UNIVERSIDADE DE BRASÍLIA

FACULDADE DE DIREITO

CARLOS HENRIQUE DA SILVA FIGUERÊDO

O COMBATENTE INIMIGO NO HISTÓRICO CONSTITUCIONAL ESTADUNIDENSE. COMO SE CONSTRÓI O INIMIGO? ANÁLISE SOB A PERSPECTIVA DE RAÚL EUGENIO ZAFFARONI.

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Monografia apresentada como requisito parcial à obtenção do grau de Bacharel no Curso de Graduação da Faculdade de Direito da Universidade de Brasília.

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Banca Examinadora:

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Prof. Dr. Evandro Charles Piza Duarte – Professor Orientador

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Tiago Kalkmann – Examinador

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Thales Cassiano Silva – Examinador

BRASÍLIA, 24 de julho de 2023.

DEDICATÓRIA

O maior valor da conquista é ver as pessoas que tanto confiaram em nós, para uma mudança de vida, sorrindo. Infelizmente, pode ser que ao longo do caminho percamos algumas delas. Dedico esta monografia a minha querida avó, Nelci Figueiredo dos Santos (*in memoriam*), a qual levarei sempre no coração. Saudades eternas!

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“Por vezes, sentimos que aquilo que fazemos é apenas uma gota no oceano.

Mas, o oceano seria menor se lhe faltasse uma gota”.

(Santa Madre Teresa de Calcutá)

RESUMO

A presente monografia tem por objetivo analisar, a partir do histórico constitucional estadunidense, a construção do inimigo no direito penal e o discurso legitimador do poder punitivo que sustenta essa rotulação. No primeiro capítulo, a partir da aplicação da metodologia de revisão bibliográfica, sobretudo da obra "O Inimigo no Direito Penal", de Raúl Eugenio Zaffaroni, tem-se a definição do direito penal do inimigo, suas características e a percepção da existência de um *script* rotulatório, que parte de uma emergência que ameaça o convívio em sociedade à legitimação da aplicação de um tratamento penal diferenciado àqueles que incomodam o(s) detentor(es) do poder de forma real, potencial ou imaginária. No segundo capítulo, a partir da aplicação da metodologia de análise de decisões, são analisados seis casos da Suprema Corte estadunidense: *Ex Parte Milligan* (1866)*, Ex Parte Quirin* (1942)*, Hamdi v. Rumsfeld* (2004)*, Rasul v. Bush* (2004)*, Hamdan v. Rumsfeld* (2006) *e Boumediene v. Bush* (2008). Após elucidar o histórico, as acusações, defesas e fundamentos, é realizada uma análise da aplicação do *script* rotulatório a cada um dos casos, bem como uma análise dos precedentes formados pela Corte, a fim de constatar se esta decidiu garantindo e protegendo o Estado de direito ou sendo conivente com as limitações impostas aos direitos individuais e fundamentais. Conclui-se que até o caso *Rasul v. Bush* (2004), quando passou a adotar um posicionamento mais garantista, a Suprema Corte manteve-se conformada com a limitação dos direitos individuais e fundamentais, sempre se esquivando da questão principal, qual seja a possibilidade de rotulação de um indivíduo, enquanto inimigo, pelo detentor do poder. Por fim, é evidenciado que o principal inimigo existente dentro do Estado de direito não é um indivíduo ou grupo rotulado, mas o Estado de polícia, que conduz ao absolutismo, autorizando a aplicação de um tratamento penal diferenciado aos rotulados, que lhes retira a condição de pessoa e os torna objetos da coação, sobretudo física.

PALAVRAS-CHAVE: direito penal do inimigo; Raúl Eugenio Zaffaroni; teoria da rotulação; criminologia crítica; dogmática crítica; direito constitucional.

ABSTRACT

This monograph aims to analyze, from the US constitutional history, the construction of the enemy in criminal law and the legitimizing discourse of punitive power that sustains this labeling. In the first chapter, based on the application of the methodology of bibliographical review, especially of the work “The Enemy in Criminal Law”, by Raúl Eugenio Zaffaroni, there is the definition of the criminal law of the enemy, its characteristics and the perception of the existence of a labeling script, which starts from an emergency that threatens the coexistence in society to the legitimization of the application of a differentiated penal treatment to those who bother the holder(s) of power in a real, potential or imaginary way. In the second chapter, based on the application of the decision analysis methodology, six cases of the US Supreme Court are analyzed: Ex Parte Milligan (1866), Ex Parte Quirin (1942), Hamdi v. Rumsfeld (2004), Rasul v. Bush (2004), Hamdan v. Rumsfeld (2006) and Boumediene v. Bush (2008). After elucidating the history, accusations, defenses and grounds, an analysis of the application of the labeling script to each of the cases is carried out, as well as an analysis of the precedents formed by the Court, in order to verify whether it decided to guarantee and protect the rule of law or to be conniving with the limitations imposed on individual and fundamental rights. It is concluded that even the case Rasul v. Bush (2004), when it started to adopt a more guaranteeing position, the Supreme Court remained satisfied with the limitation of individual and fundamental rights, always avoiding the main issue, which is the possibility of labeling an individual, as an enemy, by the holder of power. Finally, it is shown that the main enemy within the rule of law is not a labeled individual or group, but the police state, which leads to absolutism, authorizing the application of a differentiated criminal treatment to those labeled, which removes their status as a person and makes them objects of coercion, especially physical.

KEYWORDS: enemy criminal law; Raúl Eugenio Zaffaroni; labeling theory; critical criminology; critical dogmatics; constitutional law.

SUMÁRIO

INTRODUÇÃO

Cotidianamente, novas condutas são categorizadas como criminosas. Algumas pessoas consideram que este fenômeno retrata a evolução do direito penal. Porém, este ramo do direito traz consigo um conceito bastante inexato, controverso e discutido, tanto na doutrina quanto na jurisprudência, que é o de inimigo.

Afinal, o direito penal deveria conviver com a figura do inimigo? A rotulação de indivíduos e grupos como "inimigos" é demasiadamente utilizada como instrumento da manutenção do poder e aplicada àqueles que, de formal real, potencial ou imaginária, ameaçam romper a hierarquia das relações desiguais de poder ou sobre os quais são projetadas as tensões sociais de uma sociedade desigual.

Fato é que criminalizar condutas permitindo o etiquetamento de indivíduos como objetos da coação, sobretudo física, não se trata de uma evolução, mas sim de uma involução. Especialmente, quando se incrementam as estratégias punitivas que aumentam o grau aflitivo. Porquanto, torna-se inapropriado falar em direito evoluído quando se relativizam garantias básicas e fundamentais do ser humano. O padrão de evolução necessita ser mensurado desde uma régua que inclua os Direitos Humanos, pois a evolução é central ao seu conceito e a sua estrutura.

A rotulação de indivíduos indesejáveis aos detentores do poder sempre aconteceu na história da humanidade. A cada tempo e lugar, houve emergências próprias e rotulações distintas, a partir da ameaça identificada.

A temática do presente trabalho é analisar como se deu a construção da pessoa do inimigo, esta entendida sob a perspectiva de Raúl Eugenio Zaffaroni, nos Estados Unidos da América, a partir do seu histórico constitucional.

No primeiro capítulo desta monografia será aprofundada a concepção de Zaffaroni sobre o inimigo no direito penal. Uma análise de como é construído o inimigo e o porquê de sua construção ser incompatível com o Estado de Direito. Destaca-se que o tratamento penal diferenciado – aplicação de um direito bélico – é justificado pela rotulação enquanto inimigo, que se dá pelos detentores do poder a partir de uma construção tendencialmente estrutural do discurso legitimador do poder punitivo, visando a manutenção do poder. O simples fato de um indivíduo ser rotulado enquanto tal já se mostra incompatível com o Estado de direito, que depende do respeito aos direitos humanos.

No segundo capítulo, a partir da seleção de alguns precedentes da Suprema Corte dos Estados Unidos, que trata sobre a temática do combatente inimigo, será analisado como se deu a construção do inimigo no histórico constitucional estadunidense. Destaca-se o

redesenhamento do conceito de inimigo a partir do interesse político envolvido; a revelação da existência, ainda que de forma velada, de um Estado de polícia dentro das instituições; e a importância do poder judiciário no cumprimento da função do direito penal, qual seja a limitação do poder punitivo.

Hodiernamente, o mundo possui uma cultura institucional de violência e desrespeito aos direitos individuais. Falar em inimigo no direito penal é entender que a rotulação será dada com base na suspeita, a partir de um desvio comportamental.

A Suprema Corte estadunidense tem consigo a fama de judicializar situações de suspeita e procedimentos adotados para configuração desta, o que denota uma preocupação com a qualidade da justiça presente no cotidiano do país[1].

A escolha dos casos deu-se a partir da leitura do texto "Combatente Inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema-político do século XXI", publicado por Andrea de Quadros Dantas Echeverria[2], onde a autora analisou alguns precedentes que permitem verificar a construção do conceito de inimigo, através do título combatente inimigo, no histórico constitucional estadunidense.

Estes casos evidenciaram quais discursos legitimadores foram utilizados tanto pelos detentores do poder, ao rotular pessoas, quanto pelo judiciário, ao permitir ou limitar esta rotulação em prol da qualidade da justiça.

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[1] DUARTE, Evandro Piza; CARVALHO, Gabriela Ponte. As abordagens policiais e o Caso Miranda v. Arizona (1966): violência institucional e o papel das Cortes Constitucionais na garantia da assistência do defensor na fase policial**.** Publicado em **Revista Brasileira de Direito Processual Penal**, Porto Alegre, vol. 4, n. 1, p. 303-334, jan-abr. 2018, p. 303.

[2] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, *Passim*.

CAPÍTULO 1 – O INIMIGO NO DIREITO PENAL E A SUA CONSTRUÇÃO, SOB A PERSPECTIVA DE EUGENIO RAÚL ZAFFARONI.

É inviável falar em Direito Penal do Inimigo sem trazer à baila a ideia central do criador do termo, Günter Jakobs, qual seja, existem dois tipos de Direito Penal dentro de um mesmo contexto jurídico: o do cidadão e o do inimigo. O segundo, aplicado aos infratores – lê-se inimigos – que gravemente ferem ao pacto social, os quais passariam não mais serem vistos como sujeito de direitos, mas como objetos da coação, sobretudo física.

Para Jakobs, Direito Penal do Inimigo é "o tratamento diferenciado de alguns delinquentes – em especial terroristas – mediante medidas de contenção, como tática destinada a deter o avanço desta tendência que ameaça invadir todo o campo penal"[3]. Nesse sentido, segundo o autor:

> O Direito Penal conhece, portanto, dois polos [sic] ou tendências de suas regulações: a primeira é o trato como cidadão, o qual se espera até que este último exteriorize seu fato, para então, reagir de modo a validar a forma normativa da sociedade; a segunda é o trato como inimigo, que é remotamente interceptado no campo preliminar e combatido por sua periculosidade[4].

A análise de Eugenio Raúl Zaffaroni a respeito do inimigo no Direito Penal nos permite concluir quatro principais características desse sistema: *(i)* o inimigo é aquele que o detentor do poder quer que seja; *(ii)* a rotulação enquanto inimigo é construída a partir de uma motivação política, gerada pela preocupação em manter o poder e concretizada através de discursos reguladores; *(iii)* os detentores do poder sempre etiquetaram como tal pessoas que os enfrentavam ou incomodavam de forma real, imaginária ou potencial; e *(iv)* a melhor forma destes deixarem de constituir um problema é eliminando-os.

A aplicação do poder punitivo, através de um tratamento penal diferenciado, sempre foi extremamente seletiva e fundamentada a partir da alegação de emergências, que variam de tempo para tempo, mas sempre com o mesmo discurso: ameaças à sobrevivência em sociedade.

Por vezes, falar em exceções – as emergências – parece conveniente, todavia, a grande questão é que os detentores do poder podem, sempre que os convir, invocar uma emergência e apontar um inimigo. Consoante Zaffaroni:

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[3] JAKOBS, Günther; MELIÁ, Manuel Cancio. **Direito penal do inimigo: noções e críticas**. Trad. por André Luís Callegari e Mereu José Giacomolli. Porto Alegre: Livraria do Advogado, 2005, p. 155.
[4] JAKOBS, Günther. **Direito penal do inimigo**. In: MOREIRA, Luiz; OLIVEIRA, Eugênio Pacelli (orgs.). Direito Penal do Inimigo. Rio de Janeiro: Lumen Juris, 2009, p. 14.

> O grau de periculosidade do inimigo – e, portanto, da necessidade de contenção, dependerá sempre do juízo subjetivo do individualizador, que não é outro senão o de quem exerce o poder[5].

Com a emergência e o inimigo, não há de se falar em direito penal, mas em direito bélico; não em Estado de direito, mas Estado absolutista; não em pessoa, mas em não-pessoa – ressalta-se que o tornar-se não-pessoa não se trata da quantidade de direitos que lhe são violados, mas pelo fato de tê-los violados apenas por ser considerado perigoso[6]. Este direito assinala como inimigo certos criminosos que não exercem nenhum direito natural pré-contratual. De acordo com Zaffaroni:

> É possível objetar-se que, no caso do chamado direito penal do inimigo, não se trata de assinalar como tais aqueles que exercem um direito de resistência, mas sim certos criminosos que não exercem nenhum direito natural pré-contratual nem nada parecido. Esta objeção não leva em conta o fato de que, ao consagrar o conceito de inimigo, introduz-se diretamente o modelo do Estado absoluto, sem importar em relação a quem esse conceito é aplicado, pois o rompimento do princípio do Estado de direito deixa aberto o caminho para que, mais cedo ou mais tarde, estenda-se o conceito a qualquer resistente e, em especial, àqueles a quem o soberano tem interesse em reprimir, que são os que criam obstáculos à sua arbitrariedade ou os que considera conveniente neutralizar ou eliminar por razões de poder[7].

Com a "evolução" do Direito Penal e o abandono da corrente bioantropológica positiva da criminologia de Cesare Lombroso e Raffaele Garófalo – segundo a qual existiam características físicas e psicológicas comuns da criminalidade – aumentou-se ainda mais o exercício do poder punitivo.

A consequência lógica deste aumento é a ampliação do controle estatal imposto sobre toda a sociedade, porquanto ante a impossibilidade da identificação física do inimigo, toda a população torna-se suspeita. Nas palavras de Zaffaroni:

> Quando os destinatários do tratamento diferenciado (os inimigos) são seres humanos não claramente identificáveis *ab initio* (um grupo com características físicas, étnicas ou culturais bem diferentes), e sim pessoas misturadas e confundidas com o resto da população e que só uma investigação policial ou judicial pode identificar, perguntar por um tratamento diferenciado para eles importa interrogar-se acerca da possibilidade de que o Estado de direito possa limitar as garantias e as liberdades de todos os cidadãos com o objetivo de identificar e conter os inimigos[8].

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[5] ZAFFARONI, Eugenio Raúl. **O inimigo no direito penal. Tradução de Sérgio Lamarão**. 2. Ed. Rio de Janeiro: Revan, 2007, p. 25.
[6] *Idem*, p. 18.
[7] *Idem*, p. 131.
[8] *Idem*, p. 117.

A legitimidade desse controle social se dá tendo em vista a "necessidade" de uma maior vigilância sobre todos, em prol da segurança, porque o Direito Penal do Inimigo não se fundamenta na culpabilidade, mas na periculosidade do agente. Com isso, todos se tornam suspeitos, garantidores de todas as condutas, em um processo de robotização social – o agir dentro do padrão esperado.

O foco na periculosidade do agente é observado desde a Roma Antiga, que considerava os *hostis* (estrangeiro explorado) como inimigo pelo simples fato de ser desconhecido e, porquanto perigoso[9].

Zaffaroni, em seu texto, explora a pessoa do inimigo sobre três principais frentes, quais sejam: o inimigo na história, nos discursos jurídicos e na teoria política. Essa análise histórica nos permite melhor verificar os aspectos supracitados.

Na primeira frente, o autor demonstra que desde a Antiguidade existe a figura do inimigo. Para os romanos, inicialmente, o inimigo era o estrangeiro explorado (à época, o escravo; hoje, o imigrante), conceituado como *hostis,* porquanto, desconhecido que inspira desconfiança pela razão de não ser compreendido. Posteriormente, surgiu também o inimigo declarado – chamado *hostis judicatos* –, assim rotulado pelo Senado quando, enquanto cidadão romano, ameaçava a segurança da república por meio de conspirações ou traições[10]. O tratamento era deixá-lo em condições semelhantes à dos escravos para que lhe fossem tirados os direitos inerentes a sua cidadania, visando a aplicação de penas vedadas aos cidadãos.

Na Inquisição, período marcado pela forte influência da Igreja Católica, os detentores do poder apontaram como sendo o grande inimigo Satã, que estava presente nos estranhos, nos autores de delitos graves e nos dissidentes políticos.

O novo procedimento processual penal passou a ser o interrogatório: o saber que busca o poder, onde o objeto de conhecimento passou a ser o próprio ser humano, objetivando a manutenção do poder através da hierarquização[11].

Na Revolução Industrial, abandonou-se a figura de Satã e predominou a ignorância. Os inimigos eram os criminosos graves (assassinos), os dissidentes políticos e os indesejáveis – pequenos delinquentes comuns. Para as duas primeiras classes, a eliminação física resolvia. O maior problema eram os indesejáveis, haja vista que sua quantidade aumentou e tornou-se

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[9] *Idem*, p. 22.
[10] *Ibidem*.
[11] *Idem*, p. 40.

inviável matar a tantos publicamente, tendo os detentores do poder que optar pelo encarceramento, visando a domesticação e reinserção na produção industrial, ou a deportação[12].

Nos séculos XX e XXI, destaca-se o surgimento do autoritarismo. Período marcado por profundas violações dos direitos humanos, como: "(...) desaparecimentos, torturas, e execuções policiais, individuais e em massa sem nenhum respaldo legal. Os inimigos à época eram os que cometiam crimes graves, os dissidentes políticos e indesejáveis (pequenos delinquentes comuns)"[13]. O autoritarismo, sobretudo no século XXI, tornou-se *cool,* ou seja, passou a ser assumido por todos não como convicção profunda, mas tão somente por estar na moda, ao qual havia adesão para evitar a estigmatização como antiquado e para não perder espaço publicitário[14].

Após os atentados de 11 de setembro de 2001, encontrou-se um novo inimigo: o terrorismo. Influenciado pela globalização, que faz com que todas as decisões gerem consequências planetárias, surgiu o desespero em conseguir um inimigo para preencher o vazio, bem como evidenciou a identidade do poder bélico com o poder punitivo[15]. De acordo com Zaffaroni:

> A necessidade de defender-se , por certo não mais dos atos concretos de homicídio em massa e indiscriminados, mas sim do nebuloso terrorismo, legitima não apenas as guerras preventivas de intervenção unilateral como também legislações autoritárias com poderes excepcionais, que incluem a privação de liberdade indeterminada de pessoas que não se acham em condição de prisioneiros de guerra nem de réus processados, seja sob o pretexto de que não são cidadãos dos Estados Unidos ou de que não se encontram privados de liberdade em seu território[16].

Com isso, guerras foram travadas de forma "preventiva", houve um controle maior sobre a população para evitar a infiltração de terroristas, imigrantes – estranhos – foram taxados como inimigos declarados ou em potencial.

Na América Latina, o poder punitivo é exercido por medidas de contenção para o grande inimigo que são os indesejáveis (pequenos delinquentes comuns: ladrões, prostitutas, homossexuais, bêbados, vagabundos, jogadores), que continuam sofrendo com medidas de contenção, penas desproporcionais, cárceres com altos índices de violência e mortalidade[17].

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[12] *Idem*, p. 43.
[13] *Idem*, p. 55.
[14] *Idem*, p. 69.
[15] *Idem*, p. 65.
[16] *Idem*, p. 66.
[17] *Idem*, p. 110.

De acordo com o apresentado pelo autor, sempre existiu um tratamento penal diferenciado para os iguais e os estranhos, os amigos e os inimigos[18]; e a rotulação enquanto tal se deu de forma muito heterogênea, a partir da emergência – estratégia – de cada momento. Trata-se da arbitrariedade dos discursos *volkisch* – "técnica que consiste em alimentar e reforçar os piores preconceitos para estimular publicamente a identificação do inimigo da vez"[19]. Defende o autor que:

> A história do exercício real do poder punitivo demonstra que aqueles que exerceram o poder foram os que sempre individualizaram o inimigo, fazendo isso da forma que melhor conviesse ou fosse mais funcional – ou que acreditaram que era conforme seus interesses em cada caso, e aplicaram esta etiqueta a quem os enfrentava ou incomodava, real, imaginária ou potencialmente. O uso que fizeram deste tratamento diferenciado dependeu sempre das consequências políticas e econômicas concretas, sendo em algumas vezes moderado e em outras absolutamente brutal, porém os eixos centrais que derivam da primitiva concepção romana do hostis são perfeitamente reconhecíveis ao longo de toda história real do exercício do poder punitivo no mundo[20].

O direito penal do inimigo é, em sua essência, uma ferramenta para a manutenção do poder, porquanto capaz de redesenhar a figura do inimigo e daquilo que é lícito ou ilícito a partir dos interesses políticos envolvidos.

Com a técnica *volkisch*, os detentores do poder, com o auxílio da comunicação em massa, manipulam a população para que una força ao combate de determinado delito, cujos praticantes são considerados inimigos sociais.

Quando conquistado o apoio populacional e, porquanto, a legitimidade para o exercício do poder punitivo, utiliza de exceções à aplicação do direito penal amigo para a neutralização do inimigo.

Na segunda frente, nos discursos jurídicos, Zaffaroni explora, sobretudo, a seletividade do poder punitivo, legitimada no discurso de valor meramente simbólico da pena e funcionalidade como prevenção geral positiva[21].

Conforme o autor, a seletividade é estrutural, ou seja, variante a depender da emergência invocada e da consequente rotulação dos iguais e os estranhos, os amigos e os inimigos. O fato

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[18] *Idem*, p. 81.
[19] *Idem*, p. 57.
[20] *Ibidem.*
[21] *Idem*, p. 88.

de ser estrutural explica a discriminação no exercício do poder punitivo[22]. Zaffaroni pontua que:

> A história demonstra que os rótulos caíram sobre estereótipos muito diferentes, alguns inimagináveis hoje em dia, conforme a emergência invocada, os preconceitos explorados pelo discurso *volkisch* de cada momento, as corporações que assumiram a hegemonia discursiva e muitos outros elementos imponderáveis, dando lugar a uma desconcertante heterogeneidade que prova a distribuição da qualificação de estranho ou inimigo com notória arbitrariedade ao longo dos séculos, de acordo com a perspectiva dos que detiveram o poder[23].

Fato é que o acusado sempre será vítima do sistema penal, porquanto a incidência deste constitui àquele o *status* de hipossuficiente, uma vez que, em face da magnitude dos meios e dos recursos monopolizados pelos órgãos públicos, este já se encontra vencido[24]. A aplicação desse sistema traz diversas consequências ao acusado, conforme Evandro Piza Duarte e Tiago Kalkmann:

> (...) desencadeia contra ele uma série de privações imediatamente mensuráveis, tais como a diminuição do seu padrão alimentar, o aumento do risco de contração de doenças, a exposição ao ambiente de violências físicas, bem como um outro sem número de privações prováveis, embora sem sempre mensuráveis, tais como danos psicológicos, a ruptura dos laços de convivência social, a perda da autoestima, etc[25].

Por ser essa desigualdade formal e material, decorrente das relações sociais, estrutural neste regime jurídico, nasce para o acusado alguns direitos, dentre eles o contraditório e a ampla defesa, que visa o equilíbrio os polos[26].

É exatamente nas ferramentas de equilíbrio que incide o direito penal do inimigo, visando a mitigação dos direitos penais, fundamentais e humanos para que sobressaia a relação vertical da imposição da força estatal sobre o indivíduo, fazendo deste um mero objeto de coação, sobre o qual incide um não-direito.

O sistema penal é essencialmente punitivo, e o sistema punitivo é adequado às sociedades marginalizadoras, pois seu principal efeito é a marginalização de determinados

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[22] *Idem*, p. 81.
[23] *Ibidem*.
[24] DUARTE, Evandro Piza; KALKMANN, Tiago. Por uma Releitura dos Conceitos de Sistema Processual Penal Inquisitório e Acusatória a partir do Princípio da Igualdade. Publicação da **Revista Brasileira de Ciências Criminais**. Vol. 142. Ano 26. P. 171-208. São Paulo: Ed. RT, abr. 2018, p. 196.
[25] *Ibidem*.
[26] *Ibidem*.

extratos sociais[27], que se configura pela relação de poder. De acordo com Evandro Piza Duarte e Cristina Zackseski:

> Quanto maior o grau de estranhamento diante do problema e dos envolvidos, maior é o desejo de punição. De igual modo, quanto mais excludente é um sistema de relações humanas maior será a incidência da resposta punitiva. Portanto, quanto mais marginalizadora for uma sociedade, ou seja, distanciada da premissa da convivência, marcada por relações de desrespeito e calcadas no lucro, maiores serão as chances de desenvolvimento de respostas punitivas[28].

Assim, a depender do *status* social, da classe, da profissão, do estereótipo, aplica-se um direito penal ou um direito bélico. Esse movimento pode ser visualizado ao longo dos tempos.

Na Antiguidade, visualizado através da figura dos escravos, conquistados em guerras ou por meio de dívidas, vistos como desconhecidos e inspiradores de desconfiança e, enquanto detentores desse status, inimigos[29].

Na Pré-Modernidade, através da figura dos hereges, cujo status receberam por possuir uma linha de pensamento divergente à Igreja Católica, detentora do poder, porquanto inimigos[30].

Na modernidade, através da figura dos pequenos delinquentes comuns, que tiveram grande crescimento frente o processo de urbanização. A estes aplicaram o encarceramento – medida cautelar para a extensão ilimitada da pena limitada – visando a contenção do perigo que apresentavam à sociedade[31].

Este movimento é ainda mais elucidativo na América Latina, com a divisão em sistema penal cautelar e sistema penal de condenação, haja vista que se tem uma abstenção da busca da verdade real e da condenação formal, pois grande parte da taxa de encarceramento é devida às pessoas não condenadas, que são submetidas, mesmo que por infrações de pequena e média gravidade, ao sistema penal cautelar[32].

Levando em consideração o Brasil, de acordo com dados disponibilizados pela Secretaria Nacional de Políticas Penais, do período de julho a dezembro de 2022, englobando

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[27] DUARTE, Evandro Piza; ZACKSESKI, Cristina. Sociologia dos sistemas penais: controle social, conceitos fundamentais e características. **Publicações da escola da AGU: Direito, Gestão e Democracia**, v. 1, p. 147-168, 2012, p. 162.
[28] *Idem*, p. 160.
[29] ZAFFARONI, Eugenio Raúl. **O inimigo no direito penal. Tradução de Sérgio Lamarão**. 2. Ed. Rio de Janeiro: Revan, 2007, p. 22.
[30] *Idem*, p. 88.
[31] *Idem*, p. 93.
[32] *Idem*, p. 109.

homens e mulheres, estão presos de forma provisória na justiça estadual, 179.172 pessoas em cela física e 24.228 em prisão domiciliar[33].

Na terceira frente, da teoria política, há uma contraposição entre os princípios do Estado absoluto e do Estado liberal quanto à construção do inimigo, a partir da interpretação que Zaffaroni faz aos conceitos trazidos por Thomas Hobbes e John Locke, Kant e Feuerbach.

Segundo o autor, para Hobbes, o inimigo é quem resiste ao soberano porque se torna estranho ou estrangeiro ao sair do encontro com seu próprio ato de resistência[34]. Para Locke, quem realiza um ato de resistência legítimo, reclamando o respeito de direitos anteriores ao contrato estatal, é um cidadão que exerce seu direito[35].

Para Kant, a resistência ao soberano implica a destruição de sua autoridade e a violação do contrato, acarretando, por fim, a volta ao estado de natureza e a guerra de todos contra todos[36]. Para Feuerbach, existem direitos subjetivos anteriores ao contrato, aparecendo o direito à resistência quando o soberano atua contra a sociedade civil[37].

Destaca Zaffaroni que a contraposição se encontra no direito de resistir à opressão e que não se trata de exercer um direito à resistência, mas sim dos inimigos que são privados de exercer qualquer direito[38]. Para além, que no absolutismo, diferentemente do liberalismo, onde existem infratores ou delinquentes com tratamento igual, tem-se a figura do inimigo em guerra, que são os estranhos[39].

Destaca ainda o autor que a concepção de inimigo para Schmitt é iminentemente política, haja vista que quem o define como tal é o político, ou seja, soberano, de forma politicamente assinada porque convém fazê-lo[40].

Porquanto, em se tratando de inimigo, há um abandono do direito penal do fato – criminalização pela conduta – em prol do direito penal do autor – criminalização pela personalidade.

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[33] **Secretaria Nacional de Políticas Penais**. População Prisional na Justiça Estadual – Período de julho a dezembro de 2022. Disponível em:< Microsoft Power BI>. Acesso em 28 de junho de 2023.
[34] ZAFFARONI, Eugenio Raúl. **O inimigo no direito penal. Tradução de Sérgio Lamarão**. 2. Ed. Rio de Janeiro: Revan, 2007, p. 125.
[35] *Idem*, p. 127.
[36] *Idem*, p. 129.
[37] *Idem*, p. 130.
[38] *Idem*, p. 131.
[39] *Idem*, p. 138.
[40] *Idem*, p. 141.

Zaffaroni declara ser incompatível o conceito de inimigo com o Estado de direito, porquanto negacionista dos princípios do liberalismo político[41]. Alerta que no Estado de direito está a pulsar um Estado de polícia, que conduz ao absolutismo, cuja característica é justamente a guerra, que clama sempre por um inimigo[42]. Por ser a guerra permanente e a busca pela manutenção do poder constante, apenas os inimigos vão se revezando e, nessa armadilha, toda a sociedade é submetida ao controle do detentor do poder.

A possibilidade do tratamento de um ser humano como perigoso gera a despersonalização não somente de quem assim é etiquetado, mas de toda a sociedade, exigindo-lhe maior atenção e precisão em cada movimento, pois qualquer distração ou esquecimento pode gerar consequências, tendo em vista a vigilância imposta sobre todos para alcançar os ideais de segurança e certeza do futuro[43]. Busca-se tão cegamente estes ideais que esquecem que o poder punitivo é o maior agente da lesão e do aniquilamento de bens jurídicos de forma brutal e genocida[44].

Não pode haver sequer exceções para permitir a "quebra do Estado de direito" por meio do Estado de polícia, porque o detentor do poder pode, a qualquer momento e como bem o convir, invocar a necessidade e a emergência, declarando um novo inimigo, tornando da exceção uma não-exceção, sem observância de lei nem limites.

Passadas as três frentes, voltamos ao ponto central do autor: o conceito de inimigo é incompatível com o Estado de direito[45]. Para o Estado de direito, o verdadeiro inimigo não é o *hostis*, o *hostis judicatos,* os criminosos gravosos, os dissidentes políticos, os delinquentes comuns*,* mas o Estado de polícia[46]. Este último leva ao pior dos Estados, o absolutista, segundo o qual a guerra é uma constante e, com esta, a busca pelo inimigo.

É inconcebível a relativização da condição de pessoa, considerando-a inimiga, através da seletividade e da conveniência, para aplicação de um direito bélico, por mais grave que seja a infração cometida. A teoria do Direito Penal do Inimigo traz consigo, ainda que intrinsicamente, uma estratégia de controle social e manutenção de poder.

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[41] *Idem*, p. 26.
[42] *Idem*, p. 170.
[43] *Idem*, p. 20.
[44] *Idem*, p. 120.
[45] *Idem,* p. 26.
[46] *Idem*, p. 175.

A busca por um inimigo se resume em uma construção tendencialmente estrutural do discurso legitimador do poder punitivo, de modo que primeiro encontra-se uma emergência (como uma ameaça ao convívio societário); depois, através do medo, busca-se a legitimação do controle social para segregar os causadores deste sentido e antecipar o seu agir; e por fim, convence-se a todos que unam forças para derrotar o perigo "comum", através da criação da paranoia social da estimulação da vingança e do perigo sem perigo. Segundo Zaffaroni:

> Os políticos prometem mais penas para prover mais segurança; afirma-se que os delinquentes não merecem garantias; aprimora-se uma guerra à criminalidade (...) afirma-se que os delinquentes violam os direitos humanos (...) pretendem explicar o êxito pela adoção da política de tolerância zero[47].

A partir de cada "emergência", variante a partir de cada tempo e interesse, muda-se a rotulação do inimigo. Com o processo de globalização e massificação das mídias, para além do agente daninho já rotulado em âmbito interno, existem, a partir de um discurso planetário único, inimigos etiquetados em âmbito internacional. Fator que aumenta, ainda mais, o controle socialmente imposto e a legitimação para tanto.

Atualmente, tornou-se mais difícil eleger um grupo para "estigmatizar". Porém, o enunciado precisa ser mantido, afinal, a manutenção do poder constante necessita de um discurso legitimador do poder punitivo[48], então se faz necessário encontrar um "bode expiatório" que, atualmente, são os delinquentes comuns.

Ademais, a comunicação em massa enfraqueceu ainda mais o poder, sendo mais um influenciador na definição de quem é o inimigo, haja vista que a política se tornou midiática, por oportunismo, moda ou medo. Com isso, como em todo momento a mídia bombardeia sobre os delinquentes comuns, por meio de um discurso *volkisch*, eles são tidos como o foco dos dirigentes e, logo, inimigos, a quem se deve combater para se permanecer no poder, deixando de buscar o melhor para se preocupar com o que pode ser mais bem transmitido e, por conseguinte, trazer aumento a sua clientela eleitoral[49].

Em outras palavras, é dizer que, a partir do surgimento e crescimento dos meios de comunicação – autoritarismo publicitário *cool* – estes assumiram um importante papel de, juntamente com o detentor do poder, definir inimigos. Elucida Zaffaroni que:

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[47] *Idem*, p. 64.
[48] *Idem*, p. 83.
[49] *Idem*, p. 77.

> O Estado não os define; as autoridades encontram-se sitiadas pelas sucessivas imposições dos meios, cuja velocidade reprodutiva é tão vertiginosa que impede os baques capazes de abrir espaço aos discursos críticos. Nem sempre existe uma outra corporação que pretenda construir inimigos diferentes e que para isso precise desarmar os mitos anteriores: comumente, é essa mesma corporação produtora de inimigos que os descarta e os substitui. Os ciclos anteriores se precipitam, passando de corrente alternada a corrente contínua[50].

Afirma o autor que a existência do Estado de direito só é possível quando contido o Estado de polícia, porquanto incompatíveis; e conclui, acertadamente, que a única forma de conter o Direito Penal do Inimigo é não dando espaço algum a este Estado, haja vista que qualquer espaço concedido será usado para se chegar ao absolutismo e, com ele, suprimir o Estado de direito. Dar espaço ao Estado de polícia, seria como "entregar as armas, acreditando que se chega a um armistício, quando, na realidade, trata-se de uma rendição nas piores condições[51]".

Relembra o autor que nunca um conflito fora solucionado definitivamente pela violência, salvo se a solução definitiva seja confundida com a final (genocídio)[52]. Traz ainda importante resposta à pergunta sobre o que o direito penal pode fazer em relação aos terroristas, afirmando que os responsáveis pelos delitos devem ser individualizados, detidos, processados, julgados e, apenas se caso forem condenados, levados a cumprir pena[53].

Em entrevista concedida ao ConJur, em 05 de setembro de 2009[54], defende que o poder judiciário é indispensável para limitar o poder punitivo, e afirma que "no curso da história, muitas vezes, o Judiciário traiu sua função" e quando isso acontece "os juízes deixam de ser juízes e se tornam policiais fantasiados de juízes".

A grande função do poder judiciário é a garantia e defesa dos direitos individuais, coletivos e sociais. Não se trata de extinguir o poder punitivo, mas apenas limitá-lo, de modo a garantir que sejam respeitados, sobretudo em se tratando de direito penal do inimigo, os princípios do devido processo legal, da impessoalidade, da proporcionalidade e da razoabilidade.

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[50] *Idem*, p. 76.
[51] *Idem,* p. 174.
[52] *Idem*, p. 17.
[53] *Idem*, p. 185.
[54] **CONJUR**. Função do Direito Penal é limitar o poder punitivo – Raúl Zaffaroni, jurista argentino. Publicada em: 05/08/2017. Disponível em: <https://conjur.com.br/20anos/2017-ago-03/raul-zaffaroni-jurista-argentino-funcao-do-direito-penal-limi>. Acesso em 11 de junho de 2023.

É intervir para que não seja aplicado um tratamento penal e processual penal diferenciado, principalmente quando se leva em consideração a personalidade, nacionalidade, *status* social, classe, profissão ou estereótipo; um movimento claro da substituição do direito penal do fato pelo direito penal do autor.

CAPÍTULO 2 – A CONSTRUÇÃO DO COMBATENTE INIMIGO NO HISTÓRICO CONSTITUCIONAL ESTADUNIDENSE – DO CASO *EX PARTE MILLIGAN* (1866) AO CASO *BOUMEDIENE V. BUSH* (2008).

2.1. Aspectos Introdutórios

O principal objetivo deste capítulo é verificar, através da análise de alguns precedentes da Suprema Corte estadunidense, a heterogeneidade e arbitrariedade do sistema constitucional americano na rotulação e no tratamento de pessoas rotuladas como inimigas, a partir perspectiva de Zaffaroni sobre o inimigo no direito penal.

A rotulação do indivíduo enquanto inimigo, é redesenhada a partir de interesses políticos dos detentores do poder, que utilizam do poder punitivo estatal para neutralizar pessoas que enfrentam ou incomodam de forma real, imaginária ou potencial a manutenção do poderio em suas mãos.

O direito penal do inimigo pode ser resumido na aplicação diferenciada do direito penal a determinados sujeitos que supostamente ameacem à sobrevivência em sociedade. O grande problema dessa teoria se encontra em quem pode rotular alguém enquanto tal e com base em qual fundamento o faz.

É inegável que a concepção de inimigo dentro do direito penal se trata de uma técnica para o controle social e a manutenção do poder. Logo, os rotulantes serão sempre os detentores do poderio e o fundamento será sempre a neutralização de ameaças que visam romper a hierarquia de comando.

Sendo que a melhor forma para que esses “inimigos” deixem de ser um problema é eliminando-os, todavia, para que não haja escandalização, aplicam a estes um não-direito bélico, que consiste em ignorar direitos naturais pré-contratuais básicos, fundamentais e inerentes ao ser humano.

Então ficamos diante desse movimento de, dentro de um mesmo sistema jurídico, aplicar um direito penal aos amigos e outro aos inimigos; às pessoas e as não-pessoas; porquanto são retiradas da figura de sujeitos de direito e passam à figura de objetos da coação, sobretudo física.

Por óbvio que a relativização de direitos oriunda dessa rotulação demonstra a incompatibilidade do direito penal do inimigo com o Estado de direito, mas, a primeira

incompatibilidade se dá pelo simples fato de se permitir a caracterização de um sujeito de direito enquanto inimigo.

Toda essa rotulação, visando a neutralização do inimigo, acontece por um discurso legitimador do poder punitivo, fundamento a partir de emergências que são invocadas. Esses discursos são eivados pela técnica *volkisch*, que consiste na manipulação social de identificação de inimigos sociais.

Como o direito penal do inimigo é caracterizado pelo abandono do direito penal do fato em prol do direito penal do autor, há uma antecipação da repressão estatal, justificada pela periculosidade do agente. Com isso, pelo simples fato do indivíduo gerar desconfiança aos detentores do poder, ele pode ser rotulado enquanto ameaçador e, portanto, inimigo.

Analisar o recorte histórico dos principais precedentes da Suprema Corte desde o caso *Ex Parte Milligan* (1866) até o caso *Boumediene v. Bush* (2008), nos permitirá evidenciar toda essa discussão trazida por Zaffaroni e, ainda mais, evidenciar quando o Judiciário cumpriu sua função de garantidor dos direitos individuais e quando traiu sua função, tornando-se defensor do Estado de polícia.

É importante a percepção que todos os precedentes em análise partem de um mesmo *script*, qual seja: a emergência invocada, a identificação do inimigo e a aplicação de um tratamento penal diferenciado. Em todos os casos há sempre a tentativa de suspender o pedido de *habeas corpus* dos considerados inimigos. Trata-se de uma estratégia para impedir o acesso à justiça e o pleito pelo cumprimento de direitos básicos.

Importante também ressaltar que, consoante Echeverria, independentemente do precedente, "a controvérsia durante tais crises sempre recai sobre o conflito entre a concentração de poderes do Executivo e as liberdades civis, ou se poderia mesmo afirmar, entre o estado de exceção e a ordem jurídica"[55].

[55] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, aspectos introdutórios.

2.2. Caso *Ex Parte Milligan* (1866)

Antes da Guerra Civil, os cidadãos estadunidenses encontravam-se divididos entre a ideia de supremacia nacional e direitos dos Estados. À época, os inimigos identificados pelo detentor do poder eram os simpatizantes confederados e legalistas do sul[56].

Visando combater os temores da deslealdade dentro do país, foi decretado, pelo presidente Lincoln, estado de emergência nos estados fronteiriços entre a União e a Confederação[57].

Ante a emergência invocada, foi determinado pelo presidente a criação de tribunais militares, com a finalidade de atrair a competência dos tribunais civis para o julgamento dos casos relacionados à espionagem, ação rebelde e auxílio à Confederação; e a suspensão do pedido de *habeas corpus* aos acusados de cometerem esses crimes[58].

Lambdin P. Milligan era cidadão estadunidense, residente em Indiana. Apoiava publicamente a Confederação, repudiava o alistamento ao exército da União e lutava pela libertação dos prisioneiros de guerra confederados em Ohio, Indiana e Illinois[59].

Foi preso em sua casa, em 1864, acusado de se alistar à Ordem dos Cavalheiros Americanos, sociedade secreta que tinha os propósitos de derrubar o governo por conspirações, dar suporte aos rebeldes, incitar à insurreição, realizar práticas desleais e violar outras leis de guerra[60].

O detento impetrou pedido de *habeas corpus* em tribunal federal local, requerendo que seu julgamento se desse por júri, sob os argumentos de que: *(i)* era cidadão estadunidense, residente em estado não rebelde e, à época das queixas, não estava, e nunca esteve, em serviço militar ou naval dos Estados Unidos, porquanto as leis lhe davam direito a julgamento criminal em um tribunal civil; *(ii)* o poder de levantar e apoiar exércitos é do Congresso, não há sentido que o presidente tenha poder absoluto sobre os militares, já que o poder constituinte pretendia manter o poder executivo sob controle para evitar a tirania; *(iii)* o artigo 1º da Constituição concede ao Congresso e não ao presidente o poder de suspender o pedido de *habeas corpus*; *(iv)* apenas militares e espiões em tempos de guerra ou rebelião foram submetidos a tribunais

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[56] NOLAN, Alan T. **Ex Parte Milligan: Um freio do poder executivo e militar". In We The People: Indiana and the United States Constitution: Lectures in Observance of the Bicentennial of the Constitutio**n. Indianápolis: Sociedade Histórica de Indiana. 1987, pp. 28-29.
[57] *Ibidem.*
[58] *Ibidem.*
[59] ESTADOS UNIDOS. *Supreme Court.* ***Ex Parte Milligan****, 71 U.S. 2 (1866*), p. 6.
[60] *Ibidem.*

militares e a Quinta Emenda estabelece que apenas militares estão sujeitos a tribunais militares em tempos de guerra e paz; *(v)* os tribunais estaduais e federais regulares deveriam ter precedência sobre os militares[61].

Doutro lado, foram argumentos dos Estados Unidos: *(i)* o presidente, comandante-chefe, possui autoridade constitucional para criar distritos militares e suspender o pedido de *habeas corpus*; *(ii)* a Constituição não concede ao presidente o poder de declarar guerra, mas uma vez declarada pelo Congresso, aquele tem o direito e poder de enfrentar problemas imediatos; *(iii)* o presidente tem o poder de prender, julgar ou punir quem ajude o inimigo, independentemente da classificação de residência; *(iv)* não se aplicam a Segunda, Quarta e Quinta Emendas em tempos de guerra[62].

Porquanto, a Suprema Corte precisava se posicionar acerca de três principais questões: *(i)* direito de Milligan ao *habeas corpus*; *(ii)* a constitucionalidade do julgamento de um cidadão americano por tribunal militar; e *(iii)* se Milligan deveria ser libertado da custódia.

De forma unânime, fora firmado o precedente de que o julgamento de civis por comissões militares é inconstitucional, a menos que não haja um tribunal civil disponível, uma vez que os tribunais militares são restritos às áreas de operações militares, onde a guerra realmente prevalece[63]. De acordo com o parecer emitido pela Corte:

> Se, em caso de invasão estrangeira ou de guerra civil, os tribunais forem efetivamente encerrados e for impossível administrar a justiça penal de acordo com a lei, então, no teatro de operações militares ativas, onde a guerra realmente prevalece, há necessidade de fornecer um substituto para a autoridade civil, assim derrubada, para preservar a segurança do exército e da sociedade; e como não resta outro poder senão o militar, é-lhe permitido governar por regime marcial até que as leis possam ter o seu livre curso. Tal como a necessidade cria a regra, também limita a sua duração; pois, se este governo continuar depois de os tribunais serem restabelecidos, é uma usurpação grosseira do poder. O governo marcial nunca pode existir onde os tribunais estão abertos e no exercício correto e sem obstáculos da sua jurisdição[64].

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[61] *Ibidem.*
[62] *Ibidem.*
[63] *Idem, p. 127.*
[64] *Ibidem.* Tradução nossa, no original: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."

A fundamentação se deu no sentido de que a existência de um tribunal militar fere a Constituição, porquanto suspende direitos, limita o exercício de *habeas corpus* e sujeita os cidadãos, bem como os soldados, ao governo da vontade do executivo. Logo, impossível a convivência da liberdade civil com comissões militares[65]. Ainda, de acordo com o parecer:

> A lei marcial estabelecida nessas bases destrói todas as garantias da Constituição e efetivamente torna os "militares independentes e superiores ao poder civil" - a tentativa de faze-lo por parte do Rei da Grã-Bretanha foi considerada pelos nossos pais como uma ofensa tal, que a apresentaram ao mundo como uma das causas que os impeliram a declarar a sua independência. A liberdade civil e este tipo de lei marcial não podem subsistir juntos; o antagonismo é irreconciliável; e, no conflito, um ou outro deve perecer [66].

Logo, o entendimento da Suprema Corte se deu no sentido de que a Constituição, estatuto do poder e instrumento das liberdades, não pode ser suspensa em períodos de crise, devendo ser aplicada a governantes e governados, quer em tempo de paz, quer em tempo de guerra.

Em uma primeira vista, a impressão que temos é que o Tribunal cumpriu sua função de limitar o poder punitivo e garantir a defesa dos direitos individuais. Todavia, analisar as omissões do voto da Corte nos demonstra, na realidade, uma fuga às questões principais, quais sejam: *(i)* a possibilidade de o presidente rotular indivíduos enquanto inimigos e *(ii)* a possibilidade de criação de Tribunais Militares para o julgamento destes. Evandro Piza Duarte e Thales Cassiano Silva, em análise de casos da Suprema Corte sobre a interpretação da prova ilícita, evidenciam que:

> A observação dos casos concretos traz à tona um elemento silencioso e reincidente, a conveniência das instituições jurídicas, especialmente da Magistratura, com padrões reduzidos de garantias processuais relativos às práticas de policiamente/investigação criminal, cerne das questões relacionadas às provas ilícitas[67].

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[65] *Idem*, p. 124.

[66] *Ibidem.* Tradução nossa, no original: “Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power’ - the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish”.

[67] DUARTE, Evandro Piza; SILVA, Thales Cassiano. A interpretação da prova ilícita como garantia processual penal na Suprema Corte dos Estados Unidos, de Weeks (1914) a Hering (2013): breves apontamentos sobre a convergência axiológica, ou não, com a prova ilícita no Brasil. **Revista de Direito Brasileira**: Florianópolis, SC, v. 27, n. 10, p. 216-240, Set/Dez. 2020, p. 236.

Em outras palavras, é dizer que, se possuísse Milligan outra cidadania, sua rotulação e julgamento perante uma comissão militar seriam permitidos, tendo sido a Corte silente com padrões reduzidos de garantias processuais.

2.3. Caso *Ex Parte Quirin* (1942)

A "emergência" estabelecida no presente caso foi a declaração da guerra entre os Estados Unidos e a Alemanha. O inimigo identificado foram os suspeitos de cometerem sabotagem, espionagem, atos hostis ou bélicos[68].

Evidencia, nesta busca pelo inimigo, a maior vigilância e, consequentemente, controle social imposto sobre toda a sociedade, que conduz ao processo de robotização social, porquanto aquele que divergir do padrão pode ser considerado suspeito.

Richard Quirin, junto de outros sete residentes alemães, foram treinados do uso de explosivos, fusíveis e detonadores, para a execução da operação *Pastorius*, que consistia em sabotar alvos estratégicos estadunidenses, tais como: ferrovias, fábricas e pontes[69].

Para se dirigirem ao Estado-alvo, vestiram-se com uniformes militares – para que, caso capturados, fossem categorizados como prisioneiros de guerra e não como espiões, recebendo o direito à liberdade e repatriação após a cessão das hostilidades ativas – e portaram-se de explosivos[70].

Se dividiram em dois submarinos, com desembarque em pontos estratégicos: Ernst Burger, Heinrich Heinck, Quirin e George Dasch, perto de Long Island; ao passo que Herbert Haupt, Edward Keiling, Herman Neubauer e Werener Thiel, em Ponte Vedra Beach.

Quando do desembarque do primeiro grupo, foram notados por um patrulheiro da guarda costeira, o qual tentaram subornar, mas não tiveram êxito. O servidor então voltou para seu posto de comando e soou o alarme. Por terem sido vistos, decidiram enterrar as caixas de explosivos e alguns artigos do uniforme alemão – que depois foram encontrados entregues ao FBI – e seguiram para Nova York.

George Dasch e depois Ernst Burger, cidadãos estadunidenses, por todo o desenrolar da situação, optaram por desistir da operação e se entregar. Receberam promessa de perdão

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[68] ESTADOS UNIDOS. *Supreme Court.* ***Ex Parte Quirin***, 317 U.S. 1 (1942).
[69] *Ibidem.*
[70] *Ibidem.*

presidencial caso auxiliassem a prender os demais envolvidos. Com a ajuda fornecida, todos foram capturados[71].

O presidente Franklin Delano Roosevelt, cerca de uma semana após a prisão dos "sabotadores"[72], emitiu a Proclamação 2561, cujo título se deu por "negar a certos inimigos acesso aos tribunais", que consistia na criação de tribunais militares e na suspensão de direitos recursais àqueles que fossem acusados de violação da lei de guerra. Dispunha a Proclamação:

> Agora, portanto, eu, Franklin D. Roosevelt, Presidente dos Estados Unidos da América e Comandante em Chefe do Exército e da Marinha dos Estados Unidos, em virtude da autoridade que me foi conferida pela Constituição e pelos estatutos dos Estados Unidos, proclamo que todas as pessoas que são súditos, cidadãos ou residentes de qualquer Nação em guerra com os Estados Unidos ou que dão obediência ou agem sob a direção de qualquer Nação e que durante o tempo de guerra, entrar ou tentar entrar nos Estados Unidos ou em qualquer território ou posse dos mesmos, através de defesas costeiras ou fronteiriças, e forem acusados de cometer ou tentar ou preparar-se para cometer sabotagem, espionagem, atos hostis ou bélicos, ou violações da lei de guerra, estarão sujeitos à lei de guerra e à jurisdição dos tribunais militares; e que tais pessoas não terão o privilégio de buscar qualquer recurso ou manter qualquer processo[73].

Os indivíduos foram acusados de violar a lei de guerra pelos atos de: *(i)* suporte ao inimigo; *(ii)* espionagem; e *(iii)* conspiração.

Julgados por comissão militar, todos os acusados foram condenados à execução na cadeira elétrica, com exceção de Dasch e Burger que, pelo acordo firmado, receberam pena diversa: trinta anos de prisão e prisão perpétua, respectivamente. Todavia, posteriormente receberam perdão judicial do presidente Harry S. Truman.

Antes de cumprirem a pena, impetraram pedido de *habeas corpus* argumentando: *(i)* ofensa à Quinta e Sexta Emendas; *(ii)* excesso de poder presidencial para criação de comissão militar e determinação de quem é considerado inimigo; *(iii)* inobservância do precedente gerado no caso *Ex Parte Milligan* (1866); *(iv)* não haver evidências para provar que os detentos

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[71] ESTADOS UNIDOS. *Supreme Court.* ***Ex Parte Quirin***, 317 U.S. 1 (1942).
[72] *Idem*, p. 2.
[73] Franklin D. Roosevelt, ***Proclamation 2561****—Denying Certain Enemies Access to the Courts Online por Gerhard Peters e John T. Woolley, The American Presidency,* Tradução nossa, no original: "Now, therefore, I, Franklin D. Roosevelt, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and statutes of the United States, do hereby proclaim that all persons who are subjects, citizens, or residents of any Nation at war with the United States, or who give obedience to or act under the direction of any Nation, and who during time of war, enter or attempt to enter the United States or any territory or possession thereof, through coastal or border defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not have the privilege of seeking any remedy or maintaining any proceeding".

seguiriam com o crime; *(v)* que os locais de desembarque não poderiam ser caracterizados como "zonas de operação militar", porquanto não havia combate ou ameaça plausível de invasão pela aproximação de forças inimigas.

Doutro lado, foram argumentos dos Estados Unidos: *(i)* não se tratam de delitos de competência dos tribunais civis, mas sim de competência militar, uma vez que ferem a lei de guerra; *(ii)* é um caso distinto do ocorrido no *Ex Parte Milligan*, haja vista que naquele o acusado não usava uniforme de uma força armada que está em guerra contra os Estados Unidos, residia continuamente em Indiana, e não cruzou as linhas militares.

Com o recurso negado pelo tribunal distrital, apelaram para o Tribunal de Apelações dos do Distrito de Columbia e impetraram, individualmente, *habeas corpus* à Suprema Corte.

De forma unânime, a Corte fundamentou que conspiradores que entram no país à paisana, como espiões, com o objetivo de sabotagem, violam a lei de guerra e, portanto, são reconhecidamente combatentes inimigos ilegais, sujeitos a julgamento e punição por tribunais militares.

Porquanto, não tinham direito de acesso aos tribunais civis porque, diferente de Milligan, que era residente civil de Indiana e não estava associado às forças armadas confederadas, os impetrantes são integrantes de força militar alemã e entraram em território americano sem uniforme militar adequado, em tempo de guerra, e com o propósito de sabotagem[74].

Convém destacar que Haupt e Burger eram cidadãos estadunidenses e, mesmo assim, tiveram o direito ao pedido de *habeas corpus* suspenso e foram julgados por comissão militar, decisão contrária ao que fora decidido no precedente *Ex Parte Milligan*, sob o fundamento de que a jurisdição aplicada (regular ou militar) não dependeria da nacionalidade, mas do ato que violou a lei de guerra, reconhecendo a detenção ser uma medida de guerra.

Por fim, decidiu a Corte que não houve excesso de poder do presidente, haja vista que o Congresso, para os casos de violação da lei de guerra, autorizou o julgamento dos combatentes inimigos por comissão militar.

Assim, segundo a decisão, o presidente possui autoridade para usar comissões militares com o poder de apreender e sujeitar às medidas disciplinares os inimigos que, em sua tentativa

[74] ESTADOS UNIDOS. *Supreme Court.* ***Ex Parte Quirin***, 317 U.S. 1 (1942).

de frustrar ou impedir o esforço militar, violarem a lei de guerra, independentemente da sua cidadania[75]. Nos termos do parecer:

> A cidadania estadunidense de um inimigo beligerante não o isenta das consequências de uma beligerância que é ilegal por violar a lei da guerra. Os cidadãos que se associam ao braço militar do governo inimigo e que, com a sua ajuda, [317 U.S. 1, 38] orientação e direção, entram neste país empenhados em atos hostis são beligerantes inimigos na aceção da Convenção de Haia e do direito da guerra. Cf. Gates v. Goodloe, 101 U.S. 612, 615, 617 S., 618[76].

Portanto, tivemos um precedente drasticamente alterado, ampliando – ao invés de restringindo para erradicar – as possibilidades da rotulação de um indivíduo enquanto inimigo.

Mais uma vez, o judiciário falhou no cumprimento de sua função de garantidor da defesa de direitos individuais. Quando, por sua fuga à questão, de forma velada autorizou que o detentor do poder rotulasse indivíduos como inimigos, independentemente da cidadania, e criasse tribunais de exceção.

Por se tratar de um Estado de direito, temos um retrocesso histórico em se tratando de julgados da Suprema Corte, sob a perspectiva de que fora permitida a suspensão da Constituição diante de uma emergência apresentada, ao autorizar que um cidadão estadunidense fosse julgado por um tribunal de exceção[77].

De acordo com o Ato de Nacionalidade de 1940, o cidadão estadunidense que ingressasse em forças armadas estrangeiras perderia, de imediato, sua nacionalidade. Poderia ser uma saída para que a Suprema Corte não tomasse rumo diferente ao precedente *Ex Parte Milligan* e, por conseguinte, não relativizasse a Constituição. Todavia, optou simplesmente por afirmar que a jurisdição militar se aplicaria indepentemente de cidadania[78].

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[75] *Ibidem.*

[76] *FIND LAW.* ***Ex Parte Quirin*****,** 317 U.S. 1 (1942). Disponível em:<***EX PARTE QUIRIN***, 317 U.S. 1 (1942) | *FindLaw*>. Acesso em 19/07/2023. Tradução nossa, no original: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, [317 U.S. 1, 38] guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. Gates v. Goodloe, 101 U.S. 612, 615 , 617 S., 618".

[77] Trata-se de um tribunal de exceção haja vista que sua criação se deu, aproximadamente uma semana após a detenção dos indivíduos e com a finalidade de julgamento destes [ESTADOS UNIDOS. *Supreme Court.* ***Ex Parte Quirin***, 317 U.S. 1 (1942), p.2]. Ou seja, nesse contexto a excepcionalidade se dá por sua criação posterior justamente para punir os inimigos.

[78] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, tópico 2.1.2.

Trata-se de uma decisão *extra petita,* porquanto o caso tratava de combatente militar estrangeiro, ainda que possuidor de cidadania americana, e o precedente fora firmado no sentido de que qualquer cidadão estadunidense poderia ser julgado por tribunal militar quando praticante de ato contrário à lei de guerra[79].

2.4. Caso *Hamdi v. Rumsfeld* (2004)

O caso *Hamdi v. Rumsfeld* teve como antecedente histórico os atentados de 11 de setembro de 2001, quando a rede terrorista *Al Qaeda* utilizou de aviões comerciais sequestrados para atacar alvos proeminentes nos Estados Unidos[80].

Pouco tempo depois, foi aprovado pelo Congresso a Autorização para Uso da Força Militar (AUMF), que permitiu o presidente de usar a força necessária e apropriada contra as nações, organizações ou pessoas que tenham dado suporte aos atentados terroristas[81].

Foi ordenado pelo presidente que as forças armadas fossem para o Afeganistão com a missão de subjugar a *Al Qaeda* e reprimir o regime talibã.

Nesse cenário, Yaser Esam Hamdi, cidadão estadunidense, nascido em Louisiana, fora capturado e rotulado combatente inimigo, acusado de lutar ao lado do Talibã em conflito armado contra os Estados Unidos da América[82].

A rotulação como combatente inimigo permitia que o indivíduo ficasse detido, indefinidamente, na Base Naval da Baía de Guantánamo[83], sem acusações formais e sem acesso a advogado.

Mais uma vez, cabe ressaltar as características do direito penal do autor que se aplicam ao direito penal do inimigo: a antecipação da criminalização que caracteriza a detenção a partir da suspeição; e a necessidade de, mesmo sem acusação formal e condenação, manter o indivíduo sob detenção para prevenir ações futuras.

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[79] *Ibidem.*
[80] ESTADOS UNIDOS. *Supreme Court.* ***Hamdi v. Rumsfeld***, 542 U.S. 507 (2004), p. 507.
[81] *Ibidem.*
[82] *Ibidem.*
[83] Os detidos de Guantánamo não são apenas o resultado de uma guerra ao terror, mas também de um regime de verdade construído por meio da cultura e de normas coloniais. Nesse sentido: ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, tópico 2.3.2.

Seu pai, Esam Fouad Hamdi, entrou com pedido de *habeas corpus* alegando violação à Quinta e Décima Quarta Emendas. Informou que Hamdi foi ao Afeganistão fazer trabalho de socorrista dois meses antes dos atentados de 11 de setembro, sendo, portanto, improvável que tenha recebido treinamento militar[84].

Em sede de contrarrazões, os Estados Unidos acostaram declaração feita por um funcionário do departamento de defesa que alegava o envolvimento de Hamdi com o talibã e com a luta contra os EUA, eis que a prova fidedigna seria a sua rendição e entrega da arma de fogo às forças da Aliança do Norte.

O Tribunal Distrital considerou que a supracitada declaração não era suficiente para a detenção do acusado, remetendo os autos para revisão à câmera. O Quarto Circuito reverteu a decisão, julgando improcedente o *habeas corpus*, informando não ser necessário qualquer outra prova ou permissão de defesa à Hamdi, porquanto capturado em zona de combate ativo.

Alegou o Tribunal que o propósito vital da detenção de combatentes inimigos não acusados era o de impedir que esses se juntassem ao inimigo, porquanto retirado o fardo de litigar as circunstâncias de cada prisão em tempo de guerra.

Quanto ao argumento de ser cidadão americano detido em solo americano, com direito a análises jurídicas distintas, o Tribunal afastou esse entendimento citando o precedente do caso *Ex Parte Quirin* (1942), que ao se pegar em armas contra os Estados Unidos, em zona de guerra ativa, independentemente da cidadania, gera adequação à designação enquanto combatente inimigo.

O Tribunal de Apelações foi de encontro ao Quarto Circuito, ao decidir que o presidente não extrapolou seu poder, haja vista autorização por meio da AUMF e que Hamdi possuía direito apenas a um inquérito judicial limitado sobre a legalidade de sua detenção, não a uma revisão das determinações fáticas à sua prisão[85].

Pela primeira vez, de forma direta, chegou à Suprema Corte a questão de se o executivo possuía autoridade para deter cidadãos estadunidenses qualificados combatentes inimigos.

Por 6 votos a 3, a Suprema Corte entendeu pela possibilidade da rotulação e detenção, diante do "difícil momento que enfrentava os Estados Unidos naquele momento", mas fez a ressalva de que, em se tratando de cidadão estadunidense, deveria lhe ser dada a oportunidade

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[84] ESTADOS UNIDOS. *Supreme Court.* ***Hamdi v. Rumsfeld***, 542 U.S. 507 (2004), p. 507.
[85] *Ibidem.*

de contestar seu status perante um tribunal neutro[86]. Nos termos do parecer proferido pelo Juiz O'Connor:

> Neste momento difícil da história da nossa Nação, somos chamados a considerar a legalidade da detenção pelo Governo de um cidadão dos Estados Unidos em solo americano como "combatente inimigo" e a abordar o processo que é constitucionalmente devido a quem procura contestar essa classificação (…) Consideramos que, embora o Congresso tenha autorizado a detenção de combatentes nas circunstâncias restritas aqui alegadas, o processo justo exige que um cidadão detido nos Estados Unidos como combatente inimigo tenha uma oportunidade significativa de contestar a base fatual dessa detenção perante um decisor neutro[87].

A opinião da Corte, emitida pelo juiz O'Connor, fundamentou que a autorização dada pelo Congresso, através da AUMF, satisfez o requisito permissivo exigido no §4001 da Constituição estadunidense ao permitir o exercício da força necessária e apropriada[88].

Que a supracitada autorização se deu justamente com o objetivo de deter indivíduos que lutaram contra os Estados Unidos, ainda que sejam cidadãos, porquanto a captura, detenção e julgamento não se trata de vingança, mas de incidentes de guerra, cujo principal objetivo é impedir que os detidos retornem ao campo de batalhe e fortaleça o inimigo[89].

Porém, ressalvaram que a AUMF não autorizou a detenção definitiva ou perpétua, limitando-a apenas durante o conflito relevante[90]. Para além, o cidadão-detido que pretenda impugnar a sua classificação enquanto combatente inimigo, deveria ser dada uma justa oportunidade de refutar as afirmações de fato diante de um tribunal neutro[91].

O Juiz Souter emitiu um voto demonstrando sua insatisfação com a decisão, mas concordando com a opinião pluralista, sustentando que o direito de refutar o *status* de combatente inimigo perante um juízo neutro era o mínimo a ser reconhecido a um cidadão estadunidense[92]. Nas palavras do Juiz Souter:

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[86] *Idem*, p. 509.
[87] *Ibidem.* Tradução nossa, no original: "At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such (...) We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker".
[88] *Idem,* p. 517.
[89] *Idem,* p. 518.
[90] *Idem,* p. 521.
[91] *Idem,* p. 533.
[92] *Idem, p.* 553.

> Não é preciso dizer que, ao juntar-me à pluralidade para produzir uma decisão, não adoto a resolução da pluralidade de questões constitucionais que eu não abordei. Não é que eu possa discordar das determinações da maioria (dada a visão da maioria sobre a *Force Resolution*) de que alguém na posição de Hamdi tem direito, no mínimo, a ser notificado da base factual alegada pelo Governo para o deter e a uma oportunidade justa de a refutar perante um decisor neutro, ver *ante*, em 533; nem, claro, poderia discordar da afirmação da maioria do direito de Hamdi a um advogado[93].

Na parte em que discordou, defendeu que era preciso dar ampla interpretação à Lei de Não Detenção, que prevê que nenhum cidadão será preso ou detido de outra forma pelos Estados Unidos, exceto de acordo com uma lei do congresso. De acordo com o juiz, deveria o congresso emitir uma declaração clara autorizando a detenção[94], e não utilizar de uma permissão ampla e vaga que confere poderes para "o exercício da força necessária e apropriada".

A dissidência fora apresentada pelos juízes Scalia e Thomas, acompanhados por Stevens. Os juízes fundamentaram que, quando um cidadão é acusado de guerrear contra o governo, a tradição constitucional tem sido processá-lo perante um tribunal federal por traição[95].

Não havendo Cláusula de Suspensão – para suspender essa tradição constitucional – não pode a AUMF permitir que seja detido um cidadão sem acusação e seja julgado por uma comissão militar [96].

Para além, não teria o judiciário aptidão, facilidades ou responsabilidades para definir o *status* de combatente inimigo de qualquer pessoa, porquanto se tratar de uma discussão do domínio da política[97]. Sendo uma discussão tão complexa que os tribunais sequer sabem os critérios utilizados para a definição de alguém enquanto tal[98]. Complementa o Juiz Souter:

> Concordo com a maioria que o Governo Federal tem poder para deter aqueles que o Poder Executivo determina serem combatentes inimigos. Mas não creio que a pluralidade tenha explicado adequadamente a amplitude da autoridade do Presidente

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[93] *Ibidem*. Tradução nossa, no original: "It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker, see ante, at 533; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel".

[94] *Idem,* p. 544.

[95] *Idem,* p. 559.

[96] *Idem,* p. 554.

[97] *Idem,* p. 585.

[98] *Idem,* p. 587.

> para deter combatentes inimigos, uma autoridade que inclui fazer constatações factuais praticamente conclusivas[99].

A análise dos dois primeiros precedentes trazidos nos permite verificar que este julgado tão somente confirmou algo que já vinha sendo, de forma velada, aceita pela Suprema Corte: o etiquetamento, pelo detentor do poder, de indivíduos enquanto inimigos para a posterior legitimidade de aplicação de um direito penal diferenciado.

Cabe aqui ressaltar o voto dissidente, que fundamentou ser necessária uma declaração expressa do Congresso decretando a possibilidade de um cidadão ser detido de maneira outra da convencional, seguindo todos os trâmites processuais de um tribunal civil.

É perceptível que a Corte já começou a se dividir quanto à possibilidade de rotulação, pelo presidente (detentor do poder) de um indivíduo enquanto inimigo.

2.5. Caso *Rasul v. Bush* (2004)

Vemos, a partir do caso *Rasul v. Bush*, uma inversão quanto à fundamentação da Suprema Corte, que passou a de fato exercer a sua função, qual seja a garantia e defesa dos direitos individuais, a partir da limitação do poder punitivo.

O caso em comento ocorre no mesmo contexto que *Hamdi v. Rumsfeld*. O Congresso, através da Autorização para Uso da Força Militar (AUMF), permitiu que o presidente utilizasse da força necessária e apropriada contra as nações, organizações ou pessoas que deram suporte aos ataques terroristas da *Al Qaeda*, em 11 de setembro de 2001[100].

No contexto da campanha militar no Afeganistão, os Estados Unidos enviaram suas forças armadas para neutralizar a *Al Qaeda* e o regime talibã. Momento em que foram capturados Shafiq Rasul, Asif Iqbal e David Hicks, posteriormente transferidos para a Base Naval Militar da Baía de Guantánamo[101].

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[99] *Ibidem*. Tradução nossa, no original: "I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants.But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to secondguess this determination".

[100] ESTADOS UNIDOS. *Supreme Court.* ***Rasul v. Bush****,* 542 U.S. 466 (2004), p. 466.

[101] *Ibidem.*

Os detentos impetraram pedido de *habeas corpus* alegando: *(i)* que nunca se envolveram em atos terroristas; *(ii)* a ilegalidade de, mesmo estando há mais de dois anos presos, nunca terem sido formalmente acusados; *(iii)* não possuírem acesso a advogados ou aos tribunais[102].

O Tribunal Distrital rejeitou a impetração sob o fundamento de que os tribunais estadunidenses não possuíam jurisdição para julgar demandas de estrangeiros detidos na Base Naval da Baía de Guantánamo, ante a ausência de soberania dos Estados Unidos[103].

Os impetrantes recorreram à Corte de Apelações, que considerou correto o entendimento do Tribunal Distrital, sob os mesmos fundamentos[104].

Apresentada petição de mandado de *certiorari* à Suprema Corte, esta concordou em ouvir o caso.

Por 6 votos a 3, foi gerado o precedente que os Estados Unidos exercem completa jurisdição e controle sobre a Base Naval da Baía de Guantánamo por conta de contrato de arrendamento, assinado em 1903, e que os detentos possuíam direito de impetrar *habeas corpus* independentemente da cidadania[105].

A opinião da Corte foi emitida pelo Juiz Stevens, acompanhado pelos juízes O' Connor, Souter, Ginsburg, Kennedy e Breyer.

Fundamentaram que os tribunais federais possuíam jurisdição para considerar contestações à legalidade da detenção de estrangeiros na Base Naval da Baía de Guantánamo e que os estrangeiros mantidos na base possuíam os mesmos direitos que os cidadãos estadunidenses, haja vista que o contrato de arrendamento não fazia distinção de cidadania[106].

Em voto concordante, o Juiz Kennedy acrescentou ao debate que os detentos estavam sendo mantidos indefinidamente e sem benefício de qualquer processo legal para determinar seu *status* enquanto combatente inimigo ou não[107], e que este tipo de detenção não diferencia amigos de inimigos, porquanto enfraquece a justificativa de atender às exigências militares[108]. Em seu voto, sustentou:

> A detenção por tempo indeterminado sem julgamento ou outro processo apresenta considerações completamente diferentes. Permite que amigos e inimigos permaneçam

[102] *Ibidem,* p. 468.
[103] *Ibidem.*
[104] *Ibidem.*
[105] ESTADOS UNIDOS. *Supreme Court.* ***Rasul v. Bush****,* 542 U.S. 466 (2004).
[106] *Idem,* p. 485.
[107] *Idem,* p. 488.
[108] *Ibidem.*

> em detenção. Sugere um caso mais fraco de necessidade militar e um alinhamento muito maior com a função tradicional do *habeas corpus*. Talvez, quando os detidos são retirados de uma zona de hostilidades, a detenção sem processo ou julgamento seja justificada pela necessidade militar durante algumas semanas; mas à medida que o período de detenção se estende de meses a anos, a justificação para a detenção continuada para satisfazer exigências militares torna-se mais fraca[109].

O Juiz Scalia emitiu o voto dissidente, sendo acompanhado pelo Presidente da Suprema Corte, William Rehnquist, e pelo Juiz Thomas. Fundamentou que os tribunais federais possuem jurisdição limitada, concedidas pela Constituição, que não deve ser ampliada por decreto judicial[110].

Que estender o estatuto do *habeas corpus* para estrangeiros mantidos além do território soberano dos Estados Unidos e além da jurisdição territorial de seus tribunais geraria um grande congestionamento processual, uma vez que daria escopo para os quatro cantos do mundo[111].

Finaliza fundamentando que não é aplicável a isonomia aos estrangeiros, porquanto os cidadãos americanos, por causa de suas consequências constitucionais, podem ter mais direitos em relação ao escopo e alcance do *habeas corpus*[112]. Nas palavras do Juiz Scalia:

> (...) a conclusão é que os cidadãos dos Estados Unidos, devido às suas circunstâncias constitucionais, podem ter mais direitos no que diz respeito ao âmbito e alcance do Estatuto de Habeas, tal como o Tribunal o interpretou ou interpretaria". Tr. of Oral Arg.40.Ver também id., em 27-28. E essa posição - a posição de que os cidadãos dos Estados Unidos em todo o mundo podem ter direitos de habeas corpus - é precisamente a posição que este Tribunal adoptou em Eisentrager, ver 339 U. S., em 769-770, mesmo quando considerou que os estrangeiros no estrangeiro não tinham direitos de habeas corpus[113].

Convém destacar os artifícios utilizados pelas instituições – que nada impede que possuam agentes que defendam o Estado de polícia – para permitir um tratamento penal

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[109] *Ibidem*. Tradução nossa, no original: "Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker".

[110] *Idem,* p. 489.

[111] *Idem,* p. 498.

[112] *Idem,* p. 502.

[113] *Ibidem.* Tradução nossa, no original*: "*the conclusion is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it. Tr. of Oral Arg. 40. See also id., at 27–28. And that position—the position that United States citizens throughout the world may be entitled to habeas corpus rights—is precisely the position that this Court adopted in Eisentrager, see 339 U. S., at 769– 770, even while holding that aliens abroad did not have habeas corpus rights".

diferenciado aos rotulados inimigos: permitir que sejam presos por tempo indeterminado, sem saber sequer do que estão sendo acusados, mas não permitir que impetrem *habeas corpus* para questionar a legalidade da detenção.

O voto dissidente evidenciou a seletividade estrutural do direito penal do inimigo, quando fora argumentado que os cidadãos estadunidenses possuem mais direitos constitucionais que estrangeiros e que a extensão do *habeas corpus* a estes geraria congestionamento processual.

2.6. Caso *Hamdan v. Rumsfeld* (2006)

O Congresso aprovou, no ano de 2005, a Lei de Tratamento de Detentos (TDA) que determinou que nenhum tribunal, justiça ou juiz teria jurisdição para atender pedido de *habeas corpus* apresentado por estrangeiro detido na Baía de Guantánamo[114].

A lei trouxe consigo um substituto do *habeas corpus,* um procedimento em que o processo revisional começaria a partir de uma audiência perante um Tribunal de Revisão do Status de Combatente (CSRT), seguida de uma revisão no Tribunal de Apelações, que decidiria se os procedimentos adotados pelo CSRT foram consistentes com a Constituição e Leis dos Estados Unidos[115].

Se trata de, mais uma vez, da aplicação de um direito penal diferenciado fundamentado na rotulação de combatente inimigo, com a agravante da seletividade estrutural da cidadania.

Salim Ahmed Hamdan, cidadão iemenita, foi capturado e transportado para a Baía de Guantánamo durante a campanha militar dos Estados Unidos no Afeganistão.

Foi acusado pelo crime de conspiração e processado perante a comissão militar por ter: *(i)* sido guarda-costas e motorista pessoal de Osama Bin Laden; *(ii)* providenciado o transporte de armas usados pela *Al Qaeda*; *(iii)* recebido treinamento de armas[116].

O Tribunal de Revisão do Status de Combatente (CSRT) confirmou seu *status* de combatente inimigo[117].

O acusado impetrou pedido de *habeas corpus,* alegando que: *(i)* o delito de conspiração não é uma violação da lei de guerra, porquanto não pode ser julgado por comissão militar; *(ii)*

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[114] ESTADOS UNIDOS. *Supreme Court.* ***Hamdan v. Rumsfeld***, 548 U.S. 557 (2006).
[115] *Ibidem.*
[116] *Idem,* p. 507.
[117] *Ibidem.*

os procedimentos adotados no julgamento teriam violado os princípios básicos do direito militar e internacional, pois ausentes a acusação formal e o julgamento célere[118].

O Tribunal Distrital deferiu o pedido de *habeas corpus* e suspendeu os procedimentos da comissão sob o fundamento de que a autoridade do presidente para estabelecer comissões militares se aplica apenas aos infratores de delitos previstos na lei de guerra; outro fundamento da decisão é que houve violação ao Código Uniforme de Justiça Militar (UCMJ) e às Convenções de Genebra.[119]

Porém, o Tribunal de Apelações reverteu a decisão, fundamentando que: *(i)* as Convenções de Genebra não eram judicialmente exequíveis; *(ii)* o caso *Ex Parte Quirin* afastou qualquer ofensa à separação de poderes no tocante à jurisdição da comissão militar; *(iii)* não houve violação dos regulamentos da UCMJ nem às Convenções de Genebra.

Através de mandado de prerrogativa o caso chegou à Suprema Corte. A questão a ser solucionada era se a comissão militar convocada para o julgamento de Hamdan violava o UCMJ e as Convenções de Genebra[120].

Por 5 votos a 3, ante a ausência do Presidente do Tribunal, John Roberts, a Corte entendeu que a comissão militar formada para julgamento de Hamdan era contrária tanto à UCMJ, quanto às Convenções de Genebra[121].

O Juiz Stevens proferiu a opinião da Corte, sendo acompanhado pelos juízes Kennedy, Souter, Ginsburg e Breyer.

Segundo o parecer, a comissão formada feriu o UCMJ porque carece de jurisdição para julgá-lo, haja vista que Hamdan praticou tão somente o crime de conspiração[122], que o Congresso não identificou como sendo um delito de guerra, requisito obrigatório para legitimar o julgamento por tribunal militar[123], porquanto, ausente a condição mais básica: a necessidade militar.[124]

E mesmo que entendessem o delito de conspiração como um crime de guerra, a comissão não teria o direito de prosseguir, isso porque ao se comprometer a julgar um indivíduo

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[118] *Ibidem.*
[119] *Ibidem.*
[120] *Ibidem.*
[121] ESTADOS UNIDOS. *Supreme Court.* ***Hamdan v. Rumsfeld***, 548 U.S. 557 (2006).
[122] *Idem,* p. 600.
[123] *Idem,* p. 602.
[124] *Idem,* p. 612.

e submetê-lo à punição criminal, o Executivo é obrigado a cumprir o Estado de direito que prevalece nesta jurisdição[125], porque a autorização dada pelo Congresso não dá "cheque-em-branco" para o presidente[126].

Já no que diz respeito às ofensas às Convenções de Genebra de 1949, estas se baseiam no fundamento de que a comissão militar fere o artigo 3º Comum Convenções, que determina que o julgamento precisa acontecer por tribunal regularmente constituído, que ofereça todas as garantias judiciais que são reconhecidas como indispensáveis pelos povos civilizados[127].

Neste caso, o tribunal militar não é regularmente constituído porque sua estrutura e composição divergem dos padrões convencionais das cortes marciais – a concentração de funções, incluindo as tomadas de decisões legais, em um único oficial executivo; os padrões menos rigorosos de composição do tribunal; a criação de procedimentos especiais de revisão no lugar de instituições criadas e regulamentadas pelo Congresso[128]. Porquanto, inapropriado falar em tribunal regularmente constituído quando a autoridade da constituição é colocada nas mãos do presidente[129].

O voto dissidente fora formado pelos Juízes Scalia, Thomas e Alito, que fundamentou que a Suprema Corte sequer teria jurisdição para o julgamento do caso em questão, ante aprovação, pelo Congresso, da Lei de Tratamento de Detentos (TDA)[130]. Nas palavras do Juiz Scalia:

> Em 30 de dezembro de 2005, o Congresso promulgou a Lei de Tratamento de Detidos (DTA). Esta lei estabelece inequivocamente que, a partir dessa data, "nenhum tribunal, justiça ou juiz" terá jurisdição para considerar o pedido de habeas de um detido da Baía de Guantanamo"[131].

O supracitado voto alegou que, quando o Congresso aprovou à AUMF, permitiu a utilização pelo presidente de toda força necessária e apropriada[132], e que o fato de não ter sido especificado cada poder concedido não implica que pretendia o congresso privá-lo de

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[125] *Idem,* p. 635.
[126] *Ibidem.*
[127] *Idem,* p. 643.
[128] *Idem,* p. 651.
[129] *Idem,* p. 654.
[130] *Idem*, p. 655.
[131] *Idem*, p. 656. Tradução nossa, no original: "On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee".
[132] *Idem,* p. 674.

poderes[133]. Alegou ainda que a conspiração para violar as leis de guerra é em si uma ofensa reconhecida perante a comissão militar de direito de guerra[134].

Por fim, no voto dissidente, alegou-se que o artigo 3º Comum das Convenções de Genebra foi satisfeito, uma vez que as comissões militares se qualificam como tribunais; foram nomeadas e estabelecidas de acordo com a legislação interna, haja vista a autorização dada pelo congresso ao presidente; bem como é possível que quaisquer impropriedades processuais que possam ocorrer em casos particulares sejam revistas[135].

Que por se tratar de um tribunal especial, claramente seria um tribunal diferente, servindo a uma função diferente e, portanto, operando de modo diferente aos tribunais marciais[136], não havendo razão para que um tribunal que difere de um tribunal comum seja visto como tendo sido construído de forma imprópria[137].

Outra vez o judiciário exerceu seu papel de limitador do poder punitivo, reconhecendo que a punição deve respeitar o princípio da legalidade e que não pode, o executivo, usurpar a competência do congresso. Debate semelhante ocorreu nos casos de aplicação da teoria dos poderes implícitos, em que, no contexto estadunidense, a Suprema Corte permitiu a ampliação dos poderes legislativos do congresso para realizar políticas públicas, consoante o que apontam Sousa e Duarte[138].

2.7. Caso *Boumediene v. Bush* (2008)

No que pese a vigência da Lei de Tratamento de Detentos (TDA), a pluralidade da Suprema Corte no caso *Hamdan v. Rumsfeld* decidiu que a mesma não se aplica para casos pendentes.

Como resposta, o Congresso aprovou a Lei de Comissões Militares (MCA), com vigor na data de publicação e incidência sobre todos os casos, negando jurisdição aos tribunais

[133] *Idem,* p. 680.
[134] *Idem,* p. 698
[135] *Idem,* p. 734.
[136] *Idem,* p. 721.
[137] *Idem,* p. 728.
[138] SOUSA, Pedro; DUARTE; Evandro Piza. A teoria dos poderes implícitos na determinação das competências constitucionais (legislativa e material) nos Estados Unidos e no Brasil: a trajetória constitucional para fundamentar os poderes de investigação do Ministério Público. **Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional**. Curitiba, 2021, vol. 13, n. 25, p. 210-232, ago./dez., 2021.

estadunidenses sobre quaisquer aspectos da detenção, transferência, tratamento, julgamento ou condições de confinamento, de estrangeiro detido na Baía de Guantánamo[139].

Lakhdar Boumediene e outros cinco argelianos foram capturados quando oficiais de inteligência dos Estados Unidos da América suspeitaram do envolvimento destes em um plano para atacar a embaixada dos Estados Unidos localizada na Bósnia e foram classificados como combatentes inimigos e transferidos para a Baía de Guantánamo[140].

Detidos há mais de cinco anos, impetraram pedido de *habeas corpus,* alegando violação à Quinta Emenda, à *common law* e ao direito internacional.

Os impetrantes tiveram seus pedidos negados pelo Tribunal Distrital, sob o fundamento de que estrangeiros detidos em uma base militar no exterior não possuíam direito ao pedido de *habeas corpus*[141].

Os impetrantes interpuseram recurso ao Tribunal de Apelações, que manteve a negativa sob os mesmos fundamentos, ressaltando a previsão contida na Lei de Comissões Militares (MCA). [142]

Impetraram então novo pedido de *habeas corpus*, alegando que: *(i)* a Lei das Comissões Militares (MCA) não se aplicava ao caso, e, caso fosse aplicada, seria inconstitucional por violar a Cláusula de Suspensão, que dispõe que o privilégio do *habeas corpus* não será suspenso, salvo quando em casos de rebelião ou invasão a segurança pública; *(ii)* entender pela aplicação da MCA seria decidir contrário ao precedente de *Rasul v. Bush* (2004).[143]

O Circuito, mais uma vez, negou o pedido de *habeas corpus,* fundamentando que: *(i)* a supracitada lei se aplica a todos os casos que dizem respeito aos aspectos da detenção, sem exceção; *(ii)* um dos objetivos da lei era anular os precedentes *Rasul v. Bush* (2004) e *Hamdan v. Rumsfeld* (2006); *(iii)* pelo fato da Baía de Guantánamo estar localizada fora das fronteiras geográficas dos Estados Unidos, os direitos constitucionais não se aplicam aos estrangeiros lá detidos[144].

Por petição de mandado de *certiorari,* o caso chegou à Suprema Corte. Esta deveria decidir se os detidos estão impedidos de impetrar *habeas corpus* e invocar as proteções da

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[139] ESTADOS UNIDOS. *Supreme Court.* ***Boumediene v. Bush***, 553 U.S. 723 (2008), p. 1.
[140] *Ibidem.*
[141] *Ibidem.*
[142] *Ibidem.*
[143] *Idem*, p.2.
[144] *Idem*, p.2.

Cláusula Suspensiva, seja por causa do *status* de combatentes inimigos ou da localização da Baía de Guantánamo, em Cuba, levando em consideração a jurisdição dos tribunais.

Por 5 votos a 4, a Suprema Corte reafirmou o precedente emitido no caso *Hamdan v. Rumsfeld*, de que os procedimentos previstos na DTA não são substitutos adequados para o *habeas corpus*; acrescendo que o MCA opera como uma suspensão inconstitucional do *writ;* e que os peticionários não precisam esgotar os procedimentos de revisão no Tribunal de Apelações antes de prosseguir com suas ações de *habeas corpus* no Tribunal Distrital[145]. De acordo com parecer emitido pelo Juiz Kennedy:

> A nossa decisão de hoje sustenta apenas que nos peticiona têm o direito de pedir o mandado de segurança; que os procedimentos de revisão da DTA são um substituto inadequado para o habeas corpus; e que os peticionários nestes casos não precisam de esgotar os procedimentos de revisão no Tribunal de Recursos antes de prosseguirem com as suas ações de habeas no Tribunal Distrital[146].

Em opinião elaborada pelo Juiz Kennedy, acompanhado pelos juízes Stevens, Souter, Ginsburg e Brayer, o principal motivo pelo qual a Corte entendeu ser o novo sistema recursal trazido pela TDA um substituto inadequado foi pelo fato de que os detentos não podem apresentar, na fase de apelação, provas de inocência descobertas após a conclusão dos procedimentos no CRTS[147].

De forma dissidente, os juízes Scalia, Thomas, Alito e John G. Roberts, fundamentaram ser extremamente prematuro se pronunciar sobre o direito dos detentos ao habeas corpus sem antes avaliar se as remessas que o sistema previsto na DTA oferece justificativa para quaisquer direitos que os peticionários possam reivindicar[148].

Alegaram ainda ser a intervenção da Suprema Corte no presente caso totalmente *ultra vires*, pois o *habeas corpus* não pode ser concedido a estrangeiros no exterior, porquanto não devendo ser aplicada a cláusula de suspensão[149]. Nas palavras do Juiz Scalia:

> A dissidência do Presidente da Suprema Corte, à qual me associo, mostra que os procedimentos prescritos pelo Congresso na Lei de Tratamento de Detidos fornecem as proteções essenciais que o *habeas corpus* garante; portanto, não houve suspensão do mandado de segurança e não existe base para intervenção judicial além do que a

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[145] ESTADOS UNIDOS. *Supreme Court.* ***Boumediene v. Bush***, 553 U.S. 723 (2008).
[146] *Ibidem*. Tradução nossa, no original: "Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court".
[147] *Idem,* p. 93.
[148] *Idem,* p. 78.
[149] *Idem*, p. 83.

> Lei permite. O meu problema com a opinião de hoje é ainda mais fundamental: o *habeas corpus* não funciona, nem nunca funcionou, a favor de estrangeiros no estrangeiro; a Cláusula de Suspensão não se aplica, portanto, e a intervenção do Tribunal nesta questão militar é totalmente *ultra vires*[150].

Mais uma vez, tivemos a Suprema Corte, ainda que dividida, decidindo de modo a garantir a extensão dos direitos individuais, a partir da limitação do poder punitivo.

Convém destacar a insistência dos detentores do poder, através da legitimação do discurso regulador, em fazer com que seja aplicado um tratamento penal diferenciado aos considerados inimigos.

No caso em questão, a substituição do *habeas corpus* por outro procedimento violaria diretamente a razoável duração do processo, porquanto deveria o indivíduo, sem condenação transitada em julgado, aguardar em detenção e com seus direitos limitados, o trâmite processual em dois tribunais, sendo certo que, pelo primeiro ser comissão militar, seria classificação enquanto combatente inimigo.

2.8. Algumas conclusões

A partir da análise dos precedentes, é possível concluir que, em grande parte dos casos, a Suprema Corte não afastou a discricionariedade do governo estadunidense na rotulação do indivíduo enquanto combatente inimigo.

Pelo contrário, fundamentou que não possuía condição de analisar sequer o *status* de combatente, pelo fato de nenhum tribunal conhecer os quesitos pelos quais o detentor do poder considerava alguém enquanto tal.

Esse movimento se dá pela constante reformulação, utilização inédita e confusa de conceitos legais e militares, que impossibilitam uma definição clara do termo combatente inimigo e sobre quais regras penais e processuais penais lhe serão aplicadas após a rotulação[151].

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[150] *Ibidem.* Tradução nossa, no original: "THE CHIEF JUSTICE's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires".

[151] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, tópico 2.2.

Nos casos *Ex Parte Milligan, Ex Parte Quirin e Hamdi v. Rumsfeld*, a Suprema Corte possibilitou a aplicação de um tratamento penal diferenciado, se mostrando indeferente à limitação de direitos fundamentais e individuais, dentre os quais: o acesso à justiça, devido processo legal, o contraditório e ampla defesa, a duração razoável do processo, e o juiz natural (não ser julgado por um tribunal de exceção).

Apenas a partir do caso *Rasul v. Bush,* em 2004, a Corte passou a adotar uma postura mais garantista, que modo a afirmar o respeito à função do direito penal, qual seja a limitação do poder punitivo estatal. Mesmo assim, os detentores do poder continuaram a insistir na mudança do discurso e na formulação de novas leis, visando alcançar a legitimidade social para expressar a seletividade e o tratamento bélico do direito penal do inimigo.

Fato é que quando o judiciário julga de forma garantista, visando o Estado de direito e suas prerrogativas, de modo a limitar a atuação discricionária e arbitrária dos detentores do poder, os poderes executivo e legislativo se veem na obrigação de superar as limitações impostas pelos juízes[152], a partir da adoção de novas alternativas. Esse movimento fora confirmado com a criação da Lei de Tratamento de Detentos (TDA), em 2005, que visou retirar a jurisdição dos tribunais estadunideses na análise das petições de estrangeiros detidos na Baía de Guantánamo, após o procedente gerado no caso *Rasul v. Bush,* qual seja o reconhecimento do pleno exercício de jurisdição dos Estados Unidos sobre a Base Militar, por força de acordo de arrendamento.

De igual modo, a aprovação da Lei de Comissões Militares (MCA), em 2006, que veio para confirmar a Lei de Tratamento de Detentos (TDA), no sentido de retirar a jurisdição dos tribunais estadunidenses para analisar pedidos de detidos na Baía de Guantánamo, de todos os casos, sem exceção, depois que a Suprema Corte entendeu no caso *Hamdan v. Humsfeld* que a TDA não se aplicaria aos casos pendentes de análise.

Giorgio Agamben afirma que, mais importante do que questionar a possibilidade de estabelecer a impunidade da morte de um indivíduo, é observar quais os procedimentos jurídicos e quais dispositivos políticos permitiram que seres humanos fossem privados de seus direitos e suas prerrogativas[153].

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[152] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, aspectos introdutórios.

[153] AGAMBEN, Giorgio. **Homo sacer: O poder soberano e a vida nua**. Lisboa: Editorial Presença, 1998. P. 178.

Os procedimentos jurídicos que fundamentaram o *status* de combatente inimigo nos Estados Unidos tiveram a sua construção a partir de autorizações concedidas pelo congresso ao presidente, para o uso da força necessária e apropriada. Utilizando desta prerrogativa, o chefe do executivo passou a rotular indivíduos enquanto inimigos para lhes aplicar um tratamento penal diferenciado.

Quando os questionamentos acerca desta possibilidade chegaram aos tribunais, estes se mostraram, por vezes, convenientes com padrões redutores de garantias processuais, se esquivando da discussão central, qual seja a rotulação de inimigos pelo detentor do poder. Nas palavras de Andrea de Quadros Dantas Echeverria:

> O que se percebe, dos julgamentos da Suprema Corte, é que o foco não recaiu sobre a possibilidade de o presidente designar qualquer indivíduo combatente inimigo (...) o mais interessante é justamente o que todos eles tem em comum, ou seja, a forma de agir do governo norte-americano, em que se afirma a impossibilidade de envolvimento do Poder Judiciário, de modo que somente o Executivo teria a competência para decidir quem pode ser detido, quais as evidências necessárias para tanto, qual o procedimento aplicável e por quanto tempo a detenção poderia durar[154].

Já os procedimentos políticos tiveram construção a partir da ameaça real, imaginária ou potencial da manutenção do poder; a partir de então, a disseminação da ideia de que a sobrevivência societária depende da neutralização desses inimigos.

É perceptível que, quando fora de controle, o poder punitivo reduz consideravalmente os direitos individuais e constitucionais. Porquanto, vimos a figura indispensável do judiciário na correta aplicação do direito penal para a sua contenção.

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[154] ECHEVERRIA, Andrea de Quadros Dantas. **Combatente inimigo, *homo sacer* ou inimigo absoluto? O Estado de exceção e o novo *nomos* na terra: o impacto do terrorismo sobre o sistema jurídico-político do século XXI**. Editora CRV, 2013, n.p, cap. 2, tópico 2.2.4.

CONSIDERAÇÕES FINAIS

O presente trabalho tratou da construção do combatente inimigo no histórico constitucional estadunidense. Sua relevância fora apresentada na constatação de que o conceito de inimigo, dentro de um Estado de direito, é incompatível com sua fundamentação que depende do respeito aos Direitos Humanos.

No que pese sua incompatibilidade, esse tratamento excepcional ao inimigo é demasiadamente aplicado, tendo em vista ser um instrumento de controle social e manutenção do poder, baseado na rotulação e neutralização de "ameaças indesejáveis". Tudo isso é possível através de um discurso regularizador, a partir da técnica *volkisch* (manipulação social de identificação de inimigos sociais) para convencer a sociedade da existência de um inimigo comum que põe em risco a vivência comunitária.

Dada a legitimação pela sociedade, os detentores do poder impõem um tratamento penal diferenciado sobre os rotulados inimigos, passando a tratá-los não mais como pessoas, mas como não-pessoas; deixando de aplicar um direito penal, em prol da aplicação de um direito bélico, que restringe direitos fundamentais e atenta contra a dignidade da pessoa humana. Tudo isso revela que, na verdade, falar em direito penal do inimigo é falar sobre direito do autor, ou seja, da punição não pelo fato cometido, mas pela personalidade; antecipando a repressão estatal em razão da periculosidade.

No primeiro capítulo, ao tratar sobre o inimigo no direito penal e sua construção, sob a perspectiva de Zaffaroni, foi possível chegar a algumas conclusões, dentre elas: *(i)* o inimigo é rotulado pelos detentores do poder; *(ii)* a construção do conceito de inimigo parte de um *script,* qual seja, primeiro é invocada uma emergência, depois é apontado um inimigo, por fim há uma manipulação da sociedade para atingir a legitimação de aplicar àqueles um tratamento penal diferenciado. Logo, o direito penal do inimigo é marcado por um conteúdo (a exceção bélica) e uma forma (a estratégia de transferência de responsabilidades).

No segundo capítulo, as análises dos precedentes gerados pela Suprema Corte estadunidense confirmaram o *script* identificado no primeiro capítulo e evidenciaram a importância do judiciário para que a função do direito penal seja cumprida, qual seja a limitação do poder punitivo.

A Suprema Corte, nos casos *Ex Parte Milligan*, *Ex Parte Quirin* e *Hamdi v. Rumsfeld,* permitiu a limitação dos direitos individuais e fundamentais, autorizando a rotulação de qualquer indivíduo, independentemente da cidadania, enquanto inimigo, oriundo de um ato discrionário do presidente, com a consequente aplicação de um tratamento penal diferenciado,

incompatível com o Estado de direito, que retira do rotulado a condição de pessoa e impõe a condição de objeto da coação, sobretudo física.

Somente a partir do caso *Rasul v. Bush* a Corte passou a adotar uma postura mais garantista e aplicadora do direito penal em sua plena função, qual seja a limitação do poder punitivo estatal, quando confirmou a jurisdição dos Estados Unidos sobre a Baía de Guantánamo, permitindo que todos os detentos, independentemente da nacionalidade, impetrassem pedido de *habeas corpus*.

Este posicionamento teve continuidade nos casos subsequentes; como em *Hamdan v. Rumsfeld*, que reconheceu serem as comissões militares contrárias tanto ao Código Uniforme de Justiça Militar (UCMJ), ao considerar que o delito de conspiração não havia sido previsto, pelo Congresso, enquanto delito que ofendia à lei de guerra; como às Convenções de Genebra, por não seguirem as formalidades de um tribunal comum, com divisão de funções e respeito aos direitos fundamentais.

A análise do processo de construção do combatente inimigo dentro do histórico constitucional estadunidense serviu para evidenciar que a rotulação de indivíduos e grupos enquanto inimigos é incompatível com a existência do Estado de direito, haja vista que este etiquetamento conduz à criação de uma categoria de pessoas que não possuem proteção legal.

Portanto, é imprescindível a atuação do judiciário frente ao Estado de polícia, enquanto guardião da Constituição, limitando o exercício do poder punitivo e garantindo aos cidadãos os seus direitos oriundos das legislações nacional, internacional e dos conflitos armados.

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ANEXO 01 – CASO *EX PARTE MILLIGAN* (1866)

Syllabus.

BROBST ET AL. *v.* BROBST.

This court cannot take jurisdiction on a certificate of division in a case where the question certified is one of fact and can only be determined by an examination of the evidence in the record.

THIS case came here on a certificate of division from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The record showed a litigation in respect to an alleged fraud in obtaining a deed of large tracts of land by the principal defendant from the complainant. The decree found the fraud alleged, and held the deed null as to the principal defendant, but stated that the judges were opposed in opinion on the question whether his four co-defendants, who claimed by deeds under him, were chargeable as privies to the fraud, and this question was accordingly certified to this court.

Messrs. Brent and Merrick moved to dismiss the case for want of jurisdiction.

The CHIEF JUSTICE: The question is one of fact, and can only be determined by an examination of the evidence in the record; and it has been repeatedly determined that only questions of law upon distinct points in a cause can be brought to this court by certificate.*

An order must be made, therefore, remanding this cause to the Circuit Court, without answer to the question certified, for want of jurisdiction.

EX PARTE MILLIGAN.

1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus* for the purpose of inquiring into the cause of commitment, and they have

* Wilson *v.* Barnum, 8 Howard, 261.

jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of *habeas corpus*, to issue the writ, and on its return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.
3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.
4. A petition for a writ of *habeas corpus*, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law and not of discretion.
5. A person arrested after the passage of the act of March 3d, 1863, "relating to *habeas corpus* and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district.
6. The omission to furnish a list of the persons arrested, to the judges of the Circuit or District Court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge.
7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.
8. The guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances.
9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal, for any offence whatever.
10. Cases arising in the land or naval forces, or in the militia, in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury; and the right of trial by jury, in such cases, is subject to the same exceptions.

Statement of the case.

11. Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*.
12. A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.
13. Suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further.
14. A person who is a resident of a loyal State, where he was arrested; who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

THIS case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress—the Judiciary Act of 1789,* section 14—enacts that the Circuit Courts of the United States

"Shall have power to issue writs of *habeas corpus*. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*," &c.

Another act—that of March 3d, 1863,† "relating to *habeas corpus*, and regulating judicial proceedings in certain cases" —an act passed in the midst of the Rebellion—makes various provisions in regard to the subject of it.

The first section authorizes the suspension, during the Rebellion, of the writ of *habeas corpus*, throughout the United States, by the President.

Two following sections limited the authority in certain respects.

* 1 Stat. at Large, 81.

† 12 Id. 755.

The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that *the judge* of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute *the judge's* order, under penalty, for refusal or delay, of fine and imprisonment.

The third section enacts, in case lists of persons other than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain *the judge's* order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

By proclamation,* dated the 15th September following,

* 13 Stat. at Large, 734.

the President reciting this statute suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States "hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval forces of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service."

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison, at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges; preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"
2. "Affording aid and comfort to rebels against the authority of the United States;"
3. "Inciting insurrection;"
4. "Disloyal practices;" and
5. "Violation of the laws of war."

Under each of these charges there were various specifications. The substance of them was, joining and aiding, at different times, between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate

prisoners of war, &c.; resisting the draft, &c.; . . . "at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, [and various other places specified] in Indiana, a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy." These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging; and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact, that while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empanelled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war; but during all the time aforesaid, and for twenty years last past, he had been an

inhabitant, resident, and citizen of Indiana. And so, that it had been "wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."

The record, in stating who appeared in the Circuit Court, ran thus:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and files here, in open court, the petition of said Milligan, to be discharged." . . . "At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c."

The prayer of the petition was that under the already mentioned act of Congress of March 3d, 1863, the petitioner might be brought before the court, and either turned over to the proper civil tribunal to be proceeded with according to the law of the land, or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

I. On the facts stated in the petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petitioner?

II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?

III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802,* an act

* 2 Stat. at Large, 159.

which provides "that whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of *either party* or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter; and shall by the said court be *finally* decided: and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the *cause* from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The three several questions above mentioned were argued at the last term. And along with them an additional question raised in this court, namely:

IV. A question of jurisdiction, as—1. Whether the Circuit Court had jurisdiction to hear the case there presented?—2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether *this* court had jurisdiction of the questions raised by the certificate?

Mr. J. E. McDonald, Mr. J. S. Black, Mr. J. H. Garfield, and Mr. David Dudley Field, for the petitioner. Mr. McDonald opening the case fully, and stating and examining the preliminary proceedings.

Mr. Speed, A. G., Mr. Stanbery, and Mr. B. F. Butler, special counsel of the United States, contra. Mr. Stanbery confining himself to the question of jurisdiction under the act of 1802.

ON THE SIDE OF THE UNITED STATES.

I. JURISDICTION.

1. *As to the jurisdiction of the Circuit Court.*—The record shows that the application was made to the court in open

session. The language of the third section contemplates that it shall be made to a "judge."

But, independently of this, the record does not state the facts necessary to bring the case within the act of 1863. It does not show under which section of the act it is presented; nor allege that the petitioners are state or political prisoners otherwise than as prisoners of war; nor that a list has been brought in, or that it has not been brought in. If a list had been brought in containing the name of one of these petitioners, it would have been the judge's duty to inquire into his imprisonment; if no list had been brought in, his case could only be brought before the court by some petition, and the judge, upon being satisfied that the allegations of the petition were true, would discharge him. But there is no certificate in the division of opinion that the judges were or were not satisfied that the allegations of these petitioners were true; nor were the petitions brought under the provisions of that duty. But conceding, for argument's sake, this point, a graver question exists.

2. *As to the jurisdiction of this court.*—If there is any jurisdiction over the case here, it must arise under the acts of Congress which give to this court jurisdiction to take cognizance of questions arising in cases pending in a Circuit Court of the United States and certified to the court for its decision, and then to be remanded to the Circuit Court. This is appellate jurisdiction, and is defined and limited by the single section of the act of April 29, 1802.

The case is not within the provisions of this section.

First. The question in the court below arose upon *the application* for a *habeas corpus*, before there was a service upon the parties having the petitioner in custody, before an answer was made by those parties, before the writ was ordered or issued, while yet there was no other party before the court, except the petitioner. The case was then an *ex parte* case, and is so still. The proceeding had not yet ripened into a "cause."

No division of opinion in such a case is within the purview of the section. The division of opinion on which this

court can act, must occur in the progress of a case where the parties on *both* sides are before the court, or have a status in the case. The right to send the question or point of division to this court can only arise upon the motion of the *parties, or either of them*,—not by the court on its own motion or for its own convenience. The record hardly exhibits the Attorney of the United States, Mr. Hanna, as taking any part.

The parties have an equal right to be heard upon the question in the court below. It must appear to them in open court that the judges are divided in opinion. They must have an equal right to move for its transfer to this court. They must have an equal opportunity to follow it here and to argue it here,—not as volunteers, not as *amici curiæ*, not by permission, but *as parties on the record*, with equal rights.

This record shows no parties, except the petitioner. Its title is *Ex parte* Milligan. The persons who are charged in the petition as having him in wrongful custody are not made parties, and had, when the question arose, no right to be heard as parties in the court below, and have no right to be heard as parties in this court.

In such a case, this court cannot answer any one of the questions sent here, especially the one, "Had the Military Commission jurisdiction to try and condemn Milligan?" For if the court answer that question in the negative, its answer is a *final decision*, and, as it is asserted, settles it for all the future of the case below; and when, hereafter, that case shall, in its progress, bring the parties complained of before the court, silences all argument upon the vital point so decided.* What becomes of the whole argument which will be made on the other side, of the right of every man before being condemned of crime, to be heard and tried by an impartial jury?

Second. This being an *ex parte* application for a writ of *habeas corpus* made to a court, the division of opinion *then* occurring was in effect a decision of the case.

* United States *v.* Daniel, 6 Wheaton, 542; Davis *v.* Braden, 10 Peters, 289.

The case was ended when the court declined to issue the writ. It was not a division of opinion occurring in the progress of a case or the trial of a case, and when it was announced to the petitioner that one judge was in favor of granting the writ, and that the other would not grant it—*that* settled and ended the case. The case had not arisen within the meaning of the statute, when from necessity the case and the progress of the case must stop until the question should be decided. And as Milligan was sentenced to be hanged on the 19th May, for aught that appears, we are discussing a question relating to the liberty of a dead man. Having been sentenced to be hanged on the 19th, the presumption is that he was hanged on that day. Any answer to the questions raised will therefore be answers to moot points—answers which courts will not give.*

Third. If the parties had all been before the court below, and the case in progress, and then the questions certified, and the parties were now here, the court would not answer these questions.

1. Every question involves matters of fact not stated in an agreed case, or admitted on demurrer, but alleged by one of the parties, and standing alone on his *ex parte* statement.†

2. All the facts bearing on the questions are not set forth, so that even if the parties had made an agreed state of facts, yet if this court find that other facts important to be known before a decision of the question do not appear, the questions will not be answered.‡

3. The main question certified, the one, as the counsel for the petitioners assert, on which the other two depend, had not yet arisen for decision, especially for final decision, so that if the parties had both concurred in sending that question here, this court could not decide it.

If it be said this question did arise upon the application for the writ, it did not then arise for final decision, but only as showing probable cause, leaving it open and unde-

* 6 Wheaton, 548; 10 Peters, 290.

† Wilson *v.* Barnum, 8 Howard, 262.

‡ United States *v.* City Bank of Columbus, 19 Id. 385.

cided until the answer should be made to the writ. A case, upon application for the writ of *habeas corpus*, has no status as a case until the service of the writ on the party having the petitioner in custody, and his return and the production of the body of the petitioner. No issue arises until there is a return, and when that is made the issue arises upon it, and in the courts of the United States it is conclusive as to the facts contained in the return.*

4. The uniform practice in this court is against its jurisdiction in such a case as this upon *ex parte* proceedings.

All the cases (some twenty in number) before this court, on certificates of division, during all the time that this jurisdiction has existed, are cases between parties, and stated in the usual formula of A. *v.* B., or B. *ad sectam* A.

So, too, all the rules of this court as to the rights and duties of parties in cases before this court, exclude the idea of an *ex parte* case under the head of appellate jurisdiction.

II. THE MERITS OR MAIN QUESTION.

Mr. Speed, A. G., and Mr. Butler: By the settled practice of the courts of the United States, upon application for a writ of *habeas corpus*, if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two:

I. Had the military commission jurisdiction to hear and determine the case submitted to it?

II. The jurisdiction failing, had the military authorities of the United States a right, at the time of filing the petition, to detain the petitioner in custody as a military prisoner, or for trial before a civil court?

1. A military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed.†

* Commonwealth *v.* Chandler, 11 Massachusetts, 83.

† Dynes *v.* Hoover, 20 Howard, 78; *Ex parte* Vallandigham, 1 Wallace, 243.

2. Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.*

3. Military law is the rules and regulations ma le by the legislative power of the State for the government c f its land and naval forces.†

4. The laws of war (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello.*

These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals.

Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.

Offences against military laws are determined by tribunals established in the acts of the legislature which create these laws—such as courts martial and courts of inquiry.

The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender.

But the necessities and effects of warlike operations which create the law also give power incidental to its execution. It would be impossible for the commanding general of an army to investigate each fact which might be supposed to interfere with his movements, endanger his safety, aid his enemy, or bring disorder and crime into the community under his charge. He, therefore, must commit to his offi-

* Hansard's Parliamentary Debates, 3d series, vol. 95, p. 80. Speech of the Duke of Wellington. Opinions of Attorneys-General, vol. 8, p. 367.

† Kent's Commentaries, vol. 1, p. 341, note A.

cers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition—the whole matter to be then determined and executed by his order.*

Hence arise *military commissions*, to investigate and determine, not offences against military law by soldiers and sailors, not breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary war, had repeated recourse to military commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the acts of Congress of July 17th, 1862, chap. 201, sec. 5; March 18th, 1863, chap. 75, sec. 36; Resolution No. 18, March 11th, 1862; and their jurisdiction over certain offences is also recognized by these acts.

But, as has been seen, military commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offences therein enumerated.

Assuming the jurisdiction where military operations are being in fact carried on, over classes of military offences, Congress, by this legislation, from considerations of public safety, has endeavored to extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.

As the war progressed, being a civil war, not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection, the President, as commander-in-chief, by his proclamation of September 24th, 1862, ordered:

"That during the existing insurrection, and as a necessary

* Examination of Major André before board of officers, Colonial pamphlets, vol. 18.

means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

"Second. That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission."

This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President.*

This proclamation, which by its terms was to continue during the then existing insurrection, was in full force during the pendency of the proceedings complained of, at the time of the filing of this petition, and is still unrevoked.

While we do not admit that any legislation of Congress was needed to sustain this proclamation of the President, it being clearly within his power, as commander-in-chief, to issue it; yet, if it is asserted that legislative action is necessary to give validity to it, Congress has seen fit to expressly ratify the proclamation by the act of March 3d, 1863, by declaring that the President, whenever in his judgment the public safety may require it, is authorized to suspend the writ of *habeas corpus* in any case throughout the United States, and in any part thereof.

The offences for which the petitioner for the purpose of this hearing is confessed to be guilty, are the offences enumerated in this proclamation. The prison in which he is confined is a "military prison" therein mentioned. As to him, his acts and imprisonment, the writ of *habeas corpus* is expressly suspended.

Apparently admitting by his petition that a military com-

* Brown *v.* The United States, 8 Cranch, 153.

mission might have jurisdiction in certain cases, the petitioner seeks to except himself by alleging that he is a citizen of Indiana, and has never been in the naval or military service of the United States, or since the commencement of the Rebellion a resident of a rebel State, and that, therefore, it had been out of his power to have acquired belligerent rights and to have placed himself in such a relation to the government as to enable him to violate the laws of war.

But neither residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law, even in a time of foreign war, and certainly not in a time of civil insurrection. The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.

These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial, and imprisonment took place; within a military district of a geographical military department, duly established by the commander-in chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent whose becoming soldiers the petitioner conspired with and armed others.

Thus far the discussion has proceeded without reference to the effect of the Constitution upon war-making powers, duties, and rights, save to that provision which makes the President commander-in-chief of the armies and navies.

Does the Constitution provide restraint upon the exercise of this power?

The people of every sovereign State possess all the rights and powers of government. The people of these States in forming a "more perfect Union, to insure domestic tranquillity, and to provide for the common defence," have vested the power of making and carrying on war in the general government, reserving to the States, respectively, only the right to repel invasion and suppress insurrection "of such imminent danger as will not admit of delay." This right and power thus granted to the general government is in its nature entirely *executive*, and in the absence of constitutional limitations would be wholly lodged in the President, as chief executive officer and commander-in-chief of the armies and navies.

Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and, therefore, be unsafe to be vested in a single branch of a republican government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing letters of marque and reprisal; consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while in the service of the United States.

To keep out of the hands of the Executive the fruits of victory, Congress is also invested with the power to "make rules for the disposition of captures by land or water."

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.*

During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable;

* Luther *v.* Borden, 7 Howard, 42–45; Martin *v.* Mott, 12 Wheaton, 19.

or, if acting offensively, his resources must be proportionate to the end in view,—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.*

These propositions are axiomatic in the absence of all restraining legislation by Congress.

Much of the argument on the side of the petitioner will rest, perhaps, upon certain provisions—not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

In addition to these, there are two preceding amendments

* Federalist, No. 26, by Hamilton; No. 41, by Madison.

which we may also mention, to wit: the second and third. They are thus:

2. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

3. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

It will be argued that the fourth, fifth, and sixth articles, as above given, are restraints upon the war-making power; but we deny this. All these amendments are in *pari materiâ*, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in "depriving of life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

These, in truth, are all peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.

By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall be quartered in any house in time of peace

without consent of the owner, or in *time of war*, except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of *habeas corpus* in time of peace, the Constitution takes it for granted that it will be suspended "in case of rebellion or invasion (*i. e.*, in time of war), when the public safety requires it."

The second and third sections of the act relating to *habeas corpus*, of March 3d, 1863, apply only to those persons who are held as "state or political offenders," and not to those who are held as prisoners of war. The petitioner was as much a prisoner of war as if he had been taken in action with arms in his hands.

They apply, also, only to those persons, the cause of whose detention is not disclosed; and not to those who, at the time when the lists by the provisions of said sections are to be furnished to the court, are actually undergoing trial before military tribunals upon written charges made against them.

The law was framed to prevent imprisonment for an indefinite time without trial, not to interfere with the case of prisoners undergoing trial. Its purpose was to make it certain that such persons should be tried.

Notwithstanding, therefore, the act of March 3, 1863, the commission had jurisdiction, and properly tried the prisoner.

The petitioner does not complain that he has been kept in ignorance of the charges against him, or that the investigation of those charges has been unduly delayed.

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.

ON THE SIDE OF THE PETITIONER.

Mr. David Dudley Field:

Certain topics have been brought into this discussion which have no proper place in it, and which I shall endeavor to keep out of it.

This is not a question of the discipline of camps; it is not a question of the government of armies in the field; it is not a question respecting the power of a conqueror over conquered armies or conquered states.

It is not a question, how far the *legislative* department of the government can deal with the question of martial rule. Whatever has been done in these cases, has been done by the *executive* department alone.

Nor is it a question of the patriotism, or the character, or the services of the late chief magistrate, or of his constitutional advisers.

It is a question of the rights of the citizen in time of war.

Is it true, that the moment a declaration of war is made, the executive department of this government, without an act of Congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone? These are the considerations which give to the case its greatest significance.

But we are met with the preliminary objection, that you cannot consider it for want of

JURISDICTION.

The objection is twofold: first, that the Circuit Court of Indiana had not jurisdiction to hear the case there presented; and, second, that this court has not jurisdiction to hear and decide the questions thus certified.

First. *As to the jurisdiction of the Circuit Court.* That depended on the fourteenth section of the Judiciary Act of

1789, and on the *Habeas Corpus* Act of 1863. The former was, in Bollman's case,* held to authorize the courts, as well as the judges, to issue the writ for the purpose of inquiring into the cause of commitment.

The act of March 3d, 1863, after providing that the Secretaries of State and of War shall furnish to the judges of the Circuit and District Courts a list of political and state prisoners, and of all others, except prisoners of war, goes on to declare, that if a grand jury has had a session, and has adjourned without finding an indictment, thereupon "it shall be the duty of the judge of said court forthwith to make an order, that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged."

Upon this act the objection is, first, that the application of the petitioner should have been made to one of the judges of the circuit, instead of the court itself; and, second, that the petition does not show whether it was made under the second or the third section.

To the former objection the answer is, first, that the decision in Bollman's case, just mentioned, covers this case; for the same reasoning which gives the court power to proceed under the fourteenth section of the act of 1789, gives the court power to proceed under the second and third sections of the act of 1863. The second answer is that, by the provisos of the second section, the court is expressly mentioned as having the power.

The other objection to the jurisdiction of the Circuit Court is, that the petition does not show under which section of the act it was presented. It states that the petitioner is held a prisoner under the authority of the President; that a term has been held, and that a grand jury has been in attendance, and has adjourned without indicting. It does not state whether a list has been furnished to the judges by the Secretary of State and the Secretary of War, and, therefore, argues the learned counsel, the court has no jurisdiction. That is to say, the judges, knowing themselves whether the

* 4 Cranch, 75.

list has, or has not been furnished, cannot proceed, because we have not told them by our petition what they already know, and what we ourselves might not know, and perhaps could not know, because the law does not make it necessary that the list shall be filed, or that anybody shall be informed of it but the judges.

Second. *As to the jurisdiction of this court.* Supposing the Circuit Court to have had jurisdiction, has this court jurisdiction to hear these questions as they are certified? There are various objections. It is said that a division of opinion can be certified only in a cause, and that this is not a cause.

It was decided by this court, in *Holmes* v. *Jennison*,* that a proceeding on *habeas corpus* is a suit, and suit is a more comprehensive word than cause. The argument is, that it is not a cause until the adverse party comes in. Is not a suit commenced before the defendant is brought into court? Is the defendant's appearance the first proceeding in a cause? There have been three acts in respect to this writ of *habeas corpus*. The first of 1789; then the act passed in 1833; and, finally, the act of 1842. The last act expressly designates the proceeding as a cause.

Another objection is, that there must be parties; that is, at least two parties, and that here is only one. This argument is derived from the direction in the act, that the point must be stated "upon the request of either party" or their counsel. It is said that "either party" imports two, and if there are not two, there can be no certificate. This is too literal: "*qui hæret in litera hæret in cortice.*" The language is elliptical. What is meant is, "any party or parties, his or their counsel." Again: "either," if precisely used, would exclude all over two, because "either" strictly means "one of two;" and if there are three parties or more, as there may be, you cannot have a certificate. It is not unusual, in proceedings *in rem*, to have several intervenors and claimants: what are we to do then? The answer must be, that "either" is an equivalent word for "any;" and that who-

* 14 Peters, 566.

ever may happen to be a party, whether he stand alone or with others, may ask for the certificate.

The words "either party" were introduced, not for restriction but enlargement. The purpose was to enable any party to bring the case here; otherwise it might have been argued, perhaps, that all parties must join in asking for the certificate. The purpose of the act was to prevent a failure of justice, when the two judges of the Circuit Court were divided in opinion. The reason of the rule is as applicable to a case with one party as if there were two. Whether a question shall be certified to this court, depends upon the point in controversy. If it concerns a matter of right, and not of discretion, there is as much reason for its being sent *ex parte* as for its being sent *inter partes*. This very case is an illustration. Here a writ is applied for, or an order is asked. The judges do not agree about the issue of the writ, or the granting of the order. Upon their action the lives of these men depend. Shall there be a failure of justice? The question presented to the Circuit Court was not merely a formal one; whether an initial writ should issue. It is the practice, upon petitions for *habeas corpus*, to consider whether, upon the facts presented, the prisoners, if brought up, would be remanded. The presentation of the petition brings before the court, at the outset, the merits, to a certain extent, of the whole case. That was the course pursued in *Passmore Williamson's* case;* in *Rex* v. *Ennis*;† in the case of the *Three Spanish Sailors*;‡ in *Hobhouse's* case;§ in *Husted's* case;‖ and in *Ferguson's* case;¶ and in this court, in *Watkins's* case,** where the disposition of the case turned upon the point whether, if the writ were issued, the petitioner would be remanded upon the facts as they appeared.

There may, indeed, be cases where only one party can appear, that are at first and must always remain *ex parte*.

* 26 Pennsylvania State, 9.
† 1 Burrow, 765.
‡ 2 W. Blackstone, 1324.
§ 3 Barnewall and Alderson, 420.
‖ 1 Johnson's Cases, 136.
¶ 9 Id. 239.
** 3 Peters, 202.

Here, however, there were, in fact, two parties. Who were they? The record tells us:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gordon, Esq., of counsel for said Milligan, and files here in open court the petition of said Milligan to be discharged. At the same time comes, also, John Hanna, Esq., the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given," &c.

The next day the case came on again, and the certificate was made.

In point of fact, therefore, this cause had all the solemnity which two parties could give it. The government came into court, and submitted the case in Indiana, for the very purpose of having it brought to Washington.

A still additional objection made to the jurisdiction of this court is, that no questions can be certified except those which arise upon the trial.

The answer is, first, that there has been a trial, in its proper sense, as applicable to this case. The facts are all before the court. A return could not vary them. The case has been heard upon the petition, as if that contained all that need be known, or could be known. The practice is not peculiar to *habeas corpus;* it is the same on application for *mandamus*, or for attachments in cases of contempt; in both which cases the court sometimes hears the whole matter on the first motion, and sometimes postpones it till formal pleadings are put in. In either case, the result is the same.

But, secondly, if it were not so, is it correct to say that a certificate can only be made upon a trial? To sustain this position, the counsel refers to the case of *Davis* v. *Burden.** But that case expressly reserves the question.

It is admitted that the question of jurisdiction is a question that may be certified. The qualification insisted upon is,

* 10 Peters, 289.

that no question can be certified unless it arose upon the trial of the cause, or be a question of jurisdiction. This is a question of jurisdiction. It is a question of the jurisdiction of the Circuit Court to grant the writ of *habeas corpus*, and to liberate these men; and that question brings up all the other questions in the cause.

Yet another objection to the jurisdiction of this court is, that the case must be one in which the answer to the questions when given shall be final; that is to say, the questions come here to be finally decided. What does that mean? Does it mean that the same thing can never be debated again? Certainly not. It means that the decision shall be final for the two judges who certified the difference of opinion, so that when the answer goes down from this court they shall act according to its order, as if they had originally decided in the same way.

Another objection to the jurisdiction of this court is, that the *whole* case is certified. The answer is, that no question is certified except those which actually arose before the court at the time, and without considering which it could not move at all. That is the first answer. The second is, that if too much is certified, the court will divide the questions, and answer only those which it finds to be properly certified, as it did in the *Silliman* v. *Hudson River Bridge Company** case.

The last objection to the jurisdiction of this court is, that the case is ended; because, it is to be presumed that these unfortunate men have been hanged. Is it to be presumed that any executive officer of this country, though he arrogate to himself this awful power of military government, would venture to put to death three men, who claim that they are unjustly convicted, and whose case is considered of such gravity by the Circuit Court of the United States that it certifies the question to the Supreme Court?

The suggestion is disrespectful to the executive, and I am glad to believe that it has no foundation in fact.

* 1 Black, 583.

All the objections, then, are answered. There is nothing, then, in the way of proceeding to

II. THE MERITS AND MAIN QUESTION.

The argument upon the questions naturally divides itself into two parts:

First. Was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted and sentenced?

Second. If it was not a competent tribunal, could the petitioners be released by the Circuit Court of the United States for the District of Indiana, upon writs of *habeas corpus* or otherwise?

The discussion of the competency of the military commission is first in order, because, if the petitioners were lawfully tried and convicted, it is useless to inquire how they could be released from an unlawful imprisonment.

If, on the other hand, the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of inquiry, and involve the following considerations:

1. Does the power of suspending the privilege of the writ of *habeas corpus* appertain to all the great departments of government concurrently, or to some only, and which of them?

2. If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by act of Congress?

3. If the power appertains to Congress alone, or if Congress may control its exercise by the other departments, has that body so exercised its functions as to leave to the petitioners the privilege of the writ, or to entitle them to their discharge?

In considering the first question, that of the competency of the military tribunal for the trial of the petitioners upon those charges, let me first call attention to the *dates* of the transactions.

Let it be observed next, that for the same offences as those

set forth in the charges and specifications, the petitioners could have been tried and punished by the ordinary civil tribunals.

Let it also be remembered, that Indiana, at the time of this trial, was a peaceful State; the courts were all open; their processes had not been interrupted; the laws had their full sway.

Then let it be remembered that the petitioners were simple citizens, not belonging to the army or navy; not in any official position; not connected in any manner with the public service.

The evidence against them is not to be found in this record, and it is immaterial. Their guilt or their innocence does not affect the question of the competency of the tribunal by which they were judged.

Bearing in mind, therefore, the nature of the charges, and the time of the trial and sentence; bearing in mind, also, the presence and undisputed authority of the civil tribunals and the civil condition of the petitioners, we ask by what authority they were withdrawn from their natural judges?

What is a military commission? Originally, it appears to have been an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose. General Scott resorted to it in Mexico for his assistance in governing conquered places. The first mention of it in an act of Congress appears to have been in the act of July 22, 1861, where the general commanding a separate department, or a detached army, was authorized to appoint a military board, or *commission*, of not less than three, or more than five officers, to examine the qualifications and conduct of commissioned officers of volunteers.

Subsequently, military commissions are mentioned in four acts of Congress, but in none of them is any provision made for their organization, regulation, or jurisdiction, further than that it is declared that in time of war or rebellion, spies may be tried by a general court-martial or military commission; and that "persons who are in the military service of

the United States, and subject to the Articles of War," may also be tried by the same, for murder, and certain other infamous crimes.

These acts do not confer upon military commissions jurisdiction over any persons other than those in the military service and spies.

There being, then, no act of Congress for the establishment of the commission, it depended entirely upon the executive will for its creation and support. This brings up the true question now before the court: Has the President, in time of war, upon his own mere will and judgment, the power to bring before his military officers any person in the land, and subject him to trial and punishment, even to death? The proposition is stated in this form, because it really amounts to this.

If the President has this awful power, whence does he derive it? He can exercise no authority whatever but that which the Constitution of the country gives him. Our system knows no authority beyond or above the law. We may, therefore, dismiss from our minds every thought of the President's having any prerogative, as representative of the people, or as interpreter of the popular will. He is elected by the people to perform those functions, and those only, which the Constitution of his country, and the laws made pursuant to that Constitution, confer.

The plan of argument which I propose is, first to examine the text of the Constitution. That instrument, framed with the greatest deliberation, after thirteen years' experience of war and peace, should be accepted as the authentic and final expression of the public judgment, regarding that form and scope of government, and those guarantees of private rights, which legal science, political philosophy, and the experience of previous times had taught as the safest and most perfect. All attempts to explain it away, or to evade or pervert it, should be discountenanced and resisted. Beyond the line of such an argument, everything else ought, in strictness, to be superfluous. But, I shall endeavor to show, further, that the theory of our government, for which I am contending,

is the only one compatible with civil liberty; and, by what I may call an historical argument, that this theory is as old as the nation, and that even in the constitutional monarchies of England and France that notion of executive power, which would uphold military commissions, like the one against which I am speaking, has never been admitted.

What are the powers and attributes of the presidential office? They are written in the second article of the Constitution, and, so far as they relate to the present question, they are these: He is vested with the "executive power;" he is "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" he is to "take care that the laws be faithfully executed;" and he takes this oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." The "executive power" mentioned in the Constitution is the executive power of the United States. The President is not clothed with the executive power of the States. He is not clothed with any executive power, except as he is specifically directed by some other part of the Constitution, or by an act of Congress.

He is to "take care that the laws be faithfully executed." He is to execute the laws by the means and in the manner which the laws themselves prescribe.

The oath of office cannot be considered as a grant of power. Its effect is merely to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience against any attempt to usurp power or overthrow the Constitution.

There remains, then, but a single clause to discuss, and that is the one which makes him commander-in-chief of the army and navy of the United States, and of the militia of the States when called into the federal service. The question, therefore, is narrowed down to this: Does the authority to command an army carry with it authority to arrest and

try by court-martial civilians—by which I mean persons not in the martial forces; not impressed by law with a martial character? The question is easily answered. To command an army, whether in camp, or on the march, or in battle, requires the control of no other persons than the officers, soldiers, and camp followers. It can hardly be contended that, if Congress neglects to find subsistence, the commander-in-chief may lawfully take it from our own citizens. It cannot be supposed that, if Congress fails to provide the means of recruiting, the commander-in-chief may lawfully force the citizens into the ranks. What is called the war power of the President, if indeed there be any such thing, is nothing more than the power of commanding the armies and fleets which Congress causes to be raised. To command them is to direct their operations.

Much confusion of ideas has been produced by mistaking executive power for kingly power. Because in monarchial countries the kingly office includes the executive, it seems to have been sometimes inferred that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, even for four years.

So much for that article of the Constitution, the second, which creates and regulates the executive power. If we turn to the other portions of the original instrument (I do not now speak of the amendments) the conclusion already drawn from the second article will be confirmed, if there be room for confirmation. Thus, in the first article, Congress is authorized "to declare war, and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of the land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" "to provide for organizing, arming, and disciplining the militia, and governing such part of them as may be in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline pre-

scribed by Congress;" "to exercise exclusive legislation in all cases whatsoever over . . . . all places purchased . . . . for the erection of forts, magazines, arsenals, dock-yards;" "to make all laws which shall be necessary and proper for carrying into execution the . . . . powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

These various provisions of the first article would show, if there were any doubt upon the construction of the second, that the powers of the President do not include the power to raise or support an army, or to provide or maintain a navy, or to call forth the militia, to repel an invasion, or to suppress an insurrection, or execute the laws, or even to govern such portions of the militia as are called into the service of the United States, or to make law for any of the forts, magazines, arsenals, or dock-yards. If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of Indiana to repel an invasion of that State, or, when called, govern them, it is absurd to say that he could nevertheless, under the same circumstances, govern the whole State and every person in it by martial rule.

The jealousy of the executive power prevailed with our forefathers. They carried it so far that, in providing for the protection of a State against domestic violence, they required, as a condition, that the legislature of the State should ask for it if possible to be convened.*

I submit, therefore, that upon the text of the original Constitution, as it stood when it was ratified, there is no color for the assumption that the President, without act of Congress, could create military commissions for the trial of persons not military, for any cause or under any circumstances whatever.

But, as we well know, the Constitution, in the process of ratification, had to undergo a severe ordeal. To quiet apprehensions, as well as to guard against possible dangers, ten amendments were proposed by the first Congress sitting at

* Const., Art. 4, § 4.

New York, in 1789, and were duly ratified by the States. The third and fifth are as follows:

"ART. III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

"ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

If there could have been any doubt whatever, whether military commissions or courts-martial for the trial of persons not "in the land or naval forces, or the militia" in actual service, could ever be established by the President, or even by Congress, these amendments would have removed the doubt. They were made for a state of war as well as a state of peace; they were aimed at the military authority, as well as the civil; and they were as explicit as our mother tongue could make them.

The phrase "in time of war or public danger" qualifies the member of the sentence relating to the militia; as otherwise, there could be no court-martial in the army or navy during peace.

This is the argument upon the text of the Constitution.

I will now show that military tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government. This is a legitimate argument even upon a question of interpretation; for if there be, as I think there is not, room left for interpretation of what seem to be the plain provisions of the Constitution, then the principles of liberty, as they were understood by the fathers of the Republic; the maxims of free government, as they were

accepted by the men who framed and those who adopted the Constitution; and those occurrences in the history of older states, which they had profoundly studied, may be called in to show us what they must have meant by the words they used.

The source and origin of the power to establish military commissions, if it exist at all, is in the assumed power to declare what is called martial law. I say what is called martial law, for strictly there is no such thing as martial law; it is martial rule; that is to say, the will of the commanding officer, and nothing more, nothing less.

On this subject, as on many others, the incorrect use of a word has led to great confusion of ideas and to great abuses. People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial. A moment's reflection will show that this is an error. Law is a rule of property and of conduct, prescribed by the sovereign power of the state. The Civil Code of Louisiana defines it as "a solemn expression of legislative will." Blackstone calls it "a rule of civil conduct prescribed by the supreme power in the state;" . . . "not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Demosthenes thus explains it: "The design and object of laws is to ascertain what is just, honorable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all."

There is a system of regulations known as the Rules and Articles of War, prescribed by Congress for the government of the army and navy, under that clause of the Constitution which empowers Congress "to make rules for the government and regulation of the land and naval forces." This is generally known as military law.*

* See Mills *v.* Martin, 19 Johnson, 70; Martin *v.* Mott, 12 Wheaton, 19 1 Kent's Com.. 370, note.

There are also certain usages, sanctioned by time, for the conduct towards each other of nations engaged in war, known as the usages of war, or the *jus belli*, accepted as part of the law of nations, and extended from national to all belligerents. These respect, however, only the conduct of belligerents towards each other, and have no application to the present case.

What is ordinarily called martial law is no law at all. Wellington, in one of his despatches from Portugal, in 1810, in his speech on the Ceylon affair, so describes it.

Let us call the thing by its right name; it is not martial law, but martial rule. And when we speak of it, let us speak of it as abolishing all law, and substituting the will of the military commander, and we shall give a true idea of the thing, and be able to reason about it with a clear sense of what we are doing.

Another expression, much used in relation to the same subject, has led also to misapprehension; that is, the declaration, or proclamation, of martial rule; as if a formal promulgation made any difference. It makes no difference whatever.

It may be asked, may a general never in any case use force but to compel submission in the opposite army and obedience in his own? I answer, yes; there are cases in which he may. There is a maxim of our law which gives the reason and the extent of the power: "*Necessitas quod cogit defendit.*" This is a maxim not peculiar in its application to military men; it applies to all men under certain circumstances.

Private persons may lawfully tear down a house, if necessary, to prevent the spread of a fire. Indeed, the maxim is not confined in its application to the calamities of war and conflagration. A mutiny, breaking out in a garrison, may make necessary for its suppression, and therefore justify, acts which would otherwise be unjustifiable. In all these cases, however, the person acting under the pressure of necessity, real or supposed, acts at his peril. The correctness of his conclusion must be judged by courts and juries,

whenever the acts and the alleged necessity are drawn in question.

The creation of a commission or board to decide or advise upon the subject gives no increased sanction to the act. As necessity compels, so that necessity alone can justify it. The decision or advice of any number of persons, whether designated as a military commission, or board of officers, or council of war, or as a committee, proves nothing but greater deliberation; it does not make legal what would otherwise be illegal.

Let us proceed now to the historical part of the argument.

First. As to our own country. The nation began its life in 1776, with a protest against military usurpation. It was one of the grievances set forth in the Declaration of Independence, that the king of Great Britain had "affected to render the military independent of and superior to the civil power." The attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to enforce martial rule, excited the greatest indignation. Our fathers never forgot their principles; and though the war by which they maintained their independence was a revolutionary one, though their lives depended on their success in arms, they always asserted and enforced the subordination of the military to the civil arm.

The first constitutions of the States were framed with the most jealous care. By the constitution of New Hampshire, it was declared that "in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by the constitution of Massachusetts of 1780, that "no person can in any case be subjected to law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature;" by the constitution of Pennsylvania of 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by the constitution of Delaware of 1776, "that in all cases, and at all times, the

military ought to be under strict subordination to, and governed by the civil power;" by that of Maryland of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and control of the civil power;" by that of North Carolina, 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by that of South Carolina, 1778, "that the military be subordinate to the civil power of the State;" and by that of Georgia, 1777, that "the principles of the *habeas corpus* act shall be part of this constitution; and freedom of the press, and trial by jury, to remain inviolate forever."

Second. As to England, the constitutional history of that country is the history of a struggle on the part of the crown to obtain or to exercise a similar power to the one here attempted to be set up. The power was claimed by the king as much in virtue of his royal prerogative and of his feudal relations to his people as lord paramount, as of his title as commander of the forces. But it is enough to say that, from the day when the answer of the sovereign was given in assent to the petition of right, courts-martial for the trial of civilians, upon the authority of the crown alone, have always been held illegal.

Third. As to France—as France was when she had a constitutional government. I have shown what the king of England cannot do. Let me show what the constitutional king of France could not do.

On the continent of Europe, the legal formula for putting a place under martial rule is to declare it in a state of siege; as if there were in the minds of lawyers everywhere no justification for such a measure but the exigencies of impending battle. The charter established for the government of France, on the final expulsion of the first Napoleon, contained these provisions:

"ART. The king is the supreme chief of the state; he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances

necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution."

"ART. The king alone sanctions and promulgates the laws."

"ART. No person can be withdrawn from his natural judges."

"ART. Therefore there cannot be erected commissions or extraordinary tribunals."

When Charles the Tenth was driven from the kingdom the last article was amended, by adding the words, "under what name or denomination soever;" Dupin giving the reason thus:

"In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever,' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Now, it so happened, that two years later the strength of these constitutional provisions was to be tested. A formidable insurrection broke out in France. The king issued an order, dated June 6, 1832, placing Paris in a state of siege, founded "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assassinations of national guards, troops of the line, municipal guards and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." On the 18th of June, one Geoffroy, designer, of Paris, was, by a decision of the second military commission of Paris, declared "guilty of an attack, with intent to subvert the government and to excite civil war," and condemned to death.

He appealed to the Court of Cassation. Odilon Barrot, a leader of the French bar, undertook his case, and after a discussion memorable forever for the spirit and learning of the advocates, and the dignity and independence of the judges, the court gave judgment, thus:

"Whereas Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction, and the provisions of articles 53 and 54 of the charter and those of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," &c.

Thereupon the prisoner was discharged from military custody.

This closes my argument against the competency of the military commission.

It remains to consider what remedy, if any, there was against this unlawful judgment and its threatened execution.

The great remedy provided by our legal and political system for unlawful restraint, whether upon pretended judgments, decrees, sentences, warrants, orders, or otherwise, is the writ of *habeas corpus*.

The authority to suspend the privilege of the *habeas corpus* is derived, it is said, from two sources: first, from the martial power; and, second, from the second subdivision of the ninth section of the first article of the Federal Constitution.

As to the martial power, I have already discussed it so fully that I need not discuss it again.

How, then, stands the question upon the text of the Constitution? This is the language: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The clause in question certainly either grants the power, or implies that it is already granted; and in either case it

belongs to the legislative, executive, and judicial departments concurrently, or to some excluding the rest.

There have been four theories: one that it belongs to all the departments; a second, that it belongs to the legislature; a third, that it belongs to the executive; and the fourth, that it belongs to the judiciary.

Is the clause a *grant* or a *limitation* of power? Looking only at the form of expression, it should be regarded as a limitation.

As a grant of power, it would be superfluous, for it is clearly an incident of others which are granted.

Then, regarding the clause according to its place in the Constitution, it should be deemed a *limitation;* for it is placed with six other subdivisions in the same section, every one of which is a limitation.

If the sentence respecting the *habeas corpus* be, as I contend, a limitation, and not a grant of power, we must look into other parts of the Constitution to find the grant; and if we find none making it to the President, it follows that the power is in the legislative or the judicial department. That it lies with the judiciary will hardly be contended. That department has no other function than to judge. It cannot refuse or delay justice.

But if the clause in question were deemed a *grant* of power, the question would then be, to whom is the grant made? The following considerations would show that it was made to Congress:

First. The debates in the convention which framed the Constitution seem, at least, to suppose that the power was given to Congress, and to Congress alone.

Second. The debates in the various State conventions which ratified the Constitution do most certainly proceed upon that supposition.

Third. The place in which the provision is left indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the second article, which treats of the executive department. It is not in the third, which treats of the judicial department. It is in the first

article, which treats of the legislative department. There is not another subdivision in all the seven subdivisions of the ninth section which does not relate to Congress in part, at least, and most of them relate to Congress alone.

Fourth. The constitutional law of the mother country had been long settled, that the power of suspending the privilege of the writ, or, as it was sometimes called, suspending the writ itself, belonged only to Parliament. With this principle firmly seated in the minds of lawyers, it seems incredible that so vast a change as conferring the grant upon the executive should have been so loosely and carelessly expressed.

Fifth. The prevailing sentiment of the time when the Constitution was framed, was a dislike and dread of executive authority. It is hardly to be believed, that so vast and dangerous a power would have been conferred upon the President, without providing some safeguards against its abuse.

Sixth. Every judicial opinion, and every commentary on the Constitution, up to the period of the Rebellion, treated the power as belonging to Congress, and to that department only.

And so we submit to the court, that the answers to the three questions, certified by the court below, should be, to the first, that, on the facts stated in the petition and exhibits, a writ of *habeas corpus* ought to be issued according to the prayer of the petition; to the second, that, on the same facts, the petitioner ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioner, in manner and form as in the petition and exhibits is stated.

Mr. Garfield, on the same side.

Had the military commission jurisdiction legally to try and sentence the petitioner? This is the main question.

The Constitution establishes the Supreme Court, and empowers Congress—

"To constitute tribunals inferior to the Supreme Court."

"To make rules for the government of the land and naval

forces, and to provide for governing such part of the militia as may be employed in the service of the United States."

For all cases not arising in the land or naval forces, Congress has provided in the Judiciary Act of September 24th, 1789, and the acts amendatory thereof. For all cases arising in the naval forces, it has fully provided in the act of March 2d, 1799, "for the government of the navy of the United States," and similar subsequent acts.

We are apt to regard the military department of the government as an organized despotism, in which all personal rights are merged in the will of the commander-in-chief. But that department has definitely marked boundaries, and all its members are not only controlled, but also sacredly protected by definitely prescribed law. The first law of the Revolutionary Congress, passed September 20th, 1776, touching the organization of the army, provided that no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against him; that he should be tried, at as early a day as possible, by a regular military court, whose proceedings were regulated by law, and that no sentence should be carried into execution till the full record of the trial had been submitted to Congress or to the commander-in-chief, and his or their direction be signified thereon. From year to year Congress has added new safeguards to protect the rights of its soldiers, and the rules and articles of war are as really a part of the laws of the land as the Judiciary Act or the act establishing the treasury department. The main boundary line between the civil and military jurisdictions is the muster into service. In *Mills* v. *Martin*,* a militiaman, called out by the Governor of the State of New York, and ordered by him to enter the service of the United States, on a requisition of the President for troops, refused to obey the summons, and was tried by a Federal court-martial for disobedience of orders. The Supreme Court of the State of New York decided, that until he had gone to the place of

* 19 Johnson, 7.

general rendezvous, and had been regularly enrolled, and mustered into the national militia, he was not amenable to the action of a court-martial composed of officers of the United States.*

By the sixtieth article of war, the military jurisdiction is so extended as to cover those persons not mustered into the service, but necessarily connected with the army. It provides that:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and articles of war."

That the question of jurisdiction might not be doubtful, it was thought necessary to provide by law of Congress that spies should be subject to trial by court-martial. As the law stood for eighty-five years, spies were described as "persons not citizens of, or owing allegiance to, the United States, who shall be found lurking," &c. Not until after the Great Rebellion began, was this law so amended as to allow the punishment by court-martial of *citizens of the United States* who should be found lurking about the lines of our army to betray it to the enemy.

It is evident, therefore, that by no loose and general construction of the law can citizens be held amenable to military tribunals, whose jurisdiction extends only to persons mustered into the military service, and such other classes of persons as are, by express provisions of law, made subject to the rules and articles of war. But even within their proper jurisdiction, military courts are, in many important particulars, subordinate to the civil courts. This is acknowledged by the leading authorities on the subject,† and also by precedents, to some of which I refer:

1. A Lieutenant Frye, serving in the West Indies, in 1743, on a British man-of-war, was ordered by his superior

* And see Houston *v.* Moore, 5 Wheaton, 1.

† O'Brien's Military Law, pp. 222–225.

officer to assist in arresting another officer. The lieutenant demanded, what he had, according to the customs of the naval service, a right to demand, a written order before he would obey the command. For this he was put under arrest, tried by a naval court-martial, and sentenced to fifteen years' imprisonment. In 1746 he brought an action before a civil court against the president of the court-martial, and damages of £1000 were awarded him for his illegal detention and sentence; and the judge informed him that he might also bring his action against any member of the court-martial. Rear Admiral Mayne and Captain Rentone, who were members of the court that tried him, were at the time, when damages were awarded to Lieutenant Frye, sitting on a naval court-martial. The lieutenant proceeded against them, and they were arrested by a writ from the Common Pleas. The order of arrest was served upon them one afternoon, just as the court-martial adjourned. Its members, fifteen in number, immediately reassembled and passed resolutions declaring it a great insult to the dignity of the naval service that any person, however high in civil authority, should order the arrest of a naval officer for any of his official acts. Lord Chief Justice Willes immediately ordered the arrest of all the members of the court who signed the resolutions, and they were arrested. They appealed to the king, who was very indignant at the arrest. The judge, however, persevered in his determination to maintain the supremacy of civil law, and after two months' examination and investigation of the cause, all the members of the court-martial signed an humble and submissive letter of apology, begging leave to withdraw their resolutions, in order to put an end to further proceedings. When the Lord Chief Justice had heard the letter read in open court, he directed that it be recorded in the Remembrance Office, "to the end," as he said, "that the present and future ages may know that whosoever set themselves up in opposition to the law, or think themselves above the law, will in the end find themselves mistaken."*

* McArthur on Courts-Martial, vol. i, pp. 268–271. See also London Gazette for 1745–6, Library of Congress.

2. In *Wilson* v. *McKenzie** it was proved that a mutiny of very threatening aspect had broken out; and that the lives of the captain and his officers were threatened by the mutineers. Among the persons arrested was the plaintiff, Wilson, an enlisted sailor, who being supposed to be in the conspiracy, was knocked down by the captain, ironed, and held in confinement for a number of days. When the cruise was ended, Wilson brought suit against the captain for illegal arrest and imprisonment. The cause was tried before the Supreme Court of New York; Chief Justice Nelson delivered the judgment of the court, giving judgment in favor of Wilson.

A clear and complete statement of the relation between civil and military courts may be found in *Dynes* v. *Hoover*,† in this court:

> "If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress."
>
> "The courts of common law will examine whether courts-martial have exceeded the jurisdiction given them, though it is said, 'not, however, after the sentence has been ratified and carried into execution.'"

It is clear, then, that the Supreme Court of the United States may inquire into the question of jurisdiction of a military court; may take cognizance of extraordinary punishment inflicted by such a court not warranted by law; and may issue writs of prohibition or give such other redress as the case may require. It is also clear that the Constitution and laws of the United States have carefully provided for the protection of individual liberty and the right of accused persons to a speedy trial before a tribunal established and regulated by law.

* 7 Hill, 95.

† 20 Howard, 82.

To maintain the legality of the sentence here, opposite counsel are compelled not only to ignore the Constitution, but to declare it suspended—its voice lost in war—to hold that from the 5th of October, 1864, to the 9th of May, 1865, martial law alone existed in Indiana; that it silenced not only the civil courts, but all the laws of the land, and even the Constitution itself; and that during this silence the executor of martial law could lay his hand upon every citizen; could not only suspend the writ of *habeas corpus*, but could create a court which should have the exclusive jurisdiction over the citizen to try him, sentence him, and put him to death.

Sir Matthew Hale, in his History of the Common Law,* says:

"Touching the business of martial law, these things are to be observed, viz.:

"First. That in truth and reality it is not a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance: *quod enim necessitas cogit defendit.*

"Secondly. This indulged law was only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, for others who had not listed under the army had no color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

"Thirdly. That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is declared in the Petition of Right (3 Car. I), whereby such commissions and martial law were repealed and declared to be contrary to law."

* Runnington's edition, London, 1820, pp. 42-3; and see 1 Blackstone's Com. 413-14.

In order to trace the history and exhibit the character of martial law, reference may be made to several leading precedents in English and American history.

1. *The Earl of Lancaster.* In the year 1322, the Earl of Lancaster and the Earl of Hereford rebelled against the authority of Edward II. They collected an army so large that Edward was compelled to raise forty thousand men to withstand them. The rebellious earls posted their forces on the Trent, and the armies of the king confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain and Lancaster taken in arms at the head of his army, and amid the noise of battle was tried by a court-martial, sentenced to death, and executed. When Edward III came into power, eight years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder, and declaring: "1. That in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer. 2. That regularly when the king's courts are open it is a time of peace in judgment of law; and 3. That no man ought to be sentenced to death, by the record of the king, without his legal trial *per pares.*"*

So carefully was the line drawn between civil and martial law five hundred years ago.

2. *Sir Thomas Darnell.* He was arrested in 1625 by order of the king, for refusing to pay a tax which he regarded as illegal. He was arrested and imprisoned. A writ of *habeas corpus* was prayed for, but answer was returned by the court that he had been arrested by special order of the king, and that was held to be a sufficient answer to the petition. Then the great cause came up to be tried in Parliament, whether the order of the king was sufficient to override the writ of *habeas corpus*, and after a long and stormy debate, in which the ablest minds in England were engaged, the Petition of Right, of 1628, received the sanction of the king. In that

* Hale's Pleas of the Crown, pp. 499, 500; Hume, vol. 1, p. 159.

statute it was decreed that the king should never again suspend the writ of *habeas corpus;* that he should never again try a subject by military commission; and since that day no king of England has presumed to usurp that high prerogative, which belongs to Parliament alone.

3. *The Bill of Rights of* 1688. The house of Stuart had been expelled and William had succeeded to the British throne. Great disturbances had arisen in the realm in consequence of the change of dynasty. The king's person was unsafe in London. He informed the Lords and Commons of the great dangers that threatened the kingdom, and reminded them that he had no right to declare martial law, to suspend the writ of *habeas corpus*, or to seize and imprison his subjects on suspicion of treason or intended outbreak against the peace of the realm. He laid the case before them and asked their advice and assistance. In answer, Parliament passed the celebrated *habeas corpus* act. Since that day, no king of England has dared to suspend the writ. It is only done by Parliament.

4. *Governor Wall.* In the year 1782, Joseph Wall, governor of the British colony at Goree, in Africa, had under his command about five hundred British soldiers. Suspecting a mutiny about to break out in the garrison, he assembled them on the parade-ground, held a hasty consultation with his officers, and immediately ordered Benjamin Armstrong, a private, and supposed ringleader, to be seized, stripped, tied to the wheel of an artillery-carriage, and with a rope one inch in diameter, to receive eight hundred lashes. The order was carried into execution, and Armstrong died of his injuries. Twenty years afterward Governor Wall was brought before the most august civil tribunal of England to answer for the murder of Armstrong. Sir Archibald McDonald, Lord Chief Baron of the Court of Exchequer, Sir Soulden Lawrence, of the King's Bench, Sir Giles Rooke, of the Common Pleas, constituted the court. Wall's counsel claimed that he had the power of life and death in his hands in time of mutiny; that the necessity of the case authorized him to suspend the usual forms of law; that as gov-

ernor and military commander-in-chief of the forces at Goree, he was the sole judge of the necessities of the case. After a patient hearing before that high court, he was found guilty of murder, was sentenced and executed.*

I now ask attention to precedents in our own colonial history.

5. On the 12th of June, 1775, General Gage, the commander of the British forces, declared martial law in Boston. The battles of Concord and Lexington had been fought two months before. The colonial army was besieging the city and its British garrison. It was but five days before the battle of Bunker Hill. Parliament had, in the previous February, declared the colonies in a state of rebellion. Yet, by the common consent of English jurists, General Gage violated the laws of England, and laid himself liable to its penalty, when he declared martial law. This position is sustained in the opinion of Woodbury, J., in *Luther* v. *Borden*.†

6. On the 7th of November, 1775, Lord Dunmore declared martial law throughout the commonwealth of Virginia. This was long after the battle of Bunker Hill, and when war was flaming throughout the colonies; yet he was denounced by the Virginia Assembly for having assumed a power which the king himself dared not exercise, as it "annuls the law of the land, and introduces the most execrable of all systems, martial law." Woodbury, J.,‡ declares the act of Lord Dunmore unwarranted by British law.

7. The practice of our Revolutionary fathers on this subject is instructive. Their conduct throughout the great struggle for independence was equally marked by respect for civil law, and jealousy of martial law.§ Though Washington was clothed with almost dictatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, except by express authority of Congress or the States. In his file of general orders, covering a period of

* 28 State Trials, p. 51; see also Hough's Military Law, pp. 537–540.

† 7 Howard, p. 65. See also Annual Register for 1775, p. 133.

‡ In his dissenting opinion.

§ See argument of Mr. Field. *Supra*, p. 37–8.—REP.

five years, there are but four instances in which civilians appear to have been tried by a military court, and all these trials were expressly authorized by resolutions of Congress. In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed at Chesapeake Bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause. Congress resolved "That the executive authorities of Pennsylvania and Maryland be requested to cause all persons within their respective States, notoriously disaffected, to be forthwith apprehended, disarmed, and secured till such time as the respective States think they can be released without injury to the common cause." The governor authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the writ of *habeas corpus* which a civil court issued for the release of the prisoners. Very soon afterwards the Pennsylvania legislature passed a law indemnifying the governor and the military authorities, and allowing a similar course to be pursued thereafter on recommendation of Congress or the commanding officer of the army. But this law gave authority only to arrest and hold—not to try; and the act was to remain in force only till the end of the next session of the General Assembly. So careful were our fathers to recognize the supremacy of civil law, and to resist all pretensions of the authority of martial law!

8. *Shay's Rebellion in* 1787. That rebellion, which was before the Constitution was adopted, was mentioned by Hamilton in the Federalist as a proof that we needed a strong central government to preserve our liberties. During all that disturbance there was no declaration of martial law, and the *habeas corpus* was only suspended for a limited time and with very careful restrictions. Governor Bowdoin's order to General Lincoln, on the 19th of January, 1787, was in these words: "Consider yourself in all your military offensive operations constantly as under the direction of the civil

officer, save where any armed force shall appear to oppose you marching to execute these orders."

9. I refer too to a case under the Constitution, the Rebellion of 1793, in Western Pennsylvania. President Washington did not march with his troops until the judge of the United States District Court had certified that the marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the marshal of the district to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject that he issued orders declaring that "the army should not consider themselves as judges or executioners of the laws, but only as employed to support the proper authorities in the execution of the laws."

10. I call the attention of the court also to the case of General Jackson, in 1815, at New Orleans. In 1815, at New Orleans, General Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State legislature insisted on it as the only way to save the citizens and property of the place from the unspeakable outrages committed at Badajos and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in *Johnson* v. *Duncan*,* decided that everything done during the

* See 3 Martin's Louisiana Rep., O. S., 520.

siege in pursuance of martial rule, but in conflict with the law of the land, was void and of none effect, without reference to the circumstances which made it necessary. In 1842, a bill was introduced into Congress to reimburse General Jackson for the fine. The debate was able and thorough. Mr. Buchanan, then a member of Congress, spoke in its favor, and no one will doubt his willingness to put the conduct of Jackson on the most favorable ground possible.* Yet he did not attempt to justify, but only sought to palliate and excuse the conduct of Jackson. All the leading members took the same ground.

11. I may fortify my argument by the authority of two great British jurists, and call attention to the trial of the Rev. John Smith, missionary at Demerara, in British Guiana. In the year 1823, a rebellion broke out in Demerara, extending over some fifty plantations. The governor of the district immediately declared martial law. A number of the insurgents were killed, and the rebellion was crushed. It was alleged that the Rev. John Smith, a missionary, sent out by the London Missionary Society, had been an aider and abettor of the rebellion. A court-martial was appointed, and in order to give it the semblance of civil law, the governor-general appointed the chief justice of the district as a staff officer, and then detailed him as president of the court to try the accused. All the other members of the court were military men, and he was made a military officer for the special occasion. Missionary Smith was tried, found guilty, and sentenced to be hung. The proceedings came to the notice of Parliament, and were made the subject of inquiry and debate. Smith died in prison before the day of execution; but the trial gave rise to one of the ablest debates of the century, in which the principles involved in the cause now before this court were fully discussed. Lord Brougham and Sir James Mackintosh were among the speakers. In the course of his speech Lord Brougham said:

"No such thing as martial law is recognized in Great Britain,

* Benton's Abridgment of Debates, vol. 14, page 628.

and courts founded on proclamations of martial law are wholly unknown. Suppose I am ready to admit that, on the pressure of a great necessity, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation may justifiably be issued for excluding the ordinary tribunals, and directing that offences should be tried by a military court, such a proceeding might be justified by necessity, but it could rest on that alone. Created by necessity, necessity must limit its continuance. It would be the worst of all conceivable grievances, it would be a calamity unspeakable, if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded. I know that the proclamation of martial law renders every man liable to be treated as a soldier. But the instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights, with the relations of civil life, to be restored."

Sir James Mackintosh says:*

"The only principle on which the law of England tolerates what is called 'martial law,' is necessity. Its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community."

The next paragraph lays down the chief condition that can justify martial law, and also marks the boundary between martial and civil law:

"While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is usurpation. As soon as

* Mackintosh's Miscellaneous Works, p. 734, London edition, 1851

the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject—if, indeed, the mere statement be not the evidence of its own truth—I appeal to the highest and most venerable authority known to our law."

He proceeds to quote Sir Matthew Hale on Martial Law, and cites the case of the Earl of Lancaster, to which I have already referred, and then declares:

"No other doctrine has ever been maintained in this country since the solemn parliamentary condemnation of the usurpations of Charles I, which he was himself compelled to sanction in the Petition of Right. In none of the revolutions or rebellions which have since occurred has martial law been exercised, however much, in some of them, the necessity might seem to exist. Even in those most deplorable of all commotions which tore Ireland in pieces in the last years of the eighteenth century, in the midst of ferocious revolt and cruel punishment, at the very moment of legalizing these martial jurisdictions in 1799, the very Irish statute, which was passed for that purpose, did homage to the ancient and fundamental principles of the law in the very act of departing from them. The Irish statute (39 George III, chap. 3), after reciting 'that martial law had been successfully exercised to the restoration of peace, so far as to permit the course of the common law partially to take place, but that the rebellion continued to rage in considerable parts of the kingdom, whereby it has become necessary for Parliament to interpose,' goes on to enable the Lord Lieutenant 'to punish rebels by courts-martial.' This statute is the most positive declaration, that where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails in those others, without an extraordinary interposition of the supreme legislative authority itself."

After presenting arguments to show that a declaration of martial law was not necessary, the learned jurist continues:

"For six weeks, then, before the court-martial was assembled, and for twelve weeks before that court pronounced sentence of

death on Mr. Smith, all hostility had ceased, no necessity for their existence can be pretended, and every act which they did was an open and deliberate defiance of the law of England. Where, then, are we to look for any color of law in these proceedings? Do they derive it from the Dutch law? I have diligently examined the Roman law, which is the foundation of that system, and the writings of those most eminent jurists who have contributed so much to the reputation of Holland. I can find in them no trace of any such principle as martial law. Military law, indeed, is clearly defined; and provision is made for the punishment, by military judges, of the purely military offences of soldiers. But to any power of extending military jurisdiction over those who are not soldiers, there is not an allusion."

Many more such precedents as I have already cited might be added to the list; but it is unnecessary. They all teach the same lesson. They enable us to trace, from its far-off source, the progress and development of Anglo-Saxon liberty; its conflicts with irresponsible power; its victories, dearly bought, but always won — victories which have crowned with immortal honors the institutions of England, and left their indelible impress upon the Anglo-Saxon mind. These principles our fathers brought with them to the New World, and guarded with vigilance and devotion. During the late Rebellion, the Republic did not forget them. So completely have they been impressed on the minds of American lawyers, so thoroughly ingrained into the fibre of American character, that notwithstanding the citizens of eleven States went off into rebellion, broke their oaths of allegiance to the Constitution, and levied war against their country, yet with all their crimes upon them, there was still in the minds of those men, during all the struggle, so deep an impression on this great subject, that, even during their rebellion, the courts of the Southern States adjudicated causes, like the one now before you, in favor of the civil law, and against courts-martial established under military authority for the trial of citizens. In Texas, Mississippi, Virginia, and other insurgent States, by the order of the rebel President, the

writ of *habeas corpus* was supended, martial law was declared, and provost marshals were appointed to administer military authority. But when civilians, arrested by military authority, petitioned for release by writ of *habeas corpus*, in every case, save one, the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the executive, or by any other than the supreme legislative authority.

The military commission, under our government, is of recent origin. It was instituted, as has been frequently said, by General Scott, in Mexico, to enable him, in the absence of any civil authority, to punish Mexican and American citizens for offences not provided for in the rules and articles of war. The purpose and character of a military commission may be seen from his celebrated order, No. 20, published at Tampico. It was no tribunal with authority to punish, but merely a committee appointed to examine an offender, and advise the commanding general what punishment to inflict. It is a rude substitute for a court of justice, in the absence of civil law. Even our own military authorities, who have given so much prominence to these commissions, do not claim for them the character of tribunals established by law. In his "Digest of Opinions" for 1866,* the Judge Advocate General says:

"Military commissions have grown out of the necessities of the service, but their powers have not been defined nor their mode of proceeding regulated by any statute law."

Again:

"In a military department the military commission is a substitute for the ordinary State or United States Court, when the latter is closed by the exigencies of war or is without the jurisdiction of the offence committed."

The plea set up by the Attorney-General for this military tribunal is that of the necessity of this case. But there was

* Pages 131, 133.

in fact no necessity. From the beginning of the Rebellion to its close, Congress, by its legislation, kept pace with the necessities of the nation. In sixteen carefully considered laws, the national legislature undertook to provide for every contingency, and arm the executive at every point with the solemn sanction of law. Observe how the case of the petitioner was covered by the provisions of law.

The first *charge* against him was "conspiracy against the government of the United States." In the act approved July 31st, 1861, that crime was defined, and placed within the jurisdiction of the District and Circuit Courts of the United States.

Charge 2. "Affording aid and comfort to the rebels against the authority of the United States." In the act approved July 17th, 1862, this crime is set forth in the very words of the charge, and it is provided that "on conviction before any court of the United States, having jurisdiction thereof, the offender shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not less than six months, nor exceeding five years."

Charge 3. "Inciting insurrection." In Brightly's Digest,* there is compiled from ten separate acts, a chapter of sixty-four sections on insurrection, setting forth in the fullest manner possible, every mode by which citizens may aid in insurrection, and providing for their trial and punishment by the regularly ordained courts of the United States.

Charge 4. "Disloyal practices." The meaning of this charge can only be found in the specifications under it, which consists in discouraging enlistments and making preparations to resist a draft designed to increase the army of the United States. These offences are fully defined in the thirty-third section of the act of March 3d, 1863, "for enrolling and calling out the national forces," and in the twelfth section of the act of February 24th, 1864, amendatory thereof. The provost marshal is authorized to arrest such offenders, but he must deliver them over for trial to the civil authori-

* Vol. 2, pp. 191–202.

ties. Their trial and punishment are expressly placed in the jurisdiction of the District and Circuit Courts of the United States.

Charge 5. "Violation of the laws of war;" which, according to the specifications, consisted of an attempt, through a secret organization, to give aid and comfort to rebels. This crime is amply provided for in the laws referred to in relation to the second charge.

But Congress did far more than to provide for a case like this. Throughout the eleven rebellious States, it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts, were all superseded by the laws of war. Even in States not in rebellion, but where treason had a foothold, and hostile collisions were likely to occur, Congress authorized the suspension of the writ of *habeas corpus*, and directed the army to keep the peace. But Congress went further still, and authorized the President, during the Rebellion, whenever, in his judgment, the public safety should require it, to suspend the privilege of the writ in any State or Territory of the United States, and order the arrest of any persons whom he might believe dangerous to the safety of the Republic, and hold them till the civil authorities could examine into the nature of their crimes. But this act of March 3d, 1863, gave no authority to try the person by any military tribunal, and it commanded judges of the Circuit and District Courts of the United States, whenever the grand jury had adjourned its sessions, and found no indictment against such persons, to order their immediate discharge from arrest. All these capacious powers were conferred upon the military department, but there is no law on the statute book, in which the tribunal that tried the petitioner can find the least recognition.

What have our Representatives in Congress thought on this subject?

Near the close of the Thirty-Eighth Congress, when the miscellaneous appropriation bill, which authorized the disbursement of several millions of dollars for the civil expendi-

tures of the government, was under discussion, the House of Representatives, having observed with alarm the growing tendency to break down the barriers of law, and desiring to protect the rights of citizens as well as to preserve the Union, added to the appropriation bill the following section:

"*And be it further enacted*, That no person shall be tried by court-martial or military commission in any State or Territory where the courts of the United States are open, except persons actually mustered or commissioned or appointed in the military or naval service of the United States, or rebel enemies charged with being spies."

It was debated at length in the Senate, and almost every Senator acknowledged its justice, yet, as the nation was then in the very midst of the war, it was feared that the Executive might thereby be crippled, and the section was stricken out. The bill came back to the House; conferences were held upon it, and finally, in the last hour of the session, the House deliberately determined that, important as the bill was to the interests of the country, they preferred it should not become a law if that section were stricken out.

The bill failed; and the record of its failure is an emphatic declaration that the House of Representatives have never consented to the establishment of any tribunals except those authorized by the Constitution of the United States and the laws of Congress.

A point is suggested by the opposing counsel, that if the military tribunal had no jurisdiction, the petitioners may be held as prisoners captured in war, and handed over by the military to the civil authorities, to be tried for their crimes under the acts of Congress and before the courts of the United States. The answer to this is that the petitioners were never enlisted, commissioned, or mustered into the service of the Confederacy; nor had they been within the rebel lines, or within any theatre of active military operations; nor had they been in any way recognized by the rebel authorities as in their service. They could not have been exchanged as prisoners of war; nor, if all the charges against

them were true, could they be brought under the legal definition of spies. The suggestion that they should be handed over to the civil authorities for trial is precisely what they petitioned for, and what, according to the laws of Congress, should have been done.

Mr. Black, on the same side:

Had the commissioners jurisdiction? Were they invested with legal authority to try the petitioner and put him to death for the offence of which he was accused? This is the main question in the controversy, and the main one upon which the court divided. We answer, that they were not; and, therefore, that the whole proceeding from beginning to end was null and void.

On the other hand, it is necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction both of the subject-matter and of the party, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction nor open to inquiry in any court whatever. Of these two opposite views, the court must adopt one or the other. There is no middle ground on which to stand.

The men whose acts we complain of erected themselves, it will be remembered, into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both state and national, were in the full exercise of their functions.

It is unimportant whether the petitioner was intended to be charged with treason or conspiracy, or with some offence of which the law takes no notice. Either or any way, the men who undertook to try him had no jurisdiction of the *subject-matter*.

Nor had they jurisdiction of the *party*. The case, not

having been one of impeachment, or a case arising in the land or naval forces, is either nothing at all or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the government are answerable for the offences which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3d, 1863, which was passed with reference to persons in the exact situation of this man, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject-matter or of the party, you are bound to relieve the petitioner. It is as much the duty of a judge to protect the innocent as it is to punish the guilty.

We submit that a person not in the military or naval service cannot be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offence.

Our proposition ought to be received as true without any argument to support it; because, if that, or something precisely equivalent to it, be not a part of our law, then the country is not a free country. Nevertheless, we take upon ourselves the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the government, so that it is impossible to detach it without destroying the whole political structure under which we live.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore, in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and

well; and their authority is exclusive; they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress *has*, from time to time, ordained and established certain inferior courts; and, in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. At the time the General Government was created, the States and the people bestowed upon that government a certain portion of the judicial power which otherwise would have remained in their own hands, but they gave it on a solemn trust, and coupled the grant of it with this express condition, that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way, not only violates the law of the land, but he tramples upon the most important part of that Constitution which holds these States together.

We all know that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest, and sober men, learned in the laws of their country, and lovers of justice from the habitual

practice of that virtue; independent, because their salaries could not be reduced, and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of executive influence, it was not intended that they should be wholly irresponsible. For any wilful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquillity was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be safely trusted in criminal cases—especially in prosecutions for political offences, where the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit towards actual crime. This kind of malignity vents itself in prosecutions for political offences, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of spies and delators, who make merchandise of their oaths, and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the Revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Nothing has occurred, indeed, in the history of this country to justify the doubt of

judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench, is embodied in this simple fact, that if the executive officers of this government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the venality of such men as Saunders and Wright. It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury.

We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that, than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially: Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century, the most enlightened states of continental Europe have transplanted it into their countries; and no people ever adopted it once and were afterwards willing to part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places where trial by jury did not exist became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside and substitute military trials in its place, by Lord Dunmore, in Virginia, and General Gage, in Massachusetts, accompanied with the excuse which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the Continental Congress thundered it into the ear of the world, as an unendurable outrage, sufficient to justify universal insurrection against the authority of the government which had allowed it to be done.

If the men who fought out our Revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have proved themselves recreant to the principles of that liberty of which they professed to be the special champions. But they were guilty of no such thing. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed, in the Federalist, the universal sentiment of his time, when he said, that the arbitrary power of conviction and punishment for pretended offences, had been the great engine of despotism in all ages and all countries. The existence of such a power is incompatible with freedom.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take away the protec-

tion of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over *Magna Charta*, the *Petition of Right*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the executive, nor party rage in the legislature, could change them without destroying the government itself.

Look at the particulars and see how carefully everything connected with the administration of punitive justice is guarded.

1. No *ex post facto* law shall be passed. No man shall be answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

2. For an act which is criminal he cannot be arrested without a judicial warrant founded on proof of probable cause. He shall not be kidnapped and shut up on the mere report of some base spy who gathers the materials of a false accusation by crawling into his house and listening at the keyhole of his chamber door.

3. He shall not be compelled to testify against himself. He may be examined before he is committed, and tell his own story if he pleases; but the rack shall be put out of sight, and even his conscience shall not be tortured; nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sydney.

4. He shall be entitled to a speedy trial; not kept in prison

for an indefinite time without the opportunity of vindicating his innocence.

5. He shall be informed of the accusation, its nature, and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

6. Even to the indictment he need not answer unless a grand jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

7. Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the State and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

8. His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the court. When they are called into the box he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance, by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

9. The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defence.

10. After the evidence is heard and discussed, unless the jury shall, upon their oaths, *unanimously* agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by the law to his offence. It cannot be doubted for a moment that if a person convicted of an offence not capital were to be hung on the

order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, turn up the sleeves of his gown, and let out the prisoner's blood with his own hand.

12. After all is over, the law continues to spread its guardianship around him. Whether he is acquitted or condemned he shall never again be molested for that offence. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions. But in addition to these, certain special regulations were required for *treason*,—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of minions that skulk about under the pay of an executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction. And lastly, the punishment was so limited that the property of the party could not be confiscated and used to reward the agents of his prosecutors, or strip his family of their subsistence.

If these provisions exist in full force, unchangeable and irrepealable, then we are not hereditary bondsmen. Every citizen may safely pursue his lawful calling in the open day; and at night, if he is conscious of innocence, he may lie down in security, and sleep the sound sleep of a freeman.

They are in force, and they will remain in force. We have not surrendered them, and we never will. The great race to which we belong has not degenerated.

But how am I to prove the existence of these rights? I do not propose to do it by a long chain of legal argumentation, nor by the production of numerous books with the

leaves turned down and the pages marked. If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom, under any kind of prescription, I could prove a good long possession in ourselves and those under whom we claim it. I might begin with Tacitus, and show how the contest arose in the forests of Germany more than two thousand years ago; how the rough virtues and sound common sense of that people established the right of trial by jury, and thus started on a career which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion; and all that they suffered of tyranny and oppression, during the period of their subjugation, resulted from the want of trial by jury. If that had been conceded to them, the reaction would not have taken place which drove back the Danes to their frozen homes in the North. But those ruffian sea-kings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes and the wisest monarch that ever sat on a throne, made the first use of his power, after the Saxons restored it, to re-establish their ancient laws. He had promised them that he would, and he was true to them because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power—a kind of power that everybody covets—the power to punish without regard to law. He was obliged to hang forty-four judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the Parliament of that time. During the subsequent period of Saxon domination, no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole population; all orders

of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bocman and socman, master and thrall, copyholder and villein, would have risen in one mass and burnt the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors; but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended finally in the Revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, because the courts were open, and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the state, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford, as Lord Lieutenant of Ireland, tried the Viscount Stormont before a military commission, and executed him. When impeached, he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the king himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I

issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded it; for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody. Yet the Parliament demanded, in their petition of right, and the king was obliged to concede, that all his commissions were illegal. James II claimed the right to suspend the operation of the penal laws—a power which the courts denied—but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offence he saw fit to charge them with, if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury, and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which, a few months afterwards, made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations, on the other side of the Channel, to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Temple Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shout of two hundred thousand men for the triumph of justice and law.

The truth is, that no authority exists anywhere in the world for the doctrine of the Attorney-General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer is against him. All military authors who profess to know the duties of their profession admit themselves to be under,

not above the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to dishonor the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. Court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders.

But this case does not depend on authority. It is rather a question of fact than of law.

I prove my right to a trial by jury just as I would prove my title to an estate, if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed with the sacred name of George Washington, and with thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterwards ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in the country, from that time to this, has taken an oath that he would support and sustain it through good report and through evil. The Attorney-General himself became a party to the instrument when he laid his hand upon the holy gospels, and swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain? This among other things:

"The trial of all crimes except in cases of impeachment shall be by jury."

Again:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

This is not all; another article declares that,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the witnesses in his favor; and to have the assistance of counsel for his defence."

Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words, or what collocation of words in the English language would have that effect? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the judge-advocate, or the head of a department? Shall this inestimable privilege be extended only to men whom the administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offences as those for which Sydney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burnt alive, and John Bunyan was imprisoned fourteen years, and Baxter was whipped at the cart's tail, and Prynn had his ears cut off?

No; the words of the Constitution are all-embracing, "as broad and general as the casing air." The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege—and NO person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions. Here is no attempt to enumerate the particular cases in which men charged with criminal offences shall be entitled to a jury trial. It is simply declared that *all* shall have it. But that is coupled with a statement of two specific exceptions: cases of impeachment; and cases arising in the land or naval forces. These exceptions strengthen the application of the general rule to all other cases. Where the lawgiver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons, and make different exceptions. To exceptions the maxim is always applicable, that *expressio unius exclusio est alterius.*

But we shall be answered that the judgment under consideration was pronounced in time of war, and it is, therefore, at least, morally excusable. There may, or there may not, be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power

lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.

There has been and will be another *quasi* political argument,—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.

Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretence of state necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy.

Of course, it is mere absurdity to say that the petitioner was *necessarily* deprived of his right to a fair and legal trial. But concede for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere *excuse* for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not wilful. But we are now considering the legal effect of their decision, and that depends on their legal au-

thority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them, but expressly forbade them to exercise, and it follows that their act is void, whatever may have been the real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the petitioner, had attempted to deprive him of his property by a sentence of confiscation, would any court in Christendom declare that such a sentence divested the title? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution?

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man is to stand up and dispute it. But there is decisive authority upon the point.*

The counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read *Coke's Institute*, and the opinion of Mr. Justice Grier, in the *Prize Cases*, and they know it to be a settled rule that war cannot be said to exist where the civil courts are open. They will not set up the plea of necessity, for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids.

This, therefore, must be their position: that although there was no war at the place where this commission sat, and no actual necessity for it, yet if there was a war anywhere else, to which the United States were a party, the technical effect of such war was to take the jurisdiction away from the civil courts and transfer it to army officers. Noth-

* See Johnson *v.* Duncan, in the Supreme Court of Louisiana, already referred to by General Garfield, *supra*, p. 52; the case of General Jackson's fine.

ing else is left them. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How then did the military get jurisdiction in Indiana?

They must answer the question by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed, or its operation suspended in one state because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? For no reason, if not because war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a future war what results will follow from your decision indorsing the Attorney-General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tum-

ble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, 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. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back.

The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind of public employment, state or national, civil or military, should swear, without

reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity, to impose upon them an oath like that, if they intended and expected it to be broken half the time.

These statesmen who settled our institutions, had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the president of Congress when he resigned his commission,—that he had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterwards required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia.

Opposite counsel must be conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. They do so; and argue that, while the Constitution, and the acts of Congress, and *Magna Charta*, and the common law, and all the rules of natural justice remain under foot, they will try American citizens according to what they call the *laws of war*.

But what do they mean by this? Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing to do with the subject. Do they mean that portion of our municipal code which defines our duties to the government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the government owes every citizen a fair legal trial, as much as the citizen owes obedience to the government. When they appeal to international law, it is silent; and when they interrogate the law of the land, the answer is a contradiction of their whole theory.

The Attorney-General conceives that all persons whom he and his associates choose to denounce for giving aid to the Rebellion, are to be treated as being themselves a part of

the Rebellion,—they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient rule would outlaw every citizen the moment he is charged with a political offence. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the men who generally sit in military courts. But this court decided in the *Prize Cases* that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true,—that all who reside inside of our own territory are to be treated as under the protection of the law. If they help the enemy they are criminals, but they cannot be punished without legal conviction.

You have heard much, and you will hear more, concerning the natural and inherent right of the government to defend itself without regard to law. This is fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defence of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be dragged to the block or driven into exile. A violation of law on pretence of saving such a government as ours is not self-preservation, but suicide.

Salus populi suprema lex. This is true; but it is the safety of the *people*, not the safety of the *ruler*, which is the supreme law. The maxim is revolutionary and expresses simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of government *against* the people.

But this government of ours has power to defend itself

without violating its own laws; it does not carry the seeds of destruction in its own bosom. It is clothed from head to foot in a panoply of defensive armor. What are the perils which may threaten its existence? I am not able at this moment to think of more than these, which I am about to mention: foreign invasion, domestic insurrection, mutiny in the army and navy, corruption in the civil administration, and last, but not least, criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defence against all these? Military force repels invasion and suppresses insurrection; you preserve discipline in the army and navy by means of courts-martial; you preserve the purity of the civil administration by impeaching dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities. You are not compelled to use these weapons against your enemies, merely because they and they only are justified by the law; you ought to use them because they are more efficient than any other, and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this country can exercise any kind of public authority which is not conferred by law; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the army and navy are authorized; they are legal institutions; their jurisdiction is limited, and their whole code of procedure is regulated by act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law, and if one of them goes beyond what is written its action is *ultra vires* and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and it has no law of its own. Its terrible authority is undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. So these commissions have no legal origin and no

legal name by which they are known among the children of men; no law applies to them; and they exercise all power for the paradoxical reason that none belongs to them rightfully.

How is a military commission organized? What shall be the number and rank of its members? What offences come within its jurisdiction? What is its code of procedure? How shall witnesses be compelled to attend it? Is it perjury for a witness to swear falsely? What is the function of the judge-advocate? Does he tell the members how they must find, or does he only persuade them to convict? Is he the agent of the government, to command them what evidence they shall admit and what sentence they shall pronounce; or does he always carry his point, right or wrong, by the mere force of eloquence and ingenuity? What is the nature of their punishments? May they confiscate property and levy fines as well as imprison and kill? In addition to strangling their victim, may they also deny him the last consolations of religion, and refuse his family the melancholy privilege of giving him a decent grave?

To none of these questions can the Attorney-General or any one make a reply, for there is no law on the subject.

The power exercised through these military commissions is not only unregulated by law but it is incapable of being so regulated. It asserts the right of the executive government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that government or its paid dependents may choose to impute an offence. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It operates in different ways; the instruments which it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form. But in all its mutations of outward appearance it is still identical in principle, object, and origin. It is always the same great engine of despotism which Hamilton described it to be.

We cannot help but see that military commissions, if

suffered to go on, will be used for pernicious purposes. I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? What just purpose, then, can they serve? None.

But while they are powerless to do good, they may become omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They would be organized to convict, and the conviction would follow the accusation as surely as night follows the day. A government, of course, will accuse none before such a commission except those whom it predetermines to destroy. The accuser can choose the judges, and will select those who are known to be ignorant, unprincipled, and the most ready to do whatever may please the power which gives them pay and promotion. The willing witness could be found as easily as the superserviceable judge. The treacherous spy and the base informer would stock such a market with abundant perjury; for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, would shock the world with the enormity of its crimes.

ON THE SIDE OF THE UNITED STATES. REPLY.

Mr. Butler:

What are the exact facts set forth in the record, and what the exact question raised by it?

The facts of the case are all in the relator's petition and the exhibits thereto attached, and must, for the purposes of this hearing, be taken to be indisputably true; at least as against him. He is estopped to deny his own showing. Now, every specification upon which the petitioner was tried

by the military commission concludes with this averment: "This, on or about," &c.,—the different time and place as applied to the different parties—"at or near Indianapolis, Indiana," or wherever else it may be, "a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

It may be said that these specifications are only the averments of the government against the relator. But they, in fact, are a part of the exhibits of the relator, upon which he seeks relief; are an integral part of the case presented by him, and cannot be controlled by the pretence set up on the other side, that the court should take judicial notice of the contrary. Judicial cognizance of a fact, by the court, as a matter of public notoriety, or of history, is only a mode of proof of the fact; but no proof can be heard, in behalf of the relator, in contradiction of the record.

Therefore, what we at the bar must discuss, and what the court must decide, is, what law is applicable to a theatre of military operations, within the lines of an army, in a State which has been and constantly is threatened with invasion.

Yet a large portion of the argument on the other side has proceeded on an assumption which is itself a denial of the facts stated upon the record. The fact that military operations were being carried on in Indiana, at the places where these occurrences are said to have taken place, is a question that opposite counsel desire to argue, and desire farther that the court should take judicial notice that the fact was not as stated by the record.

Is the question, then, before this court, one of law or of fact? The matter becomes exceedingly important. We do freely agree, that if at the time of these occurrences there were no military operations in Indiana, if there was no army there, if there was no necessity of armed forces there, if there was no need of a military commission there, if there was nothing there on which the war power of the United States could attach itself, then this commission had no jurisdiction to deal with the relator, and the question proposed

may as well at once be answered in the negative. What, then, is the state of facts brought here by the record? For, whatever question may have divided the learned judges in the court below, we here at the bar are divided *toto cœlo* upon a vital question of fact. If the facts are to be assumed as the record presents them, then much of the argument of the other side has been misapplied.

The facts of record should have been questioned, if at all, in the court below. If the fact, stated in the record, of war on the theatre of these events—which in our judgment is a fact conclusive upon the jurisdiction of the military commission—is not admitted, then it is of the greatest importance to the cause that it be ascertained. If that fact was questioned below, some measures should have been taken to ascertain it, before the certificate of division of opinion was sent up. Otherwise the Circuit Court, in defiance of settled practice, and also of the act of 1802, has sent up a case in which material facts are not stated, and there is no jurisdiction under the act to hear.* Certainly we at the bar seem to be arguing upon different cases; the one side on the assumption that the acts of Milligan and his trial took place in the midst of a community whose social and legal organization had never been disturbed by any war at all, the other on the assumption that they took place in a theatre of military operations, within the lines of the army, in a State which had been and then was threatened with invasion.

But the very form of question submitted, "whether upon the *facts stated in the petition and exhibits*, the military commission had jurisdiction to try the several relators in manner and form as set forth;"—not upon any other facts of which the court or anybody else will take notice, or which can be brought to the court in any other way than upon the petition and exhibits,—is conclusive as to the facts or case upon which the argument arises. The question, we therefore repeat—and we pray the court to keep it always in mind—is whether upon the facts stated in the petition and exhibit, the

* See remarks of Mr. Stanbery, *supra*, p. 12.

commission had jurisdiction; and the great and determining fact stated, and without which we have no standing in court, is that these acts of Milligan and his felonious associates, took place in the theatre of military operations, within the lines of the army, in a State which had been and then was constantly threatened with invasion. Certainly the learned judges in the court below, being on the ground, were bound to take notice of the facts which then existed in Indiana, and if they were not as alleged in the petition and exhibits, ought to have spread them as they truly were upon the record. Then they would have certified the question to be, whether under that state of facts so known by them, and spread upon the record, the military commission had jurisdiction, and not as they have certified, that the question was whether they had jurisdiction on the state of facts set forth in the relator's petition and exhibits.

The strength of the opposing argument is, that this court is bound to know that the courts of justice in Indiana were open at the time when these occurrences are alleged to have happened. Where is the proper allegation to this effect upon the record, upon which this court is to judge? If the court takes judicial notice that the courts were open, must it not also take judicial notice how, and by whose protection, and by whose permission they were so open? that they were open because the strong arm of the military upheld them; because by that power these Sons of Liberty and Knights of the American Circle, who would have driven them away, were arrested, staid, and punished. If judicial notice is to be taken of the one fact, judicial notice must be taken of the other also;—of the fact, namely, that if the soldiers of the United States, by their arms, had not held the State from intestine domestic foes within, and the attacks of traitors leagued with such without; had not kept the ten thousand rebel prisoners of war confined in the neighborhood from being released by these knights and men of the Order of the Sons of Liberty; there would have been no courts in Indiana, no place in which the Circuit Judge of the United States could sit in peace to administer the law.

If, however, this court will take notice that justice could only be administered in Indiana because of the immediate protection of the bayonet, and therefore by the permission of the commander of her armed forces, to which the safety of the State, its citizens, courts, and homes were committed, then the court will have taken notice of the precise state of facts as to the existence of warlike operations in Indiana, which is spread upon the record, and we are content with the necessary inferences.

As respects precedents. I admit that there is a dearth of precedents bearing on the exact point raised here. Why is this? It is because the facts are unprecedented; because the war out of which they grew is unprecedented also; because the clemency that did not at once strike down armed traitors, who in peaceful communities were seeking to overturn all authority, is equally unprecedented; because the necessity which called forth this exertion of the reserved powers of the government is unprecedented, as well as all the rest. Let opposing counsel show the instance in an enlightened age, in a civilized and Christian country, where almost one-half its citizens undertook, without cause, to overthrow the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason, and we will perhaps show a precedent for hanging such traitors by military commissions.

This is the value of this case: whenever we are thrown into a war again; whenever, hereafter, we have to defend the life of the nation from dangers which invade it, we shall have set precedents how a nation may preserve itself from self-destruction. In the conduct of the war, and in dealing with the troubles which preceded it, we have been obliged to learn up to these questions; to approach the result step by step.

Opposite counsel (Mr. Black) has admitted that there were dangers which might threaten the life of the nation, and in that case it would be the duty of the nation, and it

would be its right, to defend itself. He classed those dangers thus: first, foreign invasion; second, domestic insurrection; third, mutiny in the army and navy; fourth, corruption in civil administration; and last, crimes committed by individuals; and he says further, there were within the Constitution powers sufficient to enable the country to defend itself from each and all these dangers. But there is yet another, a more perilous danger, one from which this country came nearer ruin than it ever came by any or by all others. That danger is imbecility of administration; such an administration as should say that there is no constitutional right in a State to go out of the Union, but that there is no power in the Constitution to coerce a State or her people, if she choose to go out. It is in getting rid of that danger, unenumerated, that we have had to use military power, military orders, martial law, and military commissions.

The same counsel was pleased to put certain questions, difficult as he thinks to be answered, as to the method of proceeding before military commissions; but no suggestion is made upon the record or upon the briefs, that all the proceedings were not regular according to the custom and usages of war. They have all the *indicia* of regularity. There being then nothing alleged why the proceedings are not regular, we are brought back to the main question.

A portion of the argument on the other side has proceeded upon the mistake, that a military commission is a *court*, either under, by virtue of, or without the Constitution. It is not a court, and that question was decided not long ago. A military commission, whatever it may be, derives its power and authority wholly from martial law, and by that law, and by military authority only, are its proceedings to be adjudged and reviewed. In *Dynes* v. *Hoover*,* this was decided by this tribunal in regard to a court-martial. The conclusion was sustained in *Ex parte Vallandigham*.†

The last quoted case is like the present. Vallandigham was tried by a military commission, and he invoked the aid

* 20 Howard, 781.

† 1 Wallace, 243.

of the court to get away from it. Why did not this court then decide, as opposing counsel assert the law to be, that under no possible circumstances can a military commission have any right, power, authority, or jurisdiction? No such decision was made. It was decided that a military commission "is not a court within the meaning of the 14th section of the act of 1789:" that this court has no power to issue a writ of *certiorari*, or to review or pronounce any opinion upon the proceedings of a military commission; that affirmative words in the Constitution, giving this court original jurisdiction in certain cases must be construed negatively as to all others. Mr. Justice Wayne, in delivering the opinion of the court, says:

In *Ex parte Metzger** it was "determined that a *writ of certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, *but that the proceedings of the military commission* were so; and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raine's case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of *The United States* v. *Ferreira*.†

"The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them; but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States. Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide, and sentence, but there is no original jurisdiction in the Supreme

* 5 Howard, 176. † 13 Id. 48.

Court to issue a writ of *habeas corpus ad subjiciendum*, to review or reverse its proceedings, or the *writ of certiorari* to revise the proceedings of a military commission."

Under such language there is an end of this case.

We have already stated that military commissions obtain their jurisdiction from martial law. What, then, is martial law? We have also already defined it.* But our definition has not been observed. Counsel treat it as if we would set up the absolutely unregulated, arbitrary, and unjust caprice of a commanding and despotic officer. Let us restate and analyze it. "Martial law is the will of the commanding officer of an armed force or of a geographical military department, expressed in time of war, within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military or supreme executive chief." This definition is substantially taken from the despatches of the Duke of Wellington. When he was called upon to answer a complaint in Parliament for this exercise of military jurisdiction and martial law in Spain, he thus defined it.† On another occasion, when speaking of Viscount Torrington's administration as military governor of Ceylon, he said thus:

"The general who declared martial law, and commanded that it should be carried into execution, was bound to lay down distinctly the *rules*, and *regulations*, and *limits* according to which his will was to be carried out. Now he had, in another country, carried on martial law; that was to say, he had governed a large proportion of the population of a country, by his own will. But, then, what did he do? He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and judges, who at first had fled or had been expelled, afterwards consented to act under his

* *Supra*, p. 14.

† Hansard's Parliamentary Debates, 3d Series, vol. 14, p. 879; and see, also, Opinions of the Attorneys-General, vol. 8, p. 366.

direction. *The judges sat in the courts of law*, conducting their judicial business and administering the law *under his direction.*"

It is the will of the commanding officer. Being to be exercised upon the instant, it can have no other source. The commanding officer of an armed force, is another element of the definition.

Martial law must have another distinguishing quality. It must be the will of the commander, exercised under the limitations mentioned in *time of war*, and that is a portion of the definition which is fatal to the authorities read by my brother Garfield, as I shall show.

When is it to be exercised? "When necessity demands and prudence dictates." That is to say, in carrying on war, when in the judgment of him to whom the country has intrusted its welfare—whose single word, as commander of the army, can devote to death thousands of its bravest and best sons—we give to him, when necessity demands, the discretion to govern, outside of the ordinary forms and constitutional limits of law, the wicked and disloyal within the military lines.

In time of war, to save the country's life, you send forth your brothers, your sons, and put them under the command, under the arbitrary will of a general to dispose of their persons and lives as he pleases; but if, for the same purpose, he touches a Milligan, a Son of Liberty, the Constitution is invoked in his behalf—and we are told that the fabric of civil government is about to fall! We submit that if he is intrusted with the power, the will, the authority to act in the one case, he ought to have sufficient discretion to deal with the other; and that the country will not be so much endangered from the use of both, as it would be if he used the first and not the last.

Martial law is known to our laws; it is constitutional, and was derived from our mother country. De Lolme says:*

"In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and

* De Lolme, Stephens' ed. of 1838, p. 972.

authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders."

"The martial law, concerning these tender points, must be *universal.* The jealous regulations, concerning mutiny and contempt of orders, cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced, too, through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system, while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom;—that secret disposition which prompts mankind to resist and counteract their superiors, cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other."

Passing from one of the most learned commentators upon England's Constitution, to one who may be said to have lived our Constitution; who came into life almost as the Constitution came into life; whose father was the second chief executive officer of the nation; conversant with public affairs and executing constitutional law in every department of the government from earliest youth, wielding himself chief executive power, and admitted to be one of the ablest constitutional lawyers of his time—what principles do we find asserted?

Mr. John Quincy Adams, speaking of the effect of war upon the municipal institutions of a country, said:*

"Slavery was abolished in Columbia, first, by the Spanish General Morillo, and, secondly, by the American General Bolivar. It was abolished by virtue of a military command given at the head of the army, and the abolition continues to be law to this day. It was abolished by the laws of war, and not by municipal enactments; the power was exercised by military commanders, under instructions, of course, from their respective

* A.D. 1842. Records and Speeches, p. 34.

governments. And here I recur again to the examples of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge, under the laws of the State of Louisiana. You are going to refund him the money with interest; and this you are going to do because the imposition of the fine was unjust. Because General Jackson was acting under the laws of war, and because the moment you place a military commander *in a district which is the theatre of war, the laws of war apply to that district.*"

. . . . "I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do, in all such cases, take the precedence."

"I lay this down as the law of nations. I say that the military authority takes for the time the place of all municipal institutions, and slavery among the rest; and that, under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject not only the President of the United States, but the commander of the army has power to order the universal emancipation of the slaves. I have given here more in detail a principle, which I have asserted on this floor before now, and of which I have no more doubt, than that you, sir, occupy that chair. I give it in its development, in order that any gentleman, from any part of the Union, may, if he thinks proper, deny the truth of the position, and may maintain his denial; not by indignation, not by passion and fury, but by sound and sober reasoning from the laws of nations and laws of war. And if my position can be answered and refuted, I shall receive the refutation with pleasure; I shall be glad to listen to reason, aside, as I say, from indignation and passion. And if, by force of reasoning, my understanding can be convinced, I here pledge myself to recant what I have asserted."

The case of General Jackson's fine was the test case of martial law in this country. What were the facts? On the 15th of December, 1814, General Jackson declared martial law within his camp, extending four miles above and four

miles below the city. The press murmured, but did not speak out until after there came unofficial news of peace. Then it was said that the declaration of peace, *ipso facto*, dissolved martial law; that the General had no right to maintain martial law any longer; and murmurs loudly increased. But, the General said, that he had not received any official news of the establishment of peace; and, until it came officially, he should not cease his military operations for safety of the city. Thereupon what happened? One Louallier was arrested by the military, for alleged seditious language, and Judge Hall interposed with his writ of *habeas corpus*. This was on the 5th of March, 1815. The battle of New Orleans, which substantially removed all danger, was fought on the 8th of January. General Jackson sent his aide-de-camp and arrested Judge Hall. The cry then as now was that the necessity for martial law had ceased; why hold Judge Hall, after the news of peace had come? Why not turn him over to the civil authorities? What next took place? Peace was declared in an official manner; the proclamation of martial law was withdrawn; Judge Hall took his seat on the bench, and his first act was to issue an attachment of contempt for General Jackson, who was accordingly brought before him. When General Jackson offered an explanation of his conduct, the Judge refused to receive it, and fined him $1000. The fine was paid in submission to the law. Years afterwards, Congress proceeded not to excuse, not to explain away that act of General Jackson, declaring martial law, but to justify it. I am surprised to hear it said that nobody *justified* General Jackson. Whether General Jackson was to be excused or to be justified was the whole question at issue between the parties in Congress. A bill was brought in "to indemnify Major-General Andrew Jackson for damages sustained in the discharge of his official *duty*." Some who were in the Senate of that day, said: "We will not justify, we will excuse, this action in General Jackson; we move, therefore, to change the title of the bill into a 'bill for the *relief* of General Jackson.'" But Mr. R. J. Walker, speaking for General Jackson, made a minority report, in

which he put the whole question upon the ground of justification.*

He said:

"That General Jackson, and those united with him in the defence of New Orleans, fully believed this emergency to exist, is beyond all doubt or controversy. If, then, this was the state of the case, it was the duty of General Jackson to have made the arrest; and the act was not merely excusable but justifiable. It was demanded by a great and overruling necessity. . . . . This great law of necessity—of defence of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution. This was the law which justified the arrest and detention of the prisoner; and, however the act may now be assailed, it has long since received the cordial approbation of the American people. That General Jackson never desired to elevate the military above the civil authority is proved by his conduct during the trial, and after the imposition of this fine."

"The title of the bill is in strict conformity with the facts of the case, and, in the opinion of the undersigned, should be retained. The country demands that his money shall be returned as an act of justice. It was a penalty incurred for saving the country, and the country requires that it shall be restored."

The fine was returned with interest.

The case of *Johnson* v. *Duncan*, in the Supreme Court of Louisiana, and cited on the other side, was decided by judges sitting under the excitement of the collision between the military and the judges. As an authority it is of no value. The case of *Luther* v. *Borden*, in which Mr. Justice Woodbury's *dissenting* opinion, strange to say, has been cited by my brother Garfield against the opinion of the court, decides that martial law did obtain in Rhode Island, and sustains General Jackson.

The court say:

"If the government of Rhode Island deemed the armed op-

* Benton's Condensed Debates, vol. 14, p. 641.

position so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed."

We have put in our definition of martial law the words, "in time of war," *tempore belli.* That portion of the definition answers every question, as to when this law may obtain.

Now what was the Earl of Lancaster's case, quoted and so much relied on by the other side? The earl raised a rebellion; and was condemned and executed by sentence of a court-martial, *after the rebellion had been subdued.* Thereupon his brother brought a writ of error, by leave of the king, before the king himself in Parliament, for the purpose of reversing the judgment and obtaining his lands, and among the errors assigned, was this:

"Yet the said Earl Thomas, &c., was taken *in time of peace,* and brought before the king himself; and the said our lord and father the king, &c., remembered that the same Thomas was guilty of the seditions and other felonies in the aforesaid contained; without this, that he arraigned him therefor, or put him to answer as is the custom according to the law, &c., and thus, without arraignment and answer, the same Thomas, of error and contrary to the law of the land, was *in time of peace* adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes contained in the said record and proceedings were charged against the said earl, and also the time in which he was taken, and in which our said lord and father the king remembered him to be guilty, &c., and in which he was adjudged to death, was *a time of peace,* and the more especially as throughout the whole time, afore-

said, the Chancery and other courts of pleas of our lord the king were open, and in which *right was done to every man, as it used to be;* nor did the same lord the king in that *time ever side with standard unfurled;* the said lord and father the king, &c., *in such time of peace* ought not against the same earl, thus to have remembered nor to have adjudged him to death, without arraignment and answer."

So that the whole record turned upon the question whether the rebellion being ended, peace having come, the Earl of Lancaster was liable to be adjudged by military commission in time of peace, and it was held that that was against common right.

The Petition of Right is referred to; but it was not, as is supposed, because of the ship-money and the trial of Hampden and others, that this great petition was passed. It was because King Charles had quartered in the town of Plymouth, and in the County of Devon, certain soldiers in time of peace, upon the inhabitants thereof; and had issued his commission that those counties should be governed by "martial law," while the soldiers, in time of peace, were quartered there, and therefore came the Petition cited; and it was adjudged that military commissions, issued in time of peace, should never have place in the law of England; and all the people to that, even to this day, heartily agree.*

Governor Wall's case shows truly that martial law did not protect him for his action under it; but if there ever was a judicial murder, a case where a man, without cause and without right, was put to death, this was the case. Lord Chief Justice Campbell, speaking of it, says:†

"The prosecution brought great popularity to the Attorney-General and the government of which he was the organ, upon the supposition that it presented a striking display of the stern impartiality of British jurisprudence; but after a calm review of the evidence, I fear it will rather be considered by posterity

* Hale's Pleas of the Crown, 42.

† Lives of the Chief Justices; Life of Ellenborough.

as an instance of the triumph of vulgar prejudice over humanity and justice."

Another case cited is that of the Rev. John Smith, of Demerara, who was tried and convicted by a court-martial, for inciting negroes to mutiny in Demerara, six weeks after a rebellion was wholly quelled, and when there seems to have been no necessity for such proceedings, nor any reason that they should be carried on. The excuse of the governor was, that the planters were so infuriated against Mr. Smith that he thought that trying him by court-martial would secure him better justice. I agree that this was no excuse, that no necessity here existed. Brougham and Mackintosh brought all their eloquence to overturn martial law. Their words have been cited; but the other side forgot to state that upon a division of the House of Commons, Brougham and Mackintosh were in a minority of forty-six. So that after a deliberate argument of many days, the great final tribunal of English justice decided that Mr. John Smith's case was rightly tried under martial law. The case is an authority not for, but against, the side which it is cited to support.

It is said that in 1865, Congress refused to pass an act which would throw any discredit on military commissions, or limit their action wherever a rebel or a traitor, secret or open, was to be found upon whom their jurisdiction should operate. If such tribunals for certain purposes were not lawful in the judgment of the House of Representatives; if military commissions had no place in the laws of the land, why the necessity of action by Congress to repeal them?

Reference has been made by opposing counsel to what they consider the views of General Washington; and an argument has been attempted to be drawn from this. Now, the first military commission upon this continent of which there is any record sat by command of Washington himself. Its proceedings were published by order of Congress, and are well known. I refer to André's case. That was not a "court-martial;" there was no order to adjudicate; no find-

ing; no sentence; only a report of facts to General Washington, and then Washington issued the order, in virtue of his authority as commander-in-chief, which condemned André to death.

But we do not stop there. This may be said to have been the exceptional case of a spy. To give, then, another illustration of what Washington thought of the rights of military commanders in the field, attention may be directed to the trial of Joshua Hett Smith. Smith was the man at whose house Arnold and André met. He was taken and tried by a military court for treasonable practices. The civil courts were open at Tarrytown, at that time; the British Constitution as adopted by our colonial fathers extended over him, but still Washington tried Smith by a military court. In Chandler's Criminal Trials,* Smith gives an account of his interview, when he was first brought before Washington, which I cite in order that the court may understand how the Father of his Country regarded the extent of his powers as military commander. Smith says:

"After as much time had elapsed as I supposed was thought necessary to give me rest from my march, I was conducted into a room, where were standing General Washington in the centre, and on each side General Knox and the Marquis de La Fayette, with Washington's two aides-de-camp, Colonels Harrison and Hamilton. Provoked at the usage I received, I addressed General Washington, and demanded to know for what cause I was brought before him in so ignominious a manner? The General answered, sternly, that I stood before him charged with the blackest treason against the citizens of the United States; that he was authorized, from the evidence in his possession, and from the authority vested in him by Congress, to hang me immediately as a traitor, and that nothing could save me but a candid confession who in the army, or among the citizens at large, were my accomplices in the horrid and nefarious designs I had meditated for the last ten days past."

What now, may I ask, is to be thought of the argument

* Vol. 2, p. 248.

of my opposing brethren, who assert that in civil courts the Constitution does not allow any pressure to be brought upon a man to make him confess, at the same time that they eulogize the military conduct of Washington?

But what redress, it is asked, shall any citizen have if this power—so great, so terrible, and so quick in its effects—is abused? The same and only remedy that he can have whenever power is abused. If that power, under martial law, is used for personal objects of aggrandizement, or revenge; of imprisoning, one hour, any citizen, except when necessity under fair judgment demands, he ought to have an appeal to the courts of the country after peace, for redress of grievance.

It has been said that martial law, and its execution by trials by military commission, is fatal to liberty and the pursuit of happiness; but we are only asking for the exercise of military power, when necessity demands and prudence dictates. If the civil law fails to preserve rights, and to insure safety and tranquillity to the country; if there is no intervention of military power to right wrongs and punish crime, an outraged community will improvise some tribunal for themselves, whose execution shall be as swift and whose punishments shall be as terrible as any exhibition of military power; some tribunal wholly unregulated and which is responsible to no one. We are not without such examples on this continent.

The proclamation of 24th September, 1862,* by which the President suspended the privilege of the writ of *habeas corpus*, and which proclamation was in full force during these proceedings, was within the power of the President, independently of the subsequent act of Congress, to make. *Brown* v. *The United States*† seems full on this point. It says:

"When the legislative authority, to whom the right to declare war is confined, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discre-

* See *supra*, pp. 15–16.

† 8 Cranch, 153.

tion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President."

However, the subsequent act of Congress* did ratify what the President did; so that every way the view taken of his powers in the case just quoted stands firm.

And the wisdom of this view appears nowhere more than in the present case. The court, of course, can have no knowledge how extensive was this "Order of Sons of Liberty;" how extensive was the organization of these American Knights in Indiana. It was a secret Order. Its vast extent was not known generally. But the Executive might have known; and if I might step out of the record, I could say that I am aware that he did know, that this Order professed to have one hundred thousand men enrolled in it in the States of Indiana, Ohio, and Illinois, so that no jury could be found to pass upon any case, and that any courthouse wherein it had been attempted to try any of the conspirators, would have been destroyed. The President has judged that in this exigency a military tribunal alone could safely act.

We have thus far grounded our case on the great law of nations and of war. Has the Constitution any restraining clause on the power thus derived?

It is argued that the fourth, fifth, and sixth articles to the amendments to the Constitution are limitations of the war-making power; that they were made for a state of war as well as a state of peace, and aimed at the military authority as well as the civil. We have anticipated and partially answered this argument.† As we observed, by the Constitution, as originally adopted, there was no limitation put upon

* See *supra*, p. 4.

† See *supra*, pp. 20–21.

the war-making powers. It only undertook to limit one *incident* of the war-making power,—the *habeas corpus;* and if limit it can be called, observe the way in which that writ is guarded. It is provided that the writ of *habeas corpus*, in *time of peace*, shall not be suspended; it shall only be suspended when, "in case of rebellion or invasion, the public safety requires;" that is, in time of war. It seems to have been taken for granted by the Constitution that the writ is to be suspended in time of war because very different rules must then govern. The language of the Constitution is, that it "shall not be suspended except,"—showing that it was supposed that the war-making power would find it necessary to suspend the *habeas corpus;* and yet no other guard was thrown around it.

By the subsequent amendments there was, as we conceive, but one limitation put upon the war-making power, and that was in regard to the quartering of soldiers in private houses.

In no discussion upon these articles of amendment was there, in any State of the Union, a discussion upon the question, what should be their effect in time of war? Yet every one knew, and must have known, that each article would be inoperative in some cases in time of war. If in some cases, why not in all cases where necessity demands it, and where prudence dictates?

There is, in truth, no other way of construing constitutional provisions, than by the maxim, *Singula singulis reddenda.* Each provision of the Constitution must be taken to refer to the proper time, as to peace or war, in which it operates, as well as to the proper subject of its provisions.

For instance, the Constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land—as many as four millions of them at one time—people described in the Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.

The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people,

described elsewhere in the Constitution as "persons," have been deprived of their arms whenever they had them.

If you are going to stand on that letter of the Constitution which is set up by the opposite side in the matter before us, how are we to explain such features in the Constitution, in various provisions in which slaves are called persons, with nothing in the language used to distinguish them from persons who were free.

Mr. Black has said, that the very time when a constitutional provision is wanted, is the time of war, and that in time of war, of civil war especially, and the commotions just before and just after it, the constitutional provisions should be most rigidly enforced. We agree to that; but we assert that, in peace, when there is no commotion, the constitutional provisions should be most rigidly enforced as well. Constitutional provisions, within their application, should be always most rigidly enforced. We do not ask anything outside of or beyond the Constitution. We insist only that the Constitution be interpreted so as to save the nation, and not to let it perish.

We quote again the solemnly expressed opinion of Mr. Adams, in 1836, in another of his speeches:

"In the authority given to Congress by the Constitution of the United States to declare war, all the powers, incident to war, are by necessary implication conferred upon the government of the United States. Now, the powers incidental to war are derived, not from any internal, municipal source, but from the laws and usages of nations. There are, then, in the authority of Congress and the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other,—the war power and the peace power. The peace power is limited by regulation and restraints, by provisions prescribed within the Constitution itself. The war power is limited only by the law and usages of nations. The power is tremendous. It is strictly constitutional, *but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life.*"

It is much insisted on, that the determining question as to the exercise of martial law, is whether the civil courts

are in session; but civil courts were in session in this city during the whole of the Rebellion, and yet this city has been nearly the whole time under the martial law. There was martial law in this city, when, in 1864, the rebel chief, Jubal Early, was assaulting it, and when, if this court had been sitting here, it would have been disturbed by the enemy's cannon. Yet courts—ordinary courts—were in session. It does not follow, because the ordinary police machinery is in motion for the repression of *ordinary* crimes, because the rights between party and party are determined without the active interference of the military in cases where their safety and rights are not involved, that, therefore, martial law must have lost its power.

This exercise of civil power is, however, wholly permissive, and is subordinated to the military power. And whether it is to be exercised or not, is a matter within the discretion of the commander. That is laid down by Wellington,* and the same thing is to be found in nearly every instance of the exercise of martial law. The commanders of armies, in such exercise, have been glad, if by possibility they could do so, to have the courts carry on the ordinary operations of justice. But they rarely permit to them jurisdiction over crimes affecting the well-being of the army or the safety of the state.

The determining test is, in the phrase of the old law-books, that "the King's courts are open." But the King's Court, using that phrase for the highest court in the land, should not be open under the permission of martial law. In a constitutional government like ours, the Supreme Court should sit within its own jurisdiction, as one of the three great coordinate powers of the government, supreme, untrammelled, uncontrolled, unawed, unswayed, and its decrees should be executed by its own high *fiat*. The Supreme Court has no superior, and, therefore, it is beneath the office of a judge of that court, inconsistent with the dignity of the tribunal whose robes he wears, that he should sit in any district of

* See *supra*, p. 91–2.

country where martial law is the supreme law of the state, and where armed guards protect public tranquillity; where the bayonet has the place of the constable's baton; where the press is restrained by military power, and where a general order construes a statute. On the contrary, we submit that all crimes and misdemeanors, of however high a character, which have occurred during the progress and as a part of the war, however great the criminals, either civil or military, should be tried upon the scene of the offence, and within the theatre of military operations; that justice should be meted out in such cases, by military commissions, through the strong arm of the military law which the offenders have invoked, and to which they have appealed to settle their rights.

We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one, for the mild and healthy restraints of the other. Far otherwise. We demand only, that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes that league, and wait, and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources of the government, at the beginning; when the capital is imperilled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of law, is powerless; when the bayonet is called in as the final arbiter; when on its armed forces the government must rely for all it has of power, authority, and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future,—then we ask that martial law may prevail, so that the civil law may again live, to the end that this may be a "government of laws and not of men."

At the close of the last term the CHIEF JUSTICE announced the order of the court in this and in two other similar cases (those of Bowles and Horsey) as follows:

1. That on the facts stated in said petition and exhibits a writ of *habeas corpus* ought to be issued, according to the prayer of the said petitioner.

2. That on the facts stated in the said petition and exhibits the said Milligan ought to be discharged from custody as in said petition is prayed, according to the act of Congress passed March 3d, 1863, entitled, "An act relating to *habeas corpus* and regulating judicial proceedings in certain cases."

3. That on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Milligan in the manner and form as in said petition and exhibits are stated.

At the opening of the present term, opinions were delivered.

Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire

whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to *habeas corpus* and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued?"

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But, we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decided: And the decision of the

Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law, that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is, whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of *habeas corpus* and to hear and determine it; and it could not be denied; for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case,* construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But, it is maintained with earnestness and ability, that a certificate of division of opinion can occur only in a *cause;* and, that the proceeding by a party, moving for a writ of *habeas corpus*, does not become a cause *until after the writ has been issued and a return made.*

Independently of the provisions of the act of Congress of March 3, 1863, relating to *habeas corpus*, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true, that it is usual for a court, on application for a writ of *habeas corpus*, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters,† turned, was,

* 4 Cranch, 75.

† Page 193.

whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

The Chief Justice, in delivering the opinion of the court, said: "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an cxpress decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless; and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges instead of one.

Such a result was not in the contemplation of the legislature of 1802; and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States* v. *Daniel*,* the court, in holding that a division

* 6 Wheaton, 542.

of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here; and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of *habeas corpus* was the "*cause*" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion.

But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it.

This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the *cause* of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right"—and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive."

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But, the true meaning to the term "suit" has been given by this court. One of the questions in *Weston* v. *City Council of Charleston*,* was, whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The

* 2 Peters, 449.

term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens* v. *Virginia*,* he says: "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes* v. *Jennison et al.*† was, whether under the 25th section of the Judiciary Act a proceeding for a writ of *habeas corpus* was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by *habeas corpus* was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing.

The court do not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a *suit*,—the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the act of 1802.

But it is argued, that there must be *two* parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to ena-

* 6 Wheaton, 264. † 14 Peters, 540.

ble any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for the writ of *habeas corpus*, Mr. Hanna, the District Attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this,—that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought, in the only way he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, 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. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to *habeas corpus*, and regulating judicial proceedings in certain cases," approved March 3d, 1863. Did that act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger.

An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of *habeas corpus*, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of *habeas corpus*. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the

United States, a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, *then* the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last proviso of the section on the court equally with a judge of it to discharge from imprisonment. It was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him. Courts are

not, always, in session, and can adjourn on the discharge of the grand jury; and before those, who are in confinement, could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party, who could show, that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective, because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore; that under the *Habeas Corpus* Act of 1863 the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan, were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of *habeas corpus* when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802, which authorized a certificate of division, a final decision

means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; *after* his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction*, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole

people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be de-

prived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times,

and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise

connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country

have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is un-

disputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot en-

dure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons ar-

rested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with

it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests

and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith* v. *Shaw* and *McConnell* v. *Hampden* (reported in 12 Johnson*), are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that *Luther* v. *Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II, in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the *old* government, broke open the house of Luther, who supported the *new*, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which *this court* could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking

* Pages 257 and 234.

into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may by exercised by a state."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the

writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3d, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

The CHIEF JUSTICE delivered the following opinion.

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case.

We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of *habeas corpus*.

Whether this court has jurisdiction upon the certificate of division admits of more question. The construction of the act authorizing such certificates, which has hitherto prevailed here, denies jurisdiction in cases where the certificate brings up the whole cause before the court. But none of the adjudicated cases are exactly in point, and we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty. We agree, therefore, that this court may properly answer questions certified in such a case as that before us.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the executive department of the government.

This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.

We must inquire, then, what constitutional or statutory provisions have relation to this military proceeding.

The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection. The constitutionality of this act has not been questioned and is not doubted.

The first section authorized the suspension, during the Rebellion, of the writ of *habeas corpus* throughout the United States by the President. The two next sections limited this authority in important respects.

The second section required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. The lists transmitted to the judges were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third section provided, in case lists of persons other

than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

It was made the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

It was under this act that Milligan petitioned the Circuit Court for the District of Indiana for discharge from imprisonment.

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted. The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the Circuit Courts of the Indiana district, while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.

His case was thus brought within the precise letter and intent of the act of Congress, unless it can be said that Milligan was not imprisoned by authority of the President; and nothing of this sort was claimed in argument on the part of the government.

It is clear upon this statement that the Circuit Court was bound to hear Milligan's petition for the writ of *habeas corpus*, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or, in the language of the act, to make the order.

The first question, therefore—Ought the writ to issue?—must be answered in the affirmative.

And it is equally clear that he was entitled to the discharge prayed for.

It must be borne in mind that the prayer of the petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether.

And the express terms of the act of Congress required this action of the court. The prisoner must be discharged on giving such recognizance as the court should require, not only for good behavior, but for appearance, as directed by the court, to answer and be further dealt with according to law.

The first section of the act authorized the suspension of the writ of *habeas corpus* generally throughout the United States. The second and third sections limited this suspension, in certain cases, within states where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue, and under it the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances the writ must be issued, and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive, and left no discretion to court or judge.

An affirmative answer must, therefore, be given to the second question, namely: Ought Milligan to be discharged according to the prayer of the petition?

That the third question, namely: Had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively is an unavoidable inference from affirmative answers to the other two.

The military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury without indictment or other proceeding against him.

Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions.

Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session no person arrested could have the benefit of the writ; and even then no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

We agree, therefore, that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow, that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the

government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution.

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States.

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war

or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts proposed that "no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions.

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that gov-

ernment includes protection and defence as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the Presi-

dent, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed co-operation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the ex-

ecution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety,—a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated

as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER concur with me in these views.

ANEXO 02 – CASO *EX PARTE QUIRIN* (1942)

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JULY SPECIAL TERM, 1942.

EX PARTE QUIRIN ET AL.[1]

NOS. ——, ORIGINAL. MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

AND

UNITED STATES EX REL. QUIRIN ET AL. *v.* COX, PROVOST MARSHAL.[2]

NOS. 1–7. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Argued July 29–30, 1942.—Decided July 31, 1942.

Per Curiam decision filed, July 31, 1942.[3] Full Opinion filed, October 29, 1942.[4]

1. A federal court may refuse to issue a writ of habeas corpus where the facts alleged in the petition, if proved, would not warrant discharge of the prisoner. P. 24.

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[1] No. —, Original, *Ex parte Richard Quirin;* No. —, Original, *Ex parte Herbert Hans Haupt;* No. —, Original, *Ex parte Edward John Kerling;* No. ——, Original, *Ex parte Ernest Peter Burger;* No. ——, Original, *Ex parte Heinrich Harm Heinck;* No. ——, Original, *Ex parte Werner Thiel;* and No. —, Original, *Ex parte Hermann Otto Neubauer.*

[2] No. 1, *United States ex rel. Quirin* v. *Cox, Provost Marshal;* No. 2, *United States ex rel. Haupt* v. *Cox, Provost Marshal;* No. 3, *United States ex rel. Kerling* v. *Cox, Provost Marshal;* No. 4, *United States ex rel. Burger* v. *Cox, Provost Marshal;* No. 5, *United States ex rel. Heinck* v. *Cox, Provost Marshal;* No. 6, *United States ex rel. Thiel* v. *Cox, Provost Marshal;* and No. 7, *United States ex rel. Neubauer* v. *Cox, Provost Marshal.*

[3] See footnote, *post,* p. 18.

[4] *Post,* p. 18.

2. Presentation to the District Court of the United States for the District of Columbia of a petition for habeas corpus was the institution of a suit; and denial by that court of leave to file the petition was a judicial determination of a case or controversy reviewable by appeal to the U. S. Court of Appeals for the District of Columbia and in this Court by certiorari. P. 24.
3. The President's Proclamation of July 2, 1942, declaring that all persons who are citizens or subjects of, or who act under the direction of, any nation at war with the United States, and who during time of war enter the United States through coastal or boundary defenses, and are charged with committing or attempting to commit sabotage, espionage, hostile acts, or violations of the law of war, "shall be subject to the law of war and to the jurisdiction of military tribunals," does not bar accused persons from access to the civil courts for the purpose of determining the applicability of the Proclamation to the particular case; nor does the Proclamation, which in terms denied to such persons access to the courts, nor the enemy alienage of the accused, foreclose consideration by the civil courts of the contention that the Constitution and laws of the United States forbid their trial by military commission. P. 24.
4. In time of war between the United States and Germany, petitioners, wearing German military uniforms and carrying explosives, fuses, and incendiary and time devices, were landed from German submarines in the hours of darkness, at places on the Eastern seaboard of the United States. Thereupon they buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at a sabotage school, and had with them, when arrested, substantial amounts of United States currency, which had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States. Specification 1 of the charges on which they were placed on trial before a military commission charged that they, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United

1 Syllabus.

States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States." *Held:*

(1) That the specification sufficiently charged an offense against the law of war which the President was authorized to order tried by a military commission; notwithstanding the fact that, ever since their arrest, the courts in the jurisdictions where they entered the country and where they were arrested and held for trial were open and functioning normally. *Ex parte Milligan*, 4 Wall. 2, distinguished. Pp. 21, 23, 36, 48.

(2) The President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, were not in conflict with Articles of War 38, 43, 46, 50½ and 70. P. 46.

(3) The petitioners were in lawful custody for trial by a military commission; and, upon petitions for writs of habeas corpus, did not show cause for their discharge. P. 47.

5. Articles 15, 38 and 46 of the Articles of War, enacted by Congress, recognize the "military commission" as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by courts-martial. And by the Articles of War, especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenses against the law of war in appropriate cases. Pp. 26–28.

6. Congress, in addition to making rules for the government of our Armed Forces, by the Articles of War has exercised its authority under Art. I, § 8, cl. 10 of the Constitution to define and punish offenses against the law of nations, of which the law of war is a part, by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And by Article of War 15, Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Pp. 28, 30.

7. This Court has always recognized and applied the law of war as including that part of the law of nations which prescribes, for the

conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. P. 27.

8. The offense charged in this case was an offense against the law of war, the trial of which by military commission had been authorized by Congress, and which the Constitution does not require to be tried by jury. *Ex parte Milligan*, 4 Wall. 2, distinguished. P. 45.
9. By the law of war, lawful combatants are subject to capture and detention as prisoners of war; unlawful combatants, in addition, are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. P. 30.
10. It has long been accepted practice by our military authorities to treat those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, as unlawful combatants punishable as such by military commission. This practice, accepted and followed by other governments, must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War. P. 35.
11. Citizens of the United States who associate themselves with the military arm of an enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. P. 37.
12. Even when committed by a citizen, the offense here charged is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. P. 38.
13. Article III, § 2, and the Fifth and Sixth Amendments of the Constitution did not extend the right to demand a jury to trials by military commission or require that offenses against the law of war, not triable by jury at common law, be tried only in civil courts. P. 38.
14. Section 2 of the Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776, and which imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial," was a contemporary construction of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as not foreclosing trial by military tribunals, without a jury, for offenses against the law of war.

committed by enemies not in or associated with our Armed Forces. It is a construction which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to great respect. P. 41.

15. Since violation of the law of war is adequately alleged in this case, the Court finds no occasion to consider the validity of other specifications based on the 81st and 82nd Articles of War, or to construe those articles or decide upon their constitutionality as so construed. P. 46.

Leave to file petitions for habeas corpus in this Court denied.

Orders of District Court (47 F. Supp. 431), affirmed.

The Court met in Special Term, on Wednesday, July 29, 1942, pursuant to a call by the Chief Justice having the approval of all the Associate Justices.

The Chief Justice announced that the Court had convened in Special Term in order that certain applications might be presented to it and argument be heard in respect thereto.

In response to an inquiry by the Chief Justice, the Attorney General stated that the Chief Justice's son, Major Lauson H. Stone, U. S. A., had, under orders, assisted defense counsel before the Military Commission, in the case relative to which the Special Term of the Court was called; but that Major Stone had had no connection with this proceeding before this Court. Therefore, said the Attorney General, counsel for all the respective parties in this proceeding joined in urging the Chief Justice to participate in the consideration and decision of the matters to be presented. Colonel Kenneth C. Royall, of counsel for the petitioners, concurred in the statement and request of the Attorney General.

The applications, seven in number (*ante*, p. 1, n. 1), first took the form of petitions to this Court for leave to file petitions for writs of habeas corpus to secure the release of the petitioners from the custody of Brigadier General

Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington, who, pursuant to orders, was holding them in that District for and during a trial before a Military Commission constituted by an Order of the President of the United States. During the course of the argument, the petitioners were permitted to file petitions for writs of certiorari, directed to the United States Court of Appeals for the District of Columbia, to review, before judgment by that Court, orders then before it by appeal by which the District Court for the District of Columbia had denied applications for leave to file petitions for writs of habeas corpus.

After the argument, this Court delivered a Per Curiam Opinion, disposing of the cases (footnote, p. 18). A full opinion, which is the basis of this Report, was filed with the Clerk of the Court on October 29, 1942, *post*, p. 18.

Colonel Kenneth C. Royall and *Colonel Cassius M. Dowell* had been assigned as defense counsel by the President in his Order appointing the Military Commission. Colonel Royall argued the case and Colonel Dowell was with him on the brief.

Enemy aliens may resort to habeas corpus. *Ex parte Milligan*, 4 Wall. 2, at pp. 115–121; *Kaufman* v. *Eisenberg*, 32 N. Y. S. 2d 450; *Ex parte Orozco*, 201 F. 106; *Ex parte Risse*, 257 F. 102; 55 Harvard L. Rev. 1058; 31 Ops. Atty. Gen. 361.

50 U. S. C. § 21 relates only to internment and does not authorize a proclamation denying to alien enemies the right to apply for writ of habeas corpus.

The 82nd Article of War, which provides for trial and punishment of spies by courts-martial *or* by military commission, must be construed as applying only to offenses committed in connection with actual military operations, or on or near military fortifications, encampments, or installations.

Mere proof that persons in uniform landed on the American coast from a submarine, or otherwise, does not supply any of the elements of spying. None of the petitioners committed any acts on, near, or in connection with any fortifications, posts, quarters, or encampments of the Army; or on, near, or in connection with any other military installations; or at any location within the zone of operations. 2 Wheaton, Int. L., 6th Ed., 766; 2 Oppenheim, Int. L., 1905 Ed., 161; Halleck, Int. L., 3d Ed., 573. In the absence of evidence of any acts within this zone, there is no authority for a military commission under Article of War 82.

That the acts alleged to have been committed by the petitioners in violation of the 81st Article were not in the zone of military operations would also preclude the jurisdiction of a military commission to try this offense. See 18 U. S. C. § 1; 50 U. S. C. §§ 31–42, 101–106. The petitioners were arrested by the civil authorities, waived arraignment before a civil court, and also waived removal to another federal judicial district. The civil courts thereby acquired jurisdiction; and there was no authority for the military authorities to oust these courts of this jurisdiction.

The Rules of Land Warfare describe no such offense as that set forth in the specifications of the first charge. These Rules were prepared in 1940 under the direction of the Judge Advocate General, and purport to include all offenses against the law of war.

The so-called law of war is a species of international law analogous to common law. There is no common law crime against the United States.

The first charge sets out no more than the offenses of sabotage and espionage, which are specifically covered by 50 U. S. C., §§ 31–42, 101–106, and which are triable by the civil courts.

The charge of conspiracy can not stand if the other charges fall. Furthermore, 18 U. S. C. 88 deals expressly with the offense of conspiracy, and this charge is not triable by a military commission.

The conduct of the petitioners was nothing more than preparation to commit the crime of sabotage. The objects of sabotage had never been specifically selected and the plan did not contemplate any act of sabotage within a period of three months. These facts are not even sufficient to constitute an attempt to commit sabotage.

The civil courts were functioning both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses were being tried. In these localities there was no martial law and no other circumstances which would justify action by a military tribunal.

The only way in which the petitioners as a practical matter could raise the jurisdictional question was by petition for writ of habeas corpus.

The military commission had no jurisdiction over petitioners. Article of War 2 defines the persons who are subject to military law, and includes members of the armed forces and other designated persons. Military courts-martial and other military tribunals have no jurisdiction to try any other person for offenses in violation of the Articles of War, except in the cases of Articles 81 and 82. The same is true of any alleged violations of the law of war. *Ex parte Milligan, supra;* 31 Ops. Atty. Gen. 356.

Civil persons who commit acts in other localities than the zone of active military operations are triable only in the civil courts and under the criminal statutes. While it is true that the territory along the coast was patrolled by the Coast Guard, the patrol was unarmed. It would be a strained use of language to say that this patrol made the beach a military line or part of the zone of active operations.

Nor is the situation changed by the fact that on the Long Island beach, some distance away, was located a Signal Corps platoon engaged in operating a radio locator station. The evidence shows that this platoon did not patrol the beach and was not engaged in any military offensive or defensive operation at the time the petitioners landed. The whole United States is divided into defense areas or sectors and the orders therefor are substantially similar to those providing for the southern and eastern defense sectors. If the prosecution were correct in its contention that the issuance of orders for these sectors creates a zone of active military operations, then the entire United States is a zone of active military operations, and persons located therein are subject to the jurisdiction of military tribunals. The Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations, but are instead parts of the Zone of the Interior as defined in the Field Service Regulations.

Martial law is a matter of fact and not a matter of proclamation; and a proclamation assuming to declare martial law is invalid unless the facts themselves support it. See *Sterling* v. *Constantin,* 287 U. S. 378.

The President's Order and Proclamation did not create a state of martial law in the entire eastern part of the United States. In view of the facts, there was no adequate reason, either of military necessity or otherwise, for depriving any persons in that area of the benefit of constitutional provisions guaranteeing an ordinary and proper trial before a civil court. *Ex parte Milligan, supra.*

The President had no authority, in absence of statute, to issue the Proclamation. In England, the practice has been to obtain authority of Parliament for similar action. 4 and 5 Geo. V, c. 29; 5 and 6 Geo. V, c. 8; 10 and 11 Geo. V, c. 55; 2 and 3 Geo. VI, (1939) c. 62. Congress alone can suspend the writ of habeas corpus, and then only in cases of rebellion or invasion. Const., Art. I, § 9, cl. 2;

Ex parte Merryman, 17 Fed. Cas. 114; *Ex parte Bollman,* 4 Cranch 101; *McCall* v. *McDowell,* Fed. Cas. No. 8673; *Ex parte Benedict,* 3 Fed. Cas. No. 1292; Willoughby, Const. L., § 1057.

The Proclamation was issued after the commission of the acts which are charged as crimes and is *ex post facto.* Congress itself could not have passed valid legislation increasing the penalty for acts already committed. Const., Art. I, § 9, cl. 3; *Thompson* v. *Utah,* 170 U. S. 343; *Burgess* v. *Salmon,* 97 U. S. 384.

The Proclamation is violative of the Fifth and Sixth Amendments, of Art. III, § 2, cl. 3, and of Art. I, § 9, cl. 2, of the Constitution.

The Order is invalid because it violates express provisions of Article of War 38 respecting rules of evidence; and is inconsistent with provisions of Article 43 requiring concurrence of three-fourths of the Commission's members for conviction or sentence.

Article 70 requires a preliminary hearing like one before a committing magistrate, with liberty of the accused to cross-examine. This is ignored by the Order.

Whereas Article 50½ requires action by the Board of Review and the recommendation of the Judge Advocate General before the case is submitted to the President, the Order requires that the Commission transmit the record of the trial, including any judgment or sentence, *directly* to the President for his action thereon.

The Order has made it impossible to comply with the statutory provisions, by directing the Judge Advocate General (and the Attorney General) to conduct the prosecution, thereby disqualifying the Judge Advocate General and his subordinates from acting as a reviewing authority. The proceedings disclose that the Judge Advocate General has in fact assisted in the conduct of the prosecution.

This is a material violation of the statutory rights afforded accused persons by the Articles of War. The

provisions of Articles 46 and 50½ are the methods of appeal by a person tried before a military commission. The Order deprives them of this method of appeal.

A cardinal purpose of Article 38 was to provide a procedure for military commissions, with the proviso that nothing in the procedure shall be "contrary to or inconsistent with" the Articles of War.

The President had no authority to delegate the rule-making power under Art. 38 to the Commission. In violation of Articles 38 and 18 the petitioners were denied the right to challenge a member of the Commission peremptorily. Confessions of the defendants were improperly admitted against each other.

If it be suggested that these are matters which do not affect the jurisdiction of the Commission or the validity of the proceedings, but are merely questions which may be raised on appeal or review, the answer is that the Order deprived the petitioners of such appeal or review.

Citing *Ex parte Milligan,* 4 Wall. 2; *Sterling* v. *Constantin,* 287 U. S. 378; *Caldwell* v. *Parker,* 252 U. S. 376; *Kahn* v. *Anderson,* 255 U. S. 1; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Carter* v. *Carter Coal Co.,* 298 U. S. 330; 55 Harvard L. Rev. 1295; 31 Ops. A. G. 363.

Attorney General Biddle, with whom *Judge Advocate General Myron C. Cramer, Assistant Solicitor General Cox, and Col. Erwin M. Treusch* were on the brief, for respondent.

Enemies who invade the country in time of war have no privilege to question their detention by habeas corpus. Halsbury's Laws of England, 2d Ed., Vol. IX, p. 701, par. 1200; p. 710, par. 1212; Blackstone, 21 Ed., Vol. 1, c. 10, p. 372; *Sylvester's Case,* 7 Mod. 150 (1703); *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43 (1917); *Rex* v. *Schiever,* 2 Burr. 765 (1759); *Furly* v. *Newnham,* 2 Doug. K. B. 419 (1780); *Three Spanish Sailors,* 2 W. B.

1324 (1779); *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Schaffenius* v. *Goldberg,* [1916] 1 K. B. 284; *Rules of Land Warfare,* pars. 9, 70, 351, 352, 356.

If prisoners of war are denied the privilege of the writ of habeas corpus, it is inescapable that petitioners are not entitled to it. By removal of their uniforms before their capture, they lost the possible advantages of being prisoners of war. Surely, they did not thus acquire a privilege even prisoners of war do not have.

Whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President. Alien enemies—even those lawfully resident within the country—have no privilege of habeas corpus to inquire into the cause of their detention as dangerous persons. *Ex parte Graber,* 247 F. 882; *Minotto* v. *Bradley,* 252 F. 600. See also *Ex parte Weber,* [1916] 1 K. B. 280, affirmed [1916] 1 A. C. 421; *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43; *Re Chamryk,* 25 Man. L. Rep. 50; *Re Beranek,* 33 Ont. L. Rep. 139; *Re Gottesman,* 41 Ont. L. Rep. 547; *Gusetu* v. *Date,* 17 Quebec Pr. 95; Act of July 6, 1798, 50 U. S. C. § 21; *De Lacey* v. *United States,* 249 F. 625.

The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. *Brown* v. *United States,* 8 Cranch 110, 121–123; *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297; *De Lacey* v. *United States,* 249 F. 625.

The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.

In his Proclamation, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believed to be enemy

invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States.

These acts were clearly within his power as Commander in Chief and Chief Executive, and were lawful acts of the sovereign—the Government of the United States—in time of war.

The prisoners are enemies who fall squarely within the terms of the President's proclamation. Cf. Trading with the Enemy Act of 1917, §§ 2, 7 (b).

To whatever extent the President has power to bar enemies from seeking writs of habeas corpus, he clearly has power to define "enemy" as including a class as broad as that described in the Trading with the Enemy Act.

Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as "enemies" of the United States. Hall, Int. L. (1909) 490–497; 2 Oppenheim, Int. L. (1940) 216–218. This rule applies to all persons living in enemy territory, even if they are technically United States citizens. *Miller* v. *United States,* 11 Wall. 268; *Juragua Iron Co.* v. *United States,* 212 U. S. 297, 308. The return of Burger and Haupt to the United States can not by any possibility be construed as an attempt to divest themselves of their enemy character by reassuming their duties as citizens.

The offenses charged against these prisoners are within the jurisdiction of this military commission. Articles of War 81 and 82 (10 U. S. C., §§ 1553–4).

The law of war, like civil law, has a great *lex non scripta,* its own common law. This "common law of war" (*Ex parte Vallandigham,* 1 Wall. 243, 249) is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers

and civilians during time of war. Winthrop, *Military Law and Precedents* (1920), 17, 41, 42, 773 ff.

The law of war has always been applied in this country. The offense for which Major André was convicted—passing through our lines in civilian dress, with hostile purpose—is one of the most dangerous offenses known to the law of war. The other offenses here charged—appearing behind the lines in civilian guise, spying, relieving the enemy, and conspiracy—are equally serious and also demand severe punishment. See *Digest of Opinions of Judge Advocate General,* Howland (1912), pp. 1070–1071. Cf. *Instruction for the Government of Armies of the United States in the Field* (G. O. 100, A. G. O. 1863) § I, par. 13; Davis, *Military Law of the United States* (1913), p. 310; Rules of Land Warfare, §§ 348, 351, 352; Article of War 15.

The definition of *lawful* belligerents appearing in the Rules of Land Warfare (Rule 9) was adopted by the signatories to the Hague Convention in Article I, Annex to Hague Convention No. IV of Oct. 18, 1907, Treaty Series No. 539, and was ratified by the Senate of the United States. 36 Stat. 2295. Our Government has thus recognized the existence of a class of *unlawful* belligerents. These unlawful belligerents, under Article of War 15, are punishable under the common law of war. See text writers, *supra; Ex parte Vallandigham,* 1 Wall. 243, 249.

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage, and the common law of war. Const., Art. I; Art. II, § 2 (1). In Congress and the President together is lodged the power to wage war successfully. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426.

Military commissions have been acknowledged by Congressional statutes which have recognized them as courts of military law. Articles of War 15, 38, 81, 82; 10 U. S. C.

§§ 1486, 1509, 1553, 1554. Their authority has also been recognized in presidential proclamations and orders, rulings of the courts, and opinions of the Attorneys General.

The offenses charged here are unquestionably within the jurisdiction of military commissions. The prisoners are charged with violating Articles of War 81 and 82 (10 U. S. C., §§ 1553–4) which specifically provide for trial by military commission. They are also charged with violating the common law of war in crossing our military lines and appearing behind our lines in civilian dress, with hostile purpose, and with conspiring to commit all the above violations, which in itself constitutes an additional violation of the law of war. The jurisdiction of military commissions over these offenses under the law of war (in addition to the specific offenses codified in the Articles of War) is expressly recognized by Article of War 15 (10 U. S. C. § 1486).

The military commission has jurisdiction over the persons of these prisoners. *Ex parte Milligan,* 4 Wall. 2, 123, 138–139. The offenses charged here arise in the land or naval forces. The law of war embraces citizens as well as aliens (enemy or not); and civilians as well as soldiers are all within their scope. Indeed it was for the very purpose of trying civilians for war crimes that military commissions first came into use. Winthrop, *Military Law and Precedents* (1920) 831–841.

This broad comprehension of persons is well within the limits of the excepting clause of the Fifth Amendment. That clause has been almost universally construed to include civilians. Wiener, *Manual of Martial Law* (1940), 137; Morgan, *Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War,* 4 Minn. L. Rev. 79, 107; Winthrop, *Military Law and Precedents* (1920 ed.) 48, 767; Fletcher, *The Civilian and the War Power,* 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292; *Ex parte Wildman,* 29 Fed. Cas. 1232. Such construction

is founded in common sense: of all hostile acts, those by civilians are most dangerous and should be punished most severely.

By the law of war, war crimes can be committed anywhere "within the lines of a belligerent." Oppenheim's Int. L. (Lauterpacht's 6th ed. 1940) 457. Having violated the law of war in an area where it obviously applies, offenders are subject to trial by military tribunals wherever they may be apprehended. Congress may grant jurisdiction to try civilians for offenses which "occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction." Cf. Morgan, *supra,* at 107; Wiener, *supra,* at 137. Neither the Bill of Rights nor *Ex parte Milligan* grants to such persons constitutional guarantees which the Fifth Amendment expressly denies to our own soldiers. Cf. 2 Warren, *The Supreme Court in United States History* (1937) 418; Corwin, *The President: Office and Powers* (2d ed. 1941) 165; *United States* v. *McDonald,* 265 F. 754. The test of whether or not the civil courts are open to punish civil crimes is too unrealistic a test to be applied blindly to all exercises of military jurisdiction.

The judgment of the President as to what constitutes necessity for trial by military tribunal should not lightly be disregarded. *Prize Cases,* 2 Black 635. The English courts have not only long since rejected the doctrine of *Ex parte Milligan,* which they once accepted, but also have recently sustained a wide discretion granted to the Executive for the detention of persons suspected of hostile associations. *Liversidge* v. *Anderson,* [1942] 1 A. C. 206; *Greene* v. *Secretary of State for Home Affairs,* [1942] 1 A. C. 284.

Courts do not inquire into the Executive's determination on matters of the type here involved. *Martin* v. *Mott,* 12 Wheat. 19. Cf. *United States* v. *George S. Bush*

& Co., 310 U. S. 371; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163. Even if it be assumed that the President's nomination of a military commission to try war criminals, as specified by Congress, must be tested by the "actual and present necessity" criterion of the majority opinion in the *Milligan* case, this Court will not review the President's judgment save in a case of grave and obvious abuse. *Moyer* v. *Peabody*, 212 U. S. 78; *Sterling* v. *Constantin*, 287 U. S. 378.

The Commission was legally convened and constituted. *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *Keyes* v. *United States*, 109 U. S. 336.

The procedure and regulations prescribed by the President are proper. Article of War 43, requiring unanimity for a death sentence, refers to courts-martial. It has no application to charges referred to a military commission. The President's order did not make improper provision for review, Articles of War 46, 48, 50½ and 51 considered. There was no improper delegation of rule-making power.

The doctrine of unconstitutional delegation of powers relates only to the improper transfer of powers from one of the three branches of the government to another. It has nothing to do with delegations by the Chief Executive to his military subordinates within the executive branch. Military courts "form no part of the judicial system of the United States." *Kurtz* v. *Moffitt*, 115 U. S. 487, 500.

Objections to the actions of the Commission on a variety of grounds, ranging from its refusal to permit peremptory challenges to its rulings on the admissibility and sufficiency of evidence, are not cognizable by this Court. The writ of habeas corpus can only be used to question the jurisdiction of a military tribunal. It cannot be converted into a device for civil court review.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942,

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The following is the *per curiam* opinion filed July 31, 1942:

PER CURIAM.

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this Court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347 (a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The Court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the

on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, 47 F. Supp. 431, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this

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President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.

Court petitions for certiorari to the Court of Appeals before judgment, pursuant to § 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a). We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins* v. *Elg*, 307 U. S. 325, 334; *United States ex rel. Rojak* v. *Marshall*, 34 F. 2d 219; *United States ex rel. Scimeca* v. *Husband*, 6 F. 2d 957, 958; 8 U. S. C. § 801, and compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned, and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in

United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.[1]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942,[2] appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation,[3] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation,

[1] From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12–13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16–17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12–13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under written orders mentioning the purpose of detecting landings. On the night of June 17–18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

[2] 7 Federal Register 5103.

[3] 7 Federal Register 5101.

and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.

2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.

3. Violation of Article 82, defining the offense of spying.

4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in

the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker* v. *Johnston*, 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan*, 4 Wall. 2, 110–13; *Betts* v. *Brady*, 316 U. S. 455, 458–461.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of

persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion, we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.[4] Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Hill* v. *Texas,* 316 U. S. 400, 406. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of

[4] As appears from the stipulation, a defense offered before the Military Commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471–1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts

martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U. S. C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct

of war, the status, rights and duties of enemy nations as well as of enemy individuals.[5] By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law

[5] *Talbot* v. *Janson*, 3 Dall. 133, 153, 159–61; *Talbot* v. *Seeman*, 1 Cranch 1, 40–41; *Maley* v. *Shattuck*, 3 Cranch 458, 488; *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch 185, 199; *The Rapid*, 8 Cranch 155, 159–64; *The St. Lawrence*, 9 Cranch 120, 122; *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 197–98; *The Anne*, 3 Wheat. 435, 447–48; *United States* v. *Reading*, 18 How. 1, 10; *Prize Cases*, 2 Black 635, 666–67, 687; *The Venice*, 2 Wall. 258, 274; *The William Bagaley*, 5 Wall. 377; *Miller* v. *United States*, 11 Wall. 268; *Coleman* v. *Tennessee*, 97 U. S. 509, 517; *United States* v. *Pacific Railroad*, 120 U. S. 227, 233; *Juragua Iron Co.* v. *United States*, 212 U. S. 297.

of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra.* But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense, since it has adopted by reference the sufficiently precise definition of international law. *United States* v. *Smith,* 5 Wheat. 153; see *The Marianna Flora,* 11 Wheat. 1, 40–41;

United States v. *Brig Malek Adhel,* 2 How. 210, 232; *The Ambrose Light,* 25 F. 408, 423–28; 18 U. S. C. § 481.[6] Similarly, by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes* v. *Hoover,* 20 How. 65, 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations[7] and also be-

[6] Compare 28 U. S. C. § 41 (17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606 (b) and 713 (b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

[7] Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17–19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653–54; 2 Oppenheim, International Law (6th ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531–32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034–35.

tween those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196–97, 1219–21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, §§ IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,[9] and during the Mexican and Civil Wars.[10]

[8] Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445–451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

[9] On September 29, 1780, Major John Andre, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major Andre had in his possession papers containing in-

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph

telligence for the enemy, and reported their conclusion that "Major Andre . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major Andre was hanged on October 2, 1780. Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780, printed at Philadelphia in 1780.

[10] During the Mexican War military commissions were created in a large number of instances for the trial of various offenses. See General Orders cited in 2 Winthrop, Military Law (2d ed. 1896) p. 1298, note 1.

During the Civil War the military commission was extensively used for the trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a military commission, for "violations of the laws and usages of civilized war," the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The Commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On January 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war." The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the Commission was affirmed on the ground that he was both a spy

84, that "Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."[11] These and related provisions have

and a "guerrilla," and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare." He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On September 19, 1865, William Murphy, "a rebel emissary in the employ of and colleagued with rebel enemies," was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army," were tried and convicted by military commission for "being secretly within the lines of the United States forces," James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines," Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States," although not "as a spy," Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law of war punished by military commissions during the Civil War, see 2 Winthrop, Military Laws and Precedents (2d ed. 1896) 1310–11.

[11] See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

been continued in substance by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369–77; Rules of 1940, Par. 345–57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty, although a lesser penalty may be imposed." Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population," and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem." Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals." Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And paragraph 352 provides that "armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war." As is evident from reading these and related Paragraphs 345–347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the Convention declares:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law [12] that we think it must be regarded as

[12] Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes." The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroy-

a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory

ing bridges, war materials, communication facilities, etc.: 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 283; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Völkerrecht (12 ed. 1925), § 58 (B) 4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296–97; Bluntschli, Droit International Codifié (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) any hostile act: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid,

guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates* v. *Goodloe,* 101 U. S. 612, 615, 617–18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan* v. *Devine,* 237 U. S. 632; *Albrecht* v. *United States,* 273 U. S. 1, 11–12.

But petitioners insist that, even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Arti-

cle III, the Judiciary Article, had provided, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed."

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham,* 1 Wall. 243; *In re Vidal,* 179 U. S. 126; cf. *Williams* v. *United States,* 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia* v. *Colts,* 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan* v. *Wilson,* 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick* v. *United States,* 195 U. S. 65; *District of Colum-*

bia v. *Clawans,* 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry,* 128 U. S. 289, 302–04; *Savin, Petitioner,* 131 U. S. 267, 277; *In re Debs,* 158 U. S. 564, 594–96; *United States* v. *Shipp,* 203 U. S. 563, 572; *Blackmer* v. *United States,* 284 U. S. 421, 440; *Nye* v. *United States,* 313 U. S. 33, 48; see *United States* v. *Hudson and Goodwin,* 7 Cranch 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States* v. *Zucker,* 161 U. S. 475; *United States* v. *Regan,* 232 U. S. 37, and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2, or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions." In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra,* 123, 138–39. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to

give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776,[13] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our Government, and is now continued in the 82nd Article of War. Such a construction is entitled to

[13] See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107–09.

the greatest respect. *Stuart* v. *Laird,* 1 Cranch 299, 309; *Field* v. *Clark,* 143 U. S. 649, 691; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 328. It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.[14]

[14] In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John Andre, Sept. 29, 1780, see note 9 *supra.* (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy," and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449–50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139–40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20–21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy. Proceedings of a General Court Martial Convened at the Request of Major General

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*; 105 U. S. 696; *Kahn* v. *Anderson*, 255 U. S. 1, 8–9; *cf. Caldwell* v. *Parker*, 252 U. S. 376.

Arnold at the Township of Bedford, Aug. 30–31, 1780 (*Id.* MS No. 31523). He later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of "M. A." and "D. C.," G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washington, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135 and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged, by a general court-martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O–13. William Utley, tried as a spy by a court martial held at Plattsburg, March 3–5, 1814, was acquitted. *Id.*, MS No. X–161. Elijah Clark was convicted as

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—

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a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5–8, 1812. He was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121–122; Maltby, Treatise on Courts Martial and Military Law (1813) 35–36.

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 109–11. During the Civil War a number of Confederate officers and soldiers, found within the Union lines in disguise, were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregory, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission, see 2 Winthrop, Military Law and Precedents, 1193 *et seq.*

whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or, what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, *supra*, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Elsewhere in its opinion, at pp. 118, 121–22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define

with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally* v. *Hill*, 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaughry* v. *Deming*, 186 U. S. 49; *United States* v. *Brown*, 206 U. S. 240, 244; *Runkle* v. *United States*, 122 U. S. 543, 555–56; *Dynes* v. *Hoover*, 20 How. 65, 80–81); that the President's Order prescribes such an unlawful

procedure; and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that, since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been em-

ployed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.

ANEXO 03 – CASO *HAMDI V. RUMSFELD* (2004)

Syllabus

HAMDI ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-6696. Argued April 28, 2004—Decided June 28, 2004

After Congress passed a resolution—the Authorization for Use of Military Force (AUMF)—empowering the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001, al Qaeda terrorist attacks, the President ordered the Armed Forces to Afghanistan to subdue al Qaeda and quell the supporting Taliban regime. Petitioner Yaser Hamdi, an American citizen whom the Government has classified as an "enemy combatant" for allegedly taking up arms with the Taliban during the conflict, was captured in Afghanistan and presently is detained at a naval brig in Charleston, S. C. Hamdi's father filed this habeas petition on his behalf under 28 U. S. C. § 2241, alleging, among other things, that the Government holds his son in violation of the Fifth and Fourteenth Amendments. Although the petition did not elaborate on the factual circumstances of Hamdi's capture and detention, his father has asserted in other documents in the record that Hamdi went to Afghanistan to do "relief work" less than two months before September 11 and could not have received military training. The Government attached to its response to the petition a declaration from Michael Mobbs (Mobbs Declaration), a Defense Department official. The Mobbs Declaration alleges various details regarding Hamdi's trip to Afghanistan, his affiliation there with a Taliban unit during a time when the Taliban was battling U. S. allies, and his subsequent surrender of an assault rifle. The District Court found that the Mobbs Declaration, standing alone, did not support Hamdi's detention and ordered the Government to turn over numerous materials for *in camera* review. The Fourth Circuit reversed, stressing that, because it was undisputed that Hamdi was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper. Concluding that the factual averments in the Mobbs Declaration, if accurate, provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi, the court ordered the habeas petition dismissed. The appeals court held that, assuming that express congressional authorization of the detention was required by 18 U. S. C.

Syllabus

§ 4001(a)—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"—the AUMF's "necessary and appropriate force" language provided the authorization for Hamdi's detention. It also concluded that Hamdi is entitled only to a limited judicial inquiry into his detention's legality under the war powers of the political branches, and not to a searching review of the factual determinations underlying his seizure.

Held: The judgment is vacated, and the case is remanded.

316 F. 3d 450, vacated and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded that although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. P. 509.

JUSTICE SOUTER, joined by JUSTICE GINSBURG, concluded that Hamdi's detention is unauthorized, but joined with the plurality to conclude that on remand Hamdi should have a meaningful opportunity to offer evidence that he is not an enemy combatant. Pp. 540–541, 553.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined. SOUTER, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 539. SCALIA, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 554. THOMAS, J., filed a dissenting opinion, *post*, p. 579.

Frank W. Dunham, Jr., argued the cause for petitioners. With him on the briefs were *Geremy C. Kamens*, *Kenneth P. Troccoli*, and *Frances H. Pratt*.

Deputy Solicitor General Clement argued the cause for respondents. With him on the brief were *Solicitor General Olson*, *Gregory G. Garre*, and *John A. Drennan*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Dennis W. Archer* and *Barry Sullivan*; for AmeriCares et al. by *Steven M. Pesner*, *Michael Small*, and *Jeffrey P. Kehne*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Sharon M. McGowan*, *David Saperstein*, *Jeffrey Sinensky*, *Kara Stein*, and *Arthur Bryant*; for the Cato Institute by *Timothy Lynch*; for Global Rights by *James F. Fitzpatrick*, *Kathleen A. Behan*, and *Gay J. McDougall*; for Wil-

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner Yaser Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

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liam J. Aceves et al. by *Douglas W. Baruch;* for Charles B. Gittings, Jr., by *Donald G. Rehkopf, Jr.;* for the Honorable Nathaniel R. Jones et al. by *Robert P. LoBue;* for Douglas Peterson et al. by *Philip Allen Lacovara* and *Andrew J. Pincus;* and for Mary Robinson et al. by *Harold Hongju Koh* and *Jonathan M. Freiman.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law & Justice by *Jay Alan Sekulow, Thomas P. Monaghan, Stuart J. Roth, Colby M. May, James M. Henderson, Sr., Joel H. Thornton, John P. Tuskey,* and *Shannon D. Woodruff;* for the Center for American Unity et al. by *Barnaby W. Zall;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for Citizens for the Common Defence by *Adam H. Charnes;* and for the Washington Legal Foundation et al. by *Thomas V. Loran, William T. DeVinney, Daniel J. Popeo,* and *Richard A. Samp.*

A brief of *amici curiae* urging affirmance in No. 03–6696 and reversal in No. 03–1027, *Rumsfeld, Secretary of Defense* v. *Padilla et al., ante,* p. 426, was filed for Senator John Cornyn et al. by *Senator Cornyn, pro se.*

Karen B. Tripp filed a brief for the Eagle Forum Education & Legal Defense Fund as *amicus curiae.*

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the

determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U. S. C. § 2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend. The elder Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." App. 103, 104. The petition contends that Hamdi's detention was not legally authorized. *Id.*, at 105. It argues that, "[a]s an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution." *Id.*, at 107. The habeas petition asks that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) "[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody." *Id.*, at 108–109. Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received military training. *Id.*, at 188–189. The 20-year-old was traveling on his own for the first time, his father says, and "[b]ecause of his lack of experience, he was

trapped in Afghanistan once the military campaign began." *Ibid.*

The District Court found that Hamdi's father was a proper next friend, appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi. *Id.*, at 113–116. The United States Court of Appeals for the Fourth Circuit reversed that order, holding that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests. 296 F. 3d 278, 279, 283 (2002). It directed the District Court to consider "the most cautious procedures first," *id.*, at 284, and to conduct a deferential inquiry into Hamdi's status, *id.*, at 283. It opined that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Ibid.*

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter Mobbs Declaration), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." App. 148. He expressed his "familiar[ity]" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U. S. military forces." *Ibid.*

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that

he thereafter "affiliated with a Taliban military unit and received weapons training." *Ibid.* It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. *Id.*, at 148–149. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." *Id.*, at 149. Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." *Ibid.* According to the declaration, a series of "U. S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "[a] subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." *Id.*, at 149–150.

After the Government submitted this declaration, the Fourth Circuit directed the District Court to proceed in accordance with its earlier ruling and, specifically, to " 'consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.' " 316 F. 3d 450, 462 (2003). The District Court found that the Mobbs Declaration fell "far short" of supporting Hamdi's detention. App. 292. It criticized the generic and hearsay nature of the affidavit, calling it "little more than the government's 'say-so.' " *Id.*, at 298. It ordered the Government to turn over numerous materials for *in camera* review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses;

statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig. *Id.*, at 185–186. The court indicated that all of these materials were necessary for "meaningful judicial review" of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations. *Id.*, at 291–292.

The Government sought to appeal the production order, and the District Court certified the question of whether the Mobbs Declaration, "'standing alone, is sufficient as a matter of law to allow a meaningful judicial review of [Hamdi's] classification as an enemy combatant.'" 316 F. 3d, at 462. The Fourth Circuit reversed, but did not squarely answer the certified question. It instead stressed that, because it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper. *Id.*, at 459. Concluding that the factual averments in the Mobbs Declaration, "if accurate," provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi pursuant to the President's war powers, it ordered the habeas petition dismissed. *Id.*, at 473. The Fourth Circuit emphasized that the "vital purposes" of the detention of uncharged enemy combatants—preventing those combatants from rejoining the enemy while relieving the military of the burden of litigating the circumstances of wartime captures halfway around the globe—were interests "directly derived from the war powers of Articles I and II." *Id.*, at 465–466. In that court's view, because "Article III contains nothing analogous to the specific powers of war so

carefully enumerated in Articles I and II," *id.*, at 463, separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture," *id.*, at 473. Accordingly, the District Court's more vigorous inquiry "went far beyond the acceptable scope of review." *Ibid.*

On the more global question of whether legal authorization exists for the detention of citizen enemy combatants at all, the Fourth Circuit rejected Hamdi's arguments that 18 U. S. C. § 4001(a) and Article 5 of the Geneva Convention rendered any such detentions unlawful. The court expressed doubt as to Hamdi's argument that § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," required express congressional authorization of detentions of this sort. But it held that, in any event, such authorization was found in the post-September 11 AUMF. 316 F. 3d, at 467. Because "capturing and detaining enemy combatants is an inherent part of warfare," the court held, "the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Ibid.*; see also *id.*, at 467–468 (noting that Congress, in 10 U. S. C. § 956(5), had specifically authorized the expenditure of funds for keeping prisoners of war and persons whose status was determined "to be similar to prisoners of war," and concluding that this appropriation measure also demonstrated that Congress had "authoriz[ed these individuals'] detention in the first instance"). The court likewise rejected Hamdi's Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities. 316 F. 3d, at 468–469.

Finally, the Fourth Circuit rejected Hamdi's contention that its legal analyses with regard to the authorization for the detention scheme and the process to which he was consti-

tutionally entitled should be altered by the fact that he is an American citizen detained on American soil. Relying on *Ex parte Quirin*, 317 U. S. 1 (1942), the court emphasized that "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." 316 F. 3d, at 475. "The privilege of citizenship," the court held, "entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there." *Ibid.*

The Fourth Circuit denied rehearing en banc, 337 F. 3d 335 (2003), and we granted certiorari, 540 U. S. 1099 (2004). We now vacate the judgment below and remand.

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "'part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and who "'engaged in an armed conflict against the United States'" there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Con-

stitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U. S. C. § 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U. S. C. § 811 *et seq.*, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II. H. R. Rep. No. 92–116 (1971); *id.*, at 4 ("The concentration camp implications of the legislation render it abhorrent"). The Government again presses two alternative positions. First, it argues that § 4001(a), in light of its legislative history and its location in Title 18, applies only to "the control of civilian prisons and related detentions," not to military detentions. Brief for Respondents 21. Second, it maintains that § 4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress"—the AUMF. *Id.*, at 21–22. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin*, *supra*, at 28, 30. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947))); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure'" (citations omitted)); cf. *In re Territo*, 156 F. 2d 142, 145 (CA9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on

must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released" (footnotes omitted)).

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U. S., at 20. We held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.*, at 37–38. While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. See *id.*, at 30–31. See also Lieber Code ¶ 153, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 273, ¶ 153 (1880) (contemplating, in code binding the Union Army during the Civil War, that "captured rebels" would be treated "as prisoners of war"). Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject.

The Government responds that "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought." *Id.*, at 16. We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." *Ibid.* The prospect Hamdi raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV), *supra*, Oct. 18, 1907, 36 Stat. 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Paust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510–511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are

being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 U. S. T., at 3384, 3392, 3406, 3418)).

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, *e. g.*, Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); Dept. of Defense, News Transcript, Gen. J. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html (as visited June 8, 2004, and available in Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan, 4 Wall. 2, 125 (1866), does not undermine our holding about the Government's authority to seize

enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. *Id.*, at 118, 131. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.[1]

Moreover, as JUSTICE SCALIA acknowledges, the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. *Post*, at 570 (dissenting opinion). Clear in this rejection was a disavowal of the New York State cases cited in *Milligan*, 4 Wall., at 128–129, on which JUSTICE SCALIA relies. See *ibid.* Both *Smith* v. *Shaw*, 12 Johns. *257 (N. Y. 1815), and *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815), were civil suits for false imprisonment. Even accepting that these cases once could have been viewed as standing for the sweeping proposition for which JUSTICE SCALIA cites them—that the military does not have authority to try an American citizen accused of spying against his country during wartime—*Quirin* makes undeniably clear that this is not the law today.

[1] Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.

Haupt, like the citizens in *Smith* and *M'Connell*, was accused of being a spy. The Court in *Quirin* found him "subject to trial and punishment by [a] military tribuna[l]" for those acts, and held that his citizenship did not change this result. 317 U. S., at 31, 37–38.

Quirin was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

To the extent that JUSTICE SCALIA accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because "[i]n *Quirin* it was uncontested that the petitioners were members of enemy forces," while Hamdi challenges his classification as an enemy combatant. *Post*, at 571. But it is unclear why, in the paradigm outlined by JUSTICE SCALIA, such a concession should have any relevance. JUSTICE SCALIA envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. *Post*, at 554. He does not explain how his historical analysis supports the addition of a third option—detention under some other process after concession of enemy-combatant status—or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process. To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

Further, JUSTICE SCALIA largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone. JUSTICE SCALIA refers to only one case involv-

ing this factual scenario—a case in which a United States citizen-prisoner of war (a member of the Italian army) from World War II was seized on the battlefield in Sicily and then held in the United States. The court in that case held that the military detention of that United States citizen was lawful. See *In re Territo*, 156 F. 2d, at 148.

JUSTICE SCALIA's treatment of that case—in a footnote—suffers from the same defect as does his treatment of *Quirin*: Because JUSTICE SCALIA finds the fact of battlefield capture irrelevant, his distinction based on the fact that the petitioner "conceded" enemy-combatant status is beside the point. See *supra*, at 523. JUSTICE SCALIA can point to no case or other authority for the proposition that those captured on a foreign battlefield (whether detained there or in U. S. territory) cannot be detained outside the criminal process.

Moreover, JUSTICE SCALIA presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. See *post*, at 577. This creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with

the Fifth and Fourteenth Amendments. Brief for Petitioners 16. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Brief for Respondents 46. Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U. S. Const., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). Only in the rarest of circumstances has Congress seen fit to suspend the writ. See, *e. g.*, Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U. S. C. § 2241. Brief for Respondents 12. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, *id.*, at 37–38, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

B

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." 337 F. 3d, at 357 (opinion of Luttig, J.); see also *id.*, at 371–372 (opinion of Motz, J.). Further, the "facts" that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict. Brief for Respondents 3. The habeas petition states only that

"[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." App. 104. An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was "*captured* in a zone of active combat" operations in a foreign theater of war, 316 F. 3d, at 459 (emphasis added), and certainly is not a concession that one was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States." Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

C

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. Brief for Respondents 26. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. *Id.*, at 34 ("Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination" (citing *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445, 455–457 (1985) (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion"))). Under this review, a court would assume the accuracy of the Government's articulated

basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. Brief for Respondents 36; see also 316 F. 3d, at 473–474 (declining to address whether the "some evidence" standard should govern the adjudication of such claims, but noting that "[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm" the legality of Hamdi's detention).

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. See, *e. g., Zadvydas* v. *Davis*, 533 U. S. 678, 690 (2001); *Addington* v. *Texas*, 441 U. S. 418, 425–427 (1979). He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," Brief for Petitioners 21, and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counterevidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review." App. 291.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use

for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U. S. Const., Amdt. 5, is the test that we articulated in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). See, *e. g.*, *Heller* v. *Doe*, 509 U. S. 312, 330–331 (1993); *Zinermon* v. *Burch*, 494 U. S. 113, 127–128 (1990); *United States* v. *Salerno*, 481 U. S. 739, 746 (1987); *Schall* v. *Martin*, 467 U. S. 253, 274–275 (1984); *Addington* v. *Texas*, *supra*, at 425. *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U. S., at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Ibid.* We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); see also *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) (noting the "substantial liberty interest in not being confined unnecessarily"). "In our society liberty is the norm," and detention without trial "is the carefully limited exception." *Salerno*, *supra*, at 755. "We have always been careful not to 'minimize the importance and fundamental nature' of the individu-

al's right to liberty," *Foucha, supra,* at 80 (quoting *Salerno, supra,* at 750), and we will not do so today.

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection," *Jones* v. *United States,* 463 U. S. 354, 361 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual. *Carey* v. *Piphus,* 435 U. S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also *id.,* at 266 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"). Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. See Brief for AmeriCares et al. as *Amici Curiae* 13–22 (noting ways in which "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions"). Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan,* 4 Wall., at 125 ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time,

was especially hazardous to freemen"). Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975), our starting point for the *Mathews* v. *Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, *supra*, at 518, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of wag-

ing battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. Brief for Respondents 46–49. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 164–165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); see also *United States* v. *Robel*, 389 U. S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous depri-

vation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. *Mathews*, 424 U. S., at 335.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. See *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'" (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950))); *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (quoting *Ward* v. *Monroeville*, 409 U. S. 57, 61–62 (1972))). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972) (quoting *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864); *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (other citations omitted)). These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be

accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, 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 and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U. S., at 335.[2]

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Brief for Respondents 3–4. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments

[2] Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.

that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu* v. *United States*, 323 U. S. 214, 233–234 (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); *Sterling* v. *Constantin*, 287 U. S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examina-

tion of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U. S., at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta* v. *United States*, 488 U. S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. See *St. Cyr*, 533 U. S., at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"). Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court

with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any 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. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. Brief for Respondents 35. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. See, *e. g.*, *St. Cyr, supra; Hill*, 472 U. S., at 455–457. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.

Today we are faced only with such a case. Aside from unspecified "screening" processes, Brief for Respondents 3–4, and military interrogations in which the Government suggests Hamdi could have contested his classification, Tr. of Oral Arg. 40, 42, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. Compare Brief for Respondents 42–43 (discussing the "secure interrogation environment," and noting that military interrogations require a controlled "interrogation dynamic" and "a relationship of trust and dependency" and are "a critical source" of

"timely and effective intelligence") with *Concrete Pipe*, 508 U. S., at 617–618 ("[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true" (internal quotation marks omitted)). That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey* v. *Ohio*, 273 U. S. 510, 522 (1927). Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, ch. 1, § 1–6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We antici-

pate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

IV

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Brief for Petitioners 19. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

According to Yaser Hamdi's petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side. It is undisputed that the Government has not charged

him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an Executive designation of Hamdi as an "enemy combatant," the Government denied him the right to send or receive any communication beyond the prison where he was held and, in particular, denied him access to counsel to represent him.[1] The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the Government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.

In these proceedings on Hamdi's petition, he seeks to challenge the facts claimed by the Government as the basis for holding him as an enemy combatant. And in this Court he presses the distinct argument that the Government's claim, even if true, would not implicate any authority for holding him that would satisfy 18 U. S. C. § 4001(a) (Non-Detention Act), which bars imprisonment or detention of a citizen "except pursuant to an Act of Congress."

The Government responds that Hamdi's incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes. Accordingly, the Government contends that Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant; and even that challenge may go no further than to enquire whether "some evidence" supports Hamdi's designation, see Brief for Respondents 34–36; if there is "some evidence," Hamdi should remain locked up at the discretion of the Executive. At the argument of this case, in fact, the Government went further and suggested that as long as a prisoner could challenge his enemy combatant des-

[1] The Government has since February 2004 permitted Hamdi to consult with counsel as a matter of policy, but does not concede that it has an obligation to allow this. Brief for Respondents 9, 39–46.

ignation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. See Tr. of Oral Arg. 40; *id.*, at 42 ("[H]e has an opportunity to explain it in his own words" "[d]uring interrogation"). Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional.

The plurality rejects any such limit on the exercise of habeas jurisdiction and so far I agree with its opinion. The plurality does, however, accept the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by § 4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). *Ante*, at 517–521. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

I

The Government's first response to Hamdi's claim that holding him violates § 4001(a), prohibiting detention of citizens "except pursuant to an Act of Congress," is that the statute does not even apply to military wartime detentions, being beyond the sphere of domestic criminal law. Next, the Government says that even if that statute does apply, two Acts of Congress provide the authority § 4001(a) demands: a general authorization to the Department of Defense to pay for detaining "prisoners of war" and "similar" persons, 10 U. S. C. § 956(5), and the Force Resolution, passed after the attacks of 2001. At the same time, the Govern-

ment argues that in detaining Hamdi in the manner described, the President is in any event acting as Commander in Chief under Article II of the Constitution, which brings with it the right to invoke authority under the accepted customary rules for waging war. On the record in front of us, the Government has not made out a case on any theory.

II

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U. S. C. § 4001(a). Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification, see *infra*, at 548–549, the answer has to be no. For a number of reasons, the prohibition within § 4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

First, the circumstances in which the Act was adopted point the way to this interpretation. The provision superseded a cold-war statute, the Emergency Detention Act of 1950 (formerly 50 U. S. C. § 811 *et seq.* (1970 ed.)), which had authorized the Attorney General, in time of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu* v. *United States*, 323 U. S. 214 (1944). See H. R. Rep. No. 92–116, pp. 2, 4–5 (1971). While Congress might simply have struck the 1950 statute, in considering the repealer the point was made that the existing statute provided some ex-

press procedural protection, without which the Executive would seem to be subject to no statutory limits protecting individual liberty. See *id.*, at 5 (mere repeal "might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority"); 117 Cong. Rec. 31544 (1971) (Emergency Detention Act "remains as the only existing barrier against the future exercise of executive power which resulted in" the Japanese internment); cf. *id.*, at 31548 (in the absence of further procedural provisions, even § 4001(a) "will virtually leave us stripped naked against the great power . . . which the President has"). It was in these circumstances that a proposed limit on Executive action was expanded to the inclusive scope of § 4001(a) as enacted.

The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us § 4001(a) provides a powerful reason to think that § 4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. It is not merely that the legislative history shows that § 4001(a) was thought necessary in anticipation of times just like the present, in which the safety of the country is threatened. To appreciate what is most significant, one must only recall that the internments of the 1940s were accomplished by Executive action. Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, see *Ex parte Endo*, 323 U. S. 283, 285–288 (1944), the statute said nothing whatever about the detention of those who might be removed, *id.*, at 300–301; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority, see *id.*, at 287–293. When, therefore, Congress repealed the 1950 Act and adopted § 4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority (for example, providing "ac-

commodations" for those subject to removal) as authority for detention or imprisonment at the discretion of the Executive (maintaining detention camps of American citizens, for example). In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment.

Second, when Congress passed § 4001(a) it was acting in light of an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement and it presumably intended § 4001(a) to be read accordingly. This need for clarity was unmistakably expressed in *Ex parte Endo, supra,* decided the same day as *Korematsu. Endo* began with a petition for habeas corpus by an interned citizen claiming to be loyal and law-abiding and thus "unlawfully detained." 323 U. S., at 294. The petitioner was held entitled to habeas relief in an opinion that set out this principle for scrutinizing wartime statutes in derogation of customary liberty:

> "In interpreting a wartime measure we must assume that [its] purpose was to allow for the greatest possible accommodation between . . . liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.*, at 300.

Congress's understanding of the need for clear authority before citizens are kept detained is itself therefore clear, and § 4001(a) must be read to have teeth in its demand for congressional authorization.

Finally, even if history had spared us the cautionary example of the internments in World War II, even if there had been no *Korematsu,* and *Endo* had set out no principle of statutory interpretation, there would be a compelling reason

to read § 4001(a) to demand manifest authority to detain before detention is authorized. The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

III

Under this principle of reading § 4001(a) robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention.

A

First, there is the argument that § 4001(a) does not even apply to wartime military detentions, a position resting on the placement of § 4001(a) in Title 18 of the United States Code, the gathering of federal criminal law. The text of the

statute does not, however, so limit its reach, and the legislative history of the provision shows its placement in Title 18 was not meant to render the statute more restricted than its terms. The draft of what is now § 4001(a) as contained in the original bill prohibited only imprisonment unauthorized by Title 18. See H. R. Rep. No. 92–116, at 4. In response to the Department of Justice's objection that the original draft seemed to assume wrongly that all provisions for the detention of convicted persons would be contained in Title 18, the provision was amended by replacing a reference to that title with the reference to an "Act of Congress." *Id.*, at 3. The Committee on the Judiciary, discussing this change, stated that "[limiting] detention of citizens . . . to situations in which . . . an Act of Congres[s] exists" would "assure that no detention camps can be established without at least the acquiescence of the Congress." *Id.*, at 5. See also *supra*, at 542–544. This understanding, that the amended bill would sweep beyond imprisonment for crime and apply to Executive detention in furtherance of wartime security, was emphasized in an extended debate. Representative Ichord, chairman of the House Internal Security Committee and an opponent of the bill, feared that the redrafted statute would "deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec., at 31542. Representative Railsback, the bill's sponsor, spoke of the bill in absolute terms: "[I]n order to prohibit arbitrary executive action, [the bill] assures that no detention of citizens can be undertaken by the Executive without the prior consent of the Congress." *Id.*, at 31551. This legislative history indicates that Congress was aware that § 4001(a) would limit the Executive's power to detain citizens in wartime to protect national security, and it is fair to say that the prohibition was thus intended to extend not only to the exercise of power to vindicate the interests underlying domestic criminal law, but to statutorily unauthor-

ized detention by the Executive for reasons of security in wartime, just as Hamdi claims.[2]

B

Next, there is the Government's claim, accepted by the plurality, that the terms of the Force Resolution are adequate to authorize detention of an enemy combatant under the circumstances described,[3] a claim the Government fails to support sufficiently to satisfy § 4001(a) as read to require a clear statement of authority to detain. Since the Force Resolution was adopted one week after the attacks of September 11, 2001, it naturally speaks with some generality, but its focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But, like the statute discussed in *Endo*, it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit. See, *e. g.*, 18 U. S. C.

[2] Nor is it possible to distinguish between civilian and military authority to detain based on the congressional object of avoiding another *Korematsu* v. *United States*, 323 U. S. 214 (1944). See Brief for Respondents 21 (arguing that military detentions are exempt). Although a civilian agency authorized by Executive order ran the detention camps, the relocation and detention of American citizens was ordered by the military under authority of the President as Commander in Chief. See *Ex parte Endo*, 323 U. S. 283, 285–288 (1944). The World War II internment was thus ordered under the same Presidential power invoked here and the intent to bar a repetition goes to the action taken and authority claimed here.

[3] As noted, *supra*, at 541, the Government argues that a required Act of Congress is to be found in a statutory authorization to spend money appropriated for the care of prisoners of war and of other, similar prisoners, 10 U. S. C. § 956(5). It is enough to say that this statute is an authorization to spend money if there are prisoners, not an authorization to imprison anyone to provide the occasion for spending money.

§ 2339A (material support for various terrorist acts); § 2339B (material support to a foreign terrorist organization); § 2332a (use of a weapon of mass destruction, including conspiracy and attempt); § 2332b(a)(1) (acts of terrorism "transcending national boundaries," including threats, conspiracy, and attempt); § 2339C (2000 ed., Supp. II) (financing of certain terrorist acts); see also § 3142(e) (pretrial detention). See generally Brief for Janet Reno et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, pp. 14–19, and n. 17 (listing the tools available to the Executive to fight terrorism even without the power the Government claims here); Brief for Louis Henkin et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, p. 23, n. 27.[4]

C

Even so, there is one argument for treating the Force Resolution as sufficiently clear to authorize detention of a citizen consistently with § 4001(a). Assuming the argument to be sound, however, the Government is in no position to claim its advantage.

Because the Force Resolution authorizes the use of military force in acts of war by the United States, the argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Brief for Respondents 20– 22; see *ante*, at 517–521 (accepting this argument). Accordingly, the United States may detain captured enemies, and *Ex parte Quirin*, 317 U. S. 1 (1942), may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with

[4] Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has found no shortage of offenses to allege. See *United States* v. *Lindh*, 212 F. Supp. 2d 541, 547 (ED Va. 2002); *United States* v. *Khan*, 309 F. Supp. 2d 789, 796 (ED Va. 2004).

him under the usages of war. *Id.*, at 31, 37–38. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the Force Resolution, Hamdi's detention is authorized for purposes of § 4001(a).

There is no need, however, to address the merits of such an argument in all possible circumstances. For now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi. In a statement of its legal position cited in its brief, the Government says that "the Geneva Convention applies to the Taliban detainees." Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), www.whitehouse.gov/news/releases/2002/02/20020207-13.html (as visited June 18, 2004, and available in Clerk of Court's case file) (hereinafter White House Press Release) (cited in Brief for Respondents 24, n. 9). Hamdi presumably is such a detainee, since according to the Government's own account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364.

By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. See Brief for Respondents 24; White House Press Release. This treatment appears to be a violation of the Geneva Convention provision

that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5, 6 U. S. T., at 3324. The Government answers that the President's determination that Taliban detainees do not qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Convention's tribunal requirement. See Brief for Respondents 24. But reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, ch. 1, §§ 1–5, 1–6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status. See, *e. g.*, *id.*, § 1–6 ("A competent tribunal shall be composed of three commissioned officers"; a "written record shall be made of proceedings"; "[p]roceedings shall be open" with certain exceptions; "[p]ersons whose status is to be determined shall be advised of their rights at the beginning of their hearings," "allowed to attend all open sessions," "allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," and to "have a right to testify"; and a tribunal shall determine status by a "[p]reponderance of evidence"). One of the types of doubt these tribunals are meant to settle is whether a given individual may be, as Hamdi says he is, an "[i]nnocent civilian who should be immediately returned to his home or released." *Id.*, § 1–6*e*(10)(*c*). The regulation, jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, provides that "[p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed." *Id.*, § 1–6*g*. The regulation

also incorporates the Geneva Convention's presumption that in cases of doubt, "persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal." *Id.*, § 1–6*a*. Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.

Whether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point. What I can say, though, is that the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution. I conclude accordingly that the Government has failed to support the position that the Force Resolution authorizes the described detention of Hamdi for purposes of § 4001(a).

It is worth adding a further reason for requiring the Government to bear the burden of clearly justifying its claim to be exercising recognized war powers before declaring § 4001(a) satisfied. Thirty-eight days after adopting the Force Resolution, Congress passed the statute entitled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), 115 Stat. 272; that Act authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings, 8 U. S. C. § 1226a(a)(5) (2000 ed., Supp. I). It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.

D

Since the Government has given no reason either to deflect the application of § 4001(a) or to hold it to be satisfied, I need

to go no further; the Government hints of a constitutional challenge to the statute, but it presents none here. I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 643–644 (1952) (concurring opinion); see also *id.*, at 637–638 (Presidential authority is "at its lowest ebb" where the President acts contrary to congressional will).

There may be room for one qualification to Justice Jackson's statement, however: in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people (though I doubt there is any want of statutory authority, see *supra*, at 547–548). This case, however, does not present that question, because an emergency power of necessity must at least be limited by the emergency; Hamdi has been locked up for over two years. Cf. *Ex parte Milligan*, 4 Wall. 2, 127 (1866) (martial law justified only by "actual and present" necessity as in a genuine invasion that closes civilian courts).

Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by "the law of the land."

IV

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker, see *ante*, at 533; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel, see *ante*, at 539. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on

Hamdi, see *ante*, at 534, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas, see *ante*, at 538.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty. Although I share the plurality's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

I

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite

imprisonment at the will of the Executive. Blackstone stated this principle clearly:

> "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. . . .
>
> "To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, . . . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him." 1 W. Blackstone, Commentaries on the Laws of England 131–133 (1765) (hereinafter Blackstone).

These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84, p. 444 (G. Carey & J. McClellan eds. 2001). The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally im-

prisoned—found expression in the Constitution's Due Process and Suspension Clauses. See Amdt. 5; Art. I, § 9, cl. 2.

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. See, *e. g.*, 2 & 3 Philip & Mary, ch. 10 (1555); 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833) (hereinafter Story) (equating "due process of law" with "due presentment or indictment, and being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." *Ibid.* See also T. Cooley, General Principles of Constitutional Law 224 (1880) ("When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted" (internal quotation marks omitted)).

To be sure, certain types of permissible *non*criminal detention—that is, those not dependent upon the contention that the citizen had committed a criminal act—did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions—civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. See *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 88–92, 97 Eng. Rep. 29, 36–37 (H. L. 1758) (Wilmot, J.). It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.

Cf. *Kansas* v. *Hendricks*, 521 U. S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

These due process rights have historically been vindicated by the writ of habeas corpus. In England before the founding, the writ developed into a tool for challenging executive confinement. It was not always effective. For example, in *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627), King Charles I detained without charge several individuals for failing to assist England's war against France and Spain. The prisoners sought writs of habeas corpus, arguing that without specific charges, "imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually." *Id.*, at 8. The Attorney General replied that the Crown's interest in protecting the realm justified imprisonment in "a matter of state . . . not ripe nor timely" for the ordinary process of accusation and trial. *Id.*, at 37. The court denied relief, producing widespread outrage, and Parliament responded with the Petition of Right, accepted by the King in 1628, which expressly prohibited imprisonment without formal charges, see 3 Car. 1, ch. 1, §§5, 10.

The struggle between subject and Crown continued, and culminated in the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, described by Blackstone as a "second *magna carta*, and stable bulwark of our liberties." 1 Blackstone 133. The Act governed all persons "committed or detained . . . for any crime." §3. In cases other than felony or treason plainly expressed in the warrant of commitment, the Act required release upon appropriate sureties (unless the commitment was for a nonbailable offense). *Ibid.* Where the commitment was for felony or high treason, the Act did not require immediate release, but instead required the Crown to commence criminal proceedings within a specified time. §7. If the prisoner was not "indicted some Time in the next Term,"

the judge was "required . . . to set at Liberty the Prisoner upon Bail" unless the King was unable to produce his witnesses. *Ibid.* Able or no, if the prisoner was not brought to trial by the *next* succeeding term, the Act provided that "he shall be discharged from his Imprisonment." *Ibid.* English courts sat four terms per year, see 3 Blackstone 275–277, so the practical effect of this provision was that imprisonment without indictment or trial for felony or high treason under § 7 would not exceed approximately three to six months.

The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. See Art. I, § 9, cl. 2. Hamilton lauded "the establishment of the writ of *habeas corpus*" in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments . . . in all ages, [one of] the favourite and most formidable instruments of tyranny." The Federalist No. 84, at 444. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases, see Art. III, § 2, cl. 3) was his basis for arguing that additional, explicit procedural protections were unnecessary. See The Federalist No. 83, at 433.

II

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*

A

JUSTICE O'CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained

until the cessation of hostilities and then released. *Ante*, at 518–519. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

As early as 1350, England's Statute of Treasons made it a crime to "levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere." 25 Edw. 3, Stat. 5, c. 2. In his 1762 Discourse on High Treason, Sir Michael Foster explained:

> "With regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places.
>
> . . . . .
>
> "The joining with Rebels in an Act of Rebellion, or with Enemies in Acts of Hostility, will make a Man a Traitor: in the one Case within the Clause of Levying War, in the other within that of Adhering to the King's enemies.
>
> . . . . .
>
> "States in Actual Hostility with Us, though no War be solemnly Declared, are Enemies within the meaning of the Act. And therefore in an Indictment on the Clause of Adhering to the King's Enemies, it is sufficient to Aver that the Prince or State Adhered to *is an Enemy*, without shewing any War Proclaimed. . . . And if the Subject of a Foreign Prince in Amity with Us, invadeth the Kingdom without Commission from his Sovereign, He is an Enemy. And a Subject of *England* adhering to Him is a Traitor within this Clause of the Act." A Report of Some Proceedings on the Commission . . . for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, Introduction, § 1, p. 183; Ch. 2, § 8, p. 216; § 12, p. 219.

Subjects accused of levying war against the King were routinely prosecuted for treason. *E. g., Harding's Case*, 2 Ventris 315, 86 Eng. Rep. 461 (K. B. 1690); *Trial of Parkyns*, 13 How. St. Tr. 63 (K. B. 1696); *Trial of Vaughan*, 13 How. St. Tr. 485 (K. B. 1696); *Trial of Downie*, 24 How. St. Tr. 1 (1794). The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally. The Constitution provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort"; and establishes a heightened proof requirement (two witnesses) in order to "convic[t]" of that offense. Art. III, § 3, cl. 1.

In more recent times, too, citizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in federal court. See *United States* v. *Fricke*, 259 F. 673 (SDNY 1919); *United States* v. *Robinson*, 259 F. 685 (SDNY 1919). A German member of the same conspiracy was subjected to military process. See *United States ex rel. Wessels* v. *McDonald*, 265 F. 754 (EDNY 1920). During World War II, the famous German saboteurs of *Ex parte Quirin*, 317 U. S. 1 (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur, discussed below) were punished under the criminal process. See *Haupt* v. *United States*, 330 U. S. 631 (1947); L. Fisher, Nazi Saboteurs on Trial 80–84 (2003); see also *Cramer* v. *United States*, 325 U. S. 1 (1945).

The modern treason statute is 18 U. S. C. § 2381; it basically tracks the language of the constitutional provision. Other provisions of Title 18 criminalize various acts of warmaking and adherence to the enemy. See, *e. g.*, § 32 (destruction of aircraft or aircraft facilities), § 2332a (use of

weapons of mass destruction), § 2332b (acts of terrorism transcending national boundaries), § 2339A (providing material support to terrorists), § 2339B (providing material support to certain terrorist organizations), § 2382 (misprision of treason), § 2383 (rebellion or insurrection), § 2384 (seditious conspiracy), § 2390 (enlistment to serve in armed hostility against the United States). See also 31 CFR § 595.204 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to terrorists); 50 U. S. C. § 1705(b) (criminalizing violations of 31 CFR § 595.204). The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States *was* subjected to criminal process and convicted upon a guilty plea. See *United States* v. *Lindh*, 212 F. Supp. 2d 541 (ED Va. 2002) (denying motions for dismissal); Seelye, N. Y. Times, Oct. 5, 2002, p. A1, col. 5.

B

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods. Blackstone explained:

> "And yet sometimes, when the state is in real danger, even this [*i. e.*, executive detention] may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it[s] lib-

> erty for a while, in order to preserve it for ever." 1 Blackstone 132.

Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension. In England, Parliament on numerous occasions passed temporary suspensions in times of threatened invasion or rebellion. *E. g.*, 1 W. & M., c. 7 (1688) (threatened return of James II); 7 & 8 Will. 3, c. 11 (1696) (same); 17 Geo. 2, c. 6 (1744) (threatened French invasion); 19 Geo. 2, c. 1 (1746) (threatened rebellion in Scotland); 17 Geo. 3, c. 9 (1777) (the American Revolution). Not long after Massachusetts had adopted a clause in its constitution explicitly providing for habeas corpus, see Mass. Const. pt. 2, ch. 6, art. VII (1780), reprinted in 3 Federal and State Constitutions, Colonial Charters and Other Organic Laws 1888, 1910 (F. Thorpe ed. 1909), it suspended the writ in order to deal with Shay's Rebellion, see Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 10, 1786 Mass. Acts p. 510.

Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I. See *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 151–152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story § 1336, at 208–209.

The Suspension Clause was by design a safety valve, the Constitution's only "express provision for exercise of extraordinary authority because of a crisis," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 650 (1952) (Jack-

son, J., concurring). Very early in the Nation's history, President Jefferson unsuccessfully sought a suspension of habeas corpus to deal with Aaron Burr's conspiracy to overthrow the Government. See 16 Annals of Congress 402–425 (1807). During the Civil War, Congress passed its first Act authorizing executive suspension of the writ of habeas corpus, see Act of Mar. 3, 1863, 12 Stat. 755, to the relief of those many who thought President Lincoln's unauthorized proclamations of suspension (*e. g.*, Proclamation No. 1, 13 Stat. 730) unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization, *e. g.*, Proclamation No. 7, 13 Stat. 734. During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties. See Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14; A Proclamation [of Oct. 17, 1871], 7 Compilation of the Messages and Papers of the Presidents 136–138 (J. Richardson ed. 1899) (hereinafter Messages and Papers); *id.*, at 138–139.

Two later Acts of Congress provided broad suspension authority to governors of U. S. possessions. The Philippine Civil Government Act of 1902 provided that the Governor of the Philippines could suspend the writ in case of rebellion, insurrection, or invasion. Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692. In 1905 the writ was suspended for nine months by proclamation of the Governor. See *Fisher* v. *Baker*, 203 U. S. 174, 179–181 (1906). The Hawaiian Organic Act of 1900 likewise provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof). Ch. 339, § 67, 31 Stat. 153.

III

Of course the extensive historical evidence of criminal convictions and habeas suspensions does not *necessarily* refute the Government's position in this case. When the writ is

suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. See Brief for Respondents 34. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only *traditional* means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not *require* a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. First, the text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ. In the United States, this Act was read as "enforc[ing] the common law," *Ex parte Watkins*, 3 Pet. 193, 202 (1830), and shaped the early understanding of the scope of the writ. As noted above, see *supra*, at 557–558, § 7 of the Act specifically addressed those committed for high treason, and provided a remedy if they were not *indicted and tried* by the second succeeding court term. That remedy was *not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, "he shall be discharged from his Imprisonment." 31 Car. 2, c. 2, § 7. The Act does not contain any exception for wartime. That omission is conspicuous, since § 7 explicitly addresses the offense of "High Treason," which often involved offenses of a military nature. See cases cited *supra*, at 560.

Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ. In 1788, Thomas Jefferson wrote to James Madison questioning the need for a Suspension Clause in cases of rebellion in the proposed

Constitution. His letter illustrates the constraints under which the Founders understood themselves to operate:

> "Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages." 13 Papers of Thomas Jefferson 442 (July 31, 1788) (J. Boyd ed. 1956).

A similar view was reflected in the 1807 House debates over suspension during the armed uprising that came to be known as Burr's conspiracy:

> "With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution. From the communication of the Executive, it appeared there was sufficient evidence to authorize their commitment. Several months would elapse before their final trial, which would give time to collect evidence, and if this shall be sufficient, they will not fail to receive the punishment merited by their crimes, and inflicted by the laws of their country." 16 Annals of Congress, at 405 (remarks of Rep. Burwell).

The absence of military authority to imprison citizens indefinitely in wartime—whether or not a probability of treason had been established by means less than jury trial—was confirmed by three cases decided during and immediately after the War of 1812. In the first, *In re Stacy*, 10 Johns.

*328 (N. Y. 1813), a citizen was taken into military custody on suspicion that he was "carrying provisions and giving information to the enemy." *Id.*, at *330 (emphasis deleted). Stacy petitioned for a writ of habeas corpus, and, after the defendant custodian attempted to avoid complying, Chief Justice Kent ordered attachment against him. Kent noted that the military was "without any color of authority in any military tribunal to try a citizen for that crime" and that it was "holding him in the closest confinement, and contemning the civil authority of the state." *Id.*, at *333–*334.

Two other cases, later cited with approval by this Court in *Ex parte Milligan*, 4 Wall. 2, 128–129 (1866), upheld verdicts for false imprisonment against military officers. In *Smith* v. *Shaw*, 12 Johns. *257 (N. Y. 1815), the court affirmed an award of damages for detention of a citizen on suspicion that he was, among other things, "an enemy's spy in time of war." *Id.*, at *265. The court held that "[n]one of the offences charged against *Shaw* were cognizable by a court-martial, except that which related to his being a spy; and if he was an *American* citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy." *Ibid.* "If the defendant was justifiable in doing what he did, every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.*, at *266. Finally, in *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815), a jury awarded $9,000 for false imprisonment after a military officer confined a citizen on charges of treason; the judges on appeal did not question the verdict but found the damages excessive, in part because "it does not appear that [the defendant] . . . knew [the plaintiff] was a citizen." *Id.*, at *238 (Spencer, J.). See generally Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1567 (2004).

President Lincoln, when he purported to suspend habeas corpus without congressional authorization during the Civil War, apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial. In his famous message to Congress on July 4, 1861, he argued only that he could suspend the writ, not that even without suspension, his imprisonment of citizens without criminal trial was permitted. See Special Session Message, 6 Messages and Papers 20–31.

Further evidence comes from this Court's decision in *Ex parte Milligan, supra.* There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. *Id.*, at 6–7. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the 'laws and usages of war,'" *id.*, at 121:

> "It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed," *ibid.*[1]

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the

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[1] As I shall discuss presently, see *infra*, at 570–572, the Court purported to limit this language in *Ex parte Quirin*, 317 U. S. 1, 45 (1942). Whatever *Quirin*'s effect on *Milligan*'s precedential value, however, it cannot undermine its value as an indicator of original meaning. Cf. *Reid* v. *Covert*, 354 U. S. 1, 30 (1957) (plurality opinion) (*Milligan* remains "one of the great landmarks in this Court's history").

law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

> "If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended." *Id.*, at 122.

Thus, criminal process was viewed as the primary means—and the only means absent congressional action suspending the writ—not only to punish traitors, but to incapacitate them.

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." The Federalist No. 45, p. 238 (J. Madison). No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. Congress's authority "[t]o raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that

Use shall be for a longer Term than two Years." U. S. Const., Art. I, § 8, cl. 12. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be "much inferior" to that of the British King:

> "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature." The Federalist No. 69, p. 357.

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

IV

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, 317 U. S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Herbert Haupt, was a U. S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded, see *id.*, at 18–19, unnumbered note; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. See *id.*, at 37–38, 45–46. The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, *Quirin* purported to interpret the language of *Milligan* quoted above (the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed") in the following manner:

> "Elsewhere in its opinion . . . the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war . . . ." 317 U. S., at 45.

In my view this seeks to revise *Milligan* rather than describe it. *Milligan* had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its discussion of the first point. See 4 Wall., at 121. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war,

while mentioned earlier in the opinion, see *id.*, at 118, were made relevant and brought to bear in the Court's later discussion, see *id.*, at 131, of whether Milligan came within the statutory provision that effectively made an exception to Congress's authorized suspension of the writ for (as the Court described it) "all parties, not prisoners of war, resident in their respective jurisdictions, . . . who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired," *id.*, at 116. *Milligan* thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called "belligerents" or "prisoners of war."[2]

But even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "*admitted* enemy invaders," 317 U. S., at 47 (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces, *id.*, at 20. The specific holding of the Court was only that, "upon the *conceded* facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction, *id.*, at 46 (emphasis added).[3] But where those jurisdictional facts are *not* con-

[2] Without bothering to respond to this analysis, the plurality states that *Milligan* "turned in large part" upon the defendant's lack of prisoner-of-war status, and that the *Milligan* Court explicitly and repeatedly *said* so. *Ante*, at 522. Neither is true. To the extent, however, that prisoner-of-war status was relevant in *Milligan*, it was only because prisoners of war *received different statutory treatment* under the conditional suspension then in effect.

[3] The only two Court of Appeals cases from World War II cited by the Government in which citizens were detained without trial likewise involved petitioners who were conceded to have been members of enemy forces. See *In re Territo*, 156 F. 2d 142, 143–145 (CA9 1946); *Colepaugh*

ceded—where the petitioner insists that he is *not* a belligerent—*Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.[4]

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v. *Looney*, 235 F. 2d 429, 432 (CA10 1956). The plurality complains that *Territo* is the only case I have identified in which "a United States citizen [was] captured in a *foreign* combat zone," *ante*, at 523. Indeed it is; such cases must surely be rare. But given the constitutional tradition I have described, the burden is not upon me to find cases in which the writ was *granted* to citizens in this country *who had been captured on foreign battlefields;* it is upon those who would carve out an exception for such citizens (as the plurality's complaint suggests it would) to find a single case (other than one where enemy status was admitted) in which habeas was *denied.*

[4] The plurality's assertion that *Quirin* somehow "clarifies" *Milligan*, *ante*, at 523, is simply false. As I discuss *supra*, at 570–571 and this page, the *Quirin* Court propounded a mistaken understanding of *Milligan;* but nonetheless its holding was limited to "the case presented by the present record," and to *"the conceded facts,"* and thus avoided conflict with the earlier case. See 317 U. S., at 45–46 (emphasis added). The plurality, ignoring this expressed limitation, thinks it "beside the point" whether belligerency is conceded or found "by some other process" (not necessarily a jury trial) "that verifies this fact with sufficient certainty." *Ante*, at 523. But the whole point of the procedural guarantees in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen's liberty depends. The plurality's claim that *Quirin*'s one-paragraph discussion of *Milligan* provides a "[c]lear . . . disavowal" of two false imprisonment cases from the War of 1812, *ante*, at 522, thus defies logic; unlike the plaintiffs in those cases, Haupt was concededly a member of an enemy force.

The Government also cites *Moyer* v. *Peabody*, 212 U. S. 78 (1909), a suit for damages against the Governor of Colorado, for violation of due process in detaining the alleged ringleader of a rebellion quelled by the state militia after the Governor's declaration of a state of insurrection and (he contended) suspension of the writ "as incident thereto." *Ex parte Moyer*, 35 Colo. 154, 157, 91 P. 738, 740 (1905). But the holding of *Moyer* v. *Peabody* (even assuming it is transferable from state-militia detention after state suspension to federal standing-army detention without suspension) is simply that "[s]o long as such arrests [were] made in good faith and in the honest belief that they [were] needed in order to head the insurrection

V

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, 115 Stat. 224, which provides:

> "That the President is authorized 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a).

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off," 212 U. S., at 85, an action in damages could not lie. This "good-faith" analysis is a forebear of our modern doctrine of qualified immunity. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974) (understanding *Moyer* in this way). Moreover, the detention at issue in *Moyer* lasted about 2½ months, see 212 U. S., at 85, roughly the length of time permissible under the 1679 Habeas Corpus Act, see *supra*, at 557–558.

In addition to *Moyer* v. *Peabody*, JUSTICE THOMAS relies upon *Luther* v. *Borden*, 7 How. 1 (1849), a case in which the state legislature had imposed martial law—a step even more drastic than suspension of the writ. See *post*, at 590–591 (dissenting opinion). But martial law has not been imposed here, and in any case is limited to "the theatre of active military operations, where war really prevails," and where therefore the courts are closed. *Ex parte Milligan*, 4 Wall. 2, 127 (1866); see also *id.*, at 129–130 (distinguishing *Luther*).

This is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); with the clarity necessary to comport with cases such as *Ex parte Endo*, 323 U. S. 283, 300 (1944), and *Duncan* v. *Kahanamoku*, 327 U. S. 304, 314–316, 324 (1946); or with the clarity necessary to overcome the statutory prescription that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" 18 U. S. C. §4001(a).[5] But even if it

[5] The plurality rejects any need for "specific language of detention" on the ground that detention of alleged combatants is a "fundamental incident of waging war." *Ante*, at 519. Its authorities do not support that holding in the context of the present case. Some are irrelevant because they do not address the detention of *American citizens*. *E. g.*, Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002). The plurality's assertion that detentions of citizen and alien combatants are equally authorized has no basis in law or common sense. Citizens and noncitizens, even if equally dangerous, are not similarly situated. See, *e. g.*, *Milligan*, *supra*; *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950); Rev. Stat. 4067, 50 U. S. C. §21 (Alien Enemy Act). That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens. Of the authorities cited by the plurality that do deal with detention of citizens, *Quirin*, *supra*, and *Territo*, 156 F. 2d 142, have already been discussed and rejected. See *supra*, at 571–572, and n. 3. The remaining authorities pertain to U. S. detention of citizens during the Civil War, and are irrelevant for two reasons: (1) the Lieber Code was issued following a congressional authorization of suspension of the writ, see Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 246; Act of Mar. 3, 1863, 12 Stat. 755, §§1, 2; and (2) citizens of the Confederacy, while citizens of the United States, were also regarded as citizens of a hostile power.

did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It "weigh[s] the private interest . . . against the Government's asserted interest," *ante*, at 529 (internal quotation marks omitted), and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. See *ante*, at 533–534. It claims authority to engage in this sort of "judicious balancing" from *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly

recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to "engag[e] in a factfinding process that is both prudent and incremental," *ante*, at 539. "In the absence of [the Executive's prior provision of procedures that satisfy due process], . . . a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." *Ante*, at 538. This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody"); 1 Blackstone 132–133. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the

other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 769–771 (1950); *Reid* v. *Covert*, 354 U. S. 1, 74–75 (1957) (Harlan, J., concurring in result); *Rasul* v. *Bush*, *ante*, at 502–504 (SCALIA, J., dissenting). Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. See, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991) (brief detention pending judicial determination after warrantless arrest); *United States* v. *Salerno*, 481 U. S. 739 (1987) (pretrial detention under the Bail Reform Act). The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond

my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. See 3 Story § 1336, at 208–209.[6] If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

* * *

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,

> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Federalist No. 8, p. 33.

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[6] JUSTICE THOMAS worries that the constitutional conditions for suspension of the writ will not exist "during many . . . emergencies during which . . . detention authority might be necessary," *post*, at 594. It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges.* Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

I

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U. S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State*, 378 U. S. 500, 509 (1964)). The national security, after all, is the primary responsibility and purpose of the Federal Government. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 662 (1952) (Clark, J., concurring in judgment); The Federalist No. 23, pp. 146–147 (J. Cooke ed. 1961) (A. Hamilton) ("The principle purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks"). But because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation

> "ought to exist without limitation . . . *[b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *Id.*, at 147.

See also *id.*, Nos. 34 and 41.

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." *Id.*,

No. 70, at 471 (A. Hamilton). The principle "ingredien[t]" for "energy in the executive" is "unity." *Id.*, at 472. This is because "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number." *Ibid.*

These structural advantages are most important in the national-security and foreign-affairs contexts. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Id.*, No. 74, at 500 (A. Hamilton). Also for these reasons, John Marshall explained that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800); see *id.*, at 613–614. To this end, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief of the" Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3.

This Court has long recognized these features and has accordingly held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion.

> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided *by him.*" *Prize Cases*, 2 Black 635, 668, 670 (1863).

The Court has acknowledged that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and

subdue the enemy." *Fleming* v. *Page*, 9 How. 603, 615 (1850). With respect to foreign affairs as well, the Court has recognized the President's independent authority and need to be free from interference. See, *e. g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936) (explaining that the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. I cannot improve on Justice Jackson's words, speaking for the Court:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions 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 or inquiry." *Ibid.*

Several points, made forcefully by Justice Jackson, are worth emphasizing. First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because "[t]hey are delicate, complex, and involve large elements of prophecy." *Ibid.* Third, the Court in *Chicago & Southern Air Lines* and elsewhere has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts.

For these institutional reasons and because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," it should come as no surprise that "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore* v. *Regan*, 453 U. S. 654, 678 (1981) (quoting *Agee*, 453 U. S., at 291). Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore*, 453 U. S., at 678. As far as the courts are concerned, "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'" *Ibid.* (quoting *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring)).

Finally, and again for the same reasons, where "the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore, supra,* at 668 (quoting *Youngstown, supra,* at 637 (Jackson, J., concurring)). That is why the Court has explained, in a case analogous to this one, that "the detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin,* 317 U. S. 1, 25 (1942). See also *Ex parte Milligan,* 4 Wall. 2, 133 (1866) (Chase, C. J., concurring in judgment) (stating that a sentence imposed by a military commission "must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress"). This deference extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate. See *Quirin, supra,* at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners"). See also *Hirabayashi* v. *United States,* 320 U. S. 81, 93 (1943); *Prize Cases,* 2 Black, at 670; *Martin* v. *Mott,* 12 Wheat. 19, 29–30 (1827).

To be sure, the Court has at times held, in specific circumstances, that the military acted beyond its warmaking authority. But these cases are distinguishable in important ways. In *Ex parte Endo,* 323 U. S. 283 (1944), the Court held unlawful the detention of an admittedly law-abiding and loyal American of Japanese ancestry. It did so because the

Government's asserted reason for the detention had nothing to do with the congressional and executive authorities upon which the Government relied. Those authorities permitted detention for the purpose of preventing espionage and sabotage and thus could not be pressed into service for detaining a loyal citizen. See *id.*, at 301–302. Further, the Court "stress[ed] the silence . . . of the [relevant] Act *and the Executive Orders.*" *Id.*, at 301 (emphasis added); see also *id.*, at 301–304. The Court sensibly held that the Government could not detain a loyal citizen pursuant to executive and congressional authorities that could not conceivably be implicated given the Government's factual allegations. And in *Youngstown*, Justice Jackson emphasized that "Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with th[e] seizure." 343 U. S., at 639 (concurring opinion). See also *Milligan, supra*, at 134 (Chase, C. J., concurring in judgment) (noting that the Government failed to comply with statute directly on point).

I acknowledge that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi's detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is "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 or inquiry." *Chicago & Southern Air Lines*, 333 U. S., at 111. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, see, *e. g.*, *Ex parte Endo, supra*, we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is

committed to other branches.[1] In the words of then-Judge Scalia:

> "In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The [C]ourt's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing." *Ramirez de Arellano* v. *Weinberger*, 745 F. 2d 1500, 1550–1551 (CADC 1984) (dissenting opinion) (footnote omitted).

See also *id.*, at 1551, n. 1 (noting that "[e]ven the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief"). The decision whether someone is an enemy combatant is, no doubt, "delicate, complex, and involv[es] large elements of prophecy," *Chicago & Southern Air Lines*, *supra*, at 111, which, incidentally might in part explain why "the Government has never provided any court with the full criteria that it uses in classifying individuals as such," *ante*, at 516. See also *infra*, at 597–598 (discussing other military decisions).

II

"'The war power of the national government is "the power to wage war successfully."'" *Lichter* v. *United States*, 334

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[1] Although I have emphasized national-security concerns, the President's foreign-affairs responsibilities are also squarely implicated by this case. The Government avers that Northern Alliance forces captured Hamdi, and the District Court demanded that the Government turn over information relating to statements made by members of the Northern Alliance. See 316 F. 3d 450, 462 (CA4 2003).

U. S. 742, 767, n. 9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238 (1917)). It follows that this power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict," *In re Yamashita*, 327 U. S. 1, 12 (1946); see also *Stewart* v. *Kahn*, 11 Wall. 493, 507 (1871), and quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies, see, *e. g.*, *Quirin*, 317 U. S., at 28–29, 30–31; *id.*, at 37–39; *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313–314 (1946); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920); W. Whiting, War Powers Under the Constitution of the United States 167 (43d ed. 1871); *id.*, at 44–46 (noting that Civil War "rebels" may be treated as foreign belligerents); see also *ante*, at 518–519.

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so. See *ante*, at 517. The Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. Indeed, the Court has previously concluded that language materially identical to the AUMF authorizes the Executive to "make the ordinary use of the soldiers . . . ; that he may kill persons who resist and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace." *Moyer* v. *Peabody*, 212 U. S. 78, 84 (1909).

The plurality, however, qualifies its recognition of the President's authority to detain enemy combatants in the war on terrorism in ways that are at odds with our precedent. Thus, the plurality relies primarily on Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners

of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364, for the proposition that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Ante*, at 520. It then appears to limit the President's authority to detain by requiring that "the record establis[h] that United States troops are still involved in active combat in Afghanistan" because, in that case, detention would be "part of the exercise of 'necessary and appropriate force.'" *Ante*, at 521. But I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply. See n. 6, *infra*. Further, we are bound by the political branches' determination that the United States is at war. See, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160, 167–170 (1948); *Prize Cases*, 2 Black, at 670; *Mott*, 12 Wheat., at 30. And, in any case, the power to detain does not end with the cessation of formal hostilities. See, *e. g.*, *Madsen* v. *Kinsella*, 343 U. S. 341, 360 (1952); *Johnson* v. *Eisentrager*, 339 U. S. 763, 786 (1950); cf. *Moyer*, *supra*, at 85.

Accordingly, the President's action here is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Dames & Moore*, 453 U. S., at 668 (internal quotation marks omitted).[2] The question becomes whether the Federal Government (rather than the President acting alone) has power to detain Hamdi as an enemy combatant. More precisely, we must determine whether the Government may detain Hamdi given the procedures that were used.

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[2] It could be argued that the habeas statutes are evidence of congressional intent that enemy combatants are entitled to challenge the factual basis for the Government's determination. See, *e. g.*, 28 U. S. C. §§ 2243, 2246. But factual development is needed only to the extent necessary to resolve the legal challenge to the detention. See, *e. g.*, *Walker* v. *Johnston*, 312 U. S. 275, 284 (1941).

III

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. See *ante*, at 518. But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

This makes complete sense once the process that is due Hamdi is made clear. As an initial matter, it is possible that the Due Process Clause requires only "that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions." *In re Winship*, 397 U. S. 358, 382 (1970) (Black, J., dissenting). I need not go this far today because the Court has already explained the nature of due process in this context.

In a case strikingly similar to this one, the Court addressed a Governor's authority to detain for an extended period a person the executive believed to be responsible, in part, for a local insurrection. Justice Holmes wrote for a unanimous Court:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what *he deems* the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm." *Moyer*, 212 U. S., at 85 (citation omitted; emphasis added).

The Court answered Moyer's claim that he had been denied due process by emphasizing:

> "[I]t is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country. . . . Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." *Id.*, at 84–85 (citations omitted).

In this context, due process requires nothing more than a good-faith executive determination.[3] To be clear: The Court has held that an Executive, acting pursuant to statutory and constitutional authority, may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the Executive deems this necessary for the public safety *even if he is mistaken.*

Moyer is not an exceptional case. In *Luther* v. *Borden*, 7 How. 1 (1849), the Court discussed the President's constitutional and statutory authority, in response to a request from a state legislature or executive, "'to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress [an] insurrection.'" *Id.*, at 43 (quoting Act of Feb. 28, 1795). The Court explained that courts could not review the President's decision to recognize one of the competing legislatures or executives. See 7 How., at 43. If a court could second-guess this determination, "it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained

[3] Indeed, it is not even clear that the Court required good faith. See *Moyer*, 212 U. S., at 85 ("It is not alleged that [the Governor's] judgment was not honest, if that be material, or that [Moyer] was detained after fears of the insurrection were at an end").

by the troops in the service of the United States." *Ibid.* "If the judicial power extends so far," the Court concluded, "the guarantee contained in the Constitution of the United States [referring to Art. IV, § 4] is a guarantee of anarchy, and not of order." *Ibid.* The Court clearly contemplated that the President had authority to detain as he deemed necessary, and such detentions evidently comported with the Due Process Clause as long as the President correctly decided to call forth the militia, a question the Court said it could not review.

The Court also addressed the natural concern that placing "this power in the President is dangerous to liberty, and may be abused." *Id.*, at 44. The Court noted that "[a]ll power may be abused if placed in unworthy hands," and explained that "it would be difficult . . . to point out any other hands in which this power would be more safe, and at the same time equally effectual." *Ibid.* Putting that aside, the Court emphasized that this power "is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." *Ibid.* Finally, the Court explained that if the President abused this power "it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it." *Id.*, at 45.

Almost 140 years later, in *United States* v. *Salerno*, 481 U. S. 739, 748 (1987), the Court explained that the Due Process Clause "lays down [no] categorical imperative." The Court continued:

> "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous." *Ibid.*

The Court cited *Ludecke* v. *Watkins*, 335 U. S. 160 (1948), for this latter proposition even though *Ludecke* actually involved detention of enemy aliens. See also *Selective Draft Law Cases*, 245 U. S. 366 (1918); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27–29 (1905) (upholding legislated mass vaccinations and approving of forced quarantines of Americans even if they show no signs of illness); cf. *Kansas* v. *Hendricks*, 521 U. S. 346 (1997); *Juragua Iron Co.* v. *United States*, 212 U. S. 297 (1909).

The Government's asserted authority to detain an individual that the President has determined to be an enemy combatant, at least while hostilities continue, comports with the Due Process Clause. As these cases also show, the Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function. See Part I, *supra*.

I therefore cannot agree with JUSTICE SCALIA's conclusion that the Government must choose between using standard criminal processes and suspending the writ. See *ante*, at 578 (dissenting opinion). JUSTICE SCALIA relies heavily upon *Ex parte Milligan*, 4 Wall. 2 (1866), see *ante*, at 567–568, 570–572, and three cases decided by New York state courts in the wake of the War of 1812, see *ante*, at 565–566. I admit that *Milligan* supports his position. But because the Executive Branch there, unlike here, did not follow a specific statutory mechanism provided by Congress, the Court did not need to reach the broader question of Congress' power, and its discussion on this point was arguably dicta, see 4 Wall., at 122, as four Justices believed, see *id.*, at 132, 134–136 (Chase, C. J., joined by Wayne, Swayne, and Miller, JJ., concurring in judgment).

More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted

against Milligan. In fact, this feature serves to distinguish the state cases as well. See *In re Stacy*, 10 Johns. *328, *334 (N. Y. 1813) ("A military commander is here assuming *criminal jurisdiction* over a private citizen" (emphasis added)); *Smith* v. *Shaw*, 12 Johns. *257, *265 (N. Y. 1815) (Shaw "might be amenable to the civil authority for treason; but could not *be punished*, under martial law, as a spy" (emphasis added)); *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815) (same for treason).

Although I do acknowledge that the reasoning of these cases might apply beyond criminal punishment, the punishment-nonpunishment distinction harmonizes all of the precedent. And, subsequent cases have at least implicitly distinguished *Milligan* in just this way. See, *e. g.*, *Moyer*, 212 U. S., at 84–85 ("Such arrests are not necessarily for punishment, but are by way of precaution"). Finally, *Quirin* overruled *Milligan* to the extent that those cases are inconsistent. See *Quirin*, 317 U. S., at 45 (limiting *Milligan* to its facts). Because the Government does not detain Hamdi in order to punish him, as the plurality acknowledges, see *ante*, at 518–519, *Milligan* and the New York cases do not control.

JUSTICE SCALIA also finds support in a letter Thomas Jefferson wrote to James Madison. See *ante*, at 564. I agree that this provides some evidence for his position. But I think this plainly insufficient to rebut the authorities upon which I have relied. In any event, I do not believe that JUSTICE SCALIA's evidence leads to the necessary "clear conviction that [the detention is] in conflict with the Constitution or laws of Congress constitutionally enacted," *Quirin*, *supra*, at 25, to justify nullifying the President's wartime action.

Finally, JUSTICE SCALIA's position raises an additional concern. JUSTICE SCALIA apparently does not disagree that the Federal Government has all power necessary to protect the Nation. If criminal processes do not suffice, however, JUSTICE SCALIA would require Congress to suspend the writ. See *ante*, at 577–578. But the fact that the writ may

not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2, poses two related problems. First, this condition might not obtain here or during many other emergencies during which this detention authority might be necessary. Congress would then have to choose between acting unconstitutionally[4] and depriving the President of the tools he needs to protect the Nation. Second, I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. JUSTICE SCALIA's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

IV

Although I do not agree with the plurality that the balancing approach of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), is the appropriate analytical tool with which to analyze this case,[5] I cannot help but explain that the plurality misapplies its chosen framework, one that if applied correctly would probably lead to the result I have reached. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See *ante*, at 531–

[4] I agree with JUSTICE SCALIA that this Court could not review Congress' decision to suspend the writ. See *ante*, at 577–578.

[5] Evidently, neither do the parties, who do not cite *Mathews* even once.

532. But: "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Agee*, 453 U. S., at 307 (quoting *Aptheker*, 378 U. S., at 509). In *Moyer*, the Court recognized the paramount importance of the Governor's interest in the tranquility of a Colorado town. At issue here is the far more significant interest of the security of the Nation. The Government seeks to further that interest by detaining an enemy soldier not only to prevent him from rejoining the ongoing fight. Rather, as the Government explains, detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism. See Brief for Respondents 15; App. 347–351.

Additional process, the Government explains, will destroy the intelligence gathering function. Brief for Respondents 43–45. It also does seem quite likely that, under the process envisioned by the plurality, various military officials will have to take time to litigate this matter. And though the plurality does not say so, a meaningful ability to challenge the Government's factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.

The plurality manages to avoid these problems by discounting or entirely ignoring them. After spending a few sentences putatively describing the Government's interests, the plurality simply assures the Government that the alleged burdens "are properly taken into account in our due process analysis." *Ante*, at 532. The plurality also announces that "the risk of an erroneous deprivation of a detainee's liberty interest is unacceptably high under the Government's proposed rule." *Ante*, at 532–533 (internal quotation marks omitted). But there is no particular reason to believe that the federal courts have the relevant information and exper-

tise to make this judgment. And for the reasons discussed in Part I, *supra*, there is every reason to think that courts cannot and should not make these decisions.

The plurality next opines that "[w]e think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." *Ante*, at 534. Apparently by limiting hearings "to the alleged combatant's acts," such hearings "meddl[e] little, if at all, in the strategy or conduct of war." *Ante*, at 535. Of course, the meaning of the combatant's acts may become clear only after quite invasive and extensive inquiry. And again, the federal courts are simply not situated to make these judgments.

Ultimately, the plurality's dismissive treatment of the Government's asserted interests arises from its apparent belief that enemy-combatant determinations are not part of "the actual prosecution of a war," *ibid.*, or one of the "central functions of warmaking," *ante*, at 534. This seems wrong: Taking *and holding* enemy combatants is a quintessential aspect of the prosecution of war. See, *e. g.*, *ante*, at 518–519; *Quirin*, 317 U. S., at 28. Moreover, this highlights serious difficulties in applying the plurality's balancing approach here. First, in the war context, we know neither the strength of the Government's interests nor the costs of imposing additional process.

Second, it is at least difficult to explain why the result should be different for other military operations that the plurality would ostensibly recognize as "central functions of warmaking." As the plurality recounts:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Ante*, at 533 (internal quotation marks omitted).

See also *ibid.* ("notice" of the Government's factual assertions and "a fair opportunity to rebut [those] assertions before a neutral decisionmaker" are essential elements of due process). Because a decision to bomb a particular target might extinguish *life* interests, the plurality's analysis seems to require notice to potential targets. To take one more example, in November 2002, a Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States, and four others. See Priest, CIA Killed U. S. Citizen In Yemen Missile Strike, Washington Post, Nov. 8, 2002, p. A1. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well. Cf. *Tennessee* v. *Garner*, 471 U. S. 1 (1985). I offer these examples not because I think the plurality would demand additional process in these situations but because it clearly would not. The result here should be the same.

I realize that many military operations are, in some sense, necessary. But many, if not most, are merely expedient, and I see no principled distinction between the military operation the plurality condemns today (the holding of an enemy combatant based on the process given Hamdi) from a variety of other military operations. In truth, I doubt that there is any sensible, bright-line distinction. It could be argued that bombings and missile strikes are an inherent part of war, and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed. But this does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi.[6] This, in fact, bolsters my argument in Part III to the extent that

[6] Hamdi's detention comports with the laws of war, including the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364. See Brief for Respondents 22–24.

the laws of war show that the power to detain is part of a sovereign's war powers.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, *a fortiori*, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. See *ante*, at 532–533. But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42–43. See also App. 347–351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts, see, *e. g.*, *Johnson* v. *Eisentrager*, 339 U. S., at 779, and protecting classified information, see, *e. g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security and to determine" who gets access "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant"); *Agee*, 453 U. S., at 307 (upholding revocation of former CIA employee's passport in large part by reference to the Government's need "to protect the secrecy of [its] foreign intelligence operations").[7]

[7] These observations cast still more doubt on the appropriateness and usefulness of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to na-

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For these reasons, I would affirm the judgment of the Court of Appeals.

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tional security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?

ANEXO 04 – CASO *RASUL V. BUSH* (2004)

Syllabus

RASUL ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–334. Argued April 20, 2004—Decided June 28, 2004*

Pursuant to Congress' joint resolution authorizing the use of necessary and appropriate force against nations, organizations, or persons that planned, authorized, committed, or aided in the September 11, 2001, al Qaeda terrorist attacks, the President sent Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners, 2 Australians and 12 Kuwaitis captured abroad during the hostilities, are being held in military custody at the Guantanamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving this country complete jurisdiction and control for so long as it does not abandon the leased areas. Petitioners filed suits under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court construed the suits as habeas petitions and dismissed them for want of jurisdiction, holding that, under *Johnson* v. *Eisentrager*, 339 U. S. 763, aliens detained outside United States sovereign territory may not invoke habeas relief. The Court of Appeals affirmed.

Held: United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. Pp. 473–485.

(a) The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U. S. C. §2241, which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," §§2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." Pp. 473–484.

(1) The Court rejects respondents' primary submission that these cases are controlled by *Eisentrager*'s holding that a District Court

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*Together with No. 03–343, *Al Odah et al.* v. *United States et al.*, also on certiorari to the same court.

lacked authority to grant habeas relief to German citizens captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany. Reversing a Court of Appeals judgment finding jurisdiction, the *Eisentrager* Court found six critical facts: The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U. S. territory and there held in military custody, (d) were there tried and convicted by the military (e) for offenses committed there, and (f) were imprisoned there at all times. 339 U. S., at 777. Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. The *Eisentrager* Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners' *constitutional* entitlement to habeas review. *Ibid.* The Court's only statement on their *statutory* entitlement was a passing reference to its absence. *Id.*, at 768. This cursory treatment is explained by the Court's then-recent decision in *Ahrens* v. *Clark*, 335 U. S. 188, in which it held that the District Court for the District of Columbia lacked jurisdiction to entertain the habeas claims of aliens detained at Ellis Island because the habeas statute's phrase "within their respective jurisdictions" required the petitioners' presence within the court's territorial jurisdiction, *id.*, at 192. However, the Court later held, in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 494–495, that such presence is not "an invariable prerequisite" to the exercise of § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts "within [its] respective jurisdiction" if the custodian can be reached by service of process. Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners' claims. Pp. 475–479.

(2) Also rejected is respondents' contention that § 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248. That presumption has no application to the operation of the habeas statute with respect to persons detained within "the [United States'] territorial jurisdiction." *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to

Syllabus

do so permanently if it chooses. Respondents concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' § 2241 authority. Pp. 480–482.

(3) Petitioners contend that they are being held in federal custody in violation of United States laws, and the District Court's jurisdiction over petitioners' custodians is unquestioned, cf. *Braden*, 410 U. S., at 495. Section 2241 requires nothing more and therefore confers jurisdiction on the District Court. Pp. 483–484.

(b) The District Court also has jurisdiction to hear the *Al Odah* petitioners' complaint invoking 28 U. S. C. § 1331, the federal-question statute, and § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U. S. courts. Nothing in *Eisentrager* or any other of the Court's cases categorically excludes aliens detained in military custody outside the United States from that privilege. United States courts have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570, 578. And indeed, § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners are being held in military custody is immaterial. Pp. 484–485.

(c) Whether and what further proceedings may become necessary after respondents respond to the merits of petitioners' claims are not here addressed. P. 485.

321 F. 3d 1134, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 485. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 488.

John J. Gibbons argued the cause for petitioners in both cases. With him on the briefs for petitioner Rasul et al. in No. 03–334 were *Joseph Margulies*, *Barbara J. Olshansky*, and *Michael Ratner*. *Thomas B. Wilner*, *Neil H. Koslowe*, and *Kristine A. Huskey* filed briefs for petitioner Al Odah et al. in both cases.

Counsel

Solicitor General Olson argued the cause for respondents in both cases. With him on the brief were *Assistant Attorney General Keisler, Deputy Solicitor General Clement, Deputy Assistant Attorney General Katsas, Gregory G. Garre, Douglas N. Letter, Robert M. Loeb, Sharon Swingle,* and *William H. Taft IV.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Hungarian Jews et al. by *Steve W. Berman, R. Brent Walton, Jonathan W. Cuneo, David W. Stanley, Michael Waldman,* and *Samuel J. Dubbin;* for the International Commission of Jurists et al. by *William J. Butler* and *A. Hays Butler;* for the National Institute of Military Justice by *Ronald W. Meister;* for Abdullah Al-Joaid by *Mary Patricia Michel;* for Diego C. Asencio et al. by *William M. Hannay;* for David M. Brahms et al. by *James C. Schroeder;* for the Honorable John H. Dalton et al. by *Harold Hongju Koh, Gerald L. Neuman, Phillip H. Rudolph,* and *Daniel Feldman;* for Leslie H. Jackson et al. by *Thomas F. Cullen, Jr.,* and *Christian G. Vergonis;* for the Honorable Nathaniel R. Jones et al. by *David J. Bradford;* for Omar Ahmed Khadr by *John A. E. Pottow;* and for Fred Korematsu by *Stephen J. Schulhofer, Evan R. Chesler, Dale Minami,* and *Eric K. Yamamoto.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Alabama et al. by *John J. Park, Jr.,* Assistant Attorney General of Alabama, *Richard F. Allen,* Acting Attorney General of Alabama, and *Kevin Newsom,* Solicitor General, and by the Attorneys General for their respective States as follows: *Jim Petro* of Ohio, *Greg Abbott* of Texas, and *Jerry W. Kilgore* of Virginia; for the Honorable Bill Owens, Governor of Colorado, et al. by *Richard A. Westfall* and *Allan L. Hale;* for the American Center for Law & Justice et al. by *Jay Alan Sekulow, Thomas P. Monaghan, Stuart J. Roth, Colby M. May, James M. Henderson, Sr., Joel H. Thornton,* and *Robert W. Ash;* for Citizens for the Common Defence by *Carter G. Phillips;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* for Professor Kenneth Anderson et al. by *David B. Rivkin, Jr., Lee A. Casey, Darin R. Bartram, Ruth Wedgwood, Charles Fried,* and *Max Kampelman;* and for the Honorable William P. Barr et al. by *Andrew G. McBride.*

Briefs of *amici curiae* were filed in both cases for the Bipartisan Coalition of National and International Non-Governmental Organizations by *Jonathan M. Freiman;* for the Center for Justice and Accountability et al. by *Nicholas W. Van Aelstyn, Warrington S. Parker III, Thomas P. Brown, Christian E. Mammen,* and *Elizabeth A. Brown;* for the Commonwealth Lawyers Association by *Stephen J. Pollak* and *John Townsend Rich;* for the Human Rights Institute of the International Bar Association

JUSTICE STEVENS delivered the opinion of the Court.

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

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U. S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107–40, §§ 1–2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities

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by *Pamela Rogers Chepiga;* for International Law Expert by *James R. Klimaski;* for Sir J. H. Baker et al. by *James Oldham* and *Michael J. Wishnie;* for Professor John H. Barton et al. by *Mr. Barton, pro se,* and *Barry E. Carter;* and for 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland by *Edwin S. Matthews, Jr.,* and *Edward H. Tillinghast III.*

A brief of *amicus curiae* was filed in No. 03–343 for Military Attorneys Assigned to the Defense in the Office of Military Commissions by *Neal Katyal, Sharon A. Shaffer, Philip Sundel, Mark A. Bridges,* and *Michael D. Mori.*

between the United States and the Taliban.[1] Since early 2002, the U. S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay. Brief for Respondents 6. The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas."[2] In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."[3]

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the base. All alleged that none of the petitioners has ever been a combatant against the United States or has

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[1] When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody.

[2] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement). A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of "two thousand dollars, in gold coin of the United States," and to maintain "permanent fences" around the base. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I–II, T. S. No. 426.

[3] Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866 (hereinafter 1934 Treaty).

ever engaged in any terrorist acts.[4] They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108.[5]

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.*, at 98–99, 124–126. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.*, at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court's jurisdiction under 28 U. S. C. §§ 1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U. S. C. §§ 555, 702, 706; the Alien Tort Statute, 28 U. S. C. § 1350; and the general federal habeas corpus statute, §§ 2241–2243. App. 19.

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held, in reliance on our opinion in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), that "aliens detained outside the sovereign territory of the United States

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[4] Relatives of the Kuwaiti detainees allege that the detainees were taken captive "by local villagers seeking promised bounties or other financial rewards" while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U. S. custody. App. 24–25. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. *Id.*, at 84. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U. S. custody. *Id.*, at 110–111.

[5] David Hicks has since been permitted to meet with counsel. Brief for Respondents 9.

[may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" 321 F. 3d 1134, 1144 (CADC 2003) (quoting *Eisentrager*, 339 U. S., at 777–778), it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U. S. 1003 (2003), and now reverse.

II

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §§ 2241(a), (c)(3). The statute traces its ancestry to the first grant of federal-court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are "in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker* v. *Turpin*, 518 U. S. 651, 659–660 (1996).

Habeas corpus is, however, "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Williams* v. *Kaiser*, 323 U. S. 471, 484, n. 2 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the

Colonies achieved independence, *Preiser* v. *Rodriguez*, 411 U. S. 475, 485 (1973), and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus "beyond the limits that obtained during the 17th and 18th centuries." *Swain* v. *Pressley*, 430 U. S. 372, 380, n. 13 (1977). But "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). See also *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"). As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

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

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte*

Milligan, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U. S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U. S. 1 (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."[6]

III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 963 (CADC 1949). In reversing that determination, this Court summarized the six critical facts in the case:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our ter-

[6] 1903 Lease Agreement, Art. III.

> ritory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U. S., at 777.

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears." *Id.*, at 781.

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. *Id.*, at 777. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768.

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to the question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus in the U. S. District Court for the District of Columbia, this Court issued its decision in *Ahrens* v. *Clark*, 335 U. S. 188, a case concerning the application of the habeas statute to the petitions of 120 Germans who were

then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U. S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Id.*, at 192. *Ahrens* expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4. But as the dissent noted, if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one response to that question. *Id.*, at 209 (opinion of Rutledge, J.).[7]

When the District Court for the District of Columbia reviewed the German prisoners' habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens*. See *Eisentrager*, 339 U. S., at 767, 790. Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*. The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, reasoning that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a fed-

[7] Justice Rutledge wrote:

"[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . . ." 335 U. S., at 209.

eral jurisdictional statute." *Eisentrager* v. *Forrestal*, 174 F. 2d, at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to "fundamentals." 174 F. 2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms. 339 U. S., at 768.[8]

Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973), this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian

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[8] Although JUSTICE SCALIA disputes the basis for the Court of Appeals' holding, *post*, at 491 (dissenting opinion), what is most pertinent for present purposes is that this Court clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds. *Eisentrager*, 339 U. S., at 767 ("[The Court of Appeals] concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; [and] that, *although no statutory jurisdiction of such cases is given*, courts must be held to possess it as part of the judicial power of the United States . . ." (emphasis added)).

can be reached by service of process." 410 U. S., at 494–495. *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." 410 U. S., at 497. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.*, at 498 (citing *Burns* v. *Wilson*, 346 U. S. 137 (1953), rehearing denied, 346 U. S. 844, 851–852 (opinion of Frankfurter, J.); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955); *Hirota* v. *MacArthur*, 338 U. S. 197, 199 (1948) (Douglas, J., concurring (1949))). *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. 410 U. S., at 499–500.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.[9]

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[9] The dissent argues that *Braden* did not overrule *Ahrens*' jurisdictional holding, but simply distinguished it. *Post*, at 494–495. Of course, *Braden* itself indicated otherwise, 410 U. S., at 495–500, and a long line of judicial and scholarly interpretations, beginning with then-JUSTICE REHNQUIST's dissenting opinion, have so understood the decision. See, *e. g.*, *id.*, at 502 ("Today the Court overrules *Ahrens*"); *Moore* v. *Olson*, 368 F. 3d 757, 758 (CA7 2004) ("[A]fter *Braden* . . . , which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue"); *Armentero* v. *INS*, 340 F. 3d 1058, 1063 (CA9 2003) ("[T]he Court in *[Braden]* declared that *Ahrens* was overruled"); *Henderson* v. *INS*, 157 F. 3d 106, 126, n. 20 (CA2 1998) ("On the issue of territorial jurisdiction, *Ahrens* was subsequently overruled by *Braden*"); *Chatman-Bey* v. *Thornburgh*, 864 F. 2d 804, 811 (CADC 1988) (en banc) ("[I]n *Braden*, the Court cut back substantially on *Ahrens* (and indeed overruled its territorially-based jurisdictional

IV

Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on § 2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934

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holding)"). See also, *e. g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) *(per curiam)*; Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, App. A (1988).

The dissent also disingenuously contends that the continuing vitality of *Ahrens'* jurisdictional holding is irrelevant to the question presented in these cases, "inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*." *Post*, at 494. But what JUSTICE SCALIA describes as *Eisentrager*'s statutory holding—"that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States," *post*, at 493—is little more than the rule of *Ahrens* cloaked in the garb of *Eisentrager*'s facts. To contend plausibly that this holding survived *Braden*, JUSTICE SCALIA at a minimum must find a textual basis for the rule other than the phrase "within their respective jurisdictions"—a phrase which, after *Braden*, can no longer be read to require the habeas petitioner's physical presence within the territorial jurisdiction of a federal district court. Two references to the district of confinement in provisions relating to recordkeeping and pleading requirements in proceedings before circuit judges hardly suffice in that regard. See *post*, at 489–490 (citing 28 U. S. C. §§ 2241(a), 2242).

Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.[10] Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm,[11] as well as the claims of persons

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[10] JUSTICE SCALIA appears to agree that neither the plain text of the statute nor his interpretation of that text provides a basis for treating American citizens differently from aliens. *Post*, at 497. But resisting the practical consequences of his position, he suggests that he might nevertheless recognize an "atextual exception" to his statutory rule for citizens held beyond the territorial jurisdiction of the federal district courts. *Ibid.*

[11] See, *e. g.*, *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810) (reviewing the habeas petition of a "native of *South Africa*" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, *e. g.*, *United States* v. *Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson* v. *Izard*, 30 F. Cas. 131 (No. 17,810) (CC NY 1815)

detained in the so-called "exempt jurisdictions," where ordinary writs did not run,[12] and all other dominions under the sovereign's control.[13] As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v. *Cowle*, 2 Burr. 834, 854–855, 97 Eng. Rep. 587, 598–599 (K. B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya*, [1960] 1 Q. B. 241, 303 (C. A.) (Lord Evershed, M. R.).[14]

(Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

[12] See, *e. g.*, *Bourn's Case*, Cro. Jac. 543, 79 Eng. Rep. 465 (K. B. 1619) (writ issued to the Cinque-Ports town of Dover); *Alder* v. *Puisy*, 1 Freem. 12, 89 Eng. Rep. 10 (K. B. 1671) (same); *Jobson's Case*, Latch 160, 82 Eng. Rep. 325 (K. B. 1626) (entertaining the habeas petition of a prisoner held in the County Palatine of Durham). See also 3 W. Blackstone, Commentaries on the Laws of England 79 (1769) (hereinafter Blackstone) ("[A]ll prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king" (footnotes omitted)); R. Sharpe, Law of Habeas Corpus 188–189 (2d ed. 1989) (describing the "extraordinary territorial ambit" of the writ at common law).

[13] See, *e. g.*, *King* v. *Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K. B. 1668) (writ issued to Isle of Jersey); *King* v. *Salmon*, 2 Keb. 450, 84 Eng. Rep. 282 (K. B. 1669) (same). See also 3 Blackstone 131 (habeas corpus "run[s] into all parts of the king's dominions: for the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted" (footnote omitted)); M. Hale, History of the Common Law 120–121 (C. Gray ed. 1971) (writ of habeas corpus runs to the Channel Islands, even though "they are not Parcel of the Realm of England").

[14] *Ex parte Mwenya* held that the writ ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." 1 Q. B., at 265

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States.[15] No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden*, 410 U. S., at 495. Section

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(Parker, C. J.) (internal quotation marks omitted). See also *King* v. *The Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 606 (C. A.) (Williams, L. J.) (concluding that the writ would run to such a territory); *id.*, at 618 (Farwell, L. J.) (same). As Lord Justice Sellers explained:

"Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. . . . 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned." 1 Q. B., at 310.

JUSTICE SCALIA cites *In re Ning Yi-Ching*, 56 T. L. R. 3 (K. B. Vac. Ct. 1939), for the broad proposition that habeas corpus has been categorically unavailable to aliens held outside sovereign territory. *Post*, at 504. *Ex parte Mwenya*, however, casts considerable doubt on this narrow view of the territorial reach of the writ. 1 Q. B., at 295 (Lord Evershed, M. R.) (noting that *In re Ning Yi-Ching* relied on Lord Justice Kennedy's opinion in *Ex parte Sekgome* concerning the territorial reach of the writ, despite the opinions of two members of the court who "took a different view upon this matter"). And *In re Ning Yi-Ching* itself made quite clear that "the remedy of *habeas corpus* was not confined to British subjects," but would extend to "any person . . . detained" within reach of the writ. 56 T. L. R., at 5 (citing *Ex parte Sekgome*, 2 K. B., at 620 (Kennedy, L. J.)). Moreover, the result in that case can be explained by the peculiar nature of British control over the area where the petitioners, four Chinese nationals accused of various criminal offenses, were being held pending transfer to the local district court. Although the treaties governing the British Concession at Tientsin did confer on Britain "certain rights of administration and control," "the right to administer justice" to Chinese nationals was not among them. 56 T. L. R., at 4–6.

[15] Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241(c)(3). Cf. *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring), and cases cited therein.

2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

V

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

As explained above, *Eisentrager* itself erects no bar to the exercise of federal-court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U. S. courts. 321 F. 3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the

protection of their rights"). And indeed, 28 U. S. C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

VI

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

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course. JUSTICE SCALIA exposes the weakness in the Court's conclusion that *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973), "overruled the statutory predicate to *Eisentrager*'s holding," *ante*, at 479. As he explains, the Court's approach is not a plausible reading of *Braden* or *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). In my view, the correct course is to follow the framework of *Eisentrager*.

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the con-

stitutional command of the separation of powers. The issue before the Court was whether the Judiciary could exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. *Id.*, at 770. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also "gave the Judiciary power to act." *Id.*, at 769, 771. This contrasted with the "essential pattern for seasonable Executive constraint of enemy aliens." *Id.*, at 773. The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," *id.*, at 777–778, whereas in *Eisentrager* "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign," *id.*, at 778. The Court next noted that the prisoners in *Eisentrager* "were actual enemies" of the United States, proven to be so at trial, and thus could not justify "a limited opening of our courts" to distinguish the "many [aliens] of friendly personal disposition to whom the status of enemy" was unproven. *Ibid.* Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." *Id.*, at 779. Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoner's claims.

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated. See also *Ex parte Milligan*, 4 Wall. 2 (1866).

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager*, *supra*, at 777–778.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without

benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. 339 U. S., at 778. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*. For these reasons, I concur in the judgment of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today holds that the habeas statute, 28 U. S. C. § 2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). The Court's contention that *Eisentrager* was somehow ne-

gated by *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973)—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.

I

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994) (citations omitted). The petitioners do not argue that the Constitution independently requires jurisdiction here.[1] Accordingly, these cases turn on the words of § 2241, a text the Court today largely ignores. Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. Section 2241(a) states:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" (Emphasis added.)

It further requires that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had.*" (Emphases added.) And § 2242 provides that a petition "addressed to the Supreme Court, a justice thereof or a circuit judge . . .

[1] See Tr. of Oral Arg. 5 ("Question: And you don't raise the issue of any potential jurisdiction on the basis of the Constitution alone. We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . .").

shall state the reasons for not making application to *the* district court of *the district in which the applicant is held.*" (Emphases added.) No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here, as the Court allows, see *ante*, at 478, the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of these cases.

The Court asserts, however, that the decisions of this Court have placed a gloss on the phrase "within their respective jurisdictions" in § 2241 which allows jurisdiction in these cases. That is not so. In fact, the only case in point holds just the opposite (and just what the statute plainly says). That case is *Eisentrager*, but to fully understand its implications for the present dispute, I must also discuss our decisions in the earlier case of *Ahrens* v. *Clark*, 335 U. S. 188 (1948), and the later case of *Braden*.

In *Ahrens*, the Court considered "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*." 335 U. S., at 189 (construing 28 U. S. C. § 452, the statutory precursor to § 2241). The *Ahrens* detainees were held at Ellis Island, New York, but brought their petitions in the District Court for the District of Columbia. Interpreting "within their respective jurisdictions," the Court held that a district court has jurisdiction to issue the writ only on behalf of petitioners detained within its territorial jurisdiction. It was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." 335 U. S., at 190.

Ahrens explicitly reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4. That question, the same question

presented to this Court today, was shortly thereafter resolved in *Eisentrager* insofar as noncitizens are concerned. *Eisentrager* involved petitions for writs of habeas corpus filed in the District Court for the District of Columbia by German nationals imprisoned in Landsberg Prison, Germany. The District Court, relying on *Ahrens*, dismissed the petitions because the petitioners were not located within its territorial jurisdiction. The Court of Appeals reversed. According to the Court today, the Court of Appeals "implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*," and "[i]n essence . . . concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'" *Ante*, at 477, 478. That is not so. The Court of Appeals concluded that there *was* statutory jurisdiction. It arrived at that conclusion by applying the canon of constitutional avoidance: "[I]f the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result." *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 966 (CADC 1949). In cases where there was no territorial jurisdiction over the detainee, the Court of Appeals held, the writ would lie at the place of a respondent with directive power over the detainee. "It is not too violent an interpretation of 'custody' to construe it as including those who have directive custody, as well as those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements. . . . *The statute must be so construed*, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision." *Id.*, at 967 (emphasis added).[2]

[2] The parties' submissions to the Court in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), construed the Court of Appeals' decision as I do. See Pet. for Cert., O. T. 1949, No. 306, pp. 8–9 ("[T]he court felt constrained to construe the habeas corpus jurisdictional statute—despite its reference to

This Court's judgment in *Eisentrager* reversed the Court of Appeals. The opinion was largely devoted to rejecting the lower court's constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion. But the opinion *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts. A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right.[3]

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the 'respective jurisdictions' of the various courts and the gloss put on that terminology in the *Ahrens* and previous decisions—to permit a petition to be filed in the district court with territorial jurisdiction over the officials who have directive authority over the immediate jailer in Germany"); Brief for Respondent, O. T. 1949, No. 306, p. 9 ("Respondent contends that the U. S. Court of Appeals . . . was correct in its holding that the statute, 28 U. S. C. 2241, provides that the U. S. District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar"). Indeed, the briefing in *Eisentrager* was mainly devoted to the question whether there was statutory jurisdiction. See, *e. g.*, Brief for Petitioner, O. T. 1949, No. 306, pp. 15–59; Brief for Respondent, O. T. 1949, No. 306, at 9–27, 38–49.

[3] The Court does not seriously dispute my analysis of the Court of Appeals' holding in *Eisentrager*. Instead, it argues that this Court in *Eisentrager* "understood the Court of Appeals' decision to rest on constitutional and not statutory grounds." *Ante*, at 478, n. 8. That is inherently implausible, given that the Court of Appeals' opinion clearly reached a statutory holding, and that both parties argued the case to this Court on that basis, see n. 2, *supra*. The only evidence of misunderstanding the Court adduces today is the *Eisentrager* Court's description of the Court of Appeals' reasoning as "that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States . . . ." 339 U. S., at 767. That is no misunderstanding, but an entirely accurate description of the Court of Appeals' reasoning—the penultimate step of that reasoning rather than its conclusion. The Court of Appeals went on to hold that, in light of the constitutional imperative, the statute should be interpreted as supplying jurisdiction. See *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 965–967 (CADC 1949). This Court in *Eisentrager* undoubtedly understood that, which is why it immediately followed the foregoing description with a description of the Court of Appeals' *conclusion* tied to the language of the habeas statute:

And absence of a right to the writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes.*" 339 U. S., at 768 (emphasis added). "[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment *were all beyond the territorial jurisdiction of any court of the United States.*" *Id.*, at 777–778. See also *id.*, at 781 (concluding that "no right to the writ of *habeas corpus* appears"); *id.*, at 790 (finding "no basis for invoking federal judicial power in any district"). The brevity of the Court's statutory analysis signifies nothing more than that the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager*. The former course would not pass the laugh test, inasmuch as *Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never *mentioned Eisentrager*. And the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says. So instead the Court tries an oblique course: *"Braden,"* it claims, "overruled *the statutory predi-*

"[W]here deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer." 339 U. S., at 767.

cate to *Eisentrager*'s holding," *ante*, at 479 (emphasis added), by which it means the statutory analysis of *Ahrens*. Even assuming, for the moment, that *Braden* overruled some aspect of *Ahrens*, inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard to see how any of that case's "statutory predicate" could have been impaired.

But in fact *Braden* did not overrule *Ahrens;* it distinguished *Ahrens*. *Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that Braden was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for Braden's petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens*.

> "A further, *critical* development since our decision in *Ahrens* is the emergence of *new classes of prisoners* who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute. The overruling of *McNally* v. *Hill*, 293 U. S. 131 (1934), made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his

> dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama." 410 U. S., at 498–499 (citations and footnotes omitted; emphases added).

This cannot conceivably be construed as an overturning of the *Ahrens* rule *in other circumstances.* See also *Braden, supra,* at 499–500 (noting that *Ahrens* does not establish "an inflexible jurisdictional rule dictating the choice of an inconvenient forum *even in a class of cases which could not have been foreseen at the time of that decision*" (emphasis added)). Thus, *Braden* stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*). Where, as here, present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls.[4]

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[4] The Court points to Court of Appeals cases that have described *Braden* as "overruling" *Ahrens.* See *ante,* at 479–480, n. 9. Even if that description (rather than what I think the correct one, "distinguishing") is accepted, it would not support the Court's view that *Ahrens* was overruled *with regard to the point on which Eisentrager relied.* The *ratio decidendi* of *Braden* does not call into question the principle of *Ahrens* applied in *Eisentrager:* that habeas challenge to present physical confinement must be made in the district where the physical confinement exists. The Court is unable to produce a single authority that agrees with its conclusion that *Braden* overruled *Eisentrager.*

JUSTICE KENNEDY recognizes that *Eisentrager* controls, *ante,* at 485 (opinion concurring in judgment), but misconstrues that opinion. He thinks it makes jurisdiction under the habeas statute turn on the circumstances of the detainees' confinement—including, apparently, the availability of legal proceedings and the length of detention, see *ante,* at 487–

The considerations of forum convenience that drove the analysis in *Braden* do not call into question *Eisentrager*'s holding. The *Braden* opinion is littered with venue reasoning of the following sort: "The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined." 410 U. S., at 494. Of course nothing could be *more* inconvenient than what the Court (on the alleged authority of *Braden*) prescribes today: a domestic hearing for persons held abroad, dealing with events that transpired abroad.

Attempting to paint *Braden* as a refutation of *Ahrens* (and thereby, it is suggested, *Eisentrager*), today's Court imprecisely describes *Braden* as citing with approval post-*Ahrens* cases in which "habeas petitioners" located overseas were allowed to proceed (without consideration of the jurisdictional issue) in the District Court for the District of Columbia. *Ante*, at 479. In fact, what *Braden* said is that "[w]here *American citizens* confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the

488. The *Eisentrager* Court mentioned those circumstances, however, only in the course of its *constitutional* analysis, and not in its application of the statute. It is quite impossible to read §2241 as conditioning its geographic scope upon them. Among the consequences of making jurisdiction turn upon circumstances of confinement are (1) that courts would *always* have authority to inquire into circumstances of confinement, and (2) that the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. And among the questions this approach raises: When does definite detention become indefinite? How much process will suffice to stave off jurisdiction? If there is a terrorist attack at Guantanamo Bay, will the area suddenly fall outside the habeas statute because it is no longer "far removed from any hostilities," *ante*, at 487? JUSTICE KENNEDY's approach provides enticing law-school-exam imponderables in an area where certainty is called for.

petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." 410 U. S., at 498 (emphasis added). Of course "the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996) (citing cases), but we need not "overrule" those implicit holdings to decide these cases. Since *Eisentrager itself* made an exception for such cases, they in no way impugn its holding. "With the citizen," *Eisentrager* said, "we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all categories of aliens." 339 U. S., at 769. The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas. Neither party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts; but the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong.* Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal

courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth. Part III of its opinion asserts that *Braden* stands for the proposition that "a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" *Ante*, at 478–479. Endorsement of that proposition is repeated in Part IV. *Ante*, at 483–484 ("Section 2241, by its terms, requires nothing more [than the District Court's jurisdiction over petitioners' custodians]").

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. See, *e. g.*, Department of Army, G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776–1945, Pamphlet No. 20–213, p. 244 (1955) (noting that, "[b]y the end of hostilities [in World War II], U. S. forces had in custody approximately two million enemy soldiers"). A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the "[p]etitioners' allegations . . . unquestionably describe 'custody in violation

of the Constitution or laws or treaties of the United States.'" *Ante*, at 483, n. 15 (citing *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring)). From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager:*

> "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U. S., at 778–779.

These results should not be brought about lightly, and certainly not without a textual basis in the statute and on the

strength of nothing more than a decision dealing with an Alabama prisoner's ability to seek habeas in Kentucky.

III

Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But Part III flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." *Ante*, at 479. That rejection is repeated at the end of Part IV: "In the end, the answer to the question presented is clear. . . . No party questions the District Court's jurisdiction over petitioners' custodians. . . . Section 2241, by its terms, requires nothing more." *Ante*, at 483–484. Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here. The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.

Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay. Of course if the Court is right about that, not only § 2241 but presumably *all* United States law applies there—including, for example, the federal cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), which would allow prisoners to sue their captors for damages. Fortunately, however, the Court's irrelevant discussion also happens to be wrong.

The Court gives only two reasons why the presumption against extraterritorial effect does not apply to Guantanamo Bay. First, the Court says (without any further elaboration)

that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base [under the terms of a 1903 lease agreement], and may continue to exercise such control permanently if it so chooses [under the terms of a 1934 Treaty]." *Ante*, at 480; see *ante*, at 471. But that lease agreement explicitly recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418, and the Executive Branch—whose head is "exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Eisentrager*, *supra*, at 789—affirms that the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States, see Brief for Respondents 21.

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if "jurisdiction and control" rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

The second and last reason the Court gives for the proposition that domestic law applies to Guantanamo Bay is the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay. "Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Ante*, at 481. But the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay: "Our answer to that ques-

tion, Justice Souter, is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it." Tr. of Oral Arg. 40. See also *id.*, at 27–28. And *that* position—the position that United States citizens throughout the world may be entitled to habeas corpus rights—is precisely the position that this Court adopted in *Eisentrager*, see 339 U. S., at 769–770, even while holding that aliens abroad *did not have* habeas corpus rights. Quite obviously, the Court's second reason has no force whatever.

The last part of the Court's Part IV analysis digresses from the point that the presumption against extraterritorial application does not apply to Guantanamo Bay. Rather, it is directed to the contention that the Court's approach to habeas jurisdiction—applying it to aliens abroad—is "consistent with the historical reach of the writ." *Ante*, at 481. None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic territory. *Ante*, at 481–482, n. 11. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The remaining cases involve issuance of the writ to "'exempt jurisdictions'" and "other dominions under the sovereign's control." *Ante*, at 482, and nn. 12–13. These cases are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.

"Exempt jurisdictions"—the Cinque Ports and Counties Palatine (located in modern-day England)—were local franchises granted by the Crown. See 1 W. Holdsworth, History of English Law 108, 532 (7th ed. rev. 1956); 3 W. Blackstone, Commentaries on the Laws of England 78–79 (1768) (hereinafter Blackstone). These jurisdictions were "exempt" in the sense that the Crown had ceded management of municipal affairs to local authorities, whose courts had exclusive juris-

diction over private disputes among residents (although review was still available in the royal courts by writ of error). See *id.*, at 79. Habeas jurisdiction nevertheless extended to those regions on the theory that the delegation of the King's authority did not include his own prerogative writs. *Ibid.;* R. Sharpe, Law of Habeas Corpus 188–189 (2d ed. 1989) (hereinafter Sharpe). Guantanamo Bay involves no comparable local delegation of pre-existing sovereign authority.

The cases involving "other dominions under the sovereign's control" fare no better. These cases stand only for the proposition that the writ extended to dominions of the Crown outside England proper. The authorities relating to Jersey and the other Channel Islands, for example, see *ante,* at 482, n. 13, involve territories that are "dominions of the crown of Great Britain" even though not "part of the kingdom of England," 1 Blackstone 102–105 (1765), much as were the colonies in America, *id.*, at 104–105, and Scotland, Ireland, and Wales, *id.*, at 93. See also *King* v. *Cowle,* 2 Burr. 834, 853–854, 97 Eng. Rep. 587, 598 (K. B. 1759) (even if Berwick was "no part of the realm of England," it was still a "dominion of the Crown"). All of the dominions in the cases the Court cites—and all of the territories Blackstone lists as dominions, see 1 Blackstone 93–106—are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.

The Court's historical analysis fails for yet another reason: To the extent the writ's "extraordinary territorial ambit" did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied only to British *subjects.* The very sources the majority relies on say so: Sharpe explains the "broader ambit" of the writ on the ground that it is "said to depend not on the ordinary jurisdiction of the court for its effectiveness, but upon the authority of the sovereign over

all her *subjects*." Sharpe 188 (emphasis added). Likewise, Blackstone explained that the writ "run[s] into all parts of the king's dominions" because "the king is at all times entitled to have an account why the liberty of any of his *subjects* is restrained." 3 Blackstone 131 (emphasis added). *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), which can hardly be viewed as evidence of the *historic* scope of the writ, only confirms the ongoing relevance of the sovereign-subject relationship to the scope of the writ. There, the question was whether "the Court of Queen's Bench [can] be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained" in Northern Rhodesia, which was at the time a protectorate of the Crown. *Id.*, at 300 (Lord Evershed, M. R.). Each judge made clear that the detainee's status as a subject was material to the resolution of the case. See *id.*, at 300, 302 (Lord Evershed, M. R.); *id.*, at 305 (Romer, L. J.) ("[I]t is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory"); *id.*, at 311 (Sellers, L. J.) ("I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate"). None of the exempt-jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown.

The rule against issuing the writ to aliens in foreign lands was still the law when, in *In re Ning Yi-Ching*, 56 T. L. R. 3 (K. B. Vac. Ct. 1939), an English court considered the habeas claims of four Chinese subjects detained on criminal charges in Tientsin, China, an area over which Britain had by treaty acquired a lease and "therewith exercised certain rights of administration and control." *Id.*, at 4. The court held that Tientsin was a foreign territory, and that the writ would not

issue to a foreigner detained there. The Solicitor-General had argued that "[t]here was no case on record in which a writ of *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory," *id.*, at 5, and the court "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm," *id.*, at 6.[5]

In sum, the Court's treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from precedent.[6]

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[5] The Court argues at some length that *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), calls into question my reliance on *In re Ning Yi-Ching*. See *ante*, at 15, n. 14. But as I have explained, see *supra*, at 504, *Mwenya* dealt with a British subject and the court went out of its way to explain that its expansive description of the scope of the writ was premised on that fact. The Court cites not a single case holding that aliens held outside the territory of the sovereign were within reach of the writ.

[6] The Court grasps at two other bases for jurisdiction: the Alien Tort Statute (ATS), 28 U. S. C. § 1350, and the federal-question statute, § 1331. The former is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03–334, p. 2, n. 1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act . . ."); Brief for Petitioners in No. 03–343, p. 13; Tr. of Oral Arg. 6.

With respect to § 1331, petitioners assert a variety of claims arising under the Constitution, treaties, and laws of the United States. In *Eisentrager*, though the Court's holding focused on § 2241, its analysis spoke more broadly: "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U. S., at 777–778. That reasoning dooms petitioners' claims under § 1331, at least where Congress has erected a jurisdictional bar to their raising such claims in habeas.

* * *

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute,[7] instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their confinement, see *Rumsfeld* v. *Padilla*, *ante*, p. 426, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum-shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

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[7] It could, for example, provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U. S. C. §3841(a) (repealed 1979).

ANEXO 05 – CASO *HAMDAN V. RUMSFELD* (2006)

Syllabus

HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05–184. Argued March 28, 2006—Decided June 29, 2006

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001, al Qaeda terrorist attacks (AUMF), U. S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted habeas relief and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war; that such law includes the Third Geneva Convention; that Hamdan is entitled to that Convention's full protections until adjudged, under it, not to be a prisoner of war; and that, whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in violation of both the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 801 *et seq.*, and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. The D. C. Circuit reversed. Although it declined the Government's invitation to abstain from considering Hamdan's challenge, cf. *Schlesinger* v. *Councilman*, 420 U. S. 738, the appeals court ruled, on the merits, that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. The court also concluded

that *Ex parte Quirin*, 317 U. S. 1, foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the UCMJ nor Armed Forces regulations implementing the Geneva Conventions.

Held: The judgment is reversed, and the case is remanded.

415 F. 3d 33, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI–D–iv, concluding:

1. The Government's motion to dismiss, based on the Detainee Treatment Act of 2005 (DTA), is denied. DTA § 1005(e)(1) provides that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay." Section 1005(h)(2) provides that §§ 1005(e)(2) and (3)—which give the D. C. Circuit "exclusive" jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—"shall apply with respect to any claim whose review is . . . pending on" the DTA's effective date, as was Hamdan's case. The Government's argument that §§ 1005(e)(1) and (h) repeal this Court's jurisdiction to review the decision below is rebutted by ordinary principles of statutory construction. A negative inference may be drawn from Congress' failure to include § 1005(e)(1) within the scope of § 1005(h)(2). Cf., *e. g.*, *Lindh* v. *Murphy*, 521 U. S. 320, 330. "If . . . Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. The legislative history shows that Congress not only considered the respective temporal reaches of §§ 1005(e)(1), (2), and (3) together at every stage, but omitted paragraph (1) from its directive only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within that directive's scope. Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation. See *Doe* v. *Chao*, 540 U. S. 614, 621–623. Pp. 572–584.

2. The Government argues unpersuasively that abstention is appropriate under *Councilman*, which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U. S., at 740. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, there-

fore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.*, at 752, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "an integrated system of military courts and review procedures" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman*, the most relevant precedent is *Ex parte Quirin*, where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U. S., at 19. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. Pp. 584–590.

3. The military commission at issue is not expressly authorized by any congressional Act. *Quirin* held that Congress had, through Article of War 15, sanctioned the use of military commissions to try offenders or offenses against the law of war. 317 U. S., at 28. UCMJ Art. 21, which is substantially identical to the old Art. 15, reads: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such . . . commissions." 10 U. S. C. § 821. Contrary to the Government's assertion, even *Quirin* did not view that authorization as a sweeping mandate for the President to invoke military commissions whenever he deems them necessary. Rather, *Quirin* recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war. See 317 U. S., at 28–29. Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan. Assuming the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, and that those powers include authority to convene military commissions in appropriate circumstances, see, *e. g.*, *id.*, at 518, there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21. Cf. *Ex parte Yerger*, 8 Wall. 85, 105. Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's

commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. Pp. 590–595.

4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 613–635.

(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial. Pp. 613–615.

(b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia*, that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "final decision" under DTA § 1005(e)(3). Second, there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been*, excluded from his own trial.

Thus, review of the procedures in advance of a "final decision" is appropriate. Pp. 615–616.

(c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from court-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practicable," 10 U. S. C. § 836(b). The "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of *Art. 36(a)*, that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, *e. g.*, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of Hamdan's trial, any variance from the court-martial rules. The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: The right to be present. See 10 U. S. C. § 839(c). Because the jettisoning of so basic a right cannot lightly be excused as "practicable," the court-martial rules must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Art. 36(b). Pp. 617–625.

(d) The procedures adopted to try Hamdan also violate the Geneva Conventions. The D. C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia*, that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. Pp. 625–631.

Syllabus

(i) The appeals court relied on a statement in *Johnson* v. *Eisentrager*, 339 U. S. 763, 789, n. 14, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for observing and enforcing prisoners' rights under the Convention. However, *Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher*, 119 U. S. 407, they are indisputably part of the law of war, see *Hamdi*, 542 U. S., at 520–521, compliance with which is the condition upon which UCMJ Art. 21 authority is granted. Pp. 626–628.

(ii) Alternatively, the appeals court agreed with the Government that the Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i. e.*, signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons . . . placed *hors de combat* by . . . detention," including a prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples." The D. C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a "conflict not of an international character." That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory "accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not). Pp. 628–631.

(iii) While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance

with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Pp. 631–633.

(iv) Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements. P. 635.

(e) Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment. P. 635.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts V and VI–D–iv:

1. The Government has not charged Hamdan with an "offens[e] . . . that . . . by the law of war may be tried by military commissio[n]," 10 U. S. C. § 821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia*, that it must be limited to trying offenses committed within the convening commander's field of command, *i. e.*, within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin*, 317 U. S., at 30, the precedent for doing so with respect to a particular offense must be plain and unambiguous, cf., *e. g.*, *Loving* v. *United States*, 517 U. S. 748, 771. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e. g.*, the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge

does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. Pp. 595–613.

2. The phrase "all the judicial guarantees . . . recognized as indispensable by civilized peoples" in Common Article 3 of the Geneva Conventions is not defined, but it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees. Moreover, various provisions of Commission Order No. 1 dispense with the principles, which are indisputably part of customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. Pp. 633–635.

JUSTICE KENNEDY, agreeing that Hamdan's military commission is unauthorized under the Uniform Code of Military Justice, 10 U. S. C. §§ 836 and 821, and the Geneva Conventions, concluded that there is therefore no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan. Pp. 653–655.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined, *post*, p. 636. KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II, *post*, p. 636. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 655. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2, *post*, p. 678. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to Parts I through III, *post*, p. 725. ROBERTS, C. J., took no part in the consideration or decision of the case.

Neal Katyal argued the cause for petitioner. With him on the briefs were *Harry H. Schneider, Jr.*, *Joseph M. McMillan*, *Charles C. Sipos*, *Charles Swift*, *Thomas C. Goldstein*, *Amy Howe*, and *Kevin K. Russell.*

Solicitor General Clement argued the cause for respondents. With him on the brief were *Assistant Attorney Gen-*

Counsel

eral Keisler, Deputy Solicitor General Garre, Deputy Assistant Attorney General Katsas, Jonathan L. Marcus, Kannon K. Shanmugam, Douglas N. Letter, and *Robert M. Loeb.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro, Ben Wizner*, and *Lee Gelernt;* for the American Jewish Committee et al. by *Marvin L. Gray, Jr., Jeffrey L. Fisher, Jeffrey P. Sinensky, Kara H. Stein, John W. Whitehead, Elliot M. Mincberg, Arthur H. Bryant*, and *Victoria W. Ni;* for the Association of the Bar of the City of New York et al. by *James J. Benjamin, Jr.*, and *Steven M. Pesner;* for the Brennan Center for Justice et al. by *Sidney S. Rosdeitcher* and *Jonathan Hafetz;* for the Cato Institute by *Timothy Lynch;* for the Center for Constitutional Rights et al. by *Barbara J. Olshansky* and *William H. Goodman;* for International Law Professors by *Linda A. Malone* and *Jordan J. Paust;* for Law Professors by *Claudia Callaway;* for Military Law Historians, Scholars, and Practitioners by *Teresa Wynn Roseborough, Charles Lester, Jr., John A. Chandler*, and *Elizabeth V. Tanis;* for the National Association of Criminal Defense Lawyers by *Donald G. Rehkopf, Jr.;* for the National Institute of Military Justice et al. by *Eugene R. Fidell, Stephen A. Saltzburg, Kathleen A. Duignan*, and *Diane Marie Amann;* for Specialists in Conspiracy and International Law by *George P. Fletcher, pro se;* for the Yemeni National Organization for Defending Rights and Freedoms by *Lawrence D. Rosenberg;* for Madeleine K. Albright et al. by *Harold Hongju Koh* and *Jonathan M. Freiman;* for David Brahms et al. by *Andrew J. Pincus, Jay C. Johnson*, and *Andrew Tauber;* for Norman Dorsen et al. by *Burt Neuborne;* for Louise Doswald-Beck et al. by *Bridget Arimond, David J. Scheffer*, and *Steven A. Kaufman;* for Richard A. Epstein et al. by *Aaron M. Panner, Joseph S. Hall*, and *Mr. Epstein, pro se;* for Louis Fisher by *Lawrence S. Lustberg;* for Ibrahim Ahmed Mahmoud al Qosi by *Paul S. Reichler* and *Sharon A. Shaffer;* for Binyam Mohamed by *Clive A. Stafford Smith* and *Joseph Margulies;* and for Jack N. Rakove et al. by *Pamela S. Karlan.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law and Justice et al. by *Jay Alan Sekulow, Stuart J. Roth, James M. Henderson, Sr., Colby M. May*, and *Robert W. Ash;* for Common Defence by *Daniel P. Collins;* for Former Attorneys General of the United States et al. by *Andrew G. McBride* and *Kathryn Comerford Todd;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the Human Rights Committee of the Bar of England and Wales et al. by *Stephen J. Pollak* and *John Townsend Rich;* for the Center for National Security Studies et al. by

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI–D–iii, Part VI–D–v, and Part VII, and an opinion with respect to Parts V and VI–D–iv, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U. S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit . . . offenses triable by military commission." App. to Pet. for Cert. 65a.

John Payton, *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Kate Martin*, and *Joseph Onek;* for Certain Former Federal Judges by *Paul C. Saunders;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for Human Rights First et al. by *Robert P. LoBue* and *Deborah Pearlstein;* for Legal Scholars and Historians by *Daniel C. Tepstein;* for the Office of Chief Defense Counsel, Office of Military Commissions, by *Dwight H. Sullivan* and *Michael D. Mori;* for Retired Generals and Admirals et al. by *David H. Remes;* for the Urban Morgan Institute for Human Rights by *Christopher J. Wright* and *Timothy J. Simeone;* for Lawrence M. Friedman et al. by *William F. Alderman;* for Ryan Goodman et al. by *Mark A. Packman;* for Senator Lindsey Graham et al. by *Jeffrey A. Lamken;* for Louis Henkin et al. by *Carlos M. Vázquez*, *pro se;* for David Hicks by *Joshua L. Dratel*, *Mr. Mori*, *Marc A. Goldman*, and *Michael B. DeSanctis;* for Arthur R. Miller by *Mr. Remes;* for Richard D. Rosen et al. by *Steven H. Goldblatt;* for More Than 300 Detainees Incarcerated at U. S. Naval Station, Guantanamo Bay, Cuba, et al. by *Thomas B. Wilner*, *Neil H. Koslowe*, and *Kristine A. Huskey;* and for 422 Current and Former Members of the United Kingdom and European Union Parliaments by *Claude B. Stansbury.*

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 801 *et seq.* (2000 ed. and Supp. III), would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy—an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan's request for a writ of habeas corpus. 344 F. Supp. 2d 152 (DC 2004). The Court of Appeals for the District of Columbia Circuit reversed. 415 F. 3d 33 (2005). Recognizing, as we did over a half century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U. S. 1, 19 (1942), we granted certiorari. 546 U. S. 1002 (2005).

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra*, that the offense with which Hamdan has been charged is not an "offens[e] that by . . . the law of war may be tried by military commissions." 10 U. S. C. § 821.

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the

World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. *Id.*, at 57834. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." *Ibid.* The No-

vember 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order, but that power has since been delegated to John D. Altenburg, Jr., a retired Army major general and longtime military lawyer who has been designated "Appointing Authority for Military Commissions."

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U. S. C. § 810. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's jurisdiction—namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Usama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly

joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." App. to Pet. for Cert. 65a. There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy": (1) he acted as Usama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [U]sama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps. *Id.*, at 65a–67a.

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's habeas and mandamus petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant."[1]

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[1] An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal

Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," 344 F. Supp. 2d, at 158; that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. 344 F. Supp. 2d, at 158–172.

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. Cf. *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975). On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," 415 F. 3d, at 38, and two thought that the Conventions did not in any event apply to Hamdan, *id.*, at 40–42; but see *id.*, at 44 (Williams, J., concurring). In other portions of its opinion, the court concluded that our decision in *Quirin* foreclosed any separation-of-powers objection to

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§ *a* (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

the military commission's jurisdiction, and held that Hamdan's trial before the contemplated commission would violate neither the UCMJ nor U. S. Armed Forces regulations intended to implement the Geneva Conventions. 415 F. 3d, at 38, 42–43.

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari. The ground cited for dismissal was the recently enacted Detainee Treatment Act of 2005 (DTA), Pub. L. 109–148, 119 Stat. 2739. We postponed our ruling on that motion pending argument on the merits, 546 U. S. 1166 (2006), and now deny it.

The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U. S. custody, and it furnishes procedural protections for U. S. personnel accused of engaging in improper interrogation. DTA §§ 1002–1004, 119 Stat. 2739–2740. It also sets forth certain "PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES." § 1005, *id.*, at 2740. Subsections (a) through (d) of § 1005 direct the Secretary of Defense to report to Congress the procedures being used by CSRTs to determine the proper classification of detainees held in Guantanamo Bay, Iraq, and Afghanistan, and to adopt certain safeguards as part of those procedures.

Subsection (e) of § 1005, which is entitled "JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS," supplies the basis for the Government's jurisdictional argument. The subsection contains three numbered paragraphs. The first paragraph amends the judicial code as follows:

"(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"'(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"'(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"'(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"'(A) is currently in military custody; or

"'(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'" § 1005(e), *id.*, at 2741–2742.

Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Paragraph (2) also delimits the scope of that review. See §§ 1005(e)(2)(C)(i)–(ii), *id.*, at 2742.

Paragraph (3) mirrors paragraph (2) in structure, but governs judicial review of final decisions of military commissions, not CSRTs. It vests in the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." § 1005(e)(3)(A), *id.*, at 2743.[2]

[2] The military order referenced in this section is discussed further in Parts III and VI, *infra.*

Review is as of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals' discretion in all other cases. The scope of review is limited to the following inquiries:

> "(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and
>
> "(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D), *ibid.*

Finally, § 1005 contains an "effective date" provision, which reads as follows:

> "(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.
>
> "(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." § 1005(h), *id.*, at 2743–2744.[3]

The DTA is silent about whether paragraph (1) of subsection (e) "shall apply" to claims pending on the date of enactment.

The Government argues that §§ 1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court—including this Court. Accordingly, it argues, we

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[3] The penultimate subsections of § 1005 emphasize that the provision does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" and that the "United States" does not, for purposes of § 1005, include Guantanamo Bay. §§ 1005(f)–(g).

lack jurisdiction to review the Court of Appeals' decision below.

Hamdan objects to this theory on both constitutional and statutory grounds. Principal among his constitutional arguments is that the Government's preferred reading raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. Support for this argument is drawn from *Ex parte Yerger*, 8 Wall. 85 (1869), in which, having explained that "the denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ," *id.*, at 102–103, we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary. See *id.*, at 104–105; see also *Felker* v. *Turpin*, 518 U. S. 651 (1996); *Durousseau* v. *United States*, 6 Cranch 307, 314 (1810) (opinion for the Court by Marshall, C. J.) (The "appellate powers of this court" are not created by statute but are "given by the constitution"); *United States* v. *Klein*, 13 Wall. 128 (1872). Cf. *Ex parte McCardle*, 7 Wall. 506, 514 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction, reproduced in the margin,[4] could not have been "a plainer instance of positive exception"). Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut

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[4] "'*And be it further enacted*, That so much of the act approved February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed.'" 7 Wall., at 508.

the Government's theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

The Government acknowledges that only paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases, see § 1005(h)(2), 119 Stat. 2743–2744, but argues that the omission of paragraph (1) from the scope of that express statement is of no moment. This is so, we are told, because Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

The first part of this argument is not entirely without support in our precedents. We have in the past "applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994) (citing *Bruner* v. *United States*, 343 U. S. 112 (1952); *Hallowell* v. *Commons*, 239 U. S. 506 (1916)); see *Republic of Austria* v. *Altmann*, 541 U. S. 677, 693 (2004). But the "presumption" that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances.[5] If a statutory provision "would operate retroactively" as applied to cases pending at the time the provision was enacted, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U. S., at 280. We have explained, however, that, unlike other intervening changes in the law, a

[5] See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997) ("The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity . . . ").

jurisdiction-conferring or jurisdiction-stripping statute usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U. S., at 508. If that is truly all the statute does, no retroactivity problem arises because the change in the law does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U. S., at 280.[6] And if a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted.

That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment.[7] "[N]ormal rules of construction," including a contextual reading of the statutory language, may dictate otherwise. *Lindh* v. *Murphy*, 521 U. S. 320, 326

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[6] Cf. *ibid.* ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties" (emphasis in original)).

[7] In his insistence to the contrary, JUSTICE SCALIA reads too much into *Bruner* v. *United States*, 343 U. S. 112 (1952), *Hallowell* v. *Commons*, 239 U. S. 506 (1916), and *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (1867). See *post*, at 656–658 (dissenting opinion). None of those cases says that the absence of an express provision reserving jurisdiction over pending cases trumps or renders irrelevant any other indications of congressional intent. Indeed, *Bruner* itself relied on such other indications—including a negative inference drawn from the statutory text, cf. *infra*, at 578—to support its conclusion that jurisdiction was not available. The Court observed that (1) Congress had been put on notice by prior lower court cases addressing the Tucker Act that it ought to specifically reserve jurisdiction over pending cases, see 343 U. S., at 115, and (2) in contrast to the congressional silence concerning reservation of jurisdiction, reservation *had* been made of " 'any rights or liabilities' existing at the effective date of the Act" repealed by another provision of the Act, *ibid.*, n. 7.

(1997).[8] A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.*, at 330; see also, *e. g.*, *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"). The Court in *Lindh* relied on this reasoning to conclude that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases filed after that statute's effective date. Congress' failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases "apply to cases pending on or after the date of enactment." § 107(c), 110 Stat. 1226; see *Lindh*, 521 U. S., at 329–330. That contrast, combined with the fact that the amendments at issue "affect[ed] substantive entitlement to relief," *id.*, at 327, warranted drawing a negative inference.

A like inference follows *a fortiori* from *Lindh* in this case. "If . . . Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it

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[8] The question in *Lindh* was whether new limitations on the availability of habeas relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, applied to habeas actions pending on the date of AEDPA's enactment. We held that they did not. At the outset, we rejected the State's argument that, in the absence of a clear congressional statement to the contrary, a "procedural" rule must apply to pending cases. 521 U. S., at 326.

was in *Lindh*. In *Lindh*, the provisions to be contrasted had been drafted separately but were later "joined together and . . . considered simultaneously when the language raising the implication was inserted." *Id.*, at 330. We observed that Congress' tandem review and approval of the two sets of provisions strengthened the presumption that the relevant omission was deliberate. *Id.*, at 331; see also *Field* v. *Mans*, 516 U. S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects"). Here, Congress not only considered the respective temporal reaches of paragraphs (1), (2), and (3) of subsection (e) together at every stage, but omitted paragraph (1) from its directive that paragraphs (2) and (3) apply to pending cases only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within the scope of that directive. Compare DTA § 1005(h)(2), 119 Stat. 2743–2744, with 151 Cong. Rec. S12655 (Nov. 10, 2005) (S. Amdt. 2515); see *id.*, at S14257–S14258 (Dec. 21, 2005) (discussing similar language proposed in both the House and the Senate).[9] Congress' rejection of the very language that would have

[9] That paragraph (1), along with paragraphs (2) and (3), is to "take effect on the date of the enactment," DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive; "a 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'" *INS* v. *St. Cyr*, 533 U. S. 289, 317 (2001) (quoting *Landgraf* v. *USI Film Products*, 511 U. S. 244, 257 (1994)). Certainly, the "effective date" provision cannot bear the weight JUSTICE SCALIA would place on it. See *post*, at 659, and n. 1. Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2). JUSTICE SCALIA seeks to avoid reducing subsection (h)(2) to a mere redundancy—a consequence he seems to acknowledge must otherwise follow from his interpretation—by speculating that Congress had special reasons, not also relevant to subsection (e)(1), to worry that subsections (e)(2) and (e)(3) would be ruled inapplicable to pending cases. As we explain *infra*, at 582–583, and n. 12, that attempt fails.

achieved the result the Government urges here weighs heavily against the Government's interpretation. See *Doe* v. *Chao*, 540 U. S. 614, 621–623 (2004).[10]

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[10] We note that statements made by Senators preceding passage of the DTA lend further support to what the text of the DTA and its drafting history already make plain. Senator Levin, one of the sponsors of the final bill, objected to earlier versions of the DTA's "effective date" provision that would have made subsection (e)(1) applicable to pending cases. See, *e. g.*, 151 Cong. Rec. S12667 (Nov. 10, 2005) (amendment proposed by Sen. Graham that would have rendered what is now subsection (e)(1) applicable to "any application or other action that is pending on or after the date of the enactment of this Act"). Senator Levin urged adoption of an alternative amendment that "would apply only to new habeas cases filed after the date of enactment." *Id.*, at S12802 (Nov. 15, 2005). That alternative amendment became the text of subsection (h)(2). (In light of the extensive discussion of the DTA's effect on pending cases prior to passage of the DTA, see, *e. g.*, *id.*, at S12664 (Nov. 10, 2005); *id.*, at S12755 (Nov. 14, 2005); *id.*, at S12799–S12802 (Nov. 15, 2005); *id.*, at S14245, S14252–S14253, S14257–S14258, S14274–S14275 (Dec. 21, 2005), it cannot be said that the changes to subsection (h)(2) were inconsequential. Cf. *post*, at 668 (SCALIA, J., dissenting).)

While statements attributed to the final bill's two other sponsors, Senators Graham and Kyl, arguably contradict Senator Levin's contention that the final version of the DTA preserved jurisdiction over pending habeas cases, see 151 Cong. Rec. S14263–S14264 (Dec. 21, 2005), those statements appear to have been inserted into the Congressional Record *after* the Senate debate. See Reply Brief for Petitioner 5, n. 6; see also 151 Cong. Rec. S14260 (statement of Sen. Kyl) ("I would like to say a few words about the *now-completed* National Defense Authorization Act for fiscal year 2006" (emphasis added)). All statements made during the debate itself support Senator Levin's understanding that the final text of the DTA would not render subsection (e)(1) applicable to pending cases. See, *e. g.*, *id.*, at S14245, S14252–S14253, S14274–S14275 (Dec. 21, 2005). The statements that JUSTICE SCALIA cites as evidence to the contrary construe *subsection (e)(3)* to strip this Court of jurisdiction, see *post*, at 666, n. 4 (dissenting opinion) (quoting 151 Cong. Rec. S12796 (Nov. 15, 2005) (statement of Sen. Specter))—a construction that the Government has expressly disavowed in this litigation, see n. 11, *infra*. The inapposite November 14, 2005, statement of Senator Graham, which JUSTICE SCALIA cites as evidence of that Senator's "assumption that pending cases are covered," *post*, at 666,

The Government nonetheless offers two reasons why, in its view, no negative inference may be drawn in favor of jurisdiction. First, it asserts that *Lindh* is inapposite because "Section 1005(e)(1) and (h)(1) remove jurisdiction, while Section 1005(e)(2), (3) and (h)(2) create an exclusive review mechanism and define the nature of that review." Reply Brief in Support of Respondents' Motion to Dismiss 4. Because the provisions being contrasted "address wholly distinct subject matters," *Martin* v. *Hadix*, 527 U. S. 343, 356 (1999), the Government argues, Congress' different treatment of them is of no significance.

This argument must fail because it rests on a false distinction between the "jurisdictional" nature of subsection (e)(1) and the "procedural" character of subsections (e)(2) and (e)(3). In truth, all three provisions govern jurisdiction over detainees' claims; subsection (e)(1) addresses jurisdiction in habeas cases and other actions "relating to any aspect of the detention," while subsections (e)(2) and (e)(3) vest exclusive,[11] but limited, *jurisdiction* in the Court of Appeals for the District of Columbia Circuit to review "final decision[s]" of CSRTs and military commissions.

That subsection (e)(1) strips jurisdiction while subsections (e)(2) and (e)(3) restore it in limited form is hardly a distinction upon which a negative inference must founder. JUSTICE SCALIA, in arguing to the contrary, maintains that Con-

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and n. 3 (citing 151 Cong. Rec. S12756 (Nov. 14, 2005)), follows directly after the uncontradicted statement of his cosponsor, Senator Levin, assuring members of the Senate that "the amendment will not strip the courts of jurisdiction over [pending] cases," *id.*, at S12755.

[11] The District of Columbia Circuit's jurisdiction, while "exclusive" in one sense, would not bar this Court's review on appeal from a decision under the DTA. See Reply Brief in Support of Respondents' Motion to Dismiss 16–17, n. 12 ("While the DTA does not expressly call for Supreme Court review of the District of Columbia Circuit's decisions, Section[s] 1005(e)(2) and (3) . . . do not remove this Court's jurisdiction over such decisions under 28 U. S. C. § 1254(1)").

gress had "ample reason" to provide explicitly for application of subsections (e)(2) and (e)(3) to pending cases because "jurisdiction-ousting" provisions like subsection (e)(1) have been treated differently under our retroactivity jurisprudence than "jurisdiction-creating" ones like subsections (e)(2) and (e)(3). *Post*, at 662 (dissenting opinion); see also Reply Brief in Support of Respondents' Motion to Dismiss 5–6. That theory is insupportable. Assuming, *arguendo*, that subsections (e)(2) and (e)(3) "confer *new* jurisdiction (in the D. C. Circuit) where there was none before," *post*, at 662 (emphasis in original); but see *Rasul* v. *Bush*, 542 U. S. 466 (2004), and that our precedents can be read to "strongly indicat[e]" that jurisdiction-creating statutes raise special retroactivity concerns not also raised by jurisdiction-stripping statutes, *post*, at 662,[12] subsections (e)(2) and (e)(3) "confer" jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents. The provisions impose no additional liability or obligation on any private party or even on the United States, unless one counts the burden of litigating an appeal—a burden not a single one of our cases suggests triggers retroactivity concerns.[13]

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[12] This assertion is itself highly questionable. The cases that JUSTICE SCALIA cites to support his distinction are *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004), and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939 (1997). See *post*, at 662. While the Court in both of those cases recognized that statutes "creating" jurisdiction may have retroactive effect if they affect "substantive" rights, see *Altmann*, 541 U. S., at 695, and n. 15; *Hughes Aircraft*, 520 U. S., at 951, we have applied the same analysis to statutes that have jurisdiction-stripping effect, see *Lindh* v. *Murphy*, 521 U. S. 320, 327–328 (1997); *id.*, at 342–343 (Rehnquist, C. J., dissenting) (construing AEDPA's amendments as "ousting jurisdiction").

[13] See *Landgraf*, 511 U. S., at 271, n. 25 (observing that "the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties," though "we have applied the presumption in cases involving *new monetary obligations* that fell only on the government" (emphasis added)); see also *Altmann*, 541 U. S., at 728–729 (KENNEDY, J., dissenting) (explaining that if retroactivity

Moreover, it strains credulity to suggest that the desire to reinforce the application of subsections (e)(2) and (e)(3) to pending cases drove Congress to *exclude* subsection (e)(1) from § 1005(h)(2).

The Government's second objection is that applying subsections (e)(2) and (e)(3) but not (e)(1) to pending cases "produces an absurd result" because it grants (albeit only temporarily) dual jurisdiction over detainees' cases in circumstances where the statute plainly envisions that the D. C. Circuit will have "*exclusive*" and immediate jurisdiction over such cases. Reply Brief in Support of Respondents' Motion to Dismiss 7. But the premise here is faulty; subsections (e)(2) and (e)(3) grant jurisdiction only over actions to "determine the validity of any final decision" of a CSRT or commission. Because Hamdan, at least, is not contesting any "final decision" of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3). There is, then, no absurdity.[14]

The Government's more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, see n. 10, *supra*, but is otherwise without merit. There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions ren-

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concerns do not arise when a new monetary obligation is imposed on the United States it is because "Congress, by virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws").

[14] There may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to "final decision[s]" within the meaning of subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the D. C. Circuit.

dered by those tribunals are carefully channeled to a particular court and through a particular lens of review.

Finally, we cannot leave unaddressed JUSTICE SCALIA's contentions that the "meaning of § 1005(e)(1) is entirely clear," *post*, at 660, and that "the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed," *post*, at 657 (emphasis in original). Only by treating the *Bruner* rule as an inflexible trump (a thing it has never been, see n. 7, *supra*) and ignoring both the rest of § 1005's text and its drafting history can one conclude as much. Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases. It chose not to so provide—after having been presented with the option—for subsection (e)(1). The omission is an integral part of the statutory scheme that muddies whatever "plain meaning" may be discerned from blinkered study of subsection (e)(1) alone. The dissent's speculation about what Congress might have intended by the omission not only is counterfactual, cf. n. 10, *supra* (recounting legislative history), but rests on both a misconstruction of the DTA and an erroneous view of our precedents, see *supra*, at 582–583, and n. 12.

For these reasons, we deny the Government's motion to dismiss.[15]

III

Relying on our decision in *Councilman*, 420 U. S. 738, the Government argues that, even if we have statutory jurisdic-

[15] Because we conclude that § 1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment, we do not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear Hamdan's appeal. Cf. *supra*, at 575. Nor do we decide the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA. See, *e. g.*, *St. Cyr*, 533 U. S., at 300 (a construction of a statute "that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions").

tion, we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings." Brief for Respondents 12. Like the District Court and the Court of Appeals before us, we reject this argument.

In *Councilman*, an army officer on active duty was referred to a court-martial for trial on charges that he violated the UCMJ by selling, transferring, and possessing marijuana. 420 U. S., at 739–740. Objecting that the alleged offenses were not "'service connected,'" *id.*, at 740, the officer filed suit in Federal District Court to enjoin the proceedings. He neither questioned the lawfulness of courts-martial or their procedures nor disputed that, as a serviceman, he was subject to court-martial jurisdiction. His sole argument was that the subject matter of his case did not fall within the scope of court-martial authority. See *id.*, at 741, 759. The District Court granted his request for injunctive relief, and the Court of Appeals affirmed.

We granted certiorari and reversed. *Id.*, at 761. We did not reach the merits of whether the marijuana charges were sufficiently "service connected" to place them within the subject-matter jurisdiction of a court-martial. Instead, we concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces,[16] and

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[16] *Councilman* distinguished service personnel from civilians, whose challenges to ongoing military proceedings are cognizable in federal court. See, *e. g.*, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955). As we explained in *Councilman*, abstention is not appropriate in cases in which individuals raise "'substantial arguments denying the right of the military to try them at all,'" and in which the legal challenge "turn[s] on the status of the persons as to whom the military asserted its power." 420 U. S., at 759 (quoting *Noyd* v. *Bond*, 395 U. S. 683, 696, n. 8 (1969)). In other words, we do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant. Because we conclude that abstention is inappropriate

further that there was nothing in the particular circumstances of the officer's case to displace that general rule. See *id.*, at 740, 758.

Councilman identifies two considerations of comity that together favor abstention pending completion of ongoing court-martial proceedings against service personnel. See *New* v. *Cohen*, 129 F. 3d 639, 643 (CADC 1997); see also 415 F. 3d, at 36–37 (discussing *Councilman* and *New*). First, military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts. See *Councilman*, 420 U. S., at 752. Second, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion . . . .'" *Id.*, at 758 (quoting H. R. Rep. No. 491, 81st Cong., 1st Sess., 7 (1949)). Just as abstention in the face of ongoing state criminal proceedings is justified by our expectation that state courts will enforce federal rights, so abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—"will vindicate servicemen's constitutional rights," 420 U. S., at 758. See *id.*, at 755–758.[17]

for a more basic reason, we need not consider whether the jurisdictional exception recognized in *Councilman* applies here.

[17] See also *Noyd*, 395 U. S., at 694–696 (noting that the Court of Military Appeals consisted of "disinterested civilian judges," and concluding that there was no reason for the Court to address an Air Force Captain's argument that he was entitled to remain free from confinement pending appeal of his conviction by court-martial "when the highest military court stands ready to consider petitioner's arguments"). Cf. *Parisi* v. *Davidson*, 405

The same cannot be said here; indeed, neither of the comity considerations identified in *Councilman* weighs in favor of abstention in this case. First, Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply. Second, the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established. Unlike the officer in *Councilman*, Hamdan has no right to appeal any conviction to the civilian judges of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces, see § 924, 108 Stat. 2831). Instead, under Dept. of Defense Military Commission Order No. 1 (Commission Order No. 1), App. C to Brief for Petitioner 46a, which was issued by the Secretary of Defense on March 21, 2002, and amended most recently on August 31, 2005, and which governs the procedures for Hamdan's commission, any conviction would be reviewed by a panel consisting of three military officers designated by the Secretary. *Id.*, § 6(H)(4). Commission Order No. 1 provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6).[18]

We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the

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U. S. 34, 41–43 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge").

[18] If he chooses, the President may delegate this ultimate decision-making authority to the Secretary of Defense. See § 6(H)(6).

Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles.[19]

In sum, neither of the two comity considerations underlying our decision to abstain in *Councilman* applies to the circumstances of this case. Instead, this Court's decision in *Quirin* is the most relevant precedent. In *Quirin*, eight German saboteurs were captured upon arrival by submarine in New York and Florida. 317 U. S., at 21. The President convened a military commission to try seven of the saboteurs, who then filed habeas corpus petitions in the United States District Court for the District of Columbia challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals before judgment. See *id.*, at 19. Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, "[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay." *Ibid.*

As the Court of Appeals here recognized, *Quirin* "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the

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[19] JUSTICE SCALIA chides us for failing to include the D. C. Circuit's review powers under the DTA in our description of the review mechanism erected by Commission Order No. 1. See *post*, at 675. Whether or not the limited review permitted under the DTA may be treated as akin to the plenary review exercised by the Court of Appeals for the Armed Forces, petitioner here is not afforded a right to such review. See *infra*, at 616; § 1005(e)(3), 119 Stat. 2743.

processes of military commissions." 415 F. 3d, at 36.[20] The circumstances of this case, like those in *Quirin*, simply do not implicate the "obligations of comity" that, under appropriate circumstances, justify abstention. *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 733 (1996) (KENNEDY, J., concurring).

Finally, the Government has identified no other "important countervailing interest" that would permit federal courts to depart from their general "duty to exercise the jurisdiction that is conferred upon them by Congress." *Id.*, at 716 (majority opinion). To the contrary, Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and oper-

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[20] Having correctly declined to abstain from addressing Hamdan's challenge to the lawfulness of the military commission convened to try him, the Court of Appeals suggested that *Councilman* abstention nonetheless applied to bar its consideration of one of Hamdan's arguments—namely, that his commission violated Article 3 of the Third Geneva Convention, 6 U. S. T. 3316, 3318. See Part VI, *infra*. Although the Court of Appeals rejected the Article 3 argument on the merits, it also stated that, because the challenge was not "jurisdictional," it did not fall within the exception that *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975), recognized for defendants who raise substantial arguments that a military tribunal lacks personal jurisdiction over them. See 415 F. 3d, at 42.

In reaching this conclusion, the Court of Appeals conflated two distinct inquiries: (1) whether Hamdan has raised a substantial argument that the military commission lacks authority to try him; and, more fundamentally, (2) whether the comity considerations underlying *Councilman* apply to trigger the abstention principle in the first place. As the Court of Appeals acknowledged at the beginning of its opinion, the first question warrants consideration only if the answer to the second is yes. See 415 F. 3d, at 36–37. Since, as the Court of Appeals properly concluded, the answer to the second question is in fact no, there is no need to consider any exception.

At any rate, it appears that the exception would apply here. As discussed in Part VI, *infra*, Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a "'regularly constituted court'" under the Geneva Conventions, it is ultra vires and thus lacks jurisdiction over him. Brief for Petitioner 5.

ates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction. While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan's challenge.

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. See W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920) (hereinafter Winthrop). Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John André for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847. *Id.*, at 832; G. Davis, A Treatise on the Military Law of the United States 308 (rev. 3d ed. 1915) (hereinafter Davis). As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both "'*military commissions*'" to try ordinary crimes committed in the occupied territory and a "*council of war*" to try offenses against the law of war. Winthrop 832 (emphasis in original).

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military com-

missions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial: "The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code." *Id.*, at 831 (emphasis in original).

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan*, 4 Wall. 2, 121 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]"); *Ex parte Vallandigham*, 1 Wall. 243, 251 (1864); see also *Quirin*, 317 U. S., at 25 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. See *id.*, at 26–29; *In re Yamashita*, 327 U. S. 1, 11 (1946).

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*

> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in

> peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." 4 Wall., at 139–140.[21]

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. 317 U. S., at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases"). Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II,[22] reads as follows:

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[21] See also Winthrop 831 ("[I]n general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction" (emphasis in original)).

[22] Article 15 was first adopted as part of the Articles of War in 1916. See Act of Aug. 29, 1916, ch. 418, § 3, Art. 15, 39 Stat. 652. When the Articles of War were codified and reenacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been "construed by the Supreme Court (*Ex Parte Quirin*, 317 U. S. 1 (1942))." S. Rep. No. 486, 81st Cong., 1st Sess., 13 (1949).

> "Jurisdiction of courts-martial not exclusive.
>
> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." 64 Stat. 115.

We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions. Cf. Brief for Legal Scholars and Historians as *Amici Curiae* 12–15. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Brief for Respondents 17. Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war. See 317 U. S., at 28–29.[23] That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. See *ibid.*

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the

[23] Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, see *id.*, at 518; *Quirin*, 317 U. S., at 28–29; see also *Yamashita*, 327 U. S., at 11, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ. Cf. *Yerger*, 8 Wall., at 105 ("Repeals by implication are not favored").[24]

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognize[s]" the existence of the Guantanamo Bay commissions in the weakest sense, Brief for Respondents 15, because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]," DTA § 1005(e)(3), 119 Stat. 2743. But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws." *Ibid.*

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene mil-

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[24] On this point, it is noteworthy that the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), looked beyond Congress' declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances. See *id.*, at 26–29. JUSTICE THOMAS' assertion that we commit "error" in reading Article 21 of the UCMJ to place limitations upon the President's use of military commissions, see *post*, at 682 (dissenting opinion), ignores the reasoning in *Quirin*.

itary commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

V

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. See Bradley & Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2132–2133 (2005); Winthrop 831–846; Hearings on H. R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949). First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions, see *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Milligan*, 4 Wall., at 121–122, but is well recognized.[25] See Winthrop 822, 836–839. Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an

[25] The justification for, and limitations on, these commissions were summarized in *Milligan:*

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." 4 Wall., at 127 (emphasis in original).

enemy where civilian government cannot and does not function." *Duncan*, 327 U. S., at 314; see *Milligan*, 4 Wall., at 141–142 (Chase, C. J., concurring in judgment) (distinguishing "MARTIAL LAW PROPER" from "MILITARY GOVERNMENT" in occupied territory). Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See *Madsen* v. *Kinsella*, 343 U. S. 341, 356 (1952).[26]

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," *Quirin*, 317 U. S., at 28–29, has been described as "utterly different" from the other two. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 Tex. Tech. L. Rev. 899, 902 (2002–2003).[27] Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battle-

[26] The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed "pending the establishment of civil government," *Madsen*, 343 U. S., at 354–355, which may in some cases extend beyond the "cessation of hostilities," *id.*, at 348.

[27] So much may not be evident on cold review of the Civil War trials often cited as precedent for this kind of tribunal because the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. Hence, "military commanders began the practice [during the Civil War] of using the same name, the same rules, and often, the same tribunals" to try both ordinary crimes and war crimes. Bickers, 34 Tex. Tech. L. Rev., at 908. "For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission." *Id.*, at 909. The Civil War precedents must therefore be considered with caution; as we recognized in *Quirin*, 317 U. S., at 29, and as further discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.

field itself, whether the defendant has violated the law of war. The last time the U. S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. 317 U. S. 1. And in *Yamashita*, we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines. 327 U. S. 1.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" *Reid* v. *Covert*, 354 U. S. 1, 19, n. 38 (1957) (plurality opinion), describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offences committed within the field of the command of the convening commander." Winthrop 836. The "field of the command" in these circumstances means the "theatre of war." *Ibid.* Second, the offense charged "must have been committed within the period of the war."[28] *Id.*, at 837. No jurisdiction exists to try offenses "committed either before or after the war." *Ibid.* Third, a military commission not established pursuant to martial law or an occupation may try

[28] If the commission is established pursuant to martial law or military government, its jurisdiction extends to offenses committed within "the exercise of military government or martial law." Winthrop 837.

only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." *Id.*, at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.*, at 839.[29]

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*" *Id.*, at 842 (emphasis in original). The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan, described in detail in Part I, *supra*, alleges a conspiracy extending over a number of years, from 1996 to November 2001.[30] All but two months of that more than 5-year-long period preceded the attacks of

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[29] Winthrop adds as a fifth, albeit not-always-complied-with, criterion that "the *trial* must be had within the theatre of war . . . ; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice.*" *Id.*, at 836. The Government does not assert that Guantanamo Bay is a theater of war, but instead suggests that neither Washington, D. C., in 1942 nor the Philippines in 1945 qualified as a "war zone" either. Brief for Respondents 27; cf. *Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1 (1946).

[30] The elements of this conspiracy charge have been defined not by Congress but by the President. See Military Commission Instruction No. 2, 32 CFR § 11.6 (2005).

September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions.[31] Neither the purported agreement with

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[31] JUSTICE THOMAS would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. See *post*, at 683–688 (dissenting opinion). But even the Government does not go so far; although the United States had for some time prior to the attacks of September 11, 2001, been aggressively pursuing al Qaeda, neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001. Cf. Brief for Respondents 25 (describing the events of September 11, 2001, as "an act of war" that "triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda"). JUSTICE THOMAS' further argument that the AUMF is "backward looking" and therefore authorizes *trial by military commission* of crimes that occurred prior to the inception of war is insupportable. See *post*, at 685, n. 3. If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions. As explained in the text, the law of war permits trial only of offenses "committed within the period of the war." Winthrop 837; see also *Quirin*, 317 U. S., at 28–29 (observing that law-of-war military commissions may be used to try "those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war" (emphasis added)). The sources that JUSTICE THOMAS relies on to suggest otherwise simply do not support his position. Colonel Green's short exegesis on military commissions cites Howland for the proposition that "[o]ffenses committed before a *formal declaration of war* or *before the declaration of martial law* may be tried by military commission." The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (emphasis added) (cited *post*, at 686). Assuming that to be true, nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the September 11, 2001, attacks that the Government characterizes as the relevant "act[s] of war," and on the measure that authorized the President's deployment of military force—the AUMF. Because we do not question the Government's position that the war commenced with the events of September 11, 2001, the *Prize Cases*, 2 Black 635 (1863) (cited *post*, at 679, 684, 685, and 687 (THOMAS, J., dissenting)), are not germane to the analysis.

Finally, JUSTICE THOMAS' assertion that Julius Otto Kuehn's trial by military commission "for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its

Usama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. See *Yamashita*, 327 U. S., at 13 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war").[32]

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attack on Pearl Harbor" stands as authoritative precedent for Hamdan's trial by commission, *post*, at 686, misses the mark in three critical respects. First, Kuehn was tried for *federal espionage crimes* under what were then 50 U. S. C. §§ 31, 32, and 34, *not* with common-law violations of the law of war. See Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pt. 30, pp. 3067–3069 (1946). Second, he was tried by *martial law* commission (a kind of commission JUSTICE THOMAS acknowledges is not relevant to the analysis here, and whose jurisdiction extends to offenses committed within "the exercise of . . . martial law," Winthrop 837; see, n. 28, *supra*), not a commission established exclusively to try violations of the law of war, see Winthrop 837. Third, the martial law commissions established to try crimes in Hawaii were ultimately declared illegal by this Court. See *Duncan* v. *Kahanamoku*, 327 U. S. 304, 324 (1946) ("The phrase 'martial law' as employed in [the Hawaiian Organic Act], while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals").

[32] JUSTICE THOMAS adopts the remarkable view, not advocated by the Government, that the charging document in this case actually includes more than one charge: Conspiracy *and* several other ill-defined crimes,

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," U. S. Const., Art. I, § 8, cl. 10,

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like "joining an organization" that has a criminal purpose, "'[b]eing a guerrilla,'" and aiding the enemy. See *post*, at 693–697, and n. 9. There are innumerable problems with this approach.

First, the crimes JUSTICE THOMAS identifies were not actually charged. It is one thing to observe that charges before a military commission "'need not be stated with the precision of a common law indictment,'" *post*, at 692, n. 7; it is quite another to say that a crime *not charged* may nonetheless be read into an indictment. Second, the Government plainly had available to it the tools and the time it needed to charge petitioner with the various crimes JUSTICE THOMAS refers to, if it believed they were supported by the allegations. As JUSTICE THOMAS himself observes, see *post*, at 697, the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U. S. C. § 904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so. See Brief for David Hicks as *Amicus Curiae* 7.

Third, the cases JUSTICE THOMAS relies on to show that Hamdan may be guilty of violations of the law of war not actually charged do not support his argument. JUSTICE THOMAS begins by blurring the distinction between those categories of "offender" who may be tried by military commission (*e. g.*, jayhawkers and the like) with the "offenses" that may be so tried. Even when it comes to "'being a guerrilla,'" cf. *post*, at 695, n. 9, a label alone does not render a person susceptible to execution or other criminal punishment; the charge of "'being a guerrilla'" invariably is accompanied by the allegation that the defendant "'took up arms'" as such. This is because, as explained by Judge Advocate General Holt in a decision upholding the charge of "'being a guerrilla'" as one recognized by "the universal usage of the times," the charge is simply shorthand (akin to "being a spy") for "the perpetration of a succession of similar acts" of violence. Record Books of the Judge Advocate General Office, R. 3, 590. The sources cited by JUSTICE THOMAS confirm as much. See cases cited *post*, at 694–695, n. 9.

Likewise, the suggestion that the Nuremberg precedents support Hamdan's conviction for the (uncharged) crime of joining a criminal organization must fail. Cf. *post*, at 695–697. The convictions of certain high-level Nazi officials for "membership in a criminal organization" were secured pursuant to specific provisions of the Charter of the International Military

positively identified "conspiracy" as a war crime.[33] As we explained in *Quirin*, that is not necessarily fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. 317 U. S., at 30. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution. Cf. *Loving* v. *United States*, 517 U. S. 748, 771 (1996) (acknowledging that Congress "may not delegate the power to make laws"); *Reid*, 354 U. S., at 23–24 ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds"); The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny").[34]

Tribunal that permitted indictment of individual organization members following convictions of the organizations themselves. See Arts. 9 and 10, in 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 12 (1947). The initial plan to use organizations' convictions as predicates for mass individual trials ultimately was abandoned. See T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585, 638 (1992).

[33] Cf. 10 U. S. C. § 904 (making triable by military commission the crime of aiding the enemy); § 906 (same for spying); War Crimes Act of 1996, 18 U. S. C. § 2441 (2000 ed. and Supp. III) (listing war crimes); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, § 583, 111 Stat. 2436 (same).

[34] While the common law necessarily is "evolutionary in nature," *post*, at 689 (THOMAS, J., dissenting), even in jurisdictions where common-law crimes are still part of the penal framework, an act does not become a

This high standard was met in *Quirin;* the violation there alleged was, by "universal agreement and practice" both in this country and internationally, recognized as an offense against the law of war. 317 U. S., at 30; see *id.*, at 35–36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War" (footnote omitted)). Although the picture arguably was less clear in *Yamashita,* compare 327 U. S., at 16 (stating that the provisions of the Fourth Hague Convention of 1907, 36 Stat. 2306, "plainly" required the defendant to control the troops under his command), with 327 U. S., at 35 (Murphy, J., dissenting), the disagreement between the majority and the dissenters in that case concerned whether the historic and textual evidence constituted clear precedent—not whether clear precedent was required to justify trial by law-of-war military commission.

At 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. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military com-

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crime without its foundations having been firmly established in precedent. See, *e. g.*, *Queen* v. *Rimmington,* [2006] 2 All E. R. 257, 275–279 (2005) (House of Lords); *id.*, at 279 (while "some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts[,] . . . the law-making function of the courts must remain within reasonable limits"); see also *Rogers* v. *Tennessee,* 532 U. S. 451, 472–478 (2001) (SCALIA, J., dissenting). The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.

mission not exercising some other form of jurisdiction,[35] and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.[36] Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt. See Winthrop 841 ("[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely" (emphasis in original)).

The Government cites three sources that it says show otherwise. First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy. See Brief for Respondents 27. Second, it observes that Winthrop at one

[35] The 19th-century trial of the "Lincoln conspirators," even if properly classified as a trial by law-of-war commission, cf. W. Rehnquist, All the Laws But One: Civil Liberties in Wartime 165–167 (1998) (analyzing the conspiracy charges in light of ordinary criminal law principles at the time), is at best an equivocal exception. Although the charge against the defendants in that case accused them of "combining, confederating, and conspiring together" to murder the President, they were also charged (as we read the indictment, cf. *post*, at 699–700, n. 12 (THOMAS, J., dissenting)), with "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln." H. R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899). Moreover, the Attorney General who wrote the opinion defending the trial by military commission treated the charge as if it alleged the substantive offense of assassination. See 11 Op. Atty. Gen. 297 (1865) (analyzing the propriety of trying by military commission "the offence of having assassinated the President"); see also *Mudd* v. *Caldera*, 134 F. Supp. 2d 138, 140 (DC 2001).

[36] By contrast, the Geneva Conventions do extend liability for substantive war crimes to those who "orde[r]" their commission, see Third Geneva Convention, Art. 129, 6 U. S. T., at 3418, and this Court has read the Fourth Hague Convention of 1907 to impose "command responsibility" on military commanders for acts of their subordinates, see *Yamashita*, 327 U. S., at 15–16.

point in his treatise identifies conspiracy as an offense "prosecuted by military commissions." *Ibid.* (citing Winthrop 839, and n. 5). Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy "'to violate the laws of war by destroying life or property in aid of the enemy'" as an offense that was tried as a violation of the law of war during the Civil War. Brief for Respondents 27–28 (citing C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912) (hereinafter Howland)). On close analysis, however, these sources at best lend little support to the Government's position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

> "[I.] Violation of the law of war.
>
> "[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
>
> "[III.] Violation of Article 82, defining the offense of spying.
>
> "[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III]." 317 U. S., at 23.

The Government, defending its charge, argued that the conspiracy alleged "constitute[d] an additional violation of the law of war." *Id.*, at 15. The saboteurs disagreed; they maintained that "[t]he charge of conspiracy can not stand if the other charges fall." *Id.*, at 8. The Court, however, declined to resolve the dispute. It concluded, first, that the

specification supporting Charge I adequately alleged a "violation of the law of war" that was not "merely colorable or without foundation." *Id.*, at 36. The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U. S. territory in time of war without uniform "for the purpose of destroying property used or useful in prosecuting the war." That act was "a hostile and warlike" one. *Id.*, at 36, 37. The Court was careful in its decision to identify an overt, "complete" act. Responding to the argument that the saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations" and therefore had not violated the law of war, the Court responded that they had actually "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." *Id.*, at 38. "The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification." *Ibid.*

Turning to the other charges alleged, the Court explained that "[s]ince the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional." *Id.*, at 46. No mention was made at all of Charge IV—the conspiracy charge.

If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the

actual commission of or attempt to commit a "hostile and warlike act." *Id.*, at 37–38.

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See S. Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of "the military commander *in the field in time of war*" to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war. Cf. 31 Op. Atty. Gen. 356, 357, 361 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering "any camp, fortification or other military premises of the United States," he had "committed [his offenses] outside of the field of military operations"). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to "seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." 317 U. S., at 28–29 (emphasis added).

Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as one of over 20 "offenses against the laws and usages of war" "passed upon and punished by military commissions." Howland 1070–1071. But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. See *id.*, at 1071 (citing Record Books of the Judge Advocate General Office, R. 2, 144; R. 3, 401, 589, 649; R. 4, 320; R. 5,

36, 590; R. 6, 20; R. 7, 413; R. 8, 529; R. 9, 149, 202, 225, 481, 524, 535; R. 10, 567; R. 11, 473, 513; R. 13, 125, 675; R. 16, 446; R. 21, 101, 280). Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war. See Winthrop 839–840.

Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "[c]rimes and statutory offenses cognizable by State or U. S. courts" and triable by martial law or military government commission. See *id.*, at 839. And, in a footnote, he cites several Civil War examples of "conspiracies of this class, *or of the first and second classes combined.*" *Id.*, at 839, n. 5 (emphasis added). The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the "first class") and, independently, as a war crime (a crime of the "second class"). But the footnote will not support the weight the Government places on it.

As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. See n. 27, *supra.* Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "[n]ot unfrequently the crime, as charged and found, was a combination of the two species of offenses." Howland 1071; see also Davis 310, n. 2; Winthrop 842. The example he gives is "'murder in violation of the laws of war.'" Howland 1071–1072. Winthrop's conspiracy "of the first and second classes combined" is, like Howland's example, best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war. Winthrop confirms this understanding later in his discussion, when he emphasizes that "*overt acts*" constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841, and nn. 22, 23 (citing W. Finlason, Martial Law 130 (1867); emphasis in original).

JUSTICE THOMAS cites as evidence that conspiracy is a recognized violation of the law of war the Civil War indictment against Henry Wirz, which charged the defendant with "'[m]aliciously, willfully, and traitorously . . . combining, confederating, and conspiring [with others] to injure the health and destroy the lives of soldiers in the military service of the United States . . . to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.'" *Post*, at 701 (dissenting opinion) (quoting H. R. Doc. No. 314, 55th Cong., 3d Sess., 785 (1899); emphasis deleted). As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of "ferocious and bloodthirsty dogs" to "seize, tear, mangle, and maim the bodies and limbs" of prisoners, many of whom died as a result. *Id.*, at 789–790. Crucially, Judge Advocate General Holt determined that one of Wirz's alleged co-conspirators, R. B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities: "[I]n the case of R. B. Winder, *while the evidence at the trial of Wirz was deemed by the court to implicate him in the conspiracy* against the lives of all Federal prisoners in rebel hands, *no such specific overt acts of violation of the laws of war* are as yet fixed upon him as to make it expedient to prefer formal charges and bring him to trial." *Id.*, at 783 (emphasis added).[37]

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[37] The other examples JUSTICE THOMAS offers are no more availing. The Civil War indictment against Robert Louden, cited *post*, at 702, alleged a conspiracy, but not one in violation of the law of war. See War Dept., General Court Martial Order No. 41, p. 20 (1864). A separate charge of "'[t]ransgression of the laws and customs of war'" made no mention of conspiracy. *Id.*, at 17. The charge against Leger Grenfel and others for conspiring to release rebel prisoners held in Chicago only supports the observation, made in the text, that the Civil War tribunals often charged hybrid crimes mixing elements of crimes ordinarily triable in civilian courts (like treason) and violations of the law of war. Judge Advo-

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war.[38] As observed above, see *supra*, at 603–604, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947) (hereinafter Trial of Major War Criminals). The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, see, *e. g.*, 22 *id.*, at 469,[39] and convicted only Hitler's most senior associates of conspiracy to wage aggressive war, see S. Pomorski, Con-

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cate General Holt, in recommending that Grenfel's death sentence be upheld (it was in fact commuted by Presidential decree, see H. R. Doc. No. 314, at 725), explained that the accused "united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery." *Id.*, at 689.

[38] The Court in *Quirin* "assume[d] that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U. S., at 29. We need not test the validity of that assumption here because the international sources only corroborate the domestic ones.

[39] Accordingly, the Tribunal determined to "disregard the charges . . . that the defendants conspired to commit War Crimes and Crimes against Humanity." 22 Trial of Major War Criminals 469; see also *ibid.* ("[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war").

spiracy and Criminal Organization, in the Nuremberg Trial and International Law 213, 233–235 (G. Ginsburgs & V. Kudriavtsev eds. 1990). As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); see also *id.*, at 550 (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a " 'persuasive argument that conspiracy in the truest sense is not known to international law' ").[40]

In sum, the sources that the Government and JUSTICE THOMAS rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Cf. *Quirin*, 317 U. S., at 36. Because the charge does not

[40] See also 15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 90–91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, "the United States Military Tribunals" established at that time did not "recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"). The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own. See *Prosecutor* v. *Tadić*, Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999); see also *Prosecutor* v. *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes").

support the commission's jurisdiction, the commission lacks authority to try Hamdan.

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul* v. *Bush*, 542 U. S., at 487 (KENNEDY, J., concurring in judgment) (observing that "Guantanamo Bay is . . . far removed from any hostilities"). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001, and the AUMF. That may well be a crime,[41] but it is not an offense that "by the law of war may be tried by military commissio[n]." 10 U. S. C. § 821. None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the au-

[41] JUSTICE THOMAS' suggestion that our conclusion precludes the Government from bringing to justice those who conspire to commit acts of terrorism is therefore wide of the mark. See *post*, at 686, n. 3, 704–706. That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught "plotting terrorist atrocities like the bombing of the Khobar Towers." *Post*, at 705.

thority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin*, 317 U. S., at 28—including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U. S., at 20–21, 23–24. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005—after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. §4(A)(1). The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. §4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U. S. citizen with security clearance "at the level SECRET or higher." §§4(C)(2)–(3).

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§5(A)–(P). These rights

are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3).[42] Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. *Ibid.*

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." § 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§ 6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§ 6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." § 6(D)(5)(b).[43] Finally, a presiding officer's determi-

[42] The accused also may be excluded from the proceedings if he "engages in disruptive conduct." § 5(K).

[43] As the District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where

nation that evidence "would [not] have probative value to a reasonable person" may be overridden by a majority of the other commission members. § 6(D)(1).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). § 6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused. *Ibid.*

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted

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"Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts." 344 F. Supp. 2d 152, 168 (DC 2004).

based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the abstention doctrine espoused in *Councilman*, 420 U. S. 738, precludes preenforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a "final decision" under the DTA, and (3) "there is . . . no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." Brief for Respondents 45–46, nn. 20–21. The first of these contentions was disposed of in Part III, *supra*, and neither of the latter two is sound.

First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision"[44] before a federal court under the DTA. See § 1005(e)(3), 119 Stat. 2743. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. See Reply Brief for Petitioner 12; App. to Pet. for Cert. 45a. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

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[44] Any decision of the commission is not "final" until the President renders it so. See Commission Order No. 1, § 6(H)(6).

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, *e. g.*, 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court, *Madsen*, 343 U. S., at 353—confirm as much.[45] As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 3–5 (2001–2002).

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial.

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[45] See Winthrop 835, and n. 81 ("military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); *id.*, at 841–842; S. Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Gen. Crowder) ("Both classes of courts have the same procedure"); see also, *e. g.*, H. Coppée, Field Manual of Courts-Martial 105 (1863) ("[Military] commissions are appointed by the same authorities as those which may order courts-martial. They are constituted in a manner similar to such courts, and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc.").

See 327 U. S. 1. The force of that precedent, however, has been seriously undermined by post-World War II developments.

Yamashita, from late 1944 until September 1945, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands. On September 3, 1945, after American forces regained control of the Philippines, Yamashita surrendered. Three weeks later, he was charged with violations of the law of war. A few weeks after that, he was arraigned before a military commission convened in the Philippines. He pleaded not guilty, and his trial lasted for two months. On December 7, 1945, Yamashita was convicted and sentenced to hang. See *id.*, at 5; *id.*, at 31–34 (Murphy, J., dissenting). This Court upheld the denial of his petition for a writ of habeas corpus.

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See *id.*, at 41–81 (Rutledge, J., joined by Murphy, J., dissenting).[46] Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.*, at 49 (opinion of Rutledge, J.).

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[46] The dissenters' views are summarized in the following passage:

"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents . . . ; affidavits; . . . documents or translations thereof; diaries . . . , photographs, motion picture films, and . . . newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." *Yamashita,* 327 U. S., at 44 (footnotes omitted).

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat. 2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U. S., at 20, nor a protected prisoner of war being tried for crimes committed during his detention, *id.*, at 21.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position,[47] and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross,[48] Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 413 (J. Pictet gen. ed. 1960) (hereinafter GCIII Commentary) (explaining

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[47] Article 2 of the UCMJ now reads:

"(a) The following persons are subject to [the UCMJ]:

. . . . . .

"(9) Prisoners of war in custody of the armed forces.

. . . . . .

"(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U. S. C. § 802(a).

Guantanamo Bay is such a leased area. See *Rasul* v. *Bush*, 542 U. S. 466, 471 (2004).

[48] The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.

that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Geneva Convention, including this Court's decision in *Yamashita*). The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See Winthrop 835, n. 81. That understanding is reflected in Article 36 of the UCMJ, which provides:

> "(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> "(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress." 70A Stat. 50.

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts-Martial, United States (2005 ed.) (Manual for Courts-Martial). Among the inconsistencies Hamdan identifies is that between § 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll . . . proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." 10 U. S. C. § 839(c) (2000 ed., Supp. V). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, it argues, only 9 of the UCMJ's 158 Articles—the ones that expressly mention "military commissions"[49]—actually apply to commissions, and Commission Order No. 1 sets forth no pro-

[49] Aside from Articles 21 and 36, discussed at length in the text, the other seven Articles that expressly reference military commissions are: (1) 28 (requiring appointment of reporters and interpreters); (2) 47 (making it a crime to refuse to appear or testify "before a court-martial, military commission, court of inquiry, or any other military court or board"); (3) 48 (allowing a "court-martial, provost court, or military commission" to punish a person for contempt); (4) 49(d) (permitting admission into evidence of a "duly authenticated deposition taken upon reasonable notice to the other parties" *only* if "admissible under the rules of evidence" and *only* if the witness is otherwise unavailable); (5) 50 (permitting admission into evidence of records of courts of inquiry "if otherwise admissible under the rules of evidence," and if certain other requirements are met); (6) 104 (providing that a person accused of aiding the enemy may be sentenced to death or other punishment by military commission or court-martial); and (7) 106 (mandating the death penalty for spies convicted before military commission or court-martial).

cedure that is "contrary to or inconsistent with" those 9 provisions. Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," November 13 Order § 1(f), is, in the Government's view, explanation enough for any deviation from court-martial procedures. See Brief for Respondents 43–47, and n. 22.

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts*, "so far as *he considers* practicable." 10 U. S. C. § 836(a) (emphasis added). Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions—whether or not they conform with the Federal Rules of Evidence—be "uniform *insofar as practicable.*" § 836(b) (emphasis added). Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.[50]

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[50] JUSTICE THOMAS relies on the legislative history of the UCMJ to argue that Congress' adoption of Article 36(b) in the wake of World War II was "motivated" solely by a desire for "uniformity across the separate branches of the armed services." *Post*, at 711. But even if Congress was

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," § 836(a), to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial.[51] And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming, *arguendo,* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism.[52]

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concerned with ensuring uniformity across service branches, that does not mean it did not also intend to codify the longstanding practice of procedural parity between courts-martial and other military tribunals. Indeed, the suggestion that Congress did *not* intend uniformity across tribunal types is belied by the textual proximity of subsection (a) (which requires that the rules governing criminal trials in federal district courts apply, absent the President's determination of impracticability, to courts-martial, provost courts, and *military commissions* alike) and subsection (b) (which imposes the uniformity requirement).

[51] We may assume that such a determination would be entitled to a measure of deference. For the reasons given by JUSTICE KENNEDY, see *post,* at 640 (opinion concurring in part), however, the level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a).

[52] JUSTICE THOMAS looks not to the President's official Article 36(a) determination, but instead to press statements made by the Secretary of Defense and the Under Secretary of Defense for Policy. See *post,* at 712–713 (dissenting opinion). We have not heretofore, in evaluating the

Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U. S. C. § 839(c) (2000 ed., Supp. V). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U. S. C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. See Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.

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legality of executive action, deferred to comments made by such officials to the media. Moreover, the only additional reason the comments provide—aside from the general danger posed by international terrorism—for departures from court-martial procedures is the need to protect classified information. As we explain in the text, and as JUSTICE KENNEDY elaborates in his separate opinion, the structural and procedural defects of Hamdan's commission extend far beyond rules preventing access to classified information.

That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, see *Madsen*, 343 U. S., at 354, does not detract from the force of this history;[53] Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.[54]

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman* abstention is appropriate. Judge Williams, concurring, rejected the second ground but agreed with the

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[53] JUSTICE THOMAS relies extensively on *Madsen* for the proposition that the President has free rein to set the procedures that govern military commissions. See *post*, at 706–707, 709, n. 16, 710, and 721. That reliance is misplaced. Not only did *Madsen* not involve a law-of-war military commission, but (1) the petitioner there did not challenge the procedures used to try her, (2) the UCMJ, with its new Article 36(b), did not become effective until May 31, 1951, *after* the petitioner's trial, see 343 U. S., at 345, n. 6, and (3) the procedures used to try the petitioner actually afforded *more* protection than those used in courts-martial, see *id.*, at 358–360; see also *id.*, at 358 ("[T]he Military Government Courts for Germany . . . have had a less military character than that of courts-martial").

[54] Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission "'*illegal.*'" *Post*, at 707, n. 15 (THOMAS, J., dissenting) (quoting Winthrop 841). Article 36(b), however, imposes a statutory command that must be heeded.

majority respecting the first and the last. As we explained in Part III, *supra*, the abstention rule applied in *Councilman*, 420 U. S. 738, is not applicable here.[55] And for the reasons that follow, we hold that neither of the other grounds the Court of Appeals gave for its decision is persuasive.

i

The Court of Appeals relied on *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.*, at 789. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Geneva Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.*, at 790.[56]

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[55] JUSTICE THOMAS makes the different argument that Hamdan's Geneva Convention challenge is not yet "ripe" because he has yet to be sentenced. See *post*, at 719–720. This is really just a species of the abstention argument we have already rejected. See Part III, *supra*. The text of the Geneva Conventions does not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him.

[56] As explained in Part VI–C, *supra*, that is no longer true under the 1949 Conventions.

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14.

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F. 3d, at 40.

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention,[57] and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Gov-

[57] But see, *e. g.,* 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (J. Pictet gen. ed. 1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve State interests"); GCIII Commentary 91 ("It was not . . . until the Conventions of 1949 . . . that the existence of 'rights' conferred on prisoners of war was affirmed").

ernment's actions and furnishing petitioner with any enforceable right.[58] For, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher*, 119 U. S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi*, 542 U. S., at 520–521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. See 415 F. 3d, at 41–42. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contract-

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[58] But see generally Brief for Louis Henkin et al. as *Amici Curiae;* 1 Int'l Comm. of Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) ("It should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation"); GCIII Commentary 92; GCIV Commentary 79.

ing Parties." 6 U. S. T., at 3318.[59] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"—*i. e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.[60]

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.[61] Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party[62] to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including

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[59] For convenience's sake, we use citations to the Third Geneva Convention only.

[60] The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees 2 (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf.

[61] Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." 6 U. S. T., at 3324. See also Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), App. 116. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

[62] The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *Ibid.* One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3320.

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" 415 F. 3d, at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318 (Art. 2, ¶ 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, ¶ 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e. g.*, J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J.

Burns & H. Hart eds. 1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Int'l Comm. of Red Cross, Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i. e.*, a civil war, see GCIII Commentary 36–37, the commentaries also make clear "that the scope of application of the Article must be as wide as possible," *id.*, at 36.[63] In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion" was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. See *id.*, at 42–43.

iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly

[63] See also *id.*, at 35 (Common Article 3 "has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U. S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Workshop Deskbook 228 (June 2000) (reprint 2004) (Common Article 3 "serves as a 'minimum yardstick of protection' in all conflicts, not just internal armed conflicts" (quoting *Nicaragua* v. *United States*, 1986 I. C. J. 14, ¶ 218, 25 I. L. M. 1023)); *Prosecutor* v. *Tadić*, Case No. IT–94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1*(d)*). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted");[64] see also *Yamashita*, 327 U. S., at 44 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for the particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organised in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. See Brief for Respondents 49–50. As JUSTICE KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." *Post*, at 644 (opinion concurring in part). At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice sys-

[64] The commentary's assumption that the terms "properly constituted" and "regularly constituted" are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term "régulièrement constitués" in place of "properly constituted." 6 U. S. T., at 3559.

tem only if some practical need explains deviations from court-martial practice." *Post*, at 645. As we have explained, see Part VI–C, *supra*, no such need has been demonstrated here.[65]

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1*(d)*). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 322 (2003). Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).[66]

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[65] Further evidence of this tribunal's irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules "from time to time").

[66] Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. See, *e. g.*, International Covenant on Civil and Political Rights, Art. 14, ¶ 3(*d*), Mar. 23, 1976, 999 U. N. T. S. 171 (setting forth the right of an accused "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"). Following World War II, several defendants were tried and convicted by military commission for violations

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," *post*, at 647, and for that reason, at least, fail to afford the requisite guarantees. See *post*, at 646–653. We add only that, as noted in Part VI–A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§ 6(B)(3), (D).[67] That the

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of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials, the prosecutors argued that the defendants' failure to apprise accused individuals of all evidence against them constituted violations of the law of war. See 5 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 25, 30 (1948) (reprint 1997) (trial of Sergeant-Major Shigeru Ohashi), 66, 75 (trial of General Tanaka Hisakasu).

[67] The Government offers no defense of these procedures other than to observe that the defendant may not be barred from access to evidence if such action would deprive him of a "full and fair trial." Commission Order No. 1, § 6(D)(5)(b). But the Government suggests no circumstances in which it would be "fair" to convict the accused based on evidence he has not seen or heard. Cf. *Crawford* v. *Washington*, 541 U. S. 36, 49 (2004) ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine'" (quoting *State* v. *Webb*, 2 N. C. 103, 104 (Super. L. & Eq. 1794) *(per curiam)*); *Diaz* v. *United States*, 223 U. S. 442, 455 (1912) (describing the right to be present as "scarcely less important to the accused than the right of trial itself"); *Lewis* v. *United States*, 146 U. S. 370, 372 (1892) (exclusion of defendant from part of proceedings is "contrary to the dictates of humanity" (internal quotation marks omitted)); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 170, n. 17, 171 (1951) (Frankfurter, J., concurring) ("The plea that evidence of guilt must be secret is abhorrent to free men" (internal quotation marks omitted)). More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. Cf. *post*, at 723–724 (THOMAS, J., dissenting). But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

V

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." *Post*, at 705 (opinion of THOMAS, J.). They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. *Post*, at 724. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

JUSTICE KENNEDY, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join as to Parts I and II, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an inde-

pendent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect 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.

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments.

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted," *ante,* at 632—a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war," 10 U. S. C. § 821. Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

I join the Court's opinion, save Parts V and VI–D–iv. To state my reasons for this reservation, and to show my agreement with the remainder of the Court's analysis by identifying particular deficiencies in the military commissions at issue, this separate opinion seems appropriate.

I

Trial 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. Cf. *Loving* v. *United States*, 517 U. S. 748, 756–758, 760 (1996). 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. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.

The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.*, at 635. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Ibid.*

In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation. *Ante*, at 593, 619–620. In the Uniform Code

of Military Justice (UCMJ), 10 U. S. C. § 801 *et seq.*, which Congress enacted, building on earlier statutes, in 1950, see Act of May 5, 1950, ch. 169, 64 Stat. 107, and later amended, see, *e. g.*, Military Justice Act of 1968, 82 Stat. 1335, Congress has set forth governing principles for military courts. The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms, 10 U. S. C. §§ 816–820 (2000 ed. and Supp. III); it regulates the organization and procedure of those courts, *e. g.*, §§ 822–835, 851–854; it defines offenses, §§ 877–934, and rights for the accused, *e. g.*, §§ 827(b)–(c), 831, 844, 846, 855 (2000 ed.); and it provides mechanisms for appellate review, §§ 859–876b (2000 ed. and Supp. III). As explained below, the statute further recognizes that special military commissions may be convened to try war crimes. See *infra*, at 641; § 821 (2000 ed.). While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson's third category, not the second or first.

One limit on the President's authority is contained in Article 36 of the UCMJ. That section provides:

> "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> "(b) All rules and regulations made under this article shall be uniform insofar as practicable." 10 U. S. C. § 836 (2000 ed.).

In this provision the statute allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, subject to three requirements: (1) Procedures for military courts must conform to district-court rules insofar as the President "considers practicable"; (2) the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and (3) "insofar as practicable" all rules and regulations under § 836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial unless such uniformity is impracticable, *ante*, at 620, 622, and n. 50.

As the Court further instructs, even assuming the first and second requirements of § 836 are satisfied here—a matter of some dispute, see *ante*, at 620–622—the third requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable. *Ante*, at 623–625. Although we can assume the President's practicability judgments are entitled to some deference, the Court observes that Congress' choice of language in the uniformity provision of 10 U. S. C. § 836(b) contrasts with the language of § 836(a). This difference suggests, at the least, a lower degree of deference for § 836(b) determinations. *Ante*, at 623. The rules for military courts may depart from federal-court rules whenever the President "considers" conformity impracticable, § 836(a); but the statute requires procedural uniformity across different military courts "insofar as [uniformity is] practicable," § 836(b), not insofar as the President considers it to be so. The Court is right to conclude this is of relevance to our decision. Further, as the Court is also correct to conclude, *ante*, at 623–624, the term "practicable" cannot be construed to permit deviations based on mere convenience or expedience. "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." Web-

ster's Third New International Dictionary 1780 (1961). Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. Insofar as the "[p]retrial, trial, and post-trial procedures" for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.

In addition to § 836, a second UCMJ provision, 10 U. S. C. § 821, requires us to compare the commissions at issue to courts-martial. This provision states:

> "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

In § 821 Congress has addressed the possibility that special military commissions—criminal courts other than courts-martial—may at times be convened. At the same time, however, the President's authority to convene military commissions is limited: It extends only to "offenders or offenses" that "by statute or by the law of war may be tried by" such military commissions. *Ibid.;* see also *ante,* at 593. The Government does not claim to base the charges against Hamdan on a statute; instead it invokes the law of war. That law, as the Court explained in *Ex parte Quirin*, 317 U. S. 1 (1942), derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. *Id.,* at 28. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict

with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. *Ante*, at 629–633; see also 415 F. 3d 33, 44 (CADC 2005) (Williams, J., concurring). That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." See, *e. g.*, Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3318, T. I. A. S. No. 3364. The provision is part of a treaty the United States has ratified and thus accepted as binding law. See *id.*, at 3316. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U. S. C. § 2441. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in § 821.

The dissent by JUSTICE THOMAS argues that Common Article 3 nonetheless is irrelevant to this case because in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), it was said to be the "obvious scheme" of the 1929 Geneva Convention that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers," *i. e.*, signatory states, *id.*, at 789, n. 14. As the Court explains, *ante*, at 626–628, this language from *Eisentrager* is not controlling here. Even assuming the *Eisentrager* analysis has some bearing upon the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under [those Conventions]" only through protests and intervention, 339 U. S., at 789, n. 14, Common Article 3 is nonetheless relevant to the question of authorization under § 821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military

commissions. *Ante,* at 629–630. Consistent with that view, the *Eisentrager* Court itself considered on the merits claims that "procedural irregularities" under the 1929 Convention "deprive[d] the Military Commission of jurisdiction." 339 U. S., at 789, 790.

In another military-commission case, *In re Yamashita*, 327 U. S. 1 (1946), the Court likewise considered on the merits—without any caveat about remedies under the Convention—a claim that an alleged violation of the 1929 Convention "establish[ed] want of authority in the commission to proceed with the trial." *Id.*, at 23, 24. That is the precise inquiry we are asked to perform here.

Assuming the President has authority to establish a special military commission to try Hamdan, the commission must satisfy Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320. The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in § 821. The Court correctly concludes that the military commission here does not comply with this provision.

Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," *ibid.*, supports, at the least, a uniformity principle similar to that codified in § 836(b). The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable. See *ante,* at 632–633; 1 Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005) (explaining that courts are "regularly constituted" under Common Article 3 if they are "established and organised in accordance with the laws and procedures already in force in a country").

The regular military courts in our system are the courts-martial established by congressional statutes. Acts of Congress confer on those courts the jurisdiction to try "any person" subject to war crimes prosecution. 10 U. S. C. § 818. As the Court explains, moreover, while special military commissions have been convened in previous armed conflicts—a practice recognized in § 821—those military commissions generally have adopted the structure and procedure of courts-martial. See, *e. g.*, 1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 248 (2d series 1894) (Civil War general order requiring that military commissions "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"); W. Winthrop, Military Law and Precedents 835, n. 81 (rev. 2d ed. 1920) ("[M]ilitary commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); 1 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 116–117 (1947) (reprint 1997) (hereinafter Law Reports) (discussing post-World War II regulations requiring that military commissions "hav[e] regard for" rules of procedure and evidence applicable in general courts-martial); see also *ante*, at 617–620; *post*, at 707, n. 15 (THOMAS, J., dissenting). Today, moreover, § 836(b)—which took effect after the military trials in the World War II cases invoked by the dissent, see *Madsen* v. *Kinsella*, 343 U. S. 341, 344–345, and n. 6 (1952); *Yamashita*, *supra*, at 5; *Quirin*, 317 U. S., at 23—codifies this presumption of uniformity at least as to "[p]retrial, trial, and post-trial procedures." Absent more concrete statutory guidance, this historical and statutory background—which suggests that some practical need must justify deviations from the court-martial model—informs the understanding of which military courts are "regularly constituted" under United States law.

In addition, whether or not the possibility, contemplated by the regulations here, of midtrial procedural changes could by itself render a military commission impermissibly irregular, *ante*, at 633, n. 65; see also Military Commission Order No. 1, § 11 (Aug. 31, 2005), App. to Brief for Petitioner 46a–72a (hereinafter MCO), an acceptable degree of independence from the Executive is necessary to render a commission "regularly constituted" by the standards of our Nation's system of justice. And any suggestion of executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness. Again, however, courts-martial provide the relevant benchmark. Subject to constitutional limitations, see *Ex parte Milligan*, 4 Wall. 2 (1866), Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them. The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.

At a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. In this regard the standard of Common Article 3, applied here in conformity with § 821, parallels the practicability standard of § 836(b). Section 836, however, is limited by its terms to matters properly characterized as procedural—that is, "[p]retrial, trial, and post-trial procedures"—while Common Article 3 permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence. Thus the combined effect of the two statutes discussed here—§§ 836 and 821—is that considerations of practicability must support departures from court-

martial practice. Relevant concerns, as noted earlier, relate to logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience. This determination, of course, must be made with due regard for the constitutional principle that congressional statutes can be controlling, including the congressional direction that the law of war has a bearing on the determination.

These principles provide the framework for an analysis of the specific military commission at issue here.

II

In assessing the validity of Hamdan's military commission the precise circumstances of this case bear emphasis. The allegations against Hamdan are undoubtedly serious. Captured in Afghanistan during our Nation's armed conflict with the Taliban and al Qaeda—a conflict that continues as we speak—Hamdan stands accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Usama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. App. to Pet. for Cert. 65a–67a. Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized. *Ante,* at 625, 631–633, 635. The following analysis, which expands on the Court's discussion, explains my reasons for reaching this conclusion.

To begin with, the structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them.

Under the UCMJ, courts-martial are organized by a "convening authority"—either a commanding officer, the Secretary of Defense, the Secretary concerned, or the President. 10 U. S. C. §§ 822–824 (2000 ed. and Supp. III). The convening authority refers charges for trial, Manual for Courts-Martial, United States, Rule for Courts-Martial 401 (2005 ed.) (hereinafter R. C. M.), and selects the court-martial members who vote on the guilt or innocence of the accused and determine the sentence, 10 U. S. C. §§ 825(d)(2), 851–852 (2000 ed.); R. C. M. 503(a). Paralleling this structure, under MCO No. 1 an "'Appointing Authority'"—either the Secretary of Defense or the Secretary's "designee"—establishes commissions subject to the order, MCO No. 1, § 2, approves and refers charges to be tried by those commissions, § 4(B)(2)(a), and appoints commission members who vote on the conviction and sentence, §§ 4(A) (1)–(3). In addition the Appointing Authority determines the number of commission members (at least three), oversees the chief prosecutor, provides "investigative or other resources" to the defense insofar as he or she "deems necessary for a full and fair trial," approves or rejects plea agreements, approves or disapproves communications with news media by prosecution or defense counsel (a function shared by the General Counsel of the Department of Defense), and issues supplementary commission regulations (subject to approval by the General Counsel of the Department of Defense, unless the Appointing Authority is the Secretary of Defense). See MCO No. 1, §§ 4(A)(2), 5(H), 6(A)(4), 7(A); Military Commission Instruction No. 3, § 5(C) (July 15, 2005) (hereinafter MCI), available at www.defenselink.mil/news/Aug2005/d20050811MCI3.pdf; MCI No. 4, § 5(C) (Sept. 16, 2005), available at www.

defenselink.mil/news/Oct2005/d20051003MCI4.pdf; MCI No. 6, §3(B)(3) (Apr. 15, 2004), available at www.defenselink.mil/news/Apr2004/d20040420ins6.pdf (all Internet materials as visited June 27, 2006, and available in Clerk of Court's case file).

Against the background of these significant powers for the Appointing Authority, which in certain respects at least conform to ordinary court-martial standards, the regulations governing the commissions at issue make several noteworthy departures. At a general court-martial—the only type authorized to impose penalties of more than one year's incarceration or to adjudicate offenses against the law of war, R. C. M. 201(f); 10 U. S. C. §§818–820 (2000 ed. and Supp. III)—the presiding officer who rules on legal issues must be a military judge. R. C. M. 501(a)(1), 801(a)(4)–(5); 10 U. S. C. §816(1) (2000 ed., Supp. III); see also R. C. M. 201(f)(2)(B)(ii) (likewise requiring a military judge for certain other courts-martial); 10 U. S. C. §819 (2000 ed. and Supp. III) (same). A military judge is an officer who is a member of a state or federal bar and has been specially certified for judicial duties by the Judge Advocate General for the officer's Armed Service. R. C. M. 502(c); 10 U. S. C. §826(b). To protect their independence, military judges at general courts-martial are "assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R. C. M. 502(c). They must be detailed to the court, in accordance with applicable regulations, "by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R. C. M. 503(b); see also 10 U. S. C. §826(c); see generally *Weiss* v. *United States*, 510 U. S. 163, 179–181 (1994) (discussing provisions that "insulat[e] military judges from the effects of command influence" and thus "preserve judicial impartiality"). Here, by contrast, the Appointing Authority selects the presiding officer, MCO No. 1, §§4(A)(1), (A)(4);

and that officer need only be a judge advocate, that is, a military lawyer, § 4(A)(4).

The Appointing Authority, moreover, exercises supervisory powers that continue during trial. Any interlocutory question "the disposition of which would effect a termination of proceedings with respect to a charge" is subject to decision not by the presiding officer, but by the Appointing Authority. § 4(A)(5)(e) (stating that the presiding officer "shall certify" such questions to the Appointing Authority). Other interlocutory questions may be certified to the Appointing Authority as the presiding officer "deems appropriate." *Ibid.* While in some circumstances the Government may appeal certain rulings at a court-martial—including "an order or ruling that terminates the proceedings with respect to a charge or specification," R. C. M. 908(a); see also 10 U. S. C. § 862(a)—the appeals go to a body called the Court of Criminal Appeals, not to the convening authority. R. C. M. 908; 10 U. S. C. § 862(b); see also R. C. M. 1107 (requiring the convening authority to approve or disapprove the findings and sentence of a court-martial but providing for such action only after entry of sentence and restricting actions that increase penalties); 10 U. S. C. § 860 (same); cf. § 837(a) (barring command influence on court-martial actions). The Court of Criminal Appeals functions as the military's intermediate appeals court; it is established by the Judge Advocate General for each Armed Service and composed of appellate military judges. R. C. M. 1203; 10 U. S. C. § 866. This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.

Finally, in addition to these powers with respect to the presiding officer, the Appointing Authority has greater flexibility in appointing commission members. While a general court-martial requires, absent a contrary election by the accused, at least five members, R. C. M. 501(a)(1); 10 U. S. C. § 816(1) (2000 ed. and Supp. III), the Appointing Authority

here is free, as noted earlier, to select as few as three. MCO No. 1, § 4(A)(2). This difference may affect the deliberative process and the prosecution's burden of persuasion.

As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here—including even the resolution of dispositive issues in the middle of the trial—raise concerns that the commission's decisionmaking may not be neutral. If the differences are supported by some practical need beyond the goal of constant and ongoing supervision, that need is neither apparent from the record nor established by the Government's submissions.

It is no answer that, at the end of the day, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, affords military-commission defendants the opportunity for judicial review in federal court. As the Court is correct to observe, the scope of that review is limited, DTA § 1005(e)(3)(D), *id.*, at 2743; see also *ante*, at 573–574, and the review is not automatic if the defendant's sentence is under 10 years, § 1005(e)(3)(B), 119 Stat. 2743. Also, provisions for review of legal issues after trial cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial. Before military-commission defendants may obtain judicial review, furthermore, they must navigate a military review process that again raises fairness concerns. At the outset, the Appointing Authority (unless the Appointing Authority is the Secretary of Defense) performs an "administrative review" of undefined scope, ordering any "supplementary proceedings" deemed necessary. MCO No. 1, § 6(H)(3). After that the case is referred to a three-member Review Panel composed of officers selected by the Secretary of Defense. § 6(H)(4); MCI No. 9, § 4(B) (Oct. 11, 2005), available at www.defenselink.mil/news/Oct2005/d20051014MCI9.pdf. Though the Review Panel may return the case for further

proceedings only if a majority "form[s] a definite and firm conviction that a material error of law occurred," MCO No. 1, § 6(H)(4); MCI No. 9, § 4(C)(1)(a), only one member must have "experience as a judge," MCO No. 1, § 6(H)(4); nothing in the regulations requires that other panel members have legal training. By comparison to the review of court-martial judgments performed by such independent bodies as the Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces, 10 U. S. C. §§ 862, 864, 866, 867, 869, the review process here lacks structural protections designed to help ensure impartiality.

These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

Apart from these structural issues, moreover, the basic procedures for the commissions deviate from procedures for courts-martial, in violation of § 836(b). As the Court explains, *ante*, at 614–615, 623, the MCO abandons the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence in conformity with § 836(a)'s requirement of presumptive compliance with district-court rules.

Instead, the order imposes just one evidentiary rule: "Evidence shall be admitted if . . . the evidence would have probative value to a reasonable person," MCO No. 1, § 6(D)(1). Although it is true some military commissions applied

an amorphous evidence standard in the past, see, *e. g.*, 1 Law Reports 117–118 (discussing World War II military-commission orders); Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (order convening military commission to try Nazi saboteurs), the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of 10 U. S. C. § 836(b) as part of the UCMJ, see Act of May 5, 1950, ch. 169, 64 Stat. 107, 120, 149. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses, 10 U. S. C. § 849(d); R. C. M. 702, and use of classified information, Military Rule Evid. 505. Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. See *ante*, at 621, and n. 49. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons, § 849(d)—a requirement that makes no sense if military commissions may consider all probative evidence. Whether or not this conflict renders the rules at issue "contrary to or inconsistent with" the UCMJ under § 836(a), it creates a uniformity problem under § 836(b).

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements, MCO No. 1, § 6(D)(3); and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture," MCI No. 10, § 3(A) (Mar. 24, 2006), available at www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf; cf. Military Rule Evid. 304(c)(3) (generally barring use of statements obtained "through the use of coercion, unlawful influence, or unlawful inducement"); 10 U. S. C. § 831(d) (same). Besides, even if

evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military-commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence. MCO No. 1, § 6(D)(1); cf. R. C. M. 801(a)(4), (e)(1) (providing that the military judge at a court-martial determines all questions of law).

As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, *ante*, at 622–624; nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in Articles 36 and 21 of the UCMJ, 10 U. S. C. §§ 836, 821. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by JUSTICE STEVENS and the dissent by JUSTICE THOMAS.

First, I would not decide whether Common Article 3's standard—a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320 (¶ (1)*(d)*)—necessarily

requires that the accused have the right to be present at all stages of a criminal trial. As JUSTICE STEVENS explains, MCO No. 1 authorizes exclusion of the accused from the proceedings if the presiding officer determines that, among other things, protection of classified information so requires. See §§ 6(B)(3), (D)(5); *ante*, at 613–614. JUSTICE STEVENS observes that these regulations create the possibility of a conviction and sentence based on evidence Hamdan has not seen or heard—a possibility the plurality is correct to consider troubling. *Ante*, at 634–635, and n. 67 (collecting cases); see also *In re Oliver*, 333 U. S. 257, 277 (1948) (finding "no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence").

As the dissent by JUSTICE THOMAS points out, however, the regulations bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a "full and fair trial." MCO No. 1, § 6(D)(5)(b); see also *post*, at 722–723. This fairness determination, moreover, is unambiguously subject to judicial review under the DTA. See § 1005(e)(3)(D)(i), 119 Stat. 2743 (allowing review of compliance with the "standards and procedures" in MCO No. 1). The evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, *ante*, at 633, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack au-

thorization under 10 U. S. C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.

I likewise see no need to address the validity of the conspiracy charge against Hamdan—an issue addressed at length in Part V of JUSTICE STEVENS' opinion and in Part II–C of JUSTICE THOMAS' dissent. See *ante*, at 600–613; *post*, at 689–704. In light of the conclusion that the military commissions at issue are unauthorized, Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 428 (1964).

Finally, for the same reason, I express no view on the merits of other limitations on military commissions described as elements of the common law of war in Part V of JUSTICE STEVENS' opinion. See *ante*, at 595–600, 611–613; *post*, at 683–689 (THOMAS, J., dissenting).

With these observations I join the Court's opinion with the exception of Parts V and VI–D–iv.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute's *most natural* reading, *every* "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.

I

A

The DTA provides: "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." § 1005(e)(1), 119 Stat. 2742 (internal division omitted). This provision "t[ook] effect on the date of the enactment of this Act," § 1005(h)(1), *id.*, at 2743, which was December 30, 2005. As of that date, then, *no* court had jurisdiction to "hear or consider" the merits of petitioner's habeas application. This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30. It is also perfectly clear that the phrase "no court, *justice,* or judge" includes this Court and its Members, and that by exercising our appellate jurisdiction in this case we are "hear[ing] or consider[ing] . . . an application for a writ of habeas corpus."

An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date. For example, in *Bruner* v. *United States,* 343 U. S. 112 (1952), we granted certiorari to consider whether the Tucker Act's provision denying district court jurisdiction over suits by "officers" of the United States barred a suit by an *employee* of the United States. After we granted certiorari, Congress amended the Tucker Act by adding suits by "'employees'" to the provision barring jurisdiction over suits by officers. *Id.*, at 114. This statute narrowing the jurisdiction of the district courts "became effective" while the case was pending before us, *ibid.*, and made no explicit reference to pending cases. Because the statute "did not reserve jurisdiction over pending cases," *id.*, at 115, we held that it clearly ousted jurisdiction over them. Summarizing centuries of practice, we said: "This

rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court." *Id.*, at 116–117. See also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994) (opinion for the Court by STEVENS, J.) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed").

This venerable rule that statutes ousting jurisdiction terminate jurisdiction in pending cases is not, as today's opinion for the Court would have it, a judge-made "presumption against jurisdiction," *ante*, at 576, that we have invented to resolve an ambiguity in the statutes. It is simple recognition of the reality that the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed.

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *And this is not less clear upon authority than upon principle.*" *Ex parte McCardle*, 7 Wall. 506, 514 (1869) (emphasis added).

To alter this plain meaning, our cases have required an explicit reservation of pending cases in the jurisdiction-repealing statute. For example, *Bruner*, as mentioned, looked to whether Congress made "any reservation as to pending cases." 343 U. S., at 116–117; see also *id.*, at 115 ("Congress made no provision for cases pending at the effective date of the Act withdrawing jurisdiction and, for this reason, Courts of Appeals ordered pending cases terminated for want of jurisdiction"). Likewise, in *Hallowell* v. *Commons*, 239 U. S. 506 (1916), Justice Holmes relied on the fact

that the jurisdiction-ousting provision "made no exception for pending litigation, but purported to be universal," *id.*, at 508. And in *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (1867), we again relied on the fact that the jurisdictional repeal was made "without any saving of such causes as that before us," *id.*, at 544. As in *Bruner*, *Hallowell*, and *Ritchie*, the DTA's directive that "no court, justice, or judge shall have jurisdiction," § 1005(e)(1), 119 Stat. 2742, is made "without any reservation as to pending cases" and "purport[s] to be universal." What we stated in an earlier case remains true here: "[W]hen, if it had been the intention to confine the operation of [the jurisdictional repeal] . . . to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed." *Railroad Co.* v. *Grant*, 98 U. S. 398, 403 (1879).

The Court claims that I "rea[d] too much into" the *Bruner* line of cases, *ante*, at 577, n. 7, and that "the *Bruner* rule" has never been "an inflexible trump," *ante*, at 584. But the Court sorely misdescribes *Bruner*—as if it were a kind of early-day *Lindh* v. *Murphy*, 521 U. S. 320 (1997), resolving statutory ambiguity by oblique negative inference. On the contrary, as described above, *Bruner* stated its holding as an unqualified "rule," which "has been adhered to consistently by this Court." 343 U. S., at 116–117. Though *Bruner* referred to an express saving clause elsewhere in the statute, *id.*, at 115, n. 7, it disavowed any reliance on such oblique indicators to vary the plain meaning, quoting *Ritchie* at length: "'It is quite possible that this effect of the [jurisdiction-stripping statute] was not contemplated by Congress. . . . [B]ut when terms are unambiguous we may not speculate on probabilities of intention.'" 343 U. S., at 116 (quoting 5 Wall., at 544–545).

The Court also attempts to evade the *Bruner* line of cases by asserting that "the 'presumption' [of application to pend-

ing cases] that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances." *Ante*, at 576. I have already explained that what the Court calls a "presumption" is simply the acknowledgment of the unambiguous meaning of such provisions. But even taking it to be what the Court says, the effect upon the present case would be the same. *Prospective* applications of a statute are "effective" upon the statute's effective date; that is what an effective-date provision like § 1005(h)(1) *means*.[1] "'[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment,' and that presumption is too strong to be overcome by any negative inference [drawn from other provisions of the statute]." *Landgraf*, *supra*, at 288 (SCALIA, J., concurring in judgments). The Court's "nonapplication of . . . the presumption against retroactivity" to § 1005(e)(1) is thus just another way of stating that the statute takes immediate effect in pending cases.

Though the Court resists the *Bruner* rule, it cannot cite a *single case* in the history of Anglo-American law (before

[1] The Court apparently believes that the effective-date provision means nothing at all. "That paragraph (1), along with paragraphs (2) and (3), is to 'take effect on the date of the enactment,' DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive," says the Court, *ante*, at 579, n. 9. The Court's authority for this conclusion is its quote from *INS* v. *St. Cyr*, 533 U. S. 289, 317 (2001), to the effect that "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct *that occurred at an earlier date*." *Ante*, at 579, n. 9 (emphasis added and internal quotation marks omitted). But this quote merely restates the obvious: An effective-date provision does not render a statute applicable to "conduct that occurred at an *earlier* date," but of course it renders the statute applicable to conduct that occurs *on the effective date and all future dates*—such as the Court's exercise of jurisdiction here. The Court seems to suggest that, because the effective-date provision does not authorize retroactive application, it also fails to authorize prospective application (and is thus useless verbiage). This cannot be true.

today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation. By contrast, the cases granting such immediate effect are legion, and they repeatedly rely on the plain language of the jurisdictional repeal as an "inflexible trump," *ante*, at 584, by requiring an express reservation to save pending cases. See, *e. g.*, *Bruner*, *supra*, at 115; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234 (1922); *Hallowell*, 239 U. S., at 508; *Gwin* v. *United States*, 184 U. S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U. S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U. S. 679, 680 (1887); *Railroad Co.* v. *Grant*, *supra*, at 403, *Assessors* v. *Osbornes*, 9 Wall. 567, 575 (1870); *Ex parte McCardle*, 7 Wall., at 514; *Ritchie*, *supra*, at 544; *Norris* v. *Crocker*, 13 How. 429, 440 (1852); *Yeaton* v. *United States*, 5 Cranch 281 (1809) (Marshall, C. J.), discussed in *Gwin*, *supra*, at 675; *King* v. *Justices of the Peace of London*, 3 Burr. 1456, 1457, 97 Eng. Rep. 924, 925 (K. B. 1764). Cf. *National Exchange Bank of Baltimore* v. *Peters*, 144 U. S. 570, 572 (1892).

B

Disregarding the plain meaning of § 1005(e)(1) and the requirement of explicit exception set forth in the foregoing cases, the Court instead favors "a negative inference . . . from the exclusion of language from one statutory provision that is included in other provisions of the same statute," *ante*, at 578. Specifically, it appeals to the fact that § 1005(e)(2) and (e)(3) are explicitly made applicable to pending cases (by § 1005(h)(2)). A negative inference of the sort the Court relies upon might clarify the meaning of an ambiguous provision, but since the meaning of § 1005(e)(1) is entirely clear, the omitted language in that context would have been redundant.

Even if § 1005(e)(1) were at all ambiguous in its application to pending cases, the "negative inference" from § 1005(h)(2) touted by the Court would have no force. The numerous

cases in the *Bruner* line would at least create a powerful default "presumption against jurisdiction," *ante*, at 576. The negative inference urged by the Court would be a particularly awkward and indirect way of rebutting such a long-standing and consistent practice. This is especially true since the negative inference that might be drawn from § 1005(h)(2)'s specification that certain provisions *shall* apply to pending cases is matched by a negative inference in the opposite direction that might be drawn from § 1005(b)(2), which provides that certain provisions shall *not* apply to pending cases.

The Court's reliance on our opinion in *Lindh* v. *Murphy*, 521 U. S. 320 (1997), is utterly misplaced. *Lindh* involved two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): a set of amendments to chapter 153 of the federal habeas statute that redefined the scope of collateral review by federal habeas courts; and a provision creating a new chapter 154 in the habeas statute specially to govern federal collateral review of state capital cases. See 521 U. S., at 326–327. The latter provision explicitly rendered the new chapter 154 applicable to cases pending at the time of AEDPA's enactment; the former made no specific reference to pending cases. *Id.*, at 327. In *Lindh*, we drew a negative inference from chapter 154's explicit reference to pending cases, to conclude that the chapter 153 amendments did *not* apply in pending cases. It was essential to our reasoning, however, that both provisions appeared to be *identically difficult* to classify under our retroactivity cases. First, we noted that, after *Landgraf*, there was reason for Congress to suppose that an explicit statement was required to render the amendments to chapter 154 applicable in pending cases, because the new chapter 154 "will have substantive as well as purely procedural effects." 521 U. S., at 327. The next step—and the critical step—in our reasoning was that Congress had *identical* reason to suppose that an explicit statement would be required to apply the chapter 153

amendments to pending cases, but did not provide it. *Id.*, at 329. The negative inference of *Lindh* rested on the fact that "[n]othing . . . but a different intent explain[ed] the different treatment." *Ibid.*

Here, by contrast, there is ample reason for the different treatment. The exclusive-review provisions of the DTA, unlike both § 1005(e)(1) and the AEDPA amendments in *Lindh*, confer *new* jurisdiction (in the D. C. Circuit) where there was none before. For better or for worse, our recent cases have contrasted jurisdiction-*creating* provisions with jurisdiction-*ousting* provisions, retaining the venerable rule that the latter are not retroactive even when applied in pending cases, but strongly indicating that the former are typically retroactive. For example, we stated in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997), that a statute that "*creates* jurisdiction where none previously existed" is "as much subject to our presumption against retroactivity as any other." See also *Republic of Austria* v. *Altmann*, 541 U. S. 677, 695 (2004) (opinion for the Court by STEVENS, J.); *id.*, at 722 (KENNEDY, J., dissenting). The Court gives our retroactivity jurisprudence a dazzling clarity in asserting that "subsections (e)(2) and (e)(3) 'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents."[2] *Ante*, at

[2] A comparison with *Lindh* v. *Murphy*, 521 U. S. 320 (1997), shows this not to be true. Subsections (e)(2) and (e)(3) of § 1005 resemble the provisions of AEDPA at issue in *Lindh* (whose retroactivity as applied to pending cases the *Lindh* majority did not rule upon, see *id.*, at 326), in that they "g[o] beyond 'mere' procedure," *id.*, at 327. They impose novel and unprecedented disabilities on the Executive Branch in its conduct of military affairs. Subsection (e)(2) imposes judicial review on the Combatant Status Review Tribunals (CSRTs), whose implementing order did not subject them to review by Article III courts. See Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunals, p. 3, § *h* (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet ma-

582. This statement rises to the level of sarcasm when one considers its author's description of the governing test of our retroactivity jurisprudence:

> "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound . . . instinct[s],' . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf*, 511 U. S., at 270 (opinion for the Court by STEVENS, J.).

The only "familiar consideration," "reasonable reliance," and "settled expectation" I am aware of pertaining to the present

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terials as visited June 27, 2006, and available in Clerk of Court's case file). Subsection (e)(3) authorizes the D. C. Circuit to review "the validity of any final decision rendered pursuant to Military Commission Order No. 1," § 1005(e)(3)(A), 119 Stat. 2743. Historically, federal courts have *never* reviewed the validity of the final decision of any military commission; their jurisdiction has been restricted to considering the commission's "lawful *authority* to hear, decide and condemn," *In re Yamashita*, 327 U. S. 1, 8 (1946) (emphasis added). See also *Johnson* v. *Eisentrager*, 339 U. S. 763, 786–787 (1950). Thus, contrary to the Court's suggestion, *ante*, at 581, 582, subsections (e)(2) and (e)(3) confer new jurisdiction: They impose judicial oversight on a traditionally unreviewable exercise of military authority by the Commander in Chief. They arguably "spea[k] not just to the power of a particular court but to . . . substantive rights . . . as well," *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997)—namely, the unreviewable powers of the President. Our recent cases had reiterated that the Executive is protected by the presumption against retroactivity in such comparatively trivial contexts as suits for tax refunds and increased pay, see *Landgraf* v. *USI Film Products*, 511 U. S. 244, 271, n. 25 (1994).

case is the rule of *Bruner*—applicable to § 1005(e)(1), but not to § 1005(e)(2) and (e)(3)—which the Court stubbornly disregards. It is utterly beyond question that § 1005(e)(2)'s and (3)'s application to pending cases (without explicit specification) was not as clear as § 1005(e)(1)'s. That is alone enough to explain the difference in treatment.

Another obvious reason for the specification was to stave off any Suspension Clause problems raised by the immediately effective ouster of jurisdiction brought about by subsection (e)(1). That is to say, specification of the immediate effectiveness of subsections (e)(2) and (e)(3) (which, unlike subsection (e)(1), would not fall within the *Bruner* rule and would not *automatically* be deemed applicable in pending cases) could reasonably have been thought essential to be sure of replacing the habeas jurisdiction that subsection (e)(1) eliminated in pending cases with an adequate substitute. See *infra*, at 670–672.

These considerations by no means prove that an explicit statement would be *required* to render subsections (e)(2) and (e)(3) applicable in pending cases. But they surely gave Congress ample reason to *doubt* that their application in pending cases would unfold as naturally as the Court glibly assumes. In any event, even if it were true that subsections (e)(2) and (e)(3) "'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions," *ante*, at 582, this would merely establish that subsection (h)(2)'s reference to pending cases was wholly superfluous when applied to subsections (e)(2) and (e)(3), just as it would have been for subsection (e)(1). *Lindh*'s negative inference makes sense only when Congress would have perceived "the wisdom of being explicit" with respect to the immediate application of *both* of two statutory provisions, 521 U. S., at 328, but chose to be explicit only for one of them—not when it would have perceived *no need* to be explicit for both, but enacted a redundancy only for one.

In short, it is simply untrue that Congress "'should have been just as concerned about'" specifying the application of § 1005(e)(1) to pending cases, *ante*, at 578 (quoting *Lindh*, *supra*, at 329). In fact, the negative-inference approach of *Lindh* is particularly inappropriate in this case, because the negative inference from § 1005(h)(2) would tend to defeat the purpose of the very provisions that *are* explicitly rendered applicable in pending cases, § 1005(e)(2) and (3). Those provisions purport to vest "exclusive" jurisdiction in the D. C. Circuit to consider the claims raised by petitioner here. See *infra*, at 670–672. By drawing a negative inference *à la Lindh*, the Court supplants this exclusive-review mechanism with a dual-review mechanism for petitioners who were expeditious enough to file applications challenging the CSRTs or military commissions before December 30, 2005. Whatever the force of *Lindh*'s negative inference in other cases, it surely should not apply here to defeat the purpose of the very provision from which the negative inference is drawn.

C

Worst of all is the Court's reliance on the legislative history of the DTA to buttress its implausible reading of § 1005(e)(1). We have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous. But the Court nevertheless relies both on floor statements from the Senate and (quite heavily) on the drafting history of the DTA. To begin with floor statements: The Court urges that some "statements made by Senators preceding passage of the Act lend further support to" the Court's interpretation, citing excerpts from the floor debate that support its view, *ante*, at 580, n. 10. The Court immediately goes on to discount numerous floor statements by the DTA's sponsors that flatly contradict its view, because "those statements appear to have been inserted into the Congressional Record *after* the Senate debate." *Ibid.* Of course this observation, even if true, makes no difference

unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator. In any event, the Court greatly exaggerates the one-sidedness of the portions of the floor debate that clearly occurred before the DTA's enactment. Some of the statements of Senator Graham, a sponsor of the bill, only make sense on the assumption that pending cases are covered.[3] And at least one opponent of the DTA unmistakably expressed his understanding that it would terminate our jurisdiction in this very case.[4] (Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases.[5])

[3] "Because I have described how outrageous these claims are—about the exercise regime, the reading materials—most Americans would be highly offended to know that terrorists are suing us in our own courts about what they read." 151 Cong. Rec. S12756 (Nov. 14, 2005). "Instead of having unlimited habeas corpus opportunities under the Constitution, we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia. . . . It will be a one-time deal." *Id.*, at S12754. "This Levin-Graham-Kyl amendment allows every detainee under our control to have their day in court. They are allowed to appeal their convictions." *Id.*, at S12801 (Nov. 15, 2005); see also *id.*, at S12799 (rejecting the notion that "an enemy combatant terrorist al-Qaida member should be able to have access to our Federal courts under habeas like an American citizen").

[4] "An earlier part of the amendment provides that no court, justice, or judge shall have jurisdiction to consider the application for writ of habeas corpus. . . . Under the language of exclusive jurisdiction in the DC Circuit, the U. S. Supreme Court would not have jurisdiction to hear the Hamdan case . . . ." *Id.*, at S12796 (statement of Sen. Specter).

[5] "[T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, de-

But selectivity is not the greatest vice in the Court's use of floor statements to resolve today's case. These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue. The question was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted *solely* for use in the briefs in this very litigation. See, *e. g.*, 151 Cong. Rec. S14257–S14258 (Dec. 21, 2005) (statement of Sen. Levin) (arguing against a reading that would "stri[p] the Federal courts of jurisdiction to consider pending cases, *including the Hamdan case now pending in the Supreme Court*," and urging that *Lindh* requires the same negative inference that the Court indulges today (emphasis added)). The Court's reliance on such statements cannot avoid the appearance of similar opportunism. In a virtually identical context, the author of today's opinion has written for the Court that "[t]he legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement." *Landgraf*, 511 U. S., at 262 (opinion for the Court by STEVENS, J.). Likewise, the handful of floor statements that the Court treats as authoritative do not "reflec[t] any general agreement." They reflect the now-common tactic—which the Court once again rewards—of pursuing through floor-speech *ipse dixit* what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs.

With regard to the floor statements, at least the Court shows some semblance of seemly shame, tucking away its

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scribed in section 1005." President's Statement on Signing of H. R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html.

reference to them in a halfhearted footnote. Not so for its reliance on the DTA's drafting history, which is displayed prominently, see *ante,* at 579–580. I have explained elsewhere that such drafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history. This case presents a textbook example of its unreliability. The Court, *ante,* at 579, trumpets the fact that a bill considered in the Senate included redundant language, not included in the DTA as passed, reconfirming that the abolition of habeas jurisdiction "shall apply to any application or other action that is pending on or after the date of the enactment of this Act." 151 Cong. Rec. S12655 (Nov. 10, 2005). But this earlier version of the bill also differed from the DTA in other material respects. Most notably, it provided for postdecision review by the D. C. Circuit only of the decisions of *CSRTs,* not military commissions, *ibid.;* and it limited that review to whether "the status determination . . . was consistent with the procedures and standards specified by the Secretary of Defense," *ibid.,* not whether "the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. To say that what moved Senators to reject this earlier bill was the "action that is pending" provision surpasses the intuitive powers of even this Court's greatest Justices.[6] And to think that the House and the President also had this rejection firmly in mind is absurd. As always—but *especially* in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.

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[6] The Court asserts that "it cannot be said that the changes to subsection (h)(2) were inconsequential," *ante,* at 580, n. 10, but the Court's sole evidence is the self-serving floor statements that it selectively cites.

D

A final but powerful indication of the fact that the Court has made a mess of this statute is the nature of the consequences that ensue. Though this case concerns a habeas application challenging a trial by military commission, DTA § 1005(e)(1) strips the courts of jurisdiction to hear or consider *any* "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." The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of "detention" such as the terms and conditions of confinement. See *Rasul* v. *Bush*, 542 U. S. 466, 498 (2004) (SCALIA, J., dissenting). The Solicitor General represents that "[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees," including one that "seek[s] relief on behalf of every Guantanamo detainee who has not already filed an action," Respondents' Motion to Dismiss for Lack of Jurisdiction 20, n. 10 (hereinafter Motion to Dismiss). The Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.

II

Because I would hold that § 1005(e)(1) unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, I must confront petitioner's arguments that the provision, so interpreted, violates the Suspension Clause. This claim is easily dispatched. We stated in *Johnson* v. *Eisentrager*, 339 U. S. 763, 768 (1950):

> "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitu-

> tion extends such a right, nor does anything in our statutes."

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul*, 542 U. S., at 480–481, it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction" of the United States. See *id.*, at 500–505 (SCALIA, J., dissenting). Petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause.

But even if petitioner were fully protected by the Clause, the DTA would create no suspension problem. This Court has repeatedly acknowledged that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977); see also *INS* v. *St. Cyr*, 533 U. S. 289, 314, n. 38 (2001) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals").

Petitioner has made no showing that the postdecision exclusive review by the D. C. Circuit provided in § 1005(e)(3) is inadequate to test the legality of his trial by military commission. His principal argument is that the exclusive-review provisions are inadequate because they foreclose review of the claims he raises here. Though petitioner's brief does not parse the statutory language, his argument evidently rests on an erroneously narrow reading of DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. That provision grants the D. C. Circuit authority to review, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." In the quoted text, the phrase "such standards and procedures" refers to "the standards and procedures specified in the military order referred to in subparagraph (A)," namely, "Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." DTA

§ 1005(e)(3)(D)(i), (e)(3)(A), *ibid.* This Military Commission Order (Order No. 1) is the Department of Defense's fundamental implementing order for the President's order authorizing trials by military commission. Order No. 1 establishes commissions, § 2; delineates their jurisdiction, § 3; provides for their officers, § 4(A); provides for their prosecution and defense counsel, § 4(B), (C); lays out all their procedures, both pretrial and trial, § 5(A)–(P), § 6(A)–(G); and provides for post-trial military review through the Secretary of Defense and the President, § 6(H). In short, the "standards and procedures specified in" Order No. 1 include *every aspect* of the military commissions, including the fact of their existence and every respect in which they differ from courts-martial. Petitioner's claims that the President lacks legal authority to try him before a military commission constitute claims that "the use of such standards and procedures," as specified in Order No. 1, is "[in]consistent with the Constitution and laws of the United States," DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. The D. C. Circuit thus retains jurisdiction to consider these claims on postdecision review, and the Government does not dispute that the DTA leaves unaffected our certiorari jurisdiction under 28 U. S. C. § 1254(1) to review the D. C. Circuit's decisions. Motion to Dismiss 16, n. 8. Thus, the DTA merely *defers* our jurisdiction to consider petitioner's claims; it does not eliminate that jurisdiction. It constitutes neither an "inadequate" nor an "ineffective" substitute for petitioner's pending habeas application.[7]

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[7] Petitioner also urges that he could be subject to indefinite delay if military officials and the President are deliberately dilatory in reviewing the decision of his commission. In reviewing the constitutionality of legislation, we generally presume that the Executive will implement its provisions in good faith. And it is unclear in any event that delay would inflict any injury on petitioner, who (after an adverse determination by his CSRT, see 344 F. Supp. 2d 152, 161 (DC 2004)) is *already* subject to indefinite detention under our decision in *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004) (plurality opinion). Moreover, the mere possibility of delay does not render an alternative remedy "inadequate [o]r ineffective to test

Though it does not squarely address the issue, the Court hints ominously that "the Government's preferred reading" would "rais[e] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." *Ante*, at 575 (citing *Ex parte Yerger*, 8 Wall. 85 (1869); *Felker* v. *Turpin*, 518 U. S. 651 (1996); *Durousseau* v. *United States*, 6 Cranch 307 (1810); *United States* v. *Klein*, 13 Wall. 128 (1872); and *Ex parte McCardle*, 7 Wall. 506). It is not clear how there could be any such lurking questions, in light of the aptly named "*Exceptions* Clause" of Article III, § 2, which, in making our appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," explicitly permits exactly what Congress has done here. But any doubt our prior cases might have created on this score is surely chimerical in *this* case. As just noted, the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause, which *forbids* the suspension of the writ of habeas corpus. *A fortiori* they provide a substitute adequate to satisfy any implied substantive limitations, whether real or imaginary, upon the Exceptions Clause, which *authorizes* such exceptions as § 1005(e)(1).

III

Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. Traditionally, equitable principles govern both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner. See *Schlesinger* v. *Councilman*, 420 U. S. 738, 754 (1975);

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the legality" of a military commission trial. *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977). In an analogous context, we discounted the notion that postponement of relief until postconviction review inflicted any cognizable injury on a serviceman charged before a military court-martial. *Schlesinger* v. *Councilman*, 420 U. S. 738, 754–755 (1975); see also *Younger* v. *Harris*, 401 U. S. 37, 46 (1971).

Weinberger v. *Romero-Barcelo*, 456 U. S. 305, 311 (1982). In light of Congress's provision of an alternate avenue for petitioner's claims in § 1005(e)(3), those equitable principles counsel that we abstain from exercising jurisdiction in this case.

In requesting abstention, the Government relies principally on *Councilman*, in which we abstained from considering a serviceman's claim that his charge for marijuana possession was not sufficiently "service-connected" to trigger the subject-matter jurisdiction of the military courts-martial. See 420 U. S., at 740, 758. Admittedly, *Councilman* does not squarely control petitioner's case, but it provides the closest analogue in our jurisprudence. As the Court describes, *ante*, at 586, *Councilman* "identifie[d] two considerations of comity that together favor[ed] abstention pending completion of ongoing court-martial proceedings against service personnel." But the Court errs in finding these considerations inapplicable to this case. Both of them, and a third consideration not emphasized in *Councilman*, all cut in favor of abstention here.

First, the Court observes that *Councilman* rested in part on the fact that "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts," and concludes that "Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Ante*, at 586, 587. This is true enough. But for some reason, the Court fails to make any inquiry into whether military commission trials might involve *other* "military necessities" or "unique military exigencies," 420 U. S., at 757, comparable in gravity to those at stake in *Councilman*. To put this in context: The charge against the respondent in *Councilman* was the off-base possession and sale of marijuana while he was stationed in Fort Sill, Oklahoma, see *id.*, at 739–740. The charge against the petitioner here is joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent Amer-

ican civilians without warning on September 11, 2001. While *Councilman* held that the prosecution of the former charge involved "military necessities" counseling against our interference, the Court *does not even ponder the same question* for the latter charge.

The reason for the Court's "blinkered study" of this question, *ante,* at 584, is not hard to fathom. The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" *at all:* "The charge's shortcomings . . . are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." *Ante,* at 612. This is quite at odds with the views on this subject expressed by our political branches. Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," including military commissions, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, § 2(a), 115 Stat. 224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III). In keeping with this authority, the President has determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Military Order of Nov. 13, 2001, 3 CFR, 2001 Comp., § 1(e), p. 918 (2002) (hereinafter Military Order). It is not clear where the Court derives the authority—or the audacity—to contradict this determination. If "military necessities" relating to "duty" and "discipline" required abstention in *Councilman, supra,* at 757, military necessities relating to the disabling, deterrence, and punish-

ment of the mass-murdering terrorists of September 11 require abstention all the more here.

The Court further seeks to distinguish *Councilman* on the ground that "the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established." *Ante*, at 587. To be sure, *Councilman* emphasized that "Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion, who would gain over time thorough familiarity with military problems." 420 U. S., at 758 (internal quotation marks and footnote omitted). The Court contrasts this "integrated system" insulated from military influence with the review scheme established by Order No. 1, which "provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6)." *Ante*, at 587.

Even if we were to accept the Court's extraordinary assumption that the President "lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces," *ante*, at 587–588,[8] the Court's description of the review scheme here is anachronistic. As of December 30, 2005, the "fina[l]" review of decisions by military commissions is now conducted by the D. C. Circuit pursuant to § 1005(e)(3) of the DTA, and by this Court under 28 U. S. C. § 1254(1). This provision for review by Article III courts creates, if anything, a review scheme *more* insu-

[8] The very purpose of Article II's creation of a *civilian* Commander in Chief in the President of the United States was to generate "structural insulation from military influence." See The Federalist No. 28 (A. Hamilton); *id.*, No. 69 (same). We do not live under a military junta. It is a disservice to both those in the Armed Forces and the President to suggest that the President is subject to the undue control of the military.

lated from executive control than that in *Councilman*.[9] At the time we decided *Councilman*, Congress had not "conferred on any Art[icle] III court jurisdiction directly to review court-martial determinations." 420 U. S., at 746. The final arbiter of direct appeals was the Court of Military Appeals (now the Court of Appeals for the Armed Forces), an Article I court whose members possessed neither life tenure, nor salary protection, nor the constitutional protection from removal provided to federal judges in Article III, § 1. See 10 U. S. C. § 867(a)(2) (1970 ed.).

Moreover, a third consideration counsels strongly in favor of abstention in this case. *Councilman* reasoned that the "considerations of comity, the necessity of respect for coordinate judicial systems" that motivated our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), were inapplicable to courts-martial, because "the peculiar demands of federalism are not implicated." 420 U. S., at 756, 757. Though military commissions likewise do not implicate "the peculiar demands of federalism," considerations of *interbranch* comity

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[9] In rejecting our analysis, the Court observes that appeals to the D. C. Circuit under subsection (e)(3) are discretionary, rather than as of right, when the military commission imposes a sentence less than 10 years' imprisonment, see *ante*, at 588, n. 19, 616; § 1005(e)(3)(B), 119 Stat. 2743. The relevance of this observation to the abstention question is unfathomable. The fact that Article III review is discretionary does not mean that it lacks "structural insulation from military influence," *ante*, at 587, and its discretionary nature presents no obstacle to the courts' future review of these cases.

The Court might more cogently have relied on the discretionary nature of review to argue that the statute provides an inadequate substitute for habeas review under the Suspension Clause. See *supra*, at 670–672. But this argument would have no force, even if *all* appeals to the D. C. Circuit were discretionary. The exercise of habeas jurisdiction has traditionally been entirely a matter of the court's equitable discretion, see *Withrow* v. *Williams*, 507 U. S. 680, 715–718 (1993) (SCALIA, J., concurring in part and dissenting in part), so the fact that habeas jurisdiction is replaced by discretionary appellate review does not render the substitution "inadequate." *Swain*, 430 U. S., at 381.

at the federal level weigh heavily against our exercise of equity jurisdiction in this case. Here, apparently for the first time in history, see Motion to Dismiss 6, a District Court enjoined ongoing military commission proceedings, which had been deemed "necessary" by the President "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it. Elsewhere, we have deferred exercising habeas jurisdiction until state courts have "the first opportunity to review" a petitioner's claim, merely to "reduc[e] friction between the state and federal court systems." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 844, 845 (1999). The "friction" created today between this Court and the Executive Branch is many times more serious.

In the face of such concerns, the Court relies heavily on *Ex parte Quirin*, 317 U. S. 1 (1942): "Far from abstaining pending the conclusion of military proceedings, which were ongoing, [in *Quirin*] we convened a special Term to hear the case and expedited our review." *Ante*, at 588. It is likely that the Government in *Quirin*, unlike here, preferred a hasty resolution of the case in this Court, so that it could swiftly execute the sentences imposed, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 569 (2004) (SCALIA, J., dissenting). But the Court's reliance on *Quirin* suffers from a more fundamental defect: Once again, it ignores the DTA, which creates an avenue for the consideration of petitioner's claims that did not exist at the time of *Quirin*. Collateral application for habeas review was the *only* vehicle available. And there was no compelling reason to postpone consideration of the *Quirin* application until the termination of military proceedings, because the only cognizable claims presented were gen-

eral challenges to the authority of the commissions that would not be affected by the specific proceedings. See *supra*, at 662–663, n. 2. In the DTA, by contrast, Congress has expanded the scope of Article III review and has channeled it exclusively through a single, postverdict appeal to Article III courts. Because Congress has created a novel unitary scheme of Article III review of military commissions that was absent in 1942, *Quirin* is no longer governing precedent.

I would abstain from exercising our equity jurisdiction, as the Government requests.

* * *

For the foregoing reasons, I dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in all but Parts I, II–C–1, and III–B–2, dissenting.

For the reasons set forth in JUSTICE SCALIA's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims, see *ante*, at 655–669. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The plurality's evident belief that *it* is qualified to pass on the "military necessity," *ante*, at 612, of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

Our review of petitioner's claims arises in the context of the President's wartime exercise of his Commander in Chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the

respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), the structural advantages attendant to the Executive Branch—namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "'unity,'" *id.*, at 581 (dissenting opinion) (quoting The Federalist No. 70, p. 472 (J. Cooke ed. 1961) (A. Hamilton))—led the Founders to conclude that the "President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." 542 U. S., at 580. Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. See, *e. g.*, *Prize Cases*, 2 Black 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority"); *Fleming* v. *Page*, 9 How. 603, 615 (1850) (acknowledging that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy").

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore* v. *Regan*, 453 U. S. 654, 678 (1981) (quoting *Haig* v. *Agee*, 453 U. S. 280, 291 (1981)). Rather, in these domains,

the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore*, 453 U. S., at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility" (internal quotation marks omitted)).

When "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" *Id.*, at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring)). Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin*, 317 U. S. 1, 25 (1942).

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat.

224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III) (emphasis added). As a plurality of the Court observed in *Hamdi*, the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,' " 542 U. S., at 518 (quoting *Quirin*, *supra*, at 28, 30; emphasis added), and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use," *Hamdi*, 542 U. S., at 518; *id.*, at 587 (THOMAS, J., dissenting). *Hamdi*'s observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita*, 327 U. S. 1, 11 (1946); see also *Quirin*, *supra*, at 28–29; *Madsen* v. *Kinsella*, 343 U. S. 341, 354, n. 20 (1952) (" '[T]he military commission . . . is an institution of the greatest importance in a period of war and should be preserved' " (quoting S. Rep. No. 229, 63d Cong., 2d Sess., 53 (1914) (testimony of Gen. Crowder))).

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, *ante*, at 594, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict, *ibid.* Instead, the Court determines the scope of this power based exclusively on Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 821, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before [military] commissions." 317 U. S., at 29. As I shall discuss below, Article 21 alone supports the use of commissions here. Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all

conflicts—quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization.[1] Indeed, consistent with *Hamdi*'s conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization of "the initiation of war" with its attendant authorization of "the employment of all necessary and proper agencies for its due prosecution." W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920) (hereinafter Winthrop) (emphasis deleted). Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF.[2]

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case—Hamdan's military commission can plainly be sustained solely under Article 21—but to emphasize the complete congressional sanction of the President's exercise of his Commander in Chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith; it does not coun-

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[1] As previously noted, Article 15 of the Articles of War was the predecessor of Article 21 of the UCMJ. Article 21 provides as follows: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U. S. C. § 821.

[2] Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so. Cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 587 (2004) (THOMAS, J., dissenting) (same conclusion respecting detention of unlawful combatants).

tenance the kind of second-guessing the Court repeatedly engages in today. Military and foreign policy judgments

> "'are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions 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 or inquiry.'" *Hamdi*, *supra*, at 582–583 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948)).

It is within this framework that the lawfulness of Hamdan's commission should be examined.

II

The plurality accurately describes some aspects of the history of military commissions and the prerequisites for their use. Thus, I do not dispute that military commissions have historically been "used in three [different] situations," *ante*, at 595, and that the only situation relevant to the instant case is the use of military commissions "'to seize and subject to disciplinary measures those enemies who . . . have violated the law of war,'" *ante*, at 596 (quoting *Quirin*, *supra*, at 28–29). Similarly, I agree with the plurality that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged. Winthrop 836–840. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

The first two considerations are that a law-of-war military commission may only assume jurisdiction of "offences com-

mitted within the field of the command of the convening commander," and that such offenses "must have been committed within the period of the war." See *id.*, at 836, 837; *ante*, at 597. Here, as evidenced by Hamdan's charging document, the Executive has determined that the theater of the present conflict includes "Afghanistan, Pakistan and other countries" where al Qaeda has established training camps, App. to Pet. for Cert. 64a, and that the duration of that conflict dates back (at least) to Usama bin Laden's August 1996 Declaration of Jihad Against the Americans, *ibid.* Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in "Afghanistan, Pakistan, Yemen and other countries" taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. *Id.*, at 65a–67a. And these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his Commander in Chief authority. See *Prize Cases*, 2 Black, at 670 (concluding that the President's Commander in Chief judgment about the nature of a particular conflict was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted").

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war . . . but with an *agreement* the inception of which long predated . . . the [relevant armed conflict]." *Ante*, at 612 (emphasis in original). The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And

even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," Winthrop 836–837, thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. *Ante*, at 598–600, 612. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. See *Prize Cases*, *supra*, at 668 (recognizing that war may be initiated by "invasion of a foreign nation," and that such initiation, and the President's response, usually *precedes* congressional action). Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, *ante*, at 599, n. 31 (emphasis deleted), the date of such activation has never been used to determine the scope of a military commission's jurisdiction.[3] Instead, the traditional rule is that "[o]f-

[3] Even if the formal declaration of war were generally the determinative act in ascertaining the temporal reach of the jurisdiction of a military commission, the AUMF itself is inconsistent with the plurality's suggestion that such a rule is appropriate in this case. See *ante*, at 598–600, 612. The text of the AUMF is backward looking, authorizing the use of "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." § 2(a), 115 Stat. 224. Thus, the President's decision to try Hamdan by military commission—a use of force authorized by the AUMF—for Hamdan's involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspira-

fenses committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (hereinafter Green); see also C. Howland, Digest of Opinions of the Judge-Advocates General of the Army 1067 (1912) (hereinafter Howland) ("A military commission . . . exercising . . . jurisdiction . . . under the laws of war . . . may take cognizance of offenses committed, during the war, *before* the initiation of the military government or martial law" (emphasis in original));[4] cf. *Yamashita*, 327 U. S., at 13 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government"). Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green 848.[5]

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tors to justice is the *primary point* of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his involvement in the events of September 11, 2001.

[4] The plurality suggests these authorities are inapplicable because nothing in its "analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the . . . AUMF." *Ante*, at 599, n. 31. The difference identified by the plurality is purely semantic. Both Green and Howland confirm that the date of the enactment that establishes a legal basis for forming military commissions—whether it be a declaration of war, a declaration of martial law, *or* an authorization to use military force—does not limit the jurisdiction of military commissions to offenses committed after that date.

[5] The plurality attempts to evade the import of this historical example by observing that Kuehn was tried before a martial law commission for a violation of federal espionage statutes. *Ibid.* As an initial matter, the fact that Kuehn was tried before a martial law commission for an offense committed prior to the establishment of martial law provides strong support for the President's contention that he may try Hamdan for offenses

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda *declared war* on the United States as early as August 1996. See Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998); Dept. of State Fact Sheet: The Charges against International Terrorist Usama Bin Laden (Dec. 20, 2000); cf. *Prize Cases*, 2 Black, at 668 (recognizing that a state of war exists even if "the declaration of it be *unilateral*" (emphasis in original)). In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate—and, even under the laws of war as applied to legitimate nation-states, plainly illegal—killing of American civilians and military personnel alike. See Jihad Against Jews and Crusaders: World Islamic Front Statement 2 (Feb. 23, 1998), in Y. Alexander & M. Swetnam, Usama bin Laden's al-Qaida: Profile of a Terrorist Network, App. 1B (2001) ("The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it"). This was

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committed prior to the enactment of the AUMF. Here the AUMF serves the same function as the declaration of martial law in Hawaii in 1941, establishing legal authority for the constitution of military commissions. Moreover, Kuehn was not tried and punished "by statute, but by the laws and usages of war." *United States* v. *Kuehn*, Board of Review 6 (Office of the Military Governor, Hawaii 1942). Indeed, in upholding the imposition of the death penalty, a sentence "not authorized by the Espionage statutes," *id.*, at 5, Kuehn's Board of Review explained that "[t]he fact that persons may be tried and punished . . . by a military commission for committing acts defined as offenses by . . . federal statutes does not mean that such persons are being tried for violations of such . . . statutes; they are, instead, being tried for acts made offenses only by orders of the . . . commanding general," *id.*, at 6. Lastly, the import of this example is not undermined by *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946). The question before the Court in that case involved only whether "loyal civilians in loyal territory should have their daily conduct governed by military orders," *id.*, at 319; it did "not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents," *id.*, at 313.

not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U. S. Embassies in Kenya and Tanzania in 1998, and the attack on the U. S. S. *Cole* in Yemen in 2000. See *id.*, at 1. In response to these incidents, the United States "attack[ed] facilities belonging to Usama bin Ladin's network" as early as 1998. Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998). Based on the foregoing, the President's judgment—that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations—is beyond judicial reproach. And the plurality's unsupportable contrary determination merely confirms that "'the Judiciary has neither aptitude, facilities nor responsibility'" for making military or foreign affairs judgments. *Hamdi*, 542 U. S., at 585 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines*, 333 U. S., at 111).

B

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission, see *ante*, at 597–598; Winthrop 838. Law-of-war military commissions have jurisdiction over "'[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,'" *ante*, at 598 (quoting Winthrop 838). They also have jurisdiction over "[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent" "who would not be likely to respect the laws of war." *Id.*, at 783, 784. Indeed, according to Winthrop, such persons are not "within the protection of the laws of war" and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or

upon trial and conviction by military commission." *Id.*, at 784. This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war. 344 F. Supp. 2d 152, 161 (DC 2004); App. to Pet. for Cert. 63a–67a.

C

The fourth consideration relevant to the jurisdiction of law-of-war military commissions relates to the nature of the offense charged. As relevant here, such commissions have jurisdiction to try " '[v]iolations of the laws and usages of war cognizable by military tribunals only,' " *ante*, at 598 (quoting Winthrop 839). In contrast to the preceding considerations, this Court's precedents establish that judicial review of "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal" is appropriate. *Quirin*, 317 U. S., at 29. However, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Yamashita*, 327 U. S., at 17. And whether an offense is a violation of the law of war cognizable before a military commission must be determined pursuant to "the system of common law applied by military tribunals." *Quirin*, *supra*, at 30; *Yamashita*, *supra*, at 8.

The common law of war as it pertains to offenses triable by military commission is derived from the "experience of our wars" and our wartime tribunals, Winthrop 839, and "the laws and usages of war as understood and practiced by the civilized nations of the world," 11 Op. Atty. Gen. 297, 310 (1865). Moreover, the common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. Thus, "[t]he law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great

power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." *Id.*, at 300. Accordingly, this Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 346–348. Second, the common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." 11 Op. Atty. Gen., at 305. In recognition of these principles, Congress has generally " 'left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require*, for the investigation and punishment of violations of the laws of war.' " *Madsen*, *supra*, at 347, n. 9 (quoting Winthrop 831; emphasis added).

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous." *Ante*, at 602. This is a pure contrivance, and a bad one at that. It is contrary to the presumption we acknowledged in *Quirin*, namely, that the actions of military commissions are "not to be set aside by the courts without the *clear conviction* that they are" unlawful, 317 U. S., at 25 (emphasis added). It is also contrary to *Yamashita*, which recognized the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war. Compare 327 U. S., at 17 (noting that the allegations were "ade-

quat[e]" and "need not be stated with . . . precision"), with *id.*, at 35 (Murphy, J., dissenting) (arguing that the charge was inadequate). Nor does it find support from the separation-of-powers authority cited by the plurality. Indeed, Madison's praise of the separation of powers in The Federalist No. 47, quoted *ante*, at 602, if it has any relevance at all, merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir.

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, "say what may be done." 11 Op. Atty. Gen., at 300. Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate.[6] Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, see *infra*, at 692–706, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

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[6] Indeed, respecting the present conflict, the President has found that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war." App. 34–35. Under the Court's approach, the President's ability to address this "new paradigm" of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

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Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose," App. to Pet. for Cert. 65a, and that he "conspired and agreed with [al Qaeda] to commit . . . offenses triable by military commission," *ibid.*[7]

[7] It is true that both of these separate offenses are charged under a single heading entitled "CHARGE: CONSPIRACY," App. to Pet. for Cert. 65a. But that does not mean that they must be treated as a single crime, when the law of war treats them as separate crimes. As we acknowledged in *In re Yamashita*, 327 U. S. 1 (1946), "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Id.*, at 17; cf. W. Birkhimer, Military Government and Martial Law 536 (3d rev. ed. 1914) (hereinafter Birkhimer) ("[I]t would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace" (internal quotation marks omitted)).

Nevertheless, the plurality contends that Hamdan was "not actually charged," *ante*, at 601, n. 32 (emphasis deleted), with being a member in a war-criminal organization. But that position is demonstrably wrong. Hamdan's charging document expressly *charges* that he "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose." App. to Pet. for Cert. 65a. Moreover, the plurality's contention that we may only look to the label affixed to the charge to determine if the charging document alleges an offense triable by military commission is flatly inconsistent with its treatment of the Civil War cases—where it accepts as valid charges that did not appear in the heading or title of the charging document, or even the listed charge itself, but only in the supporting specification. See, *e. g.*, *ante*, at 609 (discussing the military commission trial of Wirz). For example, in the Wirz case, Wirz was charged

The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." *Id.*, at 64a; 344 F. Supp. 2d, at 161. Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U. S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." App. to Pet. for Cert. 65a. These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan's military commission.

For well over a century it has been established that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of*

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with conspiring to violate the laws of war, and that charge was supported with allegations that he personally committed a number of atrocities. The plurality concludes that military commission jurisdiction was appropriate in that case not based upon the charge of conspiracy, but rather based upon the allegations of various atrocities in the specification which were *not* separately charged. *Ante*, at 609. Just as these atrocities, not separately charged, were independent violations of the law of war supporting Wirz's trial by military commission, so too here Hamdan's membership in al Qaeda and his provision of various forms of assistance to al Qaeda's top leadership are independent violations of the law of war supporting his trial by military commission.

war." 11 Op. Atty. Gen., at 312 (emphasis added).[8] In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop 784; see also 11 Op. Atty. Gen., at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war"). This conclusion is unsurprising, as it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 3 (J. Pictet gen. ed. 1958). "Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." Winthrop 784, and n. 57.[9] Accordingly, on this basis alone,

[8] These observations respecting the law of war were made by the Attorney General in defense of the military commission trial of the Lincoln conspirators. As the foregoing quoted portion of that opinion makes clear, the Attorney General did not, as the plurality maintains, "trea[t] the charge as if it alleged the substantive offense of assassination." *Ante*, at 604, n. 35. Rather, he explained that the conspirators' "high offence against the laws of war" was "complete" when their band was "organized or joined," and did not depend upon "atrocities committed by such a band." 11 Op. Atty. Gen. 297, 312 (1865). Moreover, the Attorney General's conclusions specifically refute the plurality's unsupported suggestion that I have blurred the line between "those categories of 'offender' who may be tried by military commission . . . with the 'offenses' that may be so tried." *Ante*, at 601, n. 32.

[9] The General Orders establishing the jurisdiction for military commissions during the Civil War provided that such offenses were violations of the laws of war cognizable before military commissions. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 164 (1894) ("[P]ersons charged with the violation of the laws of war as spies, bridge-burners, marauders, &c., will . . . be held for trial under such charges"); *id.*, at 234 ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting

"the allegations of [Hamdan's] charge, tested by any reasonable standard, adequately allege a violation of the law of war." *Yamashita*, 327 U. S., at 17.

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the

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the enemy to rob, to maraud and to lay waste the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)). Numerous trials were held under this authority. See, *e. g.*, U. S. War Dept., General Court Martial Order No. 51, p. 1 (1866) (hereinafter G. C. M. O.) (indictment in the military commission trial of James Harvey Wells charged "'[b]eing a guerrilla'" and specified that he "'willfully . . . [took] up arms as a guerrilla marauder, and did join, belong to, act and co-operate with guerrillas'"); G. C. M. O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "'[b]eing a guerrilla'" and specified that he "'unlawfully, and of his own wrong, [took] up arms as a guerrilla marauder, and did join, belong to, act, and co-operate with a band of guerrillas'"); G. C. M. O. No. 41, p. 1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson "'did take up arms as an insurgent and guerrilla against the laws and authorities of the United States, and did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war'"); G. C. M. O. No. 153, p. 1 (1864) (indictment in the military commission trial of Simeon B. Kight charged that defendant was "'a guerrilla, and has been engaged in an unwarrantable and barbarous system of warfare against citizens and soldiers of the United States'"); G. C. M. O. No. 93, pp. 3–4 (1864) (indictment in the military commission trial of Francis H. Norvel charged "'[b]eing a guerrilla'" and specified that he "'unlawfully and by his own wrong, [took] up arms as an outlaw, guerrilla, and bushwhacker, against the lawfully constituted authorities of the United States government'"); *id.*, at 9 (indictment in the military commission trial of James A. Powell charged "'[t]ransgression of the laws and customs of war'" and specified that he "'[took] up arms in insurrection as a military insurgent, and did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels'"); *id.*, at 10–11 (indictment in the military commission trial of Joseph Overstreet charged "'[b]eing a guerrilla'" and specified that he "'did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers'").

military tribunals convened by the United States at Nuremberg. Pursuant to Article 10 of the Charter of the International Military Tribunal (IMT), the United States convened military tribunals "to bring individuals to trial for membership" in "a group or organization . . . declared criminal by the [IMT]." 1 Trials of War Criminals Before the Nuernberg Military Tribunals, p. XII, Art. 10 (hereinafter Trials). The IMT designated various components of four Nazi groups—the Leadership Corps, Gestapo, SD, and SS—as criminal organizations. 22 IMT, Trial of the Major War Criminals 505, 511, 517 (1948); see also T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585 (1992). "[A] member of [such] an organization [could] be . . . convicted of the crime of membership and be punished for that crime by death." 22 IMT, at 499. Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations. For example, in Military Tribunal Case No. 1, *United States* v. *Brandt*, Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven were convicted and sentenced to death for the crime of, *inter alia*, membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was convicted of no other offense than membership in a criminal organization and sentenced to a 10-year term of imprisonment. 2 Trials 180–300. This Court denied habeas relief, 333 U. S. 836 (1948), and the executions were carried out at Landsberg prison on June 2, 1948. 2 Trials 330.

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. App. to Pet. for Cert. 65a–67a. These alle-

gations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894) ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste [to] the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)); Winthrop 840 (including in the list of offenses triable by law-of-war military commissions "dealing with . . . enemies, or furnishing them with money, arms, provisions, medicines, & c.").[10] Undoubtedly, the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U. S. C. § 904.

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Separate and apart from the offense of joining a contingent of "uncivilized combatants who [are] not . . . likely to respect the laws of war," Winthrop 784, Hamdan has been charged with "conspir[ing] and agree[ing] with . . . the al Qaida organization . . . to commit . . . offenses triable by military commission," App. to Pet. for Cert. 65a. Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Ibid.* This,

[10] Even if the plurality were correct that a membership offense must be accompanied by allegations that the "defendant 'took up arms,'" *ante*, at 601, n. 32, that requirement has easily been satisfied here. Not only has Hamdan been charged with providing assistance to top al Qaeda leadership (itself an offense triable by military commission), he has also been charged with receiving weapons training at an al Qaeda camp. App. to Pet. for Cert. 66a–67a.

too, alleges a violation of the law of war triable by military commission.

"[T]he experience of our wars," Winthrop 839, is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission. World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense. See Letter, General Headquarters, United States Army Forces, Pacific (Sept. 24, 1945), Record in *Yamashita* v. *Styer*, O. T. 1945, No. 672, pp. 14, 16 (Exh. F) (Order respecting the "Regulations Governing the Trial of War Criminals" provided that "participation in a common plan or conspiracy to accomplish" various offenses against the law of war was cognizable before military commissions); 1 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 114–115 (1947) (reprint 1997) (hereinafter U. N. Commission) (recounting that the orders establishing World War II military commissions in the Pacific and China included "participation in a common plan or conspiracy" pertaining to certain violations of the laws of war as an offense triable by military commission). Indeed, those orders authorized trial by military commission of participation in a conspiracy to commit "'murder . . . or other inhumane acts . . . against any civilian population,'" *id.*, at 114, which is precisely the offense Hamdan has been charged with here. And conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission, see *Quirin*, 317 U. S., at 23, and on numerous other occasions. See, *e. g.*, *Colepaugh* v. *Looney*, 235 F. 2d 429, 431 (CA10 1956); Green 848 (describing the conspiracy trial of Julius Otto Kuehn).

To support its contrary conclusion, *ante*, at 600, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case, *ante*, at 605–607. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue in its opinion;[11] rather, it is ascertained by the practice and usage of war. Winthrop 839; *supra*, at 689–690.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder" President Lincoln. G. C. M. O. No. 356 (1865), reprinted in H. R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) (hereinafter G. C. M. O. No. 356).[12]

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[11] The plurality recounts the respective claims of the parties in *Quirin* pertaining to this issue and cites the United States Reports. *Ante*, at 605. But the claims of the parties are not included in the opinion of the Court, but rather in the sections of the Reports entitled "Argument for Petitioners" and "Argument for Respondent." See 317 U. S., at 6–17.

[12] The plurality concludes that military commission jurisdiction was appropriate in the case of the Lincoln conspirators because they were charged with "'maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln,'" *ante*, at 604, n. 35. But the sole charge filed in that case alleged conspiracy, and the allegations pertaining to "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln" were not charged or labeled as separate offenses, but rather as overt acts "in pursuance of and in prosecuting said malicious, unlawful, and traitorous *conspiracy*." G. C. M. O. No. 356, at 696 (emphasis added). While the plurality contends the murder of President Lincoln was charged as a distinct separate offense, the foregoing quoted language of the charging document unequivocally establishes otherwise. Moreover, though I agree that the allegations pertaining to these overt acts provided an independ-

In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. Winthrop 839, n. 5. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as "a species of compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offense[s] against the law of war." *Ante,* at 608 (citing, as an example, murder in violation of the laws of war). But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," Howland 1071, does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.

In any event, the plurality's effort to avoid the import of Winthrop's footnote through the smokescreen of its "compound offense" theory, *ante,* at 607–608, cannot be reconciled with the particular charges that sustained military commission jurisdiction in the cases that Winthrop cites. For ex-

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ent basis for the military commission's jurisdiction in that case, that merely confirms the propriety of examining all the acts alleged—whether or not they are labeled as separate offenses—to determine if a defendant has been charged with a violation of the law of war. As I have already explained, Hamdan has been charged with violating the law of war not only by participating in a conspiracy to violate the law of war, but also by joining a war-criminal enterprise and by supplying provisions and assistance to that enterprise's top leadership.

ample, in the military commission trial of Henry Wirz, Charge I provided that he had been

> "[m]aliciously, willfully, and traitorously . . . *combining, confederating, and conspiring,* together [with various other named and unnamed co-conspirators], to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States, and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, *in violation of the laws and customs of war.*" G. C. M. O. No. 607 (1865), reprinted in H. R. Doc. No. 314, at 785 (emphasis added).

Likewise, in the military commission trial of Leger Grenfel, Charge I accused Grenfel of "*[c]onspiring, in violation of the laws of war,* to release rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Ill." G. C. M. O. No. 452 (1865), reprinted in H. R. Doc. No. 314, at 724 (emphasis added);[13] see also G. C. M. O.

[13] The plurality's attempt to undermine the significance of these cases is unpersuasive. The plurality suggests the Wirz case is not relevant because the specification supporting his conspiracy charge alleged that he "*personally committed* a number of atrocities." *Ante,* at 609. But this does not establish that conspiracy to violate the laws of war, the very crime with which Wirz was charged, is not itself a violation of the law of war. Rather, at best, it establishes that in addition to conspiracy Wirz violated the laws of war by committing various atrocities, just as Hamdan violated the laws of war not only by conspiring to do so, but also by joining al Qaeda and providing provisions and services to its top leadership. Moreover, the fact that Wirz was charged with overt acts that are more severe than the overt acts with which Hamdan has been charged does not establish that conspiracy is not an offense cognizable before military commission; rather it merely establishes that Wirz's offenses may have been comparably worse than Hamdan's offenses.

The plurality's claim that the charge against Leger Grenfel supports its compound offense theory is similarly unsupportable. The plurality does not, and cannot, dispute that Grenfel was charged with conspiring to vio-

No. 41, p. 20 (1864) (indictment in the military commission trial of Robert Louden charged "'[c]onspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river'"). These examples provide incontrovertible support for the President's conclusion that the common law of war permits military commission trials for conspiracy to violate the law of war. And they specifically contradict the plurality's conclusion to the contrary, thereby easily satisfying its requirement that the Government "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." *Ante*, at 603.[14]

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late the laws of war by releasing rebel prisoners—a charge that bears no relation to a crime "ordinarily triable in civilian courts." *Ante*, at 609, n. 37. Tellingly, the plurality does not reference or discuss this charge, but instead refers to the conclusion of Judge Advocate Holt that Grenfel also "'united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery.'" *Ante*, at 610, n. 37 (quoting H. R. Doc. No. 314, at 689). But Judge Advocate Holt's observation provides no support for the plurality's conclusion, as it does not discuss the charges that sustained military commission jurisdiction, much less suggest that such charges were not violations of the law of war.

[14] The plurality contends that international practice—including the practice of the IMT at Nuremberg—supports its conclusion that conspiracy is not an offense triable by military commission because "'[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.'" *Ante*, at 611 (quoting T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992)). But while the IMT did not criminalize all conspiracies to violate the law of war, it did criminalize "participation in a common plan or conspiracy" to wage aggressive war. See 1 Trials, at XI–XII, Art. 6(a). Moreover, the World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable before military commissions. See 15 U. N. Commission 90–91 (noting that the French Military Tribunal at Marseilles found Henri Georges Stadelhofer "guilty of the crime of *association de malfaiteurs*," namely, of "'having formed with various members of the

The plurality further contends, in reliance upon Winthrop, that conspiracy is not an offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." *Ante*, at 604. But Winthrop does not support the plurality's conclusion. The passage in Winthrop cited by the plurality states only that "the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely." Winthrop 841 (emphasis in original). This passage would be helpful to the plurality if its subject were "conspiracy," rather than the "jurisdiction of the military commission." Winthrop is not speaking here of the requirements for a conspiracy charge, but of the requirements for *all* charges. Intentions do not suffice. An unlawful act—such as committing the crime of conspiracy—is necessary. Winthrop says nothing to exclude either conspiracy or membership in a criminal enterprise, both of which go beyond "intentions merely" and "consis[t of] *overt acts*, *i. e.* . . . unlawful commissions or actual attempts to commit," and both of which are *expressly* recognized by Winthrop as crimes against the law of war triable by military commissions. *Id.*, at 784; *id.*, at 839, and n. 5, 840. Indeed, the

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German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war' "); 11 *id.*, at 98 (noting that the Netherlands' military tribunals were authorized to try conspiracy to violate the laws of war). Thus, the European legal systems' approach to domestic conspiracy law has not prevented European nations from recognizing conspiracy offenses as violations of the law of war. This is unsurprising, as the law of war is derived not from domestic law but from the wartime practices of civilized nations, including the United States, which has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission.

commission of an "*overt ac[t]*" is the traditional requirement for the completion of the crime of conspiracy, and the charge against Hamdan alleges numerous such overt acts. App. to Pet. for Cert. 65a. The plurality's approach, unsupported by Winthrop, requires that any overt act to further a conspiracy must *itself* be a completed war crime *distinct from conspiracy*—which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, *id.*, at 65a–67a, acts which in and of themselves are violations of the laws of war. See *supra*, at 696–697; Winthrop 839–840.

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Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." *Ante*, at 612. This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a), 115 Stat. 224. The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. *Ante*, at 607. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike. See, *e. g.*, Winthrop 839–840; see also *Yamashita*, 327 U. S., at 5 (military commission trial after the cessa-

tion of hostilities in the Philippines); *Quirin*, 317 U. S. 1 (military commission trial in Washington, D. C.). Traditionally, retributive justice for heinous war crimes is as much a "military necessity" as the "demands" of "military efficiency" touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U. S. S. *Cole*, and the attacks of September 11—even if their plots are advanced to the very brink of fulfillment—our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded," *ante*, at 612, in the midst of *the attack itself*, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principle of the law of war, namely, protecting noncombatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, *ante*, at 656–658 (SCALIA, J., dissenting), and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, *ante*, at 672–678, it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the Commander in Chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See *Rapanos* v. *United States*, 547 U. S. 715 (2006). It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. *Ante*, at 613. This position is untenable.

A

As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 347–348. Indeed, this Court has concluded that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe

the jurisdiction and procedure of military commissions." *Id.*, at 348. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." *Id.*, at 346–347.[15] As such, "[s]hould the conduct of those who compose martial-law tribunals become [a] matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary." Birkhimer 534.

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[15] Though it does not constitute a basis for any holding of the Court, the Court maintains that, as a "general rule," "the procedures governing trials by military commission historically have been the same as those governing courts-martial." *Ante*, at 617. While it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts-martial, that is not a requirement. See Winthrop 841 ("[M]ilitary commissions . . . are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and . . . their proceedings . . . will not be rendered *illegal* by the omission of details required upon trials by courts-martial" (emphasis in original; footnotes omitted)); 1 U. N. Commission 116–117 ("The [World War II] Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for, *but not being bound by*, the rules of procedure prescribed for General Courts Martial" (emphasis added)); *id.*, at 117 ("In the [World War II] European directive it is stated . . . that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure . . . as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial"). Moreover, such a requirement would conflict with the settled understanding of the flexible and responsive nature of military commissions and the President's wartime authority to employ such tribunals as he sees fit. See Birkhimer 537–538 ("[M]ilitary commissions may so vary their procedure as to adapt it to any situation, and may extend their powers to any necessary degree. . . . The military commander decides upon the character of the military tribunal which is suited to the occasion . . . and his decision is final").

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court. Consistent with *Madsen*'s conclusion pertaining to the common-law nature of military commissions and the President's discretion to prescribe their procedures, Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. § 836(a) (emphasis added). Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever *he alone* does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," see *ante,* at 621, n. 49, and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, 10 U. S. C. § 836(b), which provides that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable," *ante,* at 620, requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial "'*insofar as practicable,*'" *ante,* at 622. The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court-martial. *Ante,* at 623–624.

This interpretation of § 836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ—Article 15 of the Articles of War—which provides crucial context that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." 41 Stat. 790.

In *Yamashita*, this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. The Court explained, "[b]y thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction . . . to *any use* of the military commission contemplated by the common law of war." 327 U. S., at 20 (emphasis added);[16] see also *Quirin*, 317 U. S., at 28; *Madsen*, 343 U. S., at 355. In reaching this conclusion, this Court treated as authoritative the congressional testimony of Judge Advo-

[16] The Court suggests that Congress' amendment to Article 2 of the UCMJ, providing that the UCMJ applies to "persons within an area leased by or otherwise reserved or acquired for the use of the United States," 10 U. S. C. § 802(a)(12), deprives *Yamashita*'s conclusion respecting the President's authority to promulgate military commission procedures of its "precedential value." *Ante*, at 620. But this merely begs the question of the scope and content of the remaining provisions of the UCMJ. Nothing in the additions to Article 2, or any other provision of the UCMJ, suggests that Congress has disturbed this Court's unequivocal interpretation of Article 21 as preserving the common-law status of military commissions and the corresponding authority of the President to set their procedures pursuant to his Commander in Chief powers. See *Quirin*, 317 U. S., at 28; *Yamashita*, 327 U. S., at 20; *Madsen* v. *Kinsella*, 343 U. S. 341, 355 (1952).

cate General Crowder, who testified that Article 15 of the Articles of War was enacted to preserve the military commission as "'our common-law war court.'" *Yamashita*, *supra*, at 19, n. 7. And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's Commander in Chief authority to both "establish" military commissions and to "prescribe [their] procedure[s]." *Madsen*, 343 U. S., at 348; *id.*, at 348–349 (explaining that Congress had "refrain[ed] from legislating" in the area of military commission procedures, in "contras[t] with its traditional readiness to . . . prescrib[e], with particularity, the jurisdiction and procedure of United States courts-martial"); cf. Green 834 ("The military commission exercising jurisdiction under common law authority is usually appointed by a superior military commander and is limited in its procedure only by the will of that commander. Like any other common law court, in the absence of directive of superior authority to the contrary, the military commission is free to formulate its own rules of procedure").

Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of . . . and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978). The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U. S. C. § 836(b). This is little more than an impermissible repeal by implication.

See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion) ("We have repeatedly stated . . . that absent a clearly expressed congressional intention, repeals by implication are not favored" (citations and internal quotation marks omitted)). Moreover, the Court's conclusion is flatly contrary to its duty not to set aside Hamdan's commission "without the *clear* conviction that [it is] in conflict with the . . . laws of Congress constitutionally enacted." *Quirin*, *supra*, at 25 (emphasis added).

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. See Act of May 5, 1950, ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining that the UCMJ is an Act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that different tribunals will be constituted in different manners and employ different procedures. See 10 U. S. C. § 866 (providing for three different types of courts-martial—general, special, and summary—constituted in different manners and employing different procedures). Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpreta-

tions of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.[17]

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "[t]he President has not . . . [determined] that it is impracticable to apply the rules for courts-martial." *Ante*, at 623. This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system . . . and the military court system," Dept. of

[17] It bears noting that while the Court does not hesitate to cite legislative history that supports its view of certain statutory provisions, see *ante*, at 579, 580–581, n. 10, it makes no citation of the legislative history pertaining to Article 36(b), which contradicts its interpretation of that provision. Indeed, if it were authoritative, the *only* legislative history relating to Article 36(b) would confirm the obvious—Article 36(b)'s uniformity requirement pertains to uniformity between the three branches of the Armed Forces, and no more. When that subsection was introduced as an amendment to Article 36, its author explained that it would leave the three branches "enough leeway to provide a different provision where it is absolutely necessary" because "there are some differences in the services." Hearings on H. R. 2498 before the Subcommittee No. 1 of the House Committee on Armed Services, 81st Cong., 1st Sess., 1015 (1949). A further statement explained that "there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least [Article 36(b)] is an expression of the congressional intent that we want it to be as uniform as possible." *Ibid.*

Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld), available at http://www.dod.gov/transcripts/2002/t03212002_t0321sd.html (as visited June 26, 2006, and available in Clerk of Court's case file) (hereinafter News Briefing), and that "[t]he commissions are intended to be different . . . because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed." *Ibid.* The President reached this conclusion because

> "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States. . . . [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals . . . and *each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy." *Ibid.* (remarks of Douglas J. Feith, Under Secretary of Defense for Policy (emphasis added)).

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practicability" requirement. On the contrary, this determination is precisely the 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 or inquiry.'" *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S., at 111. And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The Court further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U. S. C. § 839(c) (2000 ed., Supp. V). *Ante*, at 624. But § 839(c) applies to courts-martial, not military commissions. It provides:

> "When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

In context, "all other proceedings" plainly refers exclusively to "other proceedings" pertaining to a court-martial.[18] This is confirmed by the provision's subsequent reference to "members of the *court*" and to "cases in which a military judge has been detailed to the *court*." It is also confirmed by the other provisions of § 839, which refer only to courts-martial. See §§ 839(a)(1)–(4) ("[A]ny time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the mili-

[18] In addition to being foreclosed by the text of the provision, the Court's suggestion that 10 U. S. C. § 839(c) (2000 ed., Supp. V) applies to military commissions is untenable because it would require, in military commission proceedings, that the accused be present when the members of the commission voted on his guilt or innocence.

tary judge may . . . call the court into session without the presence of the members for the purpose of" hearing motions, issuing rulings, holding arraignments, receiving pleas, and performing various procedural functions). See also § 839(b) ("Proceedings under subsection (a) shall be conducted in the presence of the accused"). Section 839(c) simply does not address the procedural requirements of military commissions.

B

The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions, see *ante*, at 629–635. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

1

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). In that case the respondents claimed, *inter alia*, that their military commission lacked jurisdiction because it failed to provide them with certain procedural safeguards that they argued were required under the Geneva Conventions. *Id.*, at 789–790. While this Court rejected the underlying merits of the respondents' Geneva Convention claims, *id.*, at 790, it also held, in the alternative, that the respondents could "not assert . . . that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes," *id.*, at 789. The Court explained:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These

> prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14.

This alternative holding is no less binding than if it were the exclusive basis for the Court's decision. See *Massachusetts* v. *United States*, 333 U. S. 611, 623 (1948). While the Court attempts to cast *Eisentrager*'s unqualified, alternative holding as footnote dictum, *ante*, at 627, it does not dispute the correctness of its conclusion, namely, that the provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework. See *ibid.* ("We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention").

Instead, the Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because "they are . . . part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Ante*, at 628 (citation omitted). But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord. See *Quirin*, 317 U. S., at 28 (by enacting Article 21, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war"). The Court cannot escape *Eisentrager*'s holding

merely by observing that Article 21 mentions the law of war; indeed, though *Eisentrager* did not specifically consider the Court's novel interpretation of Article 21, *Eisentrager* involved a challenge to the legality of a World War II military commission, which, like all such commissions, found its authorization in Article 15 of the Articles of War, the predecessor to Article 21 of the UCMJ. Thus, the Court's interpretation of Article 21 is foreclosed by *Eisentrager*.

In any event, the Court's argument is too clever by half. The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms, see *Eisentrager*, *supra*, at 789, n. 14, and this, too, is part of the law of war. The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely, the Conventions' exclusive diplomatic enforcement scheme. The Court provides no account of why the *partial* incorporation of the Geneva Conventions should extend only so far—and no further—because none is available beyond its evident preference to adjudicate those matters that the law of war, through the Geneva Conventions, consigns exclusively to the political branches.

Even if the Court were correct that Article 21 of the UCMJ renders judicially enforceable aspects of the law of war that are not so enforceable by their own terms, Article 21 simply cannot be interpreted to render judicially enforceable the particular provision of the law of war at issue here, namely, Common Article 3 of the Geneva Conventions. As relevant, Article 21 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to *offenders or offenses* that by statute *or by*

the law of war may be tried by military commissions." 10 U. S. C. § 821 (emphasis added). Thus, to the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular "offender" or a particular "offense" is triable by military commission. Common Article 3 of the Geneva Conventions, the sole provision of the Geneva Conventions relevant to the Court's holding, relates to neither. Rather, it relates exclusively to the particulars of the tribunal itself, namely, whether it is "regularly constituted" and whether it "afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, Art. 3, ¶ 1*(d)*, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364.

2

In addition to being foreclosed by *Eisentrager*, Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." 6 U. S. T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accept[ed] the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . . detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" App. 35. Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982); *United States* v. *Stuart*, 489 U. S. 353, 369 (1989). Our duty to defer to the

President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936).

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with "furnish[ing] minimal protection to rebels involved in . . . a civil war," *ante*, at 631, precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

3

But even if Common Article 3 were judicially enforceable and applicable to the present conflict, petitioner would not be entitled to relief. As an initial matter, any claim petitioner has under Common Article 3 is not ripe. The only relevant "acts" that "are and shall remain prohibited" under Common Article 3 are "the *passing of sentences* and the *carrying out of executions* without previous judgment pro-

nounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Art. 3, ¶ 1*(d)*, 6 U. S. T., at 3318, 3320 (emphasis added). As its terms make clear, Common Article 3 is only violated, as relevant here, by the act of "passing of sentenc[e]," and thus Hamdan will only have a claim *if* his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is "contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for adjudication. *Texas* v. *United States*, 523 U. S. 296, 300 (1998) (internal quotation marks omitted).[19] Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner so as to deprive him of "the judicial guarantees which are recognized as indispensable by civilized peoples" is entirely speculative. And premature adjudication of Hamdan's claim is especially inappropriate here because "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U. S. 811, 819–820 (1997).

In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. This Court has recounted that history as follows:

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[19] The Court does not dispute the conclusion that Common Article 3 cannot be violated unless and until Hamdan is convicted and sentenced. Instead, it contends that "the Geneva Conventions d[o] not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him." *Ante*, at 626, n. 55. But the Geneva Conventions do not direct defendants to enforce their rights through litigation, but through the Conventions' exclusive diplomatic enforcement provisions. Moreover, neither the Court's observation respecting the Geneva Conventions nor its reference to the equitable doctrine of abstention bears on the *constitutional* prohibition on adjudicating unripe claims.

> " 'By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. . . . Their competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General.' " *Madsen*, 343 U. S., at 346, n. 8.

Hamdan's commission has been constituted in accordance with these historical precedents. As I have previously explained, the procedures to be employed by that commission, and the Executive's authority to alter those procedures, are consistent with the practice of previous American military commissions. See *supra*, at 706–712, and n. 15.

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviate[s] from [the procedures] governing courts-martial." *Ante*, at 634. But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted court[s]." Art. 3, ¶ 1*(d)*, 6 U. S. T., at 3320.

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Neither the Court nor petitioner disputes the Government's description of those procedures.

> "Petitioner is entitled to appointed military legal counsel, 32 C.F.R. 9.4(c)(2), and may retain a civilian attorney (which he has done), 32 C.F.R. 9.4(c)(2)(iii)(B). Petitioner is entitled to the presumption of innocence, 32

> C.F.R. 9.5(b), proof beyond a reasonable doubt, 32 C.F.R. 9.5(c), and the right to remain silent, 32 C.F.R. 9.5(f). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial, 32 C.F.R. 9.5(k); Military Commission Order No. 1 (Dep't of Defense Aug. 31, 2005) § 6(B)(3) and (D)(5)(b). If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h). The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court. See DTA § 1005(e)(3), 119 Stat. 2743; 28 U. S. C. 1254(1)." Brief for Respondents 4.

Notwithstanding these provisions, which in my judgment easily satisfy the nebulous standards of Common Article 3,[20] the plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. *Ante*, at 633–635. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair,

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[20] Notably, a prosecutor before the *Quirin* military commission has described these procedures as "a substantial improvement over those in effect during World War II," further observing that "[t]hey go a long way toward assuring that the trials will be full and fair." National Institute of Military Justice, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, p. x (2002) (foreword by Lloyd N. Cutler).

a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, Dept. of Defense, Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005), including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and . . . because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). And this Court has concluded, in the very context of a threat to reveal our Nation's intelligence gathering sources and methods, that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," *Haig*, 453 U. S., at 307 (quoting *Aptheker* v. *Secretary of State*, 378 U. S. 500, 509 (1964)), and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests," *Haig*, *supra*, at 307. See also *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980) *(per curiam)* ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"); *Curtiss-Wright*, 299 U. S., at 320. This interest is surely compelling here. According to the Government, "[b]ecause al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network

operates—identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate." Brief for United States in No. 03–4792, *United States* v. *Moussaoui* (CA4), p. 9. We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight." See *supra,* at 718.

4

In addition to Common Article 3, which applies to conflicts "not of an international character," Hamdan also claims that he is entitled to the protections of the Third Geneva Convention, which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has determined that the Convention is inapplicable here, explaining that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party." App. 35. The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core

exercise of his Commander in Chief authority that this Court is bound to respect. See *Prize Cases*, 2 Black, at 670.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join in Parts I–III, dissenting.

For the reasons set out in JUSTICE SCALIA's dissent, which I join, I would hold that we lack jurisdiction. On the merits, I join JUSTICE THOMAS' dissent with the exception of Parts I, II–C–1, and III–B–2, which concern matters that I find unnecessary to reach. I add the following comments to provide a further explanation of my reasons for disagreeing with the holding of the Court.

I

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U. S. C. § 821; this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court," Third Geneva Convention, Art. 3, ¶ 1*(d)*, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364. I disagree with this holding because petitioner's commission is "a regularly constituted court."

Common Article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) . . . [T]he following acts are and shall remain prohibited . . . :
>
> . . . . . .
>
> "*(d)* [T]he passing of sentences and the carrying out of executions without previous judgment pronounced by *a regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3318–3320 (emphasis added).

Common Article 3 thus imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3320.

I see no need here to comment extensively on the meaning of the first and third requirements. The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory.

The second element ("regularly constituted") is the one on which the Court relies, and I interpret this element to require that the court be appointed or established in accordance with the appointing country's domestic law. I agree with the Court, see *ante*, at 632, n. 64, that, as used in Common Article 3, the term "regularly" is synonymous with "properly." The term "constitute" means "appoint," "set up," or "establish," Webster's Third New International Dictionary 486 (1961), and therefore "regularly constituted" means properly appointed, set up, or established. Our cases repeatedly use the phrases "regularly constituted" and "properly constituted" in this sense. See, *e. g.*, *Hamdi* v.

Rumsfeld, 542 U. S. 507, 538 (2004) (plurality opinion of O'Connor, J.); *Nguyen* v. *United States*, 539 U. S. 69, 83 (2003); *Ryder* v. *United States*, 515 U. S. 177, 187 (1995); *Williams* v. *Bruffy*, 96 U. S. 176, 185 (1878).

In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established, and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

II

In contrast to this interpretation, the opinions supporting the judgment today hold that the military commission before which petitioner would be tried is not "a regularly constituted court" (1) because "no evident practical need explains" why its "structure and composition . . . deviate from conventional court-martial standards," *ante*, at 647 (KENNEDY, J., concurring in part); see also *ante*, at 632–633 (opinion of the Court); and (2) because, contrary to 10 U. S. C. § 836(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the Uniform Code of Military Justice (UCMJ) for use by courts-martial, *ante*, at 615–625 (opinion of the Court); *ante*, at 651–653 (KENNEDY, J., concurring in part). I do not believe that either of these grounds is sound.

A

I see no basis for the Court's holding that a military commission cannot be regarded as "a regularly constituted court" unless it is similar in structure and composition to a

regular military court or unless there is an "evident practical need" for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted. Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the former Yugoslavia. Although these courts are "differently constituted" and differ substantially in many other respects, they are all "regularly constituted."

If Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have used language that expresses that thought more directly. Other provisions of the Convention Relative to the Treatment of Prisoners of War refer expressly to the ordinary military courts and expressly prescribe the "uniformity principle" that JUSTICE KENNEDY sees in Common Article 3, see *ante*, at 643–644. Article 84 provides that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war." 6 U. S. T., at 3382. Article 87 states that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.*, at 3384. Similarly, Article 66 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War—a provision to which the Court looks for guidance in interpreting Common Article 3, see *ante*, at 632—expressly provides that ci-

vilians charged with committing crimes in occupied territory may be handed over by the occupying power "to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country." 6 U. S. T. 3516, 3558–3560, T. I. A. S. No. 3365. If Common Article 3 had been meant to incorporate a "uniformity principle," it presumably would have used language like that employed in the provisions noted above. For these reasons, I cannot agree with the Court's conclusion that the military commission at issue here is not a "regularly constituted court" because its structure and composition differ from those of a court-martial.

Contrary to the suggestion of the Court, see *ante*, at 632, the commentary on Article 66 of the Fourth Geneva Convention does not undermine this conclusion. As noted, Article 66 permits an occupying power to try civilians in its "properly constituted, non-political military courts," 6 U. S. T., at 3558. The commentary on this provision states:

> "The courts are to be 'regularly constituted.' This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 340 (J. Pictet gen. ed. 1958) (hereinafter GCIV Commentary).

The Court states that this commentary "defines '"regularly constituted"' tribunals to include 'ordinary military courts' and 'definitely exclud[e] all special tribunals.'" *Ante*, at 632 (alteration in original). This much is clear from the commentary itself. Yet the mere statement that a military court *is* a regularly constituted tribunal is of no help in addressing petitioner's claim that his commission *is not* such a tribunal. As for the commentary's mention of "special tribunals," it is doubtful whether we should take this gloss on Article 66—which prohibits an *occupying power* from trying *civilians* in courts set up specially for that purpose—to tell

us much about the very different context addressed by Common Article 3.

But even if Common Article 3 recognizes this prohibition on "special tribunals," that prohibition does not cover petitioner's tribunal. If "special" means anything in contradistinction to "regular," it would be in the sense of "special" as "relating to a single thing," and "regular" as "uniform in course, practice, or occurrence." Webster's Third New International Dictionary 2186, 1913. Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder—and nobody has suggested respondents intend otherwise—then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular and not at all special.

B

I also disagree with the Court's conclusion that petitioner's military commission is "illegal," *ante*, at 625, because its procedures allegedly do not comply with 10 U. S. C. § 836. Even if § 836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ, but see *ante*, at 711–712 (THOMAS, J., dissenting), and even if it is assumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to out-

law the commissions. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.

III

Returning to the three elements of Common Article 3—(1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights—I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts.

Second, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Ex parte Quirin*, 317 U. S. 1 (1942), and the Court acknowledges that *Quirin* recognized that the statutory predecessor of 10 U. S. C. § 821 "preserved" the President's power "to convene military commissions," *ante*, at 593. Although JUSTICE KENNEDY concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," *ante*, at 645, he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here, and 10 U. S. C. §§ 821 and 836 do not speak to this issue.[1]

Finally, the commission procedures, taken as a whole, and including the availability of review by a United States Court of Appeals and by this Court, do not provide a basis for

[1] Section 821 looks to the "law of war," not separation-of-powers issues. And § 836, as JUSTICE KENNEDY notes, concerns procedures, not structure, see *ante*, at 645.

deeming the commissions to be illegitimate. The Court questions the following two procedural rules: the rule allowing the Secretary of Defense to change the governing rules "'from time to time'" (which does not rule out midtrial changes), see *ante*, at 633, n. 65 (opinion of the Court); *ante*, at 645 (KENNEDY, J., concurring in part), and the rule that permits the admission of any evidence that would have "'probative value to a reasonable person'" (which departs from our legal system's usual rules of evidence), see *ante*, at 614–615, 623 (opinion of the Court); *ante*, at 651–653 (KENNEDY, J., concurring in part).[2] Neither of these two rules undermines the legitimacy of the commissions.

Surely the entire commission structure cannot be stricken merely because it is possible that the governing rules might be changed during the course of one or more proceedings. *If* a change is made and applied during the course of an ongoing proceeding and *if* the accused is found guilty, the validity of that procedure can be considered in the review proceeding for that case. After all, not every midtrial change will be prejudicial. A midtrial change might amend the governing rules in a way that is inconsequential or actually favorable to the accused.

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the international standard incorporated into Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320). Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence

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[2] The plurality, but not JUSTICE KENNEDY, suggests that the commission rules are improper insofar as they allow a defendant to be denied access to evidence under some circumstances. See *ante*, at 633–635. But here, too, if this procedure is used in a particular case and the accused is convicted, the validity of this procedure can be challenged in the review proceeding in that case. In that context, both the asserted need for the procedure and its impact on the accused can be analyzed in concrete terms.

rules, such as the general prohibition against the admission of hearsay. See, *e. g.*, Blumenthal, Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective, 13 Pace Int'l L. Rev. 93, 96–101 (2001). If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

The commentary on Common Article 3 supports this interpretation. The commentary on Common Article 3, ¶ 1*(d)*, in its entirety states:

> "[A]lthough [sentences and executions without a proper trial] were common practice until quite recently, they are nevertheless shocking to the civilized mind. . . . Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses . . . , but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit.* No sort of immunity is given to anyone under this provision. There is nothing in it to prevent

> a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law." GCIV Commentary 39 (emphasis added).

It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, § 1005(e)(1), 119 Stat. 2742, this system—which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court—does not dispense "summary justice."

* * *

For these reasons, I respectfully dissent.

ANEXO 06 – CASO *BOUMEDIENE V. BUSH* (2008)

Syllabus

BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06–1195. Argued December 5, 2007—Decided June 12, 2008*

In the Authorization for Use of Military Force (AUMF), Congress empowered the President "to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . on September 11, 2001." In *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 518, 588–589, five Justices recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of that conflict was a fundamental and accepted incident to war. Thereafter, the Defense Department established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at the U. S. Naval Station at Guantanamo Bay, Cuba, were "enemy combatants."

Petitioners are aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by CSRTs. Denying membership in the al Qaeda terrorist network that carried out the September 11 attacks and the Taliban regime that supported al Qaeda, each petitioner sought a writ of habeas corpus in the District Court, which ordered the cases dismissed for lack of jurisdiction because Guantanamo is outside sovereign U. S. territory. The D. C. Circuit affirmed, but this Court reversed, holding that 28 U. S. C. § 2241 extended statutory habeas jurisdiction to Guantanamo. See *Rasul* v. *Bush*, 542 U. S. 466, 473. Petitioners' cases were then consolidated into two proceedings. In the first, the District Judge granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas action. In the second, the judge held that the detainees had due process rights.

While appeals were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), § 1005(e) of which amended 28 U. S. C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo," and gave the D. C. Circuit "exclusive" jurisdiction to review CSRT decisions. In *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 576–577, the Court held this provision inapplicable to

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*Together with No. 06–1196, *Al Odah, Next Friend of Al Odah, et al.* v. *United States et al.*, also on certiorari to the same court.

cases (like petitioners') pending when the DTA was enacted. Congress responded with the Military Commissions Act of 2006 (MCA), § 7(a) of which amended § 2241(e)(1) to deny jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants, while § 2241(e)(2) denies jurisdiction as to "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detained alien determined to be an enemy combatant. MCA § 7(b) provides that the § 2241(e) amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001."

The D. C. Circuit concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas applications; that petitioners are not entitled to habeas or the protections of the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"; and that it was therefore unnecessary to consider whether the DTA provided an adequate and effective substitute for habeas.

Held:

1. MCA § 7 denies the federal courts jurisdiction to hear habeas actions, like the instant cases, that were pending at the time of its enactment. Section 7(b)'s effective date provision undoubtedly applies to habeas actions, which, by definition, "relate to . . . detention" within that section's meaning. Petitioners argue to no avail that § 7(b) does not apply to a § 2241(e)(1) habeas action, but only to "any other action" under § 2241(e)(2), because it largely repeats that section's language. The phrase "other action" in § 2241(e)(2) cannot be understood without referring back to § 2241(e)(1), which explicitly mentions the "writ of habeas corpus." Because the two paragraphs' structure implies that habeas is a type of action "relating to any aspect of . . . detention," etc., pending habeas actions are in the category of cases subject to the statute's jurisdictional bar. This is confirmed by the MCA's legislative history. Thus, if MCA § 7 is valid, petitioners' cases must be dismissed. Pp. 736–739.

2. Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo. Pp. 739–771.

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(a) A brief account of the writ's history and origins shows that protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights; in the system the Framers conceived, the writ has a centrality that must inform proper interpretation of the Suspension Clause. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion. The Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution's essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance." *Hamdi*, *supra*, at 536. Separation-of-powers principles, and the history that influenced their design, inform the Clause's reach and purpose. Pp. 739–746.

(b) A diligent search of founding-era precedents and legal commentaries reveals no certain conclusions. None of the cases the parties cite reveal whether a common-law court would have granted, or refused to hear for lack of jurisdiction, a habeas petition by a prisoner deemed an enemy combatant, under a standard like the Defense Department's in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control. The evidence as to the writ's geographic scope at common law is informative, but, again, not dispositive. Petitioners argue that the site of their detention is analogous to two territories outside England to which the common-law writ ran, the exempt jurisdictions and India, but critical differences between these places and Guantanamo render these claims unpersuasive. The Government argues that Guantanamo is more closely analogous to Scotland and Hanover, where the writ did not run, but it is unclear whether the common-law courts lacked the power to issue the writ there, or whether they refrained from doing so for prudential reasons. The parties' arguments that the very lack of a precedent on point supports their respective positions are premised upon the doubtful assumptions that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before the Court. Pp. 746–752.

(c) The Suspension Clause has full effect at Guantanamo. The Government's argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval station is rejected. Pp. 753–771.

Syllabus

(1) The Court does not question the Government's position that Cuba maintains sovereignty, in the legal and technical sense, over Guantanamo, but it does not accept the Government's premise that *de jure* sovereignty is the touchstone of habeas jurisdiction. Common-law habeas' history provides scant support for this proposition, and it is inconsistent with the Court's precedents and contrary to fundamental separation-of-powers principles. Pp. 753–755.

(2) Discussions of the Constitution's extraterritorial application in cases involving provisions other than the Suspension Clause undermine the Government's argument. Fundamental questions regarding the Constitution's geographic scope first arose when the Nation acquired Hawaii and the noncontiguous Territories ceded by Spain after the Spanish-American War, and Congress discontinued its prior practice of extending constitutional rights to territories by statute. In the so-called Insular Cases, the Court held that the Constitution had independent force in the Territories that was not contingent upon acts of legislative grace. See, *e. g., Dorr* v. *United States*, 195 U. S. 138. Yet because of the difficulties and disruption inherent in transforming the former Spanish colonies' civil-law system into an Anglo-American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See, *e. g.*, *id.*, at 143. Practical considerations likewise influenced the Court's analysis in *Reid* v. *Covert*, 354 U. S. 1, where, in applying the jury provisions of the Fifth and Sixth Amendments to American civilians being tried by the U. S. military abroad, both the plurality and the concurrences noted the relevance of practical considerations, related not to the petitioners' citizenship, but to the place of their confinement and trial. Finally, in holding that habeas jurisdiction did not extend to enemy aliens, convicted of violating the laws of war, who were detained in a German prison during the Allied Powers' post-World War II occupation, the Court, in *Johnson* v. *Eisentrager*, 339 U. S. 763, stressed the practical difficulties of ordering the production of the prisoners, *id.*, at 779. The Government's reading of *Eisentrager* as adopting a formalistic test for determining the Suspension Clause's reach is rejected because: (1) The discussion of practical considerations in that case was integral to a part of the Court's opinion that came before it announced its holding, see *id.*, at 781; (2) it mentioned the concept of territorial sovereignty only twice in its opinion, in contrast to its significant discussion of practical barriers to the running of the writ; and (3) if the Government's reading were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach. A constricted reading of *Eisentrager* overlooks

what the Court sees as a common thread uniting all these cases: the idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism. Pp. 755–764.

(3) The Government's sovereignty-based test raises troubling separation-of-powers concerns, which are illustrated by Guantanamo's political history. Although the United States has maintained complete and uninterrupted control of Guantanamo for over 100 years, the Government's view is that the Constitution has no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in its 1903 lease with Cuba. The Nation's basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177. These concerns have particular bearing upon the Suspension Clause question here, for the habeas writ is itself an indispensable mechanism for monitoring the separation of powers. Pp. 764–766.

(4) Based on *Eisentrager*, *supra*, at 777, and the Court's reasoning in its other extraterritoriality opinions, at least three factors are relevant in determining the Suspension Clause's reach: (1) the detainees' citizenship and status and the adequacy of the process through which that status was determined; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ. Application of this framework reveals, first, that petitioners' status is in dispute: They are not American citizens, but deny they are enemy combatants; and although they have been afforded some process in CSRT proceedings, there has been no *Eisentrager*–style trial by military commission for violations of the laws of war. Second, while the sites of petitioners' apprehension and detention weigh against finding they have Suspension Clause rights, there are critical differences between *Eisentrager*'s German prison, circa 1950, and the Guantanamo Naval Station in 2008, given the Government's absolute and indefinite control over the naval station. Third, although the Court is sensitive to the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad, these factors are not dispositive because the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction. The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. Pp. 766–771.

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(d) Petitioners are therefore entitled to the habeas privilege, and if that privilege is to be denied them, Congress must act in accordance with the Suspension Clause's requirements. Cf. *Hamdi*, 542 U. S., at 564. P. 771.

3. Because the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA § 7 operates as an unconstitutional suspension of the writ. Pp. 771–792.

(a) Given its holding that the writ does not run to petitioners, the D. C. Circuit found it unnecessary to consider whether there was an adequate substitute for habeas. This Court usually remands for consideration of questions not decided below, but departure from this rule is appropriate in "exceptional" circumstances, see, *e. g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 169, here, the grave separation-of-powers issues raised by these cases and the fact that petitioners have been denied meaningful access to a judicial forum for years. Pp. 771–773.

(b) Historically, Congress has taken care to avoid suspensions of the writ. For example, the statutes at issue in the Court's two leading cases addressing habeas substitutes, *Swain* v. *Pressley*, 430 U. S. 372, and *United States* v. *Hayman*, 342 U. S. 205, were attempts to streamline habeas relief, not to cut it back. Those cases provide little guidance here because, *inter alia*, the statutes in question gave the courts broad remedial powers to secure the historic office of the writ, and included saving clauses to preserve habeas review as an avenue of last resort. In contrast, Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of MCA § 7's jurisdiction-stripping language, from the DTA's text limiting the Court of Appeals' jurisdiction to assessing whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense," DTA § 1005(e)(2)(C), and from the absence of a saving clause in either Act. That Congress intended to create a more limited procedure is also confirmed by the legislative history and by a comparison of the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U. S. C. § 2241. In § 2241, Congress authorized "any justice" or "circuit judge" to issue the writ, thereby accommodating the necessity for fact-finding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court. See § 2241(b). However, by granting the D. C. Circuit "exclusive" jurisdiction over petitioners' cases, see DTA § 1005(e)(2)(A), Congress has foreclosed that option in these cases. Pp. 773–779.

(c) This Court does not endeavor to offer a comprehensive summary of the requisites for an adequate habeas substitute. It is uncontroversial, however, that the habeas privilege entitles the prisoner to a

meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law, *INS* v. *St. Cyr*, 533 U. S. 289, 302, and the habeas court must have the power to order the conditional release of an individual unlawfully detained. But more may be required depending on the circumstances. Petitioners identify what they see as myriad deficiencies in the CSRTs, the most relevant being the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore. Accordingly, for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the Government's evidence, and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. *In re Yamashita*, 327 U. S. 1, 5, 8, and *Ex parte Quirin*, 317 U. S. 1, 23–25, distinguished. Pp. 779–787.

(d) Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas. Among the constitutional infirmities from which the DTA potentially suffers are the absence of provisions allowing petitioners to challenge the President's authority under the AUMF to detain them indefinitely, to contest the CSRT's findings of fact, to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings, and to request release. The statute cannot be read to contain each of these constitutionally required procedures. MCA § 7 thus effects an unconstitutional suspension of the writ. There is no jurisdictional bar to the District Court's entertaining petitioners' claims. Pp. 787–792.

4. Nor are there prudential barriers to habeas review. Pp. 793–796.

(a) Petitioners need not seek review of their CSRT determinations in the D. C. Circuit before proceeding with their habeas actions in the District Court. If these cases involved detainees held for only a short time while awaiting their CSRT determinations, or were it probable that the Court of Appeals could complete a prompt review of their appli-

cations, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. But these qualifications no longer pertain here. In some instances six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. To require these detainees to pursue the limited structure of DTA review before proceeding with habeas actions would be to require additional months, if not years, of delay. This holding should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. Except in cases of undue delay, such as the present, federal courts should refrain from entertaining an enemy combatant's habeas petition at least until after the CSRT has had a chance to review his status. Pp. 793–795.

(b) In effectuating today's holding, certain accommodations—including channeling future cases to a single district court and requiring that court to use its discretion to accommodate to the greatest extent possible the Government's legitimate interest in protecting sources and intelligence gathering methods—should be made to reduce the burden habeas proceedings will place on the military, without impermissibly diluting the writ's protections. Pp. 795–796.

5. In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. Pp. 796–798.

476 F. 3d 981, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 798. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post,* p. 801. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post,* p. 826.

Seth P. Waxman argued the cause for petitioners in both cases. With him on the briefs for petitioner Lakhdar Boumediene et al. in No. 06–1195 were *Paul R. Q. Wolfson*, *Jonathan G. Cedarbaum*, *Douglas F. Curtis*, *Paul M. Winke*, *Stephen H. Oleskey*, *Robert C. Kirsch*, *Mark C. Fleming*, and *Pratik A. Shah*. *David J. Cynamon*, *Matthew J. MacLean*,

Counsel

David H. Remes, and *Marc D. Falkoff* filed briefs for petitioner Khaled A. F. Al Odah et al. in No. 06–1196. *Thomas B. Wilner*, *Neil H. Koslowe*, *George Brent Mickum IV*, *John J. Gibbons*, *Lawrence S. Lustberg*, *Michael Ratner*, *J. Wells Dixon*, *Shayana Kadidal*, *Mark S. Sullivan*, *Pamela Rogers Chepiga*, *Joseph Margulies*, *Erwin Chemerinsky*, *Baher Azmy*, *Kristine Huskey*, *Douglas J. Behr*, and *Clive Stafford Smith* filed briefs for petitioner Jamil El-Banna et al. in No. 06–1196. *William C. Kuebler*, *Rebecca Snyder*, and *Walter Dellinger* filed a brief for Omar Khadr as respondent in No. 06–1196 under this Court's Rule 12.6 in support of petitioners.

Former *Solicitor General Clement* argued the cause for respondents in both cases. With him on the brief were *Acting Solicitor General Garre*, *Assistant Attorney General Keisler*, *Principal Deputy Associate Attorney General Katsas*, *Eric D. Miller*, *Douglas N. Letter*, *Robert M. Loeb*, *August E. Flentje*, *Pamela M. Stahl*, and *Jennifer Paisner*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Bar Association by *William H. Neukom* and *Sidney S. Rosdeitcher;* for the American Civil Liberties Union et al. by *Cecillia D. Wang*, *Lucas Guttentag*, *Steven R. Shapiro*, *Arthur H. Bryant*, and *Victoria W. Ni;* for the Association of the Bar of the City of New York by *Arthur F. Fergenson* and *David E. Nachman;* for Canadian Parliamentarians and Professors of Law by *William R. Stein* and *Scott H. Christensen;* for the Cato Institute by *Timothy Lynch;* for the Coalition of Non-Governmental Organizations by *Jonathan S. Franklin*, *Stephen M. McNabb*, *Sharon Bradford Franklin*, and *John W. Whitehead;* for the Federal Public Defender for the Southern District of Florida by *Paul M. Rashkind;* for Former Federal Judges by *Beth S. Brinkmann*, *Seth M. Galanter*, *Ketanji Brown Jackson*, and *Agnieszka M. Fryszman;* for Former United States Diplomat Diego C. Asencio et al. by *Douglass Cassel;* for International Humanitarian Law Experts by *Harrison J. Frahn IV* and *Beth Van Schaack;* for Professors of Constitutional Law and Federal Jurisdiction by *Margaret L. Sanner*, *Gerald L. Neuman*, *pro se*, and *Harold Hongju Koh*, *pro se;* for Retired Military Officers by *James C. Schroeder*, *Gary A. Isaac*, and *Philip Allen Lacovara;* for Specialists in Israeli Military Law and

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005

Constitutional Law by *Stephen J. Schulhofer*, *Charles T. Lester, Jr.*, *John A. Chandler*, and *Avital Stadler;* for the United Nations High Commissioner for Human Rights by *Donald Francis Donovan*, *Catherine M. Amirfar*, and *William H. Taft V;* for Salim Hamdan by *Neal K. Katyal*, *Harry H. Schneider, Jr.*, *Joseph M. McMillan*, *Laurence H. Tribe*, *Kevin K. Russell*, and *Charles Swift;* and for United States Senator Arlen Specter, by Sen. Specter, *pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for Retired Generals and Admirals et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* were filed in both cases for 383 United Kingdom and European Parliamentarians by *Claude B. Stansbury;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, and *Robert W. Ash;* for Amnesty International et al. by *Paul L. Hoffman* and *William J. Aceves;* for the Commonwealth Lawyers Association by *John Townsend Rich* and *Stephen J. Pollak;* for Federal Courts and International Law Professors by *David C. Vladeck;* for Legal Historians by *James Oldham*, *Michael J. Wishnie*, and *Jonathan Hafetz;* for the National Institute of Military Justice by *Jennifer S. Martinez*, *Ronald W. Meister*, *Stephen A. Saltzburg*, and *Arnon D. Siegel;* and for Scholar Paul Finkelman et al. by *David Overlock Stewart*.

Andrew G. McBride filed a brief for the Foundation for Defense of Democracies et al. as *amici curiae* urging affirmance in No. 06–1195.

Briefs of *amici curiae* were filed in No. 06–1196 for International Law Scholars by *Sarah H. Paoletti;* and for the Juvenile Law Center et al. by *Marsha L. Levick*.

(DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. § 2241(e), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224, note following 50 U. S. C. § 1541, the President is authorized "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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.*, at 518 (plurality opinion of O'Connor, J.); *id.*, at 588–589 (THOMAS, J., dissenting). After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. See App. to Pet. for Cert. in No. 06–1195, p. 81a. A later memorandum established procedures to implement the

CSRTs. See App. to Pet. for Cert. in No. 06–1196, p. 147. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*. See Brief for Federal Respondents 10.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. The District Court ordered the cases dismissed for lack of jurisdiction because the naval station is outside the sovereign territory of the United States. See *Rasul* v. *Bush*, 215 F. Supp. 2d 55 (2002). The Court of Appeals for the District of Columbia Circuit affirmed. See *Al Odah* v. *United States*, 321 F. 3d 1134, 1145 (2003). We granted certiorari and reversed, holding that 28 U. S. C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo. See *Rasul* v. *Bush*, 542 U. S. 466, 473 (2004). The constitutional issue presented in the instant cases was not reached in *Rasul*. *Id.*, at 476.

After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due

Process Clause of the Fifth Amendment. See *Khalid* v. *Bush*, 355 F. Supp. 2d 311, 314 (DC 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U. S. C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." 119 Stat. 2742. Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs. *Ibid.*

In *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 576–577 (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA, 10 U. S. C. § 948a *et seq.*, which again amended § 2241. The text of the statutory amendment is discussed below. See Part II, *infra.* (Four Members of the *Hamdan* majority noted that "[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary." 548 U. S., at 636 (BREYER, J., concurring). The authority to which the concurring opinion referred was the authority to "create military commissions of the kind at issue" in the case. *Ibid.* Nothing in that opinion can be construed as an invitation for Congress to suspend the writ.)

Petitioners' cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan.* The Court of Appeals' ruling, 476 F. 3d 981 (CADC 2007), is the subject of our present review and today's decision.

The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, *id.*, at 987; that petitioners are not entitled to the privilege of the writ

or the protections of the Suspension Clause, *id.*, at 990–991; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

We granted certiorari. 551 U. S. 1160 (2007).

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U. S. C. § 2241(e) now provides:

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

Section 7(b) of the MCA provides the effective date for the amendment of § 2241(e). It states:

> "The amendment made by [MCA § 7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the

> date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." 120 Stat. 2636.

There is little doubt that the effective date provision applies to habeas corpus actions. Those actions, by definition, are cases "which relate to . . . detention." See Black's Law Dictionary 728 (8th ed. 2004) (defining habeas corpus as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal"). Petitioners argue, nevertheless, that MCA § 7(b) is not a sufficiently clear statement of congressional intent to strip the federal courts of jurisdiction in pending cases. See *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869). We disagree.

Their argument is as follows: Section 2241(e)(1) refers to "a writ of habeas corpus." The next paragraph, § 2241(e)(2), refers to "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who . . . [has] been properly detained as an enemy combatant or is awaiting such determination." There are two separate paragraphs, the argument continues, so there must be two distinct classes of cases. And the effective date subsection, MCA § 7(b), it is said, refers only to the second class of cases, for it largely repeats the language of § 2241(e)(2) by referring to "cases . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States."

Petitioners' textual argument would have more force were it not for the phrase "other action" in § 2241(e)(2). The phrase cannot be understood without referring back to the paragraph that precedes it, § 2241(e)(1), which explicitly mentions the term "writ of habeas corpus." The structure of the two paragraphs implies that habeas actions are a type of action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who

is or was detained . . . as an enemy combatant." Pending habeas actions, then, are in the category of cases subject to the statute's jurisdictional bar.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In *Hamdan* the Court found it unnecessary to address the petitioner's Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases. See 548 U. S., at 575 (Congress should "not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary"). This interpretive rule facilitates a dialogue between Congress and the Court. Cf. *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 206 (1991); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1209–1210 (W. Eskridge & P. Frickey eds. 1994). If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented. The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, see 476 F. 3d, at 986, n. 2 (citing relevant floor statements);

and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i. e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i. e.*, their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the

abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in Sources of Our Liberties 17 (R. Perry & J. Cooper eds. 1959) ("No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, A History of English Law 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I. *Id.*, at 108–125. Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. See J. Baker, An Introduction to English Legal History 38–39 (4th ed. 2002). Thus the writ, while it would become part of the foundation of liberty for the King's subjects, was in its earliest use a mechanism for securing compliance with the King's laws. See Halliday & White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 585 (2008) (hereinafter Halliday & White) (manuscript, at 11, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252 (all Internet materials as visited June 9, 2008, and available in Clerk of Court's case file) (noting that "conceptually the writ arose from a theory of power rather than a theory of liberty")). Over time it became clear that by issuing the

writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner. See M. Hale, Prerogatives of the King 229 (D. Yale ed. 1976); 2 J. Story, Commentaries on the Constitution of the United States § 1341, p. 237 (3d ed. 1858) (noting that the writ ran "into all parts of the king's dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained").

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, "it means this, that the king is and shall be below the law." 1 F. Pollock & F. Maitland, History of English Law 173 (2d ed. 1909); see also 2 Bracton On the Laws and Customs of England 33 (S. Thorne transl. 1968) ("The king must not be under man but under God and under the law, because law makes the king"). And, by the 1600's, the writ was deemed less an instrument of the King's power and more a restraint upon it. See Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace, 40 Cal. L. Rev. 335, 336 (1952) (noting that by this point the writ was "the appropriate process for checking illegal imprisonment by public officials").

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.

A notable example from this period was *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627). The events giving rise to the case began when, in a display of the Stuart penchant for authoritarian excess, Charles I demanded that Darnel and at least four others lend him money. Upon their refusal, they were imprisoned. The prisoners sought a writ of habeas corpus; and the King filed a return in the form of a warrant signed by the Attorney General. *Ibid.* The court held this

was a sufficient answer and justified the subjects' continued imprisonment. *Id.*, at 59.

There was an immediate outcry of protest. The House of Commons promptly passed the Petition of Right, 3 Car. 1, ch. 1 (1627), 5 Statutes of the Realm 23, 24 (reprint 1963), which condemned executive "imprison[ment] without any cause" shown, and declared that "no freeman in any such manner as is before mencioned [shall] be imprisoned or deteined." Yet a full legislative response was long delayed. The King soon began to abuse his authority again, and Parliament was dissolved. See W. Hall & R. Albion, A History of England and the British Empire 328 (3d ed. 1953) (hereinafter Hall & Albion). When Parliament reconvened in 1640, it sought to secure access to the writ by statute. The Act of 1640, 16 Car. 1, ch. 10, 5 Statutes of the Realm, at 110, expressly authorized use of the writ to test the legality of commitment by command or warrant of the King or the Privy Council. Civil strife and the Interregnum soon followed, and not until 1679 did Parliament try once more to secure the writ, this time through the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, *id.*, at 935. The Act, which later would be described by Blackstone as the "stable bulwark of our liberties," 1 W. Blackstone, Commentaries *137 (hereinafter Blackstone), established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based, see Collings, *supra*, at 338–339.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. See *Loving* v. *United States*, 517 U. S. 748, 756 (1996) (noting that "[e]ven before

the birth of this country, separation of powers was known to be a defense against tyranny"); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty"); *Clinton* v. *City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers"). Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, see *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886), protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles, see, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919, 958–959 (1983).

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2; see Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1509, n. 329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies"). The word "privilege" was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term "right" in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, § 8, cl. 8.)

Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an "exception" to the "power given to Congress to regulate courts." See 3 Debates in the Several

State Conventions on the Adoption of the Federal Constitution 460–464 (J. Elliot 2d ed. 1876). A resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention. See Resolution of the New York Ratifying Convention (July 26, 1788), in 1 *id.*, at 328 (noting the convention's understanding "[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*"). Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government. As he explained in The Federalist No. 84:

> "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: 'To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.' And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British Constitution.'" C. Rossiter ed., p. 512 (1961) (quoting 1 Blackstone *136, 4 *id.*, at *438).

Post-1789 habeas developments in England, though not bearing upon the Framers' intent, do verify their foresight. Those later events would underscore the need for structural barriers against arbitrary suspensions of the writ. Just as the writ had been vulnerable to executive and parliamentary encroachment on both sides of the Atlantic before the American Revolution, despite the Habeas Corpus Act of 1679, the writ was suspended with frequency in England during times of political unrest after 1789. Parliament suspended the writ for much of the period from 1792 to 1801, resulting in rampant arbitrary imprisonment. See Hall & Albion 550. Even as late as World War I, at least one prominent English jurist complained that the Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29(1)(a), effectively had suspended the privilege of habeas corpus for any person suspected of "communicating with the enemy." See *King* v. *Halliday*, [1917] A. C. 260, 299 (Lord Shaw, dissenting); see generally A. Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain 6–7, 24–25 (1992).

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. See *Hamdi*, 542 U. S., at 536 (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"); cf. *In re Jackson*, 15 Mich. 417, 439–440 (1867) (Cooley, J., concurring) ("The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and

served upon, not the person confined, but his jailer"). The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. See *INS* v. *St. Cyr*, 533 U. S. 289, 300–301 (2001). But the analysis may begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified. *Id.*, at 301.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past. See Brief for Legal Historians as *Amici Curiae;* see also *St. Cyr, supra*, at 302, n. 16. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. See Brief for Federal Respondents 27. Petitioners argue that jurisdiction followed the King's officers. See Brief for Petitioner Boumediene et al. 11. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant,

under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief. See, *e. g.*, *Sommersett's Case*, 20 How. St. Tr. 1, 80–82 (1772) (ordering an African slave freed upon finding the custodian's return insufficient); see generally *Khera* v. *Secretary of State for the Home Dept.*, [1984] A. C. 74, 111 ("Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question"). We know as well that common-law courts entertained habeas petitions brought by enemy aliens detained in England—"entertained" at least in the sense that the courts held hearings to determine the threshold question of entitlement to the writ. See *Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (C. P. 1779); *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *Du Castro's Case*, Fort. 195, 92 Eng. Rep. 816 (K. B. 1697).

In *Schiever* and the *Spanish Sailors*' case, the courts denied relief to the petitioners. Whether the holdings in these cases were jurisdictional or based upon the courts' ruling that the petitioners were detained lawfully as prisoners of war is unclear. See *Spanish Sailors*, *supra*, at 1324, 96 Eng. Rep., at 776; *Schiever*, *supra*, at 766, 97 Eng. Rep., at 552. In *Du Castro's Case*, the court granted relief, but that case is not analogous to petitioners' because the prisoner there appears to have been detained in England. See Halliday & White 27, n. 72. To the extent these authorities suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the

enemy, a wartime practice well known to the Framers. See Resolution of Mar. 30, 1778, 10 Journals of the Continental Congress 1774–1789, p. 295 (W. Ford ed. 1908) (directing General Washington not to exchange prisoners with the British unless the enemy agreed to exempt citizens from capture).

We find the evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive. Petitioners argue the site of their detention is analogous to two territories outside of England to which the writ did run: the so-called "exempt jurisdictions," like the Channel Islands; and (in former times) India. There are critical differences between these places and Guantanamo, however.

As the Court noted in *Rasul*, 542 U. S., at 481–482, and nn. 11–12, common-law courts granted habeas corpus relief to prisoners detained in the exempt jurisdictions. But these areas, while not in theory part of the realm of England, were nonetheless under the Crown's control. See 2 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II, pp. 232–233 (reprint 1989). And there is some indication that these jurisdictions were considered sovereign territory. *King* v. *Cowle*, 2 Burr. 834, 854, 855, 856, 97 Eng. Rep. 587, 599 (K. B. 1759) (describing one of the exempt jurisdictions, Berwick-upon-Tweed, as under the "sovereign jurisdiction" and "subjection of the Crown of England"). Because the United States does not maintain formal sovereignty over Guantanamo Bay, see Part IV, *infra*, the naval station there and the exempt jurisdictions discussed in the English authorities are not similarly situated.

Petitioners and their *amici* further rely on cases in which British courts in India granted writs of habeas corpus to noncitizens detained in territory over which the Moghul Emperor retained formal sovereignty and control. See Brief for Petitioner Boumediene et al. 12–13; Brief for Legal Historians as *Amici Curiae* 12–13. The analogy to the present cases breaks down, however, because of the geographic loca-

tion of the courts in the Indian example. The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo. The Supreme Court of Judicature was, moreover, a special court set up by Parliament to monitor certain conduct during the British Raj. See Regulating Act of 1773, 13 Geo. 3, ch. 63, §§ 13–14. That it had the power to issue the writ in nonsovereign territory does not prove that common-law courts sitting in England had the same power. If petitioners were to have the better of the argument on this point, we would need some demonstration of a consistent practice of common-law courts sitting in England and entertaining petitions brought by alien prisoners detained abroad. We find little support for this conclusion.

The Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). See *Cowle*, 2 Burr., at 856, 97 Eng. Rep., at 600. Lord Mansfield can be cited for the proposition that, at the time of the founding, English courts lacked the "power" to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as "foreign." *Ibid.* But what matters for our purposes is why common-law courts lacked this power. Given the English Crown's delicate and complicated relationships with Scotland and Hanover in the 1700's, we cannot disregard the possibility that the common-law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. This appears to have been the case with regard to other British territories where the writ did not run. See 2 R. Chambers, A Course of Lectures on English Law 1767–1773, p. 8 (T. Curley ed. 1986) (discussing the view of Lord Mansfield in *Cowle* that "[n]otwithstanding the *power* which the judges have, yet where they cannot judge of the cause, or give relief

upon it, they would not think *proper* to interpose; and therefore in the case of imprisonments in *Guernsey*, *Jersey*, *Minorca*, or the *plantations*, the most usual way is to complain to the *king in Council*" (internal quotation marks omitted)). And after the Act of Union in 1707, through which the kingdoms of England and Scotland were merged politically, Queen Anne and her successors, in their new capacity as sovereign of Great Britain, ruled the entire island as one kingdom. Accordingly, by the time Lord Mansfield penned his opinion in *Cowle* in 1759, Scotland was no longer a "foreign" country vis-à-vis England—at least not in the sense in which Cuba is a foreign country vis-à-vis the United States.

Scotland remained "foreign" in Lord Mansfield's day in at least one important respect, however. Even after the Act of Union, Scotland (like Hanover) continued to maintain its own laws and court system. See 1 Blackstone *98, *106. Under these circumstances prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or the Electorate. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction. Cf. *Munaf* v. *Geren*, *ante*, at 693 (opinion of the Court) (recognizing that "'prudential concerns' . . . such as comity and the orderly administration of criminal justice" affect the appropriate exercise of habeas jurisdiction).

By the mid-19th century, British courts could issue the writ to Canada, notwithstanding the fact that Canadian courts also had the power to do so. See 9 Holdsworth 124, and n. 6 (citing *Ex parte Anderson*, 3 El. and El. 487, 121 Eng. Rep. 525 (K. B. 1861)). This might be seen as evidence that the existence of a separate court system was no barrier to the running of the common-law writ. The Canada of the

1800's, however, was in many respects more analogous to the exempt jurisdictions or to Ireland, where the writ ran, than to Scotland or Hanover in the 1700's, where it did not. Unlike Scotland and Hanover, Canada followed English law. See B. Laskin, The British Tradition in Canadian Law 50–51 (1969).

In the end a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding that prevailed when Lord Mansfield considered issuance of the writ outside England. In 1759 the writ did not run to Scotland but did run to Ireland, even though, at that point, Scotland and England had merged under the rule of a single sovereign, whereas the Crowns of Great Britain and Ireland remained separate (at least in theory). See *Cowle*, *supra*, at 856–857, 97 Eng. Rep., at 600; 1 Blackstone *100–*101. But there was at least one major difference between Scotland's and Ireland's relationship with England during this period that might explain why the writ ran to Ireland but not to Scotland. English law did not generally apply in Scotland (even after the Act of Union), but it did apply in Ireland. Blackstone put it as follows: "[A]s Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws." *Id.*, at *100 (footnote omitted). This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.

The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here. We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station. The modern-day rela-

tions between the United States and Guantanamo thus differ in important respects from the 18th-century relations between England and the kingdoms of Scotland and Hanover. This is reason enough for us to discount the relevance of the Government's analogy.

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. See Halliday & White 14–15 (noting that most reports of 18th-century habeas proceedings were not printed). And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 489 (1954) (noting evidence concerning the circumstances surrounding the adoption of the Fourteenth Amendment, discussed in the parties' briefs and uncovered through the Court's own investigation, "convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive"); *Reid* v. *Covert*, 354 U. S. 1, 64 (1957) (Frankfurter, J., concurring in result) (arguing constitutional adjudication should not be based upon evidence that is "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution").

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. See DTA § 1005(g), 119 Stat. 2743. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement); *Rasul*, 542 U. S., at 471. Under the terms of the 1934 treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base. See Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. See, *e. g.*, Brief for Petitioners in *Sale* v. *Haitian Centers Council, Inc.*, O. T. 1992, No. 92–344, p. 31 (arguing that Guantanamo is territory "*outside* the United States"). And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. See *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 (1948) ("[D]etermination of sovereignty over an area is for the legislative and executive departments"); see also *Jones* v. *United States*, 137 U. S. 202 (1890); *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982).

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, "'[s]overeignty' is a term used in many senses and is much abused." See 1 Restatement (Third) of Foreign Relations Law of the United States § 206, Comment *b*, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, see Webster's New International Dictionary 2406 (2d ed. 1934) ("sovereignty," definition 3), but sovereignty in the narrow, legal sense of the term, meaning a claim of right, see 1 Restatement (Third) of Foreign Relations, *supra*, § 206, Comment *b*, at 94 (noting that sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there"). Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War. See, *e. g.*, *Fleming* v. *Page*, 9 How. 603, 614 (1850) (noting that the port of Tampico, conquered by the United States during the war with Mexico, was "undoubtedly . . . subject to the sovereignty and dominion of the United States," but that it "does not follow that it was a part of the United States, or that it ceased to be a foreign country"); *King* v. *Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 603–604 (C. A.) (opinion of Williams, L. J.) (arguing that the Bechuanaland Protectorate in South Africa was "under His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion"). Accordingly,

for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. See 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.

The Framers foresaw that the United States would expand and acquire new territories. See *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 542 (1828). Article IV, § 3, cl. 1, grants Congress the power to admit new States. Clause 2 of the same section grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Save for a few notable (and notorious) exceptions, *e. g.*, *Dred Scott* v. *Sandford*, 19 How. 393 (1857), throughout most of our history there was little need to explore the outer boundaries of the Constitution's geographic reach. When Congress exercised its power to create new territories, it

guaranteed constitutional protections to the inhabitants by statute. See, *e. g.*, An Act: to establish a Territorial Government for Utah, § 17, 9 Stat. 458 ("[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah"); Rev. Stat. § 1891 ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States"); see generally Burnett, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 825–827 (2005). In particular, there was no need to test the limits of the Suspension Clause because, as early as 1789, Congress extended the writ to the Territories. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. II of Northwest Ordinance of 1787, which provided that "[t]he inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus").

Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the Territories by statute. See, *e. g.*, An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, 32 Stat. 692 (noting that Rev. Stat. § 1891 did not apply to the Philippines).

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. See *De Lima* v. *Bidwell*, 182 U. S. 1 (1901); *Dooley* v. *United States*, 182 U. S. 222 (1901); *Armstrong* v. *United States*, 182 U. S. 243 (1901); *Downes* v. *Bidwell*, 182 U. S. 244 (1901); *Hawaii*

v. *Mankichi*, 190 U. S. 197 (1903); *Dorr* v. *United States*, 195 U. S. 138 (1904). The Court held that the Constitution has independent force in these Territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. See An Act To declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands (Jones Act), 39 Stat. 545 (noting that "it was never the intention of the people of the United States in the incipiency of the War with Spain to make it a war of conquest or for territorial aggrandizement" and that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein"). The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. See *Downes*, *supra*, at 282 ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production . . . ").

These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See *Dorr*, *supra*, at 143 ("Until Congress shall see fit to incorporate territory

ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation"); *Downes*, *supra*, at 293 (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States"). As the Court later made clear, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Balzac* v. *Porto Rico*, 258 U. S. 298, 312 (1922). It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. Cf. *Torres* v. *Puerto Rico*, 442 U. S. 465, 475–476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's"). But, as early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants "guaranties of certain fundamental personal rights declared in the Constitution." 258 U. S., at 312; see also *Late Corp. of Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, 44 (1890) ("Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments"). Yet

noting the inherent practical difficulties of enforcing all constitutional provisions "always and everywhere," *Balzac*, *supra*, at 312, the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.

Practical considerations likewise influenced the Court's analysis a half century later in *Reid*, 354 U. S. 1. The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese Governments. *Id.*, at 15–16, and nn. 29–30 (plurality opinion). Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury.

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories "with wholly dissimilar traditions and institutions" that Congress intended to govern only "temporarily." *Id.*, at 14. Justice Frankfurter argued that the "specific circumstances of each particular case" are relevant in determining the geographic scope of the Constitution. *Id.*, at 54 (opinion concurring in result). And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, *Reid* v. *Covert*, 351 U. S. 487 (1956), was most explicit in rejecting a "rigid and abstract rule" for determining where constitutional guarantees extend. *Reid*, 354 U. S., at 74 (opinion concurring in result). He read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Id.*, at 74–75; see also *United*

States v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring) (applying the "impracticable and anomalous" extraterritoriality test in the Fourth Amendment context).

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition) these considerations were the decisive factors in the case.

Indeed the majority splintered on this very point. The key disagreement between the plurality and the concurring Justices in *Reid* was over the continued precedential value of the Court's previous opinion in *In re Ross*, 140 U. S. 453 (1891), which the *Reid* Court understood as holding that under some circumstances Americans abroad have no right to indictment and trial by jury. The petitioner in *Ross* was a sailor serving on an American merchant vessel in Japanese waters who was tried before an American consular tribunal for the murder of a fellow crewman. 140 U. S., at 459, 479. The *Ross* Court held that the petitioner, who was a British subject, had no rights under the Fifth and Sixth Amendments. *Id.*, at 464. The petitioner's citizenship played no role in the disposition of the case, however. The Court assumed (consistent with the maritime custom of the time) that Ross had all the rights of a similarly situated American citizen. *Id.*, at 479 (noting that Ross was "under the protection and subject to the laws of the United States equally with the seaman who was native born"). The Justices in *Reid* therefore properly understood *Ross* as standing for the proposition that, at least in some circumstances, the jury provisions of the Fifth and Sixth Amendments have no application

to American citizens tried by American authorities abroad. See 354 U. S., at 11–12 (plurality opinion) (describing *Ross* as holding that "constitutional protections applied 'only to citizens and others within the United States . . . and not to residents or temporary sojourners abroad' " (quoting *Ross*, *supra*, at 464)); 354 U. S., at 64 (Frankfurter, J., concurring in result) (noting that the consular tribunals upheld in *Ross* "w[ere] based on long-established custom and they were justified as the best possible means for securing justice for the few Americans present in [foreign] countries"); 354 U. S., at 75 (Harlan, J., concurring in result) ("[W]hat *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas").

The *Reid* plurality doubted that *Ross* was rightly decided, precisely because it believed the opinion was insufficiently protective of the rights of American citizens. See 354 U. S., at 10–12; see also *id.*, at 78 (Clark, J., dissenting) (noting that "four of my brothers would specifically overrule and two would impair the long-recognized vitality of an old and respected precedent in our law, the case of *In re Ross*, 140 U. S. 453 (1891)"). But Justices Harlan and Frankfurter, while willing to hold that the American citizen petitioners in the cases before them were entitled to the protections of Fifth and Sixth Amendments, were unwilling to overturn *Ross*. 354 U. S., at 64 (Frankfurter, J., concurring in result); *id.*, at 75 (Harlan, J., concurring in result). Instead, the two concurring Justices distinguished *Ross* from the cases before them, not on the basis of the citizenship of the petitioners, but on practical considerations that made jury trial a more feasible option for them than it was for the petitioner in *Ross*. If citizenship had been the only relevant factor in the case, it would have been necessary for the Court to overturn

Ross, something Justices Harlan and Frankfurter were unwilling to do. See *Verdugo-Urquidez*, *supra*, at 277 (KENNEDY, J., concurring) (noting that *Ross* had not been overruled).

Practical considerations weighed heavily as well in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' post-War occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time. *Id.*, at 779. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities. *Id.*, at 769–779; see *Rasul*, 542 U. S., at 475–476 (discussing the factors relevant to *Eisentrager*'s constitutional holding); 542 U. S., at 486 (KENNEDY, J., concurring in judgment) (same).

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U. S., at 778. The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. See Brief for Federal Respondents 18–20. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. The Court's fur-

ther determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding. See 339 U. S., at 781.

Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, see *infra*, at 768, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. See *supra*, at 751–752. The Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept. See Black's Law Dictionary 1568 (4th ed. 1951) (defining "sovereignty" as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed"; "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation"; and "[t]he power to do everything in a state without accountability"); Ballentine's Law Dictionary With Pronunciations 1216 (2d ed. 1948) (defining "sovereignty" as "[t]hat public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution"). In its principal brief in *Eisentrager*, the Government advocated a bright-line test for determining the scope of the writ, similar to the one it advocates in these cases. See Brief for Petitioners in *Johnson* v. *Eisentrager*, O. T. 1949, No. 306, pp. 74–75. Yet the Court mentioned the concept of territorial sovereignty only twice in its opinion. See *Eisentrager*, *supra*, at 778, 780. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive

factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the Insular Cases and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid:* the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically "relinquishe[d] all claim[s] of sovereignty . . . and title." See Treaty of Paris, Dec. 10, 1898, U. S.-Spain, Art. I, 30 Stat. 1755, T. S. No. 343. From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory "in trust" for the benefit of the Cuban people. *Neely* v. *Henkel*, 180

U. S. 109, 120 (1901); H. Thomas, Cuba or The Pursuit of Freedom 436, 460 (1998). And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy* v. *Ramsey*, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for deter-

mining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

As we recognized in *Rasul*, 542 U. S., at 476; *id.*, at 487 (KENNEDY, J., concurring in judgment), the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

> "(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U. S., at 777.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. Petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process

in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. See 14 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 8–10 (1949) (reprint 1997). To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses. See Memorandum by Command of Lt. Gen. Wedemeyer, Jan. 21, 1946 (establishing "Regulations Governing the Trial of War Criminals" in the China Theater), in Tr. of Record in *Johnson* v. *Eisentrager*, O. T. 1949, No. 306, pp. 34–40.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." See App. to Pet. for Cert. in No. 06–1196, at 155, ¶F(1), 172. The Government's evidence is accorded a presumption of validity. *Id.*, at 159. The detainee is allowed to present "reasonably available" evidence, *id.*, at 155, ¶F(1), but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings. See Part V, *infra*.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, U. S.-U. S. S. R.-U. K.-Fr., 60 Stat. 1649, T. I. A. S. No. 1520. The United States was therefore answerable to its Allies for all activities occurring there. Cf. *Hirota* v. *MacArthur*, 338 U. S. 197, 198 (1948) *(per curiam)* (military tribunal set up by Gen. Douglas MacArthur, acting as "the agent of the Allied Powers," was not a "tribunal of the United States"). The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. See Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, Apr. 8, 1949, U. S.-U. K.-Fr., Art. 1, 63 Stat. 2819, T. I. A. S. No. 2066 (establishing a governing framework "[d]uring the period in which it is necessary that the occupation continue" and expressing the desire "that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation"). The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no tran-

sient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. See *Rasul*, 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned alongside each other at various points in our history. See, *e. g.*, *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Ex parte Milligan*, 4 Wall. 2 (1866). The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. See Letter from President Truman to Secretary of State Byrnes (Nov. 28, 1945), in 8 Documents on American Foreign Relations 257 (R. Dennett & R. Turner eds. 1948); Pollock, A Territorial Pattern for the Military Occupation of Germany, 38 Am. Pol. Sci. Rev. 970, 975 (1944). In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the

Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerrilla fighters, and 'werewolves.'" 339 U. S., at 784.

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. See History of Guantanamo Bay, online at https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. See *Reid*, 354 U. S., at 74 (Harlan, J., concurring in result). Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them. See Part VI–B, *infra*.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us

lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. See Oxford Companion to American Military History 849 (1999). The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. Cf. *Hamdi*, 542 U. S., at 564 (SCALIA, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ"). This Court may not impose a *de facto* suspension by abstaining from these controversies. See *Hamdan*, 548 U. S., at 585, n. 16 ("[A]bstention is not appropriate in cases . . . in which the legal challenge 'turn[s] on the status of the persons as to whom the military asserted its power' " (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 759 (1975))). The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the

Court of Appeals, see DTA § 1005(e), provides an adequate substitute. Congress has granted that court jurisdiction to consider

> "(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742.

The Court of Appeals, having decided that the writ does not run to the detainees in any event, found it unnecessary to consider whether an adequate substitute has been provided. In the ordinary course we would remand to the Court of Appeals to consider this question in the first instance. See *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*. It is well settled, however, that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule. *Ibid.* Departure from the rule is appropriate in "exceptional" circumstances. See *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 169 (2004); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927).

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all

likelihood a remand simply would delay ultimate resolution of the issue by this Court.

We do have the benefit of the Court of Appeals' construction of key provisions of the DTA. When we granted certiorari in these cases, we noted "it would be of material assistance to consult any decision" in the parallel DTA review proceedings pending in the Court of Appeals, specifically any rulings in the matter of *Bismullah* v. *Gates*. 551 U. S. 1160 (2007). Although the Court of Appeals has yet to complete a DTA review proceeding, the three-judge panel in *Bismullah* has issued an interim order giving guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information. See 501 F. 3d 178 (CADC) *(Bismullah I)*, reh'g denied, 503 F. 3d 137 (CADC 2007) *(Bismullah II)*. In that matter the full court denied the Government's motion for rehearing en banc, see *Bismullah* v. *Gates*, 514 F. 3d 1291 (CADC 2008) *(Bismullah III)*. The order denying rehearing was accompanied by five separate statements from members of the court, which offer differing views as to the scope of the judicial review Congress intended these detainees to have. *Ibid.*

Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims. See,

e. g., Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version codified at 28 U. S. C. § 2241 (2000 ed. and Supp. V) (extending the federal writ to state prisoners)); Cf. *Harris* v. *Nelson*, 394 U. S. 286, 299–300 (1969) (interpreting the All Writs Act, 28 U. S. C. § 1651, to allow discovery in habeas corpus proceedings); *Peyton* v. *Rowe*, 391 U. S. 54, 64–65 (1968) (interpreting the then-existing version of § 2241 to allow petitioner to proceed with his habeas corpus action, even though he had not yet begun to serve his sentence).

There are exceptions, of course. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 106, 110 Stat. 1220, contains certain gatekeeping provisions that restrict a prisoner's ability to bring new and repetitive claims in "second or successive" habeas corpus actions. We upheld these provisions against a Suspension Clause challenge in *Felker* v. *Turpin*, 518 U. S. 651, 662–664 (1996). The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine. *Id.*, at 664; see also *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991). AEDPA applies, moreover, to federal, postconviction review after criminal proceedings in state court have taken place. As of this point, cases discussing the implementation of that statute give little helpful instruction (save perhaps by contrast) for the instant cases, where no trial has been held.

The two leading cases addressing habeas substitutes, *Swain* v. *Pressley*, 430 U. S. 372 (1977), and *United States* v. *Hayman*, 342 U. S. 205 (1952), likewise provide little guidance here. The statutes at issue were attempts to streamline habeas corpus relief, not to cut it back.

The statute discussed in *Hayman* was 28 U. S. C. § 2255. It replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, " 'imposed in viola-

tion of the Constitution or laws of the United States.'" 342 U. S., at 207, n. 1. The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient. It directed claims not to the court that had territorial jurisdiction over the place of the petitioner's confinement but to the sentencing court, a court already familiar with the facts of the case. As the *Hayman* Court explained:

> "Section 2255 . . . was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Id.*, at 219.

See also *Hill* v. *United States*, 368 U. S. 424, 427, 428, and n. 5 (1962) (noting that § 2255 provides a remedy in the sentencing court that is "exactly commensurate" with the pre-existing federal habeas corpus remedy).

The statute in *Swain*, D. C. Code Ann. § 23–110(g) (1973), applied to prisoners in custody under sentence of the Superior Court of the District of Columbia. Before enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D. C. Court Reform Act), 84 Stat. 473, those prisoners could file habeas petitions in the United States District Court for the District of Columbia. The Act, which was patterned on § 2255, substituted a new collateral process in the Superior Court for the pre-existing habeas corpus procedure in the District Court. See *Swain*, 430 U. S., at 374–378. But, again, the purpose and effect of the statute was to expedite consideration of the prisoner's claims, not to delay or frustrate it. See *id.*, at 375, n. 4 (not-

ing that the purpose of the D. C. Court Reform Act was to "alleviate" administrative burdens on the District Court).

That the statutes in *Hayman* and *Swain* were designed to strengthen, rather than dilute, the writ's protections was evident, furthermore, from this significant fact: Neither statute eliminated traditional habeas corpus relief. In both cases the statute at issue had a saving clause, providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. *Swain*, *supra*, at 381; *Hayman*, *supra*, at 223. The Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges. See *Swain*, *supra*, at 381 (noting that the provision "avoid[ed] any serious question about the constitutionality of the statute"); *Hayman*, *supra*, at 223 (noting that, because habeas remained available as a last resort, it was unnecessary to "reach constitutional questions").

Unlike in *Hayman* and *Swain*, here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review. Congress' purpose is evident not only from the unequivocal nature of MCA § 7's jurisdiction-stripping language, 28 U. S. C. § 2241(e)(1) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus . . . "), but also from a comparison of the DTA to the statutes at issue in *Hayman* and *Swain*. When interpreting a statute, we examine related provisions in other parts of the U. S. Code. See, *e. g.*, *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 88–97 (1991); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 717–718 (1995) (SCALIA, J., dissenting); see generally W. Eskridge, P. Frickey, & E. Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1039 (3d ed. 2001). When Congress has intended to replace traditional habeas corpus with habeas-like substitutes, as was the case in *Hayman* and *Swain*, it has granted to the courts broad remedial powers to secure the historic office of the writ. In the § 2255

context, for example, Congress has granted to the reviewing court power to "determine the issues and make findings of fact and conclusions of law" with respect to whether "the judgment [of conviction] was rendered without jurisdiction, or . . . the sentence imposed was not authorized by law or otherwise open to collateral attack." 28 U. S. C. § 2255(b) (2006 ed., Supp. II). The D. C. Court Reform Act, the statute upheld in *Swain*, contained a similar provision. § 23–110(g), 84 Stat. 609.

In contrast the DTA's jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful. DTA § 1005(e)(2)(C), 119 Stat. 2742. If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner. Instead, it would have used language similar to what it used in the statutes at issue in *Hayman* and *Swain*. Cf. *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972) *(per curiam)*)). Unlike in *Hayman* and *Swain*, moreover, there has been no effort to preserve habeas corpus review as an avenue of last resort. No saving clause exists in either the MCA or the DTA. And MCA § 7 eliminates habeas review for these petitioners.

The differences between the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U. S. C. § 2241 (2000 ed. and Supp. V), are likewise telling. In § 2241 (2000 ed.) Congress confirmed the authority of "any justice" or "circuit judge" to issue the writ. Cf. *Felker*, 518 U. S., at 660–661 (interpreting Title I of AEDPA to not strip from

this Court the power to entertain original habeas corpus petitions). That statute accommodates the necessity for fact-finding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for fact-finding is superior to his or her own. See 28 U. S. C. § 2241(b). By granting the Court of Appeals "exclusive" jurisdiction over petitioners' cases, see DTA § 1005(e)(2)(A), 119 Stat. 2742, Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure. See, *e. g.*, 151 Cong. Rec. S14263 (Dec. 21, 2005) (statement of Sen. Graham) (noting that the DTA "extinguish[es] these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court"); *ibid.* (statement of Sen. Kyl) (agreeing that the bill "create[s] in their place a very limited judicial review of certain military administrative decisions"); *id.*, at S14268 (same) ("It is important to note that the limited judicial review authorized by paragraphs 2 and 3 of subsection (e) [of DTA § 1005] are not habeas-corpus review. It is a limited judicial review of its own nature").

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. The present cases thus test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. *St. Cyr*, 533 U. S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See *Ex parte Bollman*, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"); R. Hurd, Treatise on the Right of Personal Liberty, and On the Writ of Habeas Corpus and the Practice Connected With It: With a View of the Law of Extradition of Fugitives 222 (2d ed. 1876) ("It cannot be denied where 'a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered,' for the writ then becomes a 'writ of right, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty' "). But see *Chessman* v. *Teets*, 354 U. S. 156, 165–166 (1957) (remanding in a habeas case for retrial within a "reasonable time"). These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Black-

stone *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup* v. *Delo*, 513 U. S. 298, 319 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed (or at least not with consistency) in such cases. Hurd, *supra*, at 271 (noting that the general rule was "subject to exceptions" including cases of bail and impressment); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 457 (1966) ("[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial" (footnotes omitted)); Fallon & Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2029, 2102 (2007) ("[T]he early practice was not consistent: courts occasionally permitted factual inquiries when no other opportunity for judicial review existed").

There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. See, *e. g.*, *Ex parte Pattison*, 56 Miss. 161, 164 (1878) (noting that "[w]hile the former adjudication must be considered as conclusive on the testimony then adduced" "newly developed exculpatory evidence . . . may authorize the admission to bail"); *Ex parte Foster*, 5 Tex. Ct. App. 625,

644 (1879) (construing the State's habeas statute to allow for the introduction of new evidence "where important testimony has been obtained, which, though not newly discovered, or which, though known to [the petitioner], it was not in his power to produce at the former hearing; [and] where the evidence was newly discovered"); *People* v. *Martin*, 7 N. Y. Leg. Obs. 49, 56 (1848) ("If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him . . . "); see generally W. Church, Treatise on the Writ of Habeas Corpus § 182, p. 235 1886) (hereinafter Church) (noting that habeas courts would "hear evidence anew if justice require it"). Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive "where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting." *Ex parte Robinson*, 20 F. Cas. 969, 971, (No. 11,935) (CC Ohio). To illustrate the circumstances in which the prior adjudication did not bind the habeas court, he gave the example of a case in which "[s]everal unimpeached witnesses" provided new evidence to exculpate the prisoner. *Ibid.*

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards"). This principle has an established foundation in habeas corpus jurisprudence as

well, as Chief Justice Marshall's opinion in *Ex parte Watkins*, 3 Pet. 193 (1830), demonstrates. Like the petitioner in *Swain*, Watkins sought a writ of habeas corpus after being imprisoned pursuant to a judgment of a District of Columbia court. In holding that the judgment stood on "high ground," 3 Pet., at 209, the Chief Justice emphasized the character of the court that rendered the original judgment, noting it was a "court of record, having general jurisdiction over criminal cases." *Id.*, at 203. In contrast to "inferior" tribunals of limited jurisdiction, *ibid.*, courts of record had broad remedial powers, which gave the habeas court greater confidence in the judgment's validity. See generally Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 982–983 (1998).

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. See *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.) (noting that a federal habeas court should accept a state court's factual findings unless "a vital flaw be found in the process of ascertaining such facts in the State court"). Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. See *Ex parte Royall*, 117 U. S. 241, 251–252 (1886) (requiring exhaustion of state collateral processes). Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, see Part IV–C, *supra*, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may

not be aware of the most critical allegations that the Government relied upon to order his detention. See App. to Pet. for Cert. in No. 06–1196, at 156, ¶ F(8) (noting that the detainee can access only the "unclassified portion of the Government Information"). The detainee can confront witnesses that testify during the CSRT proceedings. *Id.*, at 144, ¶ *g*(8). But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence "relevant and helpful," *ibid.*, ¶ *g*(9)—the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi.* See 542 U. S., at 538. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place, *id.*, at 525. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's due process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to prohibit the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic "no." *Id.*, at 527 (labeling this argument as "extreme"); *id.*, at 535–536.

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U. S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. See 2 Chambers, Course of Lectures on English Law 1767–1773, at 6 ("Liberty may be violated either by arbitrary *imprisonment* without law or the appearance of law, or by a lawful magistrate for an unlawful reason"). This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F. 3d, at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the post-conviction habeas setting. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963), overruled in part by *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 5 (1992). Here that opportunity is constitutionally required.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, *In re Yamashita*, 327 U. S. 1 (1946), and *Ex parte Quirin*, 317 U. S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. See *Yamashita*, *supra*, at 8 ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged"); *Quirin*, *supra*, at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners"). Military courts are not courts of record. See *Watkins*, 3 Pet., at 209; Church 513. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. See *Hamdan*, 548 U. S., at 617; *Yamashita*, *supra*, at 41–81 (Rutledge, J., dissenting). We need not revisit these cases, however. For on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here. See *Yama-*

shita, supra, at 5 (noting that General Yamashita was represented by six military lawyers and that "[t]hroughout the proceedings . . . defense counsel . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"); *Quirin, supra*, at 23–24; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the German saboteurs).

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. "[W]e are obligated to construe the statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. *St. Cyr*, 533 U. S., at 299–300 (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). There are limits to this principle, however. The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. See *Clark* v. *Martinez*, 543 U. S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*"). We cannot ignore the text and purpose of a statute in order to save it.

The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify

detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact. See Tr. of Oral Arg. 37, 53.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, DTA § 1005(e)(2)(B)(i), 119 Stat. 2742; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful, § 1005(e)(2)(C), *ibid.* Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence." § 1005(e)(2)(C)(i), *ibid.*

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determina-

tions, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all " 'reasonably available information in the possession of the U. S. Government bearing on the issue whether the detainee meets the criteria to be designated as an enemy combatant,' " regardless of whether this evidence was put before the CSRT. *Bismullah I*, 501 F. 3d, at 180. The Government, see Pet. for Cert. pending in *Gates* v. *Bismullah*, No. 07–1054 (hereinafter *Bismullah* Pet.), with support from five members of the Court of Appeals, see *Bismullah III*, 514 F. 3d, at 1299 (Henderson, J., dissenting from denial of rehearing en banc); *id.*, at 1302 (opinion of Randolph, J.) (same); *id.*, at 1306 (opinion of Brown, J.) (same), disagrees with this interpretation. For present purposes, however, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was "reasonably available" to the Government at the time of the CSRT but not made part of the record. Even so, the DTA review proceeding falls short of being a constitutionally adequate substitute, for the detainee still would have no opportunity to present evidence discovered after the CSRT proceedings concluded.

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT fol-

lowed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. Petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. See Brief for Boumediene Petitioners 5. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e. g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be ap-

propriate. See *Williams* v. *Taylor*, 529 U. S. 420, 436–437 (2000) (noting that § 2254 "does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

The Government does not make the alternative argument that the DTA allows for the introduction of previously unavailable exculpatory evidence on appeal. It does point out, however, that if a detainee obtains such evidence, he can request that the Deputy Secretary of Defense convene a new CSRT. See Supp. Brief for Federal Respondents 4. Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus. The Deputy Secretary's determination whether to initiate new proceedings is wholly a discretionary one. See Dept. of Defense, Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status ¶ 5(d) (May 7, 2007) (Instruction 5421.1) ("The decision to convene a CSRT to reconsider the basis of the detainee's [enemy combatant] status in light of 'new evidence' is a matter vested in the unreviewable discretion of the [Deputy Secretary of Defense]"). And we see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary's decision not to open a new CSRT pursuant to Instruction 5421.1. Congress directed the Secretary of Defense to devise procedures for considering new evidence, see DTA § 1005(a)(3), 119 Stat. 2741, but the detainee has no mechanism for ensuring that those procedures are followed. DTA § 1005(e)(2)(C), *id.*, at 2742, makes clear that the Court of Appeals' jurisdiction is "limited to consideration of . . . whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the

Secretary of Defense . . . and . . . whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(A), *ibid.*, further narrows the Court of Appeals' jurisdiction to reviewing "any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." The Deputy Secretary's determination whether to convene a new CSRT is not a "status determination of the [CSRT]," much less a "final decision" of that body.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody, *e. g.*, *Ex parte Royall*, 117 U. S. 241, and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action. See *Schlesinger*, 420 U. S., at 758.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of con-

finement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Cf. *Ex parte Milligan*, 4 Wall., at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course"). Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over two years ago, but no decisions on the merits have been issued. While some delay in fashioning new proce-

dures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7, 28 U. S. C. § 2241(e). Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. *Felker*, *Swain*, and *Hayman* stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future

cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, see *Rumsfeld* v. *Padilla*, 542 U. S. 426, 435–436 (2004), the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia. See 28 U. S. C. § 1404(a); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 499, n. 15 (1973).

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. See Brief for Federal Respondents 55–56; *Bismullah* Pet. 30. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. Cf. *United States* v. *Reynolds*, 345 U. S. 1, 10 (1953) (recognizing an evidentiary privilege in a civil damages case where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged").

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

* * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S.

304, 320 (1936). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer

boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan*, 548 U. S., at 636 (BREYER, J., concurring) ("[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul* v. *Bush*, 542 U. S. 466 (2004), held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them, *id.*, at 485. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. JUSTICE SCALIA is thus correct that here, for the first time, this Court holds there is (he says "confers") constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of *de jure* national sovereignty, see *post*, at 826 (dissenting opinion). But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question. See, *e. g.*, 542 U. S., at 473, 481–483, and nn. 11–14. Indeed, the Court in *Rasul* directly answered the very historical question that JUSTICE SCALIA says is dispositive, see *post*, at 843; it wrote that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus," 542 U. S., at 481. JUSTICE SCALIA dismisses the statement as dictum, see *post*, at 846, but if dictum it was, it was dictum well considered, and it stated the view of five Members of this Court on the historical scope of the writ. Of course, it takes more than a quotation from *Rasul*, however much on point, to resolve the constitutional issue before us here, which the majority opinion has explored afresh in the detail it deserves. But whether one agrees or disagrees with today's decision, it is no bolt out of the blue.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years, *ante*, at 794 (opinion of the Court). Hence the hollow ring when the dissenters suggest that the Court is somehow

precipitating the Judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. See, *e. g.*, *post*, at 803 (opinion of ROBERTS, C. J.) ("[T]he Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case"); *post*, at 805 ("[I]t is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate"); *post*, at 807 ("[The Court] rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary"). These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. See *ante*, at 793–794.

It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. See *post*, at 801, 802, 826 (opinion of ROBERTS, C. J.); *post*, at 830–831, 842–843, 849–850 (opinion of SCALIA, J.). The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court's exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and political branches. Instead, though, it is enough to repeat that some

of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation. See *ante*, at 797.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has exhausted the procedures under the law. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus—its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with JUSTICE SCALIA's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds.

Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. See Detainee Treatment Act of 2005 (DTA), § 1005(e)(2)(A), 119 Stat. 2742. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, *ante*, at 772, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured

abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

I

The Court's opinion makes plain that certiorari to review these cases should never have been granted. As two Members of today's majority once recognized, "traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies . . . make it appropriate to deny these petitions." *Boumediene* v. *Bush*, 549 U. S. 1328, 1329 (2007) (STEVENS and KENNEDY, JJ., statement respecting denial of certiorari) (citation omitted). Just so. Given the posture in which these cases came to us, the Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case.

The political branches created a two-part, collateral review procedure for testing the legality of the prisoners' detention: It begins with a hearing before a Combatant Status Review Tribunal (CSRT) followed by review in the D. C. Circuit. As part of that review, Congress authorized the D. C. Circuit to decide whether the CSRT proceedings are consistent with "the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. No petitioner, however, has invoked the D. C. Circuit review the statute specifies. See 476 F. 3d 981, 994, and n. 16 (CADC 2007); Brief for Federal Respondents 41–43. As a consequence, that court has had no occasion to decide whether the CSRT hearings, followed by review in the Court of Appeals, vindicate whatever constitutional and statutory rights petitioners may possess. See 476 F. 3d, at 994, and n. 16.

Remarkably, this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect

petitioners' rights. Instead, it not only denies the D. C. Circuit the opportunity to assess the statute's remedies, it refuses to do so itself: The majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process. See *ante*, at 785.

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 533 (2004), explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.*, at 533, 538. This point is directly pertinent here, for surely the Due Process Clause does not afford *non*-citizens in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, see *id.*, at 536; *INS* v. *St. Cyr*, 533 U. S. 289, 304 (2001); *Heikkila* v. *Barber*, 345 U. S. 229, 236 (1953), there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.

This is why the Court should have required petitioners to exhaust their remedies under the statute. As we explained in *Gusik* v. *Schilder*, 340 U. S. 128, 132 (1950): "If an available procedure has not been employed to rectify the alleged

error" petitioners complain of, "any interference by [a] federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion." Because the majority refuses to assess whether the CSRTs comport with the Constitution, it ends up razing a system of collateral review that it admits may in fact satisfy the Due Process Clause and be "structurally sound." *Ante*, at 785. But if the collateral review procedures Congress has provided—CSRT review coupled with Article III scrutiny—are sound, interference by a federal habeas court may be entirely unnecessary.

The only way to know is to require petitioners to use the alternative procedures Congress designed. Mandating that petitioners exhaust their statutory remedies "is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile." *Gusik*, *supra*, at 132. So too here, it is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect the detainees' rights. Cf. 28 U. S. C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). Respect for the judgments of Congress—whose Members take the same oath we do to uphold the Constitution—requires no less.

In the absence of any assessment of the DTA's remedies, the question whether detainees are entitled to habeas is an entirely speculative one. Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such [questions are] un-

avoidable"); see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (Constitutional questions should not be decided unless " 'absolutely necessary to a decision of the case' " (quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1905))). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984).

The Court acknowledges that "the ordinary course" would be not to decide the constitutionality of the DTA at this stage, but abandons that "ordinary course" in light of the "gravity" of the constitutional issues presented and the prospect of additional delay. *Ante*, at 772. It is, however, precisely when the issues presented are grave that adherence to the ordinary course is most important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices.

The Court is also concerned that requiring petitioners to pursue "DTA review before proceeding with their habeas corpus actions" could involve additional delay. *Ante*, at 794. The nature of the habeas remedy the Court instructs lower courts to craft on remand, however, is far more unsettled than the process Congress provided in the DTA. See *ante*, at 798 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined"). There is no reason to suppose that review according to procedures the Federal Judiciary will design, case by case, will proceed any faster than the DTA process petitioners disdained.

On the contrary, the system the Court has launched (and directs lower courts to elaborate) promises to take longer. The Court assures us that before bringing their habeas petitions, detainees must usually complete the CSRT process. See *ante*, at 795. Then they may seek review in federal district court. Either success or failure there will surely result

in an appeal to the D. C. Circuit—exactly where judicial review *starts* under Congress's system. The effect of the Court's decision is to add additional layers of quite possibly redundant review. And because nobody knows how these new layers of "habeas" review will operate, or what new procedures they will require, their contours will undoubtedly be subject to fresh bouts of litigation. If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2½ years, with its Article III review in the D. C. Circuit. That system might well have provided petitioners all the relief to which they are entitled long before the Court's newly installed habeas review could hope to do so.[1]

The Court's refusal to require petitioners to exhaust the remedies provided by Congress violates the "traditional rules governing our decision of constitutional questions." *Boumediene*, 549 U. S., at 1329 (STEVENS and KENNEDY, JJ., statement respecting denial of certiorari). The Court's disrespect for these rules makes its decision an awkward business. It rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary, and it

[1] In light of the foregoing, the concurrence is wrong to suggest that I "insufficiently appreciat[e]" the issue of delay in these cases. See *ante*, at 799 (opinion of SOUTER, J.). This Court issued its decisions in *Rasul* v. *Bush*, 542 U. S. 466, and *Hamdi* v. *Rumsfeld*, 542 U. S. 507, in 2004. The concurrence makes it sound as if the political branches have done nothing in the interim. In fact, Congress responded 18 months later by enacting the DTA. Congress cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe. Since the DTA became law, petitioners have steadfastly resisted the statute's review mechanisms, preferring to proceed under habeas. It is unfair to complain that the DTA system involves too much delay when petitioners have opted to litigate rather than pursue its procedures. Today's decision obligating district courts to craft new procedures to replace those in the DTA will only prolong the process—and delay relief.

does so with scant idea of how DTA judicial review will actually operate.

II

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, *ante*, at 772, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. See *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result). Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. See *ante*, at 787–788. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works—specifically, how CSRT review and review by the D. C. Circuit fit together. After briefly acknowledging in its reci-

tation of the facts that the Government designed the CSRTs "to comply with the due process requirements identified by the plurality in *Hamdi*," *ante*, at 734, the Court proceeds to dismiss the tribunal proceedings as no more than a suspect method used by the Executive for determining the status of the detainees in the first instance, see *ante*, at 783. This leads the Court to treat the review the DTA provides in the D. C. Circuit as the only opportunity detainees have to challenge their status determination. See *ante*, at 778.

The Court attempts to explain its glancing treatment of the CSRTs by arguing that "[w]hether one characterizes the CSRT process as direct review of the Executive's battlefield determination . . . or as the first step in the collateral review of a battlefield determination makes no difference." *Ante*, at 783. First of all, the majority is quite wrong to dismiss the Executive's determination of detainee status as no more than a "battlefield" judgment, as if it were somehow provisional and made in great haste. In fact, detainees are designated "enemy combatants" only after "multiple levels of review by military officers and officials of the Department of Defense." Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base (July 29, 2004), App. J to Pet. for Cert. in No. 06–1196, p. 150 (hereinafter Implementation Memo).

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to *challenge* the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190–8, see Brief for Federal Respondents 48, the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas court, see 542 U. S., at 538 (plurality opinion). The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony,

and render a decision on the legality of the Government's detention. See Implementation Memo 153–162. If the CSRT finds a particular detainee has been improperly held, it can order release. See *id.*, at 164.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." *Ante*, at 785. This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination. See *Gusik*, 340 U. S., at 132. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

The use of a military tribunal such as the CSRTs to review the aliens' detention should be familiar to this Court in light of the *Hamdi* plurality, which said that the due process rights enjoyed by *American citizens* detained as enemy combatants could be vindicated "by an appropriately authorized and properly constituted military tribunal." 542 U. S., at 538. The DTA represents Congress's considered attempt to provide the accused alien combatants detained at Guantanamo a constitutionally adequate opportunity to contest their detentions before just such a tribunal.

But Congress went further in the DTA. CSRT review is just the first tier of collateral review in the DTA system. The statute provides additional review in an Article III court. Given the rationale of today's decision, it is well worth recalling exactly what the DTA provides in this respect. The statute directs the D. C. Circuit to consider whether a particular alien's status determination "was consistent with the standards and procedures specified by the Secretary of Defense" *and* "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA

§ 1005(e)(2)(C), 119 Stat. 2742. That is, a *court* determines whether the CSRT procedures are constitutional, and a *court* determines whether those procedures were followed in a particular case.

In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. See 542 U. S., at 538. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Hamdi merits scant attention from the Court—a remarkable omission, as *Hamdi* bears directly on the issues before us. The majority attempts to dismiss *Hamdi*'s relevance by arguing that because the availability of § 2241 federal habeas was never in doubt in that case, "the Court had no occasion to define the necessary scope of habeas review . . . in the context of enemy combatant detentions." *Ante*, at 784. Hardly. *Hamdi* was all about the scope of habeas review in the context of enemy combatant detentions. The petitioner, an American citizen held within the United States as an enemy combatant, invoked the writ to challenge his detention. 542 U. S., at 510–511. After "a careful examination both of the writ . . . and of the Due Process Clause," this Court enunciated the "basic process" the Constitution entitled Hamdi to expect from a habeas court under § 2241. *Id.*, at 525, 534. That process consisted of the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.*, at 533. In light of the Government's national security responsibilities, the plurality found the process could be "tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." *Ibid.* For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence. See *id.*, at 533–534.

Hamdi further suggested that this "basic process" on collateral review could be provided by a military tribunal. It

pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution's requirements. See *id.*, at 538. Only "[i]n the *absence* of such process" before a military tribunal, the Court held, would Article III courts need to conduct full-dress habeas proceedings to "ensure that the minimum requirements of due process are achieved." *Ibid.* (emphasis added). And even then, the petitioner would be entitled to no more process than he would have received from a properly constituted military review panel, given his limited due process rights and the Government's weighty interests. See *id.*, at 533–534, 538.

Contrary to the majority, *Hamdi* is of pressing relevance because it establishes the procedures American *citizens* detained as enemy combatants can expect from a habeas court proceeding under § 2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation's military leaders have made a good-faith effort to follow our precedent.

The Court, however, will not take "yes" for an answer. The majority contends that "[i]f Congress had envisioned DTA review as coextensive with traditional habeas corpus," it would have granted the D. C. Circuit far broader review authority. *Ante*, at 777. Maybe so, but that comment reveals the majority's misunderstanding. "[T]raditional habeas corpus" takes *no* account of what *Hamdi* recognized as the "uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. Besides, Congress and the Executive did not envision "DTA review"—by which I assume the Court means D. C. Circuit review, see *ante*, at 777—as the detainees' only opportunity to challenge their detentions. Instead, the political branches crafted CSRT *and* D. C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process *Hamdi* said would satisfy the due

process rights of American citizens. See Brief for Federal Respondents 48–53.

B

Given the statutory scheme the political branches adopted, and given *Hamdi*, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." *Ante*, at 767. The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the "basic process" *Hamdi* said the Constitution affords American citizens detained as enemy combatants. See 542 U. S., at 534.

By virtue of its refusal to allow the D. C. Circuit to assess petitioners' statutory remedies, and by virtue of its own refusal to consider, at the outset, the fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect. The majority attempts to elide this problem by holding that petitioners have a right to habeas corpus and then comparing the DTA against the "historic office" of the writ. *Ante*, at 776. But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right. Its "precise application . . . change[s] depending upon the circumstances." *Ante*, at 779. The shape of habeas review ultimately depends on the nature of the rights a petitioner may assert. See, *e. g.*, *Reid* v. *Covert*, 354 U. S. 1, 75 (1957) (Harlan, J., concurring in result) ("[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case").

The scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert. See *St. Cyr*, 533 U. S., at 306 ("In [immigration cases], other than the question whether there was some evidence to support the [deportation] order, the courts generally did not review factual determinations made by the Executive" (footnote omitted)); *Burns* v. *Wilson*, 346 U. S. 137, 139 (1953) (plurality opinion) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases"); *In re Yamashita*, 327 U. S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review"); *Ex parte Quirin*, 317 U. S. 1, 25 (1942) (federal habeas review of military commission verdict limited to determining commission's jurisdiction).

Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a means for vindicating petitioners' rights, it is necessarily an adequate substitute for habeas corpus. See *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977); *United States* v. *Hayman*, 342 U. S. 205, 223 (1952).

For my part, I will assume that any due process rights petitioners may possess are no greater than those of American citizens detained as enemy combatants. It is worth noting again that the *Hamdi* controlling opinion said the Constitution guarantees citizen detainees only "basic" procedural rights, and that the process for securing those rights can "be tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. The majority, however, objects that "the procedural protections afforded to the detainees in the CSRT hearings

are . . . limited." *Ante*, at 767. But the evidentiary and other limitations the Court complains of reflect the nature of the issue in contest, namely, the status of aliens captured by our Armed Forces abroad and alleged to be enemy combatants. Contrary to the repeated suggestions of the majority, DTA review need not parallel the habeas privileges enjoyed by noncombatant American citizens, as set out in 28 U. S. C. § 2241 (2000 ed. and Supp. V). Cf. *ante*, at 777–778. It need only provide process adequate for noncitizens detained as alleged combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ "'as it existed in 1789.'" *St. Cyr*, *supra*, at 301 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 663–664 (1996)). The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." *Ante*, at 747. If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient—it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. Today's Court opines that the Suspension Clause guarantees prisoners such as the detainees "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law." *Ante*, at 779 (internal quotation marks omitted). Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees' cases "must have the power to order the conditional release of an individual unlawfully detained." *Ibid.* The DTA system—CSRT review of the Executive's determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process—meets these criteria.

C

At the CSRT stage, every petitioner has the right to present evidence that he has been wrongfully detained. This includes the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal. See Implementation Memo 154–156, 158–159, 161.

While the Court concedes detainees may confront all witnesses called before the tribunal, it suggests this right is "more theoretical than real" because "there are in effect no limits on the admission of hearsay evidence." *Ante*, at 784. The Court further complains that petitioners lack "the assistance of counsel," and—given the limits on their access to classified information—"may not be aware of the most critical allegations" against them. *Ante*, at 783–784. None of these complaints is persuasive.

Detainees not only have the opportunity to confront any witness who appears before the tribunal, they may call witnesses of their own. The Implementation Memo requires only that detainees' witnesses be "reasonably available," App. J to Pet. for Cert. in No. 06–1196, ¶F(6), at 155, a requirement drawn from Army Regulation 190–8, ch. 1, § 1–6(*e*)(6), and entirely consistent with the Government's interest in avoiding "a futile search for evidence" that might burden warmaking responsibilities, *Hamdi*, *supra*, at 532. The dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas. The Court is correct that some forms of hearsay evidence are admissible before the CSRT, but *Hamdi* expressly approved this use of hearsay by habeas courts. 542 U. S., at 533–534 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government").

As to classified information, while detainees are not permitted access to it themselves, the Implementation Memo provides each detainee with a "Personal Representative" who may review classified documents and comment on this

evidence to the CSRT on the detainee's behalf. Implementation Memo 152, 154–156; Brief for Federal Respondents 54–55. The prisoner's counsel enjoys the same privilege on appeal before the D. C. Circuit. That is more access to classified material for alleged alien enemy combatants than ever before provided. I am not aware of a single instance—and certainly the majority cites none—in which detainees such as petitioners have been provided access to classified material in *any* form. Indeed, prisoners of war who challenge their status determinations under the Geneva Convention are afforded no such access, see Army Regulation 190–8, ch. 1, §§ 1–6(*e*)(3) and (5), and the prisoner-of-war model is the one *Hamdi* cited as consistent with the demands of due process for *citizens*, see 542 U. S., at 538.

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.

Prisoners of war are not permitted access to classified information, and neither are they permitted access to counsel, another supposed failing of the CSRT process. And yet the Guantanamo detainees are hardly denied all legal assistance. They are provided a "Personal Representative" who, as previously noted, may access classified information, help the detainee arrange for witnesses, assist the detainee's preparation of his case, and even aid the detainee in presenting his evidence to the tribunal. See Implementation Memo 161. The provision for a personal representative on this order is one of several ways in which the CSRT procedures

are *more* generous than those provided prisoners of war under Army Regulation 190–8.

Keep in mind that all this is just at the CSRT stage. Detainees receive additional process before the D. C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions. DTA § 1005(e)(2)(C) empowers the Court of Appeals to determine not only whether the CSRT observed the "procedures specified by the Secretary of Defense," but also "whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States." 119 Stat. 2742. These provisions permit detainees to dispute the sufficiency of the evidence against them. They allow detainees to challenge a CSRT panel's interpretation of any relevant law, and even the constitutionality of the CSRT proceedings themselves. This includes, as the Solicitor General acknowledges, the ability to dispute the Government's right to detain alleged combatants in the first place, and to dispute the Government's definition of "enemy combatant." Brief for Federal Respondents 59. All this before an Article III court—plainly a neutral decisionmaker.

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. See *ante,* at 790. The Court hints darkly that the DTA may suffer from other infirmities, see *ante*, at 792 ("We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limita-

tions on the detainee's ability to present exculpatory evidence"), but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. See *supra*, at 816–817; Implementation Memo 155–156. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D. C. Circuit has the authority to say so on review.

Nevertheless, the Court asks us to imagine an instance in which evidence is discovered *after* the CSRT panel renders its decision, but *before* the Court of Appeals reviews the detainee's case. This scenario, which of course has not yet come to pass as no review in the D. C. Circuit has occurred, provides no basis for rejecting the DTA as a habeas substitute. While the majority is correct that the DTA does not contemplate the introduction of "newly discovered" evidence before the Court of Appeals, petitioners and the Solicitor General agree that the DTA *does* permit the D. C. Circuit to remand a detainee's case for a new CSRT determination. Brief for Petitioner Boumediene et al. in No. 06–1195, p. 30; Brief for Federal Respondents 60–61. In the event a detainee alleges that he has obtained new and persuasive exculpatory evidence that would have been considered by the tribunal below had it only been available, the D. C. Circuit could readily remand the case to the tribunal to allow that body to consider the evidence in the first instance. The Court of Appeals could later review any new or reinstated decision in light of the supplemented record.

If that sort of procedure sounds familiar, it should. Federal appellate courts reviewing factual determinations follow

just such a procedure in a variety of circumstances. See, *e. g.*, *United States* v. *White*, 492 F. 3d 380, 413 (CA6 2007) (remanding new-evidence claim to the district court for a *Brady* evidentiary hearing); *Avila* v. *Roe*, 298 F. 3d 750, 754 (CA9 2002) (remanding habeas claim to the district court for evidentiary hearing to clarify factual record); *United States* v. *Leone*, 215 F. 3d 253, 256 (CA2 2000) (observing that when faced on direct appeal with an underdeveloped claim for ineffective assistance of counsel, the appellate court may remand to the district court for necessary factfinding).

A remand is not the only relief available for detainees caught in the Court's hypothetical conundrum. The DTA expressly directs the Secretary of Defense to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." § 1005(a)(3), 119 Stat. 2741. Regulations issued by the Department of Defense provide that when a detainee puts forward new, material evidence "not previously presented to the detainee's CSRT," the Deputy Secretary of Defense "'will direct that a CSRT convene to reconsider the basis of the detainee's . . . status in light of the new information.'" Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status ¶¶ 4(a)(1), 5(b) (May 7, 2007); Brief for Federal Respondents 56, n. 30. Pursuant to DTA § 1005(e)(2)(A), the resulting CSRT determination is again reviewable in full by the D. C. Circuit.[2]

[2] The Court wonders what might happen if the detainee puts forward new material evidence but the Deputy Secretary refuses to convene a new CSRT. See *ante*, at 791–792. The answer is that the detainee can petition the D. C. Circuit for review. The DTA directs that the procedures for review of new evidence be included among "[t]he procedures submitted under paragraph (1)(A)" governing CSRT review of enemy combatant status. § 1405(a)(3), 119 Stat. 3476. It is undisputed that the D. C. Circuit has statutory authority to review and enforce these procedures. See DTA § 1005(e)(2)(C)(i), *id.*, at 2742.

In addition, DTA § 1005(d)(1) further requires the Department of Defense to conduct a yearly review of the status of each prisoner. See 119 Stat. 2741. The Deputy Secretary of Defense has promulgated concomitant regulations establishing an Administrative Review Board to assess "annually the need to continue to detain each enemy combatant." Deputy Secretary of Defense Order OSD 06942–04 (May 11, 2004), App. K to Pet. for Cert. in No. 06–1196, at 189. In the words of the implementing order, the purpose of this annual review is to afford every detainee the opportunity "to explain why he is no longer a threat to the United States" and should be released. *Ibid.* The Board's findings are forwarded to a presidentially appointed, Senate-confirmed civilian within the Department of Defense whom the Secretary of Defense has designated to administer the review process. This designated civilian official has the authority to order release upon the Board's recommendation. *Id.*, at 201.

The Court's hand wringing over the DTA's treatment of later discovered exculpatory evidence is the most it has to show after a roving search for constitutionally problematic scenarios. But "[t]he delicate power of pronouncing an Act of Congress unconstitutional," we have said, "is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U. S. 17, 22 (1960). The Court today invents a sort of reverse facial challenge and applies it with gusto: If there is *any* scenario in which the statute *might* be constitutionally infirm, the law must be struck down. Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid"); see also *Washington* v. *Glucksberg*, 521 U. S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgments) (facial challenge must fail where the statute has "'plainly legitimate sweep'" (quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973))). The Court's new method

of constitutional adjudication only underscores its failure to follow our usual procedures and require petitioners to demonstrate that *they* have been harmed by the statute they challenge. In the absence of such a concrete showing, the Court is unable to imagine a plausible hypothetical in which the DTA is unconstitutional.

E

The Court's second criterion for an adequate substitute is the "power to order the conditional release of an individual unlawfully detained." *Ante*, at 779. As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible. See *ante*, at 787–788.

The Solicitor General concedes that remedial authority of some sort must be implied in the statute, given that the DTA—like the general habeas law itself, see 28 U. S. C. § 2243—provides no express remedy of any kind. Brief for Federal Respondents 60–61. The parties agree that at the least, the DTA empowers the D. C. Circuit to remand a prisoner's case to the CSRT with instructions to perform a new status assessment. Brief for Petitioner Boumediene et al. in No. 06–1195, at 30; Brief for Federal Respondents 60–61. To avoid constitutional infirmity, it is reasonable to imply more, see *Ashwander*, 297 U. S., at 348 (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will . . . ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided" (internal quotation marks omitted)); see also *St. Cyr*, 533 U. S., at 299–300, especially in view of the Solicitor General's concession at oral argument and in his supplemental brief that authority to release might be read in the statute, see Tr. of Oral Arg. 37; Supplemental Brief for Federal Respondents 9.

The Court grudgingly suggests that "we can assume congressional silence permits a constitutionally required remedy." *Ante*, at 788. But the argument in favor of statutorily authorized release is stronger than that. The DTA's parallels to 28 U. S. C. § 2243 on this score are noteworthy. By way of remedy, the general federal habeas statute provides only that the court, having heard and determined the facts, shall "dispose of the matter as law and justice require." *Ibid.* We have long held, and no party here disputes, that this includes the power to order release. See *Wilkinson* v. *Dotson*, 544 U. S. 74, 79 (2005) ("[T]he writ's history makes clear that it traditionally has been accepted as the specific instrument to obtain release from [unlawful] confinement" (internal quotation marks omitted)).

The DTA can be similarly read. Because Congress substituted DTA review for habeas corpus and because the "unique purpose" of the writ is "to release the applicant . . . from unlawful confinement," *Allen* v. *McCurry*, 449 U. S. 90, 98, n. 12 (1980), DTA § 1005(e)(2) can and should be read to confer on the Court of Appeals the authority to order release in appropriate circumstances. Section 1005(e)(2)(D) plainly contemplates release, addressing the effect "release of [an] alien from the custody of the Department of Defense" will have on the jurisdiction of the court. 119 Stat. 2742–2743. This reading avoids serious constitutional difficulty and is consistent with the text of the statute.

The D. C. Circuit can thus order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release. These multiple release provisions within the DTA system more than satisfy the majority's requirement that any tribunal substituting for a habeas court have the authority to release the prisoner.

The basis for the Court's contrary conclusion is summed up in the following sentence near the end of its opinion: "To hold that the detainees at Guantanamo may, under the DTA,

challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them." *Ante*, at 792. In other words, any interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas. The Court could have saved itself a lot of trouble if it had simply announced this Catch-22 approach at the beginning rather than the end of its opinion.

III

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should *generally* refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. See *ante*, at 795 ("[e]xcept in cases of undue delay"). But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled "habeas"? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects. See *ante*, at 796 ("We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible"). But "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U. S. 21, 34–35 (1982).

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

- The right to hear the bases of the charges against them, including a summary of any classified evidence.
- The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process. Brief for Federal Respondents 57, 60.
- The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
- The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
- Before the D. C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Consti-

tution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history.

* * *

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine—through democratic means—how best" to balance the security of the American people with the detainees' liberty interests, see *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 636 (2006) (BREYER, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of

an ongoing war. THE CHIEF JUSTICE's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

I

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. See National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report, pp. 60–61, 70, 190 (2004). On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. See *id.*, at 552, n. 188. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war

harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense, p. 1 (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. See S. Rep. No. 110–90, pt. 7, p. 13 (2007) (minority views of Sens. Kyl, Sessions, Graham, Cornyn, and Coburn) (hereinafter Minority Report). Some have been captured or killed. See *ibid.;* see also Mintz, Released Detainees Rejoining the Fight, Washington Post, Oct. 22, 2004, pp. A1, A12. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnaping of two Chi-

nese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. See Khan & Lancaster, Pakistanis Rescue Hostage; 2nd Dies, Washington Post, Oct. 15, 2004, p. A18. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Mintz, *supra*. Still another murdered an Afghan judge. See Minority Report 13. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq. See White, Ex-Guantanamo Detainee Joined Iraq Suicide Attack, Washington Post, May 8, 2008, p. A18.

These, mind you, were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As THE CHIEF JUSTICE's dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would be no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court *is* clear about is affording the detainees increased access to witnesses (perhaps troops serv-

ing in Afghanistan?) and to classified information. See *ante*, at 783–784. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. See Minority Report 14–15. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities. See *id.*, at 15.

And today it is not just the military that the Court elbows aside. A mere two Terms ago in *Hamdan* v. *Rumsfeld*, 548 U. S. 557 (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following:

> "Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary.
>
> "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Id.*, at 636 (BREYER, J., concurring).[1]

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[1] Even today, the Court cannot resist striking a pose of faux deference to Congress and the President. Citing the above quoted passage, the Court says: "The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism." *Ante*, at 798. Indeed. What the Court apparently means is that the political branches can debate, after which the Third Branch will decide.

Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive—*both* political branches—have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. As the Solicitor General argued, "the Military Commissions Act and the Detainee Treatment Act . . . represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." Brief for Federal Respondents 10–11 (internal quotation marks omitted).

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." *Ante*, at 769. "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." *Ibid.* What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

II

A

The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be sus-

pended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. As a court of law operating under a written Constitution, our role is to determine whether there is a conflict between that Clause and the Military Commissions Act. A conflict arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.

We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. See, *e. g.*, *Department of Labor* v. *Triplett*, 494 U. S. 715, 721 (1990); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963); see also *American Communications Assn.* v. *Douds*, 339 U. S. 382, 435 (1950) (Jackson, J., concurring in part and dissenting in part). That is especially so in the area of foreign and military affairs; "perhaps in no other area has the Court accorded Congress greater deference." *Rostker* v. *Goldberg*, 453 U. S. 57, 64–65 (1981). Indeed, we accord great deference even when the President acts alone in this area. See *Department of Navy* v. *Egan*, 484 U. S. 518, 529–530 (1988); *Regan* v. *Wald*, 468 U. S. 222, 243 (1984).

In light of those principles of deference, the Court's conclusion that "the common law [does not] yiel[d] a definite answer to the questions before us," *ante*, at 752, leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. See Part III, *infra*. The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. See *ante*, at 752–754; *Rasul* v. *Bush*, 542 U. S. 466, 500–501 (2004) (SCALIA, J., dissenting). Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided

a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the co-equal branches.[2]

How, then, does the Court weave a clear constitutional prohibition out of pure interpretive equipoise? The Court resorts to "fundamental separation-of-powers principles" to interpret the Suspension Clause. *Ante*, at 755. According to the Court, because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," the test of its extraterritorial reach "must not be subject to manipulation by those whose power it is designed to restrain." *Ante*, at 765, 766.

That approach distorts the nature of the separation of powers and its role in the constitutional structure. The "fundamental separation-of-powers principles" that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general "separation-of-powers principles" dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them. And if the understood scope

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[2] The opinion seeks to avoid this straightforward conclusion by saying that the Court has been "careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." *Ante*, at 746 (citing *INS* v. *St. Cyr*, 533 U. S. 289, 300–301 (2001)). But not foreclosing the possibility that they have expanded is not the same as demonstrating (or at least holding without demonstration, which seems to suffice for today's majority) that they have expanded. The Court must either hold that the Suspension Clause has "expanded" in its application to aliens abroad, or acknowledge that it has no basis to set aside the actions of Congress and the President. It does neither.

of the writ of habeas corpus was "designed to restrain" (as the Court says) the actions of the Executive, the understood *limits* upon that scope were (as the Court seems not to grasp) just as much "designed to restrain" the incursions of the Third Branch. "Manipulation" of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as "manipulation" by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.

B

The Court purports to derive from our precedents a "functional" test for the extraterritorial reach of the writ, *ante*, at 764, which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson* v. *Eisentrager*, 339 U. S. 763, conclusively establishes the opposite. There we were confronted with the claims of 21 Germans held at Landsberg Prison, an American military facility located in the American zone of occupation in postwar Germany. They had been captured in China, and an American military commission sitting there had convicted them of war crimes—collaborating with the Japanese after Germany's surrender. *Id.*, at 765–766. Like petitioners here, the Germans claimed that their detentions violated the Constitution and international law, and sought a writ of habeas corpus. Writing for the Court, Justice Jackson held that American courts lacked habeas jurisdiction:

> "We are cited to *[sic]* no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within

> its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768.

Justice Jackson then elaborated on the historical scope of the writ:

> "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . .
>
> "But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 770–771.

Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States. *Id.*, at 779–780 (discussing *Ex parte Quirin*, 317 U. S. 1 (1942), and *In re Yamashita*, 327 U. S. 1 (1946)). "By reason of our sovereignty at that time over [the Philippines]," Jackson wrote, "Yamashita stood much as did Quirin before American courts." 339 U. S., at 780.

Eisentrager thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.[3]

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[3] In its failed attempt to distinguish *Eisentrager*, the Court comes up with the notion that "*de jure* sovereignty" is simply an additional factor that can be added to (presumably) "*de facto* sovereignty" (*i. e.*, practical control) to determine the availability of habeas for aliens, but that it is not a necessary factor, whereas *de facto* sovereignty is. It is perhaps in this *de facto* sense, the Court speculates, that *Eisentrager* found "sovereignty"

The Court would have us believe that *Eisentrager* rested on "[p]ractical considerations," such as the "difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding." *Ante*, at 762. Formal sovereignty, says the Court, is merely one consideration "that bears upon which constitutional guarantees apply" in a given location. *Ante*, at 764. This is a sheer rewriting of the case. *Eisentrager* mentioned practical concerns, to be sure—but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances.* As Justice Black accurately said in dissent, "the Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." 339 U. S., at 796.

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lacking. See *ante*, at 755, 763–764. If that were so, one would have expected *Eisentrager* to explain in some detail why the United States did not have practical control over the American zone of occupation. It did not (and probably could not). Of course this novel *de facto-de jure* approach does not explain why the writ never issued to Scotland, which was assuredly within the *de facto* control of the English Crown. See *infra*, at 846–847.

To support its holding that *de facto* sovereignty is relevant to the reach of habeas corpus, the Court cites our decision in *Fleming* v. *Page*, 9 How. 603 (1850), a case about the application of a customs statute to a foreign port occupied by U. S. forces. See *ante*, at 754. The case used the phrase "subject to the sovereignty and dominion of the United States" to refer to the United States' practical control over a "foreign country." 9 How., at 614. But *Fleming* went on to explain that because the port remained part of the "enemy's country," even though under U. S. military occupation, "its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws." *Id.*, at 618. If *Fleming* is relevant to these cases at all, it undermines the Court's holding.

The Court also tries to change *Eisentrager* into a "functional" test by quoting a paragraph that lists the characteristics of the German petitioners:

> "To support [the] assumption [of a constitutional right to habeas corpus] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." *Id.*, at 777 (quoted in part, *ante,* at 766).

But that paragraph is introduced by a sentence stating that "[t]he foregoing demonstrates *how much further we must go* if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts." 339 U. S., at 777 (emphasis added). How much further than *what?* Further than the rule set forth in the prior section of the opinion, which said that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 771. In other words, the characteristics of the German prisoners were set forth, not in application of some "functional" test, but to show that the case before the Court represented an *a fortiori* application of the ordinary rule. That is reaffirmed by the sentences that immediately follow the listing of the Germans' characteristics:

> "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here,

> for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.*, at 777–778.

Eisentrager nowhere mentions a "functional" test, and the notion that it is based upon such a principle is patently false.[4]

The Court also reasons that *Eisentrager* must be read as a "functional" opinion because of our prior decisions in the Insular Cases. See *ante*, at 756–759. It cites our statement in *Balzac* v. *Porto Rico*, 258 U. S. 298, 312 (1922), that "'the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and require-

[4] JUSTICE SOUTER's concurrence relies on our decision four Terms ago in *Rasul* v. *Bush*, 542 U. S. 466 (2004), where the Court interpreted the habeas statute to extend to aliens held at Guantanamo Bay. He thinks that "no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases." *Ante*, at 799. But *Rasul* was devoted primarily to an explanation of why *Eisentrager*'s statutory holding no longer controlled given our subsequent decision in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973). See *Rasul*, 542 U. S., at 475–479. And the opinion of the Court today—which JUSTICE SOUTER joins—expressly rejects the historical evidence cited in *Rasul* to support its conclusion about the reach of habeas corpus. Compare *id.*, at 481–482, with *ante*, at 748. Moreover, even if one were to accept as true what JUSTICE SOUTER calls *Rasul*'s "well-considered" dictum, that does not explain why *Eisentrager*'s constitutional holding must be overruled or how it can be distinguished. (After all, *Rasul* distinguished *Eisentrager*'s statutory holding on a ground inapplicable to its constitutional holding.) In other words, even if the Court were to conclude that *Eisentrager*'s rule was incorrect as an original matter, the Court would have to explain the justification for departing from that precedent. It therefore cannot possibly be true that *Rasul* controls these cases, as JUSTICE SOUTER suggests.

ments.'" *Ante,* at 758. But the Court conveniently omits *Balzac*'s predicate to that statement: "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted." 258 U. S., at 312 (emphasis added). The Insular Cases all concerned Territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States. See *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 268 (1990); *Reid* v. *Covert,* 354 U. S. 1, 13 (1957) (plurality opinion of Black, J.). None of the Insular Cases stands for the proposition that aliens located outside U. S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus. As I have said, *Eisentrager* distinguished *Yamashita* on the ground of "our sovereignty [over the Philippines]," 339 U. S., at 780.

The Court also relies on the "[p]ractical considerations" that influenced our decision in *Reid* v. *Covert, supra.* See *ante,* at 759–762. But all the Justices in the majority except Justice Frankfurter limited their analysis to the rights of *citizens* abroad. See *Reid,* 354 U. S., at 5–6 (plurality opinion of Black, J.); *id.*, at 74–75 (Harlan, J., concurring in result). (Frankfurter limited his analysis to the even narrower class of civilian dependents of American military personnel abroad, see *id.*, at 45 (opinion concurring in result).) In trying to wring some kind of support out of *Reid* for today's novel holding, the Court resorts to a chain of logic that does not hold. The members of the *Reid* majority, the Court says, were divided over whether *In re Ross,* 140 U. S. 453 (1891), which had (according to the Court) held that under certain circumstances American citizens abroad do not have indictment and jury-trial rights, should be overruled. In the Court's view, the *Reid* plurality would have overruled *Ross,* but Justices Frankfurter and Harlan preferred to distinguish it. The upshot: "If citizenship had been the only relevant factor in the case, it would have been necessary for

the Court to overturn *Ross*, something Justices Harlan and Frankfurter were unwilling to do." *Ante*, at 761–762. What, exactly, is this point supposed to prove? To say that "practical considerations" determine the precise content of the constitutional protections American citizens enjoy when they are abroad is quite different from saying that "practical considerations" determine whether aliens abroad enjoy any constitutional protections whatever, including habeas. In other words, merely because citizenship is not a *sufficient* factor to extend constitutional rights abroad does not mean that it is not a *necessary* one.

The Court tries to reconcile *Eisentrager* with its holding today by pointing out that in postwar Germany, the United States was "answerable to its Allies" and did not "pla[n] a long-term occupation." *Ante*, at 768. Those factors were not mentioned in *Eisentrager*. Worse still, it is impossible to see how they relate to the Court's asserted purpose in creating this "functional" test—namely, to ensure a judicial inquiry into detention and prevent the political branches from acting with impunity. Can it possibly be that the Court trusts the political branches more when they are beholden to foreign powers than when they act alone?

After transforming the *a fortiori* elements discussed above into a "functional" test, the Court is still left with the difficulty that most of those elements exist here as well with regard to all the detainees. To make the application of the newly crafted "functional" test produce a different result in the present cases, the Court must rely upon factors (d) and (e): The Germans had been tried by a military commission for violations of the laws of war; the present petitioners, by contrast, have been tried by a Combatant Status Review Tribunal (CSRT) whose procedural protections, according to the Court's *ipse dixit*, "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Ante*, at 767. But no one looking for "functional" equivalents would put *Eisentrager* and the pres-

ent cases in the same category, much less place the present cases in a preferred category. The difference between them cries out for lesser procedures in the present cases. The prisoners in *Eisentrager* were *prosecuted* for crimes after the cessation of hostilities; the prisoners here are enemy combatants *detained* during an ongoing conflict. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 538 (2004) (plurality opinion) (suggesting, as an adequate substitute for habeas corpus, the use of a tribunal akin to a CSRT to authorize the detention of *American citizens* as enemy combatants during the course of the present conflict).

The category of prisoner comparable to these detainees are not the *Eisentrager* criminal defendants, but the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court—and that despite the fact that they were present on U. S. soil. See Bradley, The Military Commissions Act, Habeas Corpus, and the Geneva Conventions, 101 Am. J. Int'l L. 322, 338 (2007). The Court's analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises "absolute and indefinite" control, may seek a writ of habeas corpus in federal court. And, as an even more bizarre implication from the Court's reasoning, those prisoners whom the military plans to try by full-dress Commission at a future date may file habeas petitions and secure release before their trials take place.

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U. S. sovereign territory, see *Verdugo-Urquidez*, *supra*, at 271, and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting *Eisentrager*, the Court avoids the difficulty of ex-

plaining why it should be overruled. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992) (identifying *stare decisis* factors). The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's "functional" test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed. It has engendered considerable reliance on the part of our military. And, as the Court acknowledges, text and history do not clearly compel a contrary ruling. It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.

C

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, "it would be possible for the political branches to govern without legal constraint" in areas beyond the sovereign territory of the United States. *Ante*, at 765. That cannot be, the Court says, because it is the duty of this Court to say what the law is. *Ibid.* It would be difficult to imagine a more question-begging analysis. "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies *properly before them.*" *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960) (citing *Marbury* v. *Madison*, 1 Cranch 137 (1803); emphasis added). Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555,

573–578 (1992). And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

But so long as there are *some* places to which habeas does not run—so long as the Court's new "functional" test will not be satisfied *in every case*—then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the *other* branches will be (shudder!) *supreme*. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

III

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad, as Judge Randolph's thorough opinion for the court below detailed. See 476 F. 3d 981, 988–990 (CADC 2007).

The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people. See, *e. g.*, *Crawford* v. *Washington*, 541 U. S. 36, 54 (2004). That course is especially demanded when (as here) the Constitution limits the power of Congress to infringe

upon a pre-existing common-law right. The nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding. See *McNally* v. *Hill*, 293 U. S. 131, 135–136 (1934); see also *INS* v. *St. Cyr*, 533 U. S. 289, 342 (2001) (SCALIA, J., dissenting); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 471, n. 9 (1942) (Jackson, J., concurring).

It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. To be sure, the writ had an "extraordinary territorial ambit," because it was a so-called "prerogative writ," which, unlike other writs, could extend beyond the realm of England to other places where the Crown was sovereign. R. Sharpe, The Law of Habeas Corpus 188 (2d ed. 1989) (hereinafter Sharpe); see also Note on the Power of the English Courts to Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and On the Position of Scotland in Relation to that Power, 8 Jurid. Rev. 157 (1896) (hereinafter Note on Habeas); *King* v. *Cowle*, 2 Burr. 834, 855–856, 97 Eng. Rep. 587, 599 (K. B. 1759).

But prerogative writs could not issue to foreign countries, even for British subjects; they were confined to the King's dominions—those areas over which the Crown was sovereign. See Sharpe 188; 2 R. Chambers, A Course of Lectures on the English Law 1767–1773, pp. 7–8 (T. Curley ed. 1986); 3 W. Blackstone, Commentaries on the Laws of England 131 (1768) (hereinafter Blackstone). Thus, the writ has never extended to Scotland, which, although united to England when James I succeeded to the English throne in 1603, was considered a foreign dominion under a different Crown—that of the King of Scotland. Sharpe 191; Note on Habeas 158.[5] That is why Lord Mansfield wrote that "[t]o foreign dominions, which belong to a prince who succeeds to the throne of

[5] My dissent in *Rasul* v. *Bush*, 542 U. S. 466, 503 (2004), mistakenly included Scotland among the places to which the writ could run.

England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland . . . ." *Cowle, supra,* at 856, 97 Eng. Rep., at 599–600.

The common-law writ was codified by the Habeas Corpus Act of 1679, which "stood alongside Magna Charta and the English Bill of Rights of 1689 as a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course." Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 663 (1996). The writ was established in the Colonies beginning in the 1690's and at least one colony adopted the 1679 Act almost verbatim. See Dept. of Political Science, Okla. State Univ., Research Reports, No. 1, R. Walker, The American Reception of the Writ of Liberty 12–16 (1961). Section XI of the Act stated where the writ could run. It "may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, and the islands of *Jersey* or *Guernsey*." 31 Car. 2, ch. 2. The cinque-ports and counties palatine were so-called "exempt jurisdictions"—franchises granted by the Crown in which local authorities would manage municipal affairs, including the court system, but over which the Crown maintained ultimate sovereignty. See 3 Blackstone 78–79. The other places listed—Wales, Berwick-upon-Tweed, Jersey, and Guernsey—were territories of the Crown even though not part of England proper. See *Cowle, supra,* at 853–854, 97 Eng. Rep., at 598 (Wales and Berwick-upon-Tweed); 1 Blackstone 104 (Jersey and Guernsey); Sharpe 192 (same).

The Act did not extend the writ elsewhere, even though the existence of other places to which British prisoners could be sent was recognized by the Act. The possibility of evading judicial review through such spiriting-away was eliminated, not by expanding the writ abroad, but by forbidding (in Section XII of the Act) the shipment of prisoners to places where the writ did not run or where its execution

would be difficult. See 31 Car. 2, ch. 2; see generally Nutting, The Most Wholesome Law—The Habeas Corpus Act of 1679, 65 Am. Hist. Rev. 527 (1960).

The Habeas Corpus Act, then, confirms the consensus view of scholars and jurists that the writ did not run outside the sovereign territory of the Crown. The Court says that the idea that "jurisdiction followed the King's officers" is an equally credible view. *Ante*, at 746. It is not credible at all. The only support the Court cites for it is a page in Boumediene's brief, which in turn cites this Court's dicta in *Rasul*, 542 U. S., at 482, mischaracterizing Lord Mansfield's statement that the writ ran to any place that was "under the subjection of the Crown," *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599. It is clear that Lord Mansfield was saying that the writ extended outside the realm of England proper, not outside the sovereign territory of the Crown.[6]

The Court dismisses the example of Scotland on the grounds that Scotland had its own judicial system and that the writ could not, as a practical matter, have been enforced there. *Ante*, at 750. Those explanations are totally unpersuasive. The existence of a separate court system was never a basis for denying the power of a court to issue the writ. See 9 W. Holdsworth, A History of English Law 124, and n. 6 (3d ed. 1944) (citing *Ex parte Anderson*, 3 El. and El. 487, 121 Eng. Rep. 525 (K. B. 1861)). And as for logistical problems, the same difficulties were present for places like the Channel Islands, where the writ did run. The Court attempts to draw an analogy between the prudential limitations on issuing the writ to such remote areas within the sovereign territory of the Crown and the jurisdictional prohibition on issuing the writ to Scotland. See *ante*, at 749–750. But the very authority that the Court cites, Lord

[6] The dicta in *Rasul* also cited *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), but as I explained in dissent, "[e]ach judge [in *Mwenya*] made clear that the detainee's status as a subject was material to the resolution of the case," 542 U. S., at 504.

Mansfield, expressly distinguished between these two concepts, stating that English courts had the "power" to send the writ to places within the Crown's sovereignty, the "only question" being the "propriety," while they had "no power to send any writ of any kind" to Scotland and other "foreign dominions." *Cowle*, 2 Burr., at 856, 97 Eng. Rep., at 599–600. The writ did not run to Scotland because, even after the Union, "Scotland remained a foreign dominion of the prince who succeeded to the English throne," and "union did not extend the prerogative of the English crown to Scotland." Sharpe 191; see also Sir Matthew Hale's The Prerogatives of the King 19 (D. Yale ed. 1976).[7]

In sum, *all* available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. Despite three opening briefs, three reply briefs, and support from a legion of *amici*, petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners either. See *ante*, at 752. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous

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[7] The Court also argues that the fact that the writ could run to Ireland, even though it was ruled under a "separate" crown, shows that formal sovereignty was not the touchstone of habeas jurisdiction. *Ante*, at 751. The passage from Blackstone that the Court cites, however, describes Ireland as "a dependent, subordinate kingdom" that was part of the "king's dominions." 1 Blackstone 98, 100 (internal quotation marks omitted). And Lord Mansfield's opinion in *Cowle* plainly understood Ireland to be "a dominion of the Crown of England," in contrast to the "foreign dominio[n]" of Scotland, and thought that distinction dispositive of the question of habeas jurisdiction. 2 Burr., at 856, 97 Eng. Rep., at 599–600.

commentary stating that habeas was confined to the dominions of the Crown.

What history teaches is confirmed by the nature of the limitations that the Constitution places upon suspension of the common-law writ. It can be suspended only "in Cases of Rebellion or Invasion." Art. I, § 9, cl. 2. The latter case (invasion) is plainly limited to the territory of the United States; and while it is conceivable that a rebellion could be mounted by American citizens abroad, surely the overwhelming majority of its occurrences would be domestic. If the extraterritorial scope of habeas turned on flexible, "functional" considerations, as the Court holds, why would the Constitution limit its suspension almost entirely to instances of domestic crisis? Surely there is an even greater justification for suspension in foreign lands where the United States might hold prisoners of war during an ongoing conflict. And correspondingly, there is less threat to liberty when the Government suspends the writ's (supposed) application in foreign lands, where even on the most extreme view prisoners are entitled to fewer constitutional rights. It makes no sense, therefore, for the Constitution generally to forbid suspension of the writ abroad if indeed the writ has application there.

It may be objected that the foregoing analysis proves too much, since this Court has already suggested that the writ of habeas corpus *does* run abroad for the benefit of United States citizens. "[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights . . . is precisely the position that this Court adopted in *Eisentrager*, see 339 U. S., at 769–770, even while holding that aliens abroad did not have habeas corpus rights." *Rasul*, *supra*, at 501, 502 (SCALIA, J., dissenting) (emphasis deleted). The reason for that divergence is not difficult to discern. The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from

the consent of the governed, and in which citizens (not "subjects") are afforded defined protections against the Government. As Justice Story wrote for the Court:

> "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Pacard*, 2 Pet. 137, 144 (1829).

See also Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791 (1951). It accords with that principle to say, as the plurality opinion said in *Reid:* "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 354 U. S., at 6; see also *Verdugo-Urquidez*, 494 U. S., at 269–270. On that analysis, "[t]he distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.*, at 275 (KENNEDY, J., concurring).

In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

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Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt,

for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson* v. *Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.