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ARTICLES

Habeas and (Non-)Delegation

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Although the Constitution's Suspension Clause explicitly mentions the writ of habeas corpus, it does not require that Congress make the writ available in its common-law form at all times. Rather, the Clause has long been understood to permit Congress to replace the writ with an alternative procedure, so long as that remedy is an adequate and effective substitute for habeas corpus. Under this functional view of the Suspension Clause, Congress might delegate responsibility for performing the habeas review function to an entity other than an Article III court, so long as the substitute procedure allows a detainee to challenge the lawfulness of his detention fairly and effectively. Because, at its core, habeas is concerned with checking arbitrary executive detention, however, this Article argues that any delegation of the habeas review function to a non-Article III entity must conform to the dictates of the nondelegation doctrine. To delegate the authority for designing the procedures used to challenge executive detention to the very Executive responsible for detention would defeat the purpose of the Clause.

In Boumediene v Bush, the Supreme Court cast doubt on its prior functional jurisprudence regarding the Suspension Clause. In particular, the Court expressed hostility toward any substitute for habeas corpus that did not rely exclusively on an Article III court. This Article criticizes the Court's approach in Boumediene and demonstrates how it threatens the functional view of the Suspension Clause the Court had embraced previously. At the same time, this Article explains how and why nondelegation concerns justified the result in Boumediene. In particular, by relying so heavily on an executive-designed scheme—the Combatant Status Review Tribunals—Congress's substitute for habeas delegated excessive authority to the Executive to perform the habeas review function. For that reason, Congress's attempt to eliminate access to the writ for Guantanamo detainees through the Military Commissions Act of 2006 violated the Suspension Clause when read

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in conjunction with the nondelegation doctrine. A decision grounded more in nondelegation than in the absolutist conception of the Suspension Clause espoused by the Boumediene majority would have preserved more flexibility for the political branches to design a system for detaining terrorist suspects in the future.

INTRODUCTION

“Hands off habeas corpus!” So declared, effectively, a narrow majority of the Supreme Court to Congress and the President in *Boumediene v Bush*.¹ In striking down § 7 of the Military Commissions Act of 2006² (MCA), which eliminated habeas corpus for suspected terrorists held at Guantanamo Bay, the *Boumediene* majority jealously guarded the Great Writ while struggling to explain what exactly about it was so irreplaceable. The *Boumediene* majority thus called into question the Court’s prior, seemingly functional jurisprudence under the Suspension Clause,³ which permitted the replacement of the traditional habeas corpus remedy with an adequate and effective substitute therefor.⁴ Moreover, the *Boumediene* majority demonstrated a surprising resistance to construing the MCA and its companion legislation, the Detainee Treatment Act of 2005⁵ (DTA), in a manner that would render them constitutional, despite the usual canon of construction requiring the Court to do just that.⁶ The Court also cast aside the regular presumption that, in matters of national security, amplifications of the President’s power—in this case, the power to detain—are valid when supported by Congress.⁷

In moving toward a more absolutist approach to the Suspension Clause and showing little deference to the political branches, *Boume-*

¹ 128 S Ct 2229 (2008).

² Military Commissions Act of 2006 (MCA) § 7, Pub L No 109-366, 120 Stat 2600, 2635–36, codified at 28 USC § 2241(e).

³ US 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.”).

⁴ See *Swain v Pressley*, 430 US 372, 381 (1977) (“[T]he 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.”); *United States v Hayman*, 342 US 205, 223 (1952) (holding that substitute procedures were permissible unless “inadequate or ineffective”).

⁵ Detainee Treatment Act of 2005 (DTA), Pub L No 109-148, 119 Stat 2739.

⁶ See *Boumediene*, 128 S Ct at 2291–92 (Roberts dissenting) (describing the canon of constitutional avoidance as requiring the Court to determine if it is “fairly possible” to construe the statute so as to avoid the constitutional question), citing *Ashwander v Tennessee Valley Authority*, 297 US 288, 348 (1936) (Brandeis concurring).

⁷ See *Boumediene*, 128 S Ct at 2296 (Scalia dissenting) (describing necessary deference to Congress). See also *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 635 (1952) (Jackson concurring) (“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.”).

diene constricted the democratic space in which elected officials might craft a system for detaining terrorist suspects. Regardless, many opponents of the government's indefinite detention of terrorist suspects at Guantanamo welcomed the result in *Boumediene* because it appeared to provide detainees with a fairer chance of contesting their "enemy combatant" status.⁸ This Article accepts the normative attractiveness of *Boumediene's* result, but suggests an alternative basis on which the Court might have reached the same decision. Namely, in striking down the DTA's replacement for habeas, the Court could have identified the Act's excessive delegation from Congress to the Executive as a primary constitutional flaw. By effectively authorizing the executive branch to establish the procedures a detainee must use to vindicate his liberty, the MCA and DTA violated the nondelegation doctrine when read in conjunction with the Suspension Clause. To that end, this Article explains how and why the nondelegation doctrine should inform our understanding of the Suspension Clause.

Before invoking the nondelegation doctrine, it is necessary to explain why any delegation of habeas is permissible at all. Indeed, some scholars have assumed that the Suspension Clause guarantees that an Article III court be available to hear habeas petitions, and that any infringement thereon, unless called a "suspension" in response to the requisite "rebellion or invasion," would violate the Clause.⁹ Other scholars, by contrast, have asserted in passing that Congress could delegate at least some of the responsibility for hearing challenges to executive detention to an administrative agency or legislative court.¹⁰ This Article seeks to bridge the gap between these views, arguing that some delegation of the traditional habeas *function*—the neutral review of the legality of executive detention—to a non-Article III court or agency is permissible under the Suspension Clause. Such a delegation, however, pursuant to the nondelegation doctrine, must be appropriately restrained to ensure that the Suspension Clause continues to protect against arbitrary executive detention.

⁸ See, for example, Farah Stockman, *Justices Open US Courts to Detainees: Deal Setback to Bush; Influx of Cases Expected*, Boston Globe A1 (June 13, 2008) (reporting that then-Senator Barack Obama, an opponent of the administration's tribunal system, celebrated the Court's decision for upholding the rule of law by protecting the core American value of allowing individuals to challenge their detention).

⁹ See, for example, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum L Rev 961, 1020–23 (1998); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L J 2509, 2538 (1998).

¹⁰ See, for example, Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 Const Comment 377, 402 n 107, 408 (2009).

Because the Supreme Court has only twice invoked the nondelegation doctrine to invalidate federal laws, both times in 1935,¹¹ it is tempting to dismiss as foolhardy any modern invocation of the doctrine. For the last seventy years, advocates of a nondelegation revival have run headlong into the federal courts' reluctance to disturb the modern administrative state, in which Congress routinely delegates broad authority to administrative agencies to formulate and effectuate policy. Unfortunately, the nondelegation doctrine's descent into desuetude in the area of administrative law has obscured its potential usefulness in the very different context of habeas corpus, where the doctrine fits comfortably within the Constitution's text and structure. The power to suspend habeas corpus is mentioned only in Article I, which outlines the powers of the legislative branch. The Framers, well aware of the British experience with habeas corpus, understood suspension to be primarily, if not exclusively, a legislative power. As the Supreme Court has stressed in recent years, the writ of habeas corpus was, and is, at its core, about checking arbitrary executive detention.¹² As such, the Court has clarified that the Suspension Clause not only limits Congress's authority to eliminate the writ, but also imposes upon Congress an affirmative obligation to provide at least some means of contesting executive detention in a manner consistent with the writ's historic office.¹³ Allowing Congress to delegate broadly its responsibilities under the Suspension Clause to the Executive, as Congress did in passing the DTA and MCA, empowers the very Executive that the Clause is designed to restrain.

Rather than stress Congress's abandonment of its constitutional responsibilities in *Boumediene*, the Court focused on the essentiality of preserving habeas corpus inviolate as a procedural remedy. In particular, Justice Anthony Kennedy's majority opinion in *Boumediene* emphasized habeas's essential role in allowing the judiciary to police both political branches for constitutional violations.¹⁴ In doing so, the *Boumediene* majority shifted the proper focus of the Suspension Clause away from restraining the Executive to restraining the Executive and Congress. This shift likely reflected the Court's frustration with Congress's unwillingness to stand up to the administration of President George W. Bush during the "war on terror," despite re-

¹¹ See note 294 and accompanying text.

¹² See *Boumediene*, 128 S Ct at 2283 (Roberts dissenting); *Hamdi v Rumsfeld*, 542 US 507, 525 (2004); *INS v St. Cyr*, 533 US 289, 301 (2001).

¹³ *Swain*, 430 US at 381.

¹⁴ *Boumediene*, 128 S Ct at 2247.

peated invitations from the Court to do so.¹⁵ While the *Boumediene* majority's frustration was understandable,¹⁶ its reasoning perversely validates congressional acquiescence to the Executive and limits the flexibility of more assertive Congresses in the future, problems which a decision grounded in nondelegation might have avoided.¹⁷

This Article proceeds in three Parts. Part I explains how the Suspension Clause is more than simply a negative restraint on Congress. The Clause also affirmatively requires that Congress provide some means for contesting arbitrary executive detention, and empowers Congress to meet this requirement. Part I discusses the Court's pre-*Boumediene* functional approach to the Clause, which purported to permit "adequate and effective" substitutes for the Great Writ.¹⁸ Part I defends this functional jurisprudence as consistent with the history of habeas, the structure of the Constitution, and good policy. It posits that under this functional jurisprudence, it was reasonable for Congress to believe that it could delegate some of its responsibility under the Suspension Clause to provide for the review of executive detention to an entity other than an Article III court. Part I also argues that a congressional delegation of the habeas function to a legislative court or an executive agency would not necessarily violate Article III.

Part II reviews the Supreme Court's decision in *Boumediene* and concludes that the majority opinion moves toward an absolutist reading of the Suspension Clause, strongly implying that any replacement for habeas that is charged to an entity other than an Article III court cannot pass constitutional muster. In lieu of this less attractive reasoning, Part III offers an alternative rationale for the result in *Boumediene* that is more consistent with a functional view of the Suspension Clause. Specifically, Part III explains how nondelegation principles support the result in *Boumediene*. In doing so, Part III describes the origins of the nondelegation doctrine and its modern relevance in the habeas context, concluding that the doctrine works particularly well in conjunction with the Suspension Clause. In addition to discussing the facts of *Boumediene*, Part III uses the case of *Parhat v Gates*,¹⁹ a pre-*Boumediene* challenge to detention brought by Chinese Uighurs held as

¹⁵ Katz, 25 Const Comment at 418–20 (cited in note 10).

¹⁶ See id. See generally Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L Rev 281 (2008) (arguing that when Congress enacted the MCA, the legislature was aware that § 7 was unconstitutional and expected the Court to invalidate it).

¹⁷ Diller, 61 SMU L Rev at 331 (cited in note 16).

¹⁸ *Swain*, 430 US at 381.

¹⁹ 532 F3d 834 (DC Cir 2008).

“enemy combatants” at Guantanamo, as a lens through which to examine the habeas replacement invalidated in *Boumediene Parhat*, as Part III explains, illustrates why the DTA delegated excessive authority to the executive branch, thereby making it an inadequate substitute for the habeas remedy that the MCA attempted to withdraw.

The Conclusion briefly engages the question of how a potential “national security court,” which has been proposed by some scholars and policymakers as a means of justifying continued preventive detention of some terrorist suspects, would comport with the analysis offered herein. The Conclusion more broadly considers some of the implications of a viable nondelegation doctrine in the Suspension Clause context, and sketches meaningful limits on Congress’s ability to delegate to the Executive the power to suspend or replace the writ of habeas corpus in the future.

I. THE SUSPENSION CLAUSE AS AFFIRMATIVE OBLIGATION, RESTRAINT, AND SOURCE OF POWER

By the late eighteenth century, the writ of habeas corpus had evolved into the primary means of challenging executive detention within the British legal system.²⁰ In the American colonies as well, the Great Writ was considered a primary safeguard of individual liberty against a tyrannical Executive.²¹ When they specifically mentioned the writ of habeas corpus in the Constitution, therefore, the Framers contemplated a procedural device that, at a minimum, allowed a person imprisoned without criminal conviction by a competent court²² to challenge his detention before a neutral magistrate who would demand

²⁰ See Federalist 84 (Hamilton), in *The Federalist* 575, 577 (Wesleyan 1961) (Jacob E. Cooke, ed) (quoting William Blackstone’s reference to habeas corpus as “the *Bulwark* of the British constitution”).

²¹ See *id.* See also Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *Yale L J* 600, 613 (2009); William F. Duker, *A Constitutional History of Habeas Corpus* 95–116 (Greenwood 1980) (explaining the development of the writ in Britain’s North American colonies).

²² See *United States v Hayman*, 342 US 205, 211 (1952); *Ex parte Watkins*, 28 US (3 Pet) 193, 203 (1830) (“An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.”). See also Duker, *Constitutional History* at 229 (cited in note 21); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 *Mich L Rev* 451, 461 (1966) (stating the general rule that habeas corpus relief was not available when the defendant had been judged “on an indictment according to the course of common law”), citing *Ex parte Lees*, 120 Eng Rep 718, 721 (QB 1860); Rex A. Collings, Jr, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 *Cal L Rev* 335, 338, 345, 351 (1952) (“Once convicted of a crime, there was no privilege of the writ.”). But see Collings, 40 *Cal L Rev* at 337–38 (noting that on rare occasions higher courts granted the writ after summary conviction by a lower court, or when jurisdiction was in question).

that the jailer explain his authority for imprisoning the petitioner.²³ If the jailer's authority was found legally insufficient, the judge before whom the petitioner had appeared could order the prisoner's release.²⁴ Although Congress would expand the scope of the writ of habeas corpus greatly in the latter half of the nineteenth century, its Founding-era function as a means of challenging executive detention remains, as the Supreme Court has repeatedly described it, the "core" of the Great Writ.²⁵ By contrast, until the early twentieth century, proof of conviction by a court of competent jurisdiction in the jailer's "return" to the writ generally sufficed to justify detention.²⁶

The authors of the Constitution considered the writ of habeas corpus so important that they specifically mentioned it among the negative commands to Congress enumerated in Article I, § 9. The Suspension Clause states: "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."²⁷ Exactly what the Framers intended by the Clause has been the subject of much debate since the ratification of the Constitution. By its literal terms, the Clause prescribes the circumstances under which Congress may suspend the privilege of the writ—in cases of "rebellion" and "invasion"—without necessarily requiring that the writ be made available in the first place. As a result, some judges, lawyers, and scholars, including Justice Antonin Scalia

²³ Duker, *Constitutional History* at 40–45 (cited in note 21) (explaining how the writ evolved into a restraint on the Executive); William Blackstone, *3 Commentaries on the Laws of England* 133 (Clarendon 1768) (describing the need for the court to examine testimony concerning the reasons why a prisoner was in custody before ruling upon a writ of habeas corpus).

²⁴ Blackstone, *3 Commentaries* at 133 (cited in note 23). See also *Federalist* 84 (Hamilton) at 577 (cited in note 20).

²⁵ *Boumediene*, 128 S Ct at 2279 (Roberts dissenting) ("Habeas is most fundamentally . . . a mechanism for contesting the legality of executive detention."); *Munaf v Geren*, 128 S Ct 2207, 2221 (2008) ("Habeas is at its core a remedy for unlawful executive detention."); *Rasul v Bush*, 542 US 466, 474 (2004) ("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."), quoting *INS v St. Cyr*, 533 US 289, 301 (2001); *Swain v Pressley*, 430 US 372, 386 (1977) (Burger concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). To be sure, a prisoner challenging a criminal conviction is challenging detention by the executive branch insofar as the Executive oversees the federal or state prison system. The Bureau of Prisons, which oversees federal prisoners serving sentences for criminal convictions, for example, is part of the executive branch as a component of the Department of Justice. See Act of May 14, 1930, Pub L No 71-218, 46 Stat 325 (establishing "in the Department of Justice a Bureau of Prisons"). By "executive" detention, however, the Supreme Court and most commentators have meant detention pursuant to executive command, rather than detention pursuant to a sentence imposed by a court of record.

²⁶ See note 22. See also *Fay v Noia*, 372 US 391, 456 (1963) (Harlan dissenting).

²⁷ US Const Art I, § 9, cl 2.

and former Attorney General Alberto Gonzales, have argued that the Clause only limits the circumstances under which Congress may suspend whatever form of the writ it has provided, but does not require Congress to make the writ available in the first place.²⁸ I refer to this view as the positivist conception of the Clause. On the other end of the spectrum is what I call the absolutist view, which understands the Clause as requiring Congress to make available the common law writ of habeas corpus at all times except when Congress formally suspends the writ pursuant to the Suspension Clause's conditions.²⁹ Even if Congress did not make the writ available by written law, the absolutists contend, the Suspension Clause on its own would require that some Article III court be available to grant the writ, at least to serve its original function of reviewing executive detention.³⁰

The debate between the absolutists and the positivists regarding the scope of the Suspension Clause has been largely academic throughout American history in light of the first Congress's passage of the Judiciary Act of 1789.³¹ In establishing a system of "inferior" federal courts, which the Constitution permitted—but did not require—Congress to do,³² the Act expressly provided that all such courts, as well as the Supreme Court, would have the power to issue writs of habeas corpus, at least for prisoners in the custody of the United States.³³ The Act thus laid the foundation for a "middle ground" between the positivist and absolutist views of the Suspension Clause. This middle-ground view, sometimes attributed to Chief Justice John Marshall's opinion in the 1807 case of *Ex parte Bollman*,³⁴ holds that the Suspension Clause on its own does not grant habeas jurisdiction, but it does require Congress to give "life and activity" to the writ by making habeas available in some core set of cases, including the re-

²⁸ Justice Department Oversight Hearing before the Senate Committee on the Judiciary, 110th Cong, 1st Sess 52 (2007) (statement of Attorney General Alberto R. Gonzales) (arguing that the Constitution does not guarantee the right to habeas corpus); *St. Cyr*, 533 US at 337 (Scalia dissenting) ("A straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus."). See also Collings, 40 Cal L Rev at 344 (cited in note 22) ("It is unlikely that the Framers viewed the clause as establishing a federal right to habeas corpus.").

²⁹ See Duker, *Constitutional History* at 126 (cited in note 21).

³⁰ *Id.*

³¹ Act of September 24, 1789 ("Judiciary Act of 1789"), 1 Stat 73.

³² See US Const Art III, § 1. But see *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 331 (1816) (reasoning that the words of the Constitution compel Congress to create inferior courts).

³³ Judiciary Act of 1789 § 14, 1 Stat at 81–82.

³⁴ 8 US (4 Cranch) 75 (1807).

view of executive detention.³⁵ To be sure, the middle-ground position, by viewing the Suspension Clause as requiring something from Congress, is closer to the absolutist view of the Clause than it is to the positivist conception. On the other hand, the middle-ground view differs from the absolutist view in its flexibility. Rather than imposing a rigid mandate on Congress, the middle-ground view allows Congress to play a role in shaping the precise contours of the writ.

In the 1952 case of *Hayman v United States*,³⁶ the Supreme Court took the middle-ground view a step further in embracing a functional understanding of the Suspension Clause. In *Hayman*, the Court upheld against a Suspension Clause challenge a statute passed by Congress that replaced habeas with an alternative procedure for certain federal prisoners seeking post-conviction review.³⁷ In upholding this habeas replacement, the Court focused on whether it would serve as an “adequate and effective substitute” for the *function* that habeas corpus was supposed to serve: providing a neutral venue for reviewing the legality of detention.³⁸ Like the middle-ground position, the functionalist understanding of the Suspension Clause articulated in *Hayman* views Congress as instrumental in crafting the specific contours of what the Suspension Clause protects. Unlike the middle-ground position, however, the functional view holds that the Suspension Clause can be satisfied even if Congress requires those challenging their detention to use a procedural device other than “habeas corpus.”

A. Functional Approach to the Suspension Clause

Like the middle-ground view of the Suspension Clause, the functional approach appropriately recognizes the historic role of the legis-

³⁵ Id at 95 (noting that the first Congress, “[a]cting under the immediate influence of [the Suspension Clause’s] injunction, [] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity”). See also Tyler, 118 Yale L J at 608 (cited in note 21) (“[T]he Suspension Clause constitutes not only a limitation on Congress but also an *implicit obligation* on that body to ensure some measure of jurisdiction in the courts to award the core habeas remedy.”) (emphasis altered). Some scholars have read Chief Justice Marshall’s *Bollman* opinion as embracing a positivist conception of the Suspension Clause rather than the middle-ground view. See, for example, Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U Miami L Rev 275, 278 (2008); Paul D. Halliday and G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va L Rev 575, 683 (2008) (noting that Marshall’s *Bollman* opinion “has been understood by some commentators to mean that the source of the habeas privilege in America is exclusively statutory”).

³⁶ 342 US 205 (1952).

³⁷ Id at 207, 223.

³⁸ Id at 222–23.

lature in shaping habeas corpus. In Great Britain, Parliament was instrumental in transforming the writ from a royal prerogative that the king used to control his subjects³⁹ into a constraint on the king's authority.⁴⁰ While the British courts played an important role in the writ's transformation,⁴¹ Parliament bolstered the courts' authority to do so through legislation that established detailed procedures for the writ's usage.⁴² The Habeas Corpus Act of 1679, for instance, not only cemented the writ's role as guardian against executive detention,⁴³ but also addressed such procedural specifics as fees for filing petitions for the writ and the number of days within which the jailer was required to file his return.⁴⁴ The Act served as a model for habeas statutes of the colonies⁴⁵ as well as for the habeas constitutional provisions of some of

³⁹ Duker, *Constitutional History* at 27 (cited in note 21) (noting that the original purpose of the writ was "to secure the presence" of an individual before a court, thereby compelling the party to submit to the king's judicial authority).

⁴⁰ *Boumediene*, 128 S Ct at 2244–46 (discussing the "painstaking" historical "development" of the writ from "an instrument of the King's power [to] a restraint upon it").

⁴¹ See Duker, *Constitutional History* at 27–44 (cited in note 21) (explaining English courts' evolving use of the writ). See also Halliday and White, 94 Va L Rev at 612 (cited in note 35) (arguing that after 1679, "all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ").

⁴² See, for example, Habeas Corpus Act of 1679, 31 Car II, ch 2, in 5 Statutes of the Realm 935 (creating habeas procedures). See also Duker, *Constitutional History* at 52–62 (cited in note 21) (explaining the passage of the 1679 Act, "which, with the exception of the Magna Carta, is probably the most famous statute in the annals of English Law"); id at 30–31 (explaining legislative improvements to habeas corpus passed by Parliament in 1554 and 1623); Collings, 40 Cal L Rev at 336 (cited in note 22) (noting that the writ of habeas corpus "acquired its full and present importance by legislation"). But see Halliday and White, 94 Va L Rev at 611 (cited in note 35) (arguing that it is a "persistent misapprehension" that habeas was a parliamentary rather than judicial "gift").

⁴³ See Blackstone, 1 *Commentaries on the Laws of England* 137 (Clarendon 1765) (describing the Habeas Corpus Act of 1679 as a "stable bulwark of our liberties").

⁴⁴ Habeas Corpus Act of 1679, 31 Car II, ch 2, in 5 Statutes of the Realm at 935–36. See also Collings, 40 Cal L Rev at 337 (cited in note 22) (noting that the 1679 Act was "essentially a procedural statute"); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 Can Bar Rev 10, 18 (1940); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 Can Bar Rev 172, 185–96 (1940) (recounting the Act's changes to habeas procedure in detail).

⁴⁵ *Boumediene*, 128 S Ct at 2246, citing Collings, 40 Cal L Rev at 338–39 (cited in note 21) ("[I]t was the model upon which the habeas statutes of the 13 American Colonies were based."). See also Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U Chi L Rev 243, 251 (1965) (noting that although the 1679 Act did not formally apply to the colonies, royal governors in certain colonies issued proclamations extending the Act's protections); Zechariah Chafee, Jr, *The Most Important Human Right in the Constitution*, 32 BU L Rev 143, 146 (1952) (surmising that, whether formally extended or not, "all judges" used the procedures of the 1679 Act "as a matter of course" in the colonies). But see Halliday and White, 94 Va L Rev at 611 (cited in note 35) (arguing that Blackstone overstates the importance of the Act); Duker, *Constitutional*

the thirteen states after independence.⁴⁶ Regardless of whether the Framers intended for the Suspension Clause to protect *state* habeas remedies from elimination by the federal government, as some commentators have argued,⁴⁷ it is clear that the Framers' understanding of the writ's meaning was informed greatly by the Habeas Corpus Act of 1679 and its influence on colonial and state habeas law.⁴⁸

While the Judiciary Act of 1789 was spare in its language with respect to habeas corpus's procedural specifics,⁴⁹ it would be a mistake to view the first Congress's laconism as an indication that it intended for the judiciary to have sole control over the details of habeas review, or that it intended to freeze the scope of the writ as then understood for perpetuity. Rather, the first Congress, faced with the enormous task of establishing a federal judiciary from scratch, most likely sought to incorporate by reference the preexisting common law of habeas, which by then probably included Parliament's Habeas Corpus Act of 1679.⁵⁰ Consistent with the British legal experience, the first Congress was inclined to view the development of habeas as an evolutionary, inter-branch process that allowed the legislature to respond to judicial rulings by affirming or disclaiming them through statute. As such, early Congresses felt free to pass laws changing the scope of habeas juris-

History at 105–10 (cited in note 21) (noting that some, but not all, colonies adopted habeas corpus legislation similar to the 1679 Act).

⁴⁶ Tyler, 118 Yale L J at 627 n 122 (cited in note 21) (noting that at least four states—Georgia, Massachusetts, New Hampshire, and North Carolina—had constitutional habeas corpus provisions by 1787).

⁴⁷ See, for example, Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich L Rev 862, 872–73 (1994); Duker, *Constitutional History* at 8, 131 (cited in note 21); Collings, 40 Cal L Rev at 344 (cited in note 22). In *Tarble's Case*, 80 US (13 Wall) 397, 411 (1871), the Supreme Court rejected this understanding of the Suspension Clause, holding that state habeas claims could not lie against federal officials. Consider Duker, *Constitutional History* at 153–56 (cited in note 21) (casting doubt on the *Tarble* Court's claim that the case's outcome was dictated by the Supremacy Clause).

⁴⁸ See *Boumediene*, 128 S Ct at 2246; Tyler, 118 Yale L J at 619 (cited in note 21) (noting that the Framers were “heavily steeped” in Blackstone's *Commentaries*); Blackstone, 1 *Commentaries* at 135–38 (cited in note 43).

⁴⁹ See Judiciary Act of 1789 § 14, 1 Stat at 81–82.

⁵⁰ James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex L Rev 1433, 1443 n 39 (2000) (observing that the Act of 1679 “shed[s] light on the language and structure of the habeas provisions” of the Judiciary Act of 1789). By 1789, the “common law” of habeas included English statutory revisions thereto. See *id.*; Matthew Hale, *The History of the Common Law of England* 44 (Chicago 1971) (Charles M. Gray, ed) (describing the “constituents” of English common law as including acts of Parliament). But see Duker, *Constitutional History* at 98, 111, 113 (cited in note 21) (viewing “common law” habeas corpus as distinct from the writ amplified by the Act of 1679 and arguing that the latter did not necessarily extend to the colonies).

diction when they saw fit, such as in 1833, 1842,⁵¹ and, later and most significantly, after the Civil War in 1867.⁵²

The Suspension Clause's location within Article I, which delineates Congress's powers, rather than Article III, provides further support for a functional view of habeas corpus. An earlier draft of the Clause at the Constitutional Convention was slated for Article III, but the Committee on Style moved the Clause to Article I.⁵³ While little is known of the reasons for this change, this shift is consistent with the Founding-era understanding of habeas corpus within the Anglo-American legal system as a creature subject to legislative control.⁵⁴ Moreover, the Clause by its express terms recognizes Congress's power to suspend the privilege of the writ under certain conditions.⁵⁵ Congress thus has the power to eliminate the review function that the writ of habeas corpus serves and that the Clause generally is considered to protect.⁵⁶ To grant Congress this awesome power but then deny it substantial discretion to fashion the writ's implementation short of suspension is incongruous. To be sure, it is an elementary legal mistake to assume that "the greater" power necessarily includes "the lesser."⁵⁷

⁵¹ Collings, 40 Cal L Rev at 351 (cited in note 22) (citing statutes).

⁵² See Act of February 5, 1867 ("Habeas Corpus Act of 1867"), ch 28, 14 Stat 385 (expanding federal habeas jurisdiction to include federal habeas review of federal and state convictions). See also Steiker, 92 Mich L Rev at 881–83 (cited in note 47) (tracing statutory developments). To be sure, these changes to the writ's scope generally expanded rather than contracted the writ's application. See *Boumediene*, 128 S Ct at 2263 ("[M]ost of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it."); Steiker, 92 Mich L Rev at 881–83 (cited in note 47) (reviewing the period between 1789 and 1867 during which "Congress gradually extended federal habeas jurisdiction").

⁵³ See Tyler, 118 Yale L J at 628 (cited in note 21) (describing the drafting history of the Suspension Clause, including the Committee on Style's relocation of the Clause from Article III to Article I).

⁵⁴ See notes 40–46 and accompanying text.

⁵⁵ Scholars have debated whether the Suspension Clause authorizes Congress to suspend habeas or merely recognizes a power to suspend rooted in some other congressional power. See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U Balt L Rev 11, 44–46 (2004) (recounting the debate).

⁵⁶ There may be limits on this power, however, such as judicial review of whether the appropriate conditions for suspension exist. See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 Stan L Rev 333, 339 (2006) (arguing that the federal judiciary has the authority to review the constitutionality of legislative suspensions of habeas corpus). Moreover, at least one scholar has argued that suspension does not necessarily authorize executive detention outside constitutional limits; instead, suspension simply removes one remedy therefor. See Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 Colum L Rev 1533, 1539 (2007); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 Cornell L Rev 411, 416 (2006).

⁵⁷ See, for example, Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L J 197, 212 (describing "greater includes the lesser" as a "deceptively attractive principle").

Further, one could argue that suspension carries a political cost for members of Congress that a mere whittling away of jurisdiction does not. Thus, requiring Congress to go “all out” and suspend habeas entirely, but not permitting it to chip away at the writ piecemeal, may be more protective of liberty over the long term.⁵⁸ This argument, however, gives insufficient weight to the history of habeas suspensions, which have been limited in both time and space,⁵⁹ and also discounts Congress’s historic role in fashioning the writ’s specific meaning over time.

Indeed, it is notable that in all four instances of suspension of the writ in American history, Congress delegated some of its suspension power to an executive official. The Civil War suspension of 1863, enacted after President Abraham Lincoln claimed the authority to suspend habeas corpus on his own, authorized the President to suspend the privilege of the writ throughout the United States, but subject to significant restrictions.⁶⁰ Congress’s Reconstruction-era suspension, as part of the Ku Klux Klan Act of 1871, authorized the President to suspend habeas corpus in any state or part of a state where “unlawful combinations” threatened, “by violence, to [] overthrow” the government of the state.⁶¹ President Ulysses S. Grant used this authority to suspend habeas in nine counties in the upcountry of South Carolina where Klan activity was particularly violent.⁶² The two most recent suspensions occurred in American territories, rather than states—namely, the Philippines and Hawaii—and were proclaimed by territorial governors acting pursuant to their authorities under territorial organic acts.⁶³ The Philippines suspension was declared in 1902 in re-

⁵⁸ Consider Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 S Ct Rev 1, 21–22 (“[B]ecause suspension . . . is a rare and solemn act, the Court should impose a clear statement requirement” that will likely impose “a political price” on Congress and the President for seeking a suspension.).

⁵⁹ See Tyler, 118 Yale L J at 640–64 (cited in note 21) (discussing suspensions during the Civil War and Reconstruction).

⁶⁰ Act of March 3, 1863, 12 Stat 755, 755. See also Tyler, 118 Yale L J at 639–41 (cited in note 21) (describing the Act as “empower[ing] and limit[ing] the executive at the same time” by attaching “rather hefty strings” to the President’s delegated suspension power).

⁶¹ Act of April 20, 1871 (“Ku Klux Klan Act of 1871”) § 4, 17 Stat 13, 14 (granting the President the power to suspend the writ “during the continuance of such rebellion”).

⁶² Tyler, 118 Yale L J at 655–62, 689 (cited in note 21) (describing the Ku Klux Klan Act, its legislative history, and President Grant’s use of his broadly delegated suspension power to effect a “narrowly tailored suspension” of the writ in South Carolina). See also Duker, *Constitutional History* at 178 n 190 (cited in note 21) (discussing President Grant’s suspension of the writ in “nine counties of [South] Carolina” and noting that Grant extended the suspension to a tenth county after revoking it in one of the nine counties in which the writ was originally suspended).

⁶³ See Act of July 1, 1902 (“Philippine Organic Act of 1902”) § 5, 32 Stat 691, 692:

sponse to insurgent violence,⁶⁴ and Hawaii's governor suspended habeas following the Japanese attack on Pearl Harbor in 1941.⁶⁵ Admittedly, there are significant differences between Congress's responsibility to provide for the habeas review function under the Suspension Clause and Congress's authority to suspend habeas. Insofar as a link exists between these powers, however, these historical examples offer strong support for Congress delegating its authority under the Suspension Clause.⁶⁶

On policy grounds, a functional approach to the Suspension Clause provides Congress the most flexibility in determining how best to give "life and activity" to the historic purpose of habeas corpus—namely, ensuring neutral review of the legality of executive detention. As *Hayman* demonstrated, there may be instances in which existing habeas procedures are not the best way to accomplish the goal of reviewing the legality of detention. In *Hayman*, the Supreme Court reviewed a 1948 statute Congress enacted in response to federal prisoners flooding the federal courts in their districts of confinement with habeas petitions.⁶⁷ In reaction to this problem, and after a plea by the Judicial Conference of the United States,⁶⁸ Congress altered the system, requiring federal prisoners to file collateral attacks first in the

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.

Act of April 30, 1900 ("Hawaiian Organic Act") § 67, 31 Stat 141, 153 (permitting the governor to declare suspension of habeas corpus "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it").

⁶⁴ See *Fisher v Baker*, 203 US 174, 179–81 (1906).

⁶⁵ See *Duncan v Kahanamoku*, 327 US 304, 307–09 (1946).

⁶⁶ Just as Congress's responsibility to provide for the habeas review function should be limited by nondelegation concerns, as I argue in Part III, the significant limitations Congress imposed on the delegated authority to the Executive to suspend habeas within American states during the Civil War and Reconstruction support the idea that any delegation of the suspension function should be limited by nondelegation principles as well. See Tyler, 118 Yale L J at 689 (cited in note 21). The rather unbridled discretion Congress gave territorial governors to suspend habeas in the Philippine and Hawaiian Organic Acts, see note 63, is likely a result of Congress not initially viewing those territories as fully protected by the United States Constitution, see *Boumediene*, 128 S Ct at 2253–54 (discussing the applicability of the Constitution to territories acquired by the United States in the late nineteenth century), and reflected a recognition of the difficulty of travel and communication between Washington, DC, and the South Pacific in the late nineteenth century.

⁶⁷ 342 US at 212 & nn 13–14.

⁶⁸ See *id* at 214–15; Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 Roger Williams U L Rev 411, 416–17 (2008).

district courts in which they were sentenced.⁶⁹ Repeatedly stressing the clear “practical” advantages offered by Congress’s replacement scheme,⁷⁰ the Supreme Court upheld this statutory alternative to habeas in *Hayman* against a Suspension Clause challenge.⁷¹ Although the Court was sure to note that the statute allowed for a prisoner to pursue a habeas application if the replacement system for collateral attack was shown to be “inadequate or ineffective,”⁷² the *Hayman* opinion is notable for its strongly pragmatic approach to the Suspension Clause and its deference to the political branches’ restructuring of the system.⁷³

A functional approach may also better protect, in the long run, individual liberty than an absolutist reading of the Suspension Clause. Although this may seem counterintuitive given Congress’s recent acquiescence to executive encroachments on individual rights in the “war on terror,”⁷⁴ the annals of Anglo-American legal history include moments during which the legislature, rather than the judiciary, was the branch most protective of individual liberty and most likely to resist executive encroachments thereon. In Great Britain, Parliament passed the Habeas Corpus Act of 1679 to make release more readily available to prisoners who languished in jail unnecessarily due to judicial procedural delays.⁷⁵ In 1758, the House of Commons passed a bill, ultimately rejected by the House of Lords, that similarly aimed to overcome judicial dithering in releasing deserving prisoners through habeas.⁷⁶ The United States’ history includes examples of Congress strongly opposing

⁶⁹ 28 USC § 2255.

⁷⁰ *Hayman*, 342 US at 212 (recognizing “serious administrative problems” with habeas petitions before the statutory change); id at 213 (reviewing another “practical problem” with habeas applications before the 1948 statute); id at 213–14 (recognizing that the “fortuitous concentration of federal prisoners” within judicial districts with “major federal penal institutions” led to the aggravation of “practical problems” for courts); id at 216, 217 n 25 (reviewing the Judicial Conference’s Statement to the House and Senate Judiciary Committees, which laid out “practical considerations” and “stress[ed] practical difficulties” of the pre-reform habeas procedure).

⁷¹ Id at 223 (holding that the law was not unconstitutional because its procedures were neither inadequate nor ineffective to test the legality of the defendant’s detention).

⁷² Id (noting that in cases where the § 2255 procedures are inadequate or ineffective, the statute stipulates that “the habeas corpus remedy shall remain open to afford the necessary hearing”).

⁷³ See note 70. Of course, the Supreme Court may have felt more comfortable with the proposed legislation because federal judges were involved in its drafting. See *Hayman*, 342 US at 215–18 (noting that § 2255 was modeled on a proposed bill drafted by the Judicial Conference, which was composed of the chief judges of the Supreme Court and the circuit courts of the United States).

⁷⁴ See, for example, Katz, 25 Const Comment at 418–20 (cited in note 10) (claiming that, as evidenced by the enactment of the DTA and the MCA, Congress acted as an “enabler” of “imperious presidential power”); Diller, 61 SMU L Rev at 316–25 (cited in note 16).

⁷⁵ Brief of Legal Historians as Amici Curiae in Support of Respondent, *INS v. St. Cyr*, No 00-767, *11 (US filed Mar 27, 2001) (available on Westlaw at 2001 WL 306173).

⁷⁶ Id at *12–13.

executive power, such as in the early days of post–Civil War Reconstruction⁷⁷ and during Watergate.⁷⁸ It is not preordained, therefore, that the judiciary will always be more inclined than Congress to oppose an assertive Executive and protect individual liberties.

B. Delegation of the Habeas Review Function

The Supreme Court reaffirmed *Hayman*'s functional approach to the Suspension Clause in the 1977 case of *Swain v Pressley*.⁷⁹ In *Swain*, the Court considered a component of Congress's reorganization of the District of Columbia court system. In establishing a new system of local courts for the District, Congress replaced habeas review of local convictions in federal district court with a scheme for collateral review by the new local court—the DC Superior Court.⁸⁰ The prisoner in *Swain* argued that the DC Superior Court's collateral procedure violated the Suspension Clause because it replaced a habeas corpus proceeding in front of an Article III judge with a proceeding in front of an Article I judge lacking life tenure and salary protection.⁸¹ The Court rejected the prisoner's argument, concluding that although Article III's life tenure and salary protections were important, it would presume that the District's Article I judges had the capacity to decide competently the constitutional issues raised in collateral proceedings.⁸²

Swain reaffirmed *Hayman*'s view that Congress does not violate the Suspension Clause if it replaces habeas with another procedure for challenging detention that is at least as adequate and effective as the Great Writ.⁸³ *Swain* went further than *Hayman* in holding that Congress's replacement procedure may delegate the habeas review function to something other than an Article III court—namely, an Article I court⁸⁴—without violating the Suspension Clause.⁸⁵ Although the

⁷⁷ See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* 176–84, 229–38 (Perennial 2002).

⁷⁸ See James L. Sundquist, *The Decline and Resurgence of Congress* 315–16 (Brookings 1981).

⁷⁹ 430 US 372 (1977).

⁸⁰ *Id.* at 375, citing DC Code Ann § 23-110(g) (West 1973).

⁸¹ 430 US at 382.

⁸² *Id.* at 382–83. The Court left open the possibility that in a future case, a petitioner might show how he was prejudiced by a judge lacking life tenure, *id.* at 383 n 20, and noted that habeas appeals through the DC court system could eventually reach the Supreme Court, whose judges enjoy life tenure and salary protection, *id.* at 382 n 16.

⁸³ *Swain*, 430 US at 381.

⁸⁴ See *Byrd v Henderson*, 119 F3d 34, 37 (DC Cir 1997) (noting that the DC Superior Court is an Article I court).

⁸⁵ DC Superior Court judges serve fifteen-year terms and must retire by the age of seventy-four. DC Code Ann § 11-1502 (West). Like Article III judges, however, DC Superior Court

entity to which the habeas function was delegated in *Swain* was an Article I court, *Swain*'s focus on the adequacy and effectiveness of the replacement for habeas suggested that delegating at least part of the habeas review function to an administrative agency, in addition to an Article I court, might pass constitutional muster since there is little significant constitutional difference between the two.⁸⁶

A functional approach would allow Congress to take advantage of the expertise of a specialized court or administrative agency and may even lead to more consistency in rulings. The expertise of agencies in a particular subject is a traditional justification for administrative agencies in general and administrative adjudication in particular.⁸⁷ Further, as Professor Jerry Mashaw has demonstrated, administrative agencies can sometimes be more consistent in their rulings and legal interpretations than Article III judges, in part due to their specialized focus.⁸⁸ Permitting some delegation of the habeas corpus review function allows Congress to take advantage of these potential benefits if it sees fit to do so.

To be sure, neither of the laws considered in *Hayman* or *Swain* affected a great change in the writ's preexisting availability, and both laws contained savings clauses that made the writ available in the event that the replacement schemes were inadequate or ineffective to contest the legality of detention.⁸⁹ Neither *Hayman* nor *Swain*, therefore, pressed the Court hard to define in detail the limits of the Court's functional view of the Suspension Clause. Nor did the Court need to address the question of what power, exactly, Congress exercises if and when it delegates the habeas function to an entity other than an Article III court. When Congress initially provided the federal courts with habeas jurisdiction through the Judiciary Act of 1789, it was exercising its power under Article I, § 8 to "constitute Tribunals

judges are appointed by presidential nomination subject to Senate confirmation. DC Code Ann § 11-1501 (West).

⁸⁶ Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv L Rev 915, 928 (1988); Redish, 1983 Duke L J at 201 (cited in note 57) ("[T]he Court cannot logically distinguish the work of non-article III legislative courts from that of administrative adjudicatory bodies:").

⁸⁷ See, for example, Fallon, 101 Harv L Rev at 935 (cited in note 86).

⁸⁸ See Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 193, 214 (Yale 1983).

⁸⁹ *Swain*, 430 US at 381, citing DC Code Ann § 23-110(g) (West 1973); *Hayman*, 342 US at 207 & n 1, citing 28 USC § 2255.

inferior to the supreme Court.”⁹⁰ In rewriting the habeas statute in *Hayman*, Congress drew on this power as well. In organizing courts for the District of Columbia, and substituting the collateral remedy upheld by the Court in *Swain*, Congress likely relied on its plenary authority to govern the federal District.⁹¹ Were Congress, however, to create a body to which it delegated the reviewing function required by the Suspension Clause, what would give it the authority to do so?

The most plausible answer is the Suspension Clause itself. A fortiori, if the Suspension Clause obligates Congress to provide for some review of the legality of executive detention, then Congress must have the power to fulfill this obligation. Although Congress has traditionally used the Article III courts, over which Congress exercises enumerated powers, to fulfill this obligation, the Suspension Clause’s placement in Article I rather than in Article III points toward congressional flexibility in this regard. Because Article III requires only a Supreme Court, it would stretch the “middle-ground” view of the Suspension Clause quite far to say that the Judiciary Act of 1789’s creation of lower federal courts was constitutionally required under the Suspension Clause.⁹² It is reasonable, therefore, to view the Suspension Clause itself—and its imposition on Congress of a mandate to provide for review of executive detention—as the source of the power that Congress might delegate to either an administrative agency or an Article I court to review the legality of executive detention. This view is bolstered by the broad sweep of the Necessary and Proper Clause, which applies not just to all powers specifically enumerated in Article I, § 8, but to “all other Powers vested by this Constitution in the Government of the United States.”⁹³ Moreover, locating the habeas-providing power in the Suspension Clause bridges the potential disjunction between Congress’s obligation to provide for the review of detention and the Clause’s recognition of Congress’s power to suspend such review.⁹⁴

⁹⁰ US Const Art I, § 8, cl 9. But see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv L Rev 643, 650 (2004) (arguing that Article I “tribunals” are different from Article III “courts”).

⁹¹ See *Palmore v United States*, 411 US 389, 397 (1973).

⁹² For an argument that Congress must provide habeas jurisdiction to at least the Supreme Court, see Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Georgetown L J 59, 114–15 (2007) (arguing that Article III, the Suspension Clause, the Fifth Amendment’s Due Process Clause, and the First Amendment’s Petition Clause all require Congress to either create inferior courts with jurisdiction to review habeas petitions or else “re-route those matters to the Supreme Court’s original jurisdiction”).

⁹³ US Const Art I, § 8, cl 18.

⁹⁴ Not all legal commentators have agreed that it is the Suspension Clause that provides Congress with the power to suspend habeas. Some scholars have suggested that the power to

1. Delegation of the habeas review function and Article III.

Any attempt by Congress to delegate the habeas review function to a legislative court or administrative agency is likely to raise concerns under Article III related to—but formally distinct from—the constitutional concerns such a delegation would raise under the Suspension Clause. To illustrate the Article III implications of delegating habeas to a non–Article III court, assume that there was no explicit reference to habeas corpus in the Constitution. Even without the Suspension Clause, Article III’s allocation of the “judicial power” to the federal courts might stand as a potential obstacle to the delegation of the habeas review function to some other entity given the historic role of courts in administering habeas corpus.⁹⁵

In a series of cases dating back to *Crowell v Benson*⁹⁶ in 1932, the Supreme Court has declared that some federal adjudicative functions may not be outsourced to a non–Article III court.⁹⁷ At the same time, the Court has rejected a “simple” or “literal” understanding of Article III that would hold that all federal adjudicative functions must be

suspend emanates from other congressional powers, such as the authority to regulate the federal courts, the power to declare war, or the power to “call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Jackson, 34 U Balt L Rev at 45–46 (cited in note 55). None of these alternative candidates for the source of the suspension power is particularly attractive. Linking the suspension power to Congress’s control over federal courts is in significant tension with the very plausible understanding of the Suspension Clause as designed, at least in part, to restrain Congress from suspending habeas corpus in the state courts. See note 47 and accompanying text. Rooting the suspension power in the power to declare war is incongruous given that the Clause recognizes that suspension may be required in the instance of a domestic “rebellion,” which may occur in the absence of a war declared against a foreign state. See *Boumediene*, 128 S Ct at 2306 (Scalia dissenting). Finally, the Militia Clause offers an incomplete source of the suspending power in that it refers only to the instances when Congress may choose to federalize the state militias. Before the Posse Comitatus Act of 1878, Act of June 18, 1878 § 15, 20 Stat 145, 152, the federal government was free to use the standing federal army to suppress insurrections. See Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* 12–15 (Combat Studies Institute 2006), online at http://www.au.af.mil/au/awc/awcgate/army/csi_matthews_posse.pdf (visited Jan 16, 2010) (describing numerous instances, from the Whiskey Rebellion to John Brown’s raid in Harpers Ferry, in which the President called upon—or threatened to call upon—the standing army to take part in civil operations). In light of these unsatisfactory alternatives, the most plausible view is that Congress’s power to suspend either emanates from the Suspension Clause itself, or was viewed as an inherent legislative power that the Suspension Clause recognized and limited. See Jackson, 34 U Balt L Rev at 43, 47 (cited in note 55).

⁹⁵ See US Const Art III, §§ 1–2.

⁹⁶ 285 US 22 (1932).

⁹⁷ *Id.* at 56–57 (explaining that Congress’s power to delegate adjudicatory duties to administrative agencies is not unlimited and that only Article III courts can make final determinations regarding facts “upon which enforcement of the constitutional rights of the citizen depend”).

performed by an Article III court.⁹⁸ Short of the simple model, the Court has drawn a squiggly line as to the kinds of cases and circumstances under which Congress may delegate adjudicative functions to non–Article III entities. Although some justices have dissented from this line of jurisprudence altogether—most prominently, Justice Louis Brandeis, who argued that the “judicial power” of Article III was simply a federal power subject to the plenary control of Congress, which could direct cases to whatever form of adjudicative tribunal it preferred⁹⁹—the other justices have struggled to explain the limits imposed by Article III. My aim here is not to solve all of the Article III problems that might arise were Congress to delegate some of the habeas review function to a non–Article III court, but only to show how such a delegation could be viable.

Since the early 1980s, the Court has taken two predominant approaches to Article III jurisprudence. The first, what Professor Paul Bator called a “categorical approach,”¹⁰⁰ was championed by Justice William Brennan in his plurality opinion in *Northern Pipeline Construction Co v Marathon Pipe Line Co.*¹⁰¹ Under this view, Article III established a strong default presumption for federal adjudication by Article III courts, but permitted exceptions for certain categories of cases that had historically fallen outside the purview of the Article III courts, including territorial courts, military courts-martial, and “public rights” cases.¹⁰² (As a category, “public rights” defies easy definition, and Justice Brennan did not attempt to offer a comprehensive one in *Northern Pipeline.*¹⁰³ The category roughly denotes claims for money or property against the government that were created by a congres-

⁹⁸ See, for example, *Commodity Futures Trading Commission v Schor*, 478 US 833, 858 (1986) (plurality) (finding that a non–Article III agency could have jurisdiction to hear certain state law counterclaims). See also Pfander, 118 Harv L Rev at 656 (cited in note 90) (“Most everyone agrees that a literal interpretation of Article III will not do.”); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 Ind L J 233, 234–35 (1990) (explaining the failure of the “Simple Model,” which states that “Congress may leave the initial adjudication of some or all of Article III’s list of cases to the state courts, but if federal adjudication is felt to be needed, the requirements of Article III automatically come into play”).

⁹⁹ See *Crowell*, 285 US at 85 (Brandeis dissenting) (noting that this type of delegation is something that Congress has “repeatedly exercised authority” over). Justice Byron White also took a very flexible view of Article III. See *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 105–07 (1982) (White dissenting).

¹⁰⁰ See Bator, 65 Ind L J at 243 (cited in note 98).

¹⁰¹ 458 US 50 (1982) (plurality).

¹⁰² Id at 64–70 (discussing “three narrow situations” that Article III did not cover).

¹⁰³ Id at 69 (“The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases.”).

sional waiver of sovereign immunity.¹⁰⁴) In addition to those three categories, Justice Brennan attempted to reconcile his judicial-centric views with the modern administrative state, in which numerous agencies adjudicate thousands of claims a year,¹⁰⁵ by rationalizing these myriad adjudicating agency tribunals as constitutionally permissible “adjuncts” to the Article III courts.¹⁰⁶

Justice Brennan’s categorical approach has not withstood the test of time well. Scholars criticized his categorical approach as rigid and formalistic, and rejected as inadequate his description of administrative agencies as mere “adjuncts” to Article III courts.¹⁰⁷ The Supreme Court too, in subsequent cases, has moved away from Justice Brennan’s relatively rigid view of Article III.¹⁰⁸ In its stead, the Court has embraced an “instrumental,” or more pragmatic, approach to Article III that balances the potential benefits of delegation against the harm to Article III’s values of institutional independence (secured by life tenure and salary protection) and legal expertise.¹⁰⁹ Despite moving in a more pragmatic direction, however, the Court has clung to the distinction between “public” and “private” rights in the face of significant academic criticism, continuing to favor non–Article III regimes that adjudicate public rights while disfavoring those that adjudicate private rights, particularly if grounded in the common law.¹¹⁰ Because this formal category remains important to, but not determinative of, the Court’s Article III jurisprudence, I explore below the implications of where habeas corpus falls on the spectrum of public and private rights.

In addition to criticizing the public–private rights distinction, scholarly views of Article III range from the Brandeis-like, minimalist approaches, to more stringent, judicial-centric conceptions.¹¹¹ The scho-

¹⁰⁴ See *Granfinanciera, S.A. v Nordberg*, 492 US 33, 68 (1989) (Scalia concurring) (concluding that “public rights” are “rights pertaining to claims brought by or against the United States,” usually pursuant to a waiver of sovereign immunity). See also Pfander, 118 Harv L Rev at 702 (cited in note 90) (“The history of public claims thus bears a close relationship . . . to the doctrine of sovereign immunity.”).

¹⁰⁵ See Richard H. Fallon, Jr, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler’s The Federal Courts and The Federal System* 367 (Foundation 5th ed 2003).

¹⁰⁶ *Northern Pipeline*, 458 US at 78 (plurality).

¹⁰⁷ See, for example, Fallon, 101 Harv L Rev at 917, 919 (cited in note 86) (criticizing Justice Brennan’s *Northern Pipeline* opinion as “a modified form of Article III literalism” that is “untenable”); Redish, 1983 Duke L J at 210 (cited in note 57).

¹⁰⁸ See *Schor*, 478 US at 851 (plurality) (“[T]he Court has declined to adopt formalistic and unbending rules.”).

¹⁰⁹ *Id.*

¹¹⁰ *Northern Pipeline*, 458 US at 70 (plurality). See also *Granfinanciera*, 492 US at 53–55.

¹¹¹ Compare Pfander, 118 Harv L Rev at 650 (cited in note 90) (arguing that “inferior tribunals” in Article I are distinct from “inferior courts” in Article III and that only the latter may

larly approach to Article III that has fared best at accommodating both judicial precedent and the realities of modern government is the “appellate review theory,” which has been advocated by a number of scholars.¹¹² This approach permits Congress to reroute adjudication to administrative agencies and legislative courts so long as Article III courts retain final authority over questions of law.¹¹³ In a leading account, Professor Richard Fallon argued that an appellate review theory should permit agencies and legislative courts significant independence with respect to factfinding.¹¹⁴ Although Fallon’s proposed deference differs from the Court’s stated doctrine to some degree, particularly with respect to so-called “jurisdictional facts,” regarding which the Court has claimed the necessity of Article III review,¹¹⁵ it comports well with how the modern administrative state works in practice.¹¹⁶ In addition, Professor Fallon proposes an appellate review theory that dispenses with the artificial and formalistic distinction between public and private rights, requiring an Article III court to be involved in reviewing legal questions with respect to both.¹¹⁷ Fundamentally, the appellate review thesis seeks to preserve the benefits that flow from Article III’s independent judiciary while retaining the functional benefits of non–Article III courts, which include subject-matter expertise, efficiency, and flexibility.¹¹⁸

exercise the “judicial power”) with Bator, 65 Ind L J at 257 (cited in note 98) (proposing a “substantive due process” test for transfers of adjudicative functions to non–Article III courts); Fallon, 101 Harv L Rev at 918 (cited in note 86) (arguing that Article III court review of legal and constitutional questions should be required).

¹¹² See, for example, Fallon, 101 Harv L Rev at 933 (cited in note 86) (asserting that the appellate review theory is the “best approach” to analyzing the permissibility of non–Article III tribunals); Richard B. Saphire and Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 BU L Rev 85, 135 (1988) (praising the appellate review approach for “striking an optimal balance between furthering the values of judicial independence and impartiality embodied in article III and recognizing that the realities of modern government may require the creation of new institutions which cannot be neatly harmonized with the original constitutional design”); Redish, 1983 Duke L J at 226–27 (cited in note 57) (describing the appellate review theory as an “escape route” from Brennan’s knotty analysis). But see Pfander, 118 Harv L Rev at 667–70 (cited in note 90) (criticizing appellate review theory for “empower[ing] Congress to establish some adjudicative arrangements that depart in jarring ways from our institutional traditions”); Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Georgetown L J 607, 668–69 (2002) (expressing concern with appellate review theory for its potential to turn Article III judges into supervisors of non–Article III judges).

¹¹³ Fallon, 101 Harv L Rev at 933 (cited in note 86).

¹¹⁴ Id at 986–91.

¹¹⁵ *Crowell*, 285 US at 63–64.

¹¹⁶ Fallon, 101 Harv L Rev at 920–21 (cited in note 86).

¹¹⁷ Id at 963.

¹¹⁸ Id at 933–37.

In applying the dominant approaches to Article III to the possibility of delegating habeas to a non–Article III court, I begin with the distinction between public and private rights, which the Court has continued to emphasize,¹¹⁹ despite criticism from numerous scholars. A petition for a writ of habeas corpus does not neatly fit into either category. As a request for redress against a governmental officer, a habeas claim bears a superficial resemblance to a public-right claim for money or land. On the other hand, by the nature of what it concerns—personal liberty, as opposed to tangible compensation—a habeas proceeding is more akin to a criminal proceeding, which has traditionally been classified as a private right even though it involves the government.¹²⁰ Moreover, the writ is a civil cause of action with deep roots in the common law.¹²¹ Although modern habeas claims are styled as suits against government officers in their official capacities,¹²² historically, jailers were personally liable for unlawful imprisonment,¹²³ and habeas petitions for unlawful detention may still be filed against private parties in some jurisdictions today.¹²⁴ In total, habeas corpus may bear more resemblance to a private than a public right, which, according to prevailing doctrine, would count against the compatibility of a delegation of habeas corpus with Article III.

Other factors relevant to the private rights analysis in the habeas context point in different directions. Were Congress to replace federal habeas with a substitute federal procedure, the kinds of federalism concerns recognized by the Supreme Court in *Northern Pipeline*—where the Court invalidated adjudication of private rights by a non–Article III bankruptcy judge in part because state claims were included—would be

¹¹⁹ See, for example, *Granfinanciera*, 492 US at 53.

¹²⁰ See Fallon, Meltzer, and Shapiro, *Federal Courts* at 373 (cited in note 105). See also Neuman, 98 Colum L Rev at 1030–32 (cited in note 9).

¹²¹ See Duker, *Constitutional History* at 15–63 (cited in note 21) (tracing the evolution of the writ at English common law from its origins in the thirteenth century through the enactment of the Habeas Corpus Act of 1679).

¹²² See, for example, *Rumsfeld v Padilla*, 542 US 426, 435 (2004) (explaining that the proper respondent to a habeas petition challenging present physical confinement is “the warden of the facility where the prisoner is being held”).

¹²³ See, for example, John S. Gillig, *Kentucky Post-conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 Ky L J 265, 299 n 139 (1995) (noting that “personal liability provisions,” like those in the Kentucky Habeas Corpus Act of 1796, “were commonly found in habeas corpus statutes throughout the states”).

¹²⁴ *Peyton v Rowe*, 391 US 54, 58 (1968) (noting that the writ may be used to contest “private” restraints on liberty); *Ford v Ford*, 371 US 187, 188 (1962) (concerning a husband who filed a petition for habeas in Virginia state court alleging that his wife was not a suitable caregiver for his children and asking that the children be produced before the court).

irrelevant.¹²⁵ Moreover, since judges are the finders of fact in habeas actions, the delegation of factfinding to a non–Article III tribunal would not impair a petitioner’s right to a jury.¹²⁶ On the other hand, if a substitute for habeas were the only remedy available to a particular prisoner seeking to have the legality of his detention reviewed, the prisoner would not be “voluntarily” utilizing a non–Article III forum in the same way that the Court considered relevant in *Commodity Futures Trading Commission v Schor*,¹²⁷ in which a plurality upheld an administrative agency’s adjudication of private rights in part because the party whose rights were implicated had chosen to litigate in the federal administrative forum.¹²⁸

While habeas’s more private than public nature may count against the validity of a delegation under prevailing Supreme Court doctrine, it should not be fatal to a habeas replacement scheme’s constitutionality. Rather, as the Court has noted in some of its more instrumental opinions regarding Article III, respecting the functional benefits of a non–Article III adjudicative body, while preserving Article III’s values of neutrality and expertise in legal interpretation, is more important than “doctrinaire reliance on formal categories.”¹²⁹ On the benefit side, the Court has recognized that administrative agencies or legislative courts may possess expertise in a particular field superior to that of generalist Article III courts, especially with respect to their factfinding ability.¹³⁰ In the habeas context, it is possible that an administrative agency charged with reviewing detainee status might possess—or gain—such comparative expertise. Moreover, legislative courts or administrative agencies may produce more consistent results than Article III courts.¹³¹

¹²⁵ 458 US at 84 (plurality).

¹²⁶ See *Granfinanciera*, 492 US at 52–53 (noting the intersection of Article III and Seventh Amendment concerns).

¹²⁷ 478 US 833 (1986) (plurality).

¹²⁸ *Id.* at 849 (“Schor indisputably waived any right he may have possessed to the full trial of [his adversary]’s counterclaim before an Article III court.”). See also *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 589 (1985) (upholding binding arbitration before a non–Article III body in part because of party’s “voluntary” participation in government pesticide registration scheme that mandated binding arbitration of disputes).

¹²⁹ *Thomas*, 473 US at 587.

¹³⁰ *Schor*, 478 US at 855–56 (plurality) (recognizing an administrative agency’s “obvious expertise” in applying the relevant law and regulations).

¹³¹ Mashaw, *Bureaucratic Justice* at 159, 190–93, 213–14, 222–23 (cited in note 88) (emphasizing the efficiency, expertise, and neutrality of administrative justice). But see Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan L Rev 295, 301–02, 306, 372–73 (2007) (discussing the vast inconsistencies

A non–Article III habeas replacement that is well insulated from political pressures could respect Article III’s emphasis on the institutional independence of the adjudicative body. In the specific context of habeas, the central concern of which is reviewing the legality of executive detention, independence from the detaining element of the executive branch, whether the President or the military, would be paramount. A legislative court, therefore, like the court in *Swain*, may well enjoy the necessary independence from the executive branch to satisfy Article III concerns, particularly if bolstered by some Article III review of its decisions.¹³² Even an administrative agency replacement for habeas could satisfy Article III concerns regarding independence if the agency adjudicators were sufficiently insulated from executive branch pressure. Long-term, staggered appointments or strong civil service laws could help provide this insulation.¹³³ Indeed, the less unitary the executive structure, the more neutral an agency can be for Article III purposes. Of course, given the strong historical emphasis of habeas corpus on restraining the Executive, any delegation of the habeas function to an executive agency should preserve some role for the judiciary to comport with Article III. Appellate review of legal and constitutional matters, as advocated by Fallon, would help ensure that agency “judges” without life tenure do not interpret the law in a twisted manner to please politically appointed superiors in the executive branch and justify executive detention.

Just how much control the Article III courts should retain over factfinding by an administrative agency or legislative court is a tougher question. Professor Fallon has argued for relatively deferential treatment of executive agency factfinding whereas *Crowell* seems to require an independent Article III determination of any “fundamental” fact necessary to the administrative tribunal’s “jurisdiction.”¹³⁴ Although the Court has not consistently enforced *Crowell*’s dictate in recent years,¹³⁵ the historic role of habeas as a restraint on executive detention would counsel in favor of preserving some role for Ar-

in asylum decisions, which are made by many non–Article III bodies such as asylum officers, immigration judges, and the Board of Immigration Appeals).

¹³² See note 85 and accompanying text.

¹³³ See Frank H. Easterbrook, “*Success*” and the Judicial Power, 65 *Ind L J* 277, 279 (1990) (arguing that administrative law judges enjoy job protection commensurate to that of Article III judges).

¹³⁴ 285 US at 63–64.

¹³⁵ See David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 *Cardozo L Rev* 1001, 1019 (2008) (noting that “*Crowell*’s jurisdictional fact doctrine did not fare especially well . . . in the ensuing years”); Fallon, 101 *Harv L Rev* at 990 (cited in note 86) (“*Crowell*’s celebrated conclusion that an Article III court must hear evidence de novo, although never formally overruled, has not generally held up.”).

title III review of agency factfinding, with the rigor of this review depending on the strength of the agency factfinding procedures and the institutional independence of the agency.¹³⁶ Again, it is not my aim to offer a specific scheme, but only to argue that it could be done in a way that adequately respects Article III values.

Preserving an appellate role for Article III courts, particularly with respect to legal and constitutional questions, would also honor the judiciary's perceived expertise in deciding legal questions. Beyond being axiomatic in the American constitutional system that it is "the province and duty of the judicial department to say what the law is,"¹³⁷ the Court's Article III jurisprudence has assumed that federal judges are best positioned to decide legal, as opposed to factual, questions.¹³⁸ Whether Article III judges' supposed superior legal acumen is due to the mechanism by which they are selected, the prestige associated with their posts, the wide array of cases they face, or the same factors that are believed to ensure judicial independence—namely, salary protection and life tenure—is difficult to discern. Regardless, the more important the legal question, the more necessary it is under current doctrine to have an Article III court available for review, presumably under a more stringent standard of review than for mere factual matters.¹³⁹ In the administrative context, the Administrative Procedure Act (APA) ensures that the judiciary will play a large role in reviewing administrative adjudications, at least where the APA applies.¹⁴⁰ The APA also guarantees a role for the Article III courts in reviewing rules adopted by an agency Congress might create.¹⁴¹ The APA's guarantee of judicial review of agency adjudication has helped ameliorate judicial concerns about executive adjudication trammeling individual rights and encroaching on the province of the courts, and could play a similarly

¹³⁶ See *Boumediene*, 128 S Ct at 2268 ("[T]he necessary scope of [judicial] habeas review in part depends upon the rigor of any earlier [non-judicial] proceedings.").

¹³⁷ See *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

¹³⁸ See *Schor*, 478 US at 853 (upholding an agency adjudicative scheme in part because its legal rulings were subject to de novo review by an Article III court).

¹³⁹ See *Crowell*, 285 US at 60 (holding that Article III courts must have power to independently determine all questions of law and fact "[i]n cases brought to enforce constitutional rights").

¹⁴⁰ Administrative Procedure Act (APA) § 10(a), Pub L No 79-404, 60 Stat 237, 243 (1946), codified as amended at 5 USC § 702 ("Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.").

¹⁴¹ See APA § 10(a), 60 Stat at 243 (providing that a person suffering legal wrong or "adversely affected or aggrieved" by agency action is entitled to judicial review). See also 5 USC § 553 (addressing informal rulemaking); 5 USC §§ 556-57 (detailing procedures for formal rulemaking).

key role in monitoring the creation of an agency or legislative court charged with carrying out at least part of the habeas review function.¹⁴²

Ultimately, the question of whether a non–Article III substitute for habeas would violate Article III overlaps substantially with the inquiry into “adequate substitute” under the Suspension Clause. Both inquiries focus on the neutrality and legal expertise of the decision-makers. A functional view of the Suspension Clause, therefore, as the Supreme Court articulated in *Hayman* and *Swain*, is likely to correspond to a functional view of Article III. If one embraces this understanding, under which the Suspension Clause allows for a substantial congressional role in shaping the precise contours of the writ or an appropriate substitute therefor, then a non–Article III substitute for habeas is more constitutionally palatable. Moreover, recognition of Congress’s historically broad role in shaping the habeas guarantee counsels in favor of a flexible approach to Article III. As Justice Brennan pointed out in *Northern Pipeline*, if Congress’s delegation of adjudicative power is premised on an “exceptional power[] bestowed upon Congress by the Constitution or by historical consensus,”¹⁴³ the Court will look upon the delegation more favorably because “the literal command of Art. III . . . must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.”¹⁴⁴ Due to the Framers’ awareness of Parliament’s strong role in making habeas effectual, and the Constitution’s placement of the Suspension Clause within Article I, these “historical” and “structural” factors militate in favor of permitting Congress to delegate at least some of the habeas review function to a non–Article III court.

C. Pre-*Boumediene* Suspension Clause Jurisprudence in the Immigration Context

In the decade or so before *Boumediene*, the Supreme Court revisited its Suspension Clause jurisprudence on a handful of occasions that tested its commitment to a functional view of the Clause. In 1996, Congress passed two laws that substantially changed the scope of habeas corpus—namely, the Antiterrorism and Effective Death Penalty

¹⁴² William N. Eskridge, Jr, *America’s Statutory “constitution,”* 41 UC Davis L Rev 1, 12 (2007) (asserting that the APA establishes judicial review as one of the “primary checks on arbitrary agency decisions”).

¹⁴³ 458 US at 70 (plurality).

¹⁴⁴ *Id* at 64.

Act¹⁴⁵ (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act¹⁴⁶ (IIRIRA). Unlike most earlier statutory changes to the writ, AEDPA and IIRIRA aimed to constrict the writ's application rather than expand or reroute it.¹⁴⁷ AEDPA and IIRIRA thus forced the Court to grapple more seriously with its commitment to a functional view of the Suspension Clause. In particular, AEDPA and IIRIRA raised the question of whether the Suspension Clause functioned, in effect, as a "one-way ratchet" in which post-1789 expansions of the writ by Congress could not later be retracted without violating the Clause.¹⁴⁸ If so, Congress would have less flexibility in fashioning the specific contours of habeas jurisdiction than *Hayman* and *Swain* suggested. In upholding AEDPA, which limited the ability of state prisoners to collaterally attack their convictions through federal habeas, against a Suspension Clause challenge, a majority of the Supreme Court tepidly stuck to a functional view of the Clause. The Court reasoned that AEDPA was not a substantial departure from common law habeas procedures prohibiting abuse of the writ, and thereby permitted Congress to change the contours of habeas in similar regard.¹⁴⁹

IIRIRA presented a more complicated case. In the case of *INS v. St. Cyr*,¹⁵⁰ the government argued that IIRIRA had repealed federal court jurisdiction over habeas claims brought by an alien awaiting deportation who challenged the Attorney General's denial of his request for a waiver.¹⁵¹ The petitioner in *St. Cyr* contended that the Attorney General had the authority to waive his deportation, whereas the Attorney General argued that substantive changes to immigration law made by AEDPA denied him of any such discretion.¹⁵² The question in *St. Cyr*, therefore, was where and how the petitioner could raise his claim that AEDPA had not denied the Attorney General the dis-

¹⁴⁵ Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214.

¹⁴⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L No 104-208, 110 Stat 3009.

¹⁴⁷ *Boumediene*, 128 S Ct at 2263-64.

¹⁴⁸ *St. Cyr*, 533 US at 340 n 5, 342 (Scalia dissenting) (arguing that Congress has authority to undo what it grants with respect to habeas lest the Suspension Clause operate as a "one-way ratchet"). See also *Swain*, 430 US at 384-86 (Burger concurring) (rejecting the idea that the Suspension Clause protects post-1787 statutory enhancements of habeas).

¹⁴⁹ *Felker v Turpin*, 518 US 651, 664 (1996) (stating that AEDPA's added restrictions on the writ were "well within the compass of [the] evolutionary process").

¹⁵⁰ 533 US 289 (2001).

¹⁵¹ *Id.* at 293, 297.

¹⁵² *Id.*

cretion to waive his deportation and that the Attorney General had abused his discretion.

In ruling for the immigration petitioner, a slim majority of the Supreme Court invoked the canon of constitutional avoidance, under which the Court purports to interpret statutes in a manner that avoids potential constitutional infirmities.¹⁵³ Aggressively applying the canon to avoid a potential violation of the Suspension Clause, the Court interpreted IIRIRA as not limiting habeas review of immigration deportation decisions despite statutory language that appeared to indicate the opposite.¹⁵⁴ In bending over backwards to read IIRIRA as not limiting habeas jurisdiction,¹⁵⁵ a slim majority of the Supreme Court ominously warned that a reading of the statute that so limited habeas for a detained immigrant would come dangerously close to violating the Suspension Clause.¹⁵⁶ Unlike AEDPA, which merely limited the habeas relief available to prisoners who had been criminally convicted in a state court's system, the government's reading of IIRIRA would have eliminated habeas review of the detention (and eventual deportation) of an individual who had not received the procedural protections inherent in the criminal process. In doing so, the Court observed, the limitation would cut to the heart of habeas corpus's historic function: testing the legality of executive detention.¹⁵⁷

Although *St. Cyr* was full of constitutional undertones, the majority's holding ultimately rested on the grounds of statutory interpretation. In passing, the majority rejected the argument, made halfheartedly by the government,¹⁵⁸ that even if IIRIRA had eliminated habeas corpus, there nonetheless remained an "adequate substitute for its exercise."¹⁵⁹ Notably, however, the majority reiterated its view that habeas *can* be replaced by an adequate substitute; it simply found such a substitute lacking in *St. Cyr*. The "adequate substitute" put forward by the government was federal circuit court review of the administrative process (which itself consisted of a hearing before an Immigration

¹⁵³ See *Ashwander v Tennessee Valley Authority*, 297 US 288, 345–56 (1936) (Brandeis concurring). See also Diller, 61 SMU L Rev at 293–95 (cited in note 16).

¹⁵⁴ *St. Cyr*, 533 US at 300.

¹⁵⁵ See *id* at 334 (Scalia dissenting) (accusing the majority of "distort[ing] plain statutory text"); Richard H. Fallon, Jr and Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv L Rev 2029, 2050 (2007) (stating that "[f]rom one perspective," the *St. Cyr* majority's reading of IIRIRA was "disingenuous" and "tortured").

¹⁵⁶ *St. Cyr*, 533 US at 301 n 13.

¹⁵⁷ *Id* at 301.

¹⁵⁸ Brief for the Petitioner, *INS v St. Cyr*, No 00-767, *30 (US filed Feb 26, 2001) (available on Westlaw at 2001 WL 210189) ("*St. Cyr* Petitioner Brief").

¹⁵⁹ *St. Cyr*, 533 US at 305.

Judge (IJ) and an appeal to the Bureau of Immigration Appeals (BIA)), to which the petitioner was entitled before removal.¹⁶⁰ The government spent little time pressing the “adequate substitute” argument in its brief, however, and the issue was discussed only cursorily at oral argument.¹⁶¹

It is not clear exactly why the *St. Cyr* majority rejected the possibility that the administrative process combined with appellate court review might serve as an “adequate substitute” for the district court habeas review that the government argued had been repealed by IIRIRA. Indeed, a Suspension Clause or Article III absolutist might read *St. Cyr* to mean that any alternative to habeas that replaces an Article III court with an executive agency cannot, by definition, pass constitutional muster, and it is for this reason that the Court aggressively applied the *Ashwander v Tennessee Valley Authority*¹⁶² canon of avoidance so as to read IIRIRA as not eliminating habeas.¹⁶³ On the other hand, the government’s lack of attention to the “adequate substitute” argument in its brief and at oral argument may have contributed to the Court’s summary rejection of this justification. On more substantive grounds, the executive review scheme that the government proffered as a substitute for habeas likely failed to provide the necessary neutrality for a habeas replacement. The administrative law judges who presided over deportation proceedings in the first instance were employees of the Executive Office of Immigration Review, which is an arm of the Department of Justice, an agency headed by the Attorney General serving at the pleasure of the President.¹⁶⁴ Although they enjoyed civil service protections, immigration judges were subject to supervision and discipline by politically appointed superiors.¹⁶⁵ The

¹⁶⁰ *St. Cyr* Petitioner Brief at *30 (cited in note 158).

¹⁶¹ See Transcript of Oral Argument, *INS v St. Cyr*, No 00-767, *5–6 (Apr 24, 2001) (available on Westlaw at 2001 WL 469077).

¹⁶² 297 US 288 (1936).

¹⁶³ See, for example, Neuman, 98 Colum L Rev at 1027 (cited in note 9).

¹⁶⁴ See Stephen W. Yale-Loehr and Lindsay Schoonmaker, *Overview of US Immigration Law* § 1.8, in *Basic Immigration Law* 11, 21–22 (PLI 2008).

¹⁶⁵ Neuman, 98 Colum L Rev at 1024 (cited in note 9). Because immigration judges are federal civil servants, any attempt by politically appointed superiors to discipline them would, at least in theory, be constrained by federal civil service laws. See Ronald N. Johnson and Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* 69 (Chicago 1994). See also DOJ, Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* 70 (July 28, 2008), online at <http://www.justice.gov/oig/special/s0807/final.pdf> (visited Jan 17, 2010). Nonetheless, despite such protections, politically motivated discipline remains a possibility in the executive branch. See Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 Ohio St L J 251,

Board of Immigration Appeals that reviewed the immigration judges' decisions was similarly ensconced within the Executive Office of Immigration Review.¹⁶⁶ The Board was even less insulated from executive pressures than immigration judges: the Attorney General determined the size of the Board; had the power to overrule its decisions; and could appoint or remove members who disagreed with him.¹⁶⁷ With only limited appellate judicial review available to cure any deficiencies in IJ-BIA decisions, it is not hard to see why the government did not seriously argue that the administrative process available to immigrants facing deportation was an adequate and effective substitute for the habeas review IIRIRA appeared to eliminate.

Another explanation of *St. Cyr* consistent with a functional view of the Suspension Clause is that in passing IIRIRA, Congress did not at the same time design the court of appeals review of the executive agency decisionmaking that might have served as a replacement for habeas. Rather, this review system was already in place before IIRIRA. Unlike in *Hayman* and *Swain*, therefore, the potential replacement for habeas suggested by the government in *St. Cyr* was not the intentional result of congressional deliberation, but rather a leftover scheme in place after habeas was eliminated. While it is unclear the degree to which congressional deliberation should matter to the "adequate substitute" inquiry,¹⁶⁸ the lack of such deliberation may be one reason why the government did not seriously press the "adequate substitute" argument in its brief or at oral argument.

Taking the Supreme Court at its (literal) word, Congress responded to *St. Cyr* by passing the REAL ID Act of 2005,¹⁶⁹ which elim-

269 (2009) (discussing agency supervisors' punishment of staff members who are seen as "saboteur[s]" of the administration's position on a policy question). But see Easterbrook, 65 Ind L J at 279 (cited in note 133) (arguing that administrative law judges enjoy job protection commensurate to that of Article III judges). Moreover, although politics are not supposed to play a role in the hiring of immigration law judges, there is evidence that the Justice Department under President George W. Bush "systematic[ally]" considered political and ideological affiliations in appointing immigration judges in violation of federal law. DOJ, *An Investigation of Allegations of Politicized Hiring* at 115–24.

¹⁶⁶ Yale-Loehr and Schoonmaker, *Overview of US Immigration Law* § 1.8 at 22 (cited in note 164); Ramji-Nogales, Schoenholtz, and Schrag, 60 Stan L Rev at 350 & n 93 (cited in note 131) (explaining the history and composition of the Board).

¹⁶⁷ Neuman, 98 Colum L Rev at 1024 (cited in note 9). Indeed, Attorney General John Ashcroft used these powers to "radically" change the composition of the Board. Ramji-Nogales, Schoenholtz, and Schrag, 60 Stan L Rev at 351–53 (cited in note 131).

¹⁶⁸ The importance of legislative history to a statute's meaning and constitutional validity is, of course, the subject of much academic debate. See Diller, 61 SMU L Rev at 299–301 (cited in note 16).

¹⁶⁹ REAL ID Act of 2005, Pub L No 109-13, 119 Stat 302.

inated habeas review for noncitizens challenging certain removal orders issued by an immigration judge and upheld by the Bureau of Immigration Appeals.¹⁷⁰ The Act contemplated that federal appellate court review of an agency removal order would constitute the only judicial review of the executive action.¹⁷¹ Moreover, the Act made clear that the judicial review provided in the courts of appeals included legal and constitutional—but generally not factual—questions.¹⁷² The Act’s legislative history demonstrates that Congress intended for appellate review of agency removal decisions to serve as an “adequate substitute” for the habeas jurisdiction curtailed by the Act.¹⁷³ Thus far, the federal courts of appeals have sustained against Suspension Clause challenges the REAL ID Act’s limitation on habeas jurisdiction, considering appellate court review of agency action a constitutionally “adequate substitute” therefor.¹⁷⁴ The Supreme Court has yet to weigh in on the matter, but Congress, in passing the Act, clearly put its faith in the functional view of the Suspension Clause that the Supreme Court generally embraced before *Boumediene*.

II. *BOUMEDIENE*’S MOVE AWAY FROM FUNCTIONALISM

In light of the large amount of existing scholarship surrounding the Supreme Court’s decision in *Boumediene*,¹⁷⁵ this Part focuses on the aspect of the decision most germane to this Article: the Court’s

¹⁷⁰ 8 USC § 1252(a)(5).

¹⁷¹ 8 USC § 1252(a)(5).

¹⁷² 8 USC § 1252(a)(2)(D). But see Aaron G. Leiderman, Note, *Preserving the Constitution’s Most Important Human Right: Judicial Review of Mixed Questions under the REAL ID Act*, 106 Colum L Rev 1367, 1368 (2006) (arguing for judicial review of mixed questions of fact and law under the REAL ID Act).

¹⁷³ Conference Report on HR 1268, REAL ID Act of 2005, 109th Cong, 1st Sess, in 151 Cong Rec H 2873 (daily ed May 3, 2005) (“By placing all review in the courts of appeals, [the Act] would provide an ‘adequate and effective’ substitute for habeas corpus.”), citing *Swain*, 430 US at 381.

¹⁷⁴ *Puri v Gonzales*, 464 F3d 1038, 1041 (9th Cir 2006) (holding that the Suspension Clause was not violated because an agency hearing followed by appellate review was an adequate substitute). See also *Mohamed v Gonzales*, 477 F3d 522, 526 (8th Cir 2007) (same). Moreover, some scholars have urged that the REAL ID Act be read narrowly as not eliminating habeas in circumstances that would raise Suspension Clause problems. See, for example, Gerald L. Neuman, *On the Adequacy of Direct Review after the REAL ID Act of 2005*, 51 NY L Sch L Rev 133, 139 (2006–2007); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, 91 Cornell L Rev 459, 495 (2006).

¹⁷⁵ See, for example, Katz, 25 Const Comment at 378 (cited in note 10); Ernesto Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba: Does the “Empire Strike Back”?*, 62 SMU L Rev 117, 121–22 (2009); Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S Cal L Rev 259, 259–60 (2009); Diller, 61 SMU L Rev at 283 (cited in note 16); Meltzer, 2008 S Ct Rev at 35 (cited in note 58).

analysis of whether Congress replaced habeas corpus with an “adequate and effective substitute” consistent with the Suspension Clause. The story of *Boumediene* begins with the al Qaeda terrorist attacks of September 11, 2001.¹⁷⁶ Before September 11, the United States generally tried the captured perpetrators of terrorist attacks in the federal civilian criminal justice system.¹⁷⁷ With respect to terrorist suspects, September 11 changed much, if not “everything.” Seven days after the attacks, Congress overwhelmingly passed the Authorization for Use of Military Force (AUMF), which 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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”¹⁷⁸ With the backing of the AUMF, President George W. Bush, in October 2001, ordered the military to invade Afghanistan to root out the Taliban and al Qaeda.¹⁷⁹

Beginning in January 2002, the United States began transporting some detainees captured in Afghanistan—particularly, those prisoners considered especially dangerous or possessing particularly useful information—to the detention facility at Guantanamo.¹⁸⁰ Within the next year, as part of the military’s broader “war on terror,” the United States also transported to Guantanamo terrorist suspects captured in nations other than Afghanistan, such as Bosnia and Gambia.¹⁸¹ Although the Guantanamo naval base had been under United States control for almost one hundred years, it was officially sovereign Cuban territory that the United States occupied pursuant to a lease.¹⁸² Government officials chose Guantanamo as a detention site for these detainees because they thought the location’s ambiguous legal status

¹⁷⁶ See generally National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (Norton 2004).

¹⁷⁷ See *id.* at 71–74, 78, 82, 100–01, 108, 171, 209, 259 (discussing successful criminal prosecutions of the perpetrators and conspirators of the first World Trade Center bombing in 1993 and the 1998 East Africa embassy bombings, and the government response to the Oklahoma City federal building bombing of 1995 and the Khobar Towers bombing in Saudi Arabia of 1996); *id.* at 192–97 (discussing how the United States initially investigated the October 2000 attack on the USS Cole with an eye toward criminal prosecution of the perpetrators).

¹⁷⁸ Authorization for Use of Military Force (AUMF) § 2(a), Pub L No 107-40, 115 Stat 224, 224.

¹⁷⁹ Eric Schmitt and Steven Lee Myers, *A Nation Challenged: Military; More Than 100 G.I.’s in Afghan Ground Raid*, NY Times A1 (Oct 20, 2001).

¹⁸⁰ Katharine Q. Seelye, *A Nation Challenged: The Detention Camp; U.S. to Hold Taliban Detainees in ‘the Least Worst Place’*, NY Times B6 (Dec 28, 2001).

¹⁸¹ *Boumediene*, 128 S Ct at 2241.

¹⁸² *Id.* at 2251–52 (tracing the development and conditions of the lease).

would preclude the federal courts from exercising jurisdiction over habeas petitions filed by detainees held there.¹⁸³

Whereas in prior armed conflicts the United States treated most captured combatants as prisoners of war, the United States did not accord the Guantanamo detainees that status and its attendant protections.¹⁸⁴ Alleged members of al Qaeda and suspected terrorists, whether rounded up in Afghanistan or elsewhere, were considered members of a rogue, stateless international terrorist organization and, therefore, not protected by the Geneva Conventions.¹⁸⁵ Unlike lawful combatants in a conventional war, the Guantanamo detainees were not allowed to challenge their combatant status before a competent tribunal, as required by the Geneva Conventions and the law of war.¹⁸⁶

Without a formal, legal method to challenge their designation as enemy combatants, a large number of detainees filed for writs of habeas corpus in United States federal courts, as the Bush administration had anticipated, beginning in February 2002.¹⁸⁷ The detainees argued that the federal habeas statute in effect at that time, which in relevant part was virtually identical to the Judiciary Act of 1789,¹⁸⁸

¹⁸³ John Yoo, *War by Other Means: An Insider's Account of the War on Terror* 142–43 (Atlantic Monthly 2006) (“No location was perfect, but . . . Guantanamo . . . seemed to fit the bill. . . . [T]he federal courts probably wouldn’t consider Gitmo as falling within their habeas jurisdiction.”).

¹⁸⁴ See Memorandum from White House Counsel Alberto R. Gonzales to President George W. Bush, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan 25, 2002), in Karen J. Greenberg and Joshua L. Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* 118, 118–21 (Cambridge 2005). See also Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 Ind L J 1255, 1260–73 (2006) (explaining how the Bush administration changed preexisting military policy regarding the Geneva Conventions’ applicability).

¹⁸⁵ See Memorandum from Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty to Department of Defense General Counsel William J. Haynes, II, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan 9, 2002), in Greenberg and Dratel, eds, *Torture Papers* 38, 38–39 (cited in note 184). Even fighters for the Taliban, the regime which had ruled most of Afghanistan from 1996 to 2001, were initially classified as non-POW unlawful combatants, under the theory that Afghanistan under Taliban rule was a failed state and the Taliban was functionally indistinguishable from al Qaeda. Memorandum from Assistant Attorney General Jay Bybee to White House Counsel Alberto R. Gonzales and Department of Defense General Counsel William J. Haynes, II, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan 22, 2002), in Greenberg and Dratel, eds, *Torture Papers* 81, 82 (cited in note 184) (“Afghanistan’s status as a failed State is sufficient ground alone for the President to suspend [the Geneva Conventions], and thus to deprive members of the Taliban militia of POW status.”).

¹⁸⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 5, 1955 6 UST 3516, 3522, TIAS No 3365 (1949).

¹⁸⁷ Philip Shenon, *A Nation Challenged: Captives; Suit to be Filed on Behalf of Three Detainees in Cuba*, NY Times A11 (Feb 19, 2002).

¹⁸⁸ See *Rasul v Bush*, 542 US 466, 473 (2004).

granted the federal courts jurisdiction to hear their claims of unlawful detention.¹⁸⁹ These habeas petitions wound their way through the federal courts until June 2004, when the Supreme Court decided, in *Rasul v Bush*,¹⁹⁰ that the federal habeas statute conferred jurisdiction on federal courts to hear claims from Guantanamo detainees.¹⁹¹ In ruling for the petitioners, the 6-3 *Rasul* majority based its opinion on the habeas statute alone and studiously avoided the issue of whether the Suspension Clause required that the petitioners have access to the writ.¹⁹² *Rasul* touched off a back-and-forth with Congress regarding the scope of the writ that would culminate in *Boumediene*.

On the same day that the Supreme Court decided *Rasul*, it ruled on the detention of an American citizen—Yaser Hamdi—who had allegedly been captured on a battlefield in Afghanistan by American forces.¹⁹³ Hamdi argued that he was not an enemy combatant and that his detention was therefore illegal.¹⁹⁴ To contest his detention, Hamdi's father filed a petition on his son's behalf in the federal courts.¹⁹⁵ Because of his American citizenship, the government moved Hamdi from Guantanamo to a South Carolina naval brig and did not contest his access to the writ as it did with the petitions of the foreign nationals at Guantanamo.¹⁹⁶ The government argued, however, that although Hamdi had access to the writ, his detention was justified by the AUMF and the law of war, the latter of which permitted the military detention of anyone, regardless of citizenship, caught engaging in hostilities against American forces in Afghanistan.¹⁹⁷ A controlling plurality of the *Hamdi v Rumsfeld*¹⁹⁸ Court upheld the President's authority to detain combatants caught on the battlefield in Afghanistan, including American citizens, pursuant to the AUMF and the law of war.¹⁹⁹ On the other hand, the plurality held that Hamdi was entitled, under the Due Process Clause of the Fifth Amendment, to "a fair opportunity to rebut the Government's factual assertions before a neutral decision-

¹⁸⁹ *Id.*

¹⁹⁰ 542 US 466 (2004).

¹⁹¹ *Id.* at 484.

¹⁹² *Id.* at 478. In *Rasul*, the Court avoided deciding what, if any, substantive constitutional rights the petitioners had. *Id.* at 483 n 15.

¹⁹³ *Hamdi v Rumsfeld*, 542 US 507, 510 (2004) (plurality).

¹⁹⁴ *Id.* at 511–12.

¹⁹⁵ *Id.* at 511.

¹⁹⁶ *Id.* at 510, 525.

¹⁹⁷ *Hamdi*, 542 US at 516–17.

¹⁹⁸ 542 US 507 (2004).

¹⁹⁹ *Id.* at 519.

maker,” which he had not yet received.²⁰⁰ The plurality did not require that this “neutral decisionmaker” be a federal judge; rather, it held only that Hamdi was entitled to “some system” for refuting his classification and that this system could rely on hearsay evidence and a rebuttable presumption in favor of the government’s allegations.²⁰¹ In dissent, Justice Antonin Scalia, joined by Justice John Paul Stevens, argued that in the absence of a suspension of habeas corpus by Congress, which had not occurred, the government was compelled either to try Hamdi criminally or release him.²⁰²

A. Development of the DTA-CSRT Substitute for Habeas

The Court’s holding in *Hamdi* applied, by its own terms, to “citizen detainee[s],” and, therefore, perhaps not to the foreign nationals imprisoned at Guantanamo.²⁰³ The Bush administration, however, responded to *Hamdi* by establishing a formal process, consistent with its reading of the plurality opinion, for assessing whether detainees at Guantanamo were “enemy combatants.” Through a memorandum issued by the Deputy Secretary of Defense soon after *Hamdi*, the military established Combatant Status Review Tribunals (CSRTs).²⁰⁴ The CSRTs were panels of three “neutral” commissioned officers of the United States Armed Forces, including one judge advocate, that conducted hearings to determine whether each detainee had been properly classified as an enemy combatant.²⁰⁵ Detainees were not represented before the tribunals by a lawyer, but by a “personal representative” — a military officer who reviewed a detainee’s file and “assist[ed]” the detainee with the review process.²⁰⁶ Further, the CSRT procedures did not entitle the detainee to see all of the evidence against him, attend all of the proceedings, or call the witnesses of his choosing.²⁰⁷ For these reasons and others, many lawyers and legal scholars harshly criticized the

²⁰⁰ Id at 533.

²⁰¹ Id at 533–35, 537.

²⁰² *Hamdi*, 542 US at 563–69 (Scalia dissenting).

²⁰³ Id at 537 (plurality).

²⁰⁴ Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal* 1–4 (July 7, 2004), online at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (visited Jan 17, 2010).

²⁰⁵ Id at 1–2.

²⁰⁶ Id at 1.

²⁰⁷ See Mark P. Denbeaux, et al, *No-hearing Hearings—CSRT: The Modern Habeas Corpus?* *4–6, 40 (Seton Hall Public Law Research Paper No 951245, Dec 2006), online at http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf (visited Jan 17, 2010).

CSRTs as failing to provide due process to Guantanamo detainees.²⁰⁸ In addition to the CSRTs, which made the initial determination about a detainee's combatant status, the Department of Defense in September 2004 established an Administrative Review Board (ARB) to assess annually the need to continue to detain each confirmed combatant.²⁰⁹ The ARBs consisted of three military officers who reviewed "reasonably available and relevant information" regarding a detainee to determine whether he should be released, transferred to another nation for imprisonment or conditional release, or remain at Guantanamo.²¹⁰ The ARBs provided even fewer procedural protections than the CSRTs: the detainee and his nonlawyer "Assisting Military Officer" were permitted only to see the nonclassified information relied upon by the Board, and the detainee was not allowed to call any witnesses.²¹¹

When the Department of Defense promulgated the CSRT and ARB procedures in the summer of 2004, it was not yet clear that these procedures—particularly the CSRTs—would serve as a key part of a replacement for habeas corpus for detainees at Guantanamo. The Supreme Court had just ruled in *Rasul*, after all, that the federal habeas statute permitted detainees to file habeas claims in federal court. The CSRTs were designed to provide the process that *Hamdi* said was due, not necessarily to replace the habeas that *Rasul* had concluded extended to detainees. In the wake of *Rasul*, the number of Guantanamo detainees filing habeas petitions soared.²¹² Reading *Rasul* as resting only on a statutory basis, however, the Bush administration pressed Congress to overrule *Rasul*.²¹³ In December 2005, Congress at least partially acceded to the administration's request by passing the Detainee Treatment Act (DTA).²¹⁴

²⁰⁸ See, for example, *id.* at *4. See also Fallon and Meltzer, 120 Harv L Rev at 2063 (cited in note 154).

²⁰⁹ See Memorandum from Department of Defense Designated Civilian Official Gordon England, *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, enclosure (3) 1 (Sept 14, 2004), online at <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf> (visited Jan 17, 2010).

²¹⁰ *Id.*

²¹¹ *Id.* at 2.

²¹² By November 2005, nearly two hundred of the five hundred detainees at Guantanamo had filed habeas petitions. Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, NY Times A1 (Nov 11, 2005).

²¹³ See *id.*

²¹⁴ DTA § 1005, 119 Stat at 2740. See also Josh White, *Detainees Face Limited Access to Courts; But Bill Awaiting Bush Signature Would Shield Terror Suspects from U.S. Abuse*, Wash Post A4 (Dec 24, 2005).

The DTA amended the habeas statute the Court had interpreted in *Rasul* in a manner that appeared to restrict, if not eliminate, the availability of habeas relief to alien detainees at Guantanamo.²¹⁵ The DTA was ambiguous as to whether it intended to eliminate the federal courts' jurisdiction over all potential habeas petitions filed by Guantanamo detainees, or rather preserved the pending claims of the nearly two hundred detainees who had already filed petitions.²¹⁶ Some senators who voted for the DTA believed that they were voting for a complete elimination of federal habeas jurisdiction at Guantanamo,²¹⁷ while others voted for the Act with the belief that it would let pending petitions proceed.²¹⁸

In addition to its habeas-narrowing provision, the DTA addressed a number of other issues regarding detainee treatment.²¹⁹ Of particular importance to the discussion here, the DTA established nonhabeas judicial procedures by which CSRT determinations could be reviewed in the federal courts. In particular, the DTA gave the United States Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction to determine the validity of any final decision of" a CSRT regarding an alien's designation as an "enemy combatant."²²⁰ The DTA limited the DC Circuit's jurisdiction to determining whether the CSRT "was consistent with the standards and procedures specified by

²¹⁵ DTA § 1005(e), 119 Stat at 2742.

²¹⁶ *Hamdan v Rumsfeld*, 548 US 557, 574 (2006).

²¹⁷ See, for example, 151 Cong Rec S 14262 (daily ed Dec 21, 2005) (statement of Sen Lindsey Graham) (asserting that the questions raised by the habeas petitions should be determined internally by the military rather than by the courts). See also Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents, *Hamdan v Rumsfeld*, No 05-184, *16-20 (US filed Feb 23, 2006) (available on Westlaw at 2006 WL 467689) (arguing that the Court does not have jurisdiction over such habeas petitions except as set out by the DTA, and that "Senator after Senator recognized that review under the DTA would immediately displace habeas for all cases, including those already filed"); George W. Bush, *Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, 41 Weekly Comp Pres Doc 1918, 1919 (Dec 30, 2005) (indicating that President Bush believed that the DTA cut off all detainee habeas cases, pending or not, in federal court).

²¹⁸ See 151 Cong Rec at S 14257 (statement of Sen Carl Levin) (cited in note 217) (citing the "effective date" provision of the DTA, § 1005(h), as support for the habeas limitations not applying to pending claims).

²¹⁹ For instance, the DTA included the McCain Amendment, so named for Senator John McCain of Arizona, which required that all prisoners in Department of Defense custody be treated uniformly according to the Army Field Manual. DTA § 1002, 119 Stat at 2739. The Act banned cruel, inhumane, and degrading treatment of detainees, 42 USC § 2000dd, while also immunizing military and other governmental personnel from lawsuits and criminal prosecution for acts performed while interrogating detainees pursuant to official orders. 42 USC § 2000dd-1.

²²⁰ DTA § 1005(e)(2)(A), 119 Stat at 2742.

the Secretary of Defense for [CSRTs]” and, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the [combatant’s status] determination is consistent with the Constitution and laws of the United States.”²²¹ The members of Congress who believed that the DTA would eliminate habeas jurisdiction for Guantanamo detainees also viewed this DC Circuit review procedure as the detainees’ sole means of contesting detention.²²² It is not clear from the legislative history, however, whether these legislators intended for DC Circuit review of the CSRT process to serve as a substitute for habeas.²²³

Besides providing for DC Circuit review of CSRT determinations, the DTA directed the Secretary of Defense to submit to Congress the procedures for determining combatant status within 180 days and submit periodic updates.²²⁴ The DTA also required the President to appoint a civilian official subject to Senate confirmation to serve as “the final review authority” for combatant status determinations.²²⁵ The Act also mandated that any CSRT or ARB “assess . . . whether any statement derived from or relating to such detainee was obtained as a result of coercion; and . . . the probative value (if any) of any such statement.”²²⁶ The Act did not say any more about what the CSRT or ARB should do with such evidence besides “assess” it. The DTA also said little about what specific procedures the CSRTs or ARBs should use. The DTA required that the CSRTs and ARBs “provide for periodic review of any new evidence that may become available relating to” a detainee’s status.²²⁷ In addition, in granting jurisdiction to the DC Circuit to review CSRT determinations, the DTA specifically noted that the court’s jurisdiction would be limited to whether the CSRT determination “was consistent with the standards and procedures specified by the Secretary of Defense . . . (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in

²²¹ DTA § 1005(e)(2)(C), 119 Stat at 2742.

²²² See 151 Cong Rec at S 14263 (statements of Sens Graham and Jon Kyl) (cited in note 217) (describing the bill as “extinguish[ing]” the traditional habeas action available to detainees and creating in its place the DC Circuit’s “limited judicial review”).

²²³ *Id.* (statement of Sen Graham) (urging that pending habeas claims be restyled as appeals of CSRT determinations to the DC Circuit under the DTA, but not commenting on whether this restyled procedure would offer the same level of process as a habeas proceeding).

²²⁴ DTA § 1005, 119 Stat at 2740–44.

²²⁵ DTA § 1005(a)(2), 119 Stat at 2741.

²²⁶ DTA § 1005(b)(1), 119 Stat at 2741.

²²⁷ DTA § 1005(a)(3), 119 Stat at 2741.

favor of the Government's evidence)."²²⁸ It is unclear whether Congress meant this language to bind the executive branch to a preponderance of the evidence standard or whether this language meant only to refer to the CSRT standard in effect at that time.²²⁹

Within seven months of the DTA's passage, the Supreme Court, in *Hamdan v Rumsfeld*,²³⁰ construed the Act as not stripping federal courts of jurisdiction over pending habeas claims.²³¹ *Hamdan*, which invalidated the military commissions system that President Bush established through executive order, did not speculate as to whether the DTA would have violated the Suspension Clause had it stripped the courts of habeas jurisdiction.²³² The decision prompted Congress to revisit the issues of military commissions and habeas corpus in the summer and fall of 2006. The Bush administration pressed Congress to respond to *Hamdan* by clearly and unequivocally repealing federal court jurisdiction over habeas petitions from Guantanamo.²³³ President Bush also sought legislation establishing a military commissions system that would pass constitutional muster under the approach articulated in *Hamdan*.²³⁴

In September 2006, Congress passed the Military Commissions Act (MCA), which, in addition to establishing a military commissions system, unequivocally stripped the federal courts of jurisdiction over all habeas actions—pending or not—filed by Guantanamo detainees.²³⁵ In debating the MCA's habeas-stripping provision—§ 7 of the Act—many members of Congress, including some who nonetheless voted for the Act, expressed grave doubts about § 7's constitutionality.²³⁶ These members argued that by eliminating habeas, Congress would

²²⁸ DTA § 1005(e)(2)(C), 119 Stat at 2742 (outlining the scope of judicial review of enemy combatant detention).

²²⁹ Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy at 3 (cited in note 204) (establishing preponderance of the evidence as the standard for CSRTs).

²³⁰ 548 US 557 (2006).

²³¹ *Id.* at 584.

²³² *Id.* at 575–76 (noting that the Court was not reaching constitutional questions presented regarding habeas because it was relying on “[o]rdinary principles of statutory construction”).

²³³ Diller, 61 SMU L Rev at 316 (cited in note 16).

²³⁴ Kate Zernike, *Administration Prods Congress to Curb the Rights of Detainees*, NY Times A1 (July 13, 2006).

²³⁵ See MCA § 7, 120 Stat at 2635–36, amending 28 USC § 2241(e). Despite the Act's very clear language regarding its intent to strip the courts of all pending habeas actions, see MCA § 7(b), 120 Stat at 2636 (setting forth the section's effective date), the petitioners in *Boumediene* argued unsuccessfully that the MCA's text did not state with sufficient clarity Congress's intent to strip jurisdiction. *Boumediene*, 128 S Ct at 2242–43.

²³⁶ See Diller, 61 SMU L Rev at 321–23 (cited in note 16) (discussing the reservations of Senators Arlen Specter and Gordon Smith).

violate the Suspension Clause.²³⁷ Other proponents of the Act, by contrast, argued that § 7 did not violate the Suspension Clause because aliens held overseas—including Guantanamo—were not entitled to constitutional habeas protection.²³⁸ Some proponents also argued that even if the Suspension Clause’s protections ran to Guantanamo, the alternative procedures provided for by the DTA—a CSRT coupled with DC Circuit review—amounted to a constitutionally valid replacement for habeas.²³⁹ There was at least some legislative history, therefore, to support the proposition that Congress intended for the DTA’s CSRT review scheme to serve as an adequate substitute for the habeas that § 7 of the MCA withdrew.

The Guantanamo detainees quickly challenged the MCA’s § 7 as a violation of the Suspension Clause in litigation that eventually reached the Supreme Court in *Boumediene*.²⁴⁰ Despite Guantanamo not being sovereign United States territory, the detainees nonetheless argued that the United States’ decades of control of the naval base at Guantanamo made it domestic territory for purposes of the Suspen-

²³⁷ See, for example, 152 Cong Rec H 7553 (daily ed Sept 27, 2006) (statement of Rep Sander Levin) (“This [bill] will not pass constitutional muster.”); 152 Cong Rec at H 7555 (statement of Rep Tom Lantos) (“I . . . fully expect to be back debating these issues when the Supreme Court overturns this ill-advised legislation.”); 152 Cong Rec S 10360 (daily ed Sept 28, 2006) (statement of Sen Russ Feingold) (noting that the elimination of habeas “almost surely violates our Constitution”); 152 Cong Rec at S 10366 (statement of Sen Levin) (“If we don’t strike this court-stripping language in the bill . . . our expectation is that the courts will . . . strike it down as unconstitutional.”). Senator Specter, who voted for the final bill, predicted that the MCA’s § 7 would be struck down by the Supreme Court. 152 Cong Rec S 10263, 10264–65 (daily ed Sept 27, 2006) (statement of Sen Specter) (proposing an amendment to retain detainee habeas rights in light of his reasoning that to do otherwise would violate the Constitution). Senator Gordon Smith, who also voted for the bill, called the habeas-stripping provision “a frontal attack on our judiciary . . . and civil rights laws” that “ought to trouble us all.” 152 Cong Rec at S 10364 (statement of Sen Smith) (urging removal of the MCA’s habeas provision).

²³⁸ See, for example, 152 Cong Rec at H 7545 (statement of Rep Jim Sensenbrenner) (cited in note 237) (“The Supreme Court has never, never held that the Constitution’s protections, including habeas corpus, extend to non-citizens held outside the United States.”); 152 Cong Rec at S 10359 (statement of Sen Jeff Sessions) (cited in note 237) (asserting that “unlawful combatants” have never been afforded the full protection of the Geneva Conventions).

²³⁹ See, for example, 152 Cong Rec at S 10266 (statement of Sen Graham) (cited in note 237) (“[U]nder the Detainee Treatment Act . . . every detainee at Guantanamo Bay will have their day in Federal Court.”); 152 Cong Rec at H 7540–41 (statement of Rep Duncan L. Hunter) (cited in note 237) (“Every single person held in Guantanamo has the right and will have the right under this legislation to contest whether or not they are . . . enemy combatants That, in my estimation, is an important type of habeas corpus . . . preserved in this bill.”).

²⁴⁰ See Brief for the *Boumediene* Petitioners, *Boumediene v Bush*, No 06-1196, *ii (US filed Aug 24, 2007) (available on Westlaw at 2007 WL 2441590) (“*Boumediene* Petitioners’ Brief”) (listing the seven detainee parties to the proceeding below whose 2005 appeals to the DC Circuit were eventually consolidated into *Boumediene*).

sion Clause.²⁴¹ They argued that because there was no rebellion or invasion, Congress could not constitutionally suspend the writ as applied to them at Guantanamo.²⁴² Of most importance to this discussion, the detainees argued that the DTA's CSRT review scheme was not an "adequate substitute" for the habeas that the MCA's § 7 had withdrawn. The detainees argued that the DTA's CSRT review scheme was plagued by a number of flaws that rendered it a constitutionally inadequate substitute for habeas, including: no opportunity to present evidence; no express authority to order release; its sluggish pace; restrictions on attorney-client relationship; and a lack of neutral and plenary review.²⁴³ In arguing the lack of neutral and plenary review, the detainees contended that the military officers who sat on CSRT panels, "were under strong command pressure to rule in the government's favor," and, therefore, could not be neutral in the manner of a traditional habeas judge.²⁴⁴ The detainees argued that the DC Circuit review of the CSRT panel findings would be compromised because the DTA recognized a rebuttable presumption in favor of the government, which was inconsistent with habeas practice.²⁴⁵ The detainees also argued that by limiting the DC Circuit's review to whether the CSRT followed the military's own "standards and procedures" and whether those procedures were consistent with the laws and Constitution of the United States, the MCA prohibited the court from drawing on "whatever legal sources the judge deemed applicable,"²⁴⁶ and limited the factfinding ability of the DC Circuit.²⁴⁷

The government countered by arguing that the petitioners in *Boumediene*, as foreign nationals held in a territory over which the United States was not formally sovereign, had no constitutional right to the Great Writ.²⁴⁸ Even if the detainees were protected by the Sus-

²⁴¹ Id at *10.

²⁴² Id at *9.

²⁴³ Id at *26–33.

²⁴⁴ *Boumediene* Petitioners' Brief at *29–30 (cited in note 240). See also Brief for Petitioners Al Odah, et al, *Al Odah v United States*, No 06-1196, *36–37 (US filed Aug 24, 2007) (available on Westlaw at 2007 WL 2414905) (arguing that CSRT members are under strong "command influence" in a case decided in conjunction with *Boumediene*); Brief for Petitioners El-Banna, et al, *Al Odah v United States*, No 06-1196, *42 (US filed Aug 24, 2007) (available on Westlaw at 2007 WL 2414903) ("El-Banna Brief") (same).

²⁴⁵ See *Boumediene* Petitioners' Brief at *29 (cited in note 240).

²⁴⁶ *El-Banna Brief* at *47 (cited in note 244).

²⁴⁷ Id at *30–32.

²⁴⁸ *Boumediene*, 128 S Ct at 2244; Brief for the Respondents, *Boumediene v Bush*, Nos 06-1195, 06-1196, *14 (US filed Oct 9, 2007) (available on Westlaw at 2007 WL 2972541) ("*Boumediene* Respondents' Brief").

pension Clause, the government argued, the DTA's CSRT review process amounted to a constitutionally "adequate and effective substitute" for habeas corpus.²⁴⁹ In so arguing, the government expressly relied on the Supreme Court's previously articulated functional view of the Suspension Clause, under which an executive tribunal might serve as an essential part of a constitutionally valid "substitute" for habeas. Aware of the limits to the functional approach, however, the government noted that because the DTA gave the DC Circuit jurisdiction to determine whether the CSRT process was "consistent" with the Constitution and federal law, the DC Circuit could correct any shortcomings in the CSRT process.²⁵⁰ Indeed, the government's proposed reading of the DTA was somewhat consistent with the "appellate review theory" of Article III discussed earlier.²⁵¹

On the issue of the CSRTs' neutrality, the government noted that by using military officers, the CSRTs hewed to the Court's instructions in *Hamdi*, in which the plurality suggested that a military panel could serve as the necessary "neutral" decisionmaker for due process purposes.²⁵² With respect to objections to the scope of the DC Circuit's review, the government urged the Court to read the DTA in a flexible manner that would render the scheme constitutional. In particular, at the Supreme Court oral argument, Solicitor General Paul Clement conceded that the DTA could be construed so as to permit the DC Circuit to order release.²⁵³ Clement hedged when asked whether a detainee could challenge his detention on legal grounds alone on petition to the DC Circuit from the CSRT, but did not emphatically oppose an interpretation of the DTA that would permit such a challenge.²⁵⁴

B. The Supreme Court's Decision

By a vote of 5-4, the Supreme Court invalidated the MCA's § 7 in *Boumediene*. In an opinion authored by Justice Kennedy, the majority first concluded that Guantanamo, as an area under United States control, if not formal sovereignty, was subject to the protections of the

²⁴⁹ *Boumediene* Respondents' Brief at *40 (cited in note 248).

²⁵⁰ *Id.* at *53-54.

²⁵¹ See notes 112-18 and accompanying text.

²⁵² *Boumediene* Respondents' Brief at *49-50 (cited in note 248).

²⁵³ Transcript of Oral Argument, *Boumediene v. Bush*, Nos 06-1195, 06-1196, *35-37 (Dec 5, 2007) (available on Westlaw at 2007 WL 4252686) ("[I]f what the Constitution requires to make the DTA to be an adequate substitute is the power to order release, there is no obstacle in the text of the DTA to that.").

²⁵⁴ *Id.* at *38-39, 53-56.

Suspension Clause.²⁵⁵ The Court then assessed whether the DTA-CSRT review scheme was an adequate replacement for habeas corpus. The Court admittedly did “not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”²⁵⁶ *Hayman and Swain*— “[t]he two leading cases addressing habeas substitutes”—“provide[d] little guidance” in the matter at hand, Justice Kennedy wrote, because those statutes “were attempts [by Congress] to streamline habeas corpus relief, not to cut it back.”²⁵⁷ To that end, Justice Kennedy repeatedly noted that in passing the MCA, Congress intended to provide the Guantanamo detainees with something less than habeas corpus.²⁵⁸ As a result, Justice Kennedy refused to read the DTA generously, as urged by the Solicitor General at oral argument, in a manner that would render it constitutional. In his dissent, Chief Justice John Roberts excoriated the majority for refusing to apply the usual *Ashwander* canon of construction, under which the Court reads statutes in a manner so as to render them constitutional.²⁵⁹ Justice Kennedy, in response, noted that the aggressive application of the canon urged by the dissent would be intellectually dishonest, transmogrifying the DTA-CSRT review scheme into a procedure more robust and habeas-like than Congress ever intended.²⁶⁰ The majority seemed to conclude that it was better to honor congressional intent and strike down the MCA’s § 7 than to bend over backwards in interpreting the DTA so as to save it.²⁶¹

Steadfastly refusing to read the DTA generously, the majority focused on specific flaws in the CSRT review procedures as compared to “traditional habeas corpus” proceedings.²⁶² As an initial matter, the

²⁵⁵ See *Boumediene*, 128 S Ct at 2260–61. The Court distinguished its earlier decision denying habeas to aliens held abroad in *Johnson v Eisentrager*, 339 US 763 (1950), on a number of bases, including the fact that the latter involved a “transient possession” under the jurisdiction of the combined Allied Forces, not just the United States, *Boumediene*, 128 S Ct at 2260–61, and that the petitioners in *Eisentrager* had received a trial by military commission shortly after their capture, whereas some of the Guantanamo detainees had been imprisoned for more than six years without yet facing charges for war crimes, *Boumediene*, 128 S Ct at 2259.

²⁵⁶ *Boumediene*, 128 S Ct at 2266.

²⁵⁷ *Id.* at 2264. In particular, the majority noted that the statutes at issue in *Hayman and Swain* each contained clauses preserving habeas should the substitute remedy prove inadequate or ineffective. *Id.* at 2265.

²⁵⁸ *Id.* at 2265–66.

²⁵⁹ *Id.* at 2292 (Roberts dissenting) (arguing that the DTA emulates the core release powers of habeas because it “can and should be read to confer” the authority to release “in appropriate circumstances”).

²⁶⁰ *Boumediene*, 128 S Ct at 2274.

²⁶¹ See Diller, 61 SMU L Rev at 330–31 (cited in note 16).

²⁶² See *Boumediene*, 128 S Ct at 2266.

majority, without providing any explanation, stated that it viewed the DC Circuit review procedure, rather than the CSRT, as providing the only collateral review of combatant status determinations.²⁶³ In his dissent, Chief Justice Roberts countered that the CSRT process itself provided the first level of collateral review of the military's designation of a detainee as a combatant, with the DC Circuit appeal of the CSRT serving as a second level of collateral review.²⁶⁴ The majority insisted that its view of the DC Circuit proceeding—rather than the CSRT—as the beginning of a detainee's collateral review made “no difference” in terms of whether “the sum total of procedural protections” amounted to an adequate substitute for habeas.²⁶⁵ This statement is hard to square with the rest of the majority opinion, which faulted the DC Circuit review system for its inability to gather facts and hear evidence, a role that is traditionally performed by the habeas court to which a detainee initially petitions.

Justice Kennedy's opinion most pointedly faulted the DC Circuit proceeding for its inability to consider exculpatory information obtained by a detainee after his CSRT but before or during a DC Circuit appeal.²⁶⁶ In light of the government's use of hearsay evidence and the detainee's lack of a right to counsel in front of the CSRT, Justice Kennedy found it particularly problematic that a detainee's ability to supplement the record on review—a long-held right of habeas petitioners—was limited.²⁶⁷ Although the government had conceded that, under the DTA, the DC Circuit could order the military to convene a new CSRT in light of newly discovered evidence,²⁶⁸ the majority was not satisfied that the DTA could be read as giving the DC Circuit the authority to *require* the military to convene a new CSRT.²⁶⁹ In dissent, Chief Justice Roberts highlighted the improbability of the majority's imagined scenario,²⁷⁰ and also contended that even if the Secretary of Defense refused to convene a new CSRT, as the majority feared, the detainee could petition the DC Circuit for relief.²⁷¹

²⁶³ Id at 2269.

²⁶⁴ Id at 2280, 2284 (Roberts dissenting) (observing that CSRTs operate much like habeas courts).

²⁶⁵ Id at 2269 (majority).

²⁶⁶ *Boumediene*, 128 S Ct at 2270.

²⁶⁷ Id at 2270, 2272–73.

²⁶⁸ Id at 2289 (Roberts dissenting).

²⁶⁹ Id at 2273–74 (majority).

²⁷⁰ *Boumediene*, 128 S Ct at 2289 (Roberts dissenting).

²⁷¹ Id at 2290 n 2.

In addition to this chief procedural flaw, the *Boumediene* majority faulted the DTA for not explicitly authorizing the DC Circuit to grant release, even though the Solicitor General urged the Court to read the statute in such a fashion if necessary to sustain it and the dissent contended that the *Ashwander* canon required such an interpretation.²⁷² Moreover, the majority expressed concern with the DTA's limited jurisdictional grant and whether it would allow for a legal challenge to the President's authority to detain.²⁷³ Again, with respect to this point, the Solicitor General urged a generous construction of the DTA to avoid any constitutional difficulties.²⁷⁴ The Court indicated that it might have been willing to interpret away these problems had it not been for the perceived inability of the detainee to present exculpatory evidence and what it viewed as Congress's unmistakable intent to provide something less than habeas. As part of the overall scheme, however, the Court considered the absence of express release and legal challenge provisions further evidence of constitutional taint.²⁷⁵

By refusing to fully articulate what an "adequate substitute" for habeas would require, the *Boumediene* majority left unanswered many questions about the Court's commitment to a functional view of the Suspension Clause. The Court was undoubtedly greatly influenced by the legislative history of the MCA. Many members of Congress indicated that they did not think that the Guantanamo detainees deserved habeas corpus or anything like it.²⁷⁶ Other members believed that the MCA's elimination of habeas was patently unconstitutional, yet voted for the MCA anyway.²⁷⁷ Given this backdrop, the majority thought that it would strain credibility to interpret the DTA as generously as the Solicitor General urged. Holding fast to a rigid view of the Suspension Clause, therefore, offered a doctrinal path to preserving more rights for the detainees in the face of an aggressive Executive and a weak legislative branch.²⁷⁸

The reasoning of the *Boumediene* majority, however, may imperil the functional view of the Suspension Clause that *Hayman* and *Swain* espoused. While the majority did not explain why it declined to view the CSRT process as a first level of collateral review,²⁷⁹ this choice indi-

²⁷² Id at 2271 (majority); id at 2291 (Roberts dissenting).

²⁷³ Id at 2272 (majority).

²⁷⁴ *Boumediene*, 128 S Ct at 2272.

²⁷⁵ Id.

²⁷⁶ See note 238.

²⁷⁷ See note 237.

²⁷⁸ Katz, 25 Const Comment at 418–20 (cited in note 10).

²⁷⁹ *Boumediene*, 128 S Ct at 2269.

cates a reluctance to accept any agency review of detention as even a component of a constitutionally adequate substitute for habeas. Moreover, in discussing the separation of powers concerns implicated by the Suspension Clause, the majority emphasized the need for the judiciary to check executive and congressional overreaching.²⁸⁰ This understanding of the Clause is in significant tension with the Framers' understanding of habeas corpus as a legislative and judicial tool for checking the Executive, not a judicial tool for checking the Executive and the legislature. The majority emphasized the importance of a "judicial"—rather than merely a neutral—role in administering the habeas corpus function of reviewing executive detention.²⁸¹ This emphasis may be further evidence of hostility toward delegating away the habeas function to anything other than a court—and perhaps even anything but an Article III court.²⁸²

Another hint of Suspension Clause absolutism lies in the *Boumediene* majority's treatment of the issue of due process. In his dissent, Chief Justice Roberts repeatedly chided the majority for departing from the Court's plurality opinion in *Hamdi*. In that opinion, Justice O'Connor suggested that a military system for determining combatant status in which hearsay evidence was admissible and there was a rebuttable presumption in favor of the government—in other words, a system much like the CSRTs—would satisfy standards of due process.²⁸³ Moreover, Justice O'Connor wrote in the context of due process standards for a United States citizen, whereas the DTA replacement scheme for habeas applied only to foreign nationals.²⁸⁴ As Chief Justice Roberts noted, the DTA scheme—by providing for review of the CSRTs by an Article III court—went further than the constitutionally adequate scheme suggested by Justice O'Connor in *Hamdi*.²⁸⁵

The *Boumediene* majority gave short shrift to *Hamdi*, noting that Justice O'Connor's controlling opinion did not garner a majority.²⁸⁶ More importantly, Justice Kennedy asserted that the question of due process addressed in *Hamdi* was doctrinally distinct from the question

²⁸⁰ Id at 2247.

²⁸¹ Id at 2246–47, 2271.

²⁸² Id at 2273 (recognizing “[t]he role of an Article III court in the exercise of its habeas corpus function”).

²⁸³ *Hamdi*, 542 US at 533–34 (plurality) (holding that such a “tailored” process was justified during ongoing military conflict to alleviate the burden on the executive branch).

²⁸⁴ See DTA § 1005(e), 119 Stat at 2742 (limiting the scope of applicability to “aliens”).

²⁸⁵ See *Boumediene*, 128 S Ct at 2284 (Roberts dissenting).

²⁸⁶ Id at 2269.

of whether the Suspension Clause has been violated.²⁸⁷ Even if the DTA-CSRT scheme comported with due process and the procedures for authorizing detention were “structurally sound,” Justice Kennedy wrote, the Suspension Clause would “remain[] applicable and the writ relevant.”²⁸⁸ Whereas prior cases and some scholarship viewed due process and habeas corpus as inextricably linked—the latter was a means of giving effect to the former²⁸⁹—Justice Kennedy’s opinion unapologetically considered habeas corpus to be a procedural mechanism of independent value whose existence was guaranteed by the Suspension Clause, whether necessary for due process or not.²⁹⁰ Justice Kennedy’s opinion comes close to embracing a view of the Suspension Clause as requiring habeas qua habeas, at least in certain core cases. Chief Justice Roberts, by contrast, argued that if the DTA scheme satisfied due process, and “if an Article III court is available to ensure that these procedures are followed in future cases,” then the Suspension Clause has not been violated.²⁹¹ Chief Justice Roberts was thus open to a more functional view of the Clause, although he too appeared to believe that a habeas replacement must preserve some role for the Article III judiciary in order to be constitutionally adequate.²⁹²

The more rigid Suspension Clause jurisprudence embraced by the majority in *Boumediene* threatens to limit Congress’s ability to craft a replacement for habeas in the future. To preserve a functional approach to habeas, the Court might have adopted a nondelegation rationale. Under this approach, the DTA-CSRT scheme could not function as an adequate substitute for habeas corpus because it delegated extensive authority for designing a replacement for habeas to the very Executive that habeas is designed to restrain. Moreover, the DTA further cemented the Executive’s nearly unbridled authority to define

²⁸⁷ Id at 2269–70.

²⁸⁸ Id at 2270.

²⁸⁹ See *Hamdi*, 542 US at 525 (O’Connor) (plurality) (noting that the Due Process Clause “informs the procedural contours” of habeas corpus); id at 555 (Scalia dissenting) (citing Blackstone for the proposition that the Framers intended for “due process as the right secured” and “habeas corpus as the instrument by which due process” was vindicated); Neuman, 98 Colum L Rev at 971 (cited in note 9) (“The writ of habeas corpus thus acquired an association with the principle of due process of law.”); Henry M. Hart, Jr, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1390 (1953) (noting that “existence of a jurisdiction in habeas corpus, coupled with the constitutional guarantee of due process, implied a regime of law”).

²⁹⁰ *Boumediene*, 128 S Ct at 2270.

²⁹¹ Id at 2281 (Roberts dissenting).

²⁹² Id. See also id at 2283 (“[T]he writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release.”).

who is an “enemy combatant.” While on its own this flaw may not have been enough to raise nondelegation questions of constitutional magnitude, it exacerbated the nondelegation concerns spawned by Congress’s extensive delegation to the President of the power to establish habeas replacement procedures. A rationale for invalidating the DTA grounded in nondelegation would have been more consistent with an understanding of habeas corpus as a legislative and judicial creature that is designed primarily to check the Executive, rather than a judicial tool intended to check both political branches.

III. THE NONDELEGATION ALTERNATIVE

It has been said that the nondelegation doctrine “had one good year”²⁹³—1935—when a Supreme Court hostile to President Franklin D. Roosevelt’s New Deal invalidated two federal laws in part on nondelegation grounds.²⁹⁴ Since then, the doctrine has been tarnished, particularly among supporters of the modern administrative state, by its association with a reactionary and activist Court.²⁹⁵ No majority (or even plurality) of the Court has since relied on the doctrine to invalidate a federal law. Nonetheless, despite the call by some prominent academics for its outright abolition,²⁹⁶ the nondelegation doctrine has survived, with the Supreme Court continuing to recognize at least its theoretical existence.²⁹⁷ The doctrine’s continued existence is for good reason, as some limits on delegation protect the American people from a particular type of malfeasance by their popularly elected legis-

²⁹³ Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 322 (2000).

²⁹⁴ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 530, 551 (1935) (striking down a law granting the President open-ended authority to develop “codes of fair competition”); *Panama Refining Co v Ryan*, 293 US 388, 414–15, 430, 433 (1935) (striking down a provision granting the President authority to restrict interstate shipping of petroleum exceeding a certain quota on grounds that it set no criteria for the exercise of that authority).

²⁹⁵ See David Epstein and Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 Cardozo L Rev 947, 948–50 (1999) (implying that the nondelegation doctrine is irrelevant because Congress only delegates to the Executive the minimum authority necessary to overcome flaws in the existing legislative process); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J L, Econ, & Org 81, 95–99 (1985) (asserting that delegation to experts is desirable and leads to more democratically responsive legislation).

²⁹⁶ See, for example, Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721, 1722 (2002) (“The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory.”).

²⁹⁷ See, for example, *Whitman v American Trucking Associations*, 531 US 457, 474 (2001) (describing the Clean Air Act’s provision authorizing the EPA Administrator to set ambient air quality standards as “well within the outer limits of our nondelegation precedents”).

lators: willingly granting excessive power to the Executive. As such, the nondelegation doctrine amounts to an important structural check—judicially enforced, to be sure—against America becoming an “elected dictatorship” in which the President exercises powers that are essentially legislative.

There is no express nondelegation provision in the Constitution. Rather, the doctrine has been inferred from Article I’s vesting of “All legislative Powers” in Congress, and from the overall structure of the Constitution.²⁹⁸ The doctrine’s prohibition on delegation is not absolute, focusing instead on the breadth of the delegation challenged and whether it is accompanied by some “standards” that restrain the discretion of the branch or actor exercising the delegated power.²⁹⁹ So long as Congress has articulated an “intelligible principle” in delegating powers to another branch or actor, it has not unconstitutionally ceded the essential “legislative power” that it alone holds.³⁰⁰ When, however, Congress delegates legislative power in a manner that “is not canalized within banks that keep it from overflowing,” as Justice Benjamin Cardozo stated, it may violate the nondelegation principle.³⁰¹

Since 1935, the “intelligible principle” requirement has been rendered virtually meaningless, with Congress enacting many statutes that barely constrain the use of delegated legislative authority.³⁰² Congress’s delegation of vast amounts of authority to the executive branch has enabled and, in turn, been facilitated by, the rise of the administrative state. The courts’ hesitance to invoke the nondelegation doctrine stems in part from a reluctance to gum up the workings of modern government, in which behemoth agencies, formally under executive control, exercise vast amounts of power.³⁰³ These agencies, with their cadre of professional civil servants, provide expertise in certain substantive areas that likely exceeds Congress’s, and now constitute a

²⁹⁸ *Panama Refining*, 293 US at 421.

²⁹⁹ *American Trucking*, 531 US at 490 (Stevens concurring).

³⁰⁰ *Id.*

³⁰¹ *Schechter*, 295 US at 551 (Cardozo concurring).

³⁰² See Gary Lawson, *Delegation and Original Meaning*, 88 Va L Rev 327, 379–82 (2002) (describing the Securities Exchange Act of 1934 as essentially a “naked delegation”); David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* 39–45 (Yale 1993) (recounting how Congress has avoided repeated attempts to limit delegation—first by merely stating the goals for a given statute and then by specifying the agency rule-making procedure without specifying the substance).

³⁰³ See Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 Ariz St L J 941, 943 (2000).

“Fourth Branch” upon which our federal government depends utterly for day-to-day operations.³⁰⁴

While claiming that some excessive amount of delegation of legislative power by Congress to another branch would violate the nondelegation doctrine, the Supreme Court generally has assumed that the doctrine applies in a similar manner regardless of the power delegated: any delegation from the legislature to the Executive merely requires an “intelligible principle” to be valid.³⁰⁵ This formulation of the doctrine is usually premised on the assumption that Congress’s delegations to the Executive involve an Article I, § 8 power.³⁰⁶ On the other hand, some commentators have assumed that certain other congressional powers—such as the House’s power to impeach or the Senate’s power to ratify treaties—are wholly nondelegable, even if Congress were to provide an “intelligible principle” to restrain such a delegation.³⁰⁷ The intriguing notion of a sliding scale of delegable powers, with some powers ranking lower on the scale of delegability, has received only limited attention.³⁰⁸ In *Wayman v Southard*,³⁰⁹ Chief Justice John Marshall noted that some unmentioned, “important subjects [] must be entirely regulated by the legislature itself,” whereas other subjects “of less interest” may more readily be delegated.³¹⁰ Justice Clarence Thomas, in his concurrence in *Whitman v American Trucking Associations*,³¹¹ the Court’s most recent foray into nondelegation, speculated that some delegated decisions may be so significant that they

³⁰⁴ William F. Funk, Sidney A. Shapiro, and Russell L. Weaver, *Administrative Procedure and Practice: Problems and Cases* 6–17 (West 3d ed 2006) (describing the modern federal administrative state).

³⁰⁵ *American Trucking*, 531 US at 472.

³⁰⁶ Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum L Rev 2097, 2123 (2004). See also Larry Alexander and Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va L Rev 1035, 1039 (2007) (arguing that delegation authority is premised on the Necessary and Proper Clause).

³⁰⁷ Laurence H. Tribe, *American Constitutional Law* § 5-17 at 362–63 (Foundation 2d ed 1988).

³⁰⁸ But see *United States v Curtiss-Wright Export Corp*, 299 US 304, 327 (1936) (reasoning that delegations of congressional power are more permissible when they involve a subject area, such as foreign affairs, in which the President already exercises constitutional authority).

³⁰⁹ 23 US (10 Wheat) 1 (1825).

³¹⁰ *Id* at 43:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

³¹¹ 531 US 457 (2001).

amount to unconstitutional delegations of the legislative power, even if accompanied by an “intelligible principle.”³¹²

Of all of Congress’s powers, the power and obligation to provide a neutral forum for the review of executive detention under the Suspension Clause is one of the least amenable to delegation. Although, under a functional view of the Suspension Clause, Congress may delegate some of its responsibility to provide for review of detention to an executive agency or non–Article III court, allowing Congress to delegate too much of its authority to provide for the habeas review function would defeat the core purpose of the Clause, which is to protect individuals from arbitrary executive imprisonment. This protection requires not only neutrality in adjudicating a detainee’s challenge to his detention, but significant limitations imposed on the ability of the executive branch to establish the rules for performing the habeas review function.³¹³ The writ of habeas corpus mentioned in the Suspension Clause is fundamentally a procedural mechanism,³¹⁴ and it is the preservation of habeas or some habeas-like procedure with which the Suspension Clause is concerned. If the very Executive that the Suspension Clause is designed to restrain has nearly unbridled authority to craft the procedures for challenging executive detention, there can be little guarantee that those procedures will ensure that a detainee can meaningfully challenge the lawfulness of his detention.³¹⁵ Moreover, excessive delegation by Congress would provide the Executive with the ability to *change* the relevant procedures to his advantage over time, thereby only increasing the chances of arbitrary executive detention.

A. The DTA as Excessive Delegation

The DTA is a compelling example of Congress delegating the power to the Executive to replace habeas without adequate restraints. The executive branch established the CSRT process on its own, without any congressional input, by memorandum in the summer of

³¹² *Id.* at 486–87 (Thomas concurring).

³¹³ See Pfander, 118 Harv L Rev at 757 (cited in note 90) (arguing that the President lacks power to establish “his own set of [Article I] tribunals, free from legislative control”); *id.* at 759 (criticizing the *Hamdi* plurality for “suggest[ing] that the executive branch may issue regulations to constitute enemy combatant tribunals without express legislative authorization”).

³¹⁴ *Boumediene*, 128 S Ct at 2270 (describing habeas as a collateral “process” for correcting errors that occurred during earlier proceedings); *id.* at 2279 (Roberts dissenting) (“Habeas is most fundamentally a procedural right.”).

³¹⁵ *Id.* at 2269 (majority).

2004.³¹⁶ More than a year later, Congress merely ratified this system post hoc in passing the DTA, which made explicit reference to the CSRTs and incorporated them into a potential replacement for habeas.³¹⁷ In doing so, however, Congress said almost nothing specific about how the CSRTs should function. Indeed, Congress only mentioned CSRT procedures in establishing DC Circuit review of the CSRTs, when it conditioned this review on whether the CSRT's determination conformed "with the standards and procedures specified by the Secretary of Defense . . . (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)."³¹⁸

In specifically mentioning the preponderance standard and the rebuttable presumption in the government's favor, Congress incorporated then-existing features of the CSRT system.³¹⁹ Otherwise, the DTA gave the Executive carte blanche to change the CSRT's procedures, as the DC Circuit's review focused primarily on whether the CSRT conformed with whatever procedures the Secretary of Defense established. In establishing a putative replacement for habeas, Congress said nothing about essential procedural aspects of the CSRTs, such as whether and how the detainees would be represented by counsel; who would sit on the CSRT panels; how classified information would be handled; and what right, if any, detainees would have to call witnesses and introduce evidence.

The need for a nondelegation restraint on an executive-run habeas replacement is even more pressing when the entity responsible for crafting the replacement falls outside the scope of the APA's provisions, as the CSRT appeared to do.³²⁰ By allowing for court review of agency rulemaking and adjudication, the APA aims to restrain the

³¹⁶ See note 204 and accompanying text. See also 151 Cong Rec S 14275 (daily ed Dec 21, 2005) (statement of Sen Richard Durbin) ("CSRT procedures . . . were not reported to or approved by Congress.").

³¹⁷ DTA § 1005, 119 Stat at 2740–42.

³¹⁸ DTA § 1005(e)(2)(C)(i), 119 Stat at 2742.

³¹⁹ See Memorandum from Department of Defense Designated Civilian Official Gordon England, enclosure (3) at 3–5 (cited in note 209).

³²⁰ See *Bismullah v Gates*, 514 F3d 1291, 1294–95 (DC Cir 2008), denying petition for rehearing en banc (Ginsburg concurring) (asserting that a CSRT is "*sui generis* and outside the contemplation of the APA"); id at 1303 n 3 (Randolph dissenting) (concluding that CSRTs are exempt from the APA because "the detention of enemy combatants, and the review processes related to them, are military 'functions' the APA specifically exempts").

discretion of the greatly expanded administrative state.³²¹ The APA relies on federal appellate judges to enforce its strictures. As noted above, the APA's effectiveness at restraining executive agencies is likely one reason why the nondelegation doctrine has fallen into desuetude in modern times.³²² When a replacement for habeas is implemented by an executive agency outside the confines of the APA, therefore, judicial concerns about nondelegation should increase.³²³ Because CSRT rulemaking was never subject to APA review, the executive branch simply promulgated the CSRT's procedures without any formal public input and with scant review by a federal court or Congress.³²⁴

It may seem odd to fault the DTA for not enumerating more specifically the procedures to be used by a replacement for habeas—namely, the CSRTs—given that habeas is itself such a protean remedy.³²⁵ Indeed, if one accepts that the provision of habeas is a legislative responsibility, then perhaps Congress's granting of habeas jurisdiction—without any more specificity—to the federal courts amounts to an unconstitutional delegation from the legislative branch to the judicial branch.³²⁶ The federal courts, after all, retain broad authority to craft specific procedures for habeas actions.³²⁷ Given the historic office of habeas corpus as a constraint on executive detention, however, there is a tremendous difference between Congress granting broad authority to the Executive to craft a replacement for habeas and Congress recognizing the courts' historically broad role to fashion the con-

³²¹ See 5 USC § 551 (setting forth definitions); 5 USC § 553 (laying out procedural requirements for informal rulemaking); 5 USC §§ 554, 556–57 (laying out procedural requirements for agency adjudication).

³²² See notes 140–42, 295, and accompanying text.

³²³ See *Bismullah*, 514 F3d at 1294 (Ginsburg concurring) (“If a CSRT were an agency subject to the APA, then the detainees would presumably be entitled to the significant procedural rights afforded by the APA.”).

³²⁴ The DTA required that the Executive provide Congress with a “report” regarding its procedures for detainees, but said nothing more about congressional review thereof. See DTA § 1005(a)(1)(A), 119 Stat at 2740–41. With respect to judicial review, the DTA provided, as noted above, that “to the extent the Constitution and laws of the United States are applicable” the DC Circuit could review whether the Department of Defense’s “standards and procedures” were “consistent with the Constitution and laws of the United States.” DTA § 1005(e)(2)(C), 119 Stat at 2742.

³²⁵ *Boumediene*, 128 S Ct at 2267 (describing habeas as an “adaptable remedy” whose “precise application and scope changed depending upon the circumstances”).

³²⁶ See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S Cal L Rev 405, 408 (2008).

³²⁷ *Boumediene*, 128 S Ct at 2267. For an example of a federal appellate court, sitting en banc, struggling to craft such procedures for a detainee post-*Boumediene*, see *Al-Marri v Pucciarelli*, 534 F3d 213 (4th Cir 2008) (en banc) (holding that a detainee was not afforded sufficient process by a vote of five to four with seven judges writing separate opinions either concurring or concurring in part and dissenting in part).

tours of the writ. The latter comports with the Framers' original understanding of habeas, as reflected in the passage of the Judiciary Act of 1789, and is consistent with habeas's function as a device for testing the legality of executive detention.

In addition to providing the executive branch with near *carte blanche* to create replacement procedures for habeas, the DTA said nothing about how "enemy combatant" was to be defined in the CSRTs. The DTA thus left it entirely to the executive branch to determine the standard for legal detention, subject only to the DC Circuit's general review, which I discuss below. Whereas habeas corpus traditionally allowed a court to determine whether the Executive's assertion of lawful detention was correct, Congress, in ratifying the CSRTs, left it to the President to decide whether his own detention of a person as an enemy combatant was correct. In this sense, the CSRT was unlikely to serve as even an adequate first step in replacing habeas.

The grievousness of this flaw in the DTA-CSRT scheme was on vivid display in a case decided shortly after *Boumediene: Parhat v Gates*. In that case, Guantanamo detainee Huzaiifa Parhat, a Uighur who fled to Afghanistan because of alleged ethnic persecution by the Chinese government, challenged his designation as an enemy combatant. Parhat asserted that he had sought refuge in Afghanistan because the Chinese government had cracked down on the East Turkistan Islamic Movement (ETIM), a Uighur independence group with which he had been affiliated.³²⁸ He claimed that he had never been a part of or supported al Qaeda or the Taliban in any way.³²⁹ A CSRT nonetheless concluded that Parhat was an enemy combatant because he had been affiliated with a group—the ETIM—that was "associated" with al Qaeda and the Taliban and had been engaged in hostilities against the United States and its coalition partners.³³⁰ Thus, on Parhat's appeal to the DC Circuit, the court assessed whether Parhat met the "standard" of the DOD's definition of "enemy combatant."³³¹ In the Department's memoranda establishing the CSRTs, the Department had defined an "enemy combatant" 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," including "any person who has committed a belligerent act or

³²⁸ *Parhat*, 832 F3d at 842–43.

³²⁹ *Id.* at 843.

³³⁰ *Id.*

³³¹ *Id.* at 841.

has directly supported hostilities in aid of enemy armed forces.”³³² The DC Circuit ultimately concluded that Parhat did not meet this standard because the government had not presented sufficient evidence to show that ETIM was “associated” with al Qaeda or the Taliban and that the ETIM was engaged in hostilities against the United States and its coalition partners.³³³ The court thus ordered that Parhat receive a new CSRT hearing, or be released or transferred.³³⁴

Parhat illustrates the folly of the DC Circuit reviewing the CSRTs for compliance with the Department’s own “standards and procedures.” Had the military wanted to continue detaining Parhat, it could have simply issued a new memorandum redefining “enemy combatant” to justify Parhat’s detention. The military would then have been in compliance with its own standards and procedures, as required by the DTA. Although the military did not respond to the *Parhat* ruling that way, nothing in the DTA prevented it from doing so. To be sure, the DC Circuit retained the authority under the DTA to decide whether any new definition of “enemy combatant” would be “consistent with the Constitution and laws of the United States.”³³⁵ It is arguable that under this review provision, the DC Circuit could have invalidated a new definition of “enemy combatant” by the military as overbroad. The Supreme Court, however, refused to read this catchall provision of the DTA generously in *Boumediene*.³³⁶

In a traditional judicial habeas hearing, the executive branch is likely to receive some deference from the court regarding its definition of “enemy combatant.” Indeed, one might object to applying the nondelegation doctrine to the President’s power to define “enemy combatant” on the basis of the Supreme Court’s decision in *United States v Curtiss-Wright Export Corp.*,³³⁷ which held that in matters of foreign affairs, broad delegations from Congress to the President are permissible, in large part because the President already possesses significant constitutional authority over the subject.³³⁸ The reasoning of *Curtiss-Wright* would seem to support a broad delegation of authority

³³² *Parhat*, 532 F3d at 841, citing Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy at 1 (cited in note 204).

³³³ *Parhat*, 532 F3d at 854.

³³⁴ *Id.*

³³⁵ DTA § 1005(e)(2)(C)(ii), 119 Stat at 2742.

³³⁶ 128 S Ct at 2289–91 (Roberts dissenting).

³³⁷ 299 US 304 (1936).

³³⁸ *Id.* at 326–27. See also *Loving v United States*, 517 US 748, 773 (1996) (holding that the typical limitations on delegation do not apply to a delegated duty that is “interlinked with duties already assigned to the President by express terms of the Constitution”).

from Congress to the President to define who is legally subject to capture on foreign soil.³³⁹ Indeed, the language of the AUMF, passed by Congress shortly after the attacks of September 11, 2001, follows in this tradition by granting the President the authority to use force against “those nations, organizations, or persons *he* determines planned, authorized, or committed the terrorist attacks.”³⁴⁰ Although some litigants have attacked the AUMF as an illegal delegation of congressional power, the lower courts have so far rejected this argument.³⁴¹

One need not conceive of the AUMF as an unconstitutional delegation of power, nor advocate the reversal of *Curtiss-Wright*, to accept that a broad delegation of authority to the President to define “enemy combatant” raises significant nondelegation concerns as part of a delegation of the habeas review function. Indeed, although the Court in *Hamdi* upheld the President’s authority to detain “enemy combatants” pursuant to the AUMF, it did so while exercising its authority to review the legality of executive detention through habeas corpus.³⁴² In the habeas context, the President’s authority to detain must be subject to external review to ensure that the detention is consistent with legal principles. If Congress provides a detailed definition of what constitutes lawful authority as part of a detailed delegation of the habeas function, the underlying purpose of habeas can be adequately served. If, however, Congress broadly delegates the procedures for determining who is lawfully detained in conjunction with a broad grant of authority to detain, Congress has effectively authorized arbitrary executive detention, the very evil that the Suspension Clause aims to prevent. Further, it bears noting that *Curtiss-Wright* rested heavily on the President possessing broad authority over foreign affairs under the Constitution, and stressed generally the distinction between the foreign and domestic realms.³⁴³ The Suspension Clause, by contrast, focuses on restraining the President’s domestic authority³⁴⁴ (or at least restraining his authority in areas in which the United States exercises *de facto* sovereignty, as the Court held in *Boumediene*³⁴⁵).

³³⁹ 299 US at 321–22.

³⁴⁰ AUMF § 2(a), 115 Stat at 224 (emphasis added).

³⁴¹ See *Hamdily v Obama*, 616 F Supp 2d 63, 71 n 12 (DDC 2009) (“[T]he government’s proposed framework does not implicate the non-delegation . . . concerns raised by petitioners.”).

³⁴² *Hamdi*, 542 US at 525 (plurality). See also *Hamdily*, 616 F Supp 2d at 71 n 12.

³⁴³ *Curtiss-Wright*, 299 US at 319 (“[T]he federal power over external affairs in origin and essential character [is] different from that over internal affairs.”).

³⁴⁴ *Boumediene*, 128 S Ct at 2306 (Scalia dissenting).

³⁴⁵ *Id* at 2253.

In addition to its nondelegation problems, the DTA-CSRT scheme was unlikely to serve as an adequate substitute for habeas because the initial decisionmaker—the CSRT panel—lacked the requisite adjudicative neutrality. To be an adequate and effective substitute for habeas, a detainee needs to be able to present his claim before a neutral official or set of officials. *Swain* rejected the notion that only an Article III judge could provide this neutrality, but the DC Superior Court judges who administered the habeas replacement in that case enjoyed significant independence and job security.³⁴⁶ If habeas is to be administered by an executive agency, that agency should be sufficiently insulated from the members of the executive branch, such as the President and his political appointees, who are making the detention decisions under review. In the DTA-CSRT scheme invalidated in *Boumediene*, it was difficult for CSRTs to be sufficiently neutral in light of their being composed of military officers.³⁴⁷ In addition to being employees of the executive branch, these officers served in a command structure in which they were directly answerable to the President, as commander-in-chief, as well as to other high-ranking military officials.³⁴⁸ Although military officials enjoy some employment protections akin to those enjoyed by all federal employees, the military's command structure makes it easier for superiors to discipline and influence officials of lower rank.³⁴⁹

B. Arguments against the Nondelegation Doctrine and Rebuttals Thereeto

Perhaps because the United States' experiment with democracy has been so long and successful, some academics have dismissed the idea that any judicially enforced nondelegation principle is needed to restrain the vesting of too much authority in the Executive. In an influential article, Professors Eric Posner and Adrian Vermeule ad-

³⁴⁶ See note 85 and accompanying text.

³⁴⁷ Meltzer, 2008 S Ct Rev at 49 (cited in note 58) (“One interpretation of the *Boumediene* decision is that the Court simply lacked faith that military officials serving on CSRTs possessed the combination of capacity and will needed to make [sound] judgments.”).

³⁴⁸ Id at 47–48, citing Reply to Opposition to Petition for Rehearing, *Al Odah v United States*, No 06-1196, Appendix *i–vii (US filed June 22, 2007) (declaration of Lieutenant Colonel Stephen Abraham).

³⁴⁹ Military personnel are not covered by the protections of the Civil Service Reform Act of 1978, which established the Merit System Protection Board and was designed to ensure merit hiring and promotion in the federal government. See Civil Service Reform Act of 1978, Pub L No 95-454, 92 Stat 1111, codified as amended in various sections of Title 5. Title VII's employment protections also do not apply to the military. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn L Rev 96, 161 (2008).

dressed head-on the hypothetical scenario they attribute to diehard defenders of nondelegation: the possibility that Congress, in the absence of a nondelegation doctrine, might grant all of its legislative powers to the Executive.³⁵⁰ Posner and Vermeule contend that the institutional rivalry between Congress and the Presidency makes such a grant extremely unlikely.³⁵¹ Given the improbability of such a scenario, Posner and Vermeule see “no reason to twist the constitutional structure out of shape”—that is, enforce the nondelegation doctrine—“merely to provide against an unlikely political disaster.”³⁵² Moreover, Posner and Vermeule argue that even if such an unlikely event were to occur, “it might not be bad,” since “there is little reason to suppose, ex ante, that the grant would represent legislative abdication to an engorged presidency, rather than a desirable response to contemporary social needs.”³⁵³

Posner and Vermeule’s argument has some purchase in the context of applying the nondelegation doctrine to the administrative state’s regulation of economic, scientific, and technical affairs. Administrative agencies are staffed by thousands of civil servants who provide expertise in regulating specialized subjects that Congress may lack. More importantly, administrative agencies usually promulgate rules within the confines of the APA.³⁵⁴ The APA restrains whatever authority Congress may have delegated to the Executive by requiring agencies to provide a record of the reasons for their rules. The APA also provides aggrieved persons and organizations a chance to challenge the rules—and the agency’s articulated reasons for them—in a neutral judicial forum.³⁵⁵ It is no coincidence, therefore, that the nondelegation doctrine has faded in the wake of the APA’s passage in 1946, as APA review has likely assuaged many of the concerns articulated by the Supreme Court in its two nondelegation decisions.³⁵⁶

In the context of habeas, the majoritarian defense of delegation falters. Habeas corpus, the only common law writ specifically mentioned in the Constitution, is “at its historical core” a crucial protec-

³⁵⁰ Posner and Vermeule, 69 U Chi L Rev at 1741–42 (cited in note 296).

³⁵¹ Id at 1742 (“Distrust of executive agents frequently causes Congress to attempt to control the smallest details of executive action.”).

³⁵² Id at 1743.

³⁵³ Id at 1742.

³⁵⁴ 5 USC §§ 551–59, 701–06.

³⁵⁵ 5 USC §§ 552–57; 5 USC § 702.

³⁵⁶ See Lisa Schultz Bressman, *Disciplining Delegation after Whitman v. American Trucking Ass’n*, 87 Cornell L Rev 452, 454 (2002) (“Deferring to administrative law avoids the need to revive the constitutional nondelegation doctrine or impugn the constitutionality of a statutory delegation.”).

tion against arbitrary executive imprisonment.³⁵⁷ The Framers were well aware of habeas's development in Great Britain, where it developed over time into a significant restraint upon the king's power.³⁵⁸ Habeas review by the judiciary in Britain served as a check on the ability of an unelected monarch to imprison persons without legal reason.³⁵⁹ Had the Framers fully embraced majoritarianism, they would have seen no need—or at least, not nearly as much need—for habeas to restrain a popularly elected President.³⁶⁰ Indeed, in the years following the Revolution, some states declined to adopt habeas statutes precisely because they thought that without a monarch, there would be no need for protection from arbitrary executive imprisonment.³⁶¹ The Constitution's drafters, however, despite crafting a relatively democratic system for selecting the nation's chief executive, still saw fit to constitutionalize the primary safeguard against the President's arbitrary use of power to restrain liberty. They likely understood that even an elected President could abuse his power. Relying on the democratic system to "correct" such abuses by electing a new Congress or President in one or two years is an insufficient safeguard, at least when an individual's liberty is at stake.³⁶²

To be sure, the Framers embraced majoritarianism to some degree in expressly allowing for the suspension of habeas corpus in the event of rebellion or invasion. But the Framers placed this majoritarian escape hatch squarely within Article I, establishing a strong presumption that the power to suspend was intended for the legislature. Vesting the suspension power within the legislature was consistent with the experience of Great Britain upon which the Framers relied, in which Parliament was understood to have the sole authority to sus-

³⁵⁷ *St. Cyr*, 533 US at 301.

³⁵⁸ *Boumediene*, 128 S Ct at 2244–46.

³⁵⁹ *Id.* at 2245.

³⁶⁰ Of course, the Framers established a system that picked the President indirectly through an electoral college, rather than direct election. US Const Art II, § 1. This system, however, was designed to restrain the worst impulses of majoritarianism. See Federalist 68 (Hamilton), in *The Federalist* 457, 458–60 (cited in note 20). As such, the existence of the electoral college was supposed to provide yet another check on the arbitrary use of executive power, and, accordingly, should have lessened the need for habeas corpus even more.

³⁶¹ Duker, *Constitutional History* at 115–16 (cited in note 21).

³⁶² But see generally Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 *Stan L Rev* 755 (2004) (arguing that, under certain circumstances, constitutional rights to liberty should be protected only by a "liability rule"). Moreover, the Suspension Clause likely does not authorize or require post-suspension monetary compensation for wrongly held detainees. Morrison, 107 *Colum L Rev* at 1586 (cited in note 56) (listing other constitutional rights, such as those of sovereign and qualified immunity, that are not paired with remedies).

pend the Great Writ.³⁶³ To grant the suspension power to the very branch—the Executive—that habeas is designed to restrain would have provided scant protection for individual liberty, as recognized by Chief Justice Roger B. Taney when he denounced President Abraham Lincoln’s unilateral suspension of habeas corpus in certain Union areas at the beginning of the Civil War.³⁶⁴ Moreover, while the Framers allowed for a popularly elected majority in Congress to suspend the writ, they did so while imposing strict limits on this prerogative, confining it to the two specific emergencies of rebellion or invasion.³⁶⁵

1. The importance of post-9/11 developments.

Posner and Vermeule wrote in 2002 when the “war on terror” had just begun. The events of the past seven years call into question their relatively relaxed attitude toward the potential for Congress to “abdicate[e] to an engorged presidency.”³⁶⁶ After the terrorist attacks of September 11, 2001, President Bush began to claim extensive executive powers. He asserted the authority to imprison without charge and for an indefinite period of time persons—including citizens and legal aliens—captured on American soil whom he decreed “unlawful enemy combatants.”³⁶⁷ He disregarded duly enacted legislation like the Foreign Intelligence Surveillance Act of 1978³⁶⁸ (FISA) by claiming that the Act infringed on his constitutional powers.³⁶⁹ He made unprecedented use of signing statements, indicating that he did not always intend to comply fully with the legislation he approved.³⁷⁰

³⁶³ *Ex parte Merryman*, 17 F Cases 144, 151 (Cir Ct Md 1861) (“Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of habeas corpus.”).

³⁶⁴ *Id.*

³⁶⁵ Scholarly opinion is mixed as to whether the existence of the predicate constitutional grounds for suspension is a justiciable or political question. See Tyler, 59 *Stan L Rev* at 335–36 (cited in note 56).

³⁶⁶ Posner and Vermeule, 69 *U Chi L Rev* at 1742 (cited in note 296).

³⁶⁷ See, for example, *Al-Marri v Pucciarelli*, 534 F3d 213, 217 (4th Cir 2008) (en banc) (Motz concurring); *Padilla v Hanft*, 423 F3d 386, 388 (4th Cir 2005) (explaining that President Bush designated Jose Padilla, a US citizen who had associated with hostile forces in Afghanistan but was arrested on US soil by civilian law enforcement, an enemy combatant and directed the Secretary of Defense to detain him indefinitely in military custody).

³⁶⁸ Foreign Intelligence Surveillance Act of 1978 (FISA), Pub L No 95-511, 92 Stat 1783, codified as amended at 50 USC § 1801 et seq.

³⁶⁹ See *In re National Security Agency Telecommunications Records Litigation*, 564 F Supp 2d 1109, 1116 (ND Cal 2008).

³⁷⁰ See Charlie Savage, *Bush Challenges Hundreds of Laws*, *Boston Globe* A1 (Apr 30, 2006) (reporting that as of April 2006, “President Bush ha[d] quietly claimed the authority to disobey more than 750 laws enacted since he took office”).

In the wake of President Bush's executive aggrandizing, Congress—particularly while it was under Republican control from 2003 to 2006—was extraordinarily pliant, rarely resisting the President's bold claims to power and often facilitating them. On detainees, rather than rebuking the President's assertion of the power to hold indefinitely without charge citizens and legal aliens arrested on American soil, Congress facilitated this regime by passing the DTA and the MCA. One might attribute Congress's acquiescence to President Bush from 2003 to 2006 to same-party (Republican) control of Congress during that period.³⁷¹ Posner and Vermeule argue that it is better to rely on an opposing political party than the judiciary to prevent broad delegations by the legislature to the Executive.³⁷² If the American public dislikes the broad delegations perpetrated by the parties in power, they can vote for a "correction" by electing a different party to control Congress or the White House. Indeed, perhaps because they were uncomfortable with the amount of deference the Republican-controlled Congress paid to President Bush, the American people opted for such a correction by electing Democrats to majorities in the House and Senate in the midterm elections of 2006.

Upon taking control of Congress in 2007, however, the Democrats did little to reverse the broad delegations to President Bush by the Republican Congress they replaced, at least on matters of national security. Rather than censure President Bush for his flouting of FISA, the Democratic-controlled Congress voted to give the President *additional* spying powers under a revised act.³⁷³ On the war in Iraq, Congress repeatedly failed to use its power of the purse to force President Bush to begin withdrawing troops.³⁷⁴ Even an opposing political party with con-

³⁷¹ Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 *Tulsa L Rev* 505, 535 (2007) (arguing that Congress overcame its political inertia to enact the DTA and MCA and thus "ratify the President's actions"), citing Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv L Rev* 2311, 2314–15, 2329 (2006).

³⁷² Posner and Vermeule also suggest "the army" as a better possible counterweight to a power-grabbing Executive than the judiciary, Posner and Vermeule, 69 *U Chi L Rev* at 1743 (cited in note 296), which is a scary prospect.

³⁷³ See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436, codified in various sections of Title 50 (allowing the Attorney General and Director of National Intelligence to target any "person[] reasonably believed to be located outside the United States"). See also William C. Banks, *Responses to the Ten Questions*, 35 *Wm Mitchell L Rev* 5007, 5013–14 (2009) (explaining how the FISA Amendments Act of 2008 expanded the spying capability of the executive branch as compared to the original FISA).

³⁷⁴ See, for example, Shailagh Murray, *Congress Passes Deadline-Free War Funding Bill; Measure Includes Benchmarks for Iraqis*, *Wash Post A1* (May 25, 2007).

trol of the legislature, therefore, will not necessarily resist broad delegations to the Executive as Posner and Vermeule suspect.³⁷⁵

Moreover, Posner and Vermeule's "political correction" argument against the nondelegation doctrine underestimates just how hard it is for a later Congress to reverse broad delegations by an earlier Congress. Congress in a subsequent session does not just have to muster a majority in the House and Senate to reverse the delegation. It likely has to overcome a filibuster in the Senate (and thereby attract the votes of sixty, rather than a mere majority, of senators), as well as a potential presidential veto. Indeed, a presidential veto, which requires a two-thirds majority in each house to override, is an almost insurmountable obstacle. As unpopular as a President and a Congress of his same party may be by the middle of that President's term, such unpopularity is extremely unlikely to translate to the massive shift in congressional seats necessary for a veto-proof, two-thirds majority in each house.³⁷⁶ As an illustration, consider the Democrats' attempt to "reverse" the MCA's stripping of habeas for Guantanamo detainees after taking control of Congress in 2006 and before *Boumediene* was decided. Although most Democrats—and a handful of Republicans—voted in favor of restoring habeas by a majority of 56-43, the Senate still fell short of the requisite 60 votes to break a filibuster.³⁷⁷ Even if this partial reversal of the MCA had cleared the hurdle of the Senate filibuster, the bill faced a near-certain veto by President Bush.³⁷⁸

If congressional Democrats were feckless in resisting President Bush's demands for more authority, one might nonetheless claim that the recent election of Barack Obama signifies, at least in part, a political "correction" of the executive power excesses of the Bush years. In other words, Posner and Vermeule might argue that even if Congress is no longer willing or able to resist the Executive, particularly on mat-

³⁷⁵ Consider Merrill, 104 Colum L Rev at 2159–60 (cited in note 306) (discussing Congress's overall decline in political importance relative to the executive branch).

³⁷⁶ Indeed, with fewer competitive districts and the increasing advantages of incumbency (particularly, in terms of the ability to attract campaign donations), massive shifts in congressional makeup have become rarer. See Russell D. Renka, *The Incumbency Advantage in the U.S. Congress* (unpublished report, Nov 2007), online at http://cstl-cla.semo.edu/renka/ps103/Fall2007/congressional_incumbency.htm (visited Jan 17, 2010) (indicating a more than 95 percent incumbent success rate in House elections and 89 percent incumbent success rate in Senate elections from 1982 to 2004).

³⁷⁷ 153 Cong Rec S 11697 (daily ed Sept 19, 2007). See also Carl Hulse, *Senate Blocks Appeals Options for Detainees*, Intl Herald Trib 4 (Sept 21, 2007) (describing the failure of the bipartisan effort of Senators Patrick Leahy and Arlen Specter).

³⁷⁸ See William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, NY Times A1 (June 30, 2007).

ters of civil liberties when national security is implicated, the American people can express their desire for a different approach to executive power by electing a new President. The problem with this argument is that, like waiting for a “correction” by a newly elected Congress, significant interim “costs” are borne before a correction is possible. The predicament of the detainees at Guantanamo is a prime example. While Obama’s election was seen as presaging some change in policy at Guantanamo,³⁷⁹ his election could not erase the years that the detainees languished in prison without charge. Even if the Obama administration had offered handsome reparations to wrongly held Guantanamo detainees, no amount of money could have fully compensated for the loss of their liberty.³⁸⁰ In fact, more than one year since his inauguration, President Obama has changed little about the Bush administration’s approach to terrorist suspects. The Guantanamo prison remains open, and the administration plans to continue detaining indefinitely some of the prisoners there even if they are eventually moved to the continental United States.³⁸¹

The passage of the military commissions element of the MCA, enacted by Congress in response to *Hamdan* at the urging of President Bush, demonstrates the value of the Court forcing Congress to involve itself in detainee policy. Before *Hamdan*, Congress largely remained on the sidelines after President Bush announced the establishment of a military commission system to try detainees in the wake of September 11.³⁸² In striking down President Bush’s executive order, the Court invited Congress to authorize a military commissions system through legislation. After pressure from President Bush, Congress did just that, making some important changes along the way as a result of committee hearings and political bargaining between key senators and the White House.³⁸³ Although many critics were dissatisfied with the commissions system established by the Act,³⁸⁴ the legislative process increased public awareness and involved more democratically

³⁷⁹ But see Charlie Savage, *To Critics, Obama’s Terror Policy Looks a Lot Like Bush’s*, NY Times A14 (July 2, 2009) (articulating the idea that while Obama may have different rhetoric than Bush, there has been no real “substantive break” from Bush administration counterterrorism policies).

³⁸⁰ But see Kontorovich, 56 Stan L Rev at 790 (cited in note 362).

³⁸¹ Charlie Savage, *Senator Proposes Deal on Handling of Detainees*, NY Times A21 (Mar 4, 2010).

³⁸² See Diller, 61 SMU L Rev at 308 & n 144 (cited in note 16).

³⁸³ See id at 316–17 (tracing the history of the MCA).

³⁸⁴ See, for example, ACLU, *Obama Administration to Revive Fatally Flawed Military Commissions* (May 9, 2009), online at <http://www.aclu.org/national-security/obama-administration-revive-fatally-flawed-military-commissions> (visited Jan 17, 2010).

elected representatives in fashioning a system, resulting in some increased protections for detainee-defendants.³⁸⁵ Congress has since refined the military commissions system further to increase protections for defendants.³⁸⁶

C. The Advantages of Nondelegation

The Court's decision in *Boumediene* does little to reverse a regrettable trend of recent decades in American politics: the decline of Congress as a vigorous branch capable of checking the President or even the judiciary. As Thomas Merrill has explained, the decline of Congress has created a "quiet crisis" in American constitutional law insofar as the constitutional design depends upon Congress checking an Executive who seeks power.³⁸⁷ There are a number of potential explanations for Congress's decline, including: the persistence of war, particularly since September 11, 2001, which favors a strong Executive; the seemingly permanent election cycle that requires members of Congress to raise campaign money endlessly; the revolving door between serving in Congress and lobbying, which has led to earlier retirements of prominent members of Congress; and the desire of many members of Congress—particularly senators—to use their legislative seats as springboards for presidential campaigns.³⁸⁸ Whatever the reason, the modern Congress has been loath to resist an assertive Executive on matters relating to national security.

As noted above, some members of Congress who voted for the MCA actually hoped that the Supreme Court would strike down the habeas-stripping § 7.³⁸⁹ In fact, at least one of these members—then-Republican Senator Arlen Specter, who provided crucial support for the Act's passage—publicly stated that he voted for the Act despite what he believed to be the unconstitutional habeas-stripping provision because he was confident that the courts would "clean it up."³⁹⁰ Specter

³⁸⁵ David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 Lewis & Clark L Rev 131, 176 (2008) ("Overall the MCA brings the commission process much closer to the judicial form of a court-martial.").

³⁸⁶ Military Commissions Act of 2009, Pub L No 111-84, 123 Stat 2574, codified at 10 USC § 948a et seq; Vijay M. Padmanabhan, *Norm Internalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U Pa J Intl L 427, 429 (2009).

³⁸⁷ Merrill, 104 Colum L Rev at 2162 (cited in note 306) ("The reality is that Congress has become subordinate to the Executive and for many purposes even to the courts.").

³⁸⁸ See *id.* at 2159–60 (offering reasons for the decline of Congress).

³⁸⁹ See notes 236–37 and accompanying text.

³⁹⁰ Daniel Michael, *The Military Commissions Act of 2006*, 44 Harv J Leg 473, 479 (2007).

later filed an amicus brief on behalf of the detainees in *Boumediene*, arguing against the constitutionality of the MCA's § 7.³⁹¹ This abdication of Congress's duty to interpret and defend the Constitution imperils the separation of powers envisioned by the Constitution.³⁹² The Court's validation of this abdication in *Boumediene* is likely to encourage further congressional lassitude with respect to defending constitutional principles.³⁹³ Invalidation of the MCA's § 7 on nondelegation grounds would also have provided Senator Specter and others with the result they desired, but it would have done so in a manner that, like *Hamdan*, recognized Congress's responsibility over the subject matter.³⁹⁴

A nondelegation justification for the result in *Boumediene* is prone to being criticized for being too "process-oriented." In an influential recent article, Professor Jenny Martinez criticized judicial decisions regarding the "war on terror" for focusing too much on process and too little on substance.³⁹⁵ After seven years, Martinez asserts, little has actually been decided regarding the substantive rights of detainees. Rather than lay out clear substantive rules, the Supreme Court and lower federal courts have couched their "war on terror" decisions in terms of whether litigants have properly jumped through certain procedural hoops or whether Congress, rather than the President, should have made the initial determination of policy.³⁹⁶ Martinez wrote before the Supreme Court decided *Boumediene*. In declaring

³⁹¹ Brief of United States Senator Arlen Specter as Amicus Curiae in Support of Petitioners, *Boumediene v Bush*, Nos 06-1195, 06-1196, *4 (US filed Aug 24, 2007) (available on Westlaw at 2007 WL 2441578).

³⁹² See *Boumediene*, 128 S Ct at 2277 ("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.") (emphasis added).

³⁹³ See Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 BU L Rev 499, 504 (2009) ("Knowing the courts are available to correct (some of) their constitutional errors, legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes.").

³⁹⁴ At the end of his opinion, Justice Kennedy hinted that the political branches were free to legislate in this area yet again. See *Boumediene*, 128 S Ct at 2277 ("The political branches . . . can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism."). As Justice Scalia pointed out in his dissent, however, this comment by the majority comes across as an empty gesture when read in light of the entire majority opinion. Id at 2296 n 1 (Scalia dissenting) ("What the Court apparently means is that the political branches can debate, after which the Third Branch will decide.").

³⁹⁵ Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 Colum L Rev 1013, 1014-17 (2008) (observing that despite the fact that the "war on terror" has raised profound questions regarding individual rights, "almost nothing [substantive] seems to have actually been decided" in the litigation that has ensued).

³⁹⁶ Id at 1016.

that the Guantanamo detainees receive the protection of the Suspension Clause, the decision in *Boumediene* might appear more substance- than process-oriented, and therefore perhaps the kind of decision of which Martinez hoped to see more. Moreover, the decision was clear to fault the CSRT process for being insufficiently neutral, thereby making a substantive point about the kind of procedure for determining combatant status that ought to be available to detainees. On the other hand, because habeas is a procedural remedy, and the majority opinion was unclear about the specific procedures to be used by lower courts in subsequent cases,³⁹⁷ one might say that the substantive impact of *Boumediene* was limited.

A decision grounded in nondelegation would have focused on a different kind of process—the process by which the government adopts the procedures made available to detainees to contest combatant status. In this sense, a decision grounded in nondelegation would have resembled *Hamdan*.³⁹⁸ Although Martinez faults the Court's decision in *Hamdan* for its ambiguity regarding the substantive limits for military commissions, the *Hamdan* Court's "democracy-forcing" approach succeeded in pressing Congress to revise the military commissions system that was initially proposed by President Bush through executive order.³⁹⁹ Moreover, by making clear that Congress must take part in changes to the military commission system, *Hamdan*'s effect has persisted even into the Obama administration. Rather than act unilaterally, President Obama consulted with Congress to change the military commission system.⁴⁰⁰ A similar dynamic might have taken place in the aftermath of a decision in *Boumediene* grounded in nondelegation. Instead, in the wake of *Boumediene*, Congress has not yet acted and has left it to the courts to figure out the appropriate process to be provided detainees seeking to challenge their combatant status.⁴⁰¹

³⁹⁷ *Boumediene*, 128 S Ct at 2276 (noting that many "remaining questions" regarding habeas procedure "are within the expertise and competence of the District Court to address in the first instance"); id at 2292–93 (Roberts dissenting) (criticizing the majority for "ignor[ing] the many difficult questions its holding presents" regarding habeas procedure).

³⁹⁸ Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 S Ct Rev 1, 28 ("*Hamdan* reflects a kind of narrow nondelegation principle . . .").

³⁹⁹ See Glazier, 12 Lewis & Clark L Rev at 175–76 (cited in note 385) ("Overall the MCA brings the commission process much closer to the judicial form of a court-martial" than the system established by Bush's executive order in 2001.).

⁴⁰⁰ See Military Commissions Act of 2009, Pub L No 111-84, 123 Stat 2574, to be codified as amended at 10 USC § 948a et seq.

⁴⁰¹ After *Boumediene*, on July 21, 2008, Attorney General Michael Mukasey gave a speech in which he called on Congress to provide a set of rules governing post-*Boumediene* habeas hearings that would, among other things, restrict classified information. Joey Michalakes, *Mukasey Urges*

CONCLUSION

After *Boumediene*, the idea of creating an alternative court system for assessing detainee status gained currency. Although the details of specific proposals varied,⁴⁰² the basic idea was to create a specialized adjudicative body to decide whether individuals suspected of presenting a threat of terrorist activity can be imprisoned without being charged or convicted of a crime. As it grappled with how to close Guantanamo Bay, the Obama administration considered the possibility of creating such courts as a way to deal with those detainees it considers too dangerous to release or transfer, yet against whom there is insufficient, untainted evidence to use to convict of a crime, whether in the civilian courts or before a military commission.⁴⁰³ The Obama administration's task force on detention policy recently recommended continued indefinite detention of fifty Guantanamo detainees without specifically endorsing or rejecting a "national security court."⁴⁰⁴ It is unclear whether a "national security court" proposal, should one be forthcoming, would seek to eliminate habeas entirely for detainees who appear before the court, or would preserve habeas yet rely on the "national security court's" approval of detention as justification for lawful imprisonment.

Part I explained how a replacement for habeas might satisfy the Suspension Clause even if it did not involve an Article III court. Hence, it may be that a "national security court" system could eliminate or truncate habeas review for persons subject to its process without violating the Suspension Clause. On the other hand, the distinction drawn by Justice Kennedy between due process under the Fifth Amendment and the Suspension Clause in *Boumediene* would re-

Congress to Act on Gitmo Detainees, The Hill (July 21, 2008), online at <http://thehill.com/homenews/news/15635-mukasey-urges-congress-to-act-on-gitmo-detainees> (visited Jan 17, 2010) (quoting Mukasey's statement that it was the "responsibility" of Congress, not the courts, to "mak[e] policy choices in the first instance"). Congressional Democrats reacted coolly to Mukasey's recommendations, id (quoting Senate Majority Leader Harry Reid as responding that "[t]he courts are well-equipped to handle this situation"), and no action was taken.

⁴⁰² For a good summary of leading proposals, see Stephen I. Vladeck, *The Case against National Security Courts*, 45 Willamette L. Rev 505, 508–16 (2009) (comparing the two most common categories of proposals, national security courts for detention decisions and national security courts for criminal prosecutions).

⁴⁰³ Joby Warrick and Karen DeYoung, *Obama Reverses Bush Policies on Detention and Interrogation*, Wash Post A6 (Jan 23, 2009) (noting that Obama administration officials were considering "special national security courts" as an option for dealing with detainees deemed "non-triable").

⁴⁰⁴ Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, Wash Post A1 (Jan 22, 2010).

main.⁴⁰⁵ In *Boumediene*, the relevant question was whether a replacement for habeas that conformed to the dictates of “due process” might nonetheless violate the Suspension Clause, with the majority saying yes and Chief Justice Roberts in dissent saying no.⁴⁰⁶ With respect to “national security courts,” a replacement for habeas that conformed to the dictates of the Suspension Clause—particularly, the functional view urged in this Article—might still not meet the minimums of due process. After all, in *Hamdi*, even the government conceded that Hamdi had access to the writ, but the question before the Court was whether he could nonetheless be held as an “enemy combatant” without a particular level of process.⁴⁰⁷ The plurality held that this process might take the form of a military tribunal,⁴⁰⁸ and Justices Scalia and Stevens in dissent maintained that only a criminal trial would suffice.⁴⁰⁹ In subsequent cases, lower courts have had to assess whether the plurality’s suggested military process would suffice for alleged combatants caught under different circumstances, including Jose Padilla (American citizen apprehended at Chicago’s O’Hare Airport),⁴¹⁰ and Ali Saleh Kahlal al-Marri (Qatari national and legal immigrant apprehended on American soil).⁴¹¹ These cases have centered on the due process inquiry,⁴¹² and it is likely that any case challenging detention pursuant to a “national security court’s” order would do the same, an issue outside the scope of this Article.

Putting aside due process concerns, should Congress in the future craft a replacement for habeas that delegates the responsibility for reviewing executive detention to either an administrative agency or a legislative court, the nondelegation doctrine requires that Congress provide specific guidance regarding the procedures to be used. Any legislation should address questions of substantial import like the extent of the detainees’ right to counsel, the detainees’ ability to see classified information, the burden of proof, the detainees’ ability to

⁴⁰⁵ 128 S Ct at 2269–70.

⁴⁰⁶ Id (“Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.”). See also id at 2293 (Roberts dissenting) (“[T]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause.”) (citation omitted).

⁴⁰⁷ 542 US at 525 (O’Connor) (plurality).

⁴⁰⁸ Id at 533–34.

⁴⁰⁹ Id at 554 (Scalia dissenting).

⁴¹⁰ *Padilla v Hanft*, 423 F3d 386, 391–92 (4th Cir 2005).

⁴¹¹ *Al-Marri v Pucciarelli*, 534 F3d 213, 254 (4th Cir 2008) (en banc) (Traxler concurring) (arguing that al-Marri was not afforded the necessary opportunity to challenge the factual basis for his designation as an enemy combatant so as to meet the minimum requirements of due process).

⁴¹² See, for example, id at 216 (per curiam).

introduce their own information and confront witnesses, and the makeup of the decisionmaking tribunal. Additionally, any delegation of the habeas function ought to include real limits on the Executive's ability to define who is an enemy combatant. The lack of any limitations thereon, as illustrated by *Parhat*, was another reason why the DTA-CSRT scheme could not, at least without significant judicial review, serve as an adequate substitute for habeas.⁴¹³

Any delegated substitute for habeas must also comply with the Suspension Clause's requirement of adjudicative neutrality. Even if there is Article III judicial review of legal decisions and factfinding, the initial level of adjudication must be sufficiently neutral to ensure a fair opportunity for the detainee to challenge the legality of his detention. The CSRTs did not provide this requisite level of neutrality because of the military command structure in which they functioned. Whether any executive agency can provide such neutrality would depend on the degree of independence of both the agency and the administrative judges working for it. The more insulated the agency is from presidential influence, the more likely the agency's employees are to be neutral. Moreover, the more civil service protection afforded to agency adjudicators and the more insulated they are from political pressures, the more neutral they may be in deciding initial claims of unlawful detention.⁴¹⁴ Because it is separate from the executive branch, an Article I court would have an inherent advantage with respect to neutrality. Given that an Article I court may well rely on presidential appointments, however,⁴¹⁵ the judges who fill such a court must be adequately insulated from executive pressures—through length of term, for instance—to provide a constitutional substitute for habeas.

Given Article III doctrine, any administrative or legislative court substitute for habeas would need to preserve some role for federal court review of at least legal and constitutional questions. This requirement could be met through an appeal as of right to an Article III court, allowing for *de novo* review of legal and constitutional issues. A more deferential standard of review toward the initial agency's findings of fact could be permitted. Whether the detainee would need to be provided with the ability to introduce evidence at the appellate

⁴¹³ See text accompanying notes 328–36.

⁴¹⁴ This is in contrast to the immigration system presented in *St. Cyr*, in which the Attorney General, a direct appointee of the President, held significant influence over the Bureau of Immigration Appeals. See notes 164–67 and accompanying text.

⁴¹⁵ The DC Superior Court judges discussed in *Swain*, for example, were appointed by the President subject to Senate confirmation. See note 85.

judicial stage is not clear. Although the *Boumediene* majority faulted the DC Circuit review of CSRT determinations for not providing such a right, it did so in the context of considering the DC Circuit to be the *first* level of collateral review, rather than the second.⁴¹⁶ With a delegated replacement for habeas, a soundly functioning, sufficiently neutral administrative or legislative panel could be accorded the status as the first level of collateral review, entitled to some deference with respect to its findings of fact.

Ideally, a functional approach to the Suspension Clause would allow Congress to legislate in a fashion that respects habeas's historical role as a safeguard against executive detention. Although the Court's frustration with Congress in *Boumediene* was understandable, the logic of the decision threatens to limit Congress's flexibility in this regard in the future. Despite its long dormancy, the nondelegation doctrine should play a key role in any judicial review of a replacement scheme for habeas, as it is vital to ensuring that the Suspension Clause serves its core purpose of preventing arbitrary executive imprisonment.

⁴¹⁶ 128 S Ct at 2269.