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THE ACCOUNTING: HABEAS CORPUS AND ENEMY COMBATANTS

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The judiciary should impose a heavy burden of justification on the executive when a habeas petitioner challenges the accuracy of facts on which an enemy combatant designation rests. A heavy burden of justification will ensure that the essential institutional purposes of the writ—and legitimate, separated-powers government—are preserved, even during times of national exigency. The institutional purposes of the writ argue for robust judicial review rather than deference to the executive. Moreover, the procedural flexibility traditionally associated with the writ gives the judiciary the tools to ensure that a heavy burden of justification can be imposed.

INTRODUCTION

“[The] root principle [of habeas] is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment”¹

“[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less

* Professor of Law, University of Colorado School of Law. I extend thanks to my colleagues Professors Melissa Hart, Nestor Davidson, Clare Huntington, Mark Squillace, and Pierre Schlag for their comments on early drafts of this Article. Jane Thompson, faculty reference librarian *extraordinaire*, has been of similarly invaluable assistance. I also am most grateful for the willingness of Professors Richard Fallon and Daniel Meltzer to share an early draft of their Harvard Law Review article on habeas review. Emma Adams, Heather Bias, Keenan Cople, and Merida Zerbi were present at the beginning of my efforts to think through the issues addressed in this Article, during the course of a 2005 seminar. My research assistants Alaina Stedillie, Ryan Kalamaya, Sarah Sorum, and Warren Myers have contributed especially valuable work, and David Shaw and Michelle Witter stepped in over one summer to aid in citechecking. Finally, I warmly thank Professor Jim Nickel of Arizona State University for his encouragement and suggestions.

1. *Fay v. Noia*, 372 U.S. 391, 402 (1963) (Brennan, J.).

public, a less striking, and therefore a more dangerous engine of arbitrary government.”²

The Supreme Court’s recent enemy combatant decisions are conventionally seen as affirming important individual rights, and they indeed make this affirmation. From *Hamdi v. Rumsfeld*³ to *Rasul v. Bush*⁴ to *Hamdan v. Rumsfeld*,⁵ the Supreme Court has protected individuals’ access to federal courts to challenge the constitutionality of unilateral executive detention. This access has justifiably been celebrated by advocates for alleged enemy combatants.

Less noted to date, although never hidden from view, are the structural separation of powers concepts on which the Court also relied in these decisions. The rhetoric of and principles underlying *Hamdi*, *Rasul*, and *Hamdan* manifest the Court’s intent to preserve a legitimate government, a government of separated powers, even in times of national exigency. This Article sets forth a proposal founded on and intended to effectuate the institutional ends that the Court has identified and protected through the Great Writ of habeas corpus.

A habeas proceeding consists of several discrete exercises of judicial power whose significance extends beyond the individual petitioner to the institutional purpose of separated-powers government. In a habeas proceeding, a court has power to issue the writ or an order to show cause to the executive who asserts detention authority. It may examine the legality of detention as a matter of law or by inquiring into the accuracy of facts on which a given exercise of detention power rests. It may determine whether a given detention is legitimate. Finally, a court may provide the remedy of release if detention is determined to be unlawful.

The exercise of judicial power that begins with a demand for an explanation and culminates in a determination regarding the lawfulness of detention is critically important if the writ is truly to be an instrument of separated-powers government. These phases of the habeas proceeding constitute the

2. *Boumediene v. Bush*, 476 F.3d 981, 998 (D.C. Cir. 2007) (Rogers, J., dissenting) (quoting THE FEDERALIST NO. 84, at 468 (Alexander Hamilton) (E.H. Scott ed. 1898)).

3. 542 U.S. 507 (2004).

4. 542 U.S. 466 (2004).

5. 126 S. Ct. 2749 (2006).

habeas “accounting.”⁶ In them, the executive is required to publicly and strictly account for its liberty deprivations.⁷

This Article argues that, when a habeas petitioner challenges the accuracy of facts on which a given detention rests, the judiciary should impose a heavy burden of justification on the executive in the accounting phases of the habeas process.⁸ Much turns on whether an alleged enemy combatant or, instead, the government bears the evidentiary burden in a habeas proceeding challenging the facts on which an enemy combatant designation rests. There is, of course, the fate of specific individuals. Since September 11, executive detention of enemy combatants has become potentially indefinite and can expose individuals to draconian treatment such as abusive interrogation practices. Furthermore, an enemy combatant designation may subject an individual to trial before a military tribunal rather than through ordinary criminal proceedings in which the accused enjoys a presumption of innocence. The stakes are also high for legitimate government. Preserving the integrity of the Constitution’s institutional architecture and meaningful separated-powers government during times of national exi-

6. See *infra* notes 183–274 and accompanying text.

7. For an excellent discussion of accountability, i.e., the testing of the legality of government action, see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 937–953 (1997) [hereinafter Pfander, *Petition*]. Pfander is interested in whether there is a constitutional right to a remedy, which is not the focus of this Article, but he links remedial rights to due process and structural considerations and discusses prerogative writs, as well as developing an argument based on the Petitions Clause of the First Amendment. *Id.* at 903–04, 924–25. See also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19–26 (2001) (emphasizing reason-giving and transparency as elements of an administrative law “accounting”); sources cited in note 229, *infra*.

8. For sources identifying the burden of justification as a significant issue, see, for example, Ass’n of the Bar of the City of New York: Comm. on Fed. Courts, *The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror*, 59 THE RECORD 41, 71 (Feb. 6, 2004, revised Mar. 18, 2004); Christopher A. Chrisman, *Article III Goes to War: A Case For A Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31 (2005); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2091–93 (2007); Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L. J. 39 (2005); David L. Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 74–75 (2006).

gency depends on a proper assignment of the evidentiary burden in a habeas proceeding.

Although much is at stake for both individuals and separated-powers government in the decision of how to allocate the evidentiary burden, the Supreme Court has avoided resolving the issue. It has left individuals and every branch of government in a state of uncertainty.⁹ Individuals do not know what to expect—or what they have a right to demand—if they come under suspicion of supporting terrorist activity.¹⁰ They do not know whether they will enjoy any vestige of the presumption of innocence that obtains in criminal proceedings or whether, in contrast, they will have to prove to a court that they are entitled to be free. The executive branch does not have the information it needs to make strategic decisions about whether to prosecute bad actors through normal criminal processes or to unilaterally detain them. Congress, which increasingly seems to desire a more substantive role in determining how enemy combatants are handled, does not have a clear understanding of its authority to delegate detention powers to the executive branch. It lacks guidance regarding what procedure might

9. For criticism of this state of uncertainty, see *Boumediene v. Bush*, 127 S. Ct. 1478, 1479–81 (2007) (Breyer, Souter, & Ginsburg, JJ., dissenting) (contrasting and approving of the Court's expeditious actions in *Ex parte Quirin*, 317 U.S. 1 (1942), and arguing that an expedited rather than delayed hearing is warranted for current petitioners who have languished in detention for five years). Perhaps because of the confusion reigning in lower courts as a result of the Court's avoidance of key procedural issues governing habeas hearings, see, e.g., *Bismullah v. Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (exchange of briefs throughout March and April of 2007), the Supreme Court ultimately agreed to review *Boumediene* just three months after first denying certiorari.

10. See, e.g., Hamdan Seeks New Court Review, SCOTUSblog, comment by Harold D. House, http://www.scotusblog.com/movabletype/archives/2007/06/hamdan_seeks_ne_1.html (last visited October 16, 2007). He writes,

I'm just an ordinary citizen. No legal training, just an x [sic] and some others who used me for a research gofer Long and short is that I, like so many common folk, are just trying to figure this out We can grab someone and put them in prison without much recourse, even to counsel, and there doesn't seem to be any clear path whatsoever to convict or not, and certainly no avenues that seem willing or legally able to take jurisdiction in the matter. . . . Now that's what it looks like to me and I think a good many folk. We are simply bewildered as to what system we are operating under. All these explanations are great for the legal eagles but until this is explained, sorted out, or just put in some sort of order, I fail to see why the average Joe doesn't get so frustrated with the widening gulf between understanding our laws and how law is practice [sic]. Is this another case where the common guy gets screwed by chaos?

qualify as a constitutionally adequate substitute for conventional habeas review of enemy combatant designations. Lower federal courts that believe limiting Supreme Court precedent has been undermined by recent decisions like *Hamdi* are reluctant to aggressively enforce the writ, thereby increasing confusion and delaying meaningful relief for persons who may have been wrongfully detained.¹¹ Judges do not know whether, when, or how to utilize ordinary rules of civil procedure or traditional equitable principles in reviewing the factual basis for executive detentions.

This Article argues that the essential institutional purpose of the writ and separated-powers government will be best served if the Supreme Court resolves the uncertainty and imposes a heavy burden on the executive to support the factual basis for its unilateral detention of any citizen. The executive's burden of strict justification rests on the understanding that habeas proceedings are a lynchpin of judicial review and the ultimate guarantee that all powers will not be consolidated in one tyrannical branch of government. Because the executive's burden is not based solely on individual, due process rights, it will not be defined in conventional due process terms as, for example, a burden of proof.¹² The more general phrase "burden of justification" is used throughout this Article.

To ensure that its argument is as straightforward and clear as possible, this Article will focus on citizen challenges¹³

11. As of February 2007, no individualized federal court hearings had been held, on the merits, for challenges to enemy combatant designations. Petition for Original Writ of Habeas Corpus at 10, *In re* Petitioner Ali, 127 S. Ct. 3037, No. 06-1194 (U.S. Feb. 12, 2007); see also *Munaf v. Geren*, 482 F.3d 582, 85 (D.C. Cir. 2007) (quoting *Omar v. Harvey*, 479 F.3d 1, 6 (D.C. Cir. 2007)) (noting that the circuit court is "leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

12. See *infra* notes 97–182 and accompanying text (discussing and comparing due process and institutional perspectives on the habeas writ).

13. Few citizens have been detained as enemy combatants. Yaser Hamdi and Jose Padilla were once held in the United States as enemy combatants, and two citizens have been detained abroad. See *Omar*, 479 F.3d at 3–4 (citizen held as an enemy combatant, but the habeas challenge is not to enemy combatant status); *Munaf*, 482 F.3d at 582–83 (citizen convicted in an Iraqi court but held by military forces including the United States' forces). Some might argue that risks to citizen detention are overstated, see Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1, 40–42 (2006), but the executive claims broad powers that put citizens at risk, see *infra* notes 18–30 and accompanying text. Moreover, citizens may potentially have fewer arguments against enemy combatant detentions than non-citizens because the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, limits inherent executive authority

to enemy combatant designations.¹⁴ Non-citizen access to habeas review is at present complicated by the existence of statutes that replace traditional statutory habeas review with a substitute process¹⁵ and by arguments that non-citizens are

only in cases of non-citizen detentions. *Al-Marri v. Wright*, 487 F.3d 160, 190 (4th Cir. 2007), *reh'g en banc granted*, Aug. 22, 2007 (4th Cir. No. 06-7427). Finally, the interplay of the criminal justice system and the executive's claim to detention powers, *see infra* notes 264–274 and accompanying text, enhances risks to citizens.

14. Initial detentions were effected solely through a presidential declaration that an individual should be considered an enemy combatant. *See, e.g.*, *Padilla v. Hanft*, 423 F.3d 386, 388–89 (4th Cir. 2005), *cert. denied* 547 U.S. 1062 (2006). Detentions of non-citizens—but not of citizens—are now subject to review by a military Combatant Status Review Tribunal (CSRT). *See, e.g.*, Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal, § (a) (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2743 [hereinafter DTA or Detainee Treatment Act]. The institutional perspective of this Article argues for a heavy burden of executive justification in habeas proceedings even if the executive has previously conducted its own hearing into enemy combatant status. More limited judicial review subsequent to executive hearings might arguably be proper given precedent from the immigration context, *see, e.g.*, Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 636–41 (1988) [hereinafter Neuman, *Some Evidence*], but enemy combatant designations are not immigration proceedings. More important, hearings conducted under the auspices of the military do not have the character of a typical administrative proceeding, *see, e.g.*, *al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006) (lawful permanent resident alien held within the United States as an enemy combatant is not covered by statute or regulation requiring an administrative hearing into enemy combatant status), and some military hearings have had a distinctly Kafka-esque quality, *see, e.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 469–70 (D.D.C. 2005). *See also* *Sanani v. Bush*, 127 S. Ct. 1369 (2007) (denying application for an injunction requiring the government to give counsel access to prior CSRT proceedings to facilitate a meaningful annual review of enemy combatant status); *Petition for Immediate Release and Other Relief Under the Detainee Treatment Act of 2005*, *Parhat v. Rumsfeld*, No. 06-1397 (D.C. Cir. Dec. 4, 2006) (describing CSRT processes). Finally, an enemy combatant designation is not like a probable cause determination that serves as an entry point into a conventional criminal prosecution, after which habeas review may properly be limited. *See infra* notes 202–204 and accompanying text. Rather, it sets the stage for indefinite detention and trial by a military commission. Ordinarily weighty comity arguments for deference to executive determinations do not apply under these circumstances. *See infra* notes 156–173 and accompanying text (discussing *Hamdan v. Rumsfeld*, 542 U.S. 507 (2006)). For a discussion of how institutional context and the nature of a threatened liberty interest may affect the scope of judicial review of prior executive decisions, *see* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L. J. 2537, 2576–80 (1998).

15. Non-resident aliens were given permission to petition for a writ of habeas corpus under § 2241 in *Rasul v. Bush*, 542 U.S. 466 (2004); *cf. INS v. St. Cyr.*, 533 U.S. 289 (2001) (federal courts have jurisdiction under Section 2241 to review the habeas petition of a lawful resident alien). Congress, however, complicated the

not entitled to the protection of any individual right to habeas review derived from the Constitution's Suspension Clause.¹⁶

Taking post-September 11, 2001, executive detentions for general context,¹⁷ Part I briefly describes the current executive's claim of power to detain citizens as enemy combatants. It also reviews the types of habeas challenges that might be made to enemy combatant detentions. Part II discusses the Supreme Court's 2004 *Hamdi* decision, which sets forth the Justices' differences of opinion regarding the burden of factual justification in habeas proceedings and describes the plurality's confusing

situation when it adopted the Detainee Treatment Act of 2005, *supra* note 14, amending 28 U.S.C. § 2241 to strip courts of jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." DTA § 1005(e)(1). After the Supreme Court construed the Detainee Treatment Act not to apply to pending habeas petitions, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), Congress made the removal of jurisdiction retroactive, Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 § 7(b) [hereinafter MCA]. Bills restoring habeas for non-citizens have been introduced but have not been adopted. *See, e.g.*, S. 185, 110th Cong. (1st Sess. June 26, 2007); H.R. 1416, 110th Cong. (1st Sess. March 8, 2007). One court has also construed jurisdiction-stripping legislation not to apply, by its terms, to the unique circumstances of the non-citizen petitioner. *See al-Marri v. Wright*, 487 F.3d at 190-93.

16. *See infra* note 125 (discussing constitutional rights of non-citizens). The government continues to press this argument. *See, e.g.*, Brief for the Respondents at 15, *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (No. 06-1195) (S. Ct. Oct. 9, 2007) (the Suspension Clause has only domestic application). *But see* *Boumediene v. Bush*, 127 S. Ct. 1478, 1479-81 (2007) (Breyer, Souter, & Ginsburg, JJ., dissenting) (contesting the individual rights analysis that would limit habeas access to non-citizens); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007) (drawing on the history of the Fourteenth Amendment to argue that citizens and non-citizens should be treated equally in matters other than immigration and government benefits). Katyal also suggests that courts looking for a way to bypass tough questions regarding individual rights might do so by resting their analysis on separation of powers and institutional considerations. *Id.* *But see* Fallon & Meltzer, *supra* note 8, at 2048-55 (non-citizens may not benefit from a shift to an institutional perspective if the Suspension Clause involves an authority question that is internal to the United States).

17. The context changes rapidly as new judicial decisions are rendered. As of September 15, 2007, the Supreme Court had granted certiorari to resolve questions pertaining to habeas review of CSRT hearings in light of the MCA and DTA, as well as the adequacy of DTA judicial review as a substitute for traditional habeas review. *See Boumediene v. Bush*, 127 S. Ct. 3078 (2007). A petition asking the Court to resolve similar questions pertaining to trials before military commissions has been denied. *Hamdan v. Gates*, 2007 LEXIS 10870 (Oct. 1, 2007). The Court of Appeals for the District of Columbia is considering a petition for rehearing en banc in *Bismullah v. Gates*, 2007 WL 2067938 (D.C. Cir. July 20, 2007), which also raises questions about the scope and adequacy of judicial review of CSRT determinations. *See also al-Marri*, 487 F.3d 160, *reh'g en banc granted*, Aug. 22, 2007 (4th Cir. No. 06-7427). For additional discussion of the adequacy question, see *infra* notes 127, 186.

conflation of institutional and individual rights perspectives on the writ. Part III fleshes out the institutional perspective on habeas, a perspective that has roots in history, constitutional theory, and practice. Part IV discusses the practical import of the conceit of the accounting for judicial scrutiny of the factual basis for enemy combatant detentions. The Article concludes that the Supreme Court should confirm the judiciary's power to implement habeas proceedings flexibly so as *always* to require the executive to give a strong factual justification for a given detention, even in circumstances in which the individual remedy of release from detention might not be warranted.

I. THE CONTEXT: CONTEMPORARY ENEMY COMBATANT DESIGNATIONS

The executive branch of our government has detained many persons since September 11, 2001.¹⁸ Although some have been subjected to criminal prosecution, others have been detained as material witnesses or held through immigration processes.¹⁹

18. When it was first criticized for detentions unaccompanied by charges of criminal activity, the Justice Department "stopped issuing a running tally of its detentions." David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 24 (2003) [hereinafter Cole, *McCarthyism*]. Legislation has occasionally been introduced to require the Secretary of Defense to disclose the number of people detained as unlawful combatants by the government. See, e.g., H.R. 3038, 109th Cong. (2005). Much tallying has focused on detainees held at Guantanamo Bay, Cuba. In 2005, one independent analysis put the number of Guantanamo detainees at 517, Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees, <http://law.shu.edu/aaafinal.pdf>, while as of May 12, 2007, the Pentagon was reporting that 389 individuals were confined there, see Primer on Detainee's Status, SCOTUSblog, comment by Lyle Denniston, http://www.scotusblog.com/movabletype/archives/2007/05/primer_on_detai.html (last visited Oct. 17, 2007).

19. See Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 682-94 (2005); Cole, *McCarthyism*, *supra* note 18 at 22-26; Jules Lobel, *Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389, 398-405 (2003); Deborah Pearlstein & Priti Patel, *Behind the Wire: An Update to Ending Secret Detentions*, HUMAN RIGHTS FIRST 8-9 (2005) http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf [hereinafter Pearlstein & Patel, *Behind the Wire*]; Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525, 536-41 (2005); Laura Taylor Swain, *Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity*, 37

The most troubling detentions—the detentions that are the subject of this Article—have been effected through “enemy combatant” designations made by the President. Such designations are the justification for the continuing, indefinite detention of many non-citizens at Guantanamo Bay, Cuba, and they have also been used to justify the detention of some citizens.²⁰

There is no doubt that the executive has been given some authority to detain citizens as well as non-citizens as enemy combatants. In *Hamdi v. Rumsfeld*, for example, the Supreme Court held that Congress’s post-September 11th Authorization for the Use of Military Force (AUMF) conferred these detention powers on the President.²¹ A plurality of the Court construed the AUMF narrowly to encompass those persons “carrying a weapon against American troops on a foreign battlefield”²² and whose detention was warranted to prevent a return to that battlefield.²³

The *Hamdi* plurality noted that “the legal category of enemy combatant has not been elaborated upon in great detail,”²⁴ and indeed the executive’s definition of enemy combatant has evolved over time. The President’s initial executive order authorized detention of non-citizens suspected of being members of Al Qaeda or who

there is reason to believe . . . ha[ve] engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or

SUFFOLK U. L. REV. 51 (2004) (discussing the executive’s tools of detention); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–84 (2002).

20. See *supra* note 13.

21. 542 U.S. 507, 517–18 (2004) (plurality opinion); *id.* at 579 (Thomas, J., dissenting). The Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [hereinafter AUMF], specifies that the president has power “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons” The executive relies on additional sources of authority for detentions. See Pearlstein & Patel, *Behind the Wire*, *supra* note 19, at 6. This Article neither questions Congress’s power to authorize the detention of some category of persons as enemy combatants nor enters the debate about inherent executive authority to detain.

22. *Hamdi*, 542 U.S. at 522 n.1.

23. *Id.* at 519.

24. *Id.* at 522 n.1.

adverse effects on the United States, its citizens, national security, foreign policy, or economy²⁵

Nine days after the *Hamdi* decision, the government clarified its definition for persons detained at Guantanamo Bay.²⁶ Under that second definition, government attorneys once suggested the executive could detain, among other ordinary persons, a “little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but . . . really is a front to finance al-Qaeda activities.”²⁷ More recently, the government has apparently narrowed its view of persons who may be deemed enemy combatants subject to AUMF detention, but the claim of detention authority is still quite broad, exceeding the narrow definition offered by the *Hamdi* plurality.²⁸

The danger posed by the potential reach of the government’s enemy combatant designations is exacerbated by the ongoing nature of armed hostilities in Afghanistan and Iraq. Conflicts may end only when the President says they will, perhaps only when “there are not effective global terrorist networks functioning in the world.”²⁹ The executive’s claim to

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

26. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal, § (a) (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (enemy combatants are individuals who are “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” as well as “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces”).

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

28. See, e.g., Brief for the Respondents at 37, 62–65, *Boumediene v. Bush*, No. 06-1195 (U.S. Oct. 9, 2007) (suggesting a definition that covers “associates” of al Qaeda not captured on the battlefield or carrying arms); see also *al-Marri v. Wright*, 487 F.3d 160, 177–178 (4th Cir. 2007); *supra* notes 22–23 and accompanying text (*Hamdi* plurality’s narrow definition of enemy combatant).

29. *Lobel*, *supra* note 19, at 397 (quoting Secretary of Defense Donald Rumsfeld). The executive has asserted that it has power to end detentions in an orderly fashion to “wind up” its war effort. *Qassim v. Bush*, 382 F. Supp. 2d 126, 127–28 (D.D.C. 2005); see also *Ludecke v. Watkins*, 335 U.S. 160, 170 n.10 (1948) (it is for the president to decide when war has ceased and war powers extend beyond the cessation of hostilities). Justice Thomas has taken the position that the president retrospectively can determine when a war began. *Hamdan*, 126 S. Ct. at 2827–28 (Thomas, J., dissenting) (arguing that the president has power to decide that the war on terror began in 1996, prior to both September 11, 2001 and the adoption of

power has thus put all persons within the scope of the government's broad definition at risk of detention for an indefinite period. We are truly in the middle of what might be described as a "desultory and predatory" state of war,³⁰ one which is especially threatening to the rights of individuals.

The most important judicial check on indefinite detention of alleged enemy combatants is the petition for a writ of habeas corpus.³¹ Once the habeas petitioner satisfies his burden of justifying judicial review by persuading a court that it has jurisdiction to hear such petitions,³² a court must undertake its "time-honored and constitutionally mandated role[] of reviewing and resolving" executive detention claims.³³

the AUMF). Of course, a war may not be a prerequisite to the power to detain. The *Hamdi* plurality did not discuss "war" but simply referred to enemy combatants engaged in "armed conflict" with the United States. *Hamdi*, 542 U.S. at 519. Whether the armed conflicts in which the United States is engaged are wars within the traditional or constitutional sense is discussed in Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004), and John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221 (2004).

30. The phrase is taken from THE FEDERALIST NO. 8, at 67 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (advocating the benefits of a strong Union of States to prevent repeated conflicts among state-maintained standing armies). Concerns about the dangers of ongoing wars have surfaced at other points in history. At the time of the Civil War, for example, counsel for the petitioner in *Ex parte Milligan*, 71 U.S. 2, 79 (1866), cautioned that "[t]he President or Congress can provoke [war], and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. . . . A simple declaration of hostilities is more terrible to us than an army with banners." See also Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1015–1022 (2004) (discussing the perpetual crisis of the Cold War).

31. Other checks potentially exist but have serious limitations. See, e.g., *infra* note 247 (damages actions and their limitations); *infra* notes 187 and 250 (actions for injunctive relief); see also *infra* notes 157–62 and accompanying text (discussing the *Hamdan* Court's refusal to treat habeas petitions as ordinary requests for equitable relief).

32. See, e.g., *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 118 (D.D.C. 2006); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 35 (D.D.C. 2004).

33. *Hamdi*, 542 U.S. at 535; see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (habeas petitioner persuaded the Court to exercise jurisdiction notwithstanding the enactment of the Detainee Treatment Act's jurisdiction-stripping provisions). Arguments about the existence of *judicial* jurisdiction to hear habeas claims must be distinguished from debates about *executive* jurisdiction to detain.

A habeas petitioner will surely challenge the detention authority of the executive as a matter of law.³⁴ For example, he might argue that the AUMF authorizes the President to detain only persons captured on the battlefield or who can be proven to have carried arms against the United States at some time before capture.³⁵ He may argue that none of the recent federal statutes dealing with enemy combatants authorizes detention.³⁶ He may challenge the existence of any inherent executive authority to detain.³⁷ If this sort of challenge is made, courts are required to look for a clear congressional conferral of authority,³⁸ and any claim of inherent executive authority that seems to be in tension with a statute will be viewed with judicial skepticism.³⁹ The government will, in other words, bear a rather heavy burden of justification on the issue of law, which is certain to be reviewed *de novo*.⁴⁰

34. See, e.g., *Hamdan*, 126 S. Ct at 2774–75 (rejecting the argument that the AUMF expanded the president's authority to convene military commissions under the UCMJ); *Padilla v. Hanft*, 423 F.3d 386, 391–97 (4th Cir. 2005) (reading the AUMF to authorize detention for purposes other than to prevent return to the battlefield). The issue of authorization changes as Congress becomes more engaged in directing the executive branch to deal with detentions in specific ways. See *supra* notes 14, 15 (discussing the DTA and MCA).

35. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

36. See, e.g., *al-Marri*, 487 F.3d 160.

37. *Id.*

38. *Hamdi*, 542 U.S. at 516–518.

39. See *al-Marri*, 487 F.3d at 190–91 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)) (concluding that the enactment of the USA Patriot Act puts the president's inherent powers at low ebb); cf. *supra* note 13 (regarding the implications for *citizen* exposure to indefinite detention).

40. See Fallon & Meltzer, *supra* note 8, at 2067–71 (extended discussion of how courts are to make this determination respecting citizens); *id.* at 2082 (respecting non-citizens). The question of authorization for detention and who counts as an enemy combatant overlap, but they are not the same. For the history of judicial interpretations of authorizations, see, e.g., Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1391–1401 (2003); Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 158–81 (2004); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons From Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1585–87 (2004); see also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (narrowly interpreting detention authority to preserve civilian tribunals for handling allegations of unlawful behavior by citizens); *Ex parte Mitsuye Endo*, 323 U.S. 283, 300 (1944) (narrow interpretations permit useful "accommodation[s] between [civil] liberties and the exigencies of war."); *Ex parte Milligan*, 71 U.S. 2 (1866) (construing a statute to reflect an intent of Congress to retain civilian courts, despite the fact that the statute suspended the usual operation of the habeas writ); *infra* notes 251–55 and accompanying text (discussing narrow interpretations of detention authority).

If there is a clear grant of authority to detain individuals, as well as a clearly stated and constitutional definition of enemy combatant status, a habeas petitioner might be expected to contest the government's factual assertions and to argue that his detention is inconsistent with the conditions attached to the detention authority given to the executive by Congress.⁴¹ This argument represents another, but now factual, challenge to the executive's jurisdiction over the petitioner.

A factual challenge to an assertion of executive jurisdiction is not unusual. If, for example, Congress says that aliens fourteen years of age and older can be removed from the United States by executive fiat, a court may review whether the individual subject to removal is in fact fourteen years of age or older.⁴² If Congress says that the executive can enlist only individuals who have reached the age of majority, a court may review whether a person seeking release from military custody is a minor.⁴³ If the executive is claiming detention authority by virtue of the decision of an inferior tribunal, a court may be asked to inquire into the facts on which jurisdiction of that tribunal was based.⁴⁴ If a citizen like Hamdi is detained under the battlefield detention authority of the AUMF, he will ask a habeas court to inquire into the accuracy of the factual basis of his designation as the type of enemy combatant whose detention was authorized through the AUMF.

41. Many current habeas petitions involve this type of challenge. For example, all of the petitioners in *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting certiorari to review the dismissal of habeas petitions in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007)), commenced their challenges by claiming that the government had wrongly classified them as enemy combatants. These petitioners included fifty-six individuals whose argument was initially considered in *In re Guantanamo Detainee Cases*, 335 F. Supp. 2d 443 (D.D.C. 2005), as well as seven petitioners in *Khalid v. Bush*, 335 F. Supp. 2d 311 (D.D.C. 2005). The former decision was rendered on remand from *Rasul v. Bush*, 542 U.S. 466 (2004), and was eventually joined with the appeal from the *Khalid* decision in *Boumediene*. See also *Sanani v. Bush*, 127 S. Ct. 1369 (2007) (petitioners seeking Supreme Court assistance in securing an independent inquiry into facts pertaining to alleged enemy combatant status); Petition for Original Writ of Habeas Corpus, *In re* Petitioner Ali, 127 S. Ct. 3037, No. 06-1194 (U.S. Feb. 13, 2007).

42. *Ludecke v. Watkins*, 335 U.S. 160, 172 n.17 (1948).

43. See, e.g., Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 17-22 (1995) (discussing cases challenging military enlistment of minors in the War of 1812).

44. See, e.g., Neuman, *Some Evidence*, *supra* note 14, at 733; James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 743 (2004) [hereinafter, Pfander, *Article I Tribunals*].

In some instances, however, the factual dispute may not be as simple or straightforward as those just described. In complex cases, courts may wish to avoid the aggravation of evidentiary hearings (and complicated discovery issues associated with such a hearing) and be tempted not to impose a heavy burden of factual justification on the executive.⁴⁵ In *Hamdi*, a plurality of Justices did not endorse a heavy burden of justification, even though the plurality assumed that a narrow definition of enemy combatants would ensure unproblematic factual inquiries.⁴⁶ In other cases, the Court has avoided saying anything about evidentiary issues.⁴⁷

The executive, of course, likely would prefer to continue its current practice of filing a habeas return that consists of an administrative compilation of hearsay statements⁴⁸ and then insisting that the petitioner has an obligation to rebut the return.⁴⁹ A judicial endorsement of that preference would be in-

45. The proper scope of discovery is currently being hotly debated. The Court of Appeals for the District of Columbia, asked to evaluate the proper scope of review and discovery for CSRT determinations, ruled that "the record on review consists of all the information a [Combatant Status Review] Tribunal is authorized to obtain and consider." *Bismullah v. Gates*, 2007 WL 2067938 (D.C. Cir. July 20, 2007). It imposed a September 13, 2007, production deadline on the government in the case of the first detainee to have a CSRT review falling within the scope of its decision, *id.*, then suspended that deadline pending consideration of the government's request for an en banc rehearing, Order, *Paracha v. Gates*, No. 06-1038 (D.C. Cir. Sept. 12, 2007).

46. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-519 (2004). See *infra* notes 60-61 and accompanying text.

47. In Jose Padilla's habeas proceeding, for example, opportunities to establish proof guidelines for a habeas accounting were twice short-circuited. A federal court initially upheld the president's power to designate citizens captured in the United States as enemy combatants and required the government to produce only "some evidence" supporting its designation. *Padilla v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002). In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court avoided the proof issue by holding that Padilla's original petition had been filed in the wrong district. After Padilla refiled his petition in the proper district, argument focused on whether detention power was given to the executive by the AUMF. *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) (concluding no authority), *rev'd*, 423 F.3d 386 (4th Cir. 2005) (finding detention authority). Before the Supreme Court could review the case, the executive decided to charge and try Padilla through normal criminal processes. See *Padilla v. Hanft*, 547 U.S. 1062 (2006).

48. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. at 524 (affidavits compiled by military officials); *al-Marri v. Wright*, 487 F.3d 160, 165-166 (4th Cir. 2007) (affidavit put together by administrative officials), *reh'g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007); *Padilla v. Hanft*, 423 F.3d 386, 392 (4th Cir. 2005). See also *infra* note 52 and accompanying text (discussing the Mobbs Declaration).

49. See, for example, the proceedings in *al-Marri*, 487 F.3d 160, 182-186 (4th Cir. 2007), where the habeas petitioner contended that, even if the facts alleged by

appropriate. The executive must be assigned a heavy burden of justification respecting questions of fact as well as questions of law pertaining to the claimed jurisdictional authority of the executive.⁵⁰

II. *HAMDI V. RUMSFELD*: THE DUE PROCESS PERSPECTIVE ON THE EXECUTIVE'S BURDEN

The Supreme Court has not prescribed a heavy burden of governmental justification in a fact-based habeas challenge to an enemy combatant designation. Neither, however, has it rejected such a burden. Its 2004 decision in *Hamdi v. Rumsfeld* offers food for thought but no conclusive answer as to what the executive's burden should be. The opinions of the *Hamdi* Justices are less than illuminating, in part because they respond to the arguments of Hamdi's counsel, which emphasized individual due process rights rather than institutional arguments, and in part because *Hamdi* itself produced no majority opinion.

A. *The Proceedings and Issues in Hamdi*

Yaser Hamdi, a United States citizen, was captured in Afghanistan by the Northern Alliance forces shortly after the September 11 attacks on the United States. When captured, he was allegedly in possession of an AK-47 and in the company of "other" Taliban fighters.⁵¹ The Northern Alliance subsequently turned him over to the United States military. The ex-

the government were true, they did not establish enemy combatant status within accepted enemy combatant definitions and detention authorization because the government did not allege that he was a citizen or affiliate of the armed forces of a nation at war with the U.S., that he had been seized on or near a battlefield, or that he had ever been in Afghanistan during the armed conflict with the Taliban or directly participated in any hostilities against the United States. The government relied on the hearsay allegations of the Rapp Declaration, which the trial court initially accepted as credible evidence that shifted the burden to the habeas petitioner. *Al-Marri v. Wright*, 443 F. Supp. 2d 774, 780–785 (D.S.C. 2006).

50. A recent discussion of burdens in habeas proceedings is based on debatable assumptions: that all executive determinations—a presidential declaration, a CSRT, or a military trial—entail a regularized factual inquiry and are equivalent, and that the executive will have adopted a narrow definition of enemy combatant. Fallon & Meltzer, *supra* note 8, at 2095–2101 (equivalence), 2108–10 (narrow definition). Viewing the burden issue through a due process, individual rights lens, *id.* at 2100, Fallon and Meltzer argue that the government must produce more than "some evidence" to justify detention, *id.* at 2104.

51. *Hamdi v. Rumsfeld*, 542 U.S. 507, 513 (2004).

ecutive recounted these facts in a document that has come to be known as the “Mobbs declaration,” which was prepared by an official in the Department of Defense without personal knowledge of the facts and circumstances surrounding Hamdi’s capture.⁵² Based on this declaration, the executive asserted that Hamdi was an enemy combatant. Hamdi contended that he had been innocently caught up in the Afghanistan conflict and had not fought against the United States.

The district court in which Hamdi filed his habeas petition stated that Hamdi had “asked for his constitutional right to determine why he’s being held. And [this court is] going to make the Government explain why he’s being held.”⁵³ The court scrutinized the Mobbs declaration, seeking to decide “whether the Mobbs declaration, standing alone, [was] sufficient as a matter of law to allow a meaningful judicial review” of Hamdi’s detention.⁵⁴ Troubled by validating a citizen’s detention based on evidence presented through the Mobbs declaration, the court ordered the government to turn over extensive information, including all of Hamdi’s confessions or statements; a list of all of Hamdi’s interrogators and their addresses; statements by any members of the Northern Alliance regarding Hamdi’s surrender; a list that included the date of Hamdi’s capture and the dates and locations of all subsequent detentions; the name and title of the individual within the United States who made the determination that Hamdi was an enemy combatant; and the name and title of the person(s) who moved Hamdi from Guantanamo Bay.⁵⁵

The executive appealed the order requiring it to give a detailed factual accounting. The United States Court of Appeals for the Fourth Circuit, although echoing the district court’s concern that courts should have the information they need to

52. Joint App. I at *148 ¶ 1, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 1120871 (Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy) [hereinafter Mobbs Declaration]. The Declaration was merely Mr. Mobbs’s compilation of records and reports in the government’s possession.

53. Joint App. I at *35, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 1120871 (Hearing Transcript, May 20, 2002).

54. *Hamdi*, 542 U.S. at 514. The Mobbs Declaration, *supra* note 52, bears a remarkable similarity to the affidavit the executive relied on in *Ex parte Bollman*, 8 U.S. 75 (1807). Compare the scrutiny employed by the Supreme Court in *Bollman*, *infra* text accompanying notes 260–61.

55. *Hamdi*, 542 U.S. at 513–14.

engage in a “meaningful” review,⁵⁶ overturned the order. It held that there should be no searching inquiry into the facts surrounding Hamdi’s detention as an enemy combatant.⁵⁷

Hamdi then appealed to the Supreme Court. Rejecting the appellate court’s highly deferential attitude to the executive, the Court told Hamdi that he was entitled to challenge the factual validity of his enemy combatant designation.⁵⁸ The Justices withheld, however, a definitive ruling on the power of the district court to order the government to produce a strong factual justification for Hamdi’s detention, the issue that had prompted the initial appeal.

B. *The Supreme Court Plurality’s Due Process Analysis*

The *Hamdi* plurality (consisting of Justices O’Connor, Kennedy, and Breyer and Chief Justice Rehnquist), confirmed that Hamdi’s petition raised issues of fact related to the enemy combatant designation and the legality of Hamdi’s detention.⁵⁹ Adopting the narrowest possible definition of the term “enemy combatant” given the facts of the case, these Justices interpreted the term to include only those individuals captured on the battlefield in Afghanistan and who needed to be detained to prevent their return to that battlefield.⁶⁰ Given this definition, the plurality opined that a challenge to enemy combatant status would require only a narrow inquiry into the “alleged combatant’s acts.”⁶¹

Then, invoking an administrative due process decision, *Matthews v. Eldridge*,⁶² the plurality proclaimed that Hamdi was entitled to a meaningful due process inquiry into his enemy combatant designation.⁶³ According to the plurality, the

56. *Rumsfeld v. Hamdi*, 296 F.3d 278, 283 (4th Cir. 2002); *Rumsfeld v. Hamdi*, 316 F.3d 450, 461, 466 (2003).

57. *Rumsfeld v. Hamdi*, 316 F.3d at 474–476 (deferring to the executive’s Mobbs Declaration assertions of fact as well as to executive decisions made during ongoing hostilities).

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

59. *Id.* at 526–27.

60. *Id.* at 516–18.

61. *Id.* at 535.

62. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

63. *Hamdi*, 542 U.S. at 529. The citation to *Matthews* was rather surprising, as the case involved “the withdrawal of disability benefits!”, *id.* at 575 (Scalia, J., dissenting), and because, as Justice Thomas observed, none of the parties had relied on it, *id.* at 595 (Thomas, J., dissenting). In addition to administrative law decisions, the plurality also referenced *United States v. Salerno*, 481 U.S. 739, 746

inquiry demanded by due process would need to fulfill three "constitutional promises": notice of the factual basis for detention, an opportunity for the designated person to rebut the government's designation, and a neutral decision-maker to resolve the matter.⁶⁴ Because the military itself had not engaged in any sort of review that would satisfy these due process requirements, the plurality opined that courts would have to do so, presumably in a habeas proceeding.⁶⁵

The plurality's analysis thus conflated the executive's obligations under due process with the judiciary's obligations in a habeas proceeding. The plurality acknowledged that the answer to the question of "what process is constitutionally due to a citizen who disputes his enemy combatant status" turns on *both* the due process clause *and* "a careful examination of the writ of habeas corpus."⁶⁶ The plurality also hinted that there might be some "*core elements*" of judicial review that must be maintained despite a desire to tailor enemy combatant proceedings so as to "alleviate their uncommon potential to burden the Executive at a time of ongoing conflict."⁶⁷ Nonetheless, the plurality ultimately chose to discuss only the requirements of due process. Habeas courts were effectively directed as a matter of due process to provide a substitute for the administrative hearing that the military should have provided but had not.

Under its conflated analysis, the plurality did not clearly instruct courts as to how they should weigh the strength of the executive's justifications for detention. On one hand, the plurality stated that the status justifying detention must be "established . . . by some . . . process that verifies this fact with sufficient certainty."⁶⁸ It recognized that an alleged combatant could concede his status but read Hamdi's petition narrowly and held that he had made no such concession.⁶⁹ It also did not endorse the government's recommendation that courts should "assume the accuracy of" the government's asserted basis for detention and assess only whether the basis is legiti-

(1987), and *Addington v. Texas*, 441 U.S. 418, 425 (1979), neither of which involved habeas petitions. See *Hamdi*, 542 U.S. at 529.

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

65. *Id.* at 538-39.

66. *Id.* at 524-25.

67. *Id.* at 533-34 (emphasis added).

68. *Id.* at 523.

69. *Id.* at 526. Compare *Ex parte Quirin*, 317 U.S. 1, 20 (1942) (petitioner conceded his status).

mate.⁷⁰ According to the plurality, “[A]ny process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short”.⁷¹ On the other hand, the plurality expressed skepticism about requiring a process encumbered with the trappings of criminal courts.⁷² It endorsed neither the district court’s refusal to allow the executive to rely on hearsay evidence nor that court’s extensive discovery order.⁷³ It suggested, in dicta, that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one,”⁷⁴ and that “once the Government puts forth credible evidence [of combatant status] the onus could shift to petitioner to rebut that evidence with more persuasive evidence [that he is not a combatant].”⁷⁵

C. *The Opinions of the Other Justices in Hamdi*

Although the plurality’s due process analysis has heavily influenced subsequent constitutional argument, the due process perspective has not ended debate about the proper scope of habeas review. The debate continues, in part, because four Justices in *Hamdi* (Souter and Ginsburg, and Scalia and Stevens) rejected the plurality’s due process dicta about the executive’s burden respecting the accuracy of facts on which a detention is based. In two separate and very different opinions, these Justices apparently favored placing a heavy burden of justification on the executive.

Justices Scalia and Stevens took the strictest position respecting the executive’s burden of factual justification. They rejected the government’s argument that executive detentions

70. *Hamdi*, 542 U.S. at 537.

71. *Id.* The Court thus apparently rejected the “some evidence” approach described in Neuman, *Some Evidence*, *supra* note 14.

72. *Hamdi*, 542 U.S. at 529.

73. *Id.* at 532–33.

74. *Id.* at 534.

75. *Id.* As of October 2007, the government was interpreting the *Hamdi* plurality to require only a circumscribed and deferential habeas review of the factual basis for citizen detentions. Brief for the Respondents at 45, 58, *Boumediene v. Bush*, No. 06-1195 (U.S. Oct. 9, 2007). It was also asserting that a CSRT form of review would satisfy the executive’s due process obligations to citizens. *Id.* at 52–54.

are immune from scrutiny.⁷⁶ In their view, absent suspension of the writ, the executive must either prosecute a citizen like Hamdi for a crime of treason (or some other crime) and bear the burden of factual justification usually assigned to the government in a criminal proceeding, or must release the citizen.⁷⁷ According to Scalia and Stevens, the Framers distrusted military power, feared that “military force rather than the force of law” would be used “against citizens on American soil,”⁷⁸ and limited “the methods by which the Government can determine facts that the citizen disputes and on which the citizen’s liberty depends.”⁷⁹ They asserted that the habeas writ protects people who have engaged in criminal conduct of all sorts, including “aiding an enemy in wartime”; Congress can only authorize “extraordinary [executive] authority” by suspending the writ under the narrow circumstances delineated in the Suspension Clause.⁸⁰ Thus, Justices Scalia and Stevens would have gone much further than the *Hamdi* district court, which only ordered the government to produce additional evidence.⁸¹

Justices Souter and Ginsburg did not join the dissenting views of Justices Scalia and Stevens. Their primary argument did not require an analysis of the burden of factual justification: they simply took the position that 18 U.S.C. section 4001(a) precluded Hamdi’s detention as a matter of law.⁸² When no other Justices joined their argument, Justices Souter and Ginsburg joined with the plurality in holding that Hamdi

76. *Hamdi*, 542 U.S. at 569 (Scalia and Stevens, JJ., dissenting) (characterizing *Ex parte Quirin*, 317 U.S. 1 (1942), as “not this Court’s finest hour”).

77. *Id.* at 573.

78. *Id.* at 569.

79. *Id.* at 572 n.4.

80. *Id.* at 562.

81. The district court, although strictly scrutinizing the Mobbs Declaration, did not incorporate processes associated with criminal prosecution into the habeas proceeding. If the court had done so—at least with respect to burdens of proof—it may not have merely ordered the government to produce more evidence but likely also would have threatened Hamdi’s release. *Cf.* *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (giving the government the choice to either produce evidence or to dismiss the prosecution for a capital offense), *aff’d in part, vacated in part, and remanded*, 365 F.3d 292 (4th Cir. 2004), *amended and remanded*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

82. *Hamdi*, 542 U.S. at 541–44 (Souter and Ginsburg, JJ., dissenting in part and concurring in judgment). *See* Vladeck, *supra* note 40 (discussing the non-detention statute).

was entitled to some process, simply in order to produce a judgment.⁸³

Justices Souter and Ginsburg, however, formally refused to endorse the plurality's speculations about "what process is due in litigating disputed issues in a proceeding under the habeas statute."⁸⁴ Instead, they suggested imposing a burden of justification on the executive with respect to a variety of issues. As to questions of law, they affirmed the general understanding that government should bear a "burden of clearly justifying its claim to be exercising recognized war powers" authorized by Congress.⁸⁵ Justices Souter and Ginsburg took note of the fact that international law creates a presumption of POW status for detainees, arguing that adherence to that presumption (and the accompanying protections accorded POWs under international law) would be the only way to justify judicial deference to military detentions.⁸⁶ As to disputed issues of fact, they seemed to disapprove of truncating any Article III hearing,⁸⁷ and hinted that the habeas statute itself might preclude giving the government "an evidentiary presumption casting the burden of rebuttal on Hamdi."⁸⁸

Justice Thomas, the remaining participant in *Hamdi*, favored extreme deference to the executive on questions of fact. According to Thomas, "the question [whether Hamdi's executive detention is lawful] comes to the Court with the strongest presumptions in favor of the Government."⁸⁹ If Congress has authorized the President to detain enemy combatants, as the Court held it did when it adopted the AUMF, the President's designations embody "virtually conclusive factual findings"⁹⁰ and "the burden of persuasion would rest heavily upon any who might attack it."⁹¹ Due process would at most afford Hamdi only the protection of "a good-faith executive determination."⁹²

83. *Hamdi*, 542 U.S. at 541.

84. *Id.* at 553.

85. *Id.* at 551.

86. *Id.* See also R.J. SHARPE, THE LAW OF HABEAS CORPUS 115–117 (2d ed. 1989) (discussing similar considerations regarding habeas in English courts).

87. *Hamdi*, 542 U.S. at 554.

88. *Id.* at 553–54.

89. *Id.* at 585 (Thomas, J., dissenting).

90. *Id.* at 589.

91. *Id.* at 584 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

92. *Id.* at 590 (citing *Moyer v. Peabody*, 212 U.S. 78 (1909) (discussing immunity in a damages action)).

Even if the habeas statute authorized factual inquiries,⁹³ factual development must be minimal and only extend as far as “necessary to resolve the legal challenge to the detention.”⁹⁴ For Thomas, whether Hamdi was actually an enemy combatant is a question “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion.”⁹⁵

D. *The Ambiguity of Hamdi*

A conventional analysis of the *Hamdi* decision would take the plurality dicta as highly persuasive on the question of the executive’s burden of factual justification in habeas proceedings challenging an enemy combatant designation.⁹⁶ The Justices in *Hamdi*, however, were not directly asked to consider the executive’s burden from an institutional perspective. With the exception of Justice Thomas, all focused on individual rights, due process issues, or statutory requirements, rather than an institutional analysis of the habeas writ. Moreover, the Justices could not agree on specific procedural consequences of their individual rights or statutory analysis.

Hamdi thus provides no certain constitutional rule respecting the government’s burden of factual justification in cases of executive detention of citizens. This Article argues that the *Hamdi* plurality’s dicta is misguided and should be rejected by the current Court and its newly appointed Justices. The institutional purposes of the writ require the imposition of a heavy burden of justification on the executive in habeas proceedings challenging the detention of citizens as enemy combatants.

93. *Id.* at 588 n.2.

94. *Id.* (citing *Walker v. Johnson*, 312 U.S. 275 (1941) (petition challenged detention pursuant to a criminal prosecution)).

95. *Id.* at 582–83 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)).

96. The force of even majority opinion dicta is not strong, according to the current Court. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2761–2762 (2007); see also Pierre N. Laval, *Madison Lecture: Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

III. THE INSTITUTIONAL PERSPECTIVE ON HABEAS

The argument that the executive properly bears a heavy burden of factual justification in a habeas proceeding challenging an enemy combatant designation is guided by the Supreme Court's suggestion that the Constitution's Suspension Clause embodies minimum constitutional guarantees regarding the habeas writ.⁹⁷ In this Article, the constitutional minimum is defined from an institutional perspective that highlights the role of the judiciary in checking the executive and preserving a government of separated powers even in times of national exigency. The institutional perspective has a firm lineage in doctrine, and the Court's recent decisions confirm its importance.⁹⁸

97. *INS v. St. Cyr*, 533 U.S. 289, 298–300 (2001). For development of the Suspension Clause minimal guarantee argument, see, for example, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 969–89 (1998) [hereinafter Neuman, *Removal of Aliens*]; Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1964–69 (2000) [hereinafter Neuman, *Rule of Law*]; and Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563–70 (2002) [hereinafter Neuman, *Suspension Clause*] (drawing on Justice Marshall's opinion in *Ex parte Bollman*, 8 U.S. 75 (1807), the legislative history of the Constitution's Suspension Clause, and historical materials pertaining to the habeas writ). Cf. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 135–155 (1980) (describing *Bollman* as a mere product of political maneuvering between President Thomas Jefferson, who feared that courts would release two conspirators arrested in the Burr conspiracy, and Chief Justice Marshall). Richard Fallon challenges and refines Neuman's argument in some respects, but similarly concludes that the Suspension Clause must be taken into account in defining the constitutional scope of habeas review. Richard Fallon, *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068 (1998) [hereinafter Fallon, *Suspension Clause*]. The focus on immigration detentions in many of these articles does not detract from the basic point that the Constitution presupposes that there will be habeas jurisdiction in courts and that the scope of this jurisdiction must be defined with reference to the structures of government that the Framers established in the Constitution. The Supreme Court has been less than definitive in discussing Suspension Clause theory. Cf. *Swain v. Pressley*, 430 U.S. 372, 384, 385–86 (1977) (Burger, C.J., Blackmun and Rehnquist, JJ., concurring in part and concurring in the judgment) (deciding not to “consider the important constitutional question whether the Suspension Clause protects the jurisdiction of the Art. III courts”).

98. See *infra* discussion accompanying notes 138–173. See also Shapiro, *supra* note 8, at 61–64.

A. *The Lineage of the Institutional Perspective*

Burdens of justification are often discussed in individual rights terms that draw on due process doctrine. Due process doctrine, for example, holds that if the executive wishes to incarcerate individuals as punishment for bad behavior, it must establish guilt beyond a reasonable doubt in a judicial proceeding where the accused enjoys a presumption of innocence.⁹⁹ If the executive wishes to detain someone because he is perceived to be a future danger to himself or the community, it may initiate a civil commitment proceeding, but commitment may be ordered only if danger is established by clear and convincing evidence before an appropriate tribunal.¹⁰⁰

In its due process analysis, the *Hamdi* plurality echoes an individual rights framework and rhetoric that tend to dominate discussion of the habeas writ. For example, scholars attempting to define the constitutional core of habeas typically orient their definitions with a due process compass, even if they also take note of the institutional purposes of the writ.¹⁰¹ Strong individual rights rhetoric comes from Civil War era decisions.¹⁰² When the Court speaks of the writ as a privilege and

99. *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

100. *Addington v. Texas*, 441 U.S. 418, 431–32 (1979) (due process requires proof by clear and convincing evidence). See also Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1455 (2001) (dangerousness as well as some additional factor needed to justify civil commitment).

101. See, e.g., David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO L.J. 2481 (1998) (combining Suspension Clause and due process analyses) [hereinafter Cole, *Limits on Congress*]; Fallon, *Suspension Clause*, *supra* note 97, at 1082–87 (discussing the relationship between Article III, Article I, and habeas jurisdiction); Fallon & Meltzer, *supra* note 8 (adopting a criminal law baseline for thinking about burdens in the context of a discussion that also looks to institutional perspectives on the writ). For a discussion of state constitutional provisions that link the writ to protections against encroachment on individual rights, see DUKER, *supra* note 97, at 95–116.

102. See, e.g., *In re McDonald*, 16 F. Cas. 17, 20, 22, 29, 30 (E.D. Mo. 1861) (the writ is “the inheritance of the free-born subject,” “an indefeasible privilege,” “the birthright of every man within the borders of the States; like the right to air, and water, and motion, and thought”); see also Arkin, *supra* note 43, at 59–72; Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1, 9–19 (2004) (cautioning reading too much into the

immunity of national citizenship,¹⁰³ it employs an individual rights perspective. When Justices opine that the writ is the remedy that protects individual liberty, they advert to this understanding.¹⁰⁴ When habeas petitioners rely on *Hamdi* to argue that they have a right to a full judicial hearing on their enemy combatant status, they take an individual rights perspective.¹⁰⁵

A due process, individual rights rhetoric, however, does not adequately capture the unique purposes of the habeas writ.¹⁰⁶

Milligan majority opinion, which is heavily rights-oriented, because some of the rhetoric reflects partisan reactions against President Lincoln's suspension of the habeas writ).

103. *The Slaughter-House Cases*, 83 U.S. 36, 79, 115 (1872); see also Brief for the Respondents at 14 n.4, *Boumediene v. Bush*, No. 06-1195 (S. Ct. Oct. 9, 2007) (government asserting that the Suspension Clause is best interpreted as a source of an individual right because it employs the term "privilege").

104. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–56 (2004) (Scalia & Stevens, JJ., dissenting).

105. See, e.g., *Khalid v. Bush*, 355 F. Supp. 2d 311, 316, 320 (D.D.C. 2005) (petitioner's claims to due process protections, protections against torture, and access to counsel have a rights orientation), *vacated*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007). See also Appellants' Response to Appellee's Motion to Dismiss for Lack of Jurisdiction at 40–42, *al-Marri v. Wright*, No. 06-7427 (4th Cir. Dec. 12, 2006) (applying a due process balancing test but contending that the government should bear a heavier burden than the one contemplated by the *Hamdi* plurality for captures off the battlefield).

106. It is beyond the scope of this Article to comprehensively review the limitations of an individual rights analysis under the due process clause, but two points are worth mentioning here. First, non-citizens may not enjoy due process protections. See *infra* note 125. Second, even in the absence of national security arguments, some Justices have an extremely narrow view of what due process might require by way of judicial review in habeas cases. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 345–347 (2001) (Rehnquist, C.J., Scalia, J., & Thomas, J., dissenting); *Herrera v. Collins*, 506 U.S. 390, 427–29 (1993) (Scalia & Thomas, JJ., concurring). In *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001), Justice Breyer, writing for the majority, had to cite to the dissenting opinion of Justice Brandeis in *Crowell v. Benson*, 285 U.S. 22 (1932), for the proposition that due process may require judicial review. The majority in *St. Cyr* did not even speculate that serious due process questions would be raised by a statute eliminating all habeas review. See *St. Cyr*, 533 U.S. at 289. Thus, two district court judges wishing to extend the right to counsel to enemy combatants did not venture to rely on the due process clause but turned, instead, to a statute giving them the authority to appoint counsel. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 448; *al Odah v. United States*, 346 F. Supp. 2d 1, 5–11 (D.D.C. 2004). For an argument that due process does offer meaningful guarantees for judicial review, see John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (the due process clause of the Fourteenth Amendment entails a right to some species of private civil remedy for personal injuries). It should be noted that due process is not the only individual right that arguably supports access to meaningful habeas review. See, e.g., Pfander,

As historians explain, the writ evolved in tandem with the emergence of an independent judiciary, a system of separated government powers, and a new concept of the rule of law; it was not merely a remedial device to accommodate expanding concepts of individual liberty.¹⁰⁷ In England, the writ was seen as so crucial to separated powers government that Parliament made judges liable in actions at law if they improperly refused to issue the writ.¹⁰⁸ In the United States, the Framers' debates about the Suspension Clause had an institutional cast; some wanted the writ to be guaranteed in order to protect the sovereign position of the States.¹⁰⁹ Alexander Hamilton viewed the writ as not merely a guarantee against specific arbitrary imprisonments but as protection against the pervasive tyranny and illegitimacy of an unchecked executive.¹¹⁰

Contemporary scholars have continued to emphasize that habeas review is not just about individual liberty and fairness but also about the rule of law and official adherence to law. Gerald Neuman advances a compelling institutional perspective on the writ. In his view, the mandate of the Suspension Clause gives the "assurance of legality which has come to be thought of as integral to government under law,"¹¹¹ and "keep[s] executive adjudicators within their authority."¹¹² He links the writ to the independence of federal courts,¹¹³ their checking function, and "the broader notion of the rule of law."¹¹⁴ Richard Fallon speculates that the writ might be more effective at serving rule of law purposes such as norm forma-

Petition, *supra* note 7 (bringing the individual rights protections of the First Amendment into the argument).

107. See, e.g., DUKER, *supra* note 97, at 3 (the habeas proceeding mirrors the substantive concept of liberty); *id.* at 12–63 (tracing the parallel development of concepts of liberty and the scope of the writ); SHARPE, *supra* note 86, at 115–17; Neuman, *Rule of Law*, *supra* note 97, at 966–69 (linking the development of the writ to due process, in the context of immigration and the modern administrative state).

108. DUKER, *supra* note 97, at 47.

109. *Id.* at 126–35. The historical practice and ability of sovereign state courts to issue writs of habeas corpus against federal officials changed with the decision in *Tarble's Case*, 80 U.S. 397 (1871). DUKER, *supra* note 97, at 153–55, 309. See also Meltzer, *supra* note 14, at 2566–67.

110. THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1969).

111. Neuman, *Removal of Aliens*, *supra* note 97, at 984 (citation omitted).

112. *Id.* at 988–89.

113. Neuman, *Suspension Clause*, *supra* note 97, at 597.

114. Neuman, *Removal of Aliens*, *supra* note 97, at 971.

tion or deterring official misconduct than at securing individual liberty.¹¹⁵ Ann Woolhandler argues that the habeas proceeding is concerned with systemic rather than individual, random illegality.¹¹⁶ The role of the writ in preserving separated-powers government in times of war is a persistent theme in the literature.¹¹⁷

The habeas writ has always been used as a tool to maintain the institutional position of courts as a counterweight to other governmental institutions or competing judicial systems.¹¹⁸ Institutional clashes involving the habeas writ in

115. Fallon, *Suspension Clause*, *supra* note 97, at 1093–94 (questioning whether individual habeas petitions can promote individual justice in immigration cases); *id.* at 1097 (arguing that there is a “systemic interest” in having courts review executive claims of power “as a pillar of the separation of powers and a guarantor of the rule of law”). See also James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992) (habeas jurisdiction has been construed to reach primarily issues of national concern). For a discussion of how the rule of law figures in judicial decisions generally, see Richard H. Fallon, Jr., “*The Rule of Law*” As a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

116. Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993) (habeas is concerned with systemic not random illegality).

117. See, e.g., Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 570 (2005) (judicial review is needed to preserve the reciprocal flow of information that makes democracy possible, even in wartime); *id.* at 571 (as a matter of separation of powers, courts are intended to provide transparency in government, even in times of war); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 64 (2004) [hereinafter Neuman, *Guantanamo Loophole*] (suspension of the privilege of the writ compromises separated-powers government); Neuman, *Removal of Aliens*, *supra* note 97, at 1026 (precluding habeas inquiry into executive detention would “break off the three-way conversation among the branches that makes the politics of law enforcement conform more closely to its constitutional blueprint”); *id.* at 1025–26 (habeas review will reinforce democracy and the rule of law); Scheppele, *supra* note 30, at 1051. The habeas petition in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), was the vehicle through which federal courts preserved a significant role despite Congress’s attempt to limit federal jurisdiction in the Detainee Treatment Act. See *supra* note 15; see also *Ex parte Milligan*, 71 U.S. 2 (1866) (Article III jurisdiction over crimes committed during the Civil War preserved through the habeas writ). This Article agrees with those like Scheppele who see, in the threat of war, a reason to subject war to a regime of rules—not a justification for undermining separation of powers that characterizes our government.

118. One of the earliest functions of the habeas writ was to serve the institutional needs of the judiciary by securing the presence of individuals whose testimony or presence was needed in judicial proceedings. DUKER, *supra* note 97, at 20–23 (writ was used by courts who required the presence of unwilling persons in order to perform their judicial tasks); SHARPE, *supra* note 86, at 2 (first uses of the writ were to detain individuals, although only to secure presence at trial, not to imprison). At this point in history, one might see an irony in this institutional purpose, for the habeas writ so used would result in the detention of unwilling in-

England reflected the desire of different court systems and branches of government to sustain a strong institutional position against competing institutions.¹¹⁹ Mid-nineteenth-century confrontations between northern and southern (and state and federal) judiciaries involving the habeas writ were about power relationships among institutions of government.¹²⁰

The executive even occasionally admits, albeit implicitly, that the institutional struggle takes precedence over what happens to a particular individual. The alleged enemy combatant Yaser Hamdi, for example, was released and sent to Saudi Arabia after the Supreme Court held that he was entitled to a hearing on his status. His release suggests the executive was more worried about a public accounting than about the fate of Hamdi as an individual.¹²¹ When asked to justify the legality of executive detentions effected during World War II, the executive chose not to contest the issuance of a judicial order voiding a conviction of an individual who had violated a detention order, thereby precluding a judicial determination that might have called the legality of the order into question.¹²²

dividuals. See ROBERT SEARLES WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 13–16 (1960).

119. DUKER, *supra* note 97, at 33–63 (describing how various courts, as well as Parliament, wanted the power to detain but resisted the ability of other entities to exercise the power that they claimed for themselves).

120. Arkin, *supra* note 43, at 33–42.

121. Peter Irons, “*The Constitution Is Just a Scrap of Paper*”: *Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1097 (2005). Suspension of habeas is an extreme measure precisely because it enables the executive to avoid a judicial accounting and “imprison suspected persons *without giving any reason for so doing*.” Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 437–38 n.146 (2006) (quoting Blackstone and arguing that suspending habeas is the only way that the executive can avoid having to be called into court to explain, with reference to sensitive information, a given detention). There is a debate about whether the executive is subject to an ultimate accounting for detentions effected during the writ’s suspension. Compare, e.g., *Ex parte Milligan*, 71 U.S. at 125–26 (1866) (even if Congress suspends the writ, it has not suspended rights, which presumably can be vindicated through other types of actions), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 594 (2004) (Thomas, J., dissenting) (suspension of the writ does not make executive detentions constitutional; it merely removes a remedy), with *Hamdi*, 542 U.S. at 563–64 (Scalia and Stevens, JJ., dissenting) (suggesting that suspension legalizes or authorizes unilateral executive detentions), and Shapiro, *supra* note 8 (suspension legalizes otherwise unconstitutional executive conduct).

122. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); cf. Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 127 (2006) (discussing the importance of secrecy to the executive in cases of detention).

The conceptual and historical lineage of the institutional perspective, which emphasizes the role of the judiciary and a separated-powers government essential to every liberty,¹²³ is lost when a due process rhetorical or analytic framework is the sole focus of discussions of the habeas writ. A comparison of the majority and dissenting opinions in *Boumediene v. Bush*¹²⁴ illustrates the point. In *Boumediene*, the parties debated the constitutionality of the denial of habeas review to non-citizens by the Military Commissions Act of 2006 (MCA). The case was thus about the power of Congress to compromise the writ, rather than (directly) about habeas limits on the power of unilateral executive detention. Nonetheless, the way in which the majority and dissenting judges analyzed the question of congressional power illuminates the importance of the institutional perspective developed in this Article.

The *Boumediene* majority rejected the non-citizen's constitutional challenge to the MCA. The majority asserted that the Suspension Clause protects only an individual right to habeas and held that aliens detained outside the sovereign territory of the United States are no more protected by a right to habeas review than by the guarantees of the Constitution's Bill of Rights.¹²⁵

123. *Al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007) (noting that "the extraordinary power [the President] seeks would . . . effectively undermine all of the freedoms guaranteed by the Constitution"), *reh'g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

124. 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

125. *Id.* at 990–92 (relying on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Non-citizens ordinarily do not possess the full range of constitutional rights guaranteed citizens. *Compare, e.g., Zadvydas v. Davis*, 533 U.S. 678, 691 (2001) ("In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance . . ."), and *id.* at 692 ("The serious constitutional problem arising out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty . . . is obvious."), with *id.* at 691 (suggesting the situation might differ were non-citizens detained as "suspected terrorists"), and *Clark v. Martinez*, 543 U.S. 371 (2005) (inviting Congress to figure out how to detain non-citizens indefinitely). For discussion of the constitutional rights of non-citizens, see, for example, Brief of Amici Curiae Law Professors of Constitutional Law and Federal Jurisdiction Advocating Denial of Motion to Dismiss (Reversal), *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427); Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 274–85 (2004); Ass'n of the Bar of the City of N.Y.: Comm. on Fed. Courts, *supra* note 8, at 71; Neuman, *Guantanamo Loophole*, *supra* note 117; Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004).

In contrast, the dissenting judge worked within a constitutional framework informed by an institutional perspective on habeas. The *Boumediene* dissent understood that the writ serves institutional purposes by subjecting executive justifications for detention to judicial examination.¹²⁶ Although it noted that a judicial accounting may lead to the release of individuals wrongfully detained, the dissent focused on institutional purposes in addressing the petitioner's specific challenge to the MCA.¹²⁷ According to the dissent, "[T]he process that is due inheres in the nature of the writ and the inquiry it entails."¹²⁸ The dissent asserted that the habeas writ of the Suspension Clause is referenced in Article I, section 9, and, by absolutely denying certain powers to Congress (and by implication to the executive),¹²⁹ it operates as a structural constraint that is not coextensive with a single individual right.¹³⁰ For the dissent, the Suspension Clause functions like the Ex

126. *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting).

127. A central issue in *Boumediene* is whether the MCA and DTA offer a constitutionally adequate alternative to the traditional habeas writ. According to the dissent, the government may show that a detention is justified by using normal criminal processes. If, however, the government detains without charge, a habeas court is entitled to assign to the government the burden of showing the accuracy of the facts justifying detention. *Id.* at 1009–10 (Rogers, J., dissenting) (citing *Ex parte Bollman*, 8 U.S. 75 (1807), among other cases, and noting that habeas courts have historically inquired into the government's assertion of facts). Because the MCA and DTA do not impose a proper government burden, they are not an adequate alternative to traditional habeas review. *Id.* at 1005–06, 1010. The DTA process begins with a CSRT hearing in which a detainee bears the burden of showing that he should not be detained, and the hearing is conducted under rules that impede the determination of true facts. *Id.* at 1005. None of the defects in the CSRT process are cured by the judicial review provided for in the DTA, according to the dissent. The dissent also concluded, contrary to the argument of this Article, that the traditional writ guarantees release. *Id.* Because the DTA does not offer such a guarantee—and the government has engaged in the practice of conducting repeat CSRTs until the “right” conclusion regarding enemy combatant status is reached—the dissent would hold that the DTA is not an adequate alternative to the § 2241 writ. *Id.* at 1006. For competing discussions of the adequate alternatives issue, compare Brief of Amici Curiae Professors of Constitutional Law and Federal Jurisdiction Advocating Denial of Motion to Dismiss (Reversal), *supra* note 125, at 20–25, with Brief for the Respondents at 40–48, *Boumediene v. Bush*, No. 06-1195 (U.S. Oct. 9, 2007). See also *infra* note 181.

128. *Boumediene*, 476 F.3d at 1011 (Rogers, J., dissenting).

129. *Id.* at 998.

130. The institutional perspective does not preclude a rights perspective. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 318–26 (2001) (placement of the Suspension Clause in Article I of the Constitution no obstacle to thinking about the Clause as a source of rights). As Richard Fallon notes, one must look to all constitutional sources in order to find the best (or most coherent) constitutional interpretations. Fallon, *Suspension Clause*, *supra* note 97, at 1076–78.

Post Facto Clause discussed in *Weaver v. Graham*:¹³¹ ex post facto legislation is absolutely void, and so is legislation or other conduct contravening the Suspension Clause.¹³² Article I constraints prevent government from becoming tyrannical in structure and, unlike individual rights, do not vary depending on whether a citizen or an alien is asserting them, within or without the territorial jurisdiction of the United States.¹³³

The *Boumediene* dissent demonstrates that, in the case of the Great Writ, an institutional perspective favors strong judicial review.¹³⁴ The institutional lineage of the habeas writ offers a rejoinder to those who regard courts as lacking institutional capacity in the conduct of war, preservation of national security, and pursuit of foreign affairs;¹³⁵ who believe that judicial review of enemy combatant determinations is “judicial interference”;¹³⁶ or who argue that Congress should serve as the only institutional check on the executive.¹³⁷

B. Institutional Perspectives in the Court’s Decisions

Given the well-respected lineage of the institutional perspective, it should come as no surprise that Supreme Court opinions have clearly embodied that perspective in cases involving the existence or scope of habeas review. For example, the Supreme Court plurality’s opinion in *Hamdi*—although surely benefiting Hamdi himself, as individual petitioner—also clearly recognized the institutional clash at the heart of enemy combatant litigation. The plurality emphasized that, even in dire times, the Constitution envisions a role for all three branches of government and resists the concentration of power

131. 450 U.S. 24 (1981).

132. See also *Downes v. Bidwell*, 182 U.S. 244 (1901) (discussing bills of attainder); *Petition for Writ of Certiorari and Writ of Certiorari Before Judgment at 19, Hamdan v. Gates*, No. 06-1169 (U.S. Feb. 27, 2007).

133. *Boumediene*, 476 F.3d at 1001 n.6 (Rogers, J., dissenting) (noting that the Crown might have sent people to faraway places in an attempt to create practical difficulties for courts, but not because habeas jurisdiction did not extend to the detainees as a matter of law).

134. It bears emphasizing that this Article focuses on the scope of judicial review once an individual is given access to federal courts to file a petition for a writ of habeas corpus. It takes up a question that arises only after a habeas petitioner wins the jurisdictional debate present in *Boumediene*.

135. *Hamdi v. Rumsfeld*, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting).

136. *Id.* at 582.

137. *Id.* at 591.

in a single branch of government.¹³⁸ Separation-of-powers checks are needed even in time of war.¹³⁹ Unless the writ is suspended in accordance with the Constitution, opined the plurality, courts play a "necessary role in maintaining this delicate balance of governance" and serve as a "judicial check" on the executive.¹⁴⁰ The *Hamdi* plurality refused to permit Congress to compromise the institutional function of the third branch of government by depriving federal courts of the power to issue the writ.

Similar refusals to abdicate the judicial checking function of the writ are easily identified in other Supreme Court opinions. In *Ex parte McCardle*, for example, a southern civilian who was publicly critical of post-Civil War Reconstruction was imprisoned by military authorities and held for a trial before a military tribunal.¹⁴¹ After McCardle's petition had made its way through lower federal courts to the Supreme Court, and after oral argument, Congress repealed an 1867 statute that had authorized McCardle to appeal the denial of his petition to the Supreme Court.¹⁴² Faced with Congress's attempt to deprive the Court of the ability to reach McCardle's challenge to the constitutionality of federal Reconstruction, the Court held that Congress did have the power to repeal the 1867 statute conferring appellate jurisdiction on the Court.¹⁴³ The Court, however, conditioned its approval of the statutory repeal on the fact that other avenues of reaching the Supreme Court remained, which preserved the Court's essential role.¹⁴⁴

138. *Hamdi*, 542 U.S. at 536.

139. *Id.* at 567 (citing *Ex parte Milligan*, 71 U.S. 2 (1866)).

140. *Id.* at 536.

141. 74 U.S. (7 Wall.) 506, 508 (1868). For a classic explication of the decision, see William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

142. See 74 U.S. (7 Wall.) at 507-08.

143. See *id.* at 514.

144. See *id.* at 515. *McCardle* illustrates the lengths to which the Court has been prepared to go to protect its institutional role. The "original" writ of habeas corpus is a curious and not straightforward jurisdictional basis for Supreme Court action. See Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 154-173 (1962). The jurisdictional difficulties associated with this concept are nicely illustrated in *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1833), where the majority described the absence of a judicial commitment hearing as a lower court act subject to the Court's review, see *id.* at 572, while the dissent argued that there was no order of a court to which the Court's appellate jurisdiction could apply, see *id.* at 580 (Johnson, J., dissenting). Both majority and dissenting Justices assumed that the case was beyond the reach of the Court's jurisdiction unless it could be characterized as involving appellate re-

The Court has relied more than once on the interpretational move of *McCardle*. In *Zadvydas v. Davis*, for example, it interpreted new immigration legislation to preserve § 2241 as the “basic method” for habeas challenges to detention.¹⁴⁵ In *Felker v. Turpin*, the Court interpreted provisions of the Anti-Terrorism and Effective Death Penalty Act so as to again preserve § 2241 review.¹⁴⁶

More recently, the Court construed the jurisdiction-removing statute in *INS v. St. Cyr* so as not to strip federal courts of all habeas jurisdiction.¹⁴⁷ Although it might have interpreted the statute in question to eliminate all judicial review of deportation orders of aliens convicted of criminal offenses,¹⁴⁸ the Court held that the statute preserved normal habeas review.¹⁴⁹ The majority’s interpretation required a fair bit of creativity, as the dissent charged,¹⁵⁰ but the majority said that the interpretation was justifiable because removing all habeas review would give rise to a serious constitutional question.¹⁵¹ The perceived constitutional difficulty apparently was not that Congress had flirted with eliminating a means of protecting individual rights, for the majority did not even discuss the possibility that the statute might offend individual due process protections were it interpreted to remove all habeas jurisdiction. Rather, the Court seemed to be concerned that Congress had come close to fatally compromising the larger institutional role of the judicial branch of government.¹⁵²

Institutional concerns are also reflected in the occasional comments of individual justices. For example, Justice Souter has suggested that a constitutional problem would arise were the removal of habeas jurisdiction to interfere with the ability of the Court to resolve uncertainties and differences of opinion

view. *See id.* at 572 (majority opinion); *id.* at 579–80 (Johnson, J., dissenting). Recent enemy combatant challenges have sought to take advantage of the original writ to bypass the limitations of the MCA. *See, e.g.,* Petition for Original Writ of Habeas Corpus, *In re* Petitioner Ali, 127 S. Ct. 3037, No. 06-1194 (Feb. 12, 2007).

145. *See* 533 U.S. 678, 687 (2001).

146. *See* 518 U.S. 651, 660–61 (1996).

147. *See* 533 U.S. 289, 298–314 (2001).

148. *See id.* at 327 (Scalia, J., dissenting).

149. *See id.* at 314 (majority opinion).

150. *See id.* at 326–27 (Scalia, J., dissenting).

151. *See id.* at 299–300 (majority opinion).

152. *See id.* at 298–314. The decision is thus some support for an argument that an institutional perspective on the writ may result in the extension of the writ’s protections to non-citizens. *See supra* notes 16 and 125.

regarding the proper interpretation of federal law and thereby to say what the law is.¹⁵³ Souter's concern was later echoed by Justice Stevens, who observed that a statute requiring federal courts to cede to state courts power to say what the Constitution means, so that interpretation would vary from state to state, would contravene Article III's conferral on the Supreme Court of final authority to say what the law is.¹⁵⁴ Chief Justice Burger and Justices Blackmun and Rehnquist once speculated in *Swain v. Pressley* that a constitutional, separation of powers problem might arise were habeas jurisdiction transferred to an Article I court "since the traditional Great Writ was largely a remedy against executive detention."¹⁵⁵

In its most recent habeas decision, *Hamdan v. Rumsfeld*, the Court relied heavily on institutional considerations as it refused to abstain from deciding whether a detainee's trial by military commission was legal.¹⁵⁶ The executive and the Court's dissenters were arguing that the habeas writ ought to be treated as any other request for an exercise of equitable jurisdiction, in which case abstention would be proper.¹⁵⁷ Even though the habeas statute does direct federal courts to exercise discretion in handling habeas petitions "as law and justice require,"¹⁵⁸ a majority of the *Hamdan* Court did not think ordinary equitable principles should be applied in an ordinary fash-

153. See *Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating out for the Court the important role of saying, with finality, "what the law is").

154. See *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.). Both *Williams* and *Felker v. Turpin*, 518 U.S. 651, involved the Antiterrorism and Effective Death Penalty Act, which limits federal court review of state court determinations in state criminal cases. Congress arguably has extensive authority to limit federal habeas jurisdiction in such cases. The Court has sent different messages on this subject in its interpretations of the AEDPA. See *infra* note 180.

155. *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, J., concurring); cf. Pfander, *Article I Tribunals*, *supra* note 44, at 648-49 (discussing the constitutional requirement that Article I tribunals remain inferior to Article III courts).

156. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769-70 (2006) (the government's two comity arguments were that military justice and the military function better without judicial interference and that courts should respect the congressional balance struck between military needs and individual rights); see also *id.* at 2821 n.8 (Scalia, J., dissenting) (by not abstaining the Court was improperly assuming that the president was insufficiently insulated from military pressure).

157. See *id.* at 2819; cf. *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) (citing Justice Scalia's concurring and dissenting opinion in *Withrow v. Williams*, 507 U.S. 680, 717-18 (1993)).

158. 28 U.S.C. § 2243 (2000); see also 28 U.S.C. § 2241(a) (2000) (a court "may" grant a writ).

ion to habeas challenges to unilateral executive detentions.¹⁵⁹ The Court distinguished the institutional interests in *Hamdan* from factors that might support abstention in other cases.¹⁶⁰ In particular, the Court was influenced by the fact that the military commissions challenged in *Hamdan* were not part of an integrated system of military justice that included a timely right of independent judicial review.¹⁶¹ Rather than supporting abstention, the Court suggested that circumstances and structural considerations justified an *expedited* judicial review that would both preserve “in time of war as well as in time of peace” the constitutional safeguards of civil liberty and produce the timely decision that “the public interest” required.¹⁶²

The institutional concerns voiced by the majority in *Hamdan* involved separation of powers, the rule of law, and the integrity of the third branch of government. Justice Stevens began his majority opinion by noting that “trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure.”¹⁶³ Later, he continued with a reminder that “[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny.”¹⁶⁴ Stevens emphasized that “the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction,”¹⁶⁵ and he took note of the duty of courts to decide cases and to implement the jurisdiction conferred by Congress.¹⁶⁶

The *Hamdan* majority’s institutional emphasis was also manifested in concurring opinions. Justice Breyer, for example, was concerned that the President had not properly consulted with Congress, not about whether *Hamdan* possessed any individual rights.¹⁶⁷ Had the President consulted with

159. See *Hamdan*, 126 S. Ct. at 2769–72.

160. See *id.*

161. See *id.* at 2771. For that reason, the Court was unwilling to assume that constitutional rights of detainees would be protected.

162. *Id.* at 2772 (citing *Ex parte Quirin*, 317 U.S. 1, 21 (1942), as authority for expedited review, but noting that institutional considerations might be weighed differently were the detention and trial effected on the battlefield).

163. *Id.* at 2759 (citing *Ex parte Quirin*, 317 U.S. at 19).

164. *Id.* at 2780 (non-majority opinion) (citing THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed. 1961)).

165. See *id.* at 2798.

166. See *id.* at 2772 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

167. See *id.* at 2799 (Breyer, J., concurring).

Congress about the proper way to deal with Guantanamo detainees, giving the democratic process a chance to function, Justice Breyer might have had a different view of the dispute.¹⁶⁸

Perhaps most important, the swing voter in *Hamdan*, Justice Kennedy, supported most aspects of Justice Stevens's opinion dealing with institutional interests.¹⁶⁹ According to Kennedy,

[t]rial by military commission raises separation of powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.¹⁷⁰

Kennedy asserted that "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."¹⁷¹ He relied on *Youngstown Sheet & Tube Co. v. Sawyer*'s¹⁷² structural analytical framework in concluding that, because Congress had acted and the President was seemingly acting in con-

168. See *id.*; see also Issacharoff & Pildes, *supra* note 102, at 32–33 (the executive detention habeas decisions of the Supreme Court can be best understood as attempts to decide whether the executive is acting unilaterally or in concert with Congress).

169. Justice Kennedy is typically focused on proper institutional roles. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276–77 (1990) (Kennedy, J., concurring), for example, he countered the majority's individual rights perspective—which distinguished between citizens and non-citizens—with a discussion of the restrictions on the power of governmental institutions themselves. He also joined the majority in *INS v. St. Cyr*, in an opinion that emphasized structural considerations associated with the habeas writ. See *INS v. St. Cyr*, 533 U.S. 289, 291–326 (2001). Compare his opinions in *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545–46 (2001), and *Romer v. Evans*, 517 U.S. 620, 633 (1996) (reflecting a concern for retaining the integrity of institutional processes).

170. *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (citations omitted).

171. *Id.* at 2799.

172. 343 U.S. 579 (1952).

travention of congressional wishes, the President's power should be considered to be at its lowest.¹⁷³

In *Hamdan* and other decisions dealing with the writ, Justices are clearly concerned with something more than a given individual's constitutional plight or hardship. Consistently, in and through habeas proceedings, the Court and its Justices seem to be protecting the institutional role of the federal judiciary relative to the other branches of government. In this respect, they pursue the effort, early undertaken by Justice Marshall in *Marbury v. Madison*,¹⁷⁴ to scrupulously protect the integrity and independence of judicial power.

Other decisions of the Court pursue the same goal. The Court has cautioned judges to refrain from participating in the confiscation of enemy property without clear congressional authorization.¹⁷⁵ It has reminded the executive branch that it may not "[w]ithhold[] materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks."¹⁷⁶ When a court renders a final decision—which the Article III judiciary is given constitutional power to do—the finality of that decision will be protected against legislative¹⁷⁷ or executive¹⁷⁸ intervention. The Court has prohibited the transfer of the essential attributes or core functions of the Article III judiciary to legislative or executive courts or decisionmakers without the salary and tenure protections that give federal judges the independence to perform

173. See *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (citing *Youngstown Sheet & Tube*, 343 U.S. at 637).

174. 5 U.S. (1 Cranch) 137 (1803). The central issue in *Marbury* was the validity of the Judiciary Act of 1789, through which Congress had tried to give the Supreme Court power to hear a case that fell outside the scope of the original jurisdiction defined for the Court in Article III of the Constitution. *Id.* at 148. In the opinion of the Court, Congress had therefore acted unconstitutionally. See *id.* at 176. According to Justice Marshall, federal courts are bound by oath of office to adhere to the Constitution, even if adherence requires them to refuse to exercise jurisdiction conferred by Congress. See *id.* at 180. Marshall's principle extends beyond interpretation of jurisdictional statutes. Marshall announced that it is the right and obligation of judges to implement their own jurisdiction and to manage their own affairs in accordance with their oath to abide by the Constitution. See *id.* For an excellent discussion, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

175. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–29 (1814).

176. *Cheney v. U.S. Dist. Ct. for Dist. Columbia*, 542 U.S. 367, 384 (2004) (citing *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

177. See *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995) (invalidating a statute that permitted a final judgment to be opened).

178. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

their constitutional role.¹⁷⁹ It has said that, although Congress may prescribe some rules of decision for resolving disputes that arise under federal statutes, Congress cannot tell courts how to decide particular cases.¹⁸⁰

The Supreme Court's jealous protection of the judiciary's power over the habeas writ is a significant part of the institu-

179. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–89 (1982) (reviewing the constitutionality of decisionmaking authority of bankruptcy judges); *United States v. Raddatz*, 447 U.S. 667 (1980) (reviewing the decision-making authority of magistrates).

180. See *United States v. Klein*, 80 U.S. 128, 146 (1871); see also Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437 (2006). In the habeas context, the Court has frequently deferred to statutory rules while temporizing about Congress's power to dictate procedures accompanying the use of the writ. See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 281 (2006) (the Court thinks it, not Congress, is ultimately in control of saying how much habeas is required). Faced with detailed congressional directions for handling habeas petitions filed by state prisoners, for example, the Court initially would not affirm that it was bound by the statute. *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996). It merely observed that the statutory directions would "certainly inform [the Court's] consideration of original habeas petitions." *Id.* at 663. In approving another section of the statute, which required a petitioner to obtain permission from a court of appeals before filing a second habeas petition and directed appellate courts to adhere to statutory criteria in granting permission, the *Felker* Court did not hold that Congress could impose any restrictions it might wish on habeas petitioners. See *id.* at 664. Instead, it merely held that Congress could specify restrictions that were within historical traditions that had always guided the judiciary's use of the writ. See *id.* The view that the Court might consent to be guided by, but not dictated to, through a statute implementing habeas jurisdiction was repeated most recently in *Miller-el v. Cockrell*, 537 U.S. 322, 340 (2003) (courts are to be "guided by AEDPA" in deciding whether to defer to a state court's credibility determinations). Other opinions have suggested that AEDPA rules limiting federal court review of state criminal convictions are binding. See, e.g., *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939–1940 (2007) (statutory mandate of deference implicit in the discussion of the scope of federal habeas review); *Uttecht v. Brown*, 127 S.Ct. 2218, 2224 (2007) (citing *Williams v. Taylor* and Section 2254(d)(1) as requiring deference to state courts); *Rice v. Collins*, 546 U.S. 333, 335–42 (2006) (never intimating that there might be judicial power to ignore legislative standards); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (Section 2254(d)(1) of the habeas statute limits what federal courts can do with incorrect but not unreasonable applications of constitutional principle). But see *Rice*, 546 U.S. at 343–44 (Breyer, J., concurring) (relying on principles of federalism, not the habeas statute, as a reason to defer to state-court judgments). In cases dealing with habeas review of federal executive detentions, Justice Scalia has suggested that some legislative rules are also binding. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting) (when it legitimately suspends the "privilege" of the writ, Congress may do so in a qualified way, imposing whatever proper procedural mandates on courts that it deems proper); *INS v. St. Cyr*, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting) (immigration statutes are unambiguous and binding on federal courts).

tional project commenced in *Marbury*.¹⁸¹ To date, however, the Court has not given guidance sufficient for lower courts to understand that they must ensure that the habeas writ serves institutional interests and separated-powers government.¹⁸²

IV. THE HABEAS ACCOUNTING

The accounting phases of the habeas proceeding are critical to separated-powers government, and it is time that the Court clearly attested to this fact. The Court's frequent practice of avoiding or speaking only indirectly about central questions pertaining to habeas jurisdiction has outlived any utility it might once have had, at least with respect to the central institutional purposes of the writ.¹⁸³ Avoiding key issues in controversies about indefinite, unilateral executive detention of citizens is especially inappropriate, given that those detentions have historically been constitutionally suspect¹⁸⁴ and are viewed warily by the Court.¹⁸⁵

181. Two Justices have recently reminded the government that the All Writs Act preserves Supreme Court supervisory jurisdiction over lower courts hearing enemy combatant cases and gives the Court jurisdiction to consider its jurisdiction notwithstanding the DTA and MCA. See *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens and Kennedy, JJ., concurring in the denial of certiorari).

182. Lower courts have taken their institutional obligations seriously in non-habeas settings relevant to enemy combatant detentions. See, e.g., *United States v. Moussaoui*, 282 F. Supp. 2d 480, 486 (E.D. Va. 2003) (refusing to let the executive use the court as a vehicle for a death-penalty prosecution unless it gave the defendant access to information that it wished to withhold on alleged national security grounds), *aff'd in part, vacated in part, and remanded*, 365 F.3d 292 (4th Cir. 2004), *amended and remanded*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005); *Korematsu v. United States*, 584 F. Supp. 1406, 1413, 1420 (N.D. Cal. 1984) (correcting its own previous errors in order to maintain its integrity and independence but without undermining general constitutional precedent established by the Supreme Court).

183. In the initial denial of certiorari in *Boumediene v. Bush*, two key Justices relied on principles of exhaustion and constitutional avoidance to defer consideration of jurisdiction-stripping issues. See *Boumediene*, 127 S. Ct. at 1479 (2007) (Stevens & Kennedy, JJ., concurring). However, the Court does not always invoke doctrines of constitutional avoidance in interpreting jurisdictional statutes. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006) (majority's analysis of the Detainee Treatment Act's purported denial of federal court jurisdiction over pending detainee challenges approached as a straightforward exercise in statutory interpretation without reliance on constitutional avoidance); *id.* at 2818–19 (Scalia, J., dissenting) (holding that the Act did in fact strip federal courts of jurisdiction while also addressing constitutional issues).

184. For excellent discussions of judicial review of executive detentions in times of war, see Issacharoff & Pildes, *supra* note 102; Neuborne, *supra* note 117; Neuman, *Guantanamo Loophole*, *supra* note 117; James E. Pfander, *The Limits of*

An issue that goes to the heart of the writ's institutional purposes is the government's burden of justification in a habeas proceeding that challenges the factual basis for an enemy combatant designation. That issue has been simmering for years in the lower courts, in various forms, and lies at the heart of appeals currently pending before the Supreme Court.¹⁸⁶ This Article argues that the essential institutional purpose of the writ and separated-powers government will be best served if the Supreme Court imposes a heavy burden of justification on the executive to support the factual basis for its unilateral detention of any citizen. The executive can be assigned this burden in the accounting phases of the habeas process without interfering with discretionary, equitable considerations that might influence whether an individual is entitled to the remedy of release.¹⁸⁷

Habeas Jurisdiction and the Global War on Terror, 91 CORNELL L. REV. 497, 515–24 (2006) [hereinafter Pfander, *Limits of Habeas*]; Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605 (2004); Stephen J. Schulhofer, *Check and Balances in Wartime: American, British, and Israeli Experiences*, 102 MICH. L. REV. 1906 (2004); Wuerth, *supra* note 40, at 1568.

185. The *Hamdi* plurality, for example, effectively disavowed the notorious World War II detention of citizens of Japanese ancestry, by citing to only the dissenting opinion in *Korematsu v. United States*, 323 U.S. 214 (1944). *Hamdi*, 542 U.S. at 535. A similar wariness was voiced when the Court denied Jose Padilla's petition for a writ of certiorari. See *Padilla v. Hanft*, 547 U.S. 1062 (2006). One of the three Justices who would have granted the petition, which directly challenged the constitutionality of indefinite detention, wrote an opinion voicing concerns about indefinite detention. See *id.* at 1064–65 (Ginsburg, J., dissenting). Three other Justices concurred in the denial of certiorari only because the executive had decided to criminally prosecute the petitioner rather than to continue to hold him indefinitely as an enemy combatant. See *id.* at 1063 (Roberts, C.J., Stevens, J., & Kennedy, J., concurring in the denial of certiorari). They cautioned the executive that they stood ready to protect the petitioner through the habeas writ should the executive not afford him a speedy criminal trial. See *id.* at 1064.

186. For example, one can assess the constitutional adequacy of statutory alternatives to the section 2241 habeas writ only if one first understands the constitutional requirements and purposes of habeas. See *supra* note 127 for current arguments about the adequacy of the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005. The Court has studiously avoided the adequacy issue, to date. See, e.g., *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens & Kennedy, JJ.) (denying certiorari but relying on exhaustion principles rather than an adequate substitute analysis). It remains to be seen whether the Court will reach the issue through its grant of certiorari in *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

187. The habeas proceeding is not primarily an opportunity for a petitioner to tell his or her story, as is conventional wisdom respecting civil actions action for injunctive or declaratory relief. It is an occasion for insisting that the executive justify itself. For a recent analysis of habeas misguidedly emphasizing only the

A. *The Habeas Burden in Historical Perspective*

Assigning a heavy accounting burden to the executive is consistent with historical practice.¹⁸⁸ From the first, courts recognized the accounting purpose of the writ and used habeas proceedings to demand explanations for detentions. For example, the writ was early characterized as one of the king's prerogative writs, issued to compel an inquiry into the status and welfare of individuals in whom the king had an interest as subjects.¹⁸⁹ This purpose of the writ was referenced in our own constitutional history, albeit adapted to our system of government in which the people rather than the king are sovereign, when counsel for the petitioner in *Ex parte Bollman* referred to the writ as a vehicle for "the United States, in their collective capacity, as sovereign, . . . [to exercise] the right to know what has become of [citizens who have been detained by the executive] . . ."¹⁹⁰ In England the habeas writ also came to be used as a device for demanding an accounting from the king for his detentions.¹⁹¹ In 1627, for example, after a court upheld a detention based upon the king's simple assertion that prisoners had been detained by his command,¹⁹² Parliament adopted the Petition of Right, which operated as a vehicle for governmental accountability.¹⁹³

Although in early habeas proceedings a custodian might be asked for only a perfunctory explanation for the imprisonment of individuals,¹⁹⁴ over the years courts increased their scrutiny

notion that habeas guarantees petitioners an opportunity to tell their story, see CARY FEDERMAN, *THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE* 167 (2006) (the writ is a "vessel of speech for those who have been silenced by internment" and a "counternarrative to executive authority").

188. Demands for an accounting for detentions were central in the institutional clashes described in the previous section of this Article. See *supra* notes 107–122 and accompanying text.

189. See DUKER, *supra* note 97, at 4; WALKER, *supra* note 118 at 8 (writs in the Middle Ages did not run against the king because he was the source of the writs).

190. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 82 (1807).

191. WALKER, *supra* note 118, at 34–36.

192. For discussions of *Darnel's Case*, see, for example, DUKER, *supra* note 97, at 43–44; SHARPE, *supra* note 86, at 9–16, 93; WALKER, *supra* note 118, at 57–70.

193. DUKER, *supra* note 97, at 45. Thus, the petition of right is a conceptual progenitor of our separated-powers system of government.

194. SHARPE, *supra* note 86, at 1–3; cf. Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966) (review of prior criminal convictions).

of the factual basis for detentions.¹⁹⁵ Fact-finding powers of habeas courts in the United States expanded during the nineteenth century—with significant implications for the rights of African Americans held as slaves—as state and federal courts fought each other to gain an upper institutional hand.¹⁹⁶

Neither the importance of the accounting phase nor the precise nature of the executive's justificatory obligation in the accounting process, however, has been encapsulated in specific rules. Congress, for example, has not assigned a statutory burden of justification to any party in a habeas proceeding challenging an executive detention under the general habeas statute.¹⁹⁷ Companion provisions to that statute grant some protections for a federal habeas petitioner, including the opportunity to deny allegations¹⁹⁸ and to take evidence by deposition, affidavit, or interrogatories.¹⁹⁹ Section 2248 states that "allegations of a return . . . if not traversed shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."²⁰⁰ None of these provisions, however, tells a judge who is to be given the benefit of the doubt when an issue is joined and evidence conflicts.²⁰¹

195. See DUKER, *supra* note 97, at 225–86 (recounting this progression). By the time of the Civil War, for example, courts were inquiring into the basis for detention. Arkin, *supra* note 43, at 11–12; cf. SHARPE, *supra* note 86, at 21–25 (although British judicial rhetoric frequently endorses a principle that habeas review should be limited to errors of law committed by inferior tribunals, in practice British courts engage in a much broader review if individual liberties are significantly at stake); *id.* at 32 (“[T]he recent trend in habeas corpus is to narrow significantly discretionary [executive] powers and to broaden the scope of [habeas] review.”). Recent British legislation dealing with detention of terrorists is discussed in Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395 (2007).

196. See, e.g., Arkin, *supra* note 43, at 42–59.

197. Section 2241, 28 U.S.C. § 2241 (2000), simply states that federal courts have the authority to hear petitions for habeas corpus by persons claiming to be held “in custody in violation of the Constitution or laws or treaties of the United States.” The general habeas statute and related provisions, as noted by the Court, are “largely silent” on the details of how habeas petitions challenging executive detentions should be handled. *Hamdi v. Rumsfeld*, 542 U.S. 507, 526 (2004); *Harris v. Nelson*, 394 U.S. 286, 299 (1969). *But see* Priester, *supra* note 8, at 91–92 (suggesting that the statutory language puts the burden on the government to prove that its detentions are justified).

198. 28 U.S.C. § 2243 (2000).

199. *Id.* § 2246.

200. *Id.* § 2248.

201. Recent legislation such as the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), does not fill these statutory gaps. Detainees subject to military trial under the Military Commissions Act of 2006 enjoy a presumption

Specific rules pertaining to the executive's and petitioner's burdens have emerged in only one area: habeas challenges to prior criminal convictions.²⁰² In these challenges, the Court has taken the position that a prior conviction negates any presumption of innocence favoring a citizen's liberty.²⁰³ Thus, the habeas petitioner bears the burden of persuading a federal court that a criminal conviction should be overturned. Congress confirmed and strengthened this burden in the Anti-Terrorism and Effective Death Penalty Act, which, for example, establishes presumptions in favor of state court factual determinations.²⁰⁴ Only at the margins has the Court placed a heavier burden on the government than on the petitioner challenging a criminal conviction.²⁰⁵

Confronted with statutory ambiguity, the Court has frequently turned to the common law in deciding how to handle habeas petitions.²⁰⁶ It has not, however, bound itself to the

of innocence. See Jennifer K. Elsea, CRS REPORT FOR CONGRESS, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 18 (updated 2007), <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>. However, neither the MCA, *supra* note 15, nor the Detainee Treatment Act, *supra* note 14, specify burdens in habeas proceedings. Cf. Alien Terrorist Removal Act, 8 U.S.C. § 1534(g) (2000) (government can remove a non-citizen for terrorist activities only if the government proves he is an "alien terrorist" by a preponderance of the evidence).

202. Congress has legislated detailed standards for habeas petitions challenging criminal convictions, e.g., 28 U.S.C. §§ 2254(d)–(e) (2000), and there is also a set of technical judicial rules, Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. app. 2254 (2000) (effective Feb. 1, 1977, Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, and as amended thereafter).

203. See, e.g., *Bousley v. United States*, 523 U.S. 614, 614–15 (1998); *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Walker v. Johnson*, 312 U.S. 275, 286 (1941).

204. 28 U.S.C. § 2254(e) (2000).

205. See, e.g., *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (rejecting the argument that the habeas petitioner should bear the burden of proving that a constitutional error was not harmless; if a court entertains "grave doubt" about whether a constitutional error was harmless, the habeas petitioner should win). For another case at the margins, see *Miller-El v. Dretke*, 545 U.S. 231, 242–43 (2005) (although a state court had determined there was no intentional racial discrimination in prosecutor's use of peremptory juror challenges, the Court closely scrutinized the evidence and reached a different conclusion).

206. *Ex parte Bollman*, 8 U.S. 75, 93–94 (1807) (the meaning of the habeas writ should be derived from common law); see, e.g., *Townsend v. Sain*, 372 U.S. 293, 311–12 (1963); *Brown v. Allen*, 344 U.S. 443, 458–59 (1953) (rules governing habeas challenges to state criminal convictions are conceived as constitutional common law). In *Harris v. Nelson*, 394 U.S. 286, 299–300 (1969), the Court identified the All Writs Act, 28 U.S.C. § 1651 (2000), as the source of authority for fleshing out habeas procedures. It should be emphasized that the Court is not implementing a freestanding common law writ of habeas corpus. The only available habeas

common law processes of 1789, when the Constitution and the Suspension Clause were adopted, perhaps because of “historically contingent rough edges in the constitutional design” related to the habeas writ.²⁰⁷ In *INS v. St. Cyr*, for example, the Court opined that it would be difficult to “reconstruct” historical habeas corpus practices as a guide to constitutional interpretation, “given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions.”²⁰⁸

In devising specific habeas rules, the Court has been guided by its view of the purposes of habeas and evolving notions of separated-powers government.²⁰⁹ It has not confined courts to conventional procedural cubbyholes. It has not insisted, for example, that procedural concepts ordinarily associated with civil actions be automatically imported into habeas proceedings.²¹⁰ The Federal Rules of Civil Procedure are made applicable to habeas proceedings only to the extent that they will not undermine the habeas statute.²¹¹ The Court apparently attempts to adopt modes of procedure that “allow devel-

writs are a statutory writ like § 2241 or the constitutional writ of the Suspension Clause.

207. Neuman, *Removal of Aliens*, *supra* note 97, at 1032 n.434.

208. *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (quoting Neuman, *Removal of Aliens*, *supra* note 97, at 980).

209. See Meltzer, *supra* note 14, at 2566–67 (*Tarble's Case* illustrates the difficulties with an originalist approach to the content of habeas); Neuman, *Removal of Aliens*, *supra* note 97, at 970, 975; Neuman, *Suspension Clause*, *supra* note 97, at 563–67 (the common law, an evolving constitutional tradition, and functional adaptability all point to evolution of habeas process); see also Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995) (discussing the common law argument for an expansive scope for the writ).

210. See, e.g., *Harris*, 394 U.S. at 294 (refusing to apply a federal rule of civil procedure to a habeas proceeding and calling the proceeding unique). But see *Day v. McDonough*, 547 U.S. 198, 212 (2006) (Scalia, Thomas, and Breyer, JJ., dissenting) (habeas proceedings are of an ordinary civil nature); *Browder v. Dir.*, Dep't of Corr., 434 U.S. 257 (1978) (characterizing habeas corpus review of a prior criminal conviction as a civil proceeding).

211. FED. R. CIV. P. 81(a)(2); see also Amici Curiae Brief of Professors of Evidence and Procedure Advocating Reversal in Support of Petitioners, *al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 20, 2006); cf. *al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006), *rev'd*, *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007) (petitioner argues that the Federal Rules of Evidence pertaining to hearsay apply to the habeas proceeding because they would not undermine but would support the purposes of the habeas writ). The federal rules are promulgated by the Supreme Court under authority delegated to it by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2000).

opment . . . of the facts relevant to disposition of a habeas corpus petition”²¹² and that fulfill a duty “to provide the necessary facilities and procedures for an adequate inquiry” into the government’s justification of detention.²¹³

B. *The Proper Burden of Justification*

Flexibility is a hallmark of habeas proceedings²¹⁴ and a proper response to a petition for a habeas writ that commences a unique form of action.²¹⁵ It allows the judiciary to separate accounting from remedial phases of the habeas proceeding²¹⁶ and to avoid routine application of ordinary rules of civil proce-

212. *Harris*, 394 U.S. at 298.

213. *Id.* at 300.

214. See, e.g., Fallon & Meltzer, *supra* note 8 (defending a common law approach to interpreting habeas issues); Robert J. Pushaw, *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005 (2007) (documenting a flexible approach to the issue of authority to detain, in which a number of pragmatic factors will be important to courts). Flexibility is certainly proper in matters of technical procedure. In *Ex parte Milligan*, 71 U.S. 2, 110–11 (1866), for example, the Supreme Court said that it would be usual for a lower court to issue the writ and then have a return before trying to dispose of a petition, but that a court could elect not to issue the writ and proceed to the merits based on the petitioner’s own allegations. In *Milligan*, “as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ.” *Id.* at 114. See also *Ex parte Quirin*, 317 U.S. 1, 24 (1942) (citing *Walker v. Johnson*, 312 U.S. 275, 284 (1941)).

215. *Harris*, 394 U.S. at 294, 299–300. Because the habeas process is unique, the default method of assigning a burden of proof described in *Schaffer v. Weast*, 546 U.S. 49, 56 (2005), is not applicable. The Court held in *Schaffer* that, if an ordinary civil statute does not prescribe the burden of proof, the default option is to assign the burden to the petitioner, except in criminal law and other unusual situations where special constitutional concerns affect burdens. *Id.* at 56–59. Habeas proceedings challenging unilateral executive detentions are indeed governed by special constitutional concerns.

216. Differentiation of judicial functions within the habeas proceeding is consistent with traditional understandings. See, e.g., *Milligan*, 71 U.S. at 130–31 (“suspension of the privilege of the writ does not suspend the writ itself”; the privilege has to do with the discharge order, and the right to that remedy is determined after the return is filed to the writ); DUKER, *supra* note 97, at 171 n.121 (distinguishing between the order demanding a justification for detention and the right to release or bail). For an excellent recent discussion of how to think about different stages of judicial proceedings, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) [hereinafter Fallon, *Linkage*].

ture that might undermine the unique, institutional purposes of the writ.²¹⁷

Separation of the remedial and accounting phases ensures that the government can be required to account in a meaningful way for its unsettling detention practices²¹⁸ even when a request for an individual remedy is complicated by important pragmatic considerations.²¹⁹ For understandable reasons, a court may be unwilling or unable to order the release of detained individuals, especially during times of national exigency. If a court separates the issues involved in the accounting from the issues that may complicate a release order, however, it will not feel compelled to sacrifice institutional values simply because individual release is impossible to grant. In *Qassim v. Bush*,²²⁰ for example, a lower federal court determined that there was no viable release option for habeas petitioners conceded by the government not to be enemy combatants but nonetheless structured the habeas proceeding so as to elicit a proper accounting by the executive.²²¹ James Pfander

217. Too frequently, courts are led astray by a failure to distinguish between release and accounting powers in a habeas proceeding. Most debate about whether issuance of the writ is mandatory or discretionary, for example, omits the distinction. Compare *DUKER*, *supra* note 97, at 6–7 (the writ is discretionary and should not be issued unless there are no other adequate remedies), with *SHARPE*, *supra* note 86, at 58–59 (the court must issue a writ if a petitioner raises a sufficient question of illegal detention; the writ is not discretionary in the sense that other prerogative writs are).

218. Many current practices—for example, keeping secret the detentions and identities of individuals held by the executive, *see, e.g.*, *Swain*, *supra* note 19, at 69, transferring individuals to remote islands and garrisons like Guantanamo Bay, Cuba, and frequently changing custodians, as in the case of Jose Padilla—have an unfortunately timeless quality. The practices are eerily similar to those once used by the king in an attempt to evade the reach of the courts of England. *See, e.g.*, *DUKER*, *supra* note 97, at 52; *WALKER*, *supra* note 118, at 41–43, 70–73.

219. *See* Fallon, *Suspension Clause*, *supra* note 97, at 1075 (emphasizing practical realities related to the “corrective” purposes of habeas). In some enemy combatant cases, pragmatic difficulties will vanish because the habeas petitioner will be seeking release from military to another form of custody. The substantive decision in *Ex parte Milligan*, 71 U.S. 2, 135 (1866), for example, was undoubtedly made easier for the Supreme Court because the petitioner sought only release into civilian custody where he would be subject to criminal trial. *See also* al-Marri v. Wright, 487 F.3d 160, 164 (2007) (court notes that release will be release from military custody but not necessarily freedom); *Petition for Writ of Certiorari and Writ of Certiorari Before Judgment* at 11, *Hamdan v. Gates*, No. 06-1169 (U.S. Feb. 27, 2007) (explicitly reminding the Court of this aspect of the request for release).

220. *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005).

221. Acknowledging the impossibility of ordering release, the district court nonetheless “declined to receive secret information . . . that could have been of-

discusses a similar British decision, *Ex parte Anderson*,²²² which he reads as one in which the Queen's Bench knew that it would have difficulty enforcing any individual remedy resulting from a habeas proceeding but nonetheless concluded that it was required to meaningfully implement the earlier stages of the habeas proceeding.²²³

Discretionary flexibility, properly employed in decisions regarding equitable remedies or habeas release, should be used to preserve the institutional purposes of the writ.²²⁴ Rather than merely serving as a tool of judicial deference, it ensures that the government will bear a heavy burden of justification to account for its enemy combatant detentions.²²⁵ A habeas release order may call for equitable remedial discretion, but a habeas proceeding involves more than a "corrective" request for release.²²⁶ As James Pfander notes, at common law there were a variety of remedial forms through which someone might secure release, including the writs of certiorari, mandamus, and prohibition.²²⁷ The habeas writ, which also might ultimately

ferred only to co-opt the court and seek further delay," *id.* at 200, and refused to derail its inquiry because of government representations that the petitioners were "no longer enemy combatants," a statement that sought to avoid a decision as to whether the petitioners "ever were enemy combatants," *id.* (emphasis added).

222. *Ex parte Anderson* (1861) 30 Eng. Rep. 129 (L.J.Q.B.).

223. Pfander, *Limits of Habeas*, *supra* note 184, at 513–14.

224. Habeas petitioners for whom the remedy of release is of overriding importance will understandably continue to emphasize an individual rights perspective on habeas and to see the remedy of release as an inextricable part of the habeas proceeding. See Reply Brief in Support of Petition for Rehearing, *Boumediene v. Bush*, No. 06-1195 (U.S. June 21, 2007) (arguing that the DTA is an inadequate substitute for traditional habeas because release is not guaranteed); *supra* note 127 (dissent in *Boumediene* takes this position); *infra* notes 229–32 and accompanying text (recognition of the writ's accounting function should not be interpreted as a denigration of the importance of the remedy of release).

225. *Compare Dretke v. Haley*, 541 U.S. 386, 394 (2004) (discretionary constraints pervade the implementation of the habeas writ when petitioners challenge a prior criminal conviction; equitable power supports an exhaustion rule preventing federal courts from considering claims of actual innocence by prisoners until any "nondefaulted claims for comparable relief and other grounds for cause to excuse [a] procedural default" have first been addressed). For a discussion of why courts might be tempted to use equitable discretion to defer to the executive in time of war, see Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004).

226. *But see Morrison*, *supra* note 121, at 427 (adhering to the notion that the writ is primarily remedial).

227. Pfander, *Limits of Habeas*, *supra* note 184, at 534–35; *cf.* *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (using *coram nobis* process to correct an unjust criminal conviction); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (same).

lead to release, differed from the other writs because, in considering them,

the court did not call for an explanation of the causes of imprisonment so that its legality could be determined as in the case of habeas corpus. . . . [T]he significant aspect of habeas corpus was to be that it brought the matter of the imprisonment fully before the court and provided the possibility for a fundamental and final determination.²²⁸

To say that a habeas accounting will serve an important function even if a detainee is not ultimately released is not to denigrate the importance of the habeas remedy or individual freedom. It merely reflects the view that remedial considerations should not be permitted to interfere with or block the accounting. Through consideration of the executive's justifications in an individual case, a court will help delineate the circumstances under which detention is justified and further the development of constitutional norms related to the notion that no person is above the law.²²⁹ Judicial scrutiny of detention justifications will also serve indirectly to restrain executive abuses of authority. A determination of illegality, for example, might subsequently be used in a damages lawsuit against the executive or perhaps even in a criminal prosecution.²³⁰ Moreover, by making known to all citizens the justification for the exercise of detention authority in specific cases, an accounting will help ensure that normal political processes can be activated to counteract abuses by the executive, even if a court finds itself institutionally unable to order release.²³¹ Distin-

228. SHARPE, *supra* note 86, at 3–4. Perhaps this is why habeas was the preferred vehicle for requesting the individual remedy of release. Pfander, *Limits of Habeas*, *supra* note 184, at 534–35.

229. Cf. Fallon, *Suspension Clause*, *supra* note 97, at 1101 n.186 (suggesting courts have power to undertake de novo determinations of jurisdictional or constitutional facts if those facts are related to norm formation). Interesting discussions of accountability that point to the importance of the development of constitutional norms include, for example, Goldberg, *supra* note 106, at 607, 608 (focusing on private wrongs but linking accountability to equality, to the proposition that no one is above the law, and to the need for institutions that can reinforce norms); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (discussing the issue as it relates to the Alien Tort Claims Act and thinking of accountability in terms of "exposure" and norm formation).

230. *But see infra* note 247 (discussing limitations on damages actions).

231. See Issacharoff & Pildes, *supra* note 102, for a comprehensive discussion of this idea in the context of the current discussion.

guishing the accounting from the remedial phases of habeas will constitutionalize what ought to be constitutionalized—the accounting obligation—without constitutionalizing standards for relief.²³²

Of course, even if one accepts the argument that the habeas accounting phase should be separated from its remedial phase, one might yet be reluctant to impose a heavy burden of justification on the government in the accounting phase. For example, in Great Britain, courts have not uniformly imposed such a burden,²³³ and there is also debate about whether such a burden might be required by international law.²³⁴

232. As Richard Fallon notes, remedial considerations will undoubtedly influence doctrine governing other phases of a judicial proceeding, but there still may be reasons for keeping the remedial and substantive phases of a judicial proceeding doctrinally distinct. Fallon, *Linkage*, *supra* note 216, at 692–99; *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Of particular relevance to this Article are Fallon's observations about whether distinguishing between phases might serve institutional ends. He notes, for example, that historical fears that distinctions among the phases of a judicial proceeding might transform the federal judiciary into a Council of Revision or a vehicle for public rights adjudication have been alleviated by changes both in the character of constitutional adjudication and in the nature of threats to judicial independence. *Id.* at 656. Fallon asserts that the prohibition on judicial advisory opinions was initially seen as protecting judicial independence. *Id.* at 682. This Article argues that, in the context of enemy combatant detentions, judicial independence may depend on the courts' ability to review the merits of a given detention without necessarily offering a remedy beyond the declaration of the detention's legality. As Fallon rightly notes, separating substantive issues from the provision of a remedy runs the risk of devaluing individual rights. *Id.* at 685–86. But under the right circumstances, the Court has not hesitated to make and act on distinctions. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (announcing the important link between right and remedy but nonetheless pursuing institutional goals without affording an individual remedy); *KAHN*, *supra* note 174; *cf. Wilson v. Layne*, 526 U.S. 603, 609 (1999) (permitting courts to decide whether a complaint states a violation of a constitutional right, even if the complaint might be dismissed on immunity grounds, in order to ensure that the immunity defense does not interfere with the development of constitutional norms). Readers should note that, even though the consequences of the designation of someone as an enemy combatant—e.g., eventual trial before a special military tribunal rather than an ordinary criminal court—constitute a concrete and redressable injury, an accounting concept derived from Article I habeas guarantees may give rise to new understandings of what counts as a justiciable case or controversy for purposes of Article III. For a discussion of how separation of substantive issue and remedy relates to standing requirements, albeit not applied to habeas proceedings, *see* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 775–84 (2006).

233. In Great Britain, it is said that the burden of proof under the traditional writ usually shifts to the government, *SHARPE*, *supra* note 86, at 89–91 (discussing issues of jurisdictional fact), but there is no agreement as to whether the executive must establish the facts justifying detention by a preponderance of the evi-

In the United States, lower federal courts have differed in their approach to cases involving unilateral executive detentions. No lower court has required the executive to establish enemy combatant status beyond a reasonable doubt simply because the presumption of innocence of unilaterally-held detainees has not been erased by a criminal conviction.²³⁵ In the initial habeas proceedings in *Hamdi*, for example, the court merely ordered the government to produce concrete informa-

dence, beyond a reasonable doubt, or under some other standard, *id.* at 85–86. In two decisions, British courts suggested that a beyond-a-reasonable-doubt standard should obtain because liberty was at stake; in a third, however, the government was held to a “high standard of proof” rather than to a criminal burden of proof that would be “unduly technical or rigid.” *Id.* at 88–89. The latter court simply insisted on being satisfied “that the facts which are required for the justification of the restraint put upon liberty do exist.” *Id.* at 89 (quoting Lord Scarman in *Khawaja*, [1984] A.C. 74 at 113). Moreover, recent legislation has altered the habeas landscape in Great Britain. See Walker, *supra* note 118 (discussing a system of control orders that operates under something other than normal burden of proof regimes because it is explicitly based on risk assessment rather than enemy combatant status or past wrongdoing).

234. Compare Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L. J. 503 (2003) (international law standards for justifying detentions are relatively low), with Brief Amici Curiae of Human Rights First and Human Rights Watch, *al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 20, 2006) (customary international law and the ICCPR protect against arbitrary detention by demanding truly adversarial proceedings in which detainees have access to the evidence on which the government relies, an ability to confront witnesses, access to any exculpatory evidence, and a presumption of innocence).

235. See *infra* text accompanying notes 238–250. Priester argues that it would be illogical to impose a criminal process burden because an alleged enemy combatant might actually be a terrorist, and although military exigency is not a sufficient justification for courts to “abandon” their responsibilities, it should at least justify easing the government’s burden. Priester, *supra* note 8, at 97–98. Priester believes that a clear-and-convincing evidence standard of proof is the standard properly required under his due process analysis. *Id.* He notes, for example, that criminal defendants may be preventively detained under bail statutes if there is clear and convincing evidence of a risk of flight. *Id.* at 96. Priester does not discuss the problematic intersection of the criminal justice system and enemy combatant designations, a weighty reason for imposing a heavy burden of justification on the executive. See *infra* notes 264–66 and accompanying text; see also Fallon & Meltzer, *supra* note 8 (supporting a heavy burden but declining to argue for a burden consistent with the criminal law baseline to which they orient much of their discussion).

tion justifying its detention,²³⁶ and even that order was not upheld on appeal.²³⁷

After the Court's decision in *Hamdi*, lower court efforts to impose a heavy burden of justification on the executive have been hampered by the *Hamdi* plurality's due process framework. In the *al-Marri* litigation,²³⁸ for example, the district court imagined that it might somehow simultaneously accord a presumption of validity to the hearsay declarations of the government's affidavits while still engaging in the type of close scrutiny of the facts required by "the deeply rooted and ancient opposition in this country to the extension of military control over civilians."²³⁹ In *Boumediene*, the dissent properly empha-

236. The lower court's insistence was based on an institutional concern for ensuring that the court itself would have a sufficient factual basis for engaging in a meaningful habeas review. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003).

237. *Hamdi v. Rumsfeld*, 316 F.3d 450, 469–72 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

238. *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005); *al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006), *rev'd sub nom.*, *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g granted*, (4th Cir. 2007) (en banc).

239. *See al-Marri v. Wright*, 487 F.3d at 176–77 (quoting *Reid v. Covert*, 354 U.S. 1, 33 (1957)). The district court rejected the petitioner's argument that the government "should be required to bear both the burdens of production and persuasion under a standard more closely approximating that used in a criminal trial," and also rejected the petitioner's request for a "full-blown adversary process." *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d at 778. However, the court affirmed the petitioner's right to challenge the facts by presenting his own rebuttal evidence. *Id.* at 781. The government was told that it would be required to respond to habeas petitions with something giving the habeas petitioners notice of the government's justification for detention. *See id.* The government would be permitted to rely on affidavits with hearsay allegations, because notice requirements are "analogous to the initial review of a petition for writ of habeas corpus, where the court may consider affidavits or other evidence as warranting summary dismissal." *Id.* at 782 n.7 (citing rules developed for § 2254 cases). The court concluded that, in *al-Marri's* case, the Rapp Declaration met the government's "burden of providing a factual basis in support of Petitioner's classification and detention as an enemy combatant," *id.* at 784, and shifted the burden to *al-Marri* to come forward with persuasive rebuttal evidence that he was not an enemy combatant, *id.* at 780. Because *al-Marri* responded with no facts but offered only a general denial (arguing that he should bear no burden at all), the court found it "unnecessary to detail with exactness the burdens faced by the parties." *Id.* at 784. There is evidently a dispute as to whether a magistrate had previously held that the government would bear a burden of justification under a clear and convincing standard of proof or stated that the filing of the Rapp Declaration shifted the burden of proof and production to the habeas petitioner. *Compare id.* at 784 (the government should at all times bear the burden of justifying detention by clear and convincing evidence), *with* Reply Brief for Appellants at 22 n.10, *al-Marri v. Wright*, 487 F.3d 160, No. 06-7427 (4th Cir. Jan. 17, 2007) (the magistrate shifted the burden of proof and production to *al-Marri*).

sized the institutional purposes of habeas and stated that the government has the burden of showing and convincing a judge that it has not acted unlawfully, but then mysteriously asserted that the petitioner would have to traverse the government's credible evidence, which a court would then summarily hear and determine.²⁴⁰ The dissent also suggested that it would be proper for a court to adhere to rules developed for challenges to criminal convictions in which habeas petitioners have been subjected to full-blown criminal proceedings, where the government has persuaded a jury of guilt beyond a reasonable doubt.²⁴¹

The preceding opinions illustrate that courts may find it difficult to impose a meaningfully heavy burden on the government to account for its enemy combatant designations within *Hamdi's* due process framework.²⁴² They also, however, represent a step in the right direction in their implicit rejection of any assumption that habeas proceedings are garden-variety civil actions.²⁴³

240. *Boumediene v. Bush*, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, J., dissenting) (borrowing procedural ideas from *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and relying on various statutory provisions like 28 U.S.C. §§ 2243 and 2248), *reh'g granted, cert. granted*, 127 S. Ct. 3078 (2007).

241. *Id.* at 1004.

242. Even threshold burdens assigned to the petitioner risk undermining the central purposes of the writ. See, e.g., *DUKER*, *supra* note 97, at 4–6 (a petitioner must be able to show “probable grounds” in order for the writ to issue); *Arkin*, *supra* note 43, at 11–12 (a petitioner must make a prima facie showing of unlawful detention before the custodian is required to make an accounting); *Pfander*, *Limits of Habeas*, *supra* note 184, at 531–32 (if the petitioner made a sufficient showing of illegal detention in his petition, the court would proceed to demand an accounting of the reasons for confinement). The risk is especially present when government controls access to key facts. Sharpe notes that a criminal prosecution may be defeated if the government chooses not to produce facts required by the accused and argues that this rule should perhaps also obtain in habeas proceedings involving executive detention. *SHARPE*, *supra* note 86, at 124–26; cf. *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 384 (2004) (“the need for information in the criminal context is much weightier because our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer” and because “[w]ithholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks conflict[s] with the function of the courts under Art. III”) (internal quotations omitted); *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *aff'd in part, vacated in part*, 365 F.3d 292 (4th Cir. 2004), *amended by* 382 F.3d 453 (4th Cir. 2004).

243. See, e.g., *Pfander*, *Limits of Habeas*, *supra* note 184, at 533 (citing examples of courts incorporating ordinary procedural devices into habeas proceedings).

Courts might understandably think of alleged enemy combatants as ordinary civil litigants under certain circumstances. Habeas petitioners, for example, might challenge something other than the fact or duration of their detention.²⁴⁴ Habeas petitions were used in this fashion by some of the petitioners in *Rasul v. Bush*²⁴⁵ who requested access to counsel and relief against interrogation, and also by petitioners who have asked for injunctive relief ancillary to habeas proceedings to halt the executive practice of “rendition” to foreign countries.²⁴⁶ If detainees were to seek damages for an illegal detention, courts would undoubtedly treat the request as part of an ordinary civil proceeding subject to the usual civil burdens of proof.²⁴⁷ If a habeas petitioner were to file a motion for summary judgment, a court might well follow the lead indicated by the petitioner’s conventional procedural move and assume the truth of

244. Habeas petitions may be used to challenge more than the fact or duration of confinement. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenging conditions of confinement and practices in a federal correctional facility); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (challenging conditions of confinement).

245. *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

246. *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 189 (D.D.C. 2005).

247. For a discussion of damages remedies for illegal detentions, see Morrison, *supra* note 121, at 435 (discussing possible civil damages actions against those responsible for unlawful detention); Pfander, *Limits of Habeas*, *supra* note 184, at 510–12 (referencing a number of British decisions in which illegal detention is cured—for the individual—by a damages remedy, not release from custody); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 725–30 (2002) (discussing a fine against Andrew Jackson for unlawfully detaining a member of the state legislature, two district court judges, and a district attorney during the War of 1812); Wuerth, *supra* note 40, at 1584 (describing common law actions against military personnel who detained U.S. citizens). Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 565 (2004) (Scalia & Stevens, JJ., dissenting) (suggesting that the government can arrest, release a detainee if ordered to do so after habeas review, and rearrest, indefinitely, leaving the detainee recourse against the government through an action for damages). Of course, constitutional tort actions touching on military matters are not always allowed. See, e.g., *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). Justices Scalia and Stevens conceded as much when they referenced *Moyer v. Peabody*, 212 U.S. 78 (1909), which recognized a precursor of a qualified immunity defense in an action for damages against executive detention. *Hamdi*, 542 U.S. at 572 n.4 (Scalia & Stevens, JJ., dissenting). In civil rights suits under 42 U.S.C. § 1983, the Court has held that the habeas statute preempts damages claims by prisoners actually in confinement. *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994).

the government's assertions, in accordance with the normal rules of civil procedure.²⁴⁸

A careless assignment of ordinary civil burdens to a habeas petitioner challenging executive detention, however, will undermine the essential accounting function of the habeas writ. The difficulty is not that courts might treat habeas petitioners as ordinary civil plaintiffs in minor procedural matters. It is that a civil procedural orientation may translate into judicial imposition of more troubling burdens on habeas petitioners²⁴⁹ that eviscerate the unique institutional purposes of the writ.²⁵⁰

Judicial refusal to impose a heavy accounting burden on the government is precisely the wrong reaction to present circumstances. The refusal not only is at odds with the institutional purposes of the writ, discussed previously. It also is in

248. See, e.g., *al-Marri v. Hanft*, 378 F. Supp. 2d 673, 675–76 (D.S.C. 2005); see also Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255, 1268 (2006) (illustrating this point by discussing what happened in the *al-Marri* proceedings). Respondents, as well as petitioners, may encourage an ordinary civil procedure orientation. For example, the Mobbs Declaration, *supra* note 52, was part of a motion to dismiss filed by the government in *Hamdi* and reflected an assumption that the habeas proceeding is an ordinary civil action.

249. For example, some lower courts have been so wedded to the notion that habeas proceedings are ordinary civil actions that they have improperly refused to permit petitioners to challenge their detention as enemy combatants in the absence of an authorizing statutory cause of action independent of the habeas statute. See, e.g., *Hamdan v. Rumsfeld*, 415 F.3d 33, 39–40 (D.C. Cir. 2005) (holding that an independent cause of action required to support a claim of illegality), *rev'd*, 126 S. Ct. 2749, 2794 (2006); *Khalid v. Bush*, 355 F. Supp. 2d 311, 325–26 (D.D.C. 2005) (holding that a habeas petitioner cannot assert a violation of rights through a habeas petition unless the right-creating instrument also creates a cause of action), *vacated sub nom.*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *reh'g granted*, 127 S. Ct. 3078 (2007). The Supreme Court's holding in *Hamdan*, 126 S. Ct. at 2794, that the only prerequisite to habeas enforcement of a provision of the Geneva Convention is an independent statute incorporating international as domestic law, should put this practice to rest. See also *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2371 (2005) (holding that a cause of action may be a "welcome mat" to federal court, but it is not an indispensable door key). For an informative, general discussion of the cause of action requirement, see generally Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004).

250. Because courts have treated habeas petitioners as if they had merely instituted a garden-variety civil action, some scholars have recommended that detainees simply use *Ex parte Young* requests for injunctive or declaratory relief to test the legality of their detention. Pfander, *The Limits of Habeas*, *supra* note 184, at 527 n.192. This Article disagrees with Pfander's suggestion that equivalent or even better judicial review of detentions can be secured through ordinary requests for injunctive relief, except perhaps in the case of habeas petitioners held outside the territory of the United States.

tension with the Court's strict scrutiny of authorizations of detention power, is inconsistent with the Court's own practices of factual review in important habeas decisions, and ignores important pragmatic considerations.

The Supreme Court narrowly construes congressional authorizations of executive power to detain.²⁵¹ In *Hamdi*, for example, the Court construed the AUMF to authorize only battlefield detentions.²⁵² In *Hamdan*, the Court refused to interpret the Detainee Treatment Act or the AUMF either to authorize the type of trial by military commission initially established by the executive or to create an exception to the provisions of the Uniform Code of Military Justice that require military commissions to comport with the international law.²⁵³ According to the *Hamdan* plurality, "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here."²⁵⁴ Further, the government "fail[ed] to satisfy the high standard of clarity required to justify the use of a military commission."²⁵⁵

The Court's practice of narrowly construing detention authorizations supports a heavy governmental burden in habeas challenges to the facts on which the executive relies for specific detentions. Authorization goes to the executive's jurisdiction over the petitioner, and jurisdiction implicates questions of fact as well as of law. In habeas challenges to unilateral executive detentions, a petitioner who asserts as a factual matter that he has been mistakenly designated an enemy combatant is challenging a jurisdictional fact²⁵⁶ similar to "the essential jurisdic-

251. See *supra* note 40 (discussing interpretations of detention authorizations).

252. *Hamdi*, 542 U.S. at 521–22 & n.1. It should be noted that because the *Hamdi* Court did not read the AUMF to confer detention power beyond battlefields, it is possible that the special non-detention statute, 18 U.S.C. § 4001(a) (2000), remains in effect for and limits authorization for other, non-battlefield detentions. For a discussion of the non-detention statute, see Vladeck, *supra* note 40.

253. *Hamdan*, 126 S. Ct. at 2774–75.

254. *Id.* at 2780.

255. *Id.* at 2781.

256. See *supra* notes 41–44 and accompanying text. The petitioner's factual challenge is essentially an argument that his detention is inconsistent with the conditions attached to the detention authority given to the executive by Congress. If a citizen like *Hamdi* is detained under the battlefield detention authority of the AUMF, for example, a habeas court will be asked to inquire into the accuracy of the factual basis of his designation as an enemy combatant. *Hamdi*, 542 U.S. at

tional fact" of non-citizenship that the Court has said should lead to searching judicial review by way of a habeas petition.²⁵⁷

The Supreme Court itself has occasionally closely scrutinized facts relied on by the executive to detain citizens.²⁵⁸ Consider, for example, *Ex parte Bollman*,²⁵⁹ in which two citizens accused of participating in the Aaron Burr conspiracy were arrested in New Orleans and charged with treason. Bollman and his alleged co-conspirator were transported 2,000 miles from the scene of the alleged crime to the District of Columbia for trial. Bollman then commenced a habeas proceeding in which he asserted that the evidence submitted by the executive—presented in the form of an affidavit similar to the Mobbs declaration relied on to justify the detention of Hamdi—was insufficient to justify a finding of probable cause to detain him pending prosecution.²⁶⁰ Justice Marshall manifested little if any deference to the executive's factual assertions. According to Marshall, to justify a commitment on a charge of treason, the "evidence should make the fact [in dispute] unequivocal."²⁶¹ Marshall then made a de novo determination that the evidence of probable cause was insufficient.²⁶² In other words, the Su-

517–19 (assuming that a narrow definition of enemy combatants would ensure that factual inquiries would be straightforward).

257. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); see also Meltzer, *supra* note 14, at 2582–83 (discussing how intensive judicial review is called for under these circumstances); *supra* notes 42–44 and accompanying text.

258. *Contra Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 317 (1946) (refusing to inquire, in depth, into the validity of the facts supporting the Selective Service Board's decision not to grant a rabbinical student a draft deferment). A well-known example of deference is *Hirabayashi v. United States*, 320 U.S. 81, 98–105 (1943) (deferring to executive detention of Japanese-American citizens pursuant to congressional authorization). See also *Korematsu v. United States*, 323 U.S. 214 (1944) (purporting to apply rigid scrutiny but deferring to executive judgments of military necessity). That the executive probably knew that its assertion of military necessity in *Hirabayashi* was not well-grounded is suggested in GEORGE MILLER, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 102D CONG., PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 6–8 (Comm. Print 1992).

259. 8 U.S. (4 Cranch) 75 (1807). See *supra* note 144 (discussion of the Supreme Court's original writ of habeas corpus); see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 208 (1830) (describing *Ex parte Bollman* as a case in which the petitioner was not confined by a prior judgment of a court, although a lower court had denied bail after issuing an arrest warrant).

260. Compare *Bollman*, 8 U.S. at 76, with Mobbs Declaration, *supra* note 52 and accompanying text.

261. *Bollman*, 8 U.S. at 134.

262. *Id.* at 135.

preme Court freely engaged in a de novo and strict review of the facts on which a committing official relied for detention.²⁶³

Finally, holding the executive accountable for its unilateral detentions by imposing a heavy habeas burden of justification will have important practical benefits. For one thing, the executive will be deprived of what is now a positive inducement to forum shop and manipulate process so as to avoid criminal prosecutions and their constitutional protections.²⁶⁴ In the case of Ali Saleh Kahlah al-Marri, for example, the government dropped criminal charges less than a month before trial and designated al-Marri as an enemy combatant.²⁶⁵ Moreover, there is evidence that the executive has exploited the absence of a clear judicial declaration that the executive bears a strong

263. See *In re Neagle*, 135 U.S. 1 (1890) (engaging in a searching factual inquiry surrounding the arrest for murder of a federal official by state authorities). The petitioner had been a deputy federal marshal providing security and protection for the Supreme Court's own Justice Field. *Id.* at 52. Believing Field was about to be stabbed by a disappointed litigant, Neagle killed the would-be assailant. *Id.* at 53. The central issue in the habeas proceeding was whether the petitioner could lawfully be held for state trial or whether he was immune from prosecution. *Id.* at 58. The majority opened its opinion with the words "[i]f it be true," a portent of the factual inquiry to come. *Id.* at 40. In response to the dissent's objection that the immunity question should be tried in state court, *id.* at 80 (Lamar, J., dissenting), the majority opined that "[w]e have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute," *id.* at 75 (majority opinion). In *Neagle*, the Court traced judicial power to inquire into facts to the habeas statute then in effect. *Id.* at 40–42. It pointed out that the increasing fact-finding powers conferred by Congress had resulted from persistent attempts of states to interfere with federal officers discharging their duties. See *id.* at 94–95. The historical context for these events is recounted in LEONARD L. RICHARDS, *THE CALIFORNIA GOLD RUSH AND THE COMING OF THE CIVIL WAR* (2007).

264. After September 11, the executive first seemed to contemplate criminally prosecuting terrorists but soon began characterizing terrorist attacks as acts of war. Swain, *supra* note 19, at 52. For examples of early forum-shopping by the government, see Scheppele, *supra* note 30, at 1026–1033, 1047–1053. See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866) (the statement of facts indicates that only after the executive could not secure an indictment did it move against the petitioner by way of a military commission). Forum-shopping incentives may lead to selective prosecution. The executive's decision to prosecute some individuals while designating others as enemy combatants, for example, lacks any apparent consistency. John Walker Lindh and Zacarias Moussaoui were charged criminally, see *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff'd in part, vacated in part*, 365 F.3d 292 (4th Cir. 2004), *amended by* 382 F.3d 453 (4th Cir. 2004), while Jose Padilla and Yaser Hamdi were designated as enemy combatants, see *Rumsfeld v. Padilla*, 542 U.S. 427 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

265. *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), *aff'd sub nom*; *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004).

burden of justification in habeas proceedings to coerce guilty pleas to criminal charges.²⁶⁶ Imposing a heavy burden on the government in a habeas proceeding will remove incentives to this type of executive behavior.

Second, requiring a proper accounting will give the executive a reason to think carefully about the ramifications of holding a citizen without criminal charge, while still preserving the power of the executive ultimately to choose the forum in which it will defend its actions.²⁶⁷ The executive will have the option of justifying its actions either in a criminal proceeding or in a habeas forum that might not entail all of the procedural guarantees of a criminal prosecution.²⁶⁸ In choosing, it will presumably take into account its experiences prior to September 11, when it frequently and successfully prosecuted terrorists in Article III courts.²⁶⁹ It will recognize the realistic possibility of

266. See, e.g., Radack, *supra* note 19, at 540–41 (discussing conduct that “coerce[s] the criminal process”); Yin, *supra* note 248; Note, Carl Takei, *Terrorizing Justice: An Argument That Plea Bargains Struck Under the Threat of “Enemy Combatant” Detention Violate the Right to Due Process*, 47 B.C. L. REV. 581 (2006); see also Abigail D. Lauer, *The Easy Way Out?: The Yaser Hamdi Release Agreement and the United States’ Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927, 940–943 (2006) (discussing coercion as it pertains to relinquishment of citizenship, but drawing on a discussion of coercive plea bargains in the criminal context).

267. The argument of this Article, in which the executive is given discretion as to where it wishes to defend its detentions, must be distinguished from that made in *Hamdi*, 542 U.S. at 554–58 (Scalia & Stevens, JJ., dissenting) (contending that the government must either prosecute criminally or suspend the writ; there is no alternative). It should be noted that detainees themselves may not always prefer criminal prosecution to detention as an enemy combatant. See Yin, *supra* note 248, at 1287–88 (comparing years in detention and plea bargains that require relinquishment of citizenship).

268. The habeas proceeding would not, for example, necessarily entail a jury trial, and would not necessarily include Fifth or Sixth Amendment protections. See Jason Binimow, Annotation, *Right of Enemy Combatant to Counsel*, 184 A.L.R. FED. 527 (2003) (discussing how the Fifth and Sixth Amendments are inapplicable to enemy combatant designations, which are not criminal proceedings). It should be noted that the executive might see advantages, as well as disadvantages, in a jury trial involving an alleged enemy combatant.

269. Terrorists have been successfully prosecuted. For a recent and forceful argument that the civilian criminal system can effectively be used against terrorism, see Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421 (2007). For recent statistics on criminal prosecutions related to terrorism, see TRAC Report, *Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks*, <http://trac.syr.edu/tracreports/terrorism/169/> (last visited Feb. 6, 2008). See also FEDERMAN, *supra* note 187, at 168–69 (discussing Wilson’s aggressive prosecution of enemy aliens for criminal conduct associated with World War I); Radack, *supra* note 19; Scheppele, *supra* note 30; Takei, *supra* note 266. The Court admonished

charging a person with a criminal offense and holding that person without bail, pending trial.²⁷⁰ It will know that a person who wishes to claim immunity from criminal prosecution as a lawful enemy combatant under the law of war may bear the burden of establishing entitlement to that status.²⁷¹ It will take into account that a habeas judge will not be required to delay a habeas accounting or a determination of the legality of detention, even under circumstances in which the judge might be reluctant to order a detainee's release.²⁷² It will take note of the potential consequences of a habeas court's substantive determination of the lawfulness of a given detention in any subsequent damages action,²⁷³ as well as the possibility that a determination of illegality might inspire adverse public or congressional reaction.²⁷⁴ It will have an incentive to review the plethora of statutes under which persons might be charged and to assess whether, if existing statutes are insufficiently broad, Congress should be asked to enact new laws.

CONCLUSION

After September 11, 2001, when the executive objected to any habeas review of executive detentions, courts properly required petitioners to justify *judicial* jurisdiction. *Hamdi* confirms that judicial jurisdiction exists. Petitioners may now use a habeas petition to challenge the factual basis for enemy combatant designations and the *executive's* jurisdiction over them.

in *Milligan*, 71 U.S. at 122, that the executive should not be entitled to presume that federal courts cannot adequately handle criminal prosecutions. See generally Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 CARDOZO PUB. LAW, POL'Y & ETHICS J. 101 (2006) (discussing process issues arising in criminal trials).

270. See, e.g., *Hamdi*, 542 U.S. at 577 (2004) (Scalia & Stevens, JJ., dissenting) (recognizing that people charged with a crime can be detained); see also Priester, *supra* note 8, at 98.

271. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). As a defense to criminal prosecution, Lindh claimed "lawful combatant immunity" under the Geneva Convention and customary international law of war, which forbids prosecuting soldiers for acts committed during armed conflict against legitimate military targets. *Id.* at 552–53. The court held that Lindh bore "the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity . . . [and had] not carried his burden." *Id.* at 557–58. The prosecution ended in a plea agreement. Takei, *supra* note 266, at 608.

272. See *supra* notes 220–224 and accompanying text.

273. See *supra* note 247.

274. See *supra* note 231.

In such cases, the Great Writ gives the judicial branch of government a crucial rule-of-law function.

The current executive is claiming broad authority to detain citizens without charge or criminal trial for the purpose of engaging in armed conflicts that only it has the power to declare at an end. Moreover, it is claiming an authority to detain that is not necessarily limited to "battlefield" enemy combatants. If it is permitted to detain citizens without having to properly justify its detentions, the executive will have the effective power to decide what conduct warrants detention; to decide what evidence, if any, justifies detention; and to hold the detained in "close custody, in a strongly garrisoned fort . . . during the pleasure of those who committed him."²⁷⁵ Citizens will not live under a government constrained by the rule of law; they will be subject to "martial rule"²⁷⁶ and the exercise of "powers of detention reminiscent of those claimed by the Stuarts [in the seventeenth century]."²⁷⁷

Habeas review, properly implemented to secure a meaningful accounting from the executive, stands as a barrier to illegitimate government. The Supreme Court should clearly instruct lower federal courts to be mindful of the institutional purposes of the Great Writ and of the indispensable role judges play when they require the executive to bear a heavy burden of factual justification for its detentions. By clarifying that *Hamdi's* individual due process analysis is only part of the constitutional picture of the habeas writ, the Court will ensure that the habeas proceeding will both serve a checking purpose in individual cases and also be preserved as the ultimate guarantor of separated powers government.

275. *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487). It is worth noting that *Merryman* was written by Justice Taney, himself responsible for endorsing a deprivation of liberty in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

276. SHARPE, *supra* note 86, at 110–15 (when the very state itself is threatened and martial law is declared, courts may be reluctant to interfere with the executive). In *Hamdi*, 542 U.S. at 572 n.4 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)), Justices Scalia and Stevens distinguished situations in which martial law is declared, which they would have limited to the "theatre of active military operations, where war really prevails" and where the courts are therefore not open.

277. SHARPE, *supra* note 86, at 95–96 (discussing *Darnel's Case*). As counsel for the petitioner in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 23 (1866), observed, the whole concept of martial law—the state of affairs that arises when meaningful citizen access to the habeas writ is denied—is truly a misnomer. It should more properly be known as martial "rule."