Stripping Habeas Corpus Jurisdiction over Non-Citizens Detained Outside the United States: *Boumediene v. Bush* & The Suspension Clause

*By Scott Keller**

In the ongoing saga over the detainees held at Guantanamo Bay, the D.C. Circuit recently upheld provisions of the Military Commissions Act of 2006 (MCA) that stripped jurisdiction over habeas corpus claims. In *Boumediene v. Bush*, Judges Randolph and Sentelle concluded that detainees could not challenge their statuses as enemy combatants through habeas corpus.[1] Judge Rogers dissented, posing multiple questions that the majority did not have to address.[2] While the U.S. Supreme Court was one vote short of granting certiorari, the issues in *Boumediene* will likely be reviewed by the Court at some point as Justices Stevens and Kennedy voted to deny certiorari simply because the detainees had not exhausted all available remedies.[3]

This article summarizes and expands on the many federal jurisdiction issues implicated by *Boumediene*. Specifically, it responds to the arguments advanced by Judge Rogers's dissent, and structures the Suspension Clause questions in a different manner that tracks the text of the Constitution and narrows the focus of each individual question.

Boumediene v. Bush is hardly the first case addressing the difficult questions surrounding federal courts and the war on terror—nor will it be the last. *Boumediene* specifically addresses whether the MCA constitutionally prevents noncitizens detained outside the United States from challenging their statuses as enemy combatants by resort to the writ of habeas corpus.[4] Thus, it is important to recognize what *Boumediene* does not address. Unlike *Hamdan v. Rumsfeld*, *Boumediene* does not address the military commissions that will try the detainees.[5] Likewise, *Boumediene* does not implicate the habeas rights of U.S. *citizens*[6] or non-citizens held *within* the United States.[7]

This article proceeds in three parts. Part I examines the background leading up to passage of the MCA. Part II briefly addresses the argument that the MCA did not strip habeas jurisdiction. Part III examines the core question of *Boumediene*: whether the Suspension Clause renders the MCA unconstitutional. This part structures the various Suspension Clause questions in a different manner than did Judge Rogers and holds that the Suspension Clause does not invalidate the MCA.

I. Background: From *Rasul v. Bush* To the Military Commissions Act of 2006

The Court has traversed a winding path in addressing Congress's attempts to strip habeas jurisdiction over noncitizens detained outside the United States. In *Rasul v. Bush*, the Court construed the federal habeas corpus statute as extending habeas to non-citizen detainees. Congress reacted by passing the Detainee Treatment Act of 2005 (DTA), which among other things, attempted to strip courts of the jurisdiction to hear habeas challenges of non-citizen detainees. But in *Hamdan v. Rumsfeld*, the Court held that the DTA did not strip courts of jurisdiction over habeas cases pending when the DTA was enacted. Congress responded by passing the MCA, which among other things, attempted to strip courts of jurisdiction over pending habeas cases.

A. Rasul v. Bush

In *Rasul v. Bush*,[8] the Supreme Court opened the door for non-citizen detainees to use the writ of habeas corpus to challenge executive detention.[9] The Court held that non-citizen detainees could obtain writs of habeas corpus under the federal habeas corpus statute, 28 U.S.C. § 2241.[10] Section 2241(a) provides 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.*"[11] Instead of interpreting the phrase "within their respective jurisdictions" to require that a *detainee* be within the territory of the court issuing the writ of habeas corpus, the Court only required that the *custodian* be within the territory of the court.[12]

To reach this result, though, the Court had to distinguish the 1950 case *Johnson v. Eisentrager*.[13] In *Eisentrager*, the Court held that a federal district court lacked jurisdiction to issue writs of habeas corpus to twenty-one German citizens captured in China and held in Germany.[14] According to the five Justices in the *Rasul* majority, the 1948 case *Ahrens v. Clark* foreclosed the federal habeas statute from applying in *Eisentrager*.[15] *Ahrens* had interpreted § 2241's "within their respective jurisdictions" to require the *detainee* to be within the district court's territorial jurisdiction.[16] But the subsequent 1973 case *Braden v. 30th Judicial Circuit Court of Kentucky* "held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute"—rather, the presence of the custodian was sufficient.[17] Thus, according to the *Rasul* Court, while the federal habeas statute did not apply in *Eisentrager* because of *Ahrens*'s interpretation of § 2241, the federal habeas statute did apply in *Rasul* because of *Braden*'s reinterpretation of § 2241. Of course, this required the *Rasul* majority to expel the presumption against giving statutes extraterritorial effect.[18]

Four Justices disagreed with this reasoning. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented. Justice Scalia first noted that *Ahrens* did not address the question of whether writs of habeas corpus could be issued for persons "confined in an area not subject to the jurisdiction of any district court."[19] Rather, *Eisentrager* resolved that question by holding that noncitizens detained outside the jurisdiction of any district court could not obtain a writ of habeas corpus.[20] Justice Scalia then emphasized that *Braden* distinguished *Ahrens*—it did not overrule *Ahrens*.[21] *Braden* involved a prisoner

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who was in the custody of *multiple* jurisdictions within the United States; Braden was confined within Alabama, but Alabama was merely an agent for Kentucky (the jurisdiction that actually issued the detainer).[22] Thus, where a detainee is not subject to the jurisdiction of any district court, *Eisentrager* "unquestionably controls."[23]

Justice Kennedy, concurring in the judgment, agreed that *Eisentrager* framework applied and that Justice Scalia's dissent "expose[d] the weakness in the Court's conclusion that *Braden*… 'overruled the statutory predicate to *Eisentrager*'s holding.'"[24] However, Justice Kennedy extended habeas to the Guantanamo detainees by distinguishing the facts of *Eisentrager* on two grounds. First, unlike *Eisentrager* where the detention was in Germany, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."[25] Second, as of 2004, "the detainees at Guantanamo Bay [were] being held indefinitely, and without benefit of any legal proceeding to determine their status."[26] But *Eisentrager* rejected the claim that the *Constitution* extended habeas to the German detainees.[27] Thus, simply distinguishing *Rasul* as presenting more favorable facts than *Eisentrager*, as Justice Kennedy did, would not necessarily extend habeas to the Guantanamo detainees through § 2241—unless Justice Kennedy implicitly made a constitutional decision instead of a statutory decision.

Even though *Rasul v. Bush* would have permitted non-citizen detainees to use habeas corpus to challenge their detentions, much has changed in the three years since *Rasul* was decided. First, Congress subsequently stripped courts of the jurisdiction to issue writs of habeas corpus for non-citizen detainees in the MCA.[28] *Rasul* established a statutory right to habeas corpus—not a constitutional right—which can be overridden by a subsequent congressional act.[29] Thus, a congressional amendment to § 2241 that strips habeas jurisdiction would override *Rasul*. Second, it is unclear how the current Court would have decided *Rasul v. Bush*. Justice O'Connor, who was the fifth vote for the *Rasul* majority, has been replaced by Justice Alito. Plus, contrary to the observation in Justice Kennedy's *Rasul* concurrence, detainees are no longer "being held indefinitely, and without benefit of any legal proceeding to determine their status."[30] After *Hamdi v. Rumsfeld*, the government began using Combatant Status Review Tribunals ("CSRT") to determine whether each detainee is an enemy combatant, and the government is attempting to initiate military commission proceedings against enemy combatants.[31] Therefore, it is unclear whether the Court today would interpret § 2241 in the same manner. But if § 2241 would no longer provide habeas corpus for non-citizen detainees, then there would be no Suspension Clause argument as there would be no habeas to suspend—unless *Rasul* was a constitutional holding. Regardless, *Rasul* is far from the last word on whether non-citizen detainees can use habeas corpus to challenge their detentions.

B. The Detainee Treatment Act of 2005 And Its Subsequent Limitation by Hamdan v. Rumsfeld

In response to *Rasul v. Bush*, Congress enacted the Detainee Treatment Act of 2005.[32] Subsection (e)(1) of the DTA amended 28 U.S.C. § 2241, the federal habeas statute, by adding § 2241(e):

> except as provided in section 1005 of the [DTA], no court, justice, or judge shall have
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> jurisdiction to hear or consider—
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> (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) 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—
>
> (A) is currently in military custody; or
>
> (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.[33]

The "except as provided for in section 1005 of the [DTA]" refers to "subsections (e)(2) and (e)(3) of DTA § 1005, which provided for exclusive judicial review of CSRT determinations and military commission decisions in the D.C. Circuit."[34] Thus, among other things, the DTA attempted to do three things: (1) strip courts of habeas jurisdiction over non-citizen detainees; (2) strip courts of direct review over the detention of non-citizens; and (3) create an exclusive forum for reviewing CSRTs and military commissions in the D.C. Circuit.

However, *Hamdan v. Rumsfeld* held,[35] over a vigorous dissent by Justice Scalia,[36] that the DTA did not strip courts of jurisdiction over habeas cases that were pending when the DTA was enacted because of an internal statutory distinction in the DTA.[37] According to DTA § 1005(h), subsections (e)(2) and (e)(3)—providing for D.C. Circuit review of CSRT and military commission decisions—"shall apply with respect to any claim… that is pending on or after the date of the enactment of this Act."[38] In contrast, subsection (e)(1)—the jurisdiction stripping—was silent as to whether it applied to cases *pending* when the DTA was enacted. Thus, because Congress explicitly provided that the D.C. Circuit review provisions applied to pending cases but was silent regarding the jurisdiction strip, the Court concluded that the DTA did not strip jurisdiction over non-citizen detainees.[39] However, *Hamdan* only postponed the constitutional questions relating to stripping habeas jurisdiction over non-citizens detainees.

C. The Military Commissions Act of 2006

Congress responded to *Hamdan* by passing the Military Commissions Act of 2006.[40] As Judge Randolph noted in *Boumediene*, "one of the primary purposes of the MCA was to overrule *Hamdan*."[41] In § 7(a) of the MCA, Congress again amended 28 U.S.C. § 2241(e) to strip courts of habeas and direct review jurisdiction over non-citizen detainees, while maintaining the DTA's D.C. Circuit review of CSRTs and military commissions.[42] But, in § 7(b) of the MCA, Congress specifically stated that § 7(a)'s amendment would apply to pending cases:

> 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.[43]

As a result, *Boumediene v. Bush* deals with the application of the MCA's habeas jurisdiction stripping, which explicitly applies to pending cases.

II. Does the MCA Strip Habeas Jurisdiction Over Noncitizen Detainees?

All three judges on the *Boumediene* D.C. Circuit panel held that the MCA did in fact strip jurisdiction over pending non-citizen habeas cases.[44] While MCA § 7(a)(1) is clear that Congress intended to strip all courts of habeas jurisdiction over non-citizen detainees,[45] the detainees argued that the MCA was not clear enough and therefore did not succeed in stripping habeas jurisdiction.[46] The detainees relied on *INS v. St. Cyr*, where a five Justice majority (which included Justice Kennedy) required a congressional clear statement to strip habeas jurisdiction[47]—at least in the absence of "another judicial forum" where "the question of law could be answered."[48] Justice Scalia criticized *St. Cyr* as "fabricat[ing] a superclear statement, 'magic words' requirement… unjustified in law and unparalleled in any other area of our jurisprudence."[49]

Indeed, the detainees appeared to be asking for such a "superclear statement" as they argued that MCA § 7(b) should have specifically referenced habeas cases instead of merely cross-referencing MCA § 7(a), which stripped both habeas and direct review jurisdiction.[50] Specifically, the detainees pointed out that MCA § 7(b)—which explicitly stripped jurisdiction over pending cases—referred to "detention, transfer, treatment, trial, or conditions." The jurisdiction stripping relating to direct review, MCA § 7(a)(2), referred to this same list. However, the habeas jurisdiction stripping, MCA § 7(a)(1), referred only to writs of habeas corpus. Therefore, the detainees argued, MCA § 7(b) only meant to apply MCA § 7(a)(2) retroactively—not MCA § 7(a)(1); in other words, habeas jurisdiction was not stripped for pending cases.

Both the *Boumediene* majority and the dissent quickly disposed of this argument. Calling this argument "nonsense," Judge Randolph's majority opinion concluded that the "*St. Cyr* rule of interpretation… demands clarity, not redundancy."[51] Likewise, Judge Rogers's dissent agreed that "by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none."[52] Such holdings cleared the way for the D.C Circuit to address the constitutional issues over the MCA's habeas jurisdiction stripping.

III. Is the MCA Unconstitutional Under the Suspension Clause?

Even if the MCA strips habeas jurisdiction over non-citizen detainees held outside the United States, the Suspension Clause could render this unconstitutional. The Suspension Clause provides 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.[53]

This seemingly straight-forward clause raises many questions. First, what does "The Privilege of the Writ of Habeas Corpus" protect? Second, when is habeas corpus "suspended?" Third, what qualifies as "Rebellion," "Invasion," or the "public Safety," and are these nonjusticiable political questions?

A. What Does "The Privilege of the Writ of Habeas Corpus" Protect?

The Supreme Court has not yet defined what the Suspension Clause's phrase "The Privilege of the Writ of Habeas Corpus" protects,[54] but there are essentially two possibilities: (1) the writ "as it existed in 1789,"[55] or (2) subsequent expansions of habeas corpus. *St. Cyr* held that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'"[56] However, the Court has left open whether subsequent expansions of habeas corpus are protected by the Suspension Clause.[57]

In *Boumediene*, the D.C. Circuit quarreled over what was protected by the writ of habeas corpus as it existed in 1789. The *Boumediene* majority accepted the first possible definition (implicitly rejecting the second): "the Suspension Clause protects the writ 'as it existed in 1789.'"[58] After distinguishing three historical cases that the detainees relied on, the majority concluded 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."[59] Furthermore, the majority rejected the detainee's reliance on *Rasul*.[60] In dicta, *Rasul* stated that granting habeas to non-citizens detained outside the United States "is consistent with the historical reach of the writ of habeas corpus."[61] The *Rasul* Court based this statement on historical cases that alternatively held (1) that habeas was available for *citizens* detained outside the sovereign's territory or (2) that habeas was available for non-citizens detained *within* the sovereign's territory. But as Justice Scalia's dissent in *Rasul* noted, the majority did not cite "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ."[62]

Instead, the *Boumediene* majority found that *Eisentrager* controlled, and *Eisentrager* denied habeas to non-citizens detained outside the United States:

> 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.[63]

The majority then noted that because the United States did not have sovereignty over Guantanamo Bay, Cuba, habeas corpus would not have been available to non-citizens detained by the United States in Guantanamo Bay in 1789.[64] Therefore, the Suspension Clause did not prevent the MCA from stripping habeas jurisdiction over the *Boumediene* detainees.

Judge Rogers, in dissent, argued that habeas corpus would have been available in 1789 to non-citizens detained outside the United States.[65] She recognized that while there may be no case before 1789 where a court exercised habeas jurisdiction over a non-citizen detained outside the sovereign's territory, there was also no case denying such habeas jurisdiction.[66] Rather, relying on cases that extended habeas to *citizens* detained outside the sovereign's territory and cases that extended habeas to non-citizens detained *within* the sovereign's territory,[67] Judge Rogers would have "piec[ed] together the considerable circumstantial evidence" to determine that habeas in 1789 would have been extended to non-citizens detained outside the sovereign's territory.[68] Finally, Judge Rogers distinguished *Eisentrager*. The detainees in *Eisentrager* claimed they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.*"[69] However, the *Boumediene* detainees were not arguing 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."[70]

However, both of Judge Rogers's arguments overlook crucial responses. First, it does not follow that the writ in 1789 extended to *non-citizens* detained *outside* the sovereign's territory simply because habeas was issued historically (1) to *citizens* detained outside the sovereign's territory and (2) to non-citizens held *within* the sovereign's territory. This overlooks a meaningful distinction that could explain the absence of any case extending habeas to non-citizens detained outside the sovereign's territory: the power to issue the writ of habeas corpus requires some personal, territorial connection to the sovereign.[71] Cases involving citizens *or* detention within the sovereign's territory both have such a connection—either citizenship or physical presence. But cases involving *neither* citizens *nor* detention within the sovereign's territory (like *Boumediene*) lack this territorial connection.

Second, Judge Rogers's attempt to distinguish *Eisentrager* proves too much. If the writ of habeas corpus would have been available in 1789, "when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus," then it should have been available in 1950 for *Eisentrager*—unless, sometime after 1789, Congress eliminated the ability of non-citizens detained outside the United States to obtain writs of habeas corpus.[72] But nothing between 1789 and 1950 purported to take away the ability of non-citizens detained outside the United States to obtain writs of habeas corpus. Thus, when *Eisentrager* held that the German detainees had neither a statutory nor a constitutional right to habeas corpus, it was also holding that the writ was not available in 1789.[73] The fact that the *Eisentrager* detainees claimed a constitutional right to habeas and the *Boumediene* detainees claimed the Suspension Clause restricted Congress's power to eliminate a preexisting statutory right is a distinction without a difference.

Of course, even if habeas would not have been extended to non-citizens detained outside the United States in 1789, the Supreme Court could hold—contrary to the *Boumediene* majority—that "The Privilege of the Writ of Habeas Corpus" protects some subsequent expansion of habeas corpus. The Court could hold that the Suspension Clause protects any congressional expansion of habeas from subsequent elimination. Under this view, because *Rasul* (or *Braden*) extended the federal habeas statute to non-citizens detained outside the United States, the Suspension Clause would protect against the MCA's habeas jurisdiction stripping.

Then again, the Court could take a more moderate approach. For instance, the Court could focus on the facts and circumstances of the armed conflict. Thus, the Court could hold that when "military exigencies" exist, the Suspension Clause does not protect the elimination of habeas.[74] Alternatively, the Court could focus on the facts and circumstances relating to the territory of detention. As Professor J. Andrew Kent has argued, the Court could hold that the Suspension Clause only protects the elimination of habeas in "territor[ies] over which the United States exercises such pervasive and persistent sovereignty that a hostile military incursion could be fairly described as an 'invasion' vis-à-vis the United States, or an armed insurrection could fairly be described as a 'rebellion' vis-à-vis the United States."[75] Regardless, *Boumediene v. Bush* is hardly the final word on what the Suspension Clause's phrase "The Privilege of the Writ of Habeas Corpus" protects.

B. What Qualifies as "suspended"?

The *Boumediene* majority did not address any of the remaining questions because the first question was dispositive. However, the Supreme Court could reach further questions by either disagreeing with the *Boumediene* majority's historical analysis of the writ or by extending the Suspension Clause's protection beyond the writ as it existed in 1789. The next question would be whether habeas corpus has been "suspended" under the Suspension Clause. There are essentially two separate questions: (1) Has the operative definition of "suspended" been met?; (2) Even if this definition has been met, did Congress provide an "adequate and effective" alternative remedy "to test the legality of a person's detention," so that the stripping of habeas jurisdiction "does not constitute a suspension of the writ of habeas corpus?"[76]

1. Definition of "suspended"

Without addressing this question explicitly, the *St. Cyr* majority defined "suspended" as merely "withdraw[ing]" the "power to issue the writ of habeas corpus."[77] Presumably, stripping habeas jurisdiction *where it previously existed* would amount to such a withdrawal. *Rasul* construed the federal habeas statute as permitting habeas jurisdiction over non-citizen detainees, so the MCA probably meets the *St. Cyr* definition of "suspended."[78] Judge Rogers's *Boumediene* dissent implicitly adopted this position.[79]

In contrast, Justice Scalia's dissent in *St. Cyr* determined that "suspended" only means that Congress has "temporarily withheld operation of the writ," as opposed to "permanently alter[ing] its content."[80] Examining the history of the writ, Justice Scalia found that the temporary elimination of the writ "was a distinct abuse of majority power… that had manifested itself often in the Framers' experience."[81] These suspension acts would "temporarily but entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."[82] Justice Scalia fully recognized that

a permanent alteration of the writ was subject to majoritarian abuse, but he also noted "that is not the majoritarian abuse against which the Suspension Clause was directed."[83]

Nonetheless, the implicit definition of "suspended" used by the *St. Cyr* majority probably controls. Under this view, the MCA probably "suspended" habeas corpus; the MCA withdraws the power of judges to issue writs of habeas corpus to non-citizen detainees—a power previously established under the federal habeas statute by *Rasul*.[84]

2. Adequate and Effective Alternative Remedy

Even if the operative definition of "suspended" is met, *Swain v. Pressley* held that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."[85] In other words, if habeas is replaced by an alternative adequate and effective remedy, the Court will deem that habeas is not "suspended" for purposes of the Suspension Clause. The MCA specifically preserved the alternative remedy established by the DTA (D.C. Circuit and possible Supreme Court review over CSRTs and military commissions),[86] which begs the question of whether the DTA's alternative remedy is "adequate and effective" under *Swain*.[87]

Judge Rogers determined that the DTA was not an adequate and effective remedy. In establishing her baseline for comparison, she quoted the 1969 case *Harris v. Nelson* for the proposition that the detainees should be "'entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts.'"[88] She found that the "CSRTs fall far short of this mark" because CSRT practices implemented by the MCA "impede[] the process of determining the true facts underlying the lawfulness of the challenged detention."[89]

But Judge Rogers's baseline for evaluating the DTA's D.C. Circuit review was incorrect. The baseline here should be the degree of *executive detention* habeas review over *military tribunals*.[90] However, Judge Rogers's quoted baseline dealt with *collateral attack* habeas review over *typical criminal convictions* completely removed from the military context.[91] Furthermore, the *Harris v. Nelson* standard has become an anachronism; in decades following *Harris v. Nelson*, the Court cut down on the degree of habeas review afforded.[92]

In actuality, the degree of executive detention habeas review over military tribunals is quite limited. The Court gives extremely broad deference to military commissions even under habeas review,[93] and the same deference would be accorded to the CSRTs.[94] During habeas review of executive detentions, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive."[95] In fact, compared to executive detention habeas review over military tribunals, the DTA affords detainees *more* review.[96] Granted, the D.C. Circuit review of CSRTs is limited to determining (1) whether the CSRT determination is "consistent with the standards and procedures" established for CSRTs[97] and (2) whether these procedures are "consistent with the Constitution and laws of the United States."[98] But even with these limitations, this judicial review is an adequate and effective alternative remedy. First, the DTA permits the D.C. Circuit to review constitutional challenges such as due process claims.[99] Second, because the D.C. Circuit can inquire whether the CSRT determination is consistent with the CSRT's standards, it can evaluate whether the correct evidentiary standard was used.[100] Thus, under the DTA, the D.C. Circuit would be able to review the evidence by examining the evidentiary standard[101]—which is certainly more review than only asking if "there was some evidence" to support the CSRTs determination.[102]

Simply, the DTA's D.C. Circuit review provides more review than executive detention habeas review over military tribunals. Therefore, the DTA provides an alternative adequate and effective remedy under *Swain*. Thus, the MCA's habeas jurisdiction stripping has not "suspended" habeas for purposes of the Suspension Clause.

C. What Qualifies as "Rebellion," "Invasion," or the "public Safety"? And Are These Non-justiciable Political Questions?

Even if "The Privilege of the Writ of Habeas Corpus" is "suspended," this is constitutionally permissible "in Cases of Rebellion or Invasion" when "the public Safety may require it."[103] Unfortunately, the Court has provided little guidance on what constitutes "Cases of Rebellion or Invasion" or when "the public Safety may require" suspension of habeas. Without addressing the substantive content of these provisions, Judge Rogers's *Boumediene* dissent would have found that these predicates were not satisfied because Congress did not provide a clear statement that at least one of these predicates existed.[104] Judge Rogers explained that "[o]n only four occasions has Congress seen fit to suspend the writ," and "[e]ach suspension has made specific reference to a state of 'Rebellion' or 'Invasion' and each suspension was limited to the duration of that necessity."[105] However, the MCA contained "neither of these hallmarks of suspension" and "there was "no indication that Congress sought to avail itself of the exception in the Suspension Clause."[106] Judge Rogers's view, though, is quite remarkable because it stands in stark contrast to a major argument that she did not address.

Multiple Justices have posited that questions relating to the Suspension Clause's "Rebellion," "Invasion," or "public Safety" predicates are non-justiciable political questions.[107] In *Hamdi*, Justice Scalia (joined by Justice Stevens) and Justice Thomas put forth this view.[108] Similarly, Chief Justice Marshall,[109] Justice Story,[110] and Chief Justice Taney[111] suggested that questions about the Suspension Clause's predicates are non-justiciable. According to this view, the very fact that Congress suspended habeas corpus means that Congress determined that "Rebellion" or "Invasion" existed such that the "public Safety" required suspension.

In contrast, Professor Amanda Tyler argues that whether "Rebellion" or "Invasion" exists is a justiciable question[112]—but she suggests that consideration of the "public Safety" predicate may be nonjusticiable.[113] She questions the views presented by multiple Justices on the grounds that "there is no settled authority on the justiciability of suspension, and the handful of jurists who have expressed an opinion on the question have done

so cursorily, offering little more than an institutional hunch as a basis for their conclusions."[114] Then, she essentially makes two arguments in favor of the justiciability of the suspension predicates.[115] First, she presents various textual arguments. She begins with the contextual argument that the "Suspension Clause abuts the Ex Post Facto and Bill of Attainder Clauses," both of which "are routinely enforced by the courts."[116] Additionally, the existence of "Rebellion or Invasion" represents the "kind of bright-line limitation on political authority that seems to invite judicial enforcement."[117] Finally, she uses counterfactual redrafting to explain that the Framers would have specifically mentioned Congress in the Suspension Clause if they wanted to make suspension non-justiciable.[118]

These textual arguments are far from conclusive. The Constitution invites many other "bright line limitation[s]," yet the Court hardly finds them dispositive. For example, the phrases "commerce… among the several states"[119] and "All legislative powers"[120] invite a formalistic view of the Commerce Clause and an acceptance of the non-delegation doctrine, respectively. But the Court has eschewed these formalistic limits[121] largely on the grounds that it is not competent to stand in the way of Congress.[122] Concerns of institutional competency are only heightened in the suspension context when the elected representatives of the people deem it necessary to suspend habeas corpus and the President acts under this authorization. This institutional competency argument also undermines the other textual arguments made by Tyler. The Ex Post Facto and Bill of Attainder Clauses do not implicate war powers or emergency questions. And the fact that the Framers rejected a proposal unrelated to habeas that gave Congress the authority to strike down unconstitutional state laws bears no relevance to the institutional competency of courts to judge whether a "Rebellion or Invasion" exists.[123]

Second, and analogously, Tyler points out that the Court has in fact "performed similar analyses in war powers cases since the time of Chief Justice Marshall."[124] She proceeds to list various precedents where the Court invalidated *executive* action during times of armed conflict.[125] However, suspension is completely different because it involves *congressional* action. Indeed, in each of the cases Tyler cites,[126] the President was *not* acting "pursuant to an express or implied authorization of Congress."[127] Thus, in these cases, the Court was not faced with the deferential first category of Justice Jackson's famous *Youngstown* separation of powers framework, which requires the "widest latitude of judicial interpretation."[128] But suspension cases will always involve an "express… authorization of Congress"[129] under the consensus view that only Congress can "suspend[ ]" habeas corpus.[130]

D. Synthesizing the Suspension Clause Arguments

As this Part shows, it would require five separate holdings for the Suspension Clause to render the MCA's suspension provisions unconstitutional. First, "The Privilege of the Writ of Habeas Corpus" in the Suspension Clause would need to cover more than the writ "as it existed in 1789."[131] Indeed, it would have to cover *Rasul*'s expansion of habeas in 2004,[132] even though Congress tried twice to counteract *Rasul v. Bush*.[133] Second, "suspended" in the Suspension Clause would need to apply to permanent withdrawals of habeas.[134] Third, the DTA's alternative remedy of D.C. Circuit review would need to be considered ineffective or inadequate, even though it provides more review than habeas.[135] Fourth, questions regarding the Suspension Clause's predicates must be justiciable, and, fifth, a "Rebellion or Invasion" implicating the "public Safety" must not exist.[136] Only after making those five holdings could a court invoke the Suspension Clause to invalidate the MCA's provisions stripping habeas jurisdiction over the CSRT determinations.

CONCLUSION

Regardless of how the *Boumediene* habeas jurisdiction stripping issue is resolved, there will be many more questions regarding the war on terror detainees held at Guantanamo Bay. At a minimum, there will be challenges regarding due process and the CSRTs and military commissions, habeas jurisdiction over the military commissions, and direct review in the D.C. Circuit. But as to the habeas jurisdictions stripping over CSRT determinations, the D.C. Circuit's holding in *Boumediene v. Bush* is correct: the MCA validly strips jurisdiction for issuing writs of habeas corpus to non-citizens detained outside the United States for purposes of challenging CSRT determinations.

Endnotes

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

2 *Id.* (Rogers, J., dissenting).

3 Boumediene v. Bush, No. 06-1195, 2007 WL 957363, at *1 (U.S. Apr. 2, 2007) (Stevens & Kennedy, JJ, respecting the denial of certiorari).

4 There are two distinct uses of habeas corpus: (1) to challenge executive detention when there is no judicial conviction, and (2) to collaterally attack criminal convictions. *See* Erwin Chemerinsky, Federal Jurisdiction § 15.1, at 867 (4th ed. 2003) ("[A]lthough this chapter deals primarily with habeas corpus review of criminal convictions, which is by far the most frequent use of habeas corpus, it should be noted that habeas corpus is available whenever a person is in government custody."); Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1179, 1285 (5th ed. 2003) ("The writ remains important, however, outside the postconviction context, as a mechanism for constitutional attack upon official claims of power to detain."). *Boumediene* implicates the former. *Boumediene*, 476 F.3d at 994.

5 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 (2006).

6 The MCA does not attempt to strip habeas jurisdiction for U.S. Citizens. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006).

7 *Cf.* Al-Marri v. Wright, 443 F. Supp. 2d 774, 776–77 (D.S.C. 2006) (involving a petition for a writ of habeas corpus by a noncitizen detained within the United States, who had been designated as an enemy combatant).

8 542 U.S. 466 (2004).

9 Justice Stevens wrote the majority opinion and was joined by Justices O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 468. Justice Kennedy concurred in the judgment. *Id.* Justice Scalia dissented and was joined by Chief Justice Rehnquist and Justice Thomas. *Id.*

10 *See id.* at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

11 28 U.S.C. § 2241(a) (emphasis added).

12 *See Rasul*, 542 U.S. at 478–79 ("Rather, because 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,' a district court acts 'within [its] respective jurisdiction" within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973)).

13 339 U.S. 763 (1950).

14 *Id.* at 766.

15 *Rasul*, 542 U.S. at 476–77 (citing Ahrens v. Clark, 335 U.S. 188 (1948)).

16 *Id.*

17 *Id.* at 478 (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)).

18 *See id.* at 480–81; *id.* at 500–02 (Scalia, J., dissenting) (criticizing the majority for ignoring this presumption); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))).

19 *Rasul*, 542 U.S. at 490 (Scalia, J., dissenting) (quoting Ahrens v. Clark, 335 U.S. 188, 192 n.4 (1948)).

20 *Id.* at 491.

21 *Id.* at 494.

22 *Id.* at 494–95 (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 498–500 (1973)).

23 *Id.* at 495.

24 *Id.* at 485 (Kennedy, J., concurring in the judgment) (quoting *Rasul*, 542 U.S. at 479 (majority opinion)).

25 *Id.* at 487. *But see* Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (noting that noncitizens detained outside the United States could not invoke habeas because the noncitizens "at no relevant time were within any territory over which the United States is *sovereign*" (emphasis added)).

26 *Rasul*, 542 U.S at 487–88.

27 *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950)) ("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*…." (emphasis added)).

28 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006) ("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."); *see also Detainee* Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739 (2005).

29 *See Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

30 *Id.* at 487–88 (Kennedy, J., concurring in the judgment).

31 *Hamdi* held that a U.S. citizen has a due process right to some procedures for challenging the factual basis for being classified as an enemy combatant. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

32 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

33 *Id.* § 1005(e)(1) (internal quotation marks omitted).

34 Boumediene v. Bush, 476 F.3d 981, 985 (D.C. Cir. 2007).

35 Chief Justice Roberts did not participate in the decision as he was on the D.C. Circuit panel that decided the case below. Hamdan v. Rumsfeld, 415 F.3d 33 (2005), *rev'd*, 126 S. Ct. 2749 (2006).

36 *See id.* at 2810 (Scalia, J., dissenting) ("An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date."). Justice Scalia was joined by Justice Thomas and Justice Alito. *Id.*

Justice Thomas, joined by Justice Scalia in full and Justice Alito in part, wrote an equally vigorous dissent on the merits. *Id.* at 2823 (Thomas, J., dissenting).

37 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 (2006).

38 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(h), 119 Stat. 2739 (2005).

39 *Hamdan*, 126 S. Ct. at 2769 (2006).

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

41 Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir. 2007).

42 Section 7(a) of the MCA reads:

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

(2) Except as provided in [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.

Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600 (2006) (internal quotation marks omitted).

43 *Id.* § 7(b) (emphasis added).

44 *Boumediene*, 476 F.3d at 986–88; *see id.* at 999 (Rogers, J., dissenting) ("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 and when withdrawing habeas jurisdiction from the courts, Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay." (citations omitted)).

45 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006) ("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.").

46 *See Boumediene*, 476 F.3d at 987 (stating that detainees argued that the MCA does not meet the *St. Cyr* clear statement rule for repealing habeas corpus jurisdiction).

47 *See* INS v. St. Cyr, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal [of habeas jurisdiction].").

48 *Id.* at 314.

49 *Id.* at 327 (Scalia, J., dissenting).

50 *Boumediene*, 476 F.3d at 987.

51 *Id.*

52 *Id.* at 999.

53 U.S. Const. art. I, § 9, cl. 2.

54 As Justice Scalia has noted, the Suspension Clause itself does not guarantee a constitutional right to habeas corpus. *See* INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) ("A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended. Indeed, that was precisely the objection expressed by four of the state ratifying conventions—that the Constitution failed affirmatively to guarantee a right to habeas corpus." (citations omitted)).

55 *Id.* at 301 (majority opinion); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 47 U. Chi. L. Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."), *cited in* Boumediene v. Bush, 476 F.3d 981, 988 (D.C. Cir. 2007).

56 *St. Cyr*, 533 U.S. at 301 (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).

57 *Id.* at 300–01; Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977).

58 *Boumediene*, 476 F.3d at 988 (quoting *St. Cyr*, 533 U.S. at 301).

59 *Id.* at 990.

60 *Id.*

61 Rasul v. Bush, 542 U.S. 466, 481 (2004).

62 *Id.* at 505 n.5 (Scalia, J., dissenting).

63 *Boumediene*, 476 F.3d at 990 (quoting Johnson v. Eisentrager, 339 U.S. 763, 768 (1950)).

64 *Id.* at 992.

65 *Id.* at 1000–04 (Rogers, J., dissenting).

Thus, she would not have reached the question of whether the Suspension Clause only protects the writ as it existed in 1789" or if it protects subsequent expansion of habeas corpus. *Id.* at 1000 n.5.

66 *Id.* at 1000.

67 *See id.* at 1001–04.

68 *Id.* at 1001.

69 *Id.* at 1004 (quoting Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)).

70 *Id.*

71 *Cf.* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (reaffirming *Eisentrager*'s holding that noncitizens detained outside the United States do not have a constitutional right to habeas corpus by noting that "the result of accepting [the noncitizen's] claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries").

72 *Boumediene*, 476 F.3d at 988; *see also* Felker v. Turpin, 518 U.S. 651, 663, 664 (1996) (recognizing that in 1789 "the first Congress made the writ of habeas corpus available").

73 *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) ("Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.").

74 *Cf.* Rasul v. Bush, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring in the judgment) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet *military exigencies* becomes weaker." (emphasis added)).

75 J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 523 (2007), *cited in* Boumediene v. Bush, 476 F.3d 981, 992 n.11 (D.C. Cir. 2007).

76 Swain v. Pressley, 430 U.S. 372, 381 (1977).

77 INS v. St. Cyr, 533 U.S. 289, 305 (2001); *see id.* at 304–05 ("In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge *with power to issue the writ of habeas corpus*. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have *withdrawn that power* from federal judges and provided no adequate substitute for its exercise." (emphasis added)).

78 *See supra* Part I.A.

79 *See* Boumediene v. Bush, 476 F.3d 981, 1004 (D.C. Cir. 2007) (Rogers, J., dissenting) ("[T]he Suspension Clause restricts Congress's power to *eliminate a preexisting statutory right*." (emphasis added)).

80 *St. Cyr*, 533 U.S. at 338 (Scalia, J., dissenting).

81 *Id.* at 337.

82 *Id.* at 337–38.

83 *Id.* at 338.

For the opposite argument that a limitation on suspending habeas implies a prohibition on permanently eliminating habeas, *see* Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L.J. (forthcoming 2007) (manuscript at 74, *available at* http://ssrn.com/abstract=935368) ("But the Constitution seems to assume that the jurisdiction to determine legality of federal detentions cannot be removed—that such jurisdiction can at most be suspended.").

84 This raises an intriguing hypothetical. Assume that instead of explicitly stripping jurisdiction, as the MCA does, Congress simply amended or qualified the federal habeas statute phrase at issue in *Rasul* ("within their respective jurisdictions" in 28 U.S.C. § 2241(a)) to only apply to the jurisdiction where the detainee is located.

Under the St. Cyr definition of "withdrawal," it would appear that even this suspends habeas because after *Rasul*, the power to issue the writ would have existed. But this means that if Congress thought the *Rasul* Court simply misinterpreted § 2241 and wanted to clarify it, the Suspension Clause could stand in its way.

85 Swain v. Pressley, 430 U.S. 372, 381 (1977).

86 *See supra* Part I.C.

87 The Court has provided little guidance on what constitutes an "adequate and effective" alternate remedy. *Swain* itself did not require an "exact equivalent or the pre-existing habeas corpus remedy." *Cf. Swain*, 430 U.S. at 381. Although, the only difference between the alternate remedy and habeas in *Swain* was that Article III judges did not administer the alternate remedial scheme. *Id.* at 382.

88 Boumediene v. Bush, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting) (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)).

89 *Id.* at 1006.

90 Unlike *Hamdan*, the *Boumediene* detainees were only seeking habeas review over CSRT determinations that the detainees were enemy combatants—not the validity of the military commissions. *Boumediene*, 476 F.3d at 994.

91 Harris v. Nelson, 394 U.S. 286, 288–89 (1969).

92 *See generally* Chemerinsky, *supra* note 4, § 15.2, at 871–72 (explaining that the Burger and Rehnquist Courts narrowed the scope of federal habeas corpus availability).

93 *See* Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) ("It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission."); Yamashita v. Styer, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); *id.* at 17 ("We do not here appraise the evidence on which petitioner was convicted."); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.").

94 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Quirin*, 317 U.S. at 28)); *id.* at 535 ("[T]he full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.").

95 INS v. St. Cyr, 533 U.S. 289, 305–06 (2001).

96 Indeed, the DTA review provisions afford more process than is constitutionally due for *U.S. citizens held within the United States* who are challenging their statuses as enemy combatants. And there is no plausible argument for constitutionally requiring more process for noncitizens detainees.

Hamdi held that a citizen detained as an enemy combatant "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion). But *Hamdi* also approved of hearsay evidence, a "presumption in favor of the Government's evidence," and the exclusive focus on a "combatant's acts." *Id.* at 533–34. The CSRTs meet all the requirements of *Hamdi*, and in some instances, provide greater protection than Article 5 of the Geneva Convention. *See generally* Brief for the Federal Government Appellees at 30–33, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), 2005 WL 1387147.

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

98 *Id.* § 1005(e)(2)(C)(ii).

99 *Id.*

100 *See id.* § 1005(e)(2)(C)(i) (stating that review of the "standards and procedures" specifically includes review of "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence").

101 *Id.*

102 INS v. St. Cyr, 533 U.S. 289, 305 (2001); *see also supra* text accompanying note 95.

103 U.S. Const. art. I, § 9, cl. 2.

104 Boumediene v. Bush, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, J., dissenting).

Professor Amanda Tyler also argued for a clear statement establishing these predicates when due process concerns are implicated. *See* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 Stan. L. Rev. 333, 390 (2006), *cited in* Boumediene v. Bush, 476 F.3d 981, 993–94 (D.C. Cir. 2007) ("Before honoring a suspension as displacing the habeas remedy in these circumstances, the judiciary should require, at a minimum, a clear statement from Congress setting forth the justification for the suspension and its reach. Indeed, given that the fundamental right to individual liberty is at stake, a clear statement rule is entirely appropriate.").

However, even she stipulated that deference to Congress is warranted if suspension is justiciable: "deference in the suspension context would recognize that in exercising this authority, the political branches must be given considerable latitude to define those situations warranting suspension of the writ." Tyler, *supra*, at 410.

105 *Boumediene*, 476 F.3d at 1007 (Rogers, J., dissenting).

106 *Id.*

107 *See generally* Tyler, *supra* note 104, at 335.

108 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., joined by Stevens, J., dissenting) ("To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an 'invasion,' and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court."); *id.* at 594 n.4 (Thomas, J., dissenting) ("I agree with Justice Scalia that this Court could not review Congress' decision to suspend the writ.").

109 *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.").

110 *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1336, at 208–09 (Boston, Hilliard, Gray & Co. 1833), *cited in* Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

111 *See Ex parte* Merryman, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (quoting *Bollman*, 8 U.S. at 101; 3 Story, *supra* note 110, § 1336).

112 *See* Tyler, *supra* note 104, at 339 ("In the end, I contend that suspension does not present a political question, at least insofar as that assertion would be advanced to shield the constitutionality of an exercise of the suspension authority entirely from judicial review.").

113 *Id.* at 367 ("[T]here remains the additional, separate determination whether the public safety "may" require suspension. This latter determination may be a true political question, as it is phrased expressly in discretionary terms and therefore arguably delegated to the legislature for final resolution.").

114 *Id.* at 335–36. Additionally, she cites Chief Justice Marshall as supporting her position because in *Ex parte Bollman*, Marshall only referred to the "public Safety" predicate as being nonjusticiable. *Id.* at 367; *see Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the *public safety* should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws." (emphasis added)).

115 Tyler also argues that due process concerns could render a suspension invalid. Tyler, *supra* note 104, at 382–99. But Tyler is not directly addressing a Fifth Amendment Due Process claim; rather, she is addressing the question of whether suspension in all forms is nonjusticiable.

However, due process concerns would be better conceptualized by disaggregating this independent constitutional bar claim from the justiciability of the Suspension Clause's predicates. After all, one could argue that even if the Suspension Clause's predicates ("Rebellion," "Invasion," and "public Safety") are nonjusticiable political questions, an independent constitutional bar could render a suspension invalid (and thus obviously justiciable). Indeed, while discussing the justiciability of suspension, Tyler made such an argument: "one could easily imagine scenarios in which claims sounding in the Bill of Rights should remain viable *even in the face of a suspension*." Tyler, *supra* note 104, at 387 (emphasis added).

Thus, even if the Suspension Clause would not render the MCA's suspension unconstitutional, some could argue that the Due Process Clause would (assuming that citizens detained outside the United States have Fifth

Amendment rights). Under this argument, if a jurisdiction stripping (or suspension) measure forecloses the opportunity to vindicate constitutional rights, then it is unconstitutional. *See* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (holding that Congress's jurisdiction stripping powers were subject to the Fifth Amendment's Due Process Clause and Takings Clause).

Regardless of whether this is a valid argument, the DTA does not foreclose the opportunity to vindicate due process rights because it provides for direct review in the D.C. Circuit. *See supra* note 99 and accompanying text. In fact, the DTA probably provides more process than would be due. *See supra* note 96.

116 Tyler, *supra* note 104, at 366–67.

117 *Id.* at 367.

118 *See id.* at 368 ("A Suspension Clause so designed would have read: 'The National Legislature should have authority to judge that the existence of a Rebellion or Invasion and the needs of public safety require suspension of the privilege of the writ of habeas corpus.' Of course, the Framers did not so draft the Suspension Clause. Rather, the text of the Clause suggests that the predicate conditions are judicially enforceable and that at best only the public safety determination falls exclusively to the legislature.").

119 U.S. Const. art. I, § 8, cl. 3.

120 U.S. Const. art. I, § 1, cl. 1.

121 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause."); *see also* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.").

122 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 574 (Kennedy, J., concurring) ("That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system."); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (holding that "common sense" requires that Congress have the power to delegate what it could not practicably do itself).

123 Tyler, *supra* note 104, at 368.

124 *Id.* at 402.

125 *Id.* at 403.

126 *See* N.Y. Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., concurring, joined by Black, J.) ("There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use."); *id.* at 730 (Brennan, J., concurring) ("But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws."); *id.* at 732 (White, J., concurring, joined by Stewart, J.) ("At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."); *id.* at 742 (Marshall, J., concurring) ("It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (invalidating President Truman's seizure of steel mills in part because Congress had not provided "statutory authorization"); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866) (rejecting the President's use of military commissions that were "not ordained and established by Congress"); The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) (upholding President Lincoln's blockade of the Confederacy even though Congress had not declared war); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804) (invalidating the seizure of a foreign ship on the grounds that the President exceeded the authorization granted by Congress).

127 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

128 *Id.* at 637.

129 *Id.* at 635.

130 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("[T]he Constitution's Suspension Clause, Art. I, § 9, cl. 2., allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."); *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (holding that the President could not suspend habeas because the Suspension Clause is in Article I, which is "devoted to the legislative department of the United States, and has not the slightest reference to the executive department"); *see also* Tyler, *supra* note 104, at 342 ("Although the Supreme Court has never spoken as a full Court to the issue, it is widely thought that only Congress can suspend the writ.").

131 INS v. St. Cyr, 533 U.S. 289, 301 (2001); *see supra* Part III.A.

132 *See supra* Part I.A.

133 *See supra* Parts I.B & I.C.

134 *See supra* Part III.B.1.

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

136 *See supra* Part III.C.