to apply the principles of the Geneva Conventions or of other laws of war as matter of policy, not law, would be fully consistent with the past practice of the United Stales. United States practice in post-1949 conflicts reveals several instances in which our military forces have applied Geneva III as a matter of policy, without acknowledging any legal obligation to do so. These cases include the wars in Korea and Vietnam and the

interventions in Panama and Somalia.

pp. 28-29

IV. Detention Conditions Under Geneva III

Even if the President decided not to suspend our Geneva III obligations toward Afghanistan, two reasons would justify some deviations from the requirements of Geneva III. This would be the case even if Taliban members legally were entitled to POW status. First, certain deviations concerning treatment can be justified on basic grounds of legal excuse concerning self-defense and feasibility. Second, the President could choose to find that none of the Taliban prisoners qualify as POWs under article 4 of Geneva III, which generally defines the types of armed forces that may be considered POWs once captured. In the latter instance, Geneva III would apply end the Afghanistan conflict would fall within common article 2's jurisdiction. The President, however, would be interpreting the treaty in light of the facts on the ground to find that the Taliban militia categorically failed the test for POWs within Geneva III's terms. We should be clear that we have no information that the conditions of treatment for Taliban prisoners currently violate Geneva III standards, but it is possible that some may argue that our GTMO (Guantanamo) facilities do not fully comply with all of the treaty's provisions.

A. Justified Deviations Geneva Convention Requirements

We should make clear that as we understand the facts, the detainees currently are being treated in a manner consistent with common article 3 of Geneva III. This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care. They have not yet been tried or punished by any U.S. court system. As result, the current detention conditions in GTMO do not violate common article 3, nor do they present a grave breach of Geneva III as defined in article 130. For purposes of domestic law, therefore, the GTMO conditions do not constitute a violation of the WCA, which criminalizes only violations of common article 3 or grave breaches of the Conventions.

That said, some very well may argue that detention conditions currently depart from Geneva III requirements. Nonetheless, not all of these deviations from Geneva III would amount to an outright violation of the treaty's requirements. Instead, some departures from the text can be justified by some basic doctrines of legal excuse. We believe that some deviations would not amount to a treaty violation, because they would be justified by the need for force protection. Nations have the right to take reasonable steps for the protection of the armed forces guarding prisoners. At the national level, no treaty can override a nation's inherent right to self-defense. Indeed, the United Nations Charter recognizes this fundamental principle. Article 51 of the U.N. Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." As we have discussed in other opinions relating to the war on terrorism, the September 11 attacks on the Pentagon and the World Trade Center have triggered the United States' right to defend itself. Our national right to self-defense must encompass the lesser included right lo defend our own forces from prisoners who pose a threat to their lives and safety, just as the Nation has the authority to take measures in the field to protect the U.S. armed forces. Any Geneva III obligations, therefore, may be legally adjusted to take into account the needs of force protection.

The right to national self-defense is further augmented by the individual right to self defense as a justification for modifications to Geneva 1III based on the need for force protection. Under domestic law, self-defense serves as a legal defense even to the taking of a human life. "(Self defense is . . , embodied in our jurisprudence as a consideration totally eliminating any criminal taint . .. . . It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether . . . ." As the U.S. Court of Appeals for the District of Columbia Circuit has observed, "[m]ore than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that 'all homicide is malicious, and of course, amounts to murder, unless . . . excused on the account of accident or self-preservation . . ..' Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time . . . ." Both the Supreme Court and this Office have opined that the use of force by law enforcement or the military is constitutional, even if it results in the loss of life, if necessary to protect the lives and safety of officers or innocent third parties. Thus, as a matter of domestic law, the United Slates armed forces can modify their Geneva III obligations to take into account the needs of military necessity to protect their individual members.

Other deviations from Geneva III, which do not involve force protection, may still be justified as a domestic

legal matter on the ground that immediate compliance is infeasible. Certain conditions, we have been informed, are only temporary until the Defense Department can construct permanent facilities that will be in compliance with Geneva. We believe that no treaty breach would exist under such circumstances. The State Department has informed us that state practice under the Convention allows nations a period of reasonable time to satisfy their affirmative obligations for treatment of POWs, particularly during the early stages of a conflict. . . .

To: Alberto R. Gonzales, Counsel to the President, August 1, 2002
From: Jay S. Bybee, Assistant Attorney General, Office of the Legal Counsel
Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A

* * * *

p. 1

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm must also result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the sense, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party.

In Part II, we examine the text, ratification history, and negotiating history of the Torture Convention. We conclude that the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman, or degrading treatment or punishment." . . .

In Part III, we analyze the jurisprudence of the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000), which provides civil remedies for torture victims, to predict standards that courts might following in determining what actions reach the threshold of torture in the criminal context. We conclude from these cases that courts are likely to take a totality-of-the-circumstances approach, and will look to an entire course of conduct, to determine whether certain acts will violate Section 2340A. Moreover, these cases demonstrate that most often torture involves cruel and extreme physical pain. In Part IV, we examine international decisions regarding the use of sensory deprivation techniques. These cases make clear that while many of these techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture. From these decisions, we conclude that there is a wide range of such techniques that will not rise to the level of torture.

In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in Chief Powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.

p. 31

V. The President's Commander-in-Chief Power

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached upon the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy

combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

* * * *

p. 34

In order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. . . .

p. 35

Likewise, we believe that, if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties." These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities.

p. 39

Any effort by Congress to regulate interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decision on the battlefield.

From: Secretary of Defense, Donald Rumsfield
To: The Commander, US Southern Command,
Date: April 16, 2003.
Subject: Counter-Resistance Techniques in the War on Terrorism

I have considered the report of the Working Group that I directed be established on January 15, 2003.

I approve the use of specified counter-resistance techniques, subject to the following:

a. The techniques I authorize are those lettered A-X set out at Tab A.

b. These techniques must be used with all the safeguards described at Tab B.

c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

d. Prior to the use of thee techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, 0, or X, you must specifically determine that military necessity requires its use and notify me in advance.

If, in your view, you require additional interrogation techniques for a particular detainee. you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

To: Memorandum for James B. Comey, Deputy Attorney General
From: Daniel Levin, Acting Assistant Attorney General
Date: December 30, 2004
Re: Legal Standards Applicable under 18 U.S.C. §§2340-2340A

p. 1

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

p. 2

This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

> footnote 7 *See, e.g.,* Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction.... Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.

Cases

Read the following excerpts from cases paying close attention to the power relationships of the three branches of government. Does it matter whether Congress has acted to give the executive branch power? To what extent is the judiciary acting to preserve its own power against encroachment by the executive branch? To what extent is the judiciary protecting the rights of Congress against the executive? Is the question one of the contours of constitutional rights or one of interpreting and applying a statute?

Consider the power relationships between the people and the federal government as well, and the judiciary's role in regulating it or in safeguarding the power of the people. Though these cases are interesting and important for many reasons, legal and political, for this part of the course, we are most interested in defining the limits of the executive power to act.

Consider how the principles and power relationships established in these cases affect the analysis of the questions regarding torture and abuse of prisoners. To what extent can the executive torture or abuse or treat prisoners inhumanely, especially nonresident, noncitizens of the United States.

Supreme Court of the United States

Toyosaburo Korematsu

v.

United States

Decided Dec. 18, 1944.

324 U.S. 885, 65 S.Ct. 674.

Background: Fred Toyosaburo Korematsu was convicted of remaining in a portion of a military area from which persons of Japanese ancestry had been ordered excluded, and to review a judgment, 140 F.2d 289, affirming his conviction, he brings certiorari.

Affirmed.

Mr. Justice Black delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provides that

> '* * * whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.'

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. * * *"

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Kiyoshi Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress,

the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

Supreme Court of the United States

Shafiq Rasul et al., Petitioners,

v.

George W. Bush, President of the United States, et al.

Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners,

v.

United States et al.

Decided June 28, 2004.

Background: Aliens being detained by the United States government at the U.S. Naval Base at Guantanamo Bay, Cuba, brought actions contesting legality and conditions of their confinement. The United States District Court for the District of Columbia, Colleen Kollar-Kotelly, J., 215 F.Supp.2d 55, dismissed for lack of jurisdiction, and appeal was taken. The United States Court of Appeals for the District of Columbia Circuit, 321 F.3d 1134, affirmed, and the Supreme Court granted certiorari.

Justice Stevens delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

. . . .

II

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(3). The statute traces its ancestry to the first grant

of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. S. . . .

Habeas corpus is, however, "a writ antecedent to statute, ... throwing its root deep into the genius of our common law." *Williams v. Kaiser*, 323 U.S. 471, 484, n. 2 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the Colonies achieved independence, *Preiser v. Rodriguez,* 411 U.S. 475, 485 (1973), and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus ... unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus "beyond the limits that obtained during the 17th and 18th centuries." *Swain v. Pressley*, 430 U.S. 372, 380, n. 13 (1977). But "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301 (2001). [citation omitted] As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U.S. custody:

> "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 218-219 (1953) (dissenting opinion).

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan,* 4 Wall. 2, 18 L.Ed. 281 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin,* 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita,* 327 U.S. 1 (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

V

In addition to invoking the District Court's jurisdiction under § 2241, the Al Odah petitioners' complaint invoked the court's jurisdiction under 28 U.S.C. § 1331, the federal question statute, as well as § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed the claims founded on § 1331 and § 1350 for lack of jurisdiction, even to the extent that these claims "deal only with conditions of confinement and do not sound in habeas," because petitioners lack the "privilege of litigation" in U.S. courts. 321 F.3d, at 1144 (internal quotation marks omitted). Specifically, the court held that because petitioners' § 1331 and § 1350 claims "necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute," they, like claims founded on the habeas statute itself, must be "beyond the jurisdiction of the federal courts." *Id*., at 1144-1145.

As explained above, *Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the " 'privilege of litigation' " in U.S. courts. 321 F.3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. [citation omitted] And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable "tort ... committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

. . . .

VI

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

It is so ordered.

United States Court of Appeals,District of Columbia Circuit.

Lakhdar BOUMEDIENE, Detainee, Camp Delta, et al., Appellants

v.

George W. BUSH, President of the United States, et al., Appellees

Khaled A.F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah et al., Appellees/Cross-Appellants

v.

United States of America, et al., Appellants/Cross-Appellees.

Argued Sept. 8, 2005.

Decided Feb. 20, 2007.

Before: SENTELLE, RANDOLPH and ROGERS, Circuit Judges.

Opinion for the court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge ROGERS.RANDOLPH, Circuit Judge.

***1** Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. §1331, and the Alien Tort Act, *id.* §1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases,* 355

F.Supp.2d 443 (D.D.C.2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. §1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063)–two cases involving seven detainees–Judge Leon granted the government's motion and dismissed the cases in their entirety. *See* *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C.2005).

***1** In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

***1** In *Al* *Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims-habeas and non-habeas-raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. §2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. §2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al* *Odah*, 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that §2241 did not provide statutory jurisdiction to consider habeas relief for any alien-enemy or not-held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that " 'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,' " *id.* at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

***2** The Supreme Court reversed in *Rasul v. Bush*, 542 U.S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under §2241. *See* *Rasul*, 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See* *Rasul*, 542 U.S. at 484-85. The Court remanded the cases to us, and we remanded them to the district court.

***2** In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> ***2** (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> ***2** (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
>
> > ***2** (A) is currently in military custody; or
> >
> > ***2** (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit ... to have been properly detained as an enemy combatant.

***2** DTA §1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA §1005(e)(2),

(e)(3).

***2** The following June, the Supreme Court decided *Hamdan v. Rumsfeld,* 126 S.Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim ... that is pending on or after the date of the enactment of this Act." DTA §1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide ... after having been presented with the option," the Court concluded "[t]he omission [wa]s an integral part of the statutory scheme." *Hamdan,* 126 S.Ct. at 2769.

***2** In response to *Hamdan,* Congress passed the Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 (2006)(MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended §2241(e). The new amendment reads:

> ***3** (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> ***3** (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

3** MCA §7(a) (internal quotation marks omitted). Subsection (b) states:3**

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

***3** MCA §7(b) (emphasis added).

***3** The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[FN1]

> FN1. Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. *See Bruner v. United States,* 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

***3** As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. §2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended §2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

***3** Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan.*[FN2] Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)"-which repeals habeas jurisdiction-applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all-without exception!" [FN3]

* * *

II.

***4** This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. CONST. art. I, §9, cl. 2, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

> ***4** The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr,* 533 U.S. at 301;

* * *

***5** When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* HOLDSWORTH, *supra,* at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 127-28 (William S. Hein Co.1989) (1827), which included access to habeas corpus, *see* DUKER, *supra,* at 51-53; HOLDSWORTH, *supra,* at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole,* 53 INT'L & COMP. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle,* Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* CHAMBERS, *supra,* at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.

***6** *Johnson v. Eisentrager,* 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention,* 51 COLUM. L. REV. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager,* and that this difference is material for purposes of common law habeas.[FN8] They point to dicta in *Rasul,* 542 U.S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan,* "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States-or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul,* 542 U.S. at 475-had a common law or constitutionally protected right to the writ of habeas corpus." *Hamdan v. Rumsfeld,* No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul,* 542 U.S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"), and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the detainees' way,[FN9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

FN8. The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah,* 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

FN9. The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* HOLDSWORTH, *supra,* at 116-17; DUKER, *supra,* at 51-53. As noted, *supra,* these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.1) involved both extraterritorial detention and alien petitioners.

***6** The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah,* 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager.* There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world ... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See* http://www.archives.gov/iwg/ declassified_records/oss_records_ 263_wilhelm_hoettl.html.)

***7** Later Supreme Court decisions have followed *Eisentrager*. In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id .* at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez,* the Court-again citing *Eisentrager*-found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).[FN10]

FN10. The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.,* 490 U.S. 477, 484-85 (1989).

***7** Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. *See Al Odah,* 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba-not the United States-has sovereignty over Guantanamo Bay. *See Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher,* 43 F.3d 1412 (11th Cir.1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown,* 335 U.S. at 380. Here the political departments have firmly and clearly spoken: " 'United States,' when used in a geographic sense ... does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA §1005(g).

***7** The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac v. Porto Rico,* 258 U.S. 298, 312-13 (1922); *Dorr v. United States,* 195 U.S. 138, 148 (1904); *see also Ralpho v. Bell,* 569 F.2d 607 (D.C.Cir.1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U.S. CONST., art. IV, §3, cl. 2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

***8** Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch,* 233 F.3d 596, 604 (D.C.Cir.2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager,* we held in *Pauling v. McElroy,* 278 F.2d 252, 254 n.3 (D.C.Cir.1960) (per curiam), that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 22 (D.C.Cir.1999); *see also 32 County Sovereignty Comm. v. U .S. Dep't of State,* 292 F.3d 797, 799 (D.C.Cir.2002).[FN11]

FN11. The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution,* 95 GEO. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

***8** As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[FN12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law ...." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly.

FN12. James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9-next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 700-01 & n.437 (1999).

***8** The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

***8** There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

***8** The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States v. Lovett,* 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[FN13] "The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right.*" Amanda L. Tyler, *Is Suspension a Political Question?,* 59 STAN. L. REV. 333, 374 & n.227 (2006) (emphasis added). [FN14]

FN13. *See South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups ....") (citing *United States v. Brown,* 381 U.S.

437 (1965); *Ex parte* *Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also* *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz v. Gabry*, 123 F.3d 909, 912 (6th Cir.1997).

FN14. *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

***9** Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

III.

***9** Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA §1005(e)(2).[FN15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan,* they argued that we were without authority to do so.[FN16] Even if we have authority to convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

FN15. *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

FN16. *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions-not the subsequent CSRT decisions ...."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br. Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

***9** *So ordered.*

ROGERS, Circuit Judge, dissenting.

***9** I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

***9** A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub.L. No. 109-148, Div. A, tit. X, 119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

***10** On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C.2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

I.

***10** Where a court has no jurisdiction it is powerless to act. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

***10** In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus-the MCA-and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

***10** The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs 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." U.S. CONST. art. I, §9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi v. Rumsfeld,* 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman,* 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[FN1]

FN1. The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See, e.g., United States v. Robel,* 389 U.S. 258, 263 (1967); *Gitlow v. New York,* 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman,* 8 U.S. (4 Cranch) at 95); *see also In re Barry,* 42 F. 113, 122 (C.C.S.D.N.Y.1844), *error dismissed sub nom. Barry v. Mercein,* 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that 'the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

***10** The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." [FN2] The Supreme Court has construed the Attainder Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett,* 328 U.S. 303, 315 (1946). In *Lovett,* the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

FN2. Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and therefore amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts-Constitutional Right or Legislative Grace?,* 40 CAL. L. REV. 335, 339 (1952).

***11** Our Constitution did not contemplate such a result. To quote Alexander Hamilton,

***11** * * * a limited constitution * * * [is] one which contains certain specified exceptions to the

> legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

***11** *Id.* at 314 (quoting THE FEDERALIST NO. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham,* 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and potentially vindictive legislation" and acknowledged that the clause "confin [es] the legislature to penal decisions with prospective effect." *See also Marbury,* 5 U.S. (1 Cranch) at 179-80; *Foretich v. United States,* 351 F.3d 1198, 1216-26 (D.C.Cir.2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett,* 328 U.S. at 316, and cannot operate to divest a court of jurisdiction.[FN3]

> FN3. The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a structural limitation on Congress. *See* Op. at 23 n.13. None of these cases makes the court's point. In *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver v. Graham,* 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver,* the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:
>
> > The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.
>
> The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] ... one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

***11** The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

***11** The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[FN4] It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. CONST. art. I, §8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, *see* U.S. CONST. art. I, §7, cl. 1; *see also Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 224 (1974) (finding no individual right under the Ineligibility Clause).

FN4. For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons,* 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says nothing about the distinction, relevant here, between individual rights and limitations on Congress.

***11** That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128-32 (1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., rev. ed.1966). By the court's reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch v. Maryland,* 17 U .S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper Clause); *see also, e.g., Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 220-21 (1989) (Taxing Clause).

***12** The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n.11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension-and by the court's reasoning therefore limiting habeas corpus-to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84,* invoking William Blackstone,

> ***12** To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

***12** THE FEDERALIST NO. 84, at 468 (E.H. Scott ed. 1898) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES * 131-32); *see also Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 125 (1866).

B.

***12** This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul,* 542 U.S. at 483-84, the Supreme Court held that the federal district courts had jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. §2241 by persons detained as "enemy combatants"

by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. *See* 28 U.S.C. ß §2242-2253. After *Rasul,* Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA §1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld,* 126 S.Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

***12** As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf v. USI Film Prods.,* 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS v. St. Cyr,* 533 U.S. 289, 299 (2001); *Ex parte Yerger,* 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> ***13** (b)-EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act *which relate to* any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

***13** MCA §7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. §2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

***13** The detainees suggest that by singling out habeas corpus in §2241(e)(1) and by failing to do so in section 7(b)-and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in §2241(e)(2)-Congress was expressing its intent to make the MCA retroactive only as to §2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus is not "relating to any aspect of ... detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas §2241(e)(1) refers to habeas corpus, §2241(e)(2) deals with "any *other* action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

***13** The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that "*at the absolute minimum,* the Suspension Clause protects the writ 'as it existed in 1789." ' *St. Cyr,* 533 U.S. at 301 (quoting *Felker v. Turpin,* 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution. [FN5]

This proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §3.2 (4th ed.2003).

FN5. It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus-either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment-or presumed the continued vitality of this "writ antecedent to statute," *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C. 1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of habeas corpus as it has developed since 1789. *Compare St. Cyr*, 533 U.S. at 304-05, *and LaGuerre v. Reno*, 164 F.3d 1035, 1038 (7th Cir.1998), *with Felker*, 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr,* without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

1.

***14** Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[FN6] The paucity of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

FN6. The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra.*

***14** The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know that "the

reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." ' *Rasul,* 542 U.S. at 482 (quoting *Ex parte Mwenya,* [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors,* 2 Black. W. 1324, 96 Eng. Rep. 775 (C.P.1779); *Rex v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon,* 9 GREEN BAG 2D 39 (2005) (reporting *United States v. Williams* (C.C.D.Va. Dec. 4, 1813)).

***14** To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v. Schiever,* shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever,* 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[ ] against his will and inclination ... and treated him with so much severity[ ] that [his captor] would not suffer him to go on shore when in port ... but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

***15** The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was carried into Liverpool, England, where Schiever was held in the town jail. *Id.,* 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez,* "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

***15** This court need not make the final inference. It has already been made for us. In *Rasul,* the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA,* 322 F.3d 718, 724 (D.C.Cir.2003) (quoting *United States v. Oakar,* 111 F.3d 146, 153 (D.C.Cir.1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex v. Cowle,* 2 Burr. 834, 97 Eng. Rep. 587 (K.B.1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager,* 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

***15** In *Cowle,* Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.,* 97 Eng. Rep. at 599-600. Through the use of ellipsis marks, the court excises the qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as

the court's reasoning implies, but rather "a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown,* 5 B. & S. 280, 122 Eng. Rep. 835 (K.B.1864). And the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror,* 91 CORNELL L. REV. 497, 512-13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey, Jersey, Minorca,* or the *plantations,*" courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council,* the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (1938). *Cowle,* by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853-55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul,* 542 U.S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004,* 52 NAVAL L. REV. 118, 122-23 (2005).[FN7]

FN7. The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the foreign ship has "no exemption from the jurisdiction of the country into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching,* 56 T.L.R. 3 (K.B. Vacation Ct.1939). In *Rasul,* the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person ... detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching,* 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul,* 542 U.S. at 483 n. 14; *Mwenya,* [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

***16** The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston,* 306 U.S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

***16** First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, §1. Hence, the burden of expediency imposed by the Act could scarcely have prevented common-law courts from exercising habeas jurisdiction in non-criminal matters such as the petitions in these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 CHAMBERS, *supra,* at 11; 9 HOLDSWORTH, *supra,* at 121.

***16** Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson,* 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B.1861), *superseded by statute,* 25 & 26 Vict., c. 20, §1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95, 121 Eng. Rep. at 527-28; *see also Brown,* 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 112, 149, 151 (1967); *see also Rex v. Mitter,* Morton 210 (Sup.Ct., Calcutta 1781), *reprinted in* 1 THE INDIAN DECISIONS (OLD SERIES) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex v. Hastings,* Morton 206, 208-09 (Sup.Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 THE INDIAN DECISIONS, *supra,* at 1005, 1007; *id.* at 209 (opinion of Impey, C.J.); Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501, 2530 n.156 (2005).

***17** Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager,* the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.*" 339 U.S. at 777. Thus *Eisentrager* presented a far different question than confronts this court.[FN8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

FN8. To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul, see* 542 U.S. at 475-79.

2.

***17** This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy ... less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States,* 373 U.S. 1, 14 (1963).

***17** The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States v. Hayman,* 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. §2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or ineffective." *Id.* at 223. The Court came to a similar conclusion in *Swain v. Pressley,* 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. CODE §23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker,* 518 U.S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996,

Pub.L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

***18** These cases provide little cover for the government. As the Supreme Court has stated, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr,* 533 U.S. at 301. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

***18** At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

***18** "Petitioners in habeas corpus proceedings ... are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson,* 394 U.S. 286, 298 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[FN9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See, e.g.,* 28 U.S.C. ß §2243, 2248; *Bollman,* 8 U.S. (4 Cranch) at 125; *Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B.1825); *Schiever,* 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi,* 542 U.S. at 537-38 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[FN10] Moreover, these proceedings occur before a board of military judges subject to command influence, *see Hamdan,* 126 S.Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss v. United States,* 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. §837(a). Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

FN9. At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See, e.g., Ex parte Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B.1825); *Bushell's Case,* Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P.1670). *But see* MCA §3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. §948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman,* 342 U.S. at 210-11.

FN10. With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to obtain evidence to support their claims that they are not enemies of the United States.

***19** This court's review of CSRT determinations, *see* DTA §1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case-even assuming the detainee could learn of its contents-assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA §1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA §1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

***19** Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. *See generally* INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), *available at* http://www.fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits with abhorrence for over 500 years." *A. v. Sec'y of State,* [2006] 2 A.C. 221 ∂ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.); *see also* Hamdan, 126 S.Ct. at 2786; *Jackson v. Denno,* 378 U.S. 368, 386 (1964); *Proceedings Against Felton,* 3 Howell's St. Tr. 367, 371 (1628) (Eng.); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73 (1977) ("Already in the fifteenth and sixteenth centuries, ... the celebrated Renaissance 'panegyrists' of English law were ... extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA §1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* §1005(b)(1), 119 Stat. at 2741.

***19** Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman,* 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra,* §1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al., No-Hearing Hearings: CSRT: The Modem Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/final_ no_hearing_hearings_report.pdf.

3.

***20** Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, §9, cl. 2. However, Congress has not invoked this power.

***20** Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of

that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, ... to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, §1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, §4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, §5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, §67, 31 Stat. 141, 153 (1900); *see* Duncan v. Kahanamoku, 327 U.S. 304, 307-08 (1946). *See also* DUKER, *supra,* at 149, 178 n.190.

***20** Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

***20** In *In re Guantanamo Detainee Cases,* 355 F.Supp.2d 443 (D.D.C.2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations-Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen-who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

***21** [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and ... the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

***21** *Id.* at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

***21** In *Khalid v. Bush,* 355 F.Supp.2d 311 (D.D.C.2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002, [FN11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

FN11. *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

***21** The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see* *Hamdan,* 126 S.Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin,* 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed.1920), the Geneva Conventions, *e.g.,* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the Constitution, *see* U.S. CONST. art. I, §8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi,* 519 U.S. at 519-20.

***21** The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi,* 542 U.S. at 529-32 (plurality opinion); *see* *id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi,* the plurality acknow-ledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the premise underlying the conclusion that there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

***22** Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g.,* *Milligan,* 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. CONST. art. I, §9, cl. 2; *see* 2 STORY, *supra,* §1342; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," DUKER, *supra,* at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis* ") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case,* 3 Howell's St. Tr. 1, 59 (K.B.1627); MEADOR, *supra,* at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason. *See, e.g.,* *Hamdan,* 126 S.Ct. at 2773; *cf.* *Hamdi,* 542 U.S. at 521.

***22** Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman,* the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U.S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex v. Schiever,* discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever,* the court reviewed the prisoner's affidavit and took further

testimony from a witness, who "sw[ore] that Schiever was forced against his inclination ... to serve on board [the French privateer]." 2 Burr. at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.*, 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors,* 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case,* 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P.1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching,* 4 B. & C. 137, 107 Eng. Rep. 1010.

***23** In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States v. Williams* (C.C.D.Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag,* Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the regulations made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra,* at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case,* 1 Brightly's (N.P.) 269 (Pa.1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[FN12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

FN12. Prior to *Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859), and *Tarble's Case,* 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

***23** The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g., Eisentrager,* 339 U.S. 763; *In re Yamashita,* 327 U.S. 1 (1945); *Quirin,* 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee-who could be held indefinitely without even the prospect of a trial or meaningful process-from that of a convicted war criminal. *See Rasul,* 542 U.S. at 476; *Omar v. Harvey,* No. 06-5126, slip op. at 13 (D.C.Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita,* the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. PIERCE O'DONNELL, IN TIME OF WAR 152-53, 165-66, 189 (2005). In *Eisentrager,* 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the military tribunal cases.[FN13]

FN13. There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* ß §3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* §1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal

proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Id. §1-6g. In *Hamdi,* the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.,* The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 PUB. PAPERS 121, 123 (Jan. 28, 2002).

***23** The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases,* 355 F.Supp.2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez,* 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager,* 542 U.S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager* 's constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. §2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U.S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi,* 542 U.S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* MEADOR, *supra,* at 18; *see also Hamdi,* 542 U.S. at 525-26.

***24** Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. §2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. §2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* §2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi,* 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* §2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* §2246. The district court may conduct discovery. *See Harris,* 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." [FN14] District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases,* 355 F.Supp.2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

FN14. Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases,* 355 F.Supp.2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see*

id. at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are cognizable in habeas. *Compare* *Khalid*, 355 F.Supp.2d at 324-25, *with* *Miller v. Overholser*, 206 F.2d 415, 419-21 (D.C.Cir.1953). Congressional action may also clarify matters. *See, e.g.,* S. 185, S. 576, 110th Cong. (2007).

***24** Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

C.A.D.C.,2007.

Boumediene v. Bush

--- F.3d ----, 2007 WL 506581 (C.A.D.C.)